THE ROLE OF THE COURTS IN THE PUBLIC POLICY DOMAIN IN SOUTH AFRICA

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SUMMARY

During the pre-democratic constitutional dispensation, South African public law was marked by the pre-eminence of the executive and the legislature in a parliamentary system of government. The courts were generally loath to review matters related to policy. The adoption of the interim and subsequently the final constitutions changed the position by making the Constitution of the Republic of South Africa, 1996 the supreme law of the country, with separation of powers between the three branches of government. The approach of the courts has changed noticeably from restraint to activism. Their role in reviewing policies has been steadily growing. They are now thrust into the formulation of government or public policy, which traditionally fell within the ambit of the executive branch of government. This new-found role of the courts has led to concerns that the judiciary's constant interference in the policy domain borders on violating the hallowed principle of separation of powers. The central argument of this article is that the courts' intervention in the public policy domain, if not handled with caution, has the potential to undermine the principle of separation of powers implicit in the South African Constitution.

1 INTRODUCTION

During the pre-democratic constitutional dispensation, the South African government was characterised by the strong concurrence of executive prerogative and parliamentary sovereignty.[1] Executive power had several

[1] Labuschagne "The Doctrine of Separation of Powers and its Application in South Africa" 2004 *Politeia* 84 84; Zvobgo "The Abuse of Executive Prerogative: A Purposive Difference Between Detention in Black Africa and Detention in White Racist Africa" 1976 6 *A Journal of Opinion* 38.

sources: the Constitution,[2] legislation and the common law.[3] In this context, the courts were generally loath to review matters related to policy.[4] When the Union of South Africa Act[5] was adopted, parliamentary sovereignty was still the defining feature of South African constitutionalism.[6] The Act provided a clear division between the executive, Parliament, the courts, and the powers conferred upon them.[7] Executive powers were vested in the king, assisted by the governor-general. The separation of powers notwithstanding, Parliament remained supreme and could amend Acts of Parliament when it so wished.[8]

On the other hand, the executive powers emanating from the common law were called prerogatives.[9] In developing the common law, judges have viewed these powers as inherently belonging to the executive and as residing in the monarch.[10] Their most important quality was their exemption from judicial review. As Schreiner JA stated in the leading case of *Sachs v Dönges*:

> "These powers are conveniently grouped under different headings by textbook writers, but they remain a heterogeneous collection, which, whatever their historical connection with the person of the King, are to-day recognised by the customary law of England, and have passed over into our South African constitutional law."[11]

The most important prerogatives were the power to assent to legislation, dissolve Parliament, dismiss a government, appoint ministers, stop prosecutions, bestow honours, pardon criminals, and declare war and peace.[12] As Schreiner JA indicates, many of these prerogatives originated from the English system of government. However, some of them were laid

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2 The Republic of South Africa Constitution Act 32 of 1961; The Republic of South Africa Constitution Act 110 of 1983.

3 Panel of Experts and TC 2 Technical Experts*The Constitutional Accommodation of Executive Powers* (1995) 2; *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) 5; *Waterfalls Town Management Board v Minister of Housing* 1957 (1) SA 336 (SR); *Tutu v Minister of Internal Affairs* 1982 (4) SA 571 (T).

4 Poole "United Kingdom: The Royal Prerogative" 2010 *International Journal of Constitutional Law* 184–149; see Carpenter "Prerogative Powers: An Anachronism?" 1989 *Comparative and International Law Journal of Southern Africa* 190 191–193.

5 Union of South Africa Act 2 of 1909.

6 Currie and De Waal *The Bill of Rights Handbook* 6ed (2013) 2; Elaine "South Africa's Parliamentary System: From Westminster to Hybrid?" in Parliamentary Liaison Office *South African Catholic Bishops Conference* (May 2015) 2.

7 Ss 8–116 of 2 of 1909.

8 Ss 8–66, 95–116 of 2 of 1909.

9 See Carpenter 1989 *CILSA* 190 on what the concept "prerogative" entails.

10 Britpolitics "What is the Royal Prerogative in the UK Constitution?" (undated) https://www.britpolitics.co.uk/royal-prerogative-a-level-uk-politics (accessed 2021-06-09); see Bartlett and Everett "The Royal Prerogative" 2017 *House of Commons Library Research Service* 1 5; *President of the Republic of South Africa v Hugo supra* 5; *Sachs v Donges* 1950 (2) SA 265 (A).

11 *Sachs v Donges supra* 306. The court went further to demonstrate that "[a]n act done by virtue of the prerogative is simply an act done by the executive, without statutory authority, the lawfulness of which depends on the customary law of England as adopted by us. It does not derive its lawfulness from any vague and elastic notion of executive sovereignty."

