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The Fourth Branch, Separation of Powers, and Transformative Constitutionalism

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ABSTRACT

Comparative constitutional law, generally, and the Global South, in particular, have witnessed two distinct and emerging movements in the past decade. The first is a proliferation of the "fourth branch" of the State. These institutions refer to those constitutionally entrenched bodies that do not fall neatly within the tripartite structure of separation of powers. They are tailor-made and range from electoral to human rights commissions, tasked with securing specific constitutional norms. The second movement is "transformative constitutionalism." Narrowly construed, transformative constitutionalism is but another interpretive tool that select constitutional courts employ. More broadly, and crucially, however, it has come to represent a constitutional vision. This vision demands a state commitment to broadscale social transformation, with substantive equality at the heart of this movement, where the constitutional machinery and its functionaries, comprising the legislature, judiciary, and executive, actively pursue a transformational "mandate."

In the first instance, the fourth branch and transformative constitutionalism would both appear to concern themselves with the decentralization of State power. Nonetheless, as organized and specific constitutional principles, their competing values might appear to be in conflict in practice, in turn holding serious implications for the balance of separation of powers. This Article attempts to dispel this notion of incompatibility between the two postulates. It employs India and South Africa—both labeled and studied explicitly as transformative—as comparators. Exploring the close interplay between these distinct yet interrelated principles, this Article argues that (1) the fourth branch can be appropriately understood as an integral feature of transformative constitutionalism, and (2) the mandate of transformative constitutionalism fundamentally recasts our understanding of the modern separation of powers, transitioning to a radical model encompassing collaboration of the

state as a whole. In doing so, it aims to situate, contextualize, and provide greater conceptual clarity revolving around the fourth branch, transformative constitutionalism, separation of powers, and most crucially, the complex interplay between them.

INTRODUCTION

The objective of this Article is to study the operation of entrenched fourth branch institutions[1] and, more broadly, their interaction with the tripartite organs of government (i.e., the effect on separation of powers) in a transformative model.[2] Alternatively, it aims to answer the question of how transformative constitutionalism, which demands a concerted state effort,[3] including a collaborative engagement between the legislature, executive, judiciary, and fourth branch toward reimagining the state, affects and reconceptualizes the question of separation of powers. For the purposes of this Article, the experiences of India and South Africa—both labeled and studied as explicitly transformative[4]—through both the text and jurisprudence of their Constitutional Courts are used as comparative case studies. Both are employed to, inter alia, examine the historical development and current position of separation of powers law in the respective polities, the recognition and content of rights, their differing approaches to the law, and the varying applicable standards of review. In concluding, the Article will critically assess whether the jurisprudence of the Constitutional Courts is in consonance with the mandate of transformative constitutionalism.

The Article is organized as follows. Part I is introductory and describes what is meant by "transformative constitutionalism" and the

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1 *See* S. AFR. CONST., 1996, ch. 9. These encompass the South African Human Rights Commission; Commission for Promotion and Protection of Rights of Cultural, Religious and Linguistic Communities; Commission for Gender Equality; Independent Authority to Regulate Broadcasting; Electoral Commission; Auditor-General; and Public Protector. *See also* Charles M. Fombad, *The Role of Emerging Hybrid Institutions of Accountability in the Separation of Powers Scheme in Africa*, *in* SEPARATION OF POWERS IN AFRICAN CONSTITUTIONALISM (2016).

2 For a general overview of what 'transformative constitutionalism' means and entails, see generally Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 SAJHR 146, 150 (1998).

3 *Id.*

4 *See generally* TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA AND SOUTH AFRICA (Oscar Vilhena, Upendra Baxi & Frans Viljoen eds., 2013).

"fourth branch" in the context of India and South Africa. It briefly situates fourth branch institutions within these polities, tracing their position and underlining their purpose in the constitutional schemes of these countries. Part II examines competing conceptual theories of the proper functions that might be ascribed to fourth institutions.[5] The central argument put forth here is that based on the values of constitutional entrenchment,[6] coupled with the roles that they discharge and their interaction with other branches of the state, the fourth branch can reasonably be considered to constitute an integral characteristic of transformative constitutions. Part III then sets forth the chief conceptual contribution of this Article. Using the first principles of transformative constitutionalism and separation of powers, it argues that the mandate of the transformative model fundamentally recasts our understanding of the modern separation of powers, transitioning from a doctrine built upon the reinforcing principles of checks and balances and division of labor to a more radical model encompassing collaboration of the State as a whole and an active buy-in from all its constituents, including its citizens, toward achieving social transformation. The judiciary lies at the forefront of this endeavor.

Employing case law, Parts IV and V then move on to assess the historical development of separation of powers law in South Africa and India, respectively, with a focus on the current position of the law. Attention is paid to the interaction between fourth branches and the other organs of government, the resulting tension it causes in the balance of separation of powers and its effect on judicial legitimacy,[7] and the standards of review applied by Constitutional Courts. These Parts also highlight the distinct features of separation of powers law fashioned by the courts and examines the varying judicial toolkits that they employ to adjudicate interbranch disputes. I then conclude.

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5 *See generally* Mark Tushnet, *Institutions Protecting Constitutional Democracy: Some Conceptual and Methodological Preliminaries*, 70 U. TORONTO L.J. 95 (2020) [hereinafter Tushnet, *Institutions Protecting Constitutional Democracy*]; Mark Tushnet, *Institutions Protecting Democracy: A Preliminary Inquiry*, 12 L. & ETHICS HUM. RTS. 181 (2018) [hereinafter Tushnet, *Institutions Protecting Democracy*]; Mark Tushnet, *Institutions Supporting Constitutional Democracy: Some Thoughts About Anti-Corruption (and Other) Agencies*, SING. J. LEGAL STUD. 440 (2019) [hereinafter Tushnet, *Institutions Supporting Constitutional Democracy*]; Tarunabh Khaitan, *Guarantor Institutions*, 16 ASIAN J. COMPAR. L. S41, S42 n.1 (2021).

6 N.W. Barber, *Why Entrench?*, 14 INT'L J. CONST. L. 325 (2016).

7 *See* THE EVOLUTION OF THE SEPARATION OF POWERS: BETWEEN THE GLOBAL NORTH AND THE GLOBAL SOUTH 3 (David Bilchitz & David Landau eds., 2018).

I
CONCEPTUAL PRELIMINARIES: FOURTH BRANCH AND TRANSFORMATIVE CONSTITUTIONALISM

What do I mean by transformative constitutionalism? While it is clear that there is no single or accepted definition of transformative constitutionalism, the doctrine, by its very nature, is shaped by the context in which it is applied. I focus broadly on the term as used by Karl Klare, who is credited with first introducing the term to describe a brand of South African constitutionalism, stating,

> Is there a postliberal account of the rule of law suitable to the political challenges South Africa has set for itself? . . . . By transformative constitutionalism, I mean a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political development) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.[8]

Transformative constitutionalism necessarily includes a state commitment to broadscale social transformation, with substantive equality at the heart of this movement, where the constitutional machinery and its functionaries, comprising the legislature, judiciary, and executive, actively pursue a transformational vision.

