in India,[111] this can be attributed to a number of structural and constitutional conventions. First, as a fused system in which the executive is part of the legislature dominated by the ruling party, it would come as a great surprise if any sort of real accountability of the government could be exacted. Second, the majority party since the conception of the 1994 constitution has been the ANC.[112] This continues to be the case today. However, the political problems that plagued the party and country in 1994 vis-à-vis those that haunt it today are in stark contrast. In its early years, South Africa's first truly democratic legislature seemed to be committed to diligently exercising its duty to act as a public watchdog.[113] The initial postapartheid Parliament, established under the Interim Constitution, served simultaneously as the national legislature and as the Constitutional Drafting Assembly. Given this historic mandate, it needs no gainsaying that many of the most prominent politicians and anti-apartheid activists were drawn across three generations and constituted a very diverse group.[114] They were held in high esteem and wielded enormous political authority within the ANC, which ensured a diffusion of power between the legislature and executive.[115]

From 2009 to 2018, South Africa was characterized by a power struggle and marked by several corruption scandals, the foremost of which was the "State Capture" debacle.[116] Under Jacob Zuma's leadership, with the ANC continuing to be the dominant party at the national level, there existed a form of a dual State—where the party and State were closely intertwined for all practical purposes. Under Zuma, this led to an emergence of a "shadow state," in which corrupt private interests seem to have gained ascendancy over even formal party structures by attaching themselves to a network of corrupt regional and national government leaders within the party.[117] While

111 Khaitan, *supra* note 34.

112 Gerald Imray, *South Africa's Ruling ANC Suspends Former President Zuma for Backing a New Party in Elections*, AP NEWS (Jan. 29, 2024), https://apnews.com/article/south-africa-anc-zuma-suspended-7a0b25099fd7778a057f2b8fc52fefdf.

113 Klug, *supra* note 11, at 722.

114 *Id.*

115 *Id.*

116 Neil Arun, *State Capture: Zuma, the Guptas, and the Sale of South Africa*, BBC (July 15, 2019), https://www.bbc.com/news/world-africa-48980964 [https://perma.cc/4A2M-TQRZ]. *See also The Judicial Commission of Inquiry into Allegations of State Capture*, COMM'N OF INQUIRY INTO STATE CAPTURE, https://www.statecapture.org.za/ [https://perma.cc/RN9X-ZW6U].

117 Arun, *supra* note 116.

the existence of corruption within the party or even in democracies is an unfortunate, but widespread, phenomenon, the relative weakness of opposition parties only entrenched this system of political relations further. Under Zuma, as has been widely acknowledged,[118] even state institutions such as the police anti-corruption unit, the prosecution agencies, the intelligence services, and the tax agencies had been hollowed out from the inside. Zuma increasingly wielded these corrupt entities as a personal tool for his protection—especially when legal and corruption challenges were mounted by the oppositions through the courts or initiated by the Public Protector.[119]

With this backdrop, we now deal with three landmark constitutional cases involving the Public Protector (two of which pertain to the "State Capture" period[120]), with a particular focus on the principles espoused by the court and their effect on the separation of powers. It is important to reproduce the constitutional provisions in play, which deal with the broad function, powers, and responsibilities of the Public Protector. They include Sections 181 and 182 and their provisos. They are reproduced below:

> **Section 181: Establishment and governing principles**
>
> 181. (1) The following state institutions strengthen constitutional democracy in the Republic: (a) *The Public Protector*. (b) The South African Human Rights Commission. (c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. (d) The Commission for Gender Equality. (e) The Auditor-General. (f) The Electoral Commission. (2) *These institutions are independent, and subject only to the Constitution and the law*, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice. (3) *Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.* (4) *No person or organ of state may interfere with the functioning of these institutions.* (5) *These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly* at least once a year.

---

118 Klug, *supra* note 11, at 738–39.

119 *Id. See also Final Reports*, COMM'N OF INQUIRY INTO STATE CAPTURE, https://www.statecapture.org.za/site/information/reports [https://perma.cc/GFU7-B38H] (listing the full set of the Zondo Commission Reports, which is constituted to investigate allegations of State Capture).

120 Arun, *supra* note 116.

> **Section 182: Public Protector**
>
> Functions of Public Protector 182. (1) *The Public Protector has the power, as regulated by national legislation—(a) to investigate any conduct in state affairs*, or in the public administration in any sphere of government, *that is alleged or suspected to be improper or to result in any impropriety or prejudice*; (b) to report on that conduct; and (c) *to take appropriate remedial action*. (2) The Public Protector has the additional powers and functions prescribed by national legislation. (3) The Public Protector may not investigate court decisions. (4) The Public Protector must be accessible to all persons and communities. (5) *Any report issued by the Public Protector must be open to the public unless exceptional circumstances*, to be determined in terms of national legislation, require that a report be kept confidential.[121]

We consider the first case with this in mind. *Democratic Alliance v. South African Broadcasting Corporation*[122] involved the opposition at the time, the Democratic Alliance, bringing a suit demanding the suspension Chief Operating Officer (COO) of the South African Broadcasting Corporation (SABC) in light of the Report of the Public Protector regarding allegations of abuse of power, maladministration, and systemic corruption under his leadership.[123] The SABC ignored the recommendations initially, and had chosen to not take any action. The Western Cape High Court first took up the petition and held, in short order, that the COO, in line with the Public Protector's recommendations, be suspended, and ordered that the SABC initiate disciplinary proceedings against him.[124]

However, it is the court's split reasoning to arrive at this holding that is particularly noteworthy. While the bench unanimously ruled that the decision of the SABC board to ignore the Public Protector's recommendations was irrational and arbitrary[125] (given that no reasoning to disregard them had been provided), and therefore unconstitutional, a minority among the judges chose to draw attention to the nature of the Public Protector's findings. The judge concluded that findings were not equivalent to judicial orders, and therefore, while persuasive, they were not directly binding nor enforceable.[126] The court (including the minority faction) did acknowledge, however,

---

121 *See* S. AFR. CONST., 1996, ch. 9, §§ 181–82 (emphasis added).

122 *Democratic All. v. S. Afr. Broad. Corp.* 2015 (1) SA 511 (WCC) at para. 1 (S. Afr.).

123 *Id.* at paras. 4–5.

124 *Id.* at paras. 88, 97.

125 *Id.*

126 *Id.* at paras. 51, 69.

that the subjects of the Public Protector's reports were not free to disregard them on a whim. If they chose to not implement them, substantive reasons would have to be provided. This would constitute an exercise of public power, which would become amenable to the court's judicial review on appeal by the Public Protector.[127] Alternatively, the government officials implicated could choose to mount a direct challenge to the findings contained in the report at the very outset.[128] As the final arbiter of interinstitutional disputes and with its understanding of separation of powers, the court believed these were the only two scenarios that the constitution contemplated when the Public Protector's report was challenged.

While the decision appears to be the correct one on a holistic reading of the law, I argue that the court, in arriving at their decision, committed a material error in its reading of the position of the Public Protector viz. Section 181. It attempted to analogize the Public Protector to the position of an ombudsmen in other jurisdictions, particularly the United Kingdom (U.K.).[129] However, in doing so, it failed to acknowledge that the legislative authority of the ombudsmen in the U.K. is legally distinct from entrenched Chapter 9 institutions and is circumscribed by statute.[130] As an entrenched body, the Public Protector was entrusted with responsibilities and exercised power far in excess of those granted to analogous institutions around the world. The court's judgment also woefully failed to address questions of pressing significance, such as how the constitution imagined the role of Chapter 9 bodies as "institutions supporting constitutional democracy"[131] and how checks and balances in this context should be properly theorized.

In the interim, the government established a parallel inquiry process to investigate the veracity of the findings of the Public Protector. This was a development that was heavily criticized by the opposition party.[132] The matter wound its way to the Supreme Court of Appeal,[133] which unequivocally laid down the law.[134] This ruling is

127 *Id.* at para. 74.

128 *Id.* at para. 47.

129 *Id.* at paras. 50–74.

130 *Id.* at para. 43.

131 *See* S. AFR. CONST., 1996, ch. 9.

132 Klug, *supra* note 11, at 728.

133 *S. Afr. Broad. Corp. v. Democratic All.* 2016 (2) SA 522 (SCA) at para. 3 (S. Afr.).