12 Panel of Experts and TC 2 Technical Experts*The Constitutional Accommodation of Executive Powers* 2; see Bartlett and Everett 2017 *House of Commons Library Research Service* 5.

down in legislation over time, which excluded reliance on the common law. In practice, they are not necessarily exercised by the monarch but by Cabinet Ministers by convention.[13] The 1961 South African Constitution created a state president, who replaced the monarch as the ceremonial head of state. The courts in South Africa applied this common-law principle of executive prerogative to avoid interfering with the functions of the executive.[14]

The transition from apartheid to the new democratic dispensation consequently saw a remarkable transformation of the judiciary.[15] Starting with the case of *President of the Republic of South Africa v Hugo,*[16] the courts have held the view that the common-law prerogative powers no longer exist in South African law as an independent source of power. The executive no longer has inherent common-law powers beyond the Constitution.[17] Consequently, the courts in South Africa have been encouraged to review almost everything based on different constitutional devices such as constitutional supremacy, legality, human rights and the rule of law. This new and somewhat stronger role of the courts saw their approach change noticeably from restraint to politicking. This change is aptly captured by the court in *Baloro v University of Bophuthatswana*,[18] where it was stated that the courts in South Africa

> "are now confronted by a rapid oscillation from the positivist jurisprudence founded on the sovereignty of parliament to a jurisprudence based on the sovereignty of the law contained in the constitution with a justiciable bill of rights".[19]

In this new dispensation, the courts' role in reviewing policies has steadily grown. They are now thrust into the formulation of government or public policy, which traditionally fell within the ambit of the executive branch of government. This has led to concerns that the judiciary's constant participation in the policy domain borders on violating the hallowed principle of separation of powers. The courts have cautiously developed a sensitive approach to separation of powers, which is markedly different from the concept of separation of powers under the old dispensation. The most astute formulation of this new model of separation of powers is found in the following *dictum* of the Constitutional Court in *Minister of Health v Treatment Action Campaign*:[20]

> "This Court has made it clear on more than one occasion that although there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the

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13 *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935.

14 Nicholson "Review of the Prerogative to Withdraw Passports in South Africa" 1988 47(2) *The Cambridge Law Journal* 189–192; Carpenter 1989 *CILSA* 190.

15 *AZAPO v Truth and Reconciliation Commission* 1996 (4) SA 562 (C).

16 *President of the Republic of South Africa v Hugo supra*.

17 *President of the Republic of South Africa v Hugo supra* 5–7.

18 *Baloro v University of Bophuthatswana* 1995 (4) SA 197 (B).

19 *Baloro v University of Bophuthatswana supra.*

20 2002 (5) SA 721 (CC).

> others. All arms of government should be sensitive to and respect this separation."[21]

The courts still regard the separation of powers as a sacrosanct pillar of the new constitutional design. However, they constantly insist, unlike in the past, that no branch of government is immune from judicial scrutiny.[22]

The central argument of this article is that the courts' participation in the public policy domain undermines the principle of separation of powers implicit in the South African Constitution.

2 RE-VISITING THE DOCTRINAL DEBATES

2 1 Executive powers and executive prerogatives

The executive is the second most powerful branch of government. As its name suggests, it is responsible for implementing and enforcing laws passed by the legislature.[23] It is also the executive's duty, like any other branch of government, to respect and protect the Constitution of the Republic of South Africa, 1996 (the Constitution).[24]

In South Africa, before 1994, sources of executive power, among others, included the common-law royal prerogatives that emanated from English law and were inherent in the executive.[25] Under the new constitutional dispensation, the executive no longer has common-law, royal-like prerogative powers.[26] The courts have claimed the right to review even the once-revered power to appoint and dismiss Ministers. In *Democratic Alliance v President of the Republic of SA; In re: Democratic Alliance v President of the Republic of SA*,[27] the court stated:

> "The executive power to appoint and dismiss Ministers and Deputy Ministers is wide-ranging. But it is not as unfettered as its predecessor the royal prerogative. The royal prerogative is a relic of an age past. The executive power conferred upon the office of the President by s 91(1) of the Constitution

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21 Par 36.

22 This is somewhat politically captured by the *dictum* of Mahomed CJ in *Speaker of National Assembly v De Lille MP* [1999] ZASCA 50; [1999] 4 All SA 241 (A): "This enquiry must crucially rest on the Constitution of the Republic of South Africa. It is Supreme – not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution."

23 Ghai (undated) "Your Article Library" https//www.yourarticlelibrary.com (accessed 2021-08-06); Baxter "The 'State' and Other Basic Terms in Public Law" 1982 *South African Law Journal* 212 214.

24 Spry "The Executive Power of the Commonwealth: Its Scope and Limits" 1996 *Parliamentary Research Service* 18; Department of Constitutional Development *Constitutional Handbook for Members of the Executive* (1999) 23.

25 The Republic of South Africa Constitution Act 32 of 1961; The Republic of South Africa Constitution Act 110 of 1983.

26 *Minister for Justice and Constitutional Development v Chonco* 2010 (4) SA 82 (CC) par 30; see *President of the Republic of South Africa v Hugo supra* 5–7.

27 2017 (4) SA 253 (GP).

