
“South Africans did not establish this court to be another rubber stamp. We expect you to be creative and independent. We expect you to be true to the oath you have just sworn.”

- President Nelson Mandela

Summary

This study surveys the jurisprudence of the Constitutional Court between 2009 and 2013, with specific reference to the Court’s treatment of the doctrine of the separation of powers, and the principle of the appropriate level of deference to be given by the Court to other branches of government. They study suggests that the cases surveyed do not reveal a pattern of the Court systematically failing to have proper regard to the principle of deference and the doctrine of the separation of powers, and that judgements which might seem intrusive into the domain of other branches of government must be assessed in the context of the Court’s constitutional mandate, which vests it with significant powers of review.

The study also notes that the debate misses many nuances surrounding the separation of powers, which would benefit from being more fully considered. These include separation of powers between all branches of government; a tendency to over-emphasise the popular mandate of the executive; the complexities of assessing the appropriate degree deference in cases between different branches of government; the impact of the legislative framework that is drafted and passed by the political branches of government; the effect of government litigation strategy on its success in court; and compliance by other branches of government with court decisions as an aspect of the separation of powers.

1 Speech at the inauguration of the Constitutional Court, 14 February 1995. Available at http://concourtblog.com/
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Introduction

The South African constitution has been lauded as a pioneering legal endeavour. In a country coming to grips with the uncertainties of a transition to democracy that was by no means certain to be successful, the Constitution came to acquire an almost mythical status as a beacon of hope for the country's future – both as a protector of vulnerable groups, and as a means of advancing the previously oppressed.

To be sure, the potential for the Constitution to be regarded with excessive devotion, as a panacea for all evils, is real and one to be guarded against. It is often said that the law (in this case, the Constitution) on paper is not enough. And yet, the Constitution is visionary in several respects. It’s inclusion of justiciable socio-economic rights sets it apart from many other constitutions.

It was entirely possible for the Constitutional drafters to have taken the view that parliamentary sovereignty be retained, given that, after 1994, parliament was actually representative of the majority of the population, rather than representative of an electorate making up less than 10% of the population. But they were more ambitious, identifying that there was a broader lesson to be drawn from the apartheid era: that untrammelled parliamentary authority was vulnerable to abuse, and that this should be guarded against by entrenching certain rights against legislative interference. Once this decision was made, institutional arrangements had to be made in order to police the boundaries for legislative and executive conduct which had been created by the constitution. This role was given to the courts.

It is worth reflecting on that decision. At the time the constitution was being drafted, the courts were hardly a bastion of opposition to the apartheid system so many of the constitutional drafters (not to mention their constituents) had fought long and hard to overthrow. With some honourable exceptions, the courts were widely seen as having facilitated, rather than opposed, the human rights abuses of apartheid. In the words of the current Deputy Chief Justice:

"Under apartheid, Parliament enjoyed supremacy and no constitution or bill of rights provided any fetter on its legislative powers. Oppressive laws passed by Parliament could, for the most part, not be challenged by the courts. The apartheid regime was sustained by [a] lack of accountability and the construct of parliamentary sovereignty. ... [A]t this time when the South African Parliament enjoyed parliamentary sovereignty, the Appellate Division – and [the] judiciary more generally – was a weak check on Parliament’s powers. Parliament was able to make laws without substantive constraints; it essentially enjoyed a monopoly on power."

To entrust the courts with upholding and promoting a new constitutional order, based on "human dignity, the achievement of equality and the advancement of human rights and freedoms" was remarkable in this context. It also explains why the Constitutional Court was established as a new,


specialist court, with ultimate jurisdiction over the interpretation of the Constitution. In the words of Heinz Klug, "the South African Constitutional Court has been called upon to address issues and to face challenges that would be considered extraordinary for any judiciary."4

Mosenoke comments that

"[C]ritics should be reminded that as a reaction to our hellish apartheid past, the concept and values of the constitutional state and of an egalitarian society are deeply foundational to the creation of the new order’ desired by the preamble [to the Constitution]. ... We have moved from 'a past noted by much which was arbitrary and unequal in the operation of the law to a present and a future’ where state action and indeed private action must be capable of being justified rationally ..."5

This highlights a fundamental principle of the constitutional system – that government should be able to justify its actions. Section 172(1)(a) of the Constitution requires courts to declare any law or conduct inconsistent with the Constitution to be invalid, to the extent of its inconsistency. The language of the section is noteworthy. It does not offer the court an option, but "commands"6 the courts to make findings of unconstitutionality when inconsistency is found. Mosenoke explains that "it is not open to courts to look away when confronted with unconstitutionality. They are enjoined to declare the problem and to fashion redress."7

As former Constitutional Court justice Kate O'Regan has noted, there is no sovereign unlimited power in a constitutional democracy. All power is constrained, in order to militate against the potentially corrupting effect of unconstrained power.8 The Court in Treatment Action Campaign held that any intrusion into the domain of the executive as a result of enforcing a right in the Bill of Rights was one “mandated by the Constitution itself."9

It would be surprising if these powers did not lead to contestation. As Klug puts it, the dichotomy between the promise of rights and the limits of governance inevitably draws the Constitutional Court (in particular, but all courts embarking on constitutional review of the actions of democratically elected bodies are similarly affected) into the centre of struggles over delivery.10 But during the court’s early years, it enjoyed something of a honeymoon regarding acceptance of its institutional

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10 Klug, “Finding the Constitutional Court’s Place”, 15.
role.\textsuperscript{11} This would begin to wear off during the Mbeki presidency, particularly in the build-up to the celebrated \textit{Treatment Action Campaign} case. Health Minister Manto Tshabalala-Msimang stated on national television that she would not stand by the Constitutional Court’s decision were it to go the same way as the preceding High Court judgement –i.e. against government – although the remark was quickly retracted.\textsuperscript{12}

Writing in the year 2000, Cora Hoexter, an academic doyen of administrative law, predicted that:

\begin{quote}
“[a]s for the debate about deference, it will be cancelled owing to lack of interest. Administrative lawyers will instead be debating the meaning of ‘rights’ and other concepts.”\textsuperscript{13}
\end{quote}

Whilst that view may well be an accurate reflection of debates within academia and the legal profession, a broader political debate has developed that ought to revive serious interest in issues of deference and the separation of powers, although the debate has probably not taken the form that Hoexter imagined. The past three years have seen considerable political scrutiny placed on the courts, and their institutional role, in circumstances that feel to be different to previous criticism of the courts. Some of the criticisms of the courts towards the end of the first decade of the 21\textsuperscript{st} century might be attributed to the jockeying for power with the ANC between rival Mbeki and Zuma camps, with the pending corruption trial of the latter focusing attention on the importance of the courts in deciding the future of the balance of power within the party and the country. But the criticisms of the court under, and indeed from within, the Zuma administration are from those now at the centre of power within the ANC and the nation.

On 1 September 2011, Ngaoko Ramathlodi, at the time the Deputy Minister of Correctional Services and a member of both the ANC’s National Executive Committee and the Judicial Service Commission, wrote an opinion piece\textsuperscript{14} in which he charged that:

\begin{quote}
“Apartheid forces sought to and succeeded in retaining white domination under a black government. This they achieved by emptying the legislature and executive of real political power.”

“We ... have a Constitution that reflects the great compromise, a compromise tilted heavily in favour of forces against change.”

“... [T]he black majority enjoys empty political power while forces against change reign supreme in the economy, judiciary, public opinion and civil society.”
\end{quote}

\textsuperscript{11} Theunis Roux argues that the South African political environment when the Constitutional Court came into existence was “relatively favourable to judicial review”. See \textit{Politics of Principle}, 176 – 177.


\textsuperscript{14} See http://www.timeslive.co.za/opinion/commentary/2011/09/01/the-big-read-anc-s-fatal-concessions
Ramathlodi identified a “two-pronged strategy” by these “forces against change” in relation to the judiciary. The first is alleged to be a downplaying of the importance of race and gender transformation in judicial appointments.

“The other tactic is to challenge as many policy positions as possible in the courts, where the forces against change still hold relative hegemony. The legislature itself has not escaped the encroaching tendency of the judiciary, with debatable decisions taken by majority views, in some instances. Decisions of the Judicial Services Commission have equally been systematically subjected to judicial reviews. The process of delegitimising the commission and its decisions has been initiated through the instrument of “public opinion”.

The charge of infringing the separation of powers could not be more clearly made. Ramathlodi was quoted expressing similar sentiments in June 2012, saying that “the courts are being used to replace the executive”, and accusing a “minority tyranny” of “using state institutions to undermine democratic processes”.  