134 *Id.*

particularly significant for a number of reasons. First, and as a matter of procedure, it was the Court of Appeal that adjudicated this dispute, and not the Constitutional Court. Second, the ruling was significant because it not just reversed the material error of attribution made by the lower court, but also conclusively interpreted and ruled on the Public Protector's position, proper functions, and relationship with the other branches.[135] The Court of Appeal did uphold the decision of the High Court requiring the SABC to subject its COO to a disciplinary hearing in order to ensure accountability, noting that in a modern democracy, "the guards . . . require a guard."[136] In terms of the South African constitutional scheme, this guard is unquestionably the Public Protector. Third, the court rejected the argument analogizing the Public Protector to the U.K. Parliamentary ombudsmen. It noted that the High Court had incorrectly construed the role of the Public Protector as purely making nonbinding "recommendations" to one envisaged for it under the Interim Constitution of 1993, and that in no manner was it consistent with the status reserved for it under the language employed under the 1996 Constitution.[137] According to the court, the powers of the Public Protector, on a plain reading of Section 182(1)(c) of the Constitution, far exceeded those conferred on similar institutions in comparable jurisdictions.[138] Fourth, and finally, the court also ruled as unconstitutional the government's parallel inquiry, stating that the Public Protector cannot be subject to second guessing, except through judicial review and, until that time, its recommendations were of a binding and enforceable nature.[139] Through the course of the judgment, the court not only supplied interpretive rulemaking to plug gaps in the legal framework laid bare by the High Court's judgment but established a robust precedent, with this judgement being the first that properly situated the functioning of the Public Protector within the larger constitutional scheme.

The next two cases implicating the remedial powers of the Public Protector followed closely on the heels of the Supreme Court of Appeal's landmark judgment in *Democratic Alliance*.[140] Both revolved around mounting allegations ranging from corruption and

135 *Id.*

136 *Id.*

137 *Id.* at para. 53.

138 *Id.* at para. 43.

139 *Id.* at paras. 47, 52.

140 *See supra* notes 122 and 133.

malfeasance to State Capture leveled at President Zuma, and were marked by a period of rampant inequality, growing structural discrimination and marginalization, a weak economy coupled with spiraling costs, and intense discontentment amongst the electorate.[141] The Constitutional Court heard *Economic Freedom Fighters v. Speaker of the National Assembly*,[142] which arose from the following set of facts: In 2009, President Zuma carried out extensive renovations and security upgrades to his home Nkandla. Allegations were leveled that all the upgrades carried out were not for purely "security" purposes.[143] In response, the Public Protector launched an investigation into the apparent misuse of state resources. In its final report in 2014, it found that a number of these renovations were unlawful, a misuse of the public exchequer, and recommended that President Zuma repay the amount for the accretions it deemed unlawful.[144]

Recall that under the prevailing precedent of *Democratic Alliance*, the subject of the Public Protector's recommendations had limited options in case it chose to dispute the findings of the report; however, disregarding them was not an option as they were binding in nature. Zuma ridiculed the report, and again, set up a parallel inquiry in the ANC-dominated Assembly, which appeared to exonerate him from all the charges against him.[145] In response, the largest opposition party at the time, the Economic Freedom Fighters, filed a petition before the Constitutional Court on grounds of noncompliance with the Public Protector's recommendations.[146]

In a landmark judgment, the court unanimously affirmed the precedent in *Democratic Alliance* and held that the constitutional

---

141 *See* Arun, *supra* note 116.

142 *Econ. Freedom Fighters v. Speaker of the Nat'l Assembly* 2016 (3) SA 580 (CC) at para. 2 (S. Afr.).

143 David Smith, *Jacob Zuma Told to Repay Cash Spent on Private Home*, GUARDIAN (Mar. 19, 2014, 14:47), https://www.theguardian.com/world/2014/mar/19/jacob-zuma-watchdog-report [https://perma.cc/A2E5-MDQQ].

144 *See* PUB. PROTECTOR OF S. AFR., SECURE IN COMFORT: REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPRIETY AND UNETHICAL CONDUCT RELATING TO THE INSTALLATION AND IMPLEMENTATION OF SECURITY MEASURES BY THE DEPARTMENT OF PUBLIC WORKS AT AND IN RESPECT OF THE PRIVATE RESIDENCE OF PRESIDENT JACOB ZUMA AT NKANDLA IN THE KWAZULU-NATAL PROVINCE: REPORT NO. 25 OF 2013/14 (2014).

145 *Econ. Freedom Fighters* 2016 (3) SA 580, at para. 12.

146 Klug, *supra* note 11, at 729.

safeguards in Section 181[147] would be rendered meaningless if the institutions purportedly established to strengthen the constitutional democracy lacked even the remotest possibility to do so.[148] The court was unequivocal in stating that the Public Protector, as a guarantor institution, could not be undermined, sabotaged, or inhibited in the exercise of its functions, observing that "[w]hen all other essential requirements for the proper exercise of her power are met, she is to take appropriate remedial action."[149] Crucially, the court rooted the power of the Public Protector in the constitution itself and therefore made clear that delegated legislation could not be used to clip the powers of remedial action, since that power was derived from the supreme law itself.[150] However, it reiterated, as had the Supreme Court of Appeal in *Democratic Alliance*,[151] that this remedial power was not unfettered and was open to judicial review.[152] This decision is noteworthy not just for affirming existing precedent, but also because the court had an eye on its legitimacy when it issued its judgment in this extraordinary matter. This allowed it to not just act in accordance with the mandates of transformative constitutionalism, but also maintain the balance between issuing strictures against not just one, but two coordinate institutions, while also respecting institutional comity.

As far as remedies were concerned for President Zuma's actions, the court held that due to his manifest failure in disregarding the remedial action taken against him by the Public Protector in terms of its constitutional powers, as well as his failure to assist the Public Protector to ensure her independence, impartiality, and effectiveness by complying with the remedial action, the court ordered him to pay the money as recommended by the Protector in forty-five days.[153] It next dealt with the actions of the legislature, particularly those concerning instituting and adopting the report of the parallel inquiry:

> On a proper construction of its constitutional obligations, the National Assembly was duty-bound to hold the President accountable by facilitating and ensuring compliance with the decision of the Public Protector. The exception would be where the

147 S. AFR. CONST., 1996, ch. 9, § 181.

148 *Econ. Freedom Fighters* 2016 (3) SA 580 at paras. 1, 49.

149 *Id.* at para. 54.

150 *Id.* at para. 64.

151 *S. Afr. Broad. Corp. v. Democratic All.* 2016 (2) SA 522 (SCA) (S. Afr.).

152 *Econ. Freedom Fighters* 2016 (3) SA 580 at para. 71.

153 *Id.* at para. 83.

> findings and remedial action are challenged and set aside by a court, which was of course not done in this case.[154]

At the same time, with an eye on preserving its own legitimacy while upholding the law, the court noted that under its understanding of separation of powers, the court was empowered only to determine whether what the National Assembly did amounted to a fulfillment of its constitutional obligations.[155] In this case, the court concluded it did not. However, prescribing to the National Assembly how to fulfill its constitutional obligations fell outside the scope of the judicially permissible inquiry.[156] Along a representative spectrum, this Article argues that *Economic Freedom Fighters* was another matter where the court creatively employed a combination of strong form and weak form judicial review, along with the principle of preeminent domain.

In the interim, the President still failed to implement the recommendations of the Nkandla Report or repay the money he was ordered to. However, the period following the aftermath of *Economic Freedom Fighter-I* was marked by another contentious development—the release of the Public Protector's Report in 2016 on allegations of State Capture and the undue influence of corrupt private interests in State institutions exercising public power.[157] The President first petitioned the High Court in *President of the Republic of South Africa v. Office of the Public Protector*, requesting that an order be issued to prevent the Public Protector from finalizing and releasing the report.[158] This preliminary challenge was dismissed. In turn, the President mounted a substantive challenge before the court. He argued that the Public Protector, which had called upon him to establish a Judicial Commission of Inquiry into the State Capture, while requiring the head of the Commission to be nominated by the Chief Justice of South Africa rather than the President, as was provided for in the constitution, be declared unconstitutional.[159] This was dismissed by the court as well, on the ground that while constitutional procedure indeed vested the power to appoint a

---

154 *Id.* at para. 97.

155 *Id.*

156 *Id.*

157 Arun, *supra* note 116.

158 *President of the Republic of S. Afr. v. Off. of the Pub. Protector* 2018 (2) SA 100 (GP) (S. Afr.).

159 *Id.* at para. 62 (noting that under section 84(2)(f) of the South African Constitution, only the President has powers to appoint a Commission of Inquiry).

Commission of Inquiry in the President alone, this power was not untrammeled. The High Court argued that this power also had to be exercised within the bounds of institutional comity and given the President's conflict of interest in this matter, the Public Protector's recommendation to the President in those circumstances was lawful.[160]

The years 2017 and 2018 continued to be marked by the political fallout from these episodes, where the Constitutional Court dealt with a number of cases that sought directions to the Speaker of the Parliament to bring a vote of no confidence in the President to the floor of the Assembly.[161] On its direction, similar to the precedent first established in *Mazibuko*,[162] the no-confidence vote was held. President Zuma narrowly survived his seventh no-confidence vote in August 2017.[163] This vote was significant because it was becoming increasingly apparent that there were fast-growing factions within the ANC that no longer felt Zuma exercised the moral authority to continue as President.[164] These events, and the President's refusal to materially implement the Nkandla Report in violation of the Constitutional Court's 2016 order, were the subject matter before the Constitutional Court in *Economic Freedom Fighters v. Speaker of the National Assembly-II*.[165] In this matter, the court was asked to adjudicate upon a petition brought by the opposition, claiming that the Parliament had failed to uphold its constitutional duty in holding the President accountable for failing to implement the Public Protector's report.[166]

In a bold decision, one that bears the hallmarks of the ruling handed down by the Constitutional Court in *Economic Fighters-I*, a majority of the court ruled that the National Assembly had in fact failed in its constitutional duty.[167] I argue that this decision repays close study for three primary reasons. First, the court, as it did in its

160 *Id.* at para. 71.