> is circumscribed by the bounds of rationality and by sections 83(b) and (c) of the Constitution."[28]

In the current dispensation, the Constitution as the supreme law is the primary source of the scope and parameters of executive powers. Section 85(2) of the Constitution provides that the President[29] is the head of the executive, and that the head of state exercises this executive authority together with the Cabinet by:

> "(*a*) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;
> (*b*) developing and implementing national policy;
> (*c*) co-ordinating the functions of state departments and administrations;
> (*d*) preparing and initiating legislation; and
> (*e*) performing any other executive function provided for in the Constitution or in national legislation."[30]

The Constitution also enumerates the powers of the President as head of state in section 84(2). However, mindful of the possible predicament created by the seemingly exhaustive enumeration in section 82(1) of the Interim Constitution,[31] the final Constitution included a prelude in section 84(1) that

> "[t]he President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive."

Apparently, the formulation under section 84(1) suggests that executive prerogative is still part of the constitutional edifice of the Republic, but only to the extent necessary to execute the enumerated executive functions. While there is a paucity of direct judicial pronouncements on the actual meaning of section 84(1), *Minister for Justice and Constitutional Development v Chonco*[32] stands out as the most critical among the cases in which the superior courts in South Africa have grappled with the meaning of section 84(1).

In the *Chonco* case,[33] Mr Chonco had been incarcerated with 383 others for various crimes that they alleged were politically motivated. They had applied for a presidential pardon in terms of section 84(2)(*j*) of the Constitution. Their applications were not processed by the Minister, who is a member of the national executive, as a preliminary phase of the application process and such applications did not reach the President. As a result, the

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28 Par 18.

29 The President is voted into power by members of the National Assembly in Parliament and is sworn into the office of the President by the Chief Justice, who is the head of the judiciary in South Africa.

30 S 85(2) of the Constitution; Hodgson "The Mysteriously Appearing and Disappearing Doctrine of Separation of Powers: Towards a Distinctly South African Doctrine for a More Radically Transformative Constitution" 2018 *South African Journal on Human Rights* 1 16–17; Seedorf and Sibanda "Separation of Powers" in Woolman and Bishop (eds) *Constitutional Law of South Africa* (2013) 22. The Cabinet is formed by the President as the head, together with the Deputy President and all senior Ministers in various state departments. The Deputy President and the Ministers are appointed by the current sitting President of the Republic.

31 Constitution of the Republic of South Africa Act 200 of 1993.

32 *Supra.*

33 *Supra*.

applicants took the matter to the High Court for appropriate relief; the case then went to the Supreme Court of Appeal and later to the Constitutional Court. The Constitutional Court held that the President has the power to decide on the pardon, request advice and initiate the processes needed to generate that advice. The court stated:

> "Section 84(1) gives the President the powers 'necessary' to fulfil the functions accorded to him or her. This indicates that the President bears powers that go beyond the principal decision-making power and include what may be described as 'auxiliary powers' … Accordingly, the scope of these auxiliary powers is narrow – only those powers reasonably necessary to properly fulfil the functions in section 84(2) are endowed."[34]

This approach seems to be somewhat at variance with the approach taken earlier by the Constitutional Court in *President of the Republic of South Africa v South African Rugby Football Union*,[35] and the widely held view in legal scholarship that the President's powers as head of state are exhaustively listed in section 84(2).[36] In effect, the court confirmed that section 84(2) is an exhaustive code of the powers of the President as head of state. Thus, he cannot exercise any power that is not listed in section 84(2).

The approach of the court in *Chonco* to the list of powers in section 84(2) seems to be in keeping with the interpretive approach taken by the court in several other cases. In *Mansingh v General Council of the Bar*,[37] the court had to deal with the vexed question of whether the conferral of senior counsel status on practising advocates is part of the powers of the President embodied in section 84(2)(*k*) of the Constitution: the power of "conferring honours". The Constitutional Court ruled that the President's power to confer honours in terms of section 84(2)(*k*) includes the authority to confer senior council status or silk on advocates.[38]

Seedorf and Sibanda aptly contend:

> "[T]he executive function is a broad one that entails responsibility for the development, preparation and implementation of national policy and legislation, and the co-ordination of the functions of state departments and the public administration."[39]

Executive authority, therefore, broadly entails all the functions of government that are neither legislative nor judicial. Therefore, it would seem that executive authority is residual; it encompasses virtually everything that remains after the legislative and judicial functions have been demarcated.

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34 *Minister of Justice and Constitutional Development v Chonco supra* 31–33.

35 2000 (1) SA 1 (CC).

36 Murray and Stacey "The President and the National Executive" in Woolman and Bishop (eds) *Constitutional Law of South Africa* (2013) 1.

37 2014 (2) SA 26 (CC).

38 *Mansingh v General Council of the Bar supra* 38.