In an address to a conference on access to Justice, President Zuma gave a speech in which he made the following remarks:

“Political Disputes resulting from the exercise of powers that have been constitutionally conferred on the ruling party through a popular vote must not be subverted, simply because those who disagree with the ruling party politically, and who cannot win the popular vote during elections, feel other arms of the State are avenues to help them co-govern the country. … Political battles must be fought on political platforms.”

And in a subsequent address to Parliament:

“[T]here is a need to distinguish the areas of responsibility, between the judiciary and the elected branches … especially with regards to policy formulation. Our view is that the Executive, as elected officials, has the sole discretion to decide policies for government. ..”

As O’Regan notes, President Zuma’s remarks convey two underlying issues: that executive and legislative power is being constrained by the courts, particularly in relation to policy, and that those who disagree with the ruling party use the courts to ‘co-govern’ the country.

ANC Secretary General Gwede Mantashe has also accused the Constitutional Court of thwarting the will of the people by finding legislation passed by Parliament unconstitutional.

The courts thus stand accused of infringing the separation of powers by senior members of government, including the President. (Though it should be noted that, in a 2012 interview, President


16 Quoted in O'Regan, “A Forum for Reason”, 117.

17 O'Regan, “A Forum for Reason”, 118.

Zuma was quoted as saying that the country’s judges were doing an “excellent job”, and that it was the Constitutional Court’s function to intervene when government policy clashed with constitutional principles.\(^{19}\)

Commentators acknowledge that there are grounds for concerns about the infringement of the separation of powers. Moseneke comments that, just as there are dangers in parliamentary sovereignty, so too there are dangers in constitutional supremacy. He argues that “[c]ontemporary attacks on the Constitutional Court as undermining the popular will have traction precisely because they are rooted in a legitimate fear.”\(^{20}\) Moseneke further acknowledges that there is a tension between democratic theory and constitutional supremacy – the so-called “counter-majoritarian dilemma” - which is not unique to South Africa.\(^{21}\)

On 24 November 2011, a government announcement\(^{22}\) stated that Cabinet had agreed that an “assessment of the transformation of the judicial system and the role of the judiciary in a developmental state” would be carried out by a “reputable research institution.” The announcement identified three core aspects of the assessment:

- Ensuring that “the judiciary conforms to the transformation mandate as envisaged in the Constitution ... in terms of non-racialism, gender, disability, and other transformational variables.”
- Access to justice, “on all levels of the courts from lower courts through to Constitutional Courts”
- “[T]o affirm the independence of the judiciary as well as that of the executive and parliament with a view to promoting interdependence and interface that is necessary to realize transformation goals envisaged by the Constitution.”

Coming as it did hot on the heels of many of the hostile comments towards the judiciary set out above, the announcement provoked considerable concern within legal circles. Once the terms of reference were announced, some of these were assuaged (though other still felt that the proposed assessment was unconstitutional \(^{23}\)), and before the end of 2012, it was announced that the tender had been withdrawn. It was then re-introduced and awarded in 2013.\(^{24}\)

\(^{19}\) See http://www.news24.com/SouthAfrica/News/ConCourts-job-to-intervene-Zuma-20120705


From examining the statements made in the build-up to the announcement of the assessment, it seems clear that a major issue, which has been lurking in the political firmament for a long time before the assessment was announced, revolves around the question of how the courts have interpreted and applied the principle of the separation of powers. However, this issue is not specifically raised in the terms of reference. It seems appropriate, therefore, to conduct a specific examination of how the courts have dealt with questions of the separation of powers. This study seek to do so by focusing specifically on the Constitutional Court. The nature of that court’s role warrants this. It is the country’s apex court on constitutional matters, thus placing it at the forefront of controversies when political and policy issues find their way to court.

The study is focused, examining the jurisprudence of the Constitutional Court relating to issues of the separation of powers in the period between 2009 and 2013. This time period effectively encompasses the “second Constitutional Court”, since the tenures of the last of the court’s original justices (Justices Langa, O’Regan, Mokgoro and Sachs) ended in 2009. The period also spans the leadership of three Chief Justices – the end of the tenure of Justice Langa, the full tenure of Justice Ngcobo, and the beginning of the tenure of Justice Mogoeng. In addition to the four-justice turnover at the end of 2009, the time period also encompasses the retirement of Justice Ngcobo from the court, ultimately replaced by Justice Zondo, and of Justice Yacoob, replaced by Justice Madlanga. From the political side, the time period also encompasses a change in administration, with President Zuma assuming office after the 2009 national elections. In light of the source of many of the criticisms of the Court, highlighted above, and their timing, it is not unreasonable to assume that it is decisions during this period in particular that have stoked the ire of some (although as has been described, tensions relating to the separation of powers are not unique to the Zuma administration).

The study comprises three parts. Part I attempts to define some fundamental concepts. It examines academic literature on the subject and highlights some key pre-2009 cases to frame the analysis. Part II consists of a table of pertinent judgements within the survey period. We highlight where the courts can be said to have deferred, or not deferred, to government, and the basis on which they did so. Therefore, cases are selected on the basis that the raise an issue relevant to the separation of powers, as conceptualised in the preceding sections of the study, and in light of the criticisms of judicial over-reach highlighted above.

Part III attempts to pull together these issues in order to provide an assessment the Court’s record in the surveyed period, particularly in light of the highlighted criticisms. It will also mention some academic commentary on the cases surveyed, although this will be to highlight specific issues and will not seek to be comprehensive.

The study does not seek to analyse the correctness or strengths or weaknesses of the Court’s substantive reasoning from a legal theoretical perspective. This would be a valuable exercise but would unduly stretch an already extensive project. Whilst some elements of legal theoretical analysis will enter the discussion, the study is focused primarily on responding to the critiques of the Court from within the political arena, and so is focused more on the actual results and outcomes of cases, in order to address these criticisms on their own terms.
First, it is necessary to define the core terms and concepts implicated in this study.

**Deference and the Separation of Powers**

The question of the courts showing proper appreciation for the constitutional role of other branches of government is intertwined with the question of the appropriate level of 'deference' the courts should show to other branches of government. In *Bato Star*,²⁵ O'Regan J held that the need for courts to show deference to decision makers did not follow from "judicial courtesy or etiquette", but "from the fundamental constitutional principle of the separation of powers itself".²⁶ This shows how the concepts of deference and separation of powers are closely related, yet subtly distinct.

Whilst the concepts of separation of powers and deference have been applied and developed by the courts, a clear theoretical basis for the concept has not been established.²⁷ No meaningful discussion of these concepts can take place without recognising South Africa's pre-constitutional history. During the apartheid era, South African courts were frequently criticised for "executive-mindedness", or failing to uphold basic rights and for being overly deferential to the will of the executive. This background prompted some to question calls for a theory of deference in post-apartheid jurisprudence.²⁸ Hoexter has described South African administrative law in the twentieth century as needing an appropriate theory of deference to be developed, particularly in light of a tendency of lawyers to become "preoccupied with judicial review, so much so that they largely ignored its limits and limitations."²⁹ This, Hoexter argues, was not always appropriate in the constitutional era, when it was "no longer possible automatically to equate judicial deference with acquiescence in political repression; an era, indeed, in which executive mindedness might sometimes be a desirable judicial stance."³⁰

The doctrine of separation of powers is not expressly mentioned in the text of the Constitution, but is implicit within the structure and provisions of the Constitution.³¹ In *De Lange v Smuts NO and Others*³², Ackermann J expressed the view that the courts would:

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²⁵ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC).
²⁶ Quoted in Mclean, "Towards a framework", 463.
³² 1998 (3) SA 785 (CC).
'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.'

Setting out the basic landscape of the separation of powers in the South African context, the current Deputy Chief Justice has said:

"Parliament must be in the forefront of making laws and making ... budgetary allocations that help change our divided and unequal past. The executive is entrusted with vital roles of policy formulation, management of the budget and ... key executive functions. It is self evident that courts are relevant only in the event of a system failure.

Our role is not proactive, but reactive. It arises only when a breach of a vital right or interest is alleged ... Courts must bolster rather than diminish democratic control. They must be wary not to intrude into the terrain of the legislature, the executive and other state institutions."

The courts are thus given the task of ensuring that each branch of government carries out their functions in terms of the constitutional framework. As O'Regan explains:

"The role of the Constitutional Court is ... not to thwart or frustrate the democratic arms of government, but is rather to hold them accountable for the manner in which they exercise public power. In Etienne Mureinik's celebrated formulation: our new constitutional order establishes a 'culture of justification' ...