161 *See, e.g.*, *United Democratic Movement v. Speaker of the Nat'l Assembly* 2017 (5) SA 300 (CC) at paras. 93–94 (S. Afr.).

162 *See Mazibuko v. Sisulu* [2013] ZACC 28 (CC) (S. Afr.).

163 Niren Tolsi, *Zuma Survives No-Confidence Vote Despite ANC Dissenters*, MAIL & GUARDIAN (Aug. 8, 2017), https://mg.co.za/article/2017-08-08-no-confidence-vote-the-people-versus-jacob-zuma/ [https://perma.cc/MG7R-QVBX].

164 Klug, *supra* note 11, at 739.

165 *Econ. Freedom Fighters v. Speaker of the Nat'l Assembly* 2016 (3) SA 580 (CC) at para. 276 (S. Afr.).

166 *Id. See also* Klug, *supra* note 11.

167 *Mazibuko v. Sisulu* [2013] ZACC 28.

seminal judgment in *Mazibuko*,[168] interpreted the law of separation of powers in a balanced manner and, as I argue, one consistent with the ideals of transformative constitutionalism. Second, while mindful of not transgressing its exclusive domain on one hand, it nonetheless balanced this concern with exercising judicial review and issuing an actionable remedy. It held that accountability in the context of holding the President responsible was distinguishable from a vote of no confidence.[169] The constitution envisaged a separate standard and consequences for the impeachment of the President, and, given that this structure was not created through the enactment of statute by the National Assembly, the court issued a declaratory order of invalidity.[170] This order held that Parliament was duty-bound to establish procedures for an impeachment process and create a regulatory structure for the implementation of Section 89 of the constitution.[171] Section 89 provided for the impeachment of the President by a two-thirds vote of the National Assembly if the President was in serious violation of the constitution or had engaged in serious misconduct.[172] However, it is also noteworthy, that the minority, comprising of Chief Justice Mogoeng, who authored the unanimous verdict on behalf of the court in *Economic Freedom Fighters-I*, issued a scathing dissent, characterizing the majority's judgment as a textbook case of judicial overreach, at odds with the dictates of separation of powers.[173] In contrast, Justice Froneman authored a separate opinion, solely to respond to the Chief Justice's charges. He noted that he considered the majority's decision to be

168 *See id.*

169 *Id.* at para. 212.

170 *Econ. Freedom Fighters* 2016 (3) SA 580 at paras. 209–22.

171 Section 89 of the Constitution of South Africa provides:

89. Removal of President

1. The National Assembly, by a resolution adopted with a supporting vote of at least two thirds of its members, may remove the President from office only on the grounds of:
   a. a serious violation of the Constitution or the law;
   b. serious misconduct; or
   c. inability to perform the functions of office.
2. Anyone who has been removed from the office of President in terms of subsection (1) (a) or (b) may not receive any benefits of that office, and may not serve in any public office.

172 *Econ. Freedom Fighters* 2016 (3) SA 580 at para. 212.

173 *Id.* at para. 223.

"nothing more than interpreting the Constitution," providing Parliament with "guidance and the tools necessary to enable it to fulfill its constitutional duty."[174] Competing views on the doctrine's application, as demonstrated in the cases discussed in this Article, have continued to dictate the outcome of the court's decisions.

Economic Freedom Fighters II is also noteworthy because it marked arguably the first time in modern South African history that vast swathes of civil society, drawn from all walks of life, played a significant and tangible role in tempering State power with very material consequences. As was mentioned earlier, the role that transformative constitutionalism assigns to civil society as not just the focal point of, but also as a constituent, one that acts as both a check and as a repository of the balance of separation of powers, is one that carries deep significance. The aftermath of *Economic Freedom Fighters II* provides a frame that demonstrates this.

Following the verdict, political pressure on Zuma, and public disaffection had never been higher and reached a breaking point.[175] The first was the ANC National Elective Conference, during which the party elected a new president, Cyril Ramaphosa.[176] Zuma's removal as the head of the ANC raised the possibility of Zuma being recalled from the presidency of the country by his own party. Faced with this threat, Zuma finally complied with the remedy imposed by the Public Protector (and subsequently confirmed by the High Court in *President of Republic of South Africa*). He did so, by announcing in January 2018 that he would appoint a Commission of Inquiry into the State Capture to be headed by the Deputy Chief Justice of the Constitutional Court, who had been nominated by the Chief Justice as required by the Public Protector.[177] As the backlash to the executive using its appointment powers to undermine each constitutional institution grew, along with the clamor for Zuma's removal, a political fallout manifested. This was led by the civil society and included the political opposition and the ruling party itself.[178] This was a movement only emboldened by active resistance from within constitutional institutions and strong judgments from the courts during this period. The ANC's performance during this period at the

174 *Id.* at para. 285.

175 Klug, *supra* note 11, at 737.

176 *Id.*

177 *Id.*

178 *Id.* at 739.

electoral polls, particularly in metropolitan strongholds, continued to decline. This finally culminated in Zuma's forced resignation from the presidency and his subsequent replacement by Cyril Ramaphosa as President in January 2018.[179]

However, as Chief Justice Mogoeng's scathing dissent in *Economic Freedom Fighters-II* illustrates, the inherent inconsistencies in the application of South African separation of powers law continued to become more prominent. *Economic Freedom Fighters-II* was simply the latest, and highly politicized instance, to reflect this incoherence. The court's tentative approach, however—one that sought to build its own legitimacy in interactions with the executive and the legislature while attempting to strike a balance with its mandate under the constitution—has been present on occasion since its enactment in 1994. However, nowhere was this piecemeal approach more apparent, and indeed, damaging than in the court's landmark 2012 judgment in *National Treasury & Ors. v. Opposition to National Tolling Alliance & Ors*.[180] The implications stemming from the judgment (both positive and otherwise) are discussed here.

The brief facts are as follows: The South African cabinet had approved an extensive upgrade to the roads in Gauteng, a province in South Africa, as part of a highway construction project known as the Gauteng Freeway.[181] The upgrades were to be carried out by the South African National Roads Agency Ltd. (SANRAL), an organ of the State established under the South African Roads Agency Limited and the National Roads Act of 1998. The Act provided various options for funding the road infrastructure, including the levying of tolls. In implementing the project, SANRAL incurred a substantial debt (somewhere in the region of R21 billion), and subsequently declared certain internal roads in the region as toll roads with the approval of the Ministry of Transport.[182] The Opposition to Urban Tolling Alliance (OUTA), a nongovernmental organization, challenged this decision before the High Court in *Opposition to*

---

179 *Id.*

180 *Nat'l Treasury & Others v. Opposition to Urb. Tolling All. & Others (Rd. Freight Ass'n Intervening)* 2012 (6) SA 223 (CC) (S. Afr.).

181 Cachalia, *supra* note 94, at 310.

182 Mia Swart & Thomas Coggin, *The Road Not Taken: Separation of Powers, Interim Interdicts, Rationality Review and e-Tolling in* National Treasury v. Opposition to Urban Tolling, 5 CONST. CT. REV. 346, 348–49 (2013).

Urban Tolling Alliance and Others v. South African National Roads Agency Ltd & Ors (2012).[183] OUTA sought an interdict on an urgent basis which would prevent SANRAL from levying and collecting tolls pending its application to review. It would also set aside various administrative decisions—including those made in implementing the tolling funding policy—it contended were unconstitutional.[184]

The High Court, in considering the grant of the interdict, focused upon three distinct characteristics of e-tolling. First, the Gauteng project involved tolling that was entirely intracity or within the city bounds, as opposed to intercity tolling. The sections earmarked for tolling constituted the major arterial roads for vehicular movement. Second, due to a lack of alternative public transport, a large majority of the population would be compelled to use the toll roads. Third, due to a lack of alternative forms of transport coupled with non-toll roads along the same route, constituents would effectively be held captive by the new toll network.[185] Bear in mind that at the stage of considering whether to grant an interdict, the adjudicating court is generally foreclosed from conducting a merits-based review—a decision is typically granted after engaging with the four requirements for interim relief, where the applicant must demonstrate (1) the establishment of a prima facie right for relief, (2) a well-grounded apprehension of irreparable harm if the interim relief is not granted, (3) a balance of convenience in its favor, and (4) the absence of any other remedy.[186] In its ruling, the High Court found that the applicant (OUTA) had satisfied the threshold for a grant of an interdict, and that based on the balance of evidence, even a prima facie review established the possibility that not only would irreparable harm be caused to the applicant by not denying the application, but there was also a reasonable possibility of them succeeding on the merits before the higher court.[187] SANRAL appealed before the Constitutional Court, and in a rather strange order, the court set aside the interdict granted by the High Court, on grounds that broadly revolved around the court's hesitation in interfering in matters that lay within the heartland of the executive policymaking and directing action that entailed severe budgetary consequences for the State.[188]

183 *Nat'l Treasury & Others* 2012 (6) SA 233.