Notably, the constitutions of India and South Africa, among others, that are primarily regarded as transformative are also characterized by features of constitutional design that unify them: they tend to be thicker constitutions, whereby constitutional drafters gave detailed and relatively flexible instructions to political institutions. With increasing frequency, they contain rights such as socioeconomic and collective rights that reflect transformational aspirations for their societies,[9] find explicit expression in Bill of Rights provisions,[10] and are often treated as justiciable. In addition, many of these constitutions also include a range of organs that do not fit into the

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8 Klare, *supra* note 2.

9 *See generally* TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA AND SOUTH AFRICA, *supra* note 4.

10 S. AFR., CONST., 1996, ch. 2. The provisions on the socioeconomic rights are contained in sections 24 through 29.

traditional tripartite structure. These fourth branch institutions range from human rights commissions to ombudsmen and are tasked with carrying out their mandate alongside the traditional organs under the tripartite powers model: the legislature, the executive, and the judiciary. While there are obvious advantages to the establishment of these newer organs—they function as the site of further checks and balances—the ubiquitous nature of accountability ensures that this creates only more tension in the traditional tripartite separation of powers. This tension in the framework of governance is only more pronounced when these institutions are also tasked with pursuing their own transformative agenda[11]—an issue which is dealt with more substantially in the following sections.

The introduction of Chapter 9 institutions in the South African constitutional framework,[12] and their subsequent development as active participants in ensuring accountability, responsiveness, and openness in the exercise of governmental authority is noteworthy. The idea of creating institutions independent of the traditional three branches of government in South Africa originated as a vital component of the democratic transition.[13] Early on in the negotiations surrounding the transition, the establishment of an ombudsman was considered—one which would be tasked with investigating malfeasance and maladministration in the state and bureaucracy and safeguarding fundamental rights. The idea of creating independent institutions would also crucially address the intense distrust between competing parties.[14] Therefore, the African National Congress (ANC) Constitutional Committee's working document titled "A bill of rights for a new South Africa," published in 1990, specifically included the establishment of an independent ombudsman, classed broadly under the section on "enforcement."[15] As the country moved toward its first

11 Heinz Klug, *Transformative Constitutions and the Role of Integrity Institutions in Tempering Power: The Case of Resistance to State Capture in Post-Apartheid South Africa*, 67 BUFF. L. REV. 701 (2019).

12 S. AFR. CONST., 1996, ch. 9. See also Klug, *supra* note 11, at 705, for a helpful overview of the historical development and evolution of Chapter 9 institutions in the South African context.

13 Klug, *supra* note 11, at 705–06.

14 Allan D. Cooper, *Klug, Heinz. 2000. Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction*, AFR. TODAY, Fall/Winter 2003, at 107, 119–21 (book review).

15 ANC CONSTITUTIONAL COMMITTEE, A BILL OF RIGHTS FOR A NEW SOUTH AFRICA 36–37 (1990).

democratic election, members of civil society raised concerns about its management and legitimacy.[16]

The liberation movement argued that if the apartheid regime was to conduct the elections, the result would be tainted and might possibly evolve into a conflict.[17] The apartheid regime, in turn, insisted upon a legal continuity of power between the existing State and the future legal order, while the liberation movement called for an interim government to be installed until elections were conducted.[18] To break this impasse, the ANC embraced the idea of creating a number of independent bodies to oversee the transition to democracy, one of which was the Electoral Commission.[19]

The South African experience set the stage for these bodies to proliferate and find a place in the new and amended constitutions of the 20th century and beyond. Modern constitution-making continues to bear witness to this growing trend, which continues to make the modern administrative state increasingly dirigiste and discretionary, with a multitude of bodies exercising quasi-institutional functions. As far as the fourth branch in South Africa is concerned, the South African Constitution of 1996 established six separate institutions, termed broadly as "state institutions supporting democracy," and three "integrity institutions" to enhance accountability. These institutions were constitutionally recognized under Chapter 9 of the constitution; hence they are also called "Chapter 9" institutions.[20] At one end of the spectrum lies the Human Rights Commission; Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; Commission for Gender Equality; and an independent authority to regulate broadcasting. On the other hand, the integrity institutions are composed of the Electoral Commission, Auditor-General, and Public Protector,[21] all of which have an aspirational mandate under the constitution to further the constitutional promise of achieving a more

16 Klug, *supra* note 11, at 706.

17 *Id.*

18 *Id.* at 706–07.

19 *Id.* at 707. *See also* Heinz Klug, *Constitution-Making, Democracy and the "Civilizing" of Irreconcilable Conflict: What Might We Learn from the South African Miracle?*, 25 WIS. INT'L L.J. 269, 277, 279 (2007).

20 *See generally* S. AFR. CONST., 1996, ch. 9.

21 *Id.*

equitable and sustainable society.[22] While the fourth branch in India is not as extensive as the one that exists in South Africa, the Indian Constitution does provide for autonomous entrenched bodies that exist outside the tripartite framework. These include the Election Commission, tasked with organizing and conducting free elections, and the Comptroller and Auditor General, a body entrusted with auditing the accounts of the government.

II
FOURTH BRANCH OR GUARANTOR INSTITUTIONS

What are fourth branch institutions? The scholarship that attempts to situate, clarify, and trace the scope and functions that should be properly ascribed to these fourth branch institutions, while rapidly emerging, remains underexplored in the literature. This makes their examination even more compelling, especially their operation within a transformative model—which, as I argue more substantially in Part III below, lies at the heart of not just transforming the doctrine of separation of powers as traditionally understood, but more crucially plays a pivotal role in the state's pursuit of securing the transformative promise of the constitution for its polity. Recent studies have attempted to grapple with this question, including those conducted by constitutional scholars Mark Tushnet and Tarunabh Khaitan.

Part II first, and briefly, engages with how Tushnet and, more crucially, Khaitan conceive of fourth branch institutions. Second, it highlights not just the differences in their overarching conceptual understandings of these bodies, but also how they categorize the particularity of their functions, their scope, and their context of operation. Third, as a more formal matter, the Article examines the "labeling," i.e., the usage of the term that most accurately captures the operation of fourth branch institutions in the polities within which they are situated. Finally, this Part includes a competing critical analysis of their respective formulations and explains where this Article departs from their framings.

A. Fourth Branch in the Literature

Tushnet and Khaitan disagree on labels but essentially subscribe to the same view on what is the commonly accepted ambit of the term

22 *See* Klug, *supra* note 11, at 708.

"fourth branch" within the literature today. First coined in the context of South Africa, as previously mentioned, the placeholder fourth branch is now in vogue, primarily in the Global South. It generally refers to those *constitutional* institutions that do not neatly fit within any of the three traditional branches of the State.[23] Both Tushnet and Khaitan also agree on the fundamental functional components of fourth branch institutions that are indispensable to and determine their effectiveness in serving their stated purpose. They are, namely, the characteristics of expertise, independence, and accountability.[24] They also share a similar view on the principled value of entrenchment of these hybrid institutions, for it exerts a direct bearing on the independence, and subsequent effectiveness (or otherwise), of the particular institution.[25] The implications of entrenchment are wide-ranging. They extend to not just the ability of the institution to fulfill its own constitutional (and often transformative) mandate at par with the traditional organs of the State but collaborate and work in cohesion to improve governance and serve as checks and balances. Moreover, depending on the particular branch in question, and especially in the case of the probity bodies such as anti-corruption watchdogs and public prosecutors, the institutions actively constrain State power and prosecute constitutional excesses or abuse of power. In short, fourth branch institutions are tasked with not just maintaining the delicate balance of separation of powers between the traditional three branches. As a result, however, they also hold an unwieldy power to upset it dramatically, and often to the detriment of the citizens and the (generally) liberal democratic framework within which it operates.