The "separation" of powers is traditionally not regarded as an absolute one, but one of checks and balances with each branch of government being allowed some degree of intrusion into the sphere of operation of the others. The courts oversee this system, and determine, not just the degree of intrusion permitted between the executive and legislative branches, but also the extent of the court’s own power to intrude into the domain of the other branches. This tends to be done not through the development of an overarching theory, but through case by case development.
Where the courts are granted jurisdiction under the Constitution, they cannot decline to intervene simply because there may be political consequences to the decision.\(^{39}\) Even where the respective roles of executive, legislature and judiciary are not clearly demarcated, some functions are said to be pre-eminently within the domain of one of the arms of government – and not the others.\(^{40}\)

The Court acknowledged the principle of deference as early as its second judgement. In \(S \text{ v Makwanyane}\), Chaskalson P held that where a choice has been made between different but reasonable policy options, the courts should give the legislature a degree of deference regarding that choice. However, Chaskalson P cautioned that this did not mean giving the legislature an “unlimited license” to infringe constitutional rights.\(^{41}\)

The importance of these principles should not be taken for granted. Corder argues that the prospects for successful compliance with the rule of law (itself a founding constitutional value) “will be directly affected by the current health and future viability” of the doctrine of separation of powers.\(^{42}\)

But what is the basis for the perceived need for the courts to be deferent to other branches? Mclean identifies three intersecting principles which explain why the courts defer to the executive and legislature: the courts’ views on their appropriate role in a constitutional democracy (which Mclean identifies as the most important underlying factor); the courts’ views on their appropriate role in light of their own institutional limitations; and the nature of the particular dispute before a court.\(^{43}\) Each of these principles will now be considered in turn.

- The anti-democratic argument

One of the main criticisms of judicial review is that it is undemocratic, in that it allows the judiciary to “usurp the powers of the administration.”\(^{44}\) This debate focuses primarily on the democratic legitimacy of the practice of judicial review in itself, rather than on its effectiveness in protecting rights.\(^{45}\) The essence of the democracy debate is that judges are unelected and therefore democratically unaccountable, and overturn decision of democratically-elected representatives of the people.\(^{46}\)


\(^{40}\) Okpaluba, “Justiciability”, 337, citing \textit{Minister of Health v Treatment Action Campaign (1) 2002 (5) SA 721 (CC)} para 98.

\(^{41}\) Quoted in Mclean, “Towards a framework”, 461.

\(^{42}\) Hugh Corder, “Principled Calm Amidst a Shameless Storm: Testing the Limits of the Judicial Regulation of Legislative and Executive Power” (2009) 2 \textit{Constitutional Court Review} 239, 240.

\(^{43}\) Mclean, “Towards a Framework”, 446.

\(^{44}\) Hoexter, “Future of Judicial Review”, 490.

\(^{45}\) Mclean, “Towards a framework”, 446.

\(^{46}\) Mclean, “Towards a framework”, 447.
As Mclean explains, judicial review in constitutional democracies results in a paradox:

“[O]n the one hand, separation of powers requires that courts hold government accountable to the standards set out in the constitution; yet this power ... may be used to thwart the very right to political participation by withdrawing debate from the public arena to the domain of the courts.”

Jeremy Waldron has argued that judicial review negates the individual right to democratic self-government, as effected through electoral representation. The entrenchment of a right in a bill of rights creates an “attitude of mistrust”, argues Waldron, as it precludes the involvement of citizens in the development of rights jurisprudence, and undermines the fundamental premise of rights that citizens are autonomous, responsible agents. Waldron argues that disagreement can only be properly accommodated through majority decision-making.

Whilst this “counter-majoritarian dilemma”, is most acute in instances of constitutional review, where judges who are not elected may invalidate legislation enacted by elected representatives, it is not always easy to distinguish this from review of administrative action on supposedly more procedural (rather than substantive, in the case of constitutional review) grounds. Parliament will often delegate a broad range of discretion to administrators, expecting them to develop their own policies within a broad statutory framework.

There an additional significance of the doctrine in the South African context, which is the need to address the country’s notorious levels of socio-economic inequality. Some commentators have expressed fears that judicial review could be an impediment to the implementation of legislative measures designed to achieve such change, or the measures themselves.

However, defenders of judicial review have several points of refuge. One counter is to limit the scope of review to procedural matters. If the debate is confined to substantive constitutional review, another approach is to challenge the assumption that legitimacy is determined solely by democracy. The latter approach accepts that constitutional review is undemocratic, but argues that it remains valuable as it affords greater rights protection. Alternatively, the premise that democracy is undermined by judicial review may be challenged, it being argued that democracy is in fact enhanced by judicial review.

Ronald Dworkin has argued for the democratic legitimacy of judicial review, questioning the assumption that, for a politically important decision to be democratic, it must necessarily be one that a majority would agree to. Dworkin prefers a “constitutional conception of democracy” to a majoritarian one, where the primary aim of a democracy is that collective decisions are made by

47 Mclean, “Towards a framework”, 447.

48 As summarised in Mclean, “Towards a framework”, 448.


51 Mclean, “Towards a framework”, 447.
political institutions which treat all members of a community, individually, with equal concern and respect. On this understanding of democracy, it is more important that rights are correctly enforced than that they were interpreted by a majoritarian government.\textsuperscript{52}

As Mclean points out, there is a difficulty with this approach in the assumption that there is a single correct, identifiable answer. There may be reasonable differences of opinion over the interpretation of rights, and Mclean argues that it cannot be in argument in favour of judicial review to say that the judiciary is better able to find that correct answer.\textsuperscript{53} The last part of that criticism does not inevitably follow, however. It may well be argued that, due to their specialist training, experience and expertise, judges are indeed better placed to make decisions interpreting rights.

Indeed, Dworkin further bases his defence of judicial review on the institutional strengths of the judiciary, and weaknesses of majoritarianism and the legislative process. Dworkin argues that judicial review of constitutional rights generates a widespread public debate (although one might question to what extent that is true in the South African context), and thereby may produce superior deliberation to the majoritarian process.\textsuperscript{54} Dworkin challenges the assumption that legislators are responsible to the people in the manner assumed by democratic theory, arguing that, in the United States experience at least, it is not apparent that courts lack the democratic legitimacy to make policy decisions.\textsuperscript{55} Dworkin resists the suggestion that a decision by a majority is necessary fairer, and that decisions about rights should be left to a majority.\textsuperscript{56}

Whilst some degree of tension between different branches of government may be said to be inevitable, it does not follow that there need be an irreconcilable disjunct between democracy and the supremacy of a Constitution. Consider Moseneke’s argument that:

“[C]onstitutionalism holds that certain essential features of the polity – most importantly certain fundamental rights and the institutional guarantees protecting them – may not be amended or destroyed by a majority government. The Constitution sets out normative constraints on majoritarian politics, and their preservation [is] entrusted to the judiciary. Judicial review, then, is a necessary mechanism for preserving the Constitution, for guaranteeing fundamental rights and for enforcing limits that the Constitution itself imposes on governmental power.”\textsuperscript{57}

Moseneke further contends that whilst constitutional democracy recognises the principle that government is based on and legitimated by the will and consent of (at least the majority of) those governed, it limits this principle by subjecting the democratically elected government and majority

\textsuperscript{52} Mclean, “Towards a framework”, 448 – 449.
\textsuperscript{53} Mclean, “Towards a framework”, 449.
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\textsuperscript{56} Mclean, “Towards a framework”, 450.
\textsuperscript{57} Moseneke, “Striking a Balance”, 17.
will subject to a constitution and the norms therein. Constitutionalism thus reflects a commitment to entrench protections of rights and liberties to secure vulnerable groups from “the potential tyranny of political majorities”. Moseneke argues that democracy cannot therefore be equated with majority rule, and that an entrenched constitution enforced by judicial review is not undemocratic.

The Constitutional Court – and this is hardly surprising in light of the Constitutional framework – has adopted an approach to democracy that is not purely majoritarian. In a concurring judgment in Democratic Alliance & Another v Maseondo NO & Another, Sachs J held that “the Constitution does not envisage a mathematical form of democracy”, but rather a “pluralistic democracy where continuous respect is given to the rights of all to be heard and have their views considered.”

Sachs J held further that this approach: “is calculated to produce better outcomes through subjecting laws and governmental action to the test of critical debate”, and that “[m]ajority rule, within the framework of fundamental rights, presupposes that after proper deliberative procedures have been followed, decisions are taken and become binding.”

Budlender remarks that:

“If we were simply to be governed by virtue of the “mandate given by the people in a popular vote” on a five-yearly basis, we would not need a Bill of Rights. We would not need our elaborate constitution. The elected representatives would decide, and everyone else would fall into line. But that is a very thin and impoverished notion of democracy. Our Constitution contemplates a richer and “thicker” form of democracy. And it does so precisely so that the people may govern.”