184 Cachalia, *supra* note 94, at 285.

185 *Nat'l Treasury & Others* 2012 (6) SA at para. 37.

186 *Id.* at para. 41.

187 *Id.*

188 *Id.* at para. 69.

The reasons the court outlined, revolving around the separation of powers, were broadly as follows: (1) absent any proof of fraud or corruption, the power to formulate policy on how to finance projects resides in executive domain (or the "policymaking" argument); (2) the collection and distribution of public resources calls for policy-laden and polycentric decision making, and courts are ill-suited to make decisions of that nature (the "polycentricity" argument); and (3) a court considering the grant of an interim interdict that operates against the executive or legislative must have separation of powers concerns at the forefront of its analysis (the broader "separation of powers" or "institutional comity" argument).[189] We now engage with all these arguments separately. It is also noteworthy that the majority (led by Deputy Chief Justice Moseneke) and the minority (led by Froneman), while reaching the same outcome to set aside the interdict, formulated different conceptions of separation of powers. While Deputy Chief Justice Moseneke grounded his understanding in the polycentricity of resource allocation (or the functional argument) and the normative framework of the constitution (including a breach of the separation of powers), the minority of Justice Froneman relied upon a varying set of normative principles—broadly the political process argument, and particularly those of self-government and democratic legitimacy.[190]

The court's order was both substantively and procedurally flawed, and I engage with both respectively. First, and on the aspect of substantive law, I contend with the court's reasoning on the policymaking, polycentricity, and separation of powers arguments underlined above. This Article posits that the order setting aside the interdict was premised on a fundamentally incorrect reading of the principles of the law (primarily on socioeconomic rights and separation of powers). These arguments are naturally mutually interdependent and reinforcing and should be read as such.

1. Separation of Powers/Institutional Comity

In its order the majority held that "a court considering the grant of an interim interdict against the exercise of power within the camp of Government must have the separation of powers consideration at the

189 *Id.* at para. 68.

190 *Id.* at paras. 75–94.

very forefront [of its analysis]."[191] I deal with this strand first, because the policymaking and polycentricity concerns necessarily flow from it. While separation of powers is a valid and significant consideration in any form or stage of adjudication, it is not an absolute value that forecloses judicial inquiry. Indeed, in a transformative framework, it simply cannot. The court in *Urban Tolling*, therefore, in my view, commits a fundamental error in conflating separation of powers concerns with the very existence of the right itself, two issues with very different normative underpinnings.[192] As stated earlier, while the court is generally eschewed from embarking upon a thorough merits-based inquiry at the stage of considering an injunction, in assessing the balance of convenience (as is itself established by South African constitutional law),[193] it certainly should engage in a prima facie review of the merits of e-tolling. If it had, it would have realized that the potential impact of the project on the rights of ordinary South Africans was not marginal, and in fact would have implicated a gamut of socioeconomic rights—all of which have been recognized as explicitly justiciable by the constitution, and which have been subsequently developed by the Constitutional Court to varying degrees. Foremost among these was the right to the basic entitlement of food (or the "right to livelihood") and health. The e-tolling system was intracity, existed in absence of any other means of public transport, and did not envisage a reasonable classification between single-occupant private vehicles and (for instance) those transporting food and medical supplies. Therefore, this would have led to an exponential rise in the price of food, other vital commodities, and essential medical supplies. In turn, this substantial price increase would be passed on to the consumers, which would affect the most vulnerable and marginalized sections of society disproportionately—which constitutes a classic case of indirect discrimination.[194]

The implementation of the system would also have adversely affected the individual's guaranteed right to freedom of movement, as many consumers would simply be prevented from traveling entirely, which consequently would again adversely impinge upon their right to livelihood. This Section argues that had the court undertaken a rights-based analysis of the project, the interdict would, at the very

191 *Id.* at para. 68.

192 *Id.*

193 *Id.* at paras. 24, 26, 28–29.

194 Swart & Coggin, *supra* note 182, at 359–60.

minimum, have stood until final adjudication upon merits was completed.

2. Polycentricity

Through the Constitutional Court's historical recognition, development, and enforcement of socioeconomic rights, the law is now well-established that a court—particularly one that exercises judicial review in a transformative model—simply cannot defer to the executive because a dispute is complicated or polycentric.[195] In doing so, the Constitutional Court's damaging order militated against years of established precedent. The arguments against the court declining to interfere in matters implicating justiciable rights are well-rehearsed in the literature but are nonetheless discussed briefly here. First, given the complexities of litigation, virtually all private party versus State disputes that the Constitutional Court takes up are public and polycentric, even if the dispute appears binary on its face.[196] The problems of polycentricity are inherently pervasive in all forms of adjudication and particularly constitutional law, which involves the creation of public norms that obviously affect unrepresented parties. Second, virtually every piece of litigation that involves enacted law and government rulemaking influences the public purse. Therefore, a dispute does not become polycentric the moment the State raises budgetary concerns or the reallocation of resources.[197] Third, forms of participation in adjudication have been expanded through changes in standing, and intentionally so, through the tools of constitutional dialogue, meaningful participation, etc. with the stated goal of increasing stakeholder participation.[198] Making disputes more polycentric in practice is, therefore, a conscious choice linked to more equitable outcomes.

3. Policymaking and Democratic Legitimacy

The Constitutional Court, in its order setting aside the interdict, argued that the lower court had, by granting the interim relief and halting the rollout of the tolling project essentially engaged in

---

195 *Id.* at 347.

196 Jeff King, *Polycentricity and Resource Allocation: A Critique and Refinement*, OXFORD JURIS. GRP. 5 (2006). *See also* Cachalia, *supra* note 94, at 307.

197 Cachalia, *supra* note 94, at 307.

198 *Id.*

policymaking, a function that falls within the heart of the executive. The objections against the line of reasoning adopted by the court, which this Article argues are wholly incorrect, flow from those mounted against both the separation of powers and polycentricity strands above. It is particularly important to deal with the notion of democratic legitimacy, as it was put forth by Justice Froneman to justify the court's order and espouse judicial restraint.[199] Democratic legitimacy essentially states that all policymaking decisions (even if incorrect in hindsight) should be left to the executive branch. Since the executive branch is democratically elected by the people, it represents the popular will to a greater degree than say, the judiciary. Concerns of democratic legitimacy become more pertinent in socioeconomic rights cases, where concerns of judicial overreach are at their strongest, and disputes are, at the very least, more polycentric and policy laden. In these cases, considerations of democratic accountability may become relevant in giving context to rights.[200]

This Article argues that once a right has been established, and the appropriate standard of judicial review implicated, the democratic legitimacy and policymaking arguments also collapse on similar grounds—especially when the matter at hand is considered as a whole. At best, democratic legitimacy is just another factor to be weighed by a court, alongside competing principles such as separation of powers, popular sovereignty, individual rights and trumps, and the allocation of public resources (particularly in socioeconomic rights cases).[201] Once a court undertakes this examination, and the existence of a right has been established, the only constitutional inquiry permissible on a case-by-case basis is to determine the content of the rights in question, the appropriate standard of review, and the judicial deference that is warranted.[202]

In conclusion, it is pertinent to engage with the notion of "separation of powers harm,"[203] an ingenious device that the Constitutional Court fashioned in this particular case. While it appears rather self-explanatory, the court stated that in deciding whether an injunction against the operation of a statute should be granted, a

199 *Id. See also id.* at 301, 309.

200 *Id.* at 309.