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23 Khaitan, *supra* note 5. In American scholarship the "fourth branch" is often used to describe regulatory agencies to distinguish them from the partisan, executive branch agencies. F.T.C. v. Ruberoid Co., 345 U.S. 470, 487 (1952) (Jackson, J., dissenting); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984). *See also* Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 689 (2000). This however remains an idiosyncratic American usage. As Mark Tushnet correctly says, these administrative agencies did not actually perform any functions not already being performed by the traditional branches, nor did constitutions identify an "administrative" branch separate from the "executive." Tushnet, *Institutions Protecting Constitutional Democracy*, *supra* note 5.

24 Khaitan, *supra* note 5.

25 *Id.*

B. Function and Scope of Fourth Branch Institutions

Tushnet and Khaitan diverge, however, based on their distinct approaches and their overall focus. Tushnet focuses primarily on the constitutional design of these institutions (in particular, the anti-corruption watchdog and public protector) and their dominant features, and he employs the case studies of Brazil and South Africa to illustrate how each country conducts corruption investigations, subsequent prosecutions, and assesses their interactions with other traditional organs of the State.[26] In stark contrast, Khaitan's survey does not focus on any particular jurisdiction or institution but attempts to study the institutions of the fourth branch more comprehensively—ranging from the institutions' proper functions (i.e., to secure a constitutional norm) to their primary and secondary duties to effectuate the norm. He then makes a case for their value in a constitutional framework.[27] In short, he puts forth a functional theory of fourth branch institutions, and one that, in my view, offers a steadier conceptual platform for constitutional scholars to build upon. While my analysis of fourth branch institutions departs from both Tushnet and Khaitan in part, this Section is nonetheless premised largely on Khaitan's foundation.

Khaitan's principal contribution provides a working definition of what he emphasizes are best described as "guarantor institutions"[28] as opposed to Tushnet's labeling of them as "institutions supporting constitutional democracies."[29] Both phrases form some part of the wider parlance of "fourth branch institutions" used in constitutional practice. Khaitan expresses that in a "given political context, a guarantor institution is a tailor-made constitutional institution, vested with material as well as expressive capacities, whose function is to provide a credible and enduring guarantee to a specific non-self-enforcing constitutional norm (or any aspect thereof)."[30] This formulation requires careful unpacking, and I focus on a few specific aspects in my assessment—namely, the guarantor branch as a (1) constitutional institution that embodies or is entrusted with,

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26 Tushnet, *Institutions Protecting Constitutional Democracy*, *supra* note 5; Tushnet, *Institutions Protecting Democracy*, *supra* note 5; Tushnet, *Institutions Supporting Constitutional Democracy*, *supra* note 5.

27 Khaitan, *supra* note 5, at S43.

28 *Id.*

29 *See generally* MARK V. TUSHNET, THE NEW FOURTH BRANCH: INSTITUTIONS FOR PROTECTING CONSTITUTIONAL DEMOCRACY (2021).

30 Khaitan, *supra* note 5, at S42.

(2) both primary and secondary duties that can be duly performed through material and/or expressive capacities toward, and (3) guaranteeing a *specific* nonenforcing constitutional norm.

1. Constitutional Entrenchment

Let us deal with entrenchment first, and the closely related values that are essential to its effectiveness. These are its *expertise* in providing the said guarantee, its *independence* from actors who are likely to have the ability and willingness to frustrate the norm in question, and its *accountability* alike to actors who are likely to, in turn, have the ability and willingness to secure the norm being guaranteed.[31] Therefore, in most democratic contexts, guarantor institutions must necessarily have their independence guaranteed and must be adequately (if not completely) insulated from the ruling party, or coalition, to provide credible and enduring guarantees. Constitutional entrenchment in turn serves not only to implicate all the aforementioned values but also arguably to present the best possible means to adequately secure them and the institutions they animate at large. Taking this argument to its logical conclusion then, it is proposed that to retain the greatest degree of effectiveness, and more crucially, one that will endure in the face of a changing political and legal culture, it is imperative that any guarantor is, ideally, *doubly constitutionalized*[32] (i.e., they are themselves entrenched as constitutional institutions and the norms that they seek to effectuate must also enjoy the status of a constitutional character). The varying possibilities explained below drive this point home with clarity.

For instance, ordinary regulators can be either:

1. not constitutionalized at all (i.e., both the institution or underlying norm/s);
2. themselves not entrenched as institutions though the norm they protect is constitutional (e.g., welfare regulators in jurisdictions recognizing social rights, but that do not entrench the institutions that enforce them); or
3. are themselves entrenched constitutionally, but the underlying norms they protect are not, and therefore these norms can easily be changed.

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31 *Id.* at S44.

32 *Id.* at S50–51.

And herein lies the difference between an ordinary regulator and the guarantor—*only if* the norm, as well as the institutional regulator, are constitutionalized can an institution be termed as a guarantor or fourth branch institution.[33]

It is important to bear in mind that institutional credibility is not a static value and can be enhanced or diminished over time. It is affected, to a large extent, by the particular political context it operates in, and the promise of a guarantor institution can therefore be fairly judged by the metric of endurance. Therefore, providing institutional guarantees in relatively stable, affluent democracies that abide by the rule of law and enjoy high degrees of diffused political trust and low levels of corruption might be far more straightforward than doing so in a transitional democracy marred by poverty, inequality, and rampant discrimination. Institutional design plays a salient role in any of these contexts—but guarantor institutions can downgrade into an ordinary regulator by losing credibility.[34] Over time, a formerly ruling-party guarantor, if operating in a conducive setting, can acquire enough effectiveness and credibility to qualify as a guarantor institution.

2. The Non-Self-Enforcing Norm

It is now worth considering what constitutes a specific non-self-enforcing constitutional norm. I, like Khaitan, am of the view that for a norm to be considered as constitutional, and therefore the subject of protection by a guarantor branch, it is not essential that it must be found solely in the text, whether explicitly or implicitly (for instance, through judicial adjudication or interpretation) in the primary (or big-c) constitutional codes of a polity. Small-c norms of the material constitution are also, for all practical purposes "constitutional," although classifying them as such might be a cause of controversy.[35] This Article argues that what is material is whether the polity in question has entrenched, either legally or politically, the constitutional norm, and, therefore, a more demanding mechanism than the ordinary political or legal process is required to amend or weaken it.

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33 *Id.* at S51.

34 This is arguably what has happened to the Indian Central Information Commission. *See* Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India*, 14 L. & ETHICS HUM. RTS. 49, 80–81 (2020).

35 On the distinction between the big-c and the small-c constitution, see ANTHONY KING, THE BRITISH CONSTITUTION 5–7 (2009).

3. Primary and Secondary Duties

Finally, it is pertinent to consider the last substantive aspect, which is broadly centered on the primary and secondary duties of the guarantor institution that enable it to effectuate the norm it is specifically tasked with performing or securing. According to Khaitan, three overarching classifications guide, inform, or provide content to these duties.[36] The first involves distinguishing the content of the norm from the norm's real-world impact.[37] Second, each of these dimensions of a norm requires the imposition of duties. These duties are duly expressed through primary duties—namely, those that are imposed directly by the norm and therefore necessary to protect its content or impact in the first place—and secondary duties, which generally consist of redress mechanisms and come into play once the primary duties are breached.[38] The third classification, which is more accurately described as a subset of primary and secondary duties, concerns their enforcement. Duties, whether primary or secondary in nature, are performed through expressive capacity or material capacity, and in some cases, a combination of both. Guarantor institutions are often specifically vested and imbibed with the requisite capacities to secure the particular norm in question.