Moseneke puts the relationship between majoritarianism and the Constitution thus:

“There can be no doubt that the Constitution envisages that the will of the majority shall prevail because our state is a democratic one. That said, the Constitution poses a particular

61 For example, sections 59(1)(a) and 72(1)(a) of the Constitution require the National Assembly and the National Council of Provinces respectively to facilitate public involvement in the legislative process. See Corder, “Principled Calm”, 242.
62 2002 (2) SA 413 (CC).
63 Paragraph 42, quoted in Moseneke, "Striking a Balance", 11.
64 Paragraph 43.
notion of democracy. ... [T]his majoritarian primacy is subjected to the provisions of a supreme Constitution. ... 

[T]he democratic ethos and practice are indispensable and constitutive of our constitutional state. The will of the majority when expressed in some formal act through its duly appointed and elected representatives must be given effect and courts are bound to do so, provided that the democratic will, if translated into a law, policy or conduct, bears a rational and legitimate purpose and has been passed by a procedure authorised by the Constitution. Simply put, valid laws bind everyone, but one cannot by-pass the supremacy of the Constitution by merely asserting the parliamentary or executive will of the people. It must be a will expressed within the constraints of the Constitution. 66

It is also worth considering the democratic legitimacy argument a little more closely in the South African context. It is true that the legislature is elected by the people – those eligible to vote, and from a list prepared by political parties, so even that proposition has some qualifications. In the South African system, there is no further direct public input into the selection of the executive. The President is elected by the National Assembly67 (the person at the top of the winning party’s list will almost inevitably become President, but this is not an express constitutional requirement), and it is left entirely to the discretion of the President to select the rest of the executive. 68 And as Budlender cautions: “we should not be naive about the fact that in reality, the President is accountable to his party, not to the National Assembly.” 69

Now it may well be argued that this is unproblematic, since the executive is chosen from a group of democratically elected representatives, and that this is sufficient to provide all the democratic accountability one might ask for. But it is worth pondering for a moment the extent to which that differs from the selection of judges, and whether that difference is sufficient to justify the assumption that judicial involvement or interference in policy-making is indeed so inherently anti-democratic. Judges are formally appointed by the President. The Judicial Service Commission (JSC) effectively makes the appointment of all judges other than Constitutional Court judges. 70 The JSC comprises of a large proportion of politicians – 11 out of the core 23, and the President may appoint another 4 individuals. Furthermore, the President plays a significant role in appointing the Chief Justice and President of the SCA, who are both ex officio commissioners. 71 And the Constitution, which mandates judicial review, was adopted by a democratically-elected parliament. 71

67 Constitution, s 86(1).
68 Constitution, ss 91, 93.
69 Budlender, “Bram Fischer Memorial Lecture”.
70 See section 178 of the Constitution for the full composition of the JSC.
Furthermore, as Budlender points out, much policy making power in fact resides with unelected civil servants. This prompts Budlender to note that “not ... every policy which the executive develops and implements can claim a genuine democratic mandate.”

An argument for deference by the courts purely on the grounds of majoritarian democracy is therefore difficult to sustain in South Africa’s constitutional context. For there to be merit in criticisms of the courts, some other more persuasive principles must be in play.

- The institutional expertise argument

The relative institutional capacity of the courts has been identified as a critical factor in determining whether or not the courts should defer to other branches of government. When the legislature delegates powers to administrators, the argument goes, it selects them to carry out particular functions, at least in part on the basis of their particular expertise. Whilst judges will usually lack that expertise, they nevertheless have the power to interfere with administrative decisions via grounds of review. Therefore, it is said, judicial review is a threat to the separation of powers since it allows judges “unqualified in the esoteric aspects of public administration, to usurp the functions entrusted by Parliament to the executive arm of government.” This, it is suggested, harms the courts’ legitimacy.

The critique centres on the argument that it is not appropriate for the courts to review complex government policy – also described as “polycentric” decisions (the concept of polycentricity is discussed further below) – due to judges’ lack of relevant experience, knowledge and/or resources. In particular, judges are said to lack the means to assess the consequences of their decisions, and to respond to any unforeseen outcomes of the decisions. Thus, it is said that as a general rule, courts are more prepared to defer on matters of fact or policy rather than law or constitutional interpretation.

Despite what might be implied from the previous paragraph, commentators suggest that the institutional capacity argument is one based primarily on “the perceived appropriateness of the courts to make certain types of decisions, rather than an inherent inability to make these decisions”, since in principle “there are very few, if any, decisions which a court cannot make, if given enough time and information.” Former President of the Supreme Court of Israel, Aharon Barak, has said that: “[i]f a member of the legislative or executive branch can reach a decision regarding polycentric issues, a member of the judiciary should be able to examine whether or not those decisions are lawful.” Mclean quotes the following from an article by Lord Justice Dyson, commenting on the

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72 Budlender, “Bram Fischer Memorial Lecture”.


74 Hoeexter, “Future of Judicial Review”, 490.

75 Mclean, “Towards a framework”, 452.

76 Mclean, “Towards a framework”, 452.

Court of Appeal judgment in *R v Cambridge Health Authority, Ex parte B*, where the court had declined to pronounce on the allocation of limited budgets in the healthcare sector:

“I do not think that the court was saying that the court cannot make such a judgment. Clearly, it is not impossible for the court to do so, especially if it is provided with all the material that was available to the decision makers. But it is not the normal function of courts to make such judgments, and they are less-well-equipped than health authorities to make them.”

Presented this way, the institutional incapacity argument seems to be a fairly close variant of the democratic appropriateness argument, rather than one of pure inability on the courts’ part. Indeed, in the Supreme Court of Appeal decision in *Logbro Properties CC v Bedderson NO*, Cameron JA (as he was then), after relying on Constitutional Court jurisprudence on institutional competence to hold that a measure of judicial deference was appropriate to administrators, linked the question of institutional competence to issues of democratic competence. Cameron JA held that deference was important in order *inter alia* to ensure that judges appreciated the legitimate and constitutionally prescribed province of administrative agencies and recognised their expertise in relevant matters; and to ensure that judges are generally sensitive to interests legitimately pursued by administrative agencies, and the constraints under which such agencies operate.

The SCA developed this further in the subsequent case of *Phambili Fisheries*, finding that deference in judicial review touching on government economic policy was appropriate for the same institutional and democratic competence reasons. Schutz JA held that judicial deference “manifests the recognition that the law itself places certain administrative actions in the hands of the executive, not the judiciary.” This was held to be especially important where the issue under review was particularly technical, or related to an issue in which a court “has no particular proficiency.”

Mclean argues that South African courts have placed great importance on considerations of institutional competence in cases impacting on socio economic rights, whereas in cases of civil and political rights, the courts have been more robust. She cites the Constitutional court’s judgment in *Bel Porto School Governing Body v Premier, Western Cape*, where the court held that deference to the practical difficulties faced by administrators did not mean that decision-makers should not be

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78 Quoted in Mclean, “Towards a framework”, 452.

79 2003 (2) SA 460 (SCA).

80 As summarised in Mclean, “Towards a framework”, 462.

81 *Minister of Environmental affairs and Tourism v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA).

82 Paragraph 50, quoted in Mclean, “Towards a framework”, 463.

83 Mclean, “Towards a framework”, 463, and at 452, arguing that courts are more likely to defer to decision makers in “matters of complex social science.”

84 2002 (3) SA 265 (CC).
held accountable for infringing constitutional rights,\textsuperscript{85} nor undermine the role of the courts in interpreting ad protecting rights.\textsuperscript{86} In the Pillay case, the Constitutional Court held that though deference was appropriate in reviewing administrative action where a decision maker was well qualified to decide the issue, no institutional deference was necessary or desirable to decide on an infringement of the right to equality.\textsuperscript{87} This illustrates how the institutional competence argument is closely linked to the ‘nature of the case’ argument (discussed below).

The argument of institutional competence usually invokes the concept of polycentricity, which was articulated by the scholar Lon Fuller, in a work on the limits of adjudication. Fuller examined adjudication as one means of social ordering, along with contract and voting. He argued that different types of decisions were best suited to one of these forms of ordering, and that a “polycentric matter” was especially unsuitable for adjudicative resolution, as the wide range of interrelated issues meant that altering one facto would have unforeseeable consequences on other issues in the framework.\textsuperscript{88} Polycentricity is not an absolute, but a matter of degree, with most decisions a court is required to make containing some aspects of polycentricity.\textsuperscript{89}

One of the early conceptual underpinnings of polycentricity is that a person making a decision based on complex facts is subject to inherent institutional complaints, and therefore that polycentric central state decisions regarding budget allocations are inappropriate, and should be left to market forces and spontaneous adjustment by individuals within the system. When a matter is “significantly polycentric”, it is problematic to resolve it through centralised decision-making processes.\textsuperscript{90} The argument was originally directed at opposing the delegation of powers by legislatures to administrative agencies to decide polycentric matters.\textsuperscript{91} (There would be a certain irony, when one considers some of the political rhetoric in contemporary South Africa, in the free market overtones of the basis of the polycentricity argument being used as a basis for arguing in favour of deference in a developmental state).