201 *Id.*

202 *Id.*

203 *Nat'l Treasury & Others v. Opposition to Urb. Tolling All. & Others (Rd. Freight Ass'n Intervening)* 2012 (6) SA 223 (CC) at paras. 23–24, 47 (S. Afr.).

court's inquiry must, alongside other relevant harm, properly regard what it called separation of powers harm.[204] The court also stated, "A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases and after careful consideration of separation of powers harm."[205]

However, it qualified this statement by noting that an important consideration would be if the potential harm involves the breach of fundamental rights protected by the Bill of Rights.[206] The court in its reasoning felt that, on weighing the separation of powers harm, the interdict could not be properly upheld and, therefore, set the interdict aside.[207] However, this Article respectfully argues that the court's conclusion (is again) premised on a mistaken and potentially damaging application of its own standard. The discussion in the foregoing Sections has substantially demonstrated that a gamut of fundamental rights was not just implicated, but they were explicitly justiciable. The justiciability of these rights more than meets the court's own standard for intervention, and it is therefore unfortunate that the court misapplied this tool. Therefore, little more can be said of separation of powers harm in the context of this case. That being said, it is worthwhile considering the potential ramifications of this principle. It is clear then, that like other innovations of the Constitutional Court, such as meaningful engagement, constitutional dialogue, and preeminent domain,[208] this principle should be employed to guide creative remedies by the court in order to provide just and equitable relief in cases. This principle becomes another crucial characteristic that directly informs and shapes the continued formulation of a distinctive South African doctrine of separation of powers.

Finally, I tackle one last procedural and practical point. Considering the reasons discussed above and given that the court chose not to adopt any form of a merits-based analysis, it might have served the interests of justice and the court's judicial legitimacy had it ruled against the government as a preliminary matter—i.e., by

204 *Id.* at para. 47.

205 *Id.*

206 *Id.*

207 *Id.* at paras. 72–74.

208 Seedorf & Sibanda, *supra* note 73, at 39.

affirming the interdict. If it had, this "safe" decision would have ensured the initiation of a rights-based conversation at the final hearing stage, and almost as significantly, because a negative decision would not have resulted in a permanent end to the system.

V
INDIA

This Part on the Indian experience is broadly organized as follows. Section A examines the current state of separation of powers law and situates the entrenched fourth branch within the Indian constitutional framework. As opposed to the foregoing section on South Africa, however, Section B of this Article represents a pivot in direction. It engages with two contemporary judgments from the Supreme Court of India that respectively deal with aspects of separation of powers law that have remained underexplored in this Article thus far. The first, *In re Distribution of Essential Supplies and Services During Pandemic*,[209] is a foremost example of the effective exercise of dialogic review during the height of the COVID-19 pandemic in India and balanced complex separation of powers claims. The second, *Kalpana Mehta v. Union of India*,[210] presents a classic case study in constitutional theory on the misapplication of transformative constitutionalism by a constitutional court and the possible implications on judicial legitimacy. Both are grappled with substantially. Therefore, the Indian case study assumes a particular focus, and while it is considerably thinner in breadth than its South African counterpart, it is nonetheless hoped that it makes a meaningful contribution toward understanding the separation of powers concerns within a transformative framework.

A. The Fourth Branch and Separation of Powers Under the Indian Constitution

Much like the South African constitutional arrangement, the Indian Constitution has envisaged a functional overlap between the tripartite wings of government. There is, therefore, no strict or pure separation of powers, and each organ of the State exercises separate and distinct

209 *In re* Distribution of Essential Supplies and Services During Pandemic, Suo Moto Writ Petition (Civil) No.3 of 2021, SCC, https://main.sci.gov.in/supremecourt/2021/11001/11001_2021_35_301_28040_Judgement_31-May-2021.pdf [https://perma.cc/ASA2-WSXN] (India).

210 Kalpana Mehta v. Union of India, (2018) 7 SCC 1 (India).

roles as defined by the Constitution.[211] Each branch, in line with the mandates and the spirit of collaboration and institutional comity, is also meant to support each other in the general interest of good governance. And yet, the Indian Constitution also provides for an extensive system of checks and balances—one that delineates the degree of latitude granted for interference by each branch in the functions performed by a coordinate institution in greater detail than provided by most written constitutions around the world.[212]

For instance, exceptions to the doctrine in the Indian context include the broad power granted to the executive to frame legislation (including promulgating ordinances), the power of the legislature to punish for contempt of its privileges, and the power entrusted to the Indian Supreme Court and High Courts to regulate their own procedure by framing rules. In framing subordinate legislation, the executive is entrusted by the legislature to make delegated legislation, subject to its control. The power of the legislature to punish for the contempt of its privileges carries a judicial character, while the rulemaking power of the judiciary has trappings of a legislative character.[213]

Moreover, the Indian Supreme Court has, in a long line of jurisprudence, and through its evolution of the "basic structure"[214] doctrine, also ruled that the precept of separation of powers, while not specifically engrafted into the text, remains constitutionally entrenched and forms a part of the basic structure of the constitution.[215] In elevating the separation of powers to the status of a foundational principle around which the Indian republic is organized and recognizing it as a part of the basic structure, the Indian Supreme Court has ruled that while it coexists alongside other basic features of the constitution such as judicial review, it lies beyond the realm of the constituent power to amend.[216] It cannot be substituted or abrogated.

---

211 *See generally* THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION (Sujit Choudhry et al. eds., 2015).

212 Dr. Ashwani Kumar v. Union of India, (2019) SCC 21–22, https://main.sci.gov.in/supremecourt/2018/34505/34505_2018_14_1501_16639_Judgement_05-Sep-2019.pdf [https://perma.cc/5CKS-ALA9].

213 *Id.*

214 For an exposition on the basic structure, see Kesavananda Bharati Sripadagalvaru v. State of Kerala, AIR 1973 SC 1461, where the court first recognized and gave shape to the doctrine.

215 *Id.*

216 *Id.*

Moving onto the fourth branch, the Indian Constitution also provides for the allocation of powers relating to governance bodies that traditionally fall outside the scope of the tripartite organs of the State.[217] The constitutional setup of these institutions mandates that they discharge their functions independently, without unwarranted interference in their work. These include the Election Commission of India, an authority created and duly entrenched under Article 324 of the Indian Constitution and tasked with the superintendence, direction, and conduct of elections.[218] In addition, the constitution also provides for a Comptroller and Auditor General (CAG) under Article 148 to audit receipts that are payable into the Consolidated Fund of India and of each state and union territory.[219]

The Election Commission is, for the purposes of discharging its functions, vested with executive, quasi-judicial, and legislative powers. These plenary powers also extend to the power of postponing or canceling an election if the circumstances so warrant. An added layer of protection is also provided by Article 329(b) of the Constitution,[220] which imposes a "blanket ban on legislative interference during the process of the election."[221] It is evident that constitutionally adequate protections exist to insulate the essential functioning of the Election Commission from being impinged upon (including by a dominant executive that enjoys a majority in the legislature). Similar constitutional protections are also accorded to the CAG. As mentioned earlier, the powers of auditing receipts and expenditures of the Union and States lie exclusively within the domain of the CAG.

This Article argues that, unfortunately, the prevailing political climate in India has diminished the stature and, more crucially, the tempering influence of these bodies considerably.[222] Changes such as an authoritarian executive, legislative silences, and an abuse of the power in framing conditions of service for members of these bodies have increasingly served to undermine the functioning of both these hitherto autonomous bodies. As a result, they are often now

217 Pal, *supra* note 73, at 254.

218 India Const. art. 324.

219 India Const. art. 148.

220 India Const. art. 329, cl. b.

221 Pal, *supra* note 73, at 266.

222 *See generally* Khaitan, *supra* note 34.

considered to be an extension of the executive, as opposed to an effective check.[223]

For instance, despite being vested with plenary powers over the conduct of elections, the Election Commission is frequently thwarted by the executive branch.[224] This takes place most frequently through bypassing Article 324(6).[225] This provision mandates that the President or Governor of a state must depute requisite staff to the Commission for it to effectively discharge its functions, if so requested. The executive has often demonstrated a contempt toward this requirement and delays or takes no action altogether when requests are forthcoming, which in turn serves only to threaten the democratic health of the polity.[226] Similarly, protections granted to the CAG are also disregarded by an emboldened executive in practice. This is amply borne out by the following facts. First, there is no constitutionally prescribed criterion for selecting a candidate for appointment as the Comptroller and Auditor General of India, who in turn is assisted by other officers. All candidates are appointed by the President on the advice of the Prime Minister.[227] Second, the head of the CAG, unlike the Supreme Court, also does not have the power to appoint its own officers and servants.[228] This provides yet another avenue for executive interference.[229] Third, the conditions of service of these officers are also determined by rules made by the President after consultation with the CAG. Fourth and finally, the operational independence of the CAG is seriously impaired. Despite being an entrenched body, the individual at the helm of the CAG is not assured of tenure, unlike the judiciary and, therefore, serves at the pleasure of the government.[230] Crucially, the CAG as an office also has no power to act on its own report, no matter the urgency of the issues contained therein.[231] The CAG remains limited to placing a report on malfeasance or corruption before the Parliament or State Assemblies

223 *Id.*
224 Pal, *supra* note 73, at 266.
225 India Const. art. 324, cl. 6.
226 Pal, *supra* note 73, at 266.
227 *Id.* at 267.
228 *Id.*
229 *Id.*
230 *Id.*
231 *Id.*

as the case may be.[232] All these factors have ensured that the CAG has effectively, and ever increasingly, been reduced to a paper tiger.