39 Seedorf and Sibanda in Woolman and Bishop (eds) *Constitutional Law of South Africa* 22.

2 2 South African model of separation of powers

Developing a distinctly South African model of separation of powers has been particularly elusive for judges and scholars in South Africa.[40] In *De Lange v Smuts*,[41] the Constitutional Court called it "a complex matter" that is better left to time, and assumed that it would develop over time on a case-by-case basis.[42]

The starting point in this search is the Constitution as the supreme law and primary source of public power.[43] The adoption of the Interim Constitution and subsequently the (final) Constitution marked a milestone in transforming the constitutional design in South Africa.[44] It reversed decades of colonial and apartheid policies of racial fragmentation and, most importantly, the governmental structures established by the apartheid constitutions.[45] The design had been cast in an obscure and often feeble assignment of functions to various branches of government. Admittedly, the three traditional branches – the judiciary, the executive, and the legislature – always undergirded government design in pre-democratic South Africa. However, the checks and balances were very weak, leading to ineffective horizontal accountability between the main branches of government.[46]

At the time of the certification of the Constitution, the Constitutional Court was asked to verify that there was indeed compliance with Principle VI (separation of powers), which is one of the principles agreed upon during the multi-party negotiation process.[47] The court in *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa, 1996* (the *First Certification* case)[48] indicated that there is no universal model of separation of powers; the principle of separation of powers recognises the functional independence of branches of government.[49] The court argued that this anticipates the necessary and unavoidable intrusion by one branch on the terrain of another branch of

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40 *S v Dodo* 2001 (3) SA 382 (CC); *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC).

41 1998 (3) SA 785 (CC).

42 Par 61.

43 Ngcobo "South Africa's Transformative Constitution: Towards an Appropriate Doctrine of Separation of Powers" 2011 *Stellenbosch Law Review* 38.

44 Langa "The Separation of Powers in the South African Constitution" 2006 22 *South African Journal on Human Rights* 2 4.

45 Seedorf and Sibanda in Woolman and Bishop (eds) *Constitutional Law of South Africa* 1; Labuschagne 2004 *Politeia* 84; Langa 2006 *South African Journal on Human Rights* 4; s 2 of the Constitution.

46 Dugard "The Judiciary in a State of National Crisis with Special Reference to the South African Experience" 1987 44 *Washington & Lee Law Review* 477.

47 Constitutional Principle VI in Schedule 4 to the Interim Constitution provided: "There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness." See also O'Regan "Checks and Balances: Reflections on the Development of the Doctrine of Separation of Powers Under the South African Constitution" 2005 *Potchefstroom Electronic Law Journal* 120 120.

48 1996 (4) SA 744 (CC).

49 O'Regan 2005 *PELJ* 120.

government because no scheme can reflect a complete separation of powers.[50] The court emphasised that the new design envisages

> "a separation of powers between the Legislature, Executive and Judiciary with appropriate checks and balances to ensure accountability, responsiveness and openness."[51]

The separation of powers principle is not expressly provided for in the South African Constitution. However, it is apparent from the scheme of the Constitution that such a principle is implicit as a dominant coordinator of power within the State.[52] As former Chief Justice Ngcobo pointedly contends, the fact that the Constitution provides for it implicitly does not make it any less important than an express provision.[53] This principle is regarded as a necessary incident of a constitution in which governmental powers and functions are distributed between the three organs of state, and where one branch cannot exercise powers that are conferred on the other branches of government unless it is constitutionally mandated to do so.[54]

The pure, traditional principle of separation of powers, as advocated by Locke and Montesquieu, essentially posits that government should be divided into three arms: the executive, the legislature and the judiciary.[55] In addition, explicit duties, responsibilities and powers are assigned to each distinct branch of government with a demarcated means of capability and control.[56] On the other hand the partial separation of powers provides functional separation, permitting functional inter-branch relationships. In South Africa, it seems that this demarcation has been cast in general terms without necessarily imposing the hard-and-fast lines of the pure separation of powers.[57]

The government arrangement in the post-democratic South African dispensation displays an element of the Westminster system; there is still a fusion of the legislature and executive.[58] This indicates that there is no sharp division between these two branches of government.[59] The majority of the Cabinet members (the executive branch) are also members of Parliament (the legislature); the Constitutional Court in the *First Certification* case had to

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50 O'Regan 2005 *PELJ* 120.

51 *First Certification* case *supra* par 45.

52 Sewpersadh and Mubangizi "Judicial Review of Administrative and Executive Decisions: Overreach, Activism or Pragmatism?" 2017 21 *Law, Democracy & Development* 201 202; Langa 2006 *South African Journal on Human Rights* 4; see also *Justice Alliance of South Africa v President of the Republic of South Africa* 2011 (5) SA 388 (CC) par 32.

53 Ngcobo 2011 *Stellenbosch Law Review* 38.

54 Okpaluba and Mhango 2017 *Law, Democracy & Development* 4; see *Justice Alliance of South Africa v President of the Republic of South Africa* 2011 (5) SA 388 (CC) par 32.

55 Mathebula and Munzhedzi "Trias Politica for Ethical Leadership and Good Governance: Praxis of Checks and Balances in the South African Context" 2017 *Bangladesh E-Journal of Sociology* 7 7–9.