Critics charge that it will often not be apparent to a court whether the matter involves complex polycentricity issues, since it is constrained by the evidence placed before it by the parties. Therefore the concept is said to be too vague to be of use as a theory of adjudication, and is also criticised for failing to put forward an alternative to judicial resolution, since the other identified social institutions are no better suited to determining such disputes.\textsuperscript{92}

\textsuperscript{85} Mclean, “Towards a framework”, 457.
\textsuperscript{86} Mclean, “Towards a framework”, 462.
\textsuperscript{87} Mclean, “Towards a framework”, 464.
\textsuperscript{88} Mclean, “towards a framework”, 453.
\textsuperscript{89} Mclean, “Towards a framework”, 454.
\textsuperscript{90} Mclean, “Towards a framework”, 453 - 454.
\textsuperscript{91} Mclean, “Towards a framework”, 454.
\textsuperscript{92} Mclean, “Towards a framework”, 455.
Critics also point out that, whilst it is true that it may be difficult for courts to choose between two valid policy choices (though this assumes that policy choices are presented in starkly binary terms, which is not an especially helpful reflection of the 'choices' courts are faced with), it may be equally difficult for the executive or legislature to make such choices. They recall that the concept of polycentricity was developed to oppose centralised state planning and to favour market-generated planning.\textsuperscript{93} Whilst it is so that the legislature and (at least to a large extent) the executive are democratically mandated to make those choices, that is a distinct argument not relating to institutional capacity.\textsuperscript{94} It is also pointed out that judicial review of social policy need not necessarily exclude the executive and legislative branches, since those branches can take part in a dialogue.\textsuperscript{95} Mclean suggests that South African jurisprudence shows that the courts are capable of assessing state policy for reasonableness, thus creating a dialogue over policy development in line with the constitution.\textsuperscript{96} This concept has been championed by former Chief Justice Sandile Ngcobo, that the constitution contemplates an interaction, or “constitutional dialogue”, between the courts and other branches of government. Ngcobo believes that such dialogue should be the underpinning of the doctrine of separation of powers in South Africa,\textsuperscript{97} and points out that there is support for the concept in other jurisdictions.\textsuperscript{98}

In conclusion, polycentricity is said to be “not a bar to justiciability, but merely one consideration to be taken into account by the judiciary in deciding whether a matter should be justiciable or what the appropriate level of constitutional deference should be.”\textsuperscript{99} Whilst not uniformly accepted, concerns about institutional competence and polycentricity are frequently invoked when discussing the appropriate limits of the courts’ powers, and it is therefore a factor to be considered careful when considering the court’s engagement with separation of powers issues.

- The nature of the case

One way in which this may affect the level of deference shown by a court is where an action is characterised by greater political discretion. It is thought that courts will tend to be more deferential in such a situation.\textsuperscript{100} Distinctions between legal and political questions may be difficult to make, and describing a matter as “political” (and therefore worthy of greater deference) “will often be used as a

\textsuperscript{93} Mclean, “Towards a framework”, 456.
\textsuperscript{94} Mclean, “Towards a framework”, 456.
\textsuperscript{95} Mclean, “Towards a framework”, 456.
\textsuperscript{96} Mclean, “Towards a framework”, 456.
\textsuperscript{97} Ngcobo, “South Africa’s Transformative Constitution”, 38 – 39.
\textsuperscript{98} Ngcobo, “South Africa’s Transformative Constitution”, 41 – 42.
\textsuperscript{99} Mclean, “Towards a framework”, 457.
\textsuperscript{100} Mclean, “Towards a framework”, 457.
mask for a prior decision to afford the decision-maker a high level of deference”. But the political nature of an issue may still be a principled ground for the courts to defer.\(^{101}\)

Another scenario in which courts are felt to be more likely to defer is where the issue in question “permits a wide range of legitimate responses, or where the right has to be balanced against another right.”\(^{102}\) In *Ferreira v Levin*,\(^ {103}\) Ackermann J held that when the Constitution expressly and narrowly protects a right, the Court would be less deferent to Parliament than where the protected interest was protected generally or through a residual right.\(^ {104}\)

The third scenario in which the nature of the case is said to make a difference to the courts’ deference is whether a right in issue is one that is fundamental and “highly prized in a particular society”.\(^ {105}\) The Constitutional Court in *MEC for Education, KwaZulu Natal v Pillay*\(^ {106}\) provided support for this theory, with Langa CJ holding that:

“This court has recognised the need for judicial deference in reviewing administrative decisions where the decision-maker is, by virtue of his or her expertise, especially well qualified to decide. It is true that the court must give due weight to the opinion of experts ... who are particularly knowledgeable in their area, depending on the cogency of their opinions. The question before this court, however, is whether the fundamental right to equality has been violated, which in turn requires the court to determine what obligations the school bears to accommodate diversity reasonably. Those are questions that courts are best qualified and constitutionally mandated to answer. This court cannot abdicate its duty by deferring to the school's view on the requirements of fairness. That approach is obviously incorrect for the further reason that it is for the school to show that the discrimination was fair. A court cannot defer to the view of a party concerning a contention that that same party is bound to prove.”\(^ {107}\)

In Pillay, the school authorities had argued that they were entitled to a degree of deference, as a school governing body, which bodies were statutorily required to run schools, and possessing of the expertise to do so, and drew on the concept of a "margin of appreciation" established in the jurisprudence of the European Court of Human Rights. The Constitutional Court had however already determined that the doctrine of the margin of appreciation was not helpful in determining whether a right had been limited, or whether the limitation was justified.

Socio-economic rights, and other cases with a significant impact on resource allocation, are generally regarded as falling on the other end of the scale – they are seen as an example of rights which would

\(^{101}\) Mclean, “Towards a framework”, 458.

\(^{102}\) Mclean, “Towards a framework”, 458.

\(^{103}\) 1996 (1) SA 984 (CC).

\(^{104}\) Quoted in Mclean, “Towards a framework”, 458 - 459.

\(^{105}\) Mclean, “Towards a framework”, 459.

\(^{106}\) 2008 (1) SA 474 (CC).

\(^{107}\) Paragraph 81.
generally be accepted as requiring a high degree of deference. Some commentators have suggested that the Constitutional Court has handled “political” rights cases differently to other cases, and that its record in civil and political rights cases contrasts distinctly with its socio-economic rights jurisprudence. It has, however, been pointed out that a distinction between decisions with resources implications and those that do not is difficult to sustain.

Mclean identifies *Minister of Health v TAC* as the first instance of the Constitutional Court expressly considering how deference and the separation of powers related to the adjudication of socio-economic rights. The Court raised the issue in two parts, looking first at the deference it was required to show to the executive regarding policy formulation, and second, the remedy which it should order.

Regarding the first, the issue of policy formulation, the Court rejected the so-called “minimum core” interpretation of section 26(1) and 27(1) of the Constitution, holding that courts were “not institutionally equipped” to make the broad factual and political determinations that would be needed to determine minimum core standards. Courts, it was further held, were not suited to adjudicate on issues with multiple social and economic consequences.

Regarding the second issue of remedy, the Court faced an argument from the state that it would only be appropriate for the Court to issue a declaration of rights, as the executive had the sole prerogative to make policy. The court rejected this argument, holding that whilst certain matters were “pre-eminently within the domain of one or other of the arms of government and not the others” and that such separation needed to be respected, this did not mean “that courts cannot or should not make orders that impact on policy.”

Mclean argues that this shows that the Court clearly set out not to follow “a rigid adherence to a functionalist separation of powers and would, where necessary, make declaratory or mandatory orders that impinge on the traditional roles of the other branches of government”, when so mandated by the Constitution.

Mclean develops further the argument that the Court has dealt with socio economic rights differently, highlighting its adoption of a lower review standard, and deferential remedies. Mclean suggests that this is due to the Court harbouring “a number of unarticulated and unexamined reservations to the adjudication of these rights.” On the standard of review, Mclean argues that the reasonableness test adopted in socio-economic rights cases is a lower standard of review (in the sense of being less demanding for government to meet) than the proportionality standard employed

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109 Mclean, "Towards a framework", 464. See also Roux, *Politics of Principle*, 362 (arguing that the NNP and UDF cases are unconvincing and overly deferential outliers in the Court’s record on political rights).

110 Mclean, "Towards a framework", 459.

111 Quoted in Mclean, "Towards a framework", 465.

112 Quoted in Mclean, "Towards a framework", 465.

113 Mclean, "Towards a framework", 465.
in civil and political rights cases, allowing the Court to adopt a restrictive interpretation of socio-economic rights, and to avoid normative interpretations of the scope of the right.  