The Indian case study therefore takes on a different shape considering the stark contrast that exists between the South African constitutional scheme and its own. This extends to the breadth and functions the fourth branch is tasked with, and the varied interrelationships that organs of the State share toward the achievement of a transformation vision. To elaborate, this distinction is premised on two salient features. First, the fourth branch as an institution in South Africa, as opposed to India, is far more expansive—both in terms of the number of specialized bodies, their development and institutional engagement, and their scope of powers and operational independence.[233] Second, it is therefore no surprise that there is a considerably larger (albeit incongruous, as argued earlier) body of jurisprudence dealing with interbranch and separation of powers concerns in South Africa than exists in India. The Indian Supreme Court, in the rare instance that it has been faced with a justiciable separation of powers issue that pitted the executive or legislature against the fourth branch, has largely either squandered the opportunity to clearly demarcate operational boundaries in the interest of good governance or has entirely failed to hold the executive to account in the face of its excesses.[234] Therefore, and in the absence of well-settled judgments that squarely address issues between the tripartite and guarantor branches in India, *Kalpana Mehta* and the *suo motu* pandemic matter (*Essential Supplies*)—which each raise fascinating issues that concern the larger questions raised in this Article—are engaged with.

B. Dialogic Review and Judicial Legitimacy: **In re Distribution of Essential Supplies *and* Kalpana Mehta**

The COVID-19 pandemic wrought death and destruction the world over, India included. Despite monumental efforts to contain it at various levels—national, regional, and local—it continues to adversely affect the daily life of the average citizen. At its height, however, the pandemic control efforts involved stringent lockdowns, testing, and tracing, to containment measures and the evolution of a

232 *Id.*

233 *See* discussion on Chapter 9 institutions in South Africa *supra* Parts I & II.

234 Khaitan, *supra* note 34.

nationwide, tiered vaccination policy.[235] The sheer magnitude of these programs, the emergent nature of the issues and consequent rights they implicated, and the fundamental shift they entailed in the relationship between the individual and the State led to a multiplicity of litigation across the country—particularly across various High Courts and the Indian Supreme Court. While the bulk of the petitions were filed using the Public Interest Litigation (PIL) jurisdiction, the court also took cognizance of certain pressing matters *suo motu* (i.e., of its own accord). Such matters included the right of livelihood and wages to migrant workers, the right to food, the right to the disbursal of compensation to the next of kin for victims, the regulation of treatment in private hospitals, the adequate availability of supplies and medical-grade oxygen, and finally, the vaccination policy.[236]

It is against this backdrop, and considering India was operating under a state of constitutional exceptionalism, that this Section engages with the order in *In re Distribution of Essential Supplies*.[237] This was a period marked by the invocation of two overarching pieces of legislation for the management of a health emergency. These pieces of legislation permitted the issuance of periodic rules that completely eschewed legislative oversight.[238]

---

235 *India's Covid Vaccination, Lockdown Saved over 34 Lakh Lives: Stanford Varsity Report*, INDIAN EXPRESS (Feb. 25, 2023), https://indianexpress.com/article/india/indias-covid-vaccination-lockdown-saved-over-34-lakh-lives-stanford-varsity-report-8465479/ [https://perma.cc/HP2W-4Q46].

236 See, among others, Public Interest Litigations filed before the Supreme Court of India concerning a number of issues raised by the pandemic. Ashish Tripathi, *COVID-19: PIL Filed in SC for Allowing Use of Private Hospitals for Those Who Can Afford*, DECCAN HERALD (May 16, 2020), https://www.deccanherald.com/national/covid-19-pil-filed-in-sc-for-allowing-use-of-private-hospitals-for-those-who-can-afford-838359.html [https://perma.cc/V9ZT-QS4A]; *Supreme Court Refuses to Entertain Plea for Alternate Medicines to Treat Coronavirus*, DECCAN HERALD (Apr. 15, 2020), https://www.deccanherald.com/national/supreme-court-refuses-to-entertain-plea-for-alternate-medicines-to-treat-coronavirus-825676.html [https://perma.cc/DVX3-2URA]; *PIL in SC for Compensation to Next Kin of Covid 19 Victims*, TIMES OF INDIA (July 12, 2020), https://timesofindia.indiatimes.com/india/pil-in-sc-for-compensation-to-next-kin-of-covid-19-victims/articleshow/76925768.cms [https://perma.cc/WA2G-UB4W].

237 *In re* Distribution of Essential Supplies and Services During Pandemic, Suo Moto Writ Petition (Civil) No.3 of 2021, SCC, https://main.sci.gov.in/supremecourt/2021/11001/11001_2021_35_301_28040_Judgement_31-May-2021.pdf [https://perma.cc/ASA2-WSXN] (India).

238 Gautam Bhatia, *Coronavirus and the Constitution – XVIII: Models of Accountability*, INDIAN CONST. L. & PHIL. (Apr. 16, 2020), https://indconlawphil.wordpress.com/2020/04/16/coronavirus-and-the-constitution-xviii-models-of-accountability/ [https://perma.cc/G2UF-ADKJ].

The order in *In re Distribution of Essential Supplies* was pronounced on May 31, 2021, and marked the third in a series of three substantive orders that the court had passed since it took *suo motu* cognizance of various issues relating to the pandemic. This order limited itself to the wide-ranging and multifaceted issue of Phase 3 of the Union government's updated Liberalized Vaccination Policy (LVP), which came into effect on May 1, 2021.[239]

The introduction of Phase 3 coincided with the gradual recession of the second wave of COVID-19, particularly in Indian society, and built upon earlier iterations of the government's pan-India vaccine policy. To provide a broad overview, Phase 1 was introduced in early 2021 and was targeted toward protecting healthcare and frontline workers, given the paucity of vaccines at the time. This was followed by Phase 2 in March and April 2021, which was directed toward protecting the most vulnerable population in the age group of persons above forty-five years of age. Crucially, in Phases 1 and 2, the Union government was procuring the vaccines and distributing them to States free of cost for disbursal through government and private vaccination centers.[240] Moreover, the government also operationalized and began promoting the digital CoWIN platform for eligible beneficiaries to book vaccine appointments.[241]

This existing arrangement was overhauled in Phase 3 through the LVP, the chief features of which were:

> [V]accination manufacturers [were now] required to supply 50% of their doses to the central government, [while the remaining] 50% (with an even split, i.e. 25% each) to state governments and private hospitals (at a pre-declared price). Central government vaccination centres [were now] limited to vaccinating healthcare workers, frontline workers, and people above the age of 45 [for free], while individuals between the ages of 18–44 [had to] be vaccinated at

---

239 *See* Azman Usmani, *Centre Still Controls India's 'Liberalised' Vaccine Policy*, BQ PRIME (May 13, 2021), https://www.bqprime.com/coronavirus-outbreak/centre-still-controls-indias-liberalised-vaccine-policy [https://perma.cc/U3GG-L3FW] (summarizing the Liberalized Vaccine Policy (Phase 3) announced by the Union government of India).

240 *In re* Distribution of Essential Supplies and Services During Pandemic, Suo Moto Writ Petition (Civil) No.3 of 2021, SCC, at 10, https://main.sci.gov.in/supremecourt/2021/11001/11001_2021_35_301_28040_Judgement_31-May-2021.pdf [https://perma.cc/ASA2-WSXN] (India).

241 Gautam Bhatia, *Coronavirus and the Constitution – XXXVII: Dialogic Review and the Supreme Court (2)*, INDIAN CONST. L. & PHIL. (June 3, 2021), https://indconlawphil.wordpress.com/2021/06/03/coronavirus-and-the-constitution-xxxvii-dialogic-review-and-the-supreme-court-2/ [https://perma.cc/Q78C-BCNQ].

> state government centres, or in private hospitals. Vaccination appointments [were] to be booked digitally, via the CoWIN app.[242]

In practice, the LVP created a price differential, with the Union government securing vaccines at a different (and considerably lower) rate than States who would negotiate and compete on the open market. As a result of the price differential and a bifurcation of the procurement strategy, those in the 18–44 age category would in all likelihood have to incur a greater cost to be vaccinated vis-à-vis their fellow citizens. Consequently, this created concerns of an arbitrary classification and implicated the equality right. The constitutionality of several features of the LVP were contested before the court. Due to a paucity of space, it is not possible to engage with every aspect of the court's judgment on the LVP.

This Section, briefly, undertakes a critical assessment of the Union government's factual defense of the policy filed on affidavit in court,[243] coupled with the Union government's arguments on grounds of separation of powers and policymaking, which it argued foreclosed the exercise of judicial review. It also engages with the court's response to this contention,[244] and relevant observations and directions passed by the court.[245] All these strands are tested against the touchstone of the conceptual platform developed in earlier portions of this Article, and the court's role in an explicitly transformative framework.