56 Mathebula and Munzhedzi 2017 *Bangladesh E-Journal of Sociology* 7–9; Hodgson 2018 *South African Journal on Human Rights* 13.

57 Nyane "Separation of Powers and State Institutions Supporting Democracy: Does South Africa Have a 'Fourth Branch' Par Excellence?" 2021 *Perspectives of Law and Public Administration* 188 189.

58 Labuschagne 2004 *Politeia* 90.

59 *Ibid*.

decide whether a Cabinet member's concurrent membership in Parliament was consistent with the doctrine of separation of powers.[60] The Constitutional Court held that the system of separation of powers is not a rigid or fixed constitutional principle. The South African variant of the system, in any event, strengthened the accountability of the executive to the legislative arm and did not violate the doctrine.[61] Irrespective of the institutional separation between the branches of government, the Constitution makes provision for the involvement of the executive in the legislative function, allowing members of the Cabinet to initiate and introduce legislation in Parliament.[62]

The Constitution places the judicial authority of the Republic in the courts. Furthermore, it provides that the courts are independent and only subject to the Constitution and the law. They must apply the law without fear, favour or prejudice, and no person or organ of state may interfere with their functions.[63] In *Glenister v President of RSA,*[64] the court held that the courts are the ultimate guardians of the Constitution. They have the right to intervene to prevent the violation of the Constitution, and they also have the duty to do so. Therefore, the courts are more likely than other branches to consider venturing into the domain of other branches of government and to determine the extent of such intervention. Still, even in these circumstances, they must observe the limits of their power.[65]

The judiciary is one of the three branches of the South African government. It does not have unlimited powers. It must always be cautious and sensitive to the need to refrain from unwarranted interference with the functional independence of other branches of government, unless it is constitutionally mandated to do so.[66] It falls outside the parameters of judicial authority to prescribe to the National Assembly what mechanisms to use, how to use them, and what mandate it has to scrutinise the executive and hold it accountable, which is a responsibility primarily entrusted to Parliament.[67]

In *De Lange v Smuts NO*,[68] the court held that the courts would over time develop a distinctive South African model of separation of powers that fits the governmental system provided by the Constitution; and that reflects a balance between South Africa's history and the current dispensation, and between the need to separate powers and enforce checks and balances to

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60 Seedorf and Sibanda in Woolman and Bishop (eds) *Constitutional Law of South Africa* 23; Langa 2006 *South African Journal on Human Rights* 5.

61 Langa 2006 *South African Journal on Human Rights* 5; *First Certification* case *supra* par 111.

62 Seedorf and Sibanda in Woolman and Bishop (eds) *Constitutional Law of South Africa* 23.

63 S 165(1)–(3) of the Constitution.

64 2009 (1) SA 287 (CC).

65 *Glenister v President of the Republic of South Africa supra* 30; see also O'Regan 2005 *PELJ* 132.

66 *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 580 (CC) par 92.

67 *EFF v Speaker of the National Assembly supra* par 93.

68 1998 (3) SA 785 (CC).

control the government, and avoid diffusing power uncontrollably.[69] In *United Democratic Movement v President of the Republic of South Africa*,[70] the court ruled that the merits of the disputed legislation were outside its remit and that, according to the principle of the separation of powers, its job was simply to determine whether or not the legislation complied with the Constitution.[71]

The Constitution of South Africa also establishes state institutions supporting constitutional democracy, as outlined in Chapter 9 of the Constitution.[72] These institutions (for example, the Public Protector) function beyond the traditional *trias politica* and enjoy protection as well as independence from the three traditional branches of government.[73] It is unclear whether the drafters of the Constitution intended these institutions to function as a fourth branch of government. However, they seem to play a watchdog role and to strengthen the system of checks and balances between the traditional spheres of government by advocating effective accountability.[74]

The importance and nature of the powers of these institutions have been the subject of intense judicial and scholarly engagement. While the controversy around the nature of their powers in the broad institutional scheme is yet to be settled, the emerging consensus is that the Public Protector's remedial actions are binding; they are not merely recommendations.[75] This is a profound development because the orthodox view has been that the powers of the Public Protector cannot be equated with those of a court of law. The creation of these institutions, and allowing them to wield such immense powers, has far-reaching implications for the traditional concept of separation of powers. It has led to the view that these institutions have constituted themselves into a "fourth branch" of government.[76]

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69 *De Lange v Smuts NO supra* 60; see also *Justice Alliance of South Africa v President of the Republic of South Africa* 2011 (5) SA 388 (CC) par 32.

70 2003 (1) SA 495 (CC).

71 *UDM v President of the Republic of South Africa supra* par 11.

72 Murray "The Human Rights Commission et al: What Is the Role of South Africa's Chapter 9 Institutions?" 2006 *Potchefstroom Electronic Law Journal* 121.

73 Seedorf and Sibanda in Woolman and Bishop (eds) *Constitutional Law of South Africa* 30–31; Murray 2006 *PELJ* 122.

74 Nyane 2021 *Perspectives of Law and Public Administration* 188, 198–199; Murray 2006 *PELJ* 132 .

75 *EFF v Speaker of the National Assembly supra* 103–105; s 83(*b*) read with ss 181(3) and 182(1)(*c*) of the Constitution.