To break down what these terms entail in practice, expressive capacity is generally manifested in formal expression, such as the pronouncement of a judgment or enactment of a statute, as well as through informal expression, such as a minister's speech. For material capacity, on the other hand, the duty bearer must be able to perform certain physical actions that drive material change in the world.[39] However, it bears repeating that duties—whether primary or secondary and whether performed in express or material capacities—are to be discharged in the service of the act of either *respecting* the norm (i.e. refrain from weakening or erasing it) and/or *nourishing* it (i.e., to update and strengthen it), so that it does not lose its functional and normative relevance under changing circumstances. This is a primary duty that attaches to all norm-makers by necessary

36 Khaitan, *supra* note 5, at S45.

37 *Id.* at S47.

38 *See* 1 LUIGI FERRAJOLI, PRINCIPIA IURIS: TEORÍA DEL DERECHO Y DE LA DEMOCRACIA 637–38 (Trotta 2011). Ferrajoli characterizes these duties as primary/ substantive and secondary/instrumental "guarantees."

39 Khaitan, *supra* note 5, at S45.

implication, which is the obligation to act in a manner that upholds the content of the norm. Significantly, these obligations of respect apply not just to the guarantor institution but also, by extension, become the primary duty of the relevant actors against whom the guarantee applies.

In addition, and again alongside guarantor institutions, some primary actors might also be tasked with nourishing the norm in question and keeping it relevant to changing times and circumstances, if so necessary. This particularly includes the legislature, although in many states a significant portion of constitutional norm-making is also undertaken by appellate courts and the executive through various means, including through the exercise of powers of delegated legislation. Generally speaking, however, the primary duty to nourish the norm and strengthen it is almost always borne by the judiciary in most states.[40] Finally, the effective discharge of secondary duties is vital toward securing primary duties. The importance of this discharge, through the tools of publicizing, investigating, criticizing, reprimanding, and remedying a breach, cannot be overstated, and acts as a focal point of this institutional mechanism. When breaches of primary duties go uninvestigated, overlooked, uncriticized, or unremedied, the norm itself could be at grave risk of irreversible change.

4. Situating the Fourth Branch

The analysis presented here differs fundamentally from the preexisting scholarship. First, at various stages and in an effort to further lend a degree of classification to fourth branch institutions, the extant body of scholarship has attempted to categorize these institutions into those that can be fairly termed as "integrity institutions," and others which are not. Some scholars claim that the integrity branch is roughly synonymous with the guarantor branch and composed of exclusively anti-corruption institutions. For this school, there is no material difference between a guarantor institution and an integrity institution.

By contrast, Khaitan and I adopt a more functional approach, holding that integrity institutions are but a subset of guarantor institutions. This is because integrity institutions are those that only perform secondary duties that kick in when primary duties have already been breached. They include constitutional and administrative

40 *Id.* at S46.

courts, as well as anti-corruption watchdogs, ombudsmen, electoral commissions, and so on. Unlike these integrity institutions, guarantor institutions also have to shoulder primary duties directly (especially targeted at preventing a breach or fulfilling the mandate of a norm), through some form of overt action, and by doing whatever is required by the norm itself.[41] Additionally, it is important to note that while guarantor institutions are posited as distinct from integrity institutions, the same institution can sometimes be a guarantor as well as an integrity institution, as is often the case with anti-corruption watchdogs.

Therefore, this now conventional distinction between guarantor and integrity institutions should be discarded. Rather, the various institutions should be organized along contextual lines, instead of structural or institutional lines. Ignoring context can confuse the purpose and functionality of these institutions. For instance, constitutional courts, as well as electoral commissions, are not solely integrity institutions regardless of the context. They may be in certain settings, but not all. While courts, and often electoral commissions, have primary functions that may align best with those performed by integrity institutions (i.e., addressing a breach of a norm through remedies etc.), they are also tasked with primary duties imposed by the norm itself and imperative for its performance. Courts are often tasked with not just duties of adjudication, which arise due to the breach of a norm, but also with ensuring that they uphold and respect the law while developing a cogent body of jurisprudence. On the other hand, electoral commissions are entrusted with addressing electoral disputes, as well as with organizing elections in the first instance.[42]

The approach presented here departs significantly from Khaitan's. Khaitan claims that the need to guarantee constitutional commitments is important in any constitutional context, irrespective of the content of the constitutional norms. In liberal democratic traditions, this includes norms of legality, democracy, civil rights, and the rule of law. Khaitan also claims that there is no good conceptual reason why other norms, such as theocracy, socialism, or *Laïcité* cannot also be constitutionalized.[43] While this argument has strong normative

41 *Id.* at S49.

42 *Id.* at S56.

43 *Id.* at S51; Tushnet, *Institutions Protecting Constitutional Democracy*, *supra* note 5.

purchase, it seems risky. The proliferation of fourth branch institutions is *currently* restricted to broadly liberal democracies in practice. There is therefore not yet sufficient evidence to support their operation in more autocratic, fragile, or closed democratic systems, and even less evidence to support the claim that such operation would be, all things considered, desirable. Therefore, for the time being, I think Tushnet's label of "institutions protecting constitutional democracy"[44] might be the more accurate phrase to apply.

III
SEPARATION OF POWERS RECAST

Having established an understanding of the fourth branch, this Part uses the concepts of the fourth branch and separation of powers in tandem. The mandate of the transformative model fundamentally recasts our understanding of the "modern" separation of powers. While the doctrine of separation of powers has been a central tenet of constitutional theory, the evolution of constitutional design, the recognition and expansion of wide-ranging constitutional rights,[45] and the growth of the administrative state,[46] among other factors, has highlighted a need to revisit our understanding of the tripartite model in light of the changing nature of the state. The transformative constitutions of the Global South, and creative assertions of judicial power to enforce socioeconomic rights, pose a significant challenge to traditional conceptions of separation of powers,[47] and in turn, the judicial legitimacy of these institutions.

Recall that the previous Part argues that, in light of their proliferation, fourth branch institutions can be considered to form both an integral part of the modern administrative state *and* a defining characteristic of the transformative framework. This Part stretches the argument further in the context of separation of powers along three distinct yet interrelated strands of inquiry. These distinct schools of thought are (A) the pure theory, (B) the administrative state, and (C) the transformative reconstruction. For simplicity, all these

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44 Tushnet, *Institutions Protecting Constitutional Democracy*, *supra* note 5, at 181.

45 THE EVOLUTION OF THE SEPARATION OF POWERS: BETWEEN THE GLOBAL NORTH AND THE GLOBAL SOUTH, *supra* note 7.

46 *See* EOIN CAROLAN, THE NEW SEPARATION OF POWERS: A THEORY FOR THE MODERN STATE 253 (2009).