The Union government, in its defense of the LVP, argued inter alia that (1) it would be incorrect to state that a consequence of the policy on vaccination for the eighteen-to-forty-four age bracket would lead to competition between the States; (2) the LVP, which created two distinct channels for Union and State procurement, would in fact spur competitive prices; and (3) the facility of a walk-in registration (as opposed to an exclusive reliance on the CoWIN platform) would be offered to all those above the age of forty-five at vaccination centers run by the Union government.[246] The Union, however, focused its

---

242 *Id.*

243 *In re* Distribution of Essential Supplies and Services During Pandemic, Suo Moto Writ Petition (Civil) No.3 of 2021, SCC, at 5, https://main.sci.gov.in/supremecourt/2021/11001/11001_2021_35_301_28040_Judgement_31-May-2021.pdf [https://perma.cc/ASA2-WSXN] (India).

244 *Id.* at 12–15.

245 *Id.* at 15.

246 *Id.* at 5–9.

most vociferous arguments toward eschewing judicial review entirely, based chiefly on the balance of separation of powers, followed by constitutional grounds. This justification for the Union's two-pronged strategy is clear—while it was wholly inappropriate for the judiciary to subject the policy to constitutional scrutiny in the first instance, even if it did so, its scrutiny must be limited to a prima facie examination in the first instance, which it contended also passed constitutional muster.

While these arguments, and their inherent fallacies, are previously discussed in this Article as well as in the literature, they run along these lines: (1) in times of unprecedented crisis, such as the pandemic, the executive is entitled to an even greater degree of deference; (2) the then-current vaccine policy conformed to Articles 14 and 21 of the Indian Constitution (which enshrines the right to equality and life respectively); and (3) judicial review was permitted only on grounds of manifest arbitrariness, if any.[247] It was certainly not open to the judiciary to second-guess the decisions of the executive, where policymaking and its resultant budgetary implications are its exclusive preserve. The court addressed these arguments at the very threshold, clarifying the standard of review it sought to apply. It held, while reiterating the model of separation of powers the Indian Constitution subscribed to, that although separation of powers militates against the judiciary impinging upon the exclusive domain of the executive, it does not result in courts lacking jurisdiction to constitutionally examine the policies at hand.[248]

This Article argues that the court's role took on a singular importance, particularly at a time marked with an executive rule by decree and complete absence of legislative oversight,[249] especially considering the bundle of constitutional rights implicated. This was a period that demanded that the court exercised jurisdiction to test the policy in question against the standards of not just manifest arbitrariness, but also, and pertinently, reasonableness and

247 *Id.* at 12–13.

248 *Id.* at 13–15.

249 Disaster Management Act, 2005, https://cdn.s3waas.gov.in/s365658fde58ab3c2b6e5132a39fae7cb9/uploads/2018/04/2018041720.pdf; Epidemic Diseases Act, 1897. *See also* M.P. Ram Mohan & Jacob P. Alex, *COVID-19 and the Ambit of the Disaster Management Act*, WK. MAG. (April 26, 2020), https://www.theweek.in/news/india/2020/04/26/covid-19-and-the-ambit-of-the-disaster-management-act.html [https://perma.cc/AJE3-2SFT].

proportionality.[250] It is in assuming a bounded-deliberative approach jurisdiction[251] that I believe the court struck the right balance between executive deference and discharging its duties as an independent arbiter. The benefits of the dialogic review process are beyond dispute—as the instant LVP matter illustrated, it is a particularly powerful judicial tool in contentious, layered, and fast-moving pieces of litigation that often entails wide-ranging implications. Ground realities were shifting on a daily basis, and the court was required to keep up with the real-time policy formulations of the executive. A judgment on the merits would have represented an exercise in strong form review, which might have led to backlash from a dominant executive at best and a willful defiance of an order at worst, leading to an erosion of judicial review. An exercise of its jurisdiction of dialogic review allowed the court to manage what are otherwise matters of a full-blown adversarial nature. The open court process then serves as a site for dialogue, deliberation, and evaluation, where various stakeholders have an opportunity to raise constitutional grievances. In turn, these grievances serve as a platform against which justifications for existing policies can be elicited from the executive before being duly assessed against a rights-based approach.[252]

With the exercise and the standard of review to be applied now settled by the court, the resolution of the matter became rather straightforward. To facilitate an understanding, the court grouped its observation under three heads: vaccine distribution between different age groups, the vaccine procurement process, and finally, the augmentation of vaccine availability.[253] For further ease of analysis, I subdivide these observations into three categories: (1) directions for further information from the Union government ("queries"), (2) "recommendations," and (3) findings of prima facie unconstitutionality, requiring a response from the government ("objections").

---

250 *In re* Distribution of Essential Supplies and Services During Pandemic, Suo Moto Writ Petition (Civil) No.3 of 2021, SCC, at 15, https://main.sci.gov.in/supremecourt/2021/11001/11001_2021_35_301_28040_Judgement_31-May-2021.pdf [https://perma.cc/ASA2-WSXN] (India).

251 *Id.*

252 Bhatia, *supra* note 241.

253 *In re* Distribution of Essential Supplies and Services During Pandemic, Suo Moto Writ Petition (Civil) No.3 of 2021, SCC, at 17, https://main.sci.gov.in/supremecourt/2021/11001/11001_2021_35_301_28040_Judgement_31-May-2021.pdf [https://perma.cc/ASA2-WSXN] (India).

In regard to the vaccine distribution among different age groups, the court held that free vaccinations for those over forty-five years of age and frontline healthcare workers on one hand (through the Union government channel), and paid vaccinations for the eighteen- to forty-four-year-olds on the other (through both the state and private hospital channels), coupled with the limited availability of vaccines at the outset, and the additional requirement of mandatory digital registration through CoWIN, was prima facie arbitrary and irrational ("objection").[254] This is chiefly on the grounds that experiential learning from the second wave had shown that even young adults, especially those that suffered from comorbidities and disabilities, were not just afforded vaccines on priority but were also at considerable risk of developing serious illness, and in unfortunate cases, suffering untimely deaths.

With respect to issues around procurement, the order asked the government for more information regarding rationale behind its decision-making ("query").[255] Recall that the LVP permitted states to directly bargain with vaccine manufacturers, ostensibly (as per the Union's justification) in order to spur competitive prices and a higher quality of vaccines. It was pointed out in response by the states, however, that vaccine manufacturers were refusing to negotiate with them, subjecting them to differential pricing within the states as a whole. Additionally, the Union government, as a monopoly buyer, would have greater bargaining power to drive down prices rather than an individual or group of state governments operating in tandem.[256] The court also noted that under the LVP, the basis of pro rata allocation to states was both unclear (with respect to the Union's intervention) and incomplete (failing to account for healthcare infrastructure, variation in demographics like income inequalities, population distribution and literacy rates, and interstate migration, etc.).[257] It therefore asked the Union government to clarify how it intended to address these concerns within the policy ("query").[258]

With respect to the issue of vaccine availability, the court raised a query and asked the government to adduce material in support of its plans to fully vaccinate a certain percentage of the population by the

254 *Id.* at 18.

255 *Id.* at 19.

256 *Id.*

257 *Id.*

258 *Id.* at 6–9, 19.

year-end (2021).[259] Pertinently, the court also subjected with intense scrutiny the specifics of the policy that mandated that private hospitals would be eligible to receive twenty-five percent of the total vaccines produced.[260] Recall that the ostensible logic forwarded was that there existed a certain section of society that was able to pay for vaccines and would therefore be directed toward private hospitals. The court, however, rejected this argument by noting that the present system of allowing digital-only registrations, coupled with the scarcity of vaccines—whether free or paid—would ensure that any available vaccines would first be taken by the privileged sections of society.[261] In a sharp observation, it noted that ground realities then might take shape to ensure that even those in a position to afford vaccines might opt for free vaccines simply because of issues of availability, even if it entailed travelling to far-flung rural areas, and, therefore, any calculations of economic ability might not translate directly to the vaccination route individuals opted for.[262] Consequently, it was entirely possible that private hospitals would have vaccine doses left over because everyone in a position to afford them would have already purchased or availed themselves of a free vaccine.[263] Conversely, those who needed the vaccine might be unable to pay for it.[264] In this respect, the court asked the Union government to provide a set of clarifications about the manner of disbursal of vaccines to private hospitals and the regulatory oversight to be exercised.[265]

Finally, the court dealt with the differential pricing regime created by the LVP. It noted that its underlying rationale, and preponderance toward unduly burdening the exchequer of states vis-à-vis the Union government, would have to be examined against the touchstone of Article 14—namely, the equality code of the Indian Constitution.[266] To enable this examination, it asked the Union government to place on record certain clarifications ("queries") on the basis of pricing. These clarifications included the reasons that drove the Union