76 Mahomed "The Fourth Branch: Challenges and Opportunities for a Robust and Meaningful Role for South Africa's State Institutions Supporting Democracy" in Bilchitz and Landau (eds) *The Evolution of the Separation of Powers* (2018) 177.

3 THE REVIEW OF POLICY

3 1 The problem of distinguishing administrative action from executive function

The review of policy in South Africa still reflects the deference that the courts had under the old dispensation – that is, the courts are reluctant to review policy decisions.[77] This view has been bolstered by the enactment of the Promotion of Administrative Justice Act (PAJA),[78] which has excluded policy or the executive function from its labyrinthine definition of administrative action. In terms of the Act, only administrative action, as defined by the Act, is susceptible to judicial review as envisaged by section 6 of the Act.[79] Section 1 of PAJA provides:

> "'administrative action' means any decision taken, or any failure to take a decision, by–
> *(a)* an organ of state, when–
> (i) exercising a power in terms of the Constitution, or a provincial constitution; or
> (ii) exercising a public power or performing a public function in terms of any legislation; or
> *(b)* a natural or juristic person, other than an organ of state, when exercising a public power or performing a function in terms of an empowering provision,
> which adversely affects the rights of any person and which has direct, external legal effect, but does not include–
> *(aa)* the executive powers or function of the National Executive ...;
> *(bb)* the executive powers or function of the Provincial Executive ... ."[80]

The section expressly excludes the executive function from the ambit of administrative action. However, the courts have called this definition "a rather complex taxonomy"[81] and "a rather unwieldy definition".[82] As a result, there is clear disagreement about what constitutes administrative action as opposed to executive function.[83] The emerging judicial approach is an attempt to define these two concepts – administrative action and executive function. In *Motau*, the court attempted, without much success, to create a test to be used to distinguish between the two somewhat confusing functions. The court held that

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77 Dugard 1987 *Washington & Lee Law Review* 477.

78 3 of 2000.

79 Ss 1 and 6 of PAJA.

80 S 1 of Act 3 of 2000.

81 *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC) par 29.

82 *Minister of Defence and Military Veterans v Motau supra* par 33.

83 Hoexter *Administrative Law in South Africa* (2012) 249 contends that: "The users of PAJA are more likely to be flummoxed than guided by this definition, in which nothing can be taken for granted. It is a shame that such an important piece of legislation is so inaccessible to ordinary people. But then it is inaccessible to lawyers too. As we have seen, even the Constitutional Court is unable to agree on the status of legislative administrative action in PAJA. That the definition should produce such uncertainty about something so fundamental is inexcusable."

> "[a] power that is more closely related to the formulation of policy is likely to be executive in nature and, conversely, one closely related to its application is likely to be administrative."[84]

This is clearly a nebulous test because it creates a continuum but not a specific guideline. In the end, whether a function is administrative or executive remains subjective. The net effect is that the courts review policy or executive decisions either under PAJA or under the generic principle of legality. There is a growing concern that the distinction between administrative action and executive action is blurred and mostly unhelpful.[85] It is thus difficult for courts to decide on the extent of judicial scrutiny in reviewing a decision so as to avoid moving beyond the existing legal confines.

3 2 Rationality review: an increasing trend towards more power of review

Rationality review often places the courts in a predicament. Courts have to tread a thin line between deference and stronger review. The predicament is often more pronounced when it comes to the review of policy because, ordinarily, English and South African courts have been reluctant to enter the policy domain. However, rationality review has been one avenue that has emboldened the courts to enter the policy domain. The orthodox approach has been to enquire whether the policy under scrutiny is unlawful (illegal). If the answer is in the affirmative, the courts will intervene; if not, the courts will exercise restraint. This approach was adopted by the House of Lords in England, as far back as 1985, in *Gillick v West Norfolk and Wisbech Area Health Authority*.[86] The principle was reiterated recently in the decision of the English Supreme Court in *R (on the application of A) v Secretary of State for the Home Department.*[87] In this case, the appellant sought the judicial review of a policy, the Child Sex Offender Disclosure Scheme Guidance (the Guidance), issued by the Secretary of State (the respondent). The Guidance empowered police to disclose information in its possession about the relevant previous convictions of any child sex offender to any particular member of the public. The appellant, who was a convicted sex offender, challenged the policy on the basis that it did not make sufficient provision for the police to consult him before disclosing his offences to a member of the public who made an inquiry about him in circumstances where he was in contact with children. The Supreme Court outlined the test crisply:

> "In our view, *Gillick* sets out the test to be applied. It is best encapsulated in the formulation by Lord Scarman … and by adapting Lord Templeman's words: does the policy in question authorise or approve unlawful conduct by those to whom it is directed? So far as the basis for intervention by a court is concerned, we respectfully consider that Lord Bridge and Lord Templeman were correct in their analysis that it is not a matter of rationality, but rather that the Court will intervene when a public authority has, by issuing a policy, positively authorised or approved unlawful conduct by others. In that sort of

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84 *Minister of Defence and Military Veterans v Motau supra* 38.