47 THE EVOLUTION OF THE SEPARATION OF POWERS: BETWEEN THE GLOBAL NORTH AND THE GLOBAL SOUTH, *supra* note 7, at 7.

conceptions build upon the foundations of those that precede them, culminating in a reconceptualization or an alternate framing of separation of powers. They are all set out below. We first engage with the pure theory of separation of powers, as understood when it was first conceived.

A. Pure Theory of Separation of Powers

Originally formulated by Montesquieu, the pure theory has a long academic pedigree and analogues in many parts of the world. Since its conception, it has become one of the cornerstones along which the modern nation-state is organized.[48] The doctrine argues that the legislature, the executive, and the judiciary should be kept separate, while the principles of "checks and balances" and "division of labor" also remain intrinsic to this formulation. The pure theory accounts for the fact that the checks-and-balances function necessarily involves a degree of mutual separation among the branches of government, and may therefore result in a certain amount of interference by one branch into the functions and tasks of another.[49] With that being said, it was evident that this original interpretation sought to foremost compartmentalize and isolate the different branches of government from one another to the greatest extent possible. The principles of checks and balances and division of labor were considered secondary and thought to fulfill a distinct, but limited, function in the exercise of power. Perhaps the most prominent defense of the pure theory today is that it has prevented the concentration of powers in any one political institution and has acted as a largely effective check against the abuse of power.

It is important to bear this formulation in mind as we consider the evolution of the doctrine in light of the changing nature of the modern state. Today, it is widely accepted that the traditional theory of the separation of powers, as first formulated, no longer neatly encapsulates the complex and overlapping functions that are ascribed to most systems of governance (i.e., what we understand as the

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48 *See* M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 13 (1st ed. 1967).

49 *Id. See also* Aileen Kavanagh, *The Constitutional Separation of Powers*, *in* PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW 221 (David Dyzenhaus & Malcolm Thorburn eds., 2016).

growth of the modern administrative state).[50] The modern administrative state therefore constitutes the second stage in this evolutionary process.

B. The Administrative State

A central characteristic of the modern administrative state is that public power is exercised in a decentralized manner, and on an ever-growing discretionary basis.[51] The modern system of government has grown in ways previously thought unfathomable and now encompasses a breadth of activity previously unseen. Government today is characterized by an increase in the powers of its agencies and the rapid growth of organizations which can neither be classified as exclusively public or private bodies. Administrative bodies are not defined by a uniform design and exercise an institutional fluidity that is the benchmark of the organizational complexity of the administrative state. In the same vein, they exercise powers and perform functions that might have formerly been classified as legislative, executive, or judicial in nature.[52] A structured fourth branch, as demonstrated by the Indian and South African experiences in the following parts of this Article, now also inheres in our construction of the administrative state.

This understanding reframes the tripartite division to one that can be appropriately classified as a management of interinstitutional relations. An important consequence of this framing is that its foundational principles of checks and balances and division of labor, formerly treated as secondary, now occupy the foreground of separation of powers under the administrative state. In this vein, the interpretation of the doctrine has progressed from being a one-branch, one-function approach to a notion that integrates the division of labor and checks and balances, with limited exceptions.[53] The primary aim of the doctrine today has transformed from one espousing isolation to one ensuring the accountability of each wing of the State, while ensuring concerted action in respect of the functions of each organ for

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50 *See* Dimitrios Kyritsis, *What Is Good About Legal Conventionalism?*, 14 LEGAL THEORY 135, 154 (2008).

51 CAROLAN, *supra* note 46.

52 Eoin Carolan, The Problems with the Theory of Separation of Powers 26 (Nov. 14, 2011) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1889304 [https://perma.cc/VEK2-S5X5].

53 Kavanagh, *supra* note 49.

the good governance of democracy.[54] These two components are strengthened by a deep-rooted ethos of coordinated institutional effort and joint activity, while moving toward an understanding that is premised on the necessary interdependence, independence, interaction, and interconnection of branches.[55] These are all mutually reinforcing values that assimilate with each other in a complex interactive setting. While this understanding remains necessarily at odds with a view that is advocated by an adherence to the stronghold of the pure separation of powers,[56] it is the idea of collective enterprise that remains essential to the fulfillment of the objectives of the welfare state.

C. Separation of Powers and Transformative Constitutionalism: A Reframing

Finally, we address the third line of inquiry, one which pushes the conceptual envelope a little further. From the perspective of separation of powers, the distinction between the functioning of a modern administrative state considered in the abstract vis-à-vis the administrative state in a transformative framework might be considered irrelevant. Nonetheless, I believe there is a pertinent conceptual distinction to be drawn here.

Therefore, the final stage of this evolutionary process argues that in its essence transformative constitutionalism, by its very nature, recasts separation of powers in the modern administrative state so fundamentally that it envisages interinstitutional relations and active collaboration of the State as a normative and abiding principle. Recall that the first principles of transformative constitutionalism concern themselves with a holistic state effort to achieve broadscale social transformation with substantive equality at the heart of this movement.[57] It is an endeavor that tasks the breadth of its machinery viz. the legislature, executive, judiciary, and fourth branch to actively pursue a transformational vision.

A necessary starting point then is the idea of a State as conceived by the drafters of the South African and Indian Constitutions. While

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

55 Kyritsis, *supra* note 50.

56 Kavanagh, *supra* note 49, at 236.

57 For a general understanding of transformative constitutionalism, see Klare, *supra* note 2.

the term "State" is not defined in either the Indian or the South African constitutional blueprint, the South African Constitution, for its part, does spell out the duties of the State in some detail. Chapter 2, encompassing South Africa's Bill of Rights,[58] begins with a resounding reminder that the Bill of Rights is a cornerstone of democracy and in the same section notes that the State, construed as a whole, must respect, protect, and fulfill all rights.[59] The use of the term "State" is repeated throughout the Bill of Rights when specific constitutional obligations are spelled out. It is noteworthy that the narrower term "government" or a specific closed list of the traditional branch of government is not used.[60] It is clear, then, that the first two sections are arguably among the most significant of the South African Constitution, given that they enshrine fundamental rights and draw a clear and explicit connection between democratic governance and the fulfillment of the rights and values entrenched therein.

The constitution also spreads the net far and wide in placing obligations, for the most part, on the entire State and not merely a select branch of government. This already suggests a substantive, rights-based and rights-informed approach to democracy and the important facets which attach to it—one of which is the separation of powers.[61] The Indian Constitution makes a similar arrangement as its South African counterpart in entrusting the State, viewed holistically, with securing the vision of the constitution.[62] It can be argued that a

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58 S. AFR. CONST., 1996, ch. 2. The references to the "State" are contained in sections 7.1 & 7.2. They are reproduced below:

§ 7. Rights:

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.

India Const. art. 12 describes the term "State" as:

12. Definition. In this Part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

59 S. AFR. CONST., 1996, ch. 2.

60 Timothy Fish Hodgson, *The Mysteriously Appearing and Disappearing Doctrine of Separation of Powers: Toward a Distinctly South Africa Doctrine for a More Radically Transformative Constitution*, 34 SAJHR 57, 71 (2018).

61 *Id.*

62 *See generally* Upendra Baxi, *Preliminary Notes on Transformative Constitutionalism*, *in* TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA, AND SOUTH AFRICA (Oscar Vilhena, Upendra Baxi & Frans Vilijoen eds., 2013).

number of nation-states around the world might employ similar terminology, which might entrust one or more traditional organs with a corresponding mandate based on the context studied. However, what sets South Africa and India on a different footing, as compared to other liberal conceptions of democracy, is that (1) the State has been entrusted with an active role in the realization of a vision, and (2) these countries have explicitly chosen to adopt a transformative understanding of the constitution, one that acts as bridge between the past and the future, and as a vehicle for achieving social justice and substantive equality.