259 *Id.* at 19–20.
260 *Id.* at 20–21.
261 *Id.* at 21–22.
262 *Id.* at 21.
263 *Id.*
264 *Id.*
265 *Id.*
266 *Id.* at 25.

government's refusal to intervene statutorily, whether any contracts for voluntarily licensing had been invited, and its controversial decision to not exercise its powers as a monopolistic buyer (a position that stood in contrast to its stand in Phases 1 and 2 of the policy).[267] Finally, it also sought relevant clarifications on the mandatory use of the CoWIN platform for those in the eighteen- to forty-four-years age group.[268] Noting that it threatened to exacerbate a pervasive digital divide, the court stated that it could have serious implications for the fundamental rights to health and equality for those within the age group.[269]

The court's order and exercise of dialogic review in the face of public health emergency was significant. First, the order holds important lessons on how competing separation of powers claims should be handled. Second, it acknowledges the fact that while the executive is given a wide latitude to enable speedy decision-making, as time passes and more information becomes available, this deferential standard undergoes a shift toward the principles of reasonableness and proportionality, and the actions of the executive are held to this stricter account. Third, dialogic review also accommodates two public functions—transparency and scrutiny in proceedings. It ensures that vital decisions do not remain opaque, but through their airing in court are subjected to public dialogue.[270] Moreover, because of a period marked by governance through executive decree and a lack of public oversight, this scrutiny takes on added importance as well. Fourth, it lays bare the benefits that inhere in the dialogic review process itself. As was demonstrated, dialogic review straddles a fine line—while it does not extend to questioning the merits of a policy in itself, the purpose of dialogic review is to allow judicial review to (a) gauge, on the basis of information provided, whether a policy is sufficiently backed by reason to pass constitutional scrutiny; (b) gauge whether, in response to judicial nudges—i.e., recommendations, queries and clarifications—the political executive modifies policy to ensure constitutional compliance; and (c) if the answer to both (a) and (b) is negative, then

267 *Id.* at 26.

268 *Id.* at 18.

269 *Id.* at 30.

270 Bhatia, *supra* note 241.

in the last resort, issue orders invalidating parts of the policy that fall afoul of rights (in this case, the rights to health and equality).[271]

It is important to note the aftermath of this order dated May 31, 2021. As directed in the order, the Union government had been given two weeks to supply the information requested by way of affidavit. On June 7, 2021, in a telling sign that the Indian Supreme Court's nudging had worked, the Union government announced a complete U-turn and overhaul of its vaccination policy.[272] Reverting to the arrangements under Phases 1 and 2 of the vaccination program, the government announced that India would inter alia (1) return to a system of centralized procurement of vaccines against COVID-19, (2) provide free vaccines for those in the eighteen-to-forty-four age group, and (3) keep twenty-five percent of procurement open for the private sector, with the cost of the vaccine being uniform and so negotiated by the Union government.[273] This system was to be operationalized by June 21, 2021.[274]

We now engage with the Indian Supreme Court's order in *Kalpana Mehta*.[275] The matter arose from two public interest petitions that placed into focus the process adopted for licensing vaccines to prevent cervical cancer. The petitioners alleged that the process of licensing was not preceded by adequate clinical trials to ensure the safety and efficacy of the vaccines. They alleged that nearly twenty-four thousand girls were vaccinated in two Indian states without following procedural safeguards. The administration of the vaccine was reported to have caused serious adverse health effects, including death.[276] Responsibility was sought to be affixed on the vaccine manufacturer and the role of the Drugs Controller General of India and the Indian Council of Medical Research respectively.[277] At the hearing, the petitioners sought to rely upon a report of the Parliamentary Standing Committee dated December 22, 2014, in

---

271 *Id.*

272 Utkarsh Anand, *Before PM Modi Changed Covid Vaccine Policy, a Nudge from the Supreme Court*, HINDUSTAN TIMES (June 8, 2021, 12:10 PM), https://www.hindustantimes.com/india-news/before-pm-modi-changed-covid-vaccine-policy-a-nudge-from-the-supreme-court-101623134442210.html [https://perma.cc/XD2U-8N5X].

273 *Id.*

274 *Id.*

275 *See* Kalpana Mehta v. Union of India, (2018) 7 SCC 1, 53.

276 *Id.* at 2.

277 *Id.* at 1.

support of their claims. The question before the court was if it could place reliance on Parliamentary Standing Committee Reports (PSC Reports) without violating parliamentary privilege.[278] Alongside interpreting constitutional provisions on parliamentary privilege (rules that the text of the Indian Constitution imported from the British House of Commons and continues to retain), the court's judgment directly implicated the horizontal separation of powers under the Indian Constitution and had a bearing on its institutional legitimacy. In short, the court in its holding invoked the transformative power of the Indian Constitution to rule that taking judicial notice of PSC reports was permissible. In its exposition of this ideal, the court held that

> in understanding the issues which have arisen before the Court in the present reference, it is well to remind ourselves that since the Constitution is about transformation and its vision is about empowerment, our reading of precepts drawn from a colonial past, including parliamentary privilege, must be subjected to a nuance that facilitates the assertion of rights and access to justice.[279]

This particular line of reasoning employed by the court to interpret Article 105(3) of the constitution,[280] which dealt with parliamentary privileges and its particular application of transformative constitution in the context of the case, received severe criticism from legal commentators and scholars alike.[281] The argument was straightforward: in importing the explicit language of Article 105(3), which dealt with rules of parliamentary privilege from the British House of Commons, the drafters had made a conscious decision to establish a colonial continuity,[282] until the time that an independent

278 *Id.* at 2.

279 *Id.* at 90.

280 India Const. art. 105(3) (Powers, privileges, etc. of the Houses of Parliament and of the members and committees thereof: "In other respects, the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House, shall be such as may from time to time be defined by Parliament by law, and, until so defined, [shall be those of that House and of its members and committees immediately before the coming into force of Section 15 of the Constitution (Forty-fourth Amendment) Act 1978]").

281 Gautam Bhatia, *Guest Post: Transformation, Continuities, and Gateways to Transformation: Reflections on the Kalpana Mehta Judgment*, INDIAN CONST. L. & PHIL. (June 27, 2018), https://indconlawphil.wordpress.com/2018/07/27/guest-post-transformation-continuities-and-gateways-to-transformation-in-the-constitution-of-india-reflections-on-the-kalpana-mehta-judgment/ [https://perma.cc/B3S2-2UYR].

282 DURGA DAS BASU, 4 COMMENTARY ON THE CONSTITUTION OF INDIA 5034 (Butterworths Wadhwa ed., 8th ed. 2008).

Indian Parliament chose to frame fresh rules in this regard. By subjecting the explicit language of Article 105(3) to an overarching analysis that facilitated "an assertion of rights and access to justice," the court was effectively rendering the provision meaningless, substituting defined rules of parliamentary privilege with its own reasoning grounded in the principle of transformative constitutionalism.[283]

This illustrative case study served only to supply evidentiary value to two long-held hypotheses about the Supreme Court of India. First, there is no consensus between judges who have been entrusted with interpreting the same constitution and are all members comprising the same Constitutional Court on the meaning, scope, and critically the application of transformative constitutionalism. Second, a careful analysis of this decision of the Supreme Court of India revealed that even a well-intentioned and purposive judgment of the court, framed in the language of "transformative constitutionalism," was subject to settled precedent and the explicit provisions of the constitution. *Kalpana Mehta* demonstrated that even decisions unpopular with the general public, and in the context of this case, a decision that was wholly premised on a misapplication of the law, are often respected and enforced by the executive wing in large part due to the institutional legitimacy of the court. However, and as the discussion goes to show, the judgment completely dismantled parliamentary privilege, eroded the balance of separation of powers, and dealt a hammer blow to the credibility of the Indian Supreme Court, the implications of which will be clear only with the passage of time.

CONCLUSION

This Article has engaged with the case studies of India and South Africa—two polities that are united by their unique constitutional histories, shared societal challenges, and explicitly transformative frameworks. Within the bounds of this overarching framework, it has examined the interplay between three conceptual strands: transformative constitutionalism, the fourth branch, and the separation of powers. The Article in Parts I and II engages deeply with competing theories of the fourth branch in the literature and situates it. Part III examines the evolution of separation of powers law and

283 Kalpana Mehta v. Union of India, (2018) 7 SCC 1, at para. 70.

introduces the transformative separation of powers model. Parts IV and V, in turn, deal with jurisprudence emerging from the Constitutional Courts of India and South Africa and test the state of the law against the first principles discussed earlier. The Article makes three chief claims. First, as opposed to being loosely connected, the fourth branch is an essential characteristic of transformative constitutionalism. Second, the fourth branch does not just implicate the tripartite separation of powers model, but it recasts it entirely into a model that envisages active state collaboration. Third, this model of state collaboration is founded upon the values of pushes and incentives and institutional comity and is directed toward securing the transformative visions that the Indian and South African Constitutions aspire to achieve.