85 The weak and withering distinction between executive and administrative action.

86 [1985] 3 All ER 402.

87 [2021] UKSC 37.

> case, it can be said that the public authority has acted unlawfully by undermining the rule of law in a direct and unjustified way."[88]

The rationale for this approach is that the superior courts in England appreciate that the policy space domain is pre-eminently the province of the executive. Hence, it is risky to permit the courts to "second-guess" the decisions of the executive.

The courts in South Africa have adopted a slightly different approach. Their approach is much broader than the lawfulness test followed by the English courts. The Constitutional Court of South Africa has, in numerous judgments,[89] developed a general principle that the exercise of public power should be rational and not arbitrary.[90] Hence, the courts will readily intervene if any exercise of public power fails to meet the demands of this principle. In *Pharmaceutical Manufacturers Association: In re Ex parte President of the Republic of South Africa,*[91] the court stated:

> "rationality … is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution, and therefore unlawful."[92]

In *Democratic Alliance v President of the Republic of South Africa,*[93] the court noted that an executive decision (as opposed to administrative action) need not be reasonable or procedurally fair. The purpose of this rule, as the court provides, is "precisely to ensure that the principle of the separation of powers is respected and given full effect".[94] In essence, testing the lawfulness of the executive decision is only the first leg of the enquiry. The second leg is whether the decision is rationally connected to the purpose for which the power was conferred.[95] In *President of the Republic of South Africa v South African Rugby Football Union,*[96] the court held that the President's exercise of his powers must not infringe on any provision in the Bill of Rights. The exercise of those powers is also constrained by the implicit principle of legality in the Constitution. The President must act in good faith and must not misconstrue his powers.[97]

In *Masethla v President of the Republic of South Africa*,[98] Moseneke DCJ highlighted the point that procedural fairness is not a requirement of the principle of legality. It would not be appropriate to constrain executive powers by the requirements of procedural fairness, which is a fundamental

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88 *R v Secretary of State for the Home Department supra* par 38.

89 Price "Rationality Review of Legislation and Executive Decisions: Poverty Alleviation Network and Albutt" 2010 *South African Law Journal* 580 580–581.

90 Kohn "The Burgeoning Constitutional Requirement of Rationality and the Separation of Powers: Has Rationality Review Gone Too Far?" 2013 *South African Law Journal* 810 825.

91 2000 (2) SA 674 (CC).

92 Par 90.

93 2013 (1) SA 248 (CC).

94 Par 41. The court went further to say: "If executive decisions are too easily set aside, the danger of courts crossing boundaries into the executive sphere would loom large."

95 *Democratic Alliance v President of RSA supra* par 41.

96 *Supra* par 41.

97 *President of RSA v SARFU supra* par 34.

98 2008 (1) SA 566 (CC).

feature in the review of administrative decisions. On the other hand, Ngcobo J, who wrote for the minority in the same matter, based his reasoning on the founding constitutional value of the rule of law that he construed as having a procedural component because of its implicit requirement of non-arbitrariness.[99]

There seems to be uncertainty about the test that the courts apply in reviewing the decisions of the executive. Du Plessis and Scott note that the Constitutional Court uses different scrutiny levels in cases based on legality challenges.[100] The rationality review standard that is applied varies in those cases, depending on the circumstances of the particular case.[101] The problem that emerges from the variability of the rationality review is the inadequate guidance provided by the Constitutional Court regarding the applicability and parameters of this rationality standard.[102] In *Albutt v Centre for the Study of Violence and Reconciliation,*[103] the court expanded the rationality standard to include elements of procedural fairness.[104] The court pointed out that it would not be possible to attain rationality without giving the person affected by the decision a hearing. A more deferential approach was taken in *Poverty Alleviation Network v President of the Republic of South Africa*.[105] The court preferred its own approach in *Doctors for Life,*[106] where it held that

> "[c]ourts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to the other branches of government [and] …should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution."

In *Poverty Alleviation Network*, the court found that the legislation that aimed to transfer a part of Matatiele from the province of KwaZulu-Natal to the province of the Eastern Cape was "rationally connected to a legitimate governmental end".[107]

In *Democratic Alliance v President of the Republic of South Africa,*[108] the Constitutional Court was concerned with whether the appointment of one Mr Menzi Simelane as the National Director of Public Prosecutions by the President was made within the bounds of the Constitution. Although, in terms of the Constitution, the President has powers to appoint the Director of Public Prosecutions,[109] he had appointed Mr Simelane despite the Ginwala

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99 *Masethla v President of the Republic of South Africa supra* par 108.

100 Du Plessis and Scott "The Variable Standard of Rationality Review: Suggestions for Improved Legality Jurisprudence" 2013 *South African Law Journal* 597, 608.

101 *Ibid*.