With an eye on the attainment of substantive equality, transformative constitutionalism concerns itself with redistributive justice.[63] What aligns the Indian and South African experiences in this respect is that the judiciary has interpreted the constitution in a manner that often facilitates an engagement in lawmaking, while maintaining that judicial review is still subject to important considerations. Indeed, judicial overreach, in the guise of pursuing a predetermined ideal or reading of the Constitutions, remains one of the foremost critiques of transformative constitutionalism. The fact that courts now have exercised the power to make decisions that are legislative or executive in character while carrying the force of law raises important issues concerning the possible parameters of judicial power and, as a logical corollary, the separation of powers. Another unifying element that unites the Constitutional Courts of both countries, and one that can hardly be disputed, is that the South African and Indian legal cultures, at least as they find expression in the judgments of the courts, have not entrenched or reflected the idea that constitutional adjudication should promote social change.[64]

The foregoing general discussion on the characteristics of transformative constitutionalism and the inability of the judiciary to fully embrace one of its fundamental facets—viz. a pursuit of social change and transformation of the legal culture—provides us with a gateway to then circle back to an engagement with how transformative constitutionalism, as an unrealized ideal, reconstructs our notion of separation of powers. In short, it not only contemplates

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63 *See generally* Danie Brand, *The South African Constitutional Courts and Livelihood Rights*, *in* TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA, AND SOUTH AFRICA (Oscar Vilhena, Upendra Baxi & Frans Vilijoen eds., 2013).

64 Hodgson, *supra* note 60, at 63.

but even demands, as a norm, the encroachment on one branch by other branches, resulting in the lines between these organs being necessarily blurred at times. It also envisages a constant state of interaction between the courts and elected branches—one manifestation of which is through the process of constitutional dialogue.[65]

It is worthwhile to briefly consider, then, what the central values that inform this formulation of separation of powers might be. First, and similar to the administrative state's iteration of separation of powers, it would necessarily include interinstitutional relationships between the three branches, while all the branches also continue carrying out their distinct roles as part of a joint enterprise. Second, this interinstitutional settlement would be premised upon the principle of interinstitutional comity,[66] which is the mutual respect that one branch of the state owes to the other. This is a material consideration that calls for collaboration among branches of government to ensure that public values such as welfare, autonomy, transparency, efficiency, and fairness[67] are protected and secured for the benefit of citizens. Therefore, while overlapping or breaches of the exclusive domains of each branch might occur under the overarching principle of interinstitutional settlement, it must be ensured that this is accompanied by institutional comity and functional integrity. Both are the source of the legitimacy of each branch and indispensable to it fulfilling its constitutional function. Third, a transformative reconstruction posits the adoption of what can be termed as mutual "pushes and incentives."[68] Note the distinction at play here, where mutual checks and balances first aggregate upon and then focus away from the more traditional conceptions of checks and balances and division of labor. These are mechanisms through which one institution may actively push both coordinate institutions and the

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65 Kate Malleson, *The Rehabilitation of Separation of Powers in the UK*, *in* SEPARATION OF POWERS IN THEORY AND PRACTICE: AN INTERNATIONAL PERSPECTIVE 99, 115 (Leny E. de Groot-van Leeuwen & Wannes Rombouts eds., 2010).

66 Jeremy Waldron, *Authority for Officials*, *in* RIGHTS, CULTURE, AND THE LAW: THEMES FROM THE LEGAL AND POLITICAL PHILOSOPHY OF JOSEPH RAZ 45 (L. Meyer, S. Paulson & T. Pogge eds., 2003).

67 *See* Jeff A. King, *Institutional Approaches to Judicial Restraint*, 28 OXFORD J. LEGAL STUD. 409, 428 (2008). *See also* Buckley v. Att'y Gen. [1950] Ir. Jur. Rep. 49 (Ir.).

68 Anuscheh Farahat, *Pushing for Transformation*, VÖLKERRECHTSBLOG (July 20, 2017), https://voelkerrechtsblog.org/pushing-for-transformation/ [https://perma.cc/29S4-NDPF].

concrete actors representing them to fulfill its legitimate function more in line with the transformative program.

In practice, a model founded upon pushes and incentives in tandem with institutional comity might broadly imply the following implications: In this scenario, the legislator may not always be free to omit legislation on a particular issue. It will require a constitutional or apex court to give the legislator particular discretion when aiming at the realization of transformative goals. Moreover, it might require courts and other institutions to develop procedural and doctrinal tools that permit concerted and continuing contestation, driven by the judiciary. Developing an approach founded upon pushes and incentives requires easy access to political and judicial forms of contestation precisely for those groups whose exclusion is meant to be addressed by transformative constitutionalism.[69]

Finally, and most crucially, it is significant to note that any suitable theory of interinstitutional relations must be grounded in the principle of nonarbitrariness.[70] A more appropriate approach for classifying institutions is one that is premised not on the division of functions, as is traditional, but by constituencies. The sole constituency in this model, around which this theory revolves, is the individual citizen. Drawing inspiration from scholar Eoin Carolan's work, this is how the interplay between the constituents and organs may be conceived:[71]

> The prescribed institutional structure operates by [and as can be expected on] inter-organ mingling instead of separation. Individual decisions are delivered at the end of a multi-institutional process, the central concern of which is to organize, structure, manage, and—crucially—ensure the input of all relevant institutional interests.
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> On this model, the government and the courts are presented as providing an orienting framework within which administrative decision-making will occur. These first-order organs function at the level of a macro-social organization, adopting general measures which are expected to advance their constituent social interest. The government specifies the actions it feels are required (or requested) to enhance the position of the collective. The courts, for their part, insist on the process precautions necessary to secure individual protection.
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> . . . .

69 *Id.*

70 CAROLAN, *supra* note 46, at 157.

71 *Id.* at 152.

> [Significantly, while this structure guarantees institutional autonomy of administration,] there must also be the facility to identify and correct cases where that body has strayed outside the range of permissible outcomes.[72]

IV
SEPARATION OF POWERS LAW IN SOUTH AFRICA

In light of the reconstruction advanced above, the objective of this Part is to outline and engage with the state of separation of powers law in South Africa. The law, as it stands, has been fashioned largely by the Constitutional Court through adjudication. Distinctive facets of this "South African" doctrine are also underlined. This Part first briefly recounts the historical evolution of the law, situating it within the broader constitutional scheme and political context. This Part is therefore roughly organized as follows: Employing case law, Section A proceeds to examine how the Constitutional Court has interpreted the doctrine and its success (or otherwise) with refashioning it into an arguably unique South African conception of this notion. Special attention is paid to each of the following: (1) how disputes involving entrenched fourth branches are managed, (2) their interaction within the transformative model, (3) the standards of review applied, (4) the role of civil society, and (5) the judicial toolkit at the court's disposal. Finally, in Section B, this Part concludes by arguing that the court's jurisprudence, including its treatment of the "fourth branch," while largely progressive, remains internally incoherent and not in line with the mandates of transformative constitutionalism.