Mclean argues further that the Court has imported its use of a reasonableness test in respect of section 26 and 27 of the Constitution into all socio-economic rights cases, thereby avoiding expansive readings of rights and being more deferent to policy makers.

Roux has argued that the “indeterminacy” of the Constitutional Court’s separation of powers doctrine formed an important part of its overall strategy, including in relation to socio-economic rights cases. Roux posits that the Chaskalson Court “alternated between two rival understandings” of the separation of powers “depending on the threat posed by the case to its institutional independence.” According to Roux, the first understanding is that “separation of powers considerations should not be factored into the Court’s determination of questions of constitutionality since the determination of such questions falls squarely within the Court’s domain.” On the second understanding, “separation of powers considerations inform the limits of the Court’s legitimate role in enforcing the Constitution”, and should therefore be taken into account in determining the scope of rights, their possible limitation and the appropriate remedy.

Away from socio-economic rights, deference has been employed in respect of the doctrine of comity. In Kaunda v President of the Republic of South Africa, it was held that government was entitled to deference in deciding whether to seek assurances from foreign governments that the death penalty would not be imposed on South African nationals.

Okpaluba has considered whether the Constitutional Court can be said to have adopted a “political question” doctrine – a concept developed in United States jurisprudence to indicate cases where the courts will decline to exercise jurisdiction due to the subject matter of the case – particularly, subject matter that is so innately political in nature as to remove it from the judicial sphere. Okpaluba argues that, rather than importing the doctrine as understood in U.S. jurisprudence, the Constitutional Court has been called on to defer on the basis that it would be called on to intervene in the implementation of government policy. Okpaluba suggests that the substantive content of the South African constitution may make it impossible to adopt the political question doctrine, due to the broad powers of review; flexible remedial powers; the Constitutional Court’s jurisdiction over

114 Mclean, “Towards a framework”, 467.
118 2005 (4) SA 235 (CC).
119 Okpaluba, “Justiciability”, 332.
120 Okpaluba, “Justiciability”, 333.
abstract constitutional issues in certain instances; and the extensive regulation of rights, including socio-economic rights.\textsuperscript{121}

The idea that the court’s approach to the application of the separation of powers doctrine might fluctuate depending on the kind of rights in issue is consistent with the principle of variability, which is defined as the notion that principles of legality, or grounds of review, do not need to be applied in an “all-or-nothing fashion”, and that context may cause the intensity of judicial scrutiny to vary.\textsuperscript{122} Factors which may cause such variation in scrutiny include the policy content of a decision, the breadth of the discretion and degree of expertise of the decision maker; the impact of the decision; the degree of public participation in the decision-making process; and any opportunities for internal reconsideration.\textsuperscript{123}

This approach, it is said, allows courts to take into account the range of different forms of administrative action, and to be explicit about the reasons for judicial intervention or non-intervention. It is also said to be consistent with the broad scope of the administrative justice rights in the Constitution.\textsuperscript{124} Hoexter argues that the concept of variability is a valuable tool for those wary of imposing too great a burden on the administration.\textsuperscript{125}

- General arguments in favour of judicial intervention

Whilst the separation of powers does recognise the need for respecting the functions of other branches of government, few would suggest that this implies a completely hands-off approach from the courts, avoiding any scrutiny at all. As Hoexter argues:

“Whatever deference means ... it ought not to imply abstentionsism or total submissiveness to the other branches of government, evoking old South African nightmares of judicial prostration to the dictates of the executive. That, it need hardly be said, is not mandated by our Constitution, whereas administrative accountability and a proper regard for human rights certainly are.”\textsuperscript{126}

The Canadian Supreme Court has also cautioned against excessive deference. In RJR MacDonald Inc v Canada (AG),\textsuperscript{127} McLachlin J held that:

“[C]are must be taken not to extend the notion of deference too far. Deference must not be carried to the point of relieving the government of the burden which the Charter places upon

\textsuperscript{121} Okpaluba, “Justiciability”, 334.
\textsuperscript{122} Hoexter, “Future of Judicial Review”, 502.
\textsuperscript{123} Hoexter, “Future of Judicial Review”, 503.
\textsuperscript{124} Hoexter, “Future of Judicial Review”, 504.
\textsuperscript{125} Hoexter, “Future of Judicial Review”, 508 – 509.
\textsuperscript{126} Hoexter, “Future of Judicial Review”, 501.
\textsuperscript{127} [1995] 3 SCR 199.
it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable. Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether parliament’s choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is parliament.”

South Africa’s historical context is also a factor that feeds in to thinking about why it may be appropriate for a more interventionist role for the courts. As Moseneke states:

“Our Constitution is pro-poor. It is cogniscent of vulnerability in society. It is premised on a past that has entrenched vacuous but real divisions along race, gender, class, religion, conscience and belief, culture, language, origin and sexual orientation. ... [O]ur Constitution ... rejects the notion of mere political might being right and seeks to restrain and control all public power and private power within the constraints of an over-arching basic law.”

It is probably necessary to accept that these issues are always going to be the subject of debate and contestation. But it is still worth trying to identify accepted parameters as far as possible. Hoexter suggests that deference should include a willingness by judges to appreciate the legitimate and constitutionally mandated domain of administrative agencies; to admit the expertise of such agencies “in policy-laden or polycentric issues”; give due respect to the agencies interpretations of law and facts; and to be generally sensitive to interests pursued by administrative agencies, as well as the constraints under which the agencies operate. There ought to be a careful weighing of the need for, and consequences of, judicial intervention, shaped primarily by mindfulness by the courts of the need not to usurp the functions of administrative agencies.

**Policy**

As will have been apparent, a frequent strand of criticism in the debate about the role of the courts is that decisions are made which intrude into the policy making sphere. This invites the question of what is meant by “policy”, a term that carries great potential for elasticity.

The Constitution specifically provides that the development and implementation of national policy is the responsibility of the executive. But the Constitution does not define what policy means. In *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty)* Ltd, Harms JA made the following pertinent remarks:


132 Section 85(2)(b).

133 2001 (4) SA 501 (SCA).
The word ‘policy’ is inherently vague and may bear different meanings. ... To draw the distinction between what is policy and what is not with reference to specificity is, in my view, not always very helpful or necessarily correct. ... Any course or program of action adopted by a government may consist of general or specific provisions. ... [L]aws, regulations and rules are legislative instruments, whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments. Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation). Otherwise the separation between Legislative and Executive will disappear. ..[Emphasis added]

The quoted passage points to a crucial aspect of the relationship between law and policy and the role the courts have to play. It is difficult to imagine how a case could come before a court that would enable the court to overrule policy in the abstract, if that policy was not manifested in some legal instrument or executive action. And once it is manifested in law or government action, the constitution very clearly provides that it is subject to judicial scrutiny. Former Constitutional Court justice Kate O'Regan has pointed out that, as a general principle, all policy, however it is pursued, must comply with three constitutional requirements: legality, rationality and compliance with the Bill of Rights. 135 As the Constitutional Court held in the TAC case, the court will intervene where government policy is designed or carried out so as to compromise its constitutional mandate or authority.136

The Constitutional Court has also emphasised that it is the implementation of policy, rather than the content of the policy (although it will be apparent that substantive content is not always immune from review, since it cannot be in conflict with the Constitution). In Ferreira v Levin NO,137 Chaskalson P(as he then was) held that:

“Whether or not there should be regulation or redistribution is essentially a political question which falls within the domain of the Legislature and not the Court. It is not for the Courts to approve or disapprove of such policies. What the Courts must ensure is that the implementation of any political decision to undertake such policies conforms with the Constitution. It should not, however, require the legislature to show that they are necessary if the Constitution does not specifically require that this be done.”138

Okpaluba argues that:

“[T]he constitutionalisation of socio-economic rights requires courts, at least to some extent, to test whether government policies are in conformity with the constitutional obligations of

134 Ibid., para 7, cited with approval by the Constitutional Court in Minister of Education v Harris 2001 (4) SA 1297 (CC) at para 10.
136 Paragraph 98, quoted in Okpaluba, “Justiciability”, 337.
137 1996 (1) SA 984 (CC).
138 Paragraph 180, quoted in Okpaluba, “Justiciability”, 337.
the government. Thus, although policy formulation may not as a general rule be subjected to judicial review, government policies are not immune from the prying eyes of the courts ... 

Section 2 of the Constitution provides that the Constitution is the supreme law in South Africa, and ‘law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.’ Furthermore, section 172 (1)(a) provides that, when deciding a constitutional matter within its power, a court ‘must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency’.

Therefore, there is a sense in which the argument that courts intrude into areas of policy is an unsustainable one, in that the constitution clearly contemplates – and indeed compels – the courts to intervene, when policy manifested through legislation (in whatever form) or conduct, violates the Constitution. Therefore any argument that the courts have no basis at all to overrule government, or make decisions that have any bearing at all on government policy, is clearly unsupportable on the plain meaning of the Constitution.