102 *Ibid.*

103 2010 (3) SA 293 (CC).

104 Kohn 2013 *South African Law Journal* 834, 833.

105 2010 (6) BCLR 520 (CC).

106 *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) par 37.

107 *Poverty Alleviation Network v President of RSA supra* 64–76; for a detailed analysis of the case, see Price 2010 *SALJ* 580–591.

108 *Supra*.

109 S 179(1) provides: "There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of–

Commission's adverse findings against him. The vexed question was whether the decision of the President, although lawful, was rational. In its exacting enquiry, the court followed its approach in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*[110] of distinguishing between rationality and unreasonableness. According to the distinction drawn in that case, the reasonableness inquiry simply inquires whether the decision taken by the public functionary is one that a reasonable decision-maker could have reached; the rationality inquiry is about "the means selected to determine whether they are rationally related to the objective sought to be achieved".[111]

Generally, if some aspect of the process is not correct, it will colour everything with irrationality, and the ultimate decision will be irrational.[112] There is a problem with the awkward and expanded meaning that courts have tagged onto the rationality requirement, which now seems to include other elements like procedural fairness, reasonableness and proportionality. The meaning attributed to rationality corresponds to and somehow amounts to an invisible application of a somewhat thicker standard of review similar to what is used in the review of administrative action. That approach creates room for the easy setting aside of executive decisions, which is not what the separation of powers principle endorses.

There are concerns that rationality review may lead courts to overstep their mark. Yacoob J lamented in *Democratic Alliance v President of the Republic of South Africa*[113] that

> "[t]he rule that executive decisions may be set aside only if they are irrational and may not ordinarily be set aside because they are merely unreasonable or procedurally unfair has been adopted precisely to ensure that the principle of the separation of powers is respected and given full effect. If executive decisions are too easily set aside, the danger of courts crossing boundaries into the executive sphere would loom large."[114]

At the core of the rationality test, as the court noted in *Pharmaceutical Manufacturers Association*,[115] is that the courts should not substitute the opinions of the power holders with their own opinions on what they deem to be appropriate.[116] What is required is that the purpose sought to be achieved by exercising that power should be within the functionary's authority and should be objectively rational.[117] Thus, a court cannot interfere with a

(*a*) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and

(*b*) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament."

110 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC).

111 See *Albutt v Centre for the Study of Violence and Reconciliation supra* par 63.

112 Kohn 2013 *South African Law Journal* 834.

113 *Supra*

114 Par 41.

115 *Supra.*

116 Par 90; see also *Albutt v Centre for the Study of Violence and Reconciliation supra* 51, where Ngcobo CJ noted that the executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives.

117 *Pharmaceutical Manufacturers Association supra* 90.

decision merely because it disagrees with it or because the power was exercised inappropriately.[118]

The *Merafong*[119] judgment dealt with a decision of the legislature and corroborates the position that a central feature of the rationality hurdle is the requirement of a merely rational connection and not a perfect or ideal connection. The bottom line should be that the decision, taken in good faith, was taken in order to achieve the results. Otherwise, the reasonability element is taken into account, which will then invoke proportionality.

Rationality review has come under immense criticism because it draws the courts into being arbiters of the legitimacy of government purpose when it inquires into the legitimacy of government purpose.[120] This is the power that the courts in South Africa seem to be accumulating on a case-by-case basis, sometimes inadvertently.

4 CONCLUSION

The review of policy decisions has always been a controversial subject in public law. The orthodox approach has always been that the policy decisions of the executive are unreviewable because of the age-old deference to executive prerogative. In South Africa, the near-universal principle was abused to cover up the most repressive actions of the executive. Hence, during the transition to a new dispensation, this was one of the first areas of public law to come under the spotlight. In *Hugo*,[121] one of the early decisions under the current dispensation, the court explicitly removed the veil on the executive decisions of the President. The case thus opened a Pandora's Box, and the line of cases that came thereafter has pushed the boundaries on a case-by-case basis.

Regard being had to the central tenet of the current Constitution – that the exercise of public power must be justified – it is not necessarily bad when the judiciary insists on reviewing the executive's policy decisions. The challenge occurs when the courts become overly active, for that is always a threat to that cornerstone of the new constitutional design – the principle of separation of powers.[122]

The foregoing analysis has demonstrated that the courts are using rationality review to scrutinise policy decisions of the executive. To that end, they ask not only about the lawfulness of the decision but also about its rationality – the relationship between the means selected and a legitimate government purpose. This is the most problematic aspect of rationality review. The main question for a policy review should be whether it is lawful. It is recommended that the judiciary exercise deference when it comes to reviewing policy decisions.

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118 *Ibid.*

119 *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 (5) SA 171 (CC).

120 Pretorius "Deliberative Democracy and Constitutionalism: The Limits of Rationality Review" 2014 29 *South African Public Law* 408 408–411.

121 *Supra*.

122 Nyane "The Judicialisation of Politics in South Africa: A Critique of the Emerging Trend" 2020 36(4) *South African Journal on Human Rights* 319–337.