A. Historical Evolution of Separation of Powers

It is now widely acknowledged that the 1996 South African Constitution, similar to its Indian counterpart, recognizes the doctrine of separation of powers as justiciable,[73] albeit implicitly. This means that the notion is one that is made evident through a holistic reading of the constitutional structure and arrangement coupled with its interpretation by the Constitutional Court.[74] Before engaging with it substantively, it is worthwhile situating its development in the broader

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72 *Id.* at 131–32.

73 Sebastian Seedorf & Sanele Sibanda, *Separation of Powers*, *in* CONSTITUTIONAL LAW OF SOUTH AFRICA 37 (Stu Woolman & Michael Bishop eds., 2d ed. 2006); Ruma Pal, *Separation of Powers*, *in* THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 253 (Sujit Choudry, Madhav Khosla & Pratap Bhanu Mehta eds., 2016).

74 Seedorf & Sibanda, *supra* note 73, at 37.

sociopolitical context—one that is characterized by the transformation of South Africa from a racially divided society into one founded on democratic values. The principle of separation of powers first found constitutional entrenchment in the Constitutional Principles, which served as a yardstick for the Constitutional Assembly in its drafting of the Final Constitution of 1994. Principle VI provided as follows: "There shall be a separation of powers between the legislature, executive, and judiciary, with appropriate checks and balances to ensure accountability, responsiveness, and openness."[75]

Note that the founders regarded the tripartite division not as an end in itself, but simply a means to facilitate good governance and a functioning democracy. Constitutional Principle VI is silent as to the particular model of separation of powers to be adopted by the Constitutional Assembly.[76] The Constitutional Court, through its *First Certification* Judgment,[77] carefully considered the constitutionality of the constitutional principles as a whole, and the separation of powers provision more specifically. In its decision, the court made it clear that the silence of Constitutional Principle VI, regarding the specific model of separation of powers to be adopted, was not a problem, but in fact allowed for a tailor-made, context-driven application. It is interesting to note then that following its review and acceptance of Constitutional Principle VI, the court in *First Certification* applied it as a standard of review, testing other provisions of the Final Constitution against it.[78]

In particular, it included those that implicated the distribution and interplay of powers and functions between various functionaries. In regard to various concerns raised about the scope of provisions that permitted dual membership, which provided for members of the executive to also occupy a place in the house as a member of the legislature, the court declared that such a deviation from the principle espousing strict separation was in line with the separation of powers as envisaged in Constitutional Principle VI.[79] Recall that the strict or

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75 *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 17 INDUS. L.J. 821, 844 (1996) [hereinafter *First Certification*].

76 Seedorf & Sibanda, *supra* note 73, at 18.

77 *First Certification*, *supra* note 75, at 822.

78 *Certification of the Constitution of the Republic of South America* 1996 (4) SA 477 (CC) at paras. 106–13 (S. Afr.).

79 *Id.* at para. 111. *See also* Strauss, *supra* note 23, at 579.

pure separation of powers, which was rejected by the court in this matter, subscribes to the theory that officials who compose the three branches of government must be kept separate and distinct, and no individual should be allowed to be a member of more than one branch at the same time. This approval of the purposive interpretation survived the period of the Interim Constitution, and while the Final Constitution does not explicitly mention the principle of separation of powers anywhere in the text, the *Final Certification* judgment has made its adoption clear. The doctrine is to be found in the provisions outlining the functions and structure of various organs of State. The nascent South African Constitutional Court then concerned itself with fashioning a distinctive South African separation of powers, one that would express a fidelity to its sociopolitical history coupled with the evolving needs of the South African state. In its 1998 decision in *De Lange v. Smuts No & Others*,[80] the court referred to its earlier holding in *First Certification* and laid the first building blocks in the development of an interpretive framework for separation of power, stating:

> [O]ver 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. This is a complex matter which will be developed more fully as cases involving separation of powers are decided.[81]

Over the next few decades, principles informing the South African separation of powers were distilled, often in the abstract or in the absence of context. Some provide greater clarity than others. For instance, a few years after *De Lange*, Justice Kate O'Regan of the Constitutional Court discussed the emerging doctrine of separation of powers.[82] In doing so, Justice O'Regan stated that "while clearly not absolute, the doctrine . . . rests on a functional understanding of the powers and requires that each institution's . . . competence to perform

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80 *De Lange v. Smuts NO & Others* 1998 (7) BCLR 779 (CC) at paras. 60, 61 (S. Afr.).

81 *Id.*

82 Kate O'Regan, *Checks and Balances: Reflections on the Development of the Doctrine of Separation of Powers Under the South African Constitution*, 8 POTCHEFSTROOM ELEC. L.J. 1, 15 (2005).

these powers be protected."[83] Five years later, Justice Moseneke, speaking for the Constitutional Court in *International Trade Administrative Committee v. SCAW*, underlined more principles of design or, alternatively, the limits that must come to govern in separation of powers questions.[84] In answering a separation of powers question, the court held that regard must be given to "the democratic system of government we have chosen"[85] (or "the democratic limit"). It also conclusively answered the hitherto unanswered "who decides" question, stating that "[e]ach arm of the state must act within the boundaries set. However, in the end, courts must determine whether unauthorized trespassing by one arm of the state into the terrain of another has occurred"[86] (the "who decides" question). Legal commentators later came to define the exercise of understanding and delineating the nature of each branch's exclusive preserve as the principle of preeminent domain.[87] They argue that this principle protects the core functions and powers of each branch of government against intrusions from outside, while other intrusions are treated as checks and balances.[88] As will be alluded to in greater depth later, the notion of preeminent domain now constitutes one of the staples of South African constitutional law, and has been duly adopted and cited with approval by the Constitutional Court.[89]

The scope of preeminent domain, as understood in South African law, is far broader than analogous principles envisaged in other polities, including India. This is primarily on account of two grounds, revolving around *power* viz. the relationships between those exercising this power and its scope. First, the preeminent domain attempts to regulate relationships between the tripartite organ (including a strong Constitutional Court) and the most sophisticated and entrenched fourth branch documented in comparative studies today. Second, the preeminent domain is also characterized by the diffusion of explicated power between these organs, the breadth of which was previously unseen.

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83 *Id.*

84 *See Int'l Trade Admin. Comm'n v. SCAW South Africa Ltd.* 2010 (5) BCLR 457 (CC) (S. Afr.).

85 *Id.* at para. 91.

86 *Id.* at para. 92.

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

88 Klug, *supra* note 11, at 712.

89 Seedorf & Sibanda, *supra* note 73, at 39–46.

Despite the emphatic proclamations that surround a distinctive South African conception of separation of powers, and the erratic development and recognition of varying principles (i.e., "democratic limits," "who decides," and "eminent domain" among others), the last few decades are a testament to the fact that the doctrine of separation of powers remains an enigma in South African constitutional law.[90] Despite being frequently cited, expansively interpreted, and engaged with, while undeniably influential on jurisprudence, it remains (for the most part) conceptually hollow.[91] This is a phenomenon made worse by its unequal application and often vigorous acerbic disagreements on its proper scope and meaning between even judges on the same bench.[92] Therefore, it is certainly far from being regarded as a distinctive South African notion, and, at best, can claim to be still in development. It is worthwhile then to examine the failings of this doctrine and the reasons that contributed to the current state of the law. This Article argues that the first is a lack of commitment to transformative constitutionalism in the South African context.