But the argument cannot rest there. Critics of the court would presumably argue that, notwithstanding these powers, the courts have strayed by making decisions that impose the court’s own policy choices under the guise of findings of unconstitutionality. As the constitution is a live document, it needs to be interpreted and in the course of that interpretation, it is certainly not beyond the realms of possibility that a court might impose its own policy preferences under the guise of a process of legal interpretation. As Roux puts it:

“the Constitution does not interpret itself, and it mandates no definite ‘intrusion into the domain of the executive’ other than the degree of intrusion that the judges strive in their decision to justify ... The Court must do the justifying, and in so doing it cannot but violate one of the most sacred principles of the rule of law: that no one should be a judge in their own cause. ... Clearly, however, once the power of review has been conferred, judges must try to make sense of it ... 

Indeed, a rigid distinction between policy and purely legal interpretation may be impossible to maintain.

Remedies

As has already been alluded to, an important factor to bear in mind in considering the courts' record on matters of deference is that there may be different levels of deference shown when making findings of substantive rights violations as opposed to in the remedies ordered. Some scholars have argued that courts may take a bold approach in making substantive findings of rights violations, but then follow a more deferent approach in making orders against government to rectify the violation. Or, the converse may apply. Okpaluba describes the Constitutional Court as having "developed some

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139 Okpaluba, "Justiciability", 339.

radical judicial relief for breaches of constitutional rights”, but regards it as having been “conscious of the limits within which it could interfere with the functions of the legislature.”

In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, the Court held that the deference owed to the legislature in determining appropriate relief depended on the circumstances of each case. Whether and to what extent a court could interfere with the language of a statute would depend, the Court held, on “the correct construction to be placed on the Constitution as applied to the legislation and facts involved in each case.”

Mclean argues that the holding in *National Coalition*, cited above, demonstrates “the Court’s awareness of the context-sensitive nature of the choice of remedies, and the role that deference to the legislature plays in that assessment.” Furthermore, it shows “a concern for institutional competence in its reference to the ‘field’ which is reserved for the legislature.”

Writing for the majority in *Fose v Minister of Safety and Security*, Ackermann J held:

“Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be an interdict, a mandamus or such relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of all these important rights …”

Mclean, highlighting the importance of distinguishing deference in the interpretation of rights and in remedies, argues that the Constitutional Court has been at its most deferent in the area of remedies, resulting in the state often failing to comply timeously. Mclean suggests that there are instances “where a court adopts a low level of deference to the interstation of a right” and then finds the state to have infringed the right, and then “adopts a highly deferential remedy”, or vice versa, using the one to counteract the other. In the TAC case, for example, the Court held that separation of powers concerns should not influence the interpretation of the scope of a right.

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141 Okpaluba, “Justiciability”, 341.
142 2000 (2) SA 1 (CC).
144 Mclean, “Towards a framework”, 462.
145 1997 (3) SA 786 (CC).
146 Paragraphs 19, 69.
147 Mclean, “Towards a framework”, 468.
148 Mclean, "Towards a framework", 468 – 469.
In this light, Mclean is critical of the Court’s use of the principle of “meaningful engagement” in eviction cases, arguing that it amounts to a failure to engage with hard issues by referring the matter back to the parties to try to sort out. With specific reference to the Olivia Road decision, Mclean argues that “the Court failed to engage with the substance of the attack on the constitutionality of the City’s housing policy and retreated to a consideration of procedural fairness”, and argues generally that whilst meaningful engagement makes “explicit an obligation to consult with those affected by administrative action”, it "masks a further retreat by the Court in its differential treatment of socio-economic rights.”

It is worth juxtaposing these critiques, which cast the Court as overly deferential and timid, with the criticisms of over-reaching cited at the beginning of this analysis.

Section conclusion

This part of the study has set out the conceptual background for debates about the Court’s treatment of the issue of the separation of powers. It has provided various potential issues to guide an examination of the surveyed cases:

- Criticisms of the Constitutional Court for encroaching into the domain of the executive and the legislature, thereby undermining the democratic process, including through usurping the policy-making function of the executive;

- The Constitution has a vision of democracy that is broader than pure majoritarianism, and vests extensive review powers in the Court. Anti-democratic arguments against judicial review are countered by the principle of constitutional supremacy;

- Nevertheless, the Court’s role is seen as intervening only in the event of “systems failure” in other branches of government;

- There should be some caution in over-emphasising the popular mandate of the executive;

- Issues of institutional expertise and polycentricity play a role in the Court’s determination of whether and when to defer;

- The nature or subject-matter of the case impacts on the Court’s willingness to defer;

- There may be a difference between the level of deference when finding a violation of rights and ordering a remedy.

The next section tabulates key deference cases, including a brief summary for each case of the central reasons why the decision could be classified as deferent or otherwise. In the final section, we then advance some conclusions from the assessment.

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150 Mclean, "Towards a framework", 469.
PART II: THE CASES

2009

The President of the Republic of South Africa and Others v Quagliani CCT 2408 [2009] ZACC 1

Issue: The Court was called on to analyse the power given by the Constitution to the national executive to negotiate and sign treaties, as well as the constitutional provisions regulating the manner in which treaties will come to have force of law domestically.

Applicants, who faced extradition, contended that the Extradition Agreement was invalid and unenforceable because the President did not "enter into" the Agreement as required by section 2 of the Extradition Act. Much of the work of entering into the Extradition Agreement had been performed by ministers and other officials. The applicants submitted that consequently their arrests in terms of the Agreement were unlawful. They contended further that the Agreement was not validly approved by the National Council of Provinces (NCOP) because the delegates were not shown to have had proper mandates. Finally they submitted that the Agreement had not been incorporated into domestic law nor was it self-executing in terms of section 231(4) of the Constitution which sets out the procedure for an international agreement to be made operable in South Africa.

Outcome / finding: For government

Reasons for deferring / not deferring: The Constitution envisaged that the President, as head of the national executive, would take the final decision to enter into an agreement. The fact that Cabinet Ministers played a role in the negotiation and signing of the Agreement was consistent with the exercise of his powers as head of the national executive.

The regular functioning of government would be unduly disrupted if courts could be called upon (on a purely speculative basis) to enquire at any stage into the regularity of completed legislative processes.

Absent evidence to the contrary, a strong presumption must accordingly exist that the legislature followed constitutionally-mandated procedures in performing its functions.

Richter v Minister of Home Affairs and Others CCT 09/09 [2009] ZACC 3

Issue: Applicant was a South African citizen and registered voter who was working as a teacher in the United Kingdom. He intended to return to South Africa at the end of that year. He wished to vote in the 2009 elections but was not permitted to do so because section 33 of the Electoral Act 73 of 1998 (the Electoral Act) restricted the classes of people absent from the country on polling day who may vote.

Outcome/finding: Against government on the rights violation, but with some deference on remedy.
**Reasons for deferring:** Where a litigant challenges the constitutionality of an Act of Parliament, it is important that the Minister responsible for the administration of that legislation be given a fair opportunity to respond to the challenge. This flows not only from the principle of fairness that should apply in all civil litigation and the useful information that may be so tendered, but also from the respect that courts owe to the other branches of government. The court also limited its remedies so as to avoid placing undue logistical strain upon the Electoral Commission.

**Reasons for not deferring:** The limitation of the right to vote occasioned by section 33(1)(e) of the Electoral Act could not be saved by section 36 of the Constitution. Government had not sought to point to any legitimate government purpose served by restricting the categories of registered voters who qualified for a special vote.

**AParty v Minister of Home Affairs and Moloko and Others v Minister of Home Affairs CCT 06/09 [2009] ZACC 4**

**Issue:** These two applications for direct access involved fundamental questions concerning the right of every citizen to vote in an election. At issue are matters concerning the rights of those South African citizens who are abroad to register and vote.

**Outcome/finding:** For government.

**Reasons for deferring:** On the facts and circumstances of the case, it was held that it cannot be in the interests of justice to come to the assistance of the two individual applicants at the expense of jeopardising the elections. It was doubted whether, even if the applicants were to be successful, they would have been entitled to any relief given the logistical and practical difficulties described by the Commission.

The key issue was the question of the constitutional validity of the electoral system – a matter that lies peculiarly with Parliament’s constitutional remit. The fundamental basis for the court’s refusal to grant direct access lies in this Court’s reluctance to deal in undue haste with a matter of this sort as a court of first and last instance. For this reason, nothing in this decision should be read as prejudging the constitutionality of the challenged registration provisions, including those which may prevent South African citizens from registering while abroad.