This argument is premised upon the understanding that all separation of powers doctrines are fundamentally, at their heart, practical matters of constitutional design, underpinned by political theories and the theory underlying the State.[93] A preliminary discussion is therefore incomplete without first understanding which political theories should, or should not, inform the separation of powers doctrine in South Africa.[94] Now, we know that the underlying political, moral, and conceptual underpinnings of the doctrine in South Africa are, at least in theory, founded upon the values of transformative constitutionalism.[95] The jurisprudence of the Constitutional Court has shown that an implicit liberal approach, absent a full commitment to transformative constitutionalism, has resulted in an unwillingness to focus on interpretations of separation

90 Hodgson, *supra* note 60, at 57–58.

91 *See id.* at 58.

92 *See Econ. Freedom Fighters v. Speaker of the Nat'l Assembly* 2018 (3) BCLR 259 (CC) at paras. 223–24 (S. Afr.). I refer primarily to Chief Justice Mogoeng's scathing dissent accusing the majority of judicial overreach and Justice Froneman writing solely to respond.

93 N.W. Barber, *Prelude to the Separation of Powers*, 60 CAMBRIDGE L.J. 59, 66 (2001).

94 Firoz Cachalia, *Separation of Powers, Active Liberty and the Allocation of Public Resources: The E-tolling Case*, 132 SALJ 285 (2015).

95 TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA AND SOUTH AFRICA, *supra* note 4, at 19.

of powers consistent with the radical aims of the Constitution.[96] These include the eradication of poverty and the achievement of substantive equality.[97]

This debate harkens to a foundational question in transformative constitutionalism. The question is one that revolves around the values of liberal constitutionalism as opposed to those put forth by transformative constitutionalism; the practical difference (if any) between them; and how transformative constitutionalism builds upon the central tenets of, but eventually transcends, liberal constitutionalism. In the separation of powers context, liberal constitutionalism is understood as being steeped in the liberal theory of political concepts such as participatory democracy.[98] While these concepts undoubtedly play a pivotal role in transformative constitutionalism, a fuller understanding of separation of powers requires attention to the political, social, and economic influences that underlie constitutional arrangements.

This formulation can be broken down as thus: if we accept that the political theory and theory of state that is entrenched in South Africa is transformative constitutionalism,[99] then I argue that, while the footprints of liberalism undoubtedly appear on the face of South Africa's constitutional dispensation since its enactment, the constitution provides various avenues to realize this radical potential. Our understanding of separation of powers in the South African context is necessarily subsumed by an answer to this larger formulation. The existence of a radical potential marks a clear departure from the liberal approach. The entrenchment of justiciable socioeconomic rights and the pursuit of substantive equality are but two facets that reaffirm that transformative constitutionalism transcends classical liberalism, which seeks neutrality and objectivity.[100] Taking this argument to its logical conclusion then, some of this radical potential is necessarily also captured in the

96 Jules Lobel, *The Political Tilt of Separation of Powers*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 591 (David Kairys ed., 1998).

97 Hodgson, *supra* note 60, at 59.

98 Lobel, *supra* note 96, at 591.

99 This is widely accepted by constitutional scholars and the Constitutional Court to in fact be the case.

100 Marius Pieterse, *Coming to Terms with the Judicial Enforcement of Socio-economic Rights*, 20 SAJHR 383, 397 (2004). *See also* Dikgang Moseneke, *The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication*, 18 SAJHR 309, 315 (2002).

Constitution's unique approach to separation of powers. Unfortunately, however, as this Article argues, the court has neither straddled the middle ground between liberal and transformative constitutionalism, nor progressively moved toward the transformative end of the spectrum. Its jurisprudence, while often reflecting the potential of transformative constitutionalism, has all too often continued to rely upon the liberal origins of the doctrine of separation of powers while prescribing its normative content. In adopting this narrower conception, as opposed to formulating the promised South African conception of separation of powers, the court has moved only closer to a U.S. understanding of the model.[101] This is a model that contains a conservative bias toward preserving existing relations and was designed to forestall radical changes in property relations.[102] If the court would have been true to this transformative mandate, its conception would be designed to eliminate poverty, inequality, and structural discrimination, which would have had obvious and possibly dramatic implications for existing property relations. However, and as the following Section demonstrates, the court has, on occasion, shown flashes of adopting a transformative conception, and while it has developed a creative judicial toolkit, this inconsistent approach has served only to fragment the jurisprudence further. The following Section not only engages with the current case law but also critiques it from the perspective of what the consequences of a more distinctive South African conception might have looked like.

B. The Constitutional Court and Standards of Review

We first grapple with the Constitutional Court's order in *Mazibuko v. Sisulu*, which concerns the exercise and permissible limits of judicial review over parliamentary affairs.[103] The leader of the opposition in Parliament at the time, Lindiwe Mazibuko, petitioned the Constitutional Court claiming that the majority party was preventing the opposition from tabling a motion of no confidence in the government.[104] In response, the Speaker of the House argued that the exercise of any jurisdiction by the court would offend the doctrine of separation of powers in light of the negotiations ongoing in the

101 D.M. Davis, *Separation of Powers: Juristocracy or Democracy*, 133 SALJ 258, 263 (2016).

102 Lobel, *supra* note 96, at 608.

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

104 *Id.* at paras. 1, 3.

Assembly at the time. Therefore, the court was prohibited from adjudicating upon a dispute that fell exclusively within Parliament's competence or preeminent domain to regulate.[105] The court rejected this argument[106] and held that a no-confidence motion, by its very nature, was a tool of accountability geared toward ensuring that the President and national executive were responsible to the Assembly made up of elected representatives. Therefore, the no-confidence motion played a significant role in effectuating the checks and balances element of separation of powers.[107] In a creative exercise of weak-form judicial review, the court issued an order of constitutional invalidity, which was declaratory in nature, but at the same time, one which also permitted the Assembly to remedy the constitutional defect identified—one that threatened the right of elected representatives.[108] For the purposes of this argument, it is important to distinguish the issuance of a declaratory order, as the court did in this matter, from an exercise that would have amounted to a rewriting of the rules of parliamentary procedure, which clearly falls within the ambit of the legislature. A declaration of invalidity in this case was crucial, as it respected the separation of powers by showing that the Constitutional Court was dutybound to declare a violation of the constitution as unconstitutional—which it duly did. However, it left the comity between branches intact by allowing Parliament to reform its own rules to correct the defect.[109] The judgment in *Mazibuko* provided the platform for several more complex rounds of litigation to come, with widespread ramifications. Unlike *Mazibuko*, however, these cases concerned the interaction between the tripartite organs and the fourth branch—the Public Protector in particular.

No serious discussion on separation of powers is complete without situating it within the appropriate sociopolitical context first. It is, therefore, worthwhile to recount the prevailing political situation in South Africa at the time before discussing the functioning of the Public Protector. This Article argues that while Parliament has always been the primary source of the formal law-making power, it has never served as an effective watchdog.[110] Akin to the current political reality

105 *Id.* at para. 67.

106 *Id.* at para. 70.

107 *Id.* at para. 21.

108 *Id.* at para. 71.

109 Klug, *supra* note 11, at 716.

110 *Id.* at 720.

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**
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> 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.

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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**
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> 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,

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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

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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

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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*

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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

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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.

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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]

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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

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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

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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").

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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

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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.