**The Director of Public Prosecutions, Transvaal v the Minister of Justice and others CCT 36/08 [2009] ZACC 8**

**Issue:** Confirmation of orders of constitutional invalidity made in relation to certain provisions of the Criminal Procedure Act (the CPA) dealing with the testimony of child victims and child witnesses in sexual offence cases.

**Outcome/finding:** Substantially for government. The order of invalidity was not confirmed, and the Department of Justice was ordered to report to the court regarding the use of intermediaries in Regional Courts.
**Reasons for deferring:** In terms of section 167(4) of the Constitution, only the Constitutional Court may decide the constitutional validity of a parliamentary bill, and, even then, the Court may only do so where the President refers the bill to the Court pursuant to the provisions of section 79(4) of the Constitution. Courts must be astute not to assume jurisdiction they do not have.

Under our constitutional democracy, courts have no power to supervise or interfere with the exercise by the executive or legislature of its functions unless the circumstances amount to a clear disregard by the executive of the powers and duties conferred upon it by the Constitution. Where there is such a disregard, courts are not only entitled but obliged to intervene. But judicial review under our constitutional democracy does not give courts the power to exercise executive or legislative functions. It permits courts to call upon the executive and legislature to observe the limits of their powers but does not permit courts to exercise those powers themselves. Courts therefore have the duty to patrol the constitutional borders defined by the Constitution. They cannot, therefore, cross those borders.

**Reasons for not deferring:** Parliament has made laws to protect child complainants from undue mental stress or suffering that may result from testifying in court. To this end, sections 170A(1) and 170A(3) promise child complainants protective measures such as the appointment of an intermediary and the creation of child-friendly courts. But the subsections also contemplate that the state will commit the necessary resources in order to achieve the objects of the subsections consistently with section 28(2) of the Constitution and give effect to sections 170A(1) and 170A(3). The non-availability of these measures contemplated in the CPA is not only a breach of the relevant provisions of the CPA, but it is indeed a breach of the Constitution.

**Crawford Lindsay Von Abo v The President of the Republic of South Africa CCT 67/08 [2009] ZACC 15**

**Issue:** Confirmation sought of an order that the failure of the President, as one of several government respondents, to consider and decide properly the request of Mr Von Abo for diplomatic protection against the violation of his property rights by the government of Zimbabwe, was inconsistent with the Constitution and invalid.

**Outcome/finding:** For government in that the case was struck from the roll, on the basis that the wrong party was cited.

**Reasons for deferring:** any failure to consider the applicant’s request for diplomatic protection would have been the failure of the government of South Africa or indeed of a specific Minister, in this case the Minister for Foreign Affairs. It did not follow that a constitutionally reprehensible failure of a Minister or of the government in a generic sense amounts to a failure by the President to fulfil his constitutional obligations.

The portion of the order of the High Court that declared the conduct of the respondents to be invalid does not concern the conduct of the President within the meaning of section 172(2)(a) of the Constitution and is therefore not subject to confirmation, despite the fact that he was cited as a party to the proceedings.

The Constitution carefully apportions powers, duties and obligations to organs of state and its functionaries. It imposes a duty on all who exercise public power to be responsive and accountable...
and to act in accordance with the law. This implies that a claimant, who seeks to vindicate a constitutional right by impugning the conduct of a state functionary, must identify the functionary and its impugned conduct with reasonable precision. Courts too, in making orders, have to formulate orders with appropriate precision.

**Reasons for not deferring:** Where the conduct of the President does not pass muster as a "constitutional obligation" envisaged in section 167(4)(e), ordinarily it would be susceptible to the jurisdiction of the Supreme Court of Appeal or the High Court. That jurisdiction is conferred by the Constitution through the provisions of section 167(5) read with section 172(2)(a) and must be given full effect.

The duty and function to give proper consideration to a legitimate request for diplomatic intervention by government is one carried out in terms of section 85(2) read together with section 92(1) of the Constitution which makes it clear that the Minister concerned bears the constitutional responsibility to execute the assigned powers and functions. Thus, any failure of the national executive or one of its members to discharge its obligations must be remedied accordingly and a court is entitled to require the government or the Minister concerned to fulfil its constitutional responsibilities.

**Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others [2009] ZACC 16**

**Issues:** The case concerned an application for the eviction of approximately 20 000 residents of the Joe Slovo informal settlement in the Western Cape. The application was brought by government agencies responsible for housing on the basis that the eviction was required for the purpose of developing affordable housing for poor people.

**Outcome/finding:** Against government.

**Reasons for not deferring:** The Court made an order which stipulated that no person may be moved unless alternative accommodation was provided them. It also requires individual engagement with households prior to their move. The order provided further that the parties should engage meaningfully on the timetable for the move; and on any other matter on which they agree to move. It also declared that 70% of the low cost housing to be built at Joe Slovo must be made available to former or current residents of Joe Slovo who have applied for and qualify for housing.

Parliament has enacted a cluster of legislation designed to protect and secure the tenure of those who reside on land unlawfully. Even so, evictions may still take place legally, but their consequences can be just as devastating as they have been in the past for many poor South Africans. In turn, courts have correctly held that the government’s obligations in terms of section 26(2) mean that eviction sought by the state should not occur without the provision of alternative housing.

**Centre for Child Law v the Minister for Justice and Constitutional Development and Others CCT 98/08 [2009] ZACC 18**

**Issue:** An application for confirmation of declarations of statutory invalidity made by the High Court, which struck down various provisions of the Criminal Law Amendment Act in the form it took after amendment by section 1 of the Criminal Law (Sentencing) Amendment Act. The impugned sections make minimum sentences applicable to offenders aged 16 and 17 at the time they committed the
offence. The High Court found these sections inconsistent with provisions of the Bill of Rights pertaining to children.

**Outcome/finding:** Against government.

**Reasons for not deferring:** Amongst other things, section 28 protects children against the undue exercise of authority. The rights the provision secures are not interpretive guides. They constitute a real restraint on Parliament. And they are an enforceable precept determining how officials and judicial officers should treat children.

It is correct that Parliament has a role in the individuation of sentences, including sentences of child offenders. This *S v B* recognised by affording the legislatively ordained minimum sentences a weighting effect. But final individuation of sentences is the preserve of the courts. And that must occur in accordance with the children's rights provisions in the Bill of Rights. Parliament cannot without weighty justification take it away.

High crime levels and well-justified public anger do not provide justification for a legislative intervention overriding a specific protection in the Bill of Rights.

**Women's Legal Trust v President of the Republic of South Africa and Others (CCT1309) [2009] ZACC 20**

**Issue:** The applicant sought an order declaring that the President and Parliament had failed to fulfil constitutional obligations. It asked the Court to direct them to fulfil those obligations within 18 months by “preparing, initiating, enacting and implementing an Act of Parliament providing for the recognition of all Muslim marriages as valid marriages for all purposes in South Africa and regulating the consequences of such recognition.”

**Outcome/finding:** For government

**Reasons for deferring:** Applications challenging the legislative programme and duties of the government should not be brought directly to the Court, but must first be lodged in the High Court and go through the ordinary judicial processes before reaching the Court.

The obligation to enact legislation to fulfil the rights in the Bill of Rights falls on a wide range of constitutional actors. These include the Cabinet, organs of state, independent institutions under Chapter 9 of the Constitution, Parliament and the President. The obligation does not fall on the President and Parliament alone. For this reason, the obligation to enact such legislation, if it exists, can be considered by the High Courts.

All exercise of judicial power in some way affects the separation of powers and may involve the judicial determination of questions with political overtones. That is not enough for this Court’s exclusive competency to be engaged. The obligations invoked must, in addition, entail an agent-specific focus on the President and Parliament alone. That is not the case here.
Brümmer v Minister for Social Development and Others (CCT 25/09) [2009] ZACC 21

**Issue:** Constitutional challenge to the 30-day time limit within which challenges to a refusal of access to information had to be brought under section 78(2) of the Promotion of Access to Information Act (PAIA).

**Outcome/finding:** Against government.

**Reasons for not deferring:** A person who seeks to challenge the refusal of access to information must be afforded an adequate and fair opportunity to do so. The 30 day period limited the right of access to court as well as the right of access to information. This limitation was not reasonable and justifiable and accordingly the 30 day limit prescribed by section 78(2) was found unconstitutional. The Court ordered Parliament to enact legislation that prescribes a time limit that is consistent with the Constitution, bearing in mind the right of access to court as well as the right of access to information.

Koyabe and Others v Minister for Home Affairs and Others (CCT 53/08) [2009] ZACC 23

**Issue:** The case involved the rights to just administrative action, guaranteed in section 33, and to access to courts, protected under section 34 of the Constitution. In particular, it dealt with the interpretation of section 7(2) of the Promotion of Administrative Justice Act which prescribes that available internal remedies must be exhausted before a judicial review of an administrative action.

**Outcome/finding:** For government.

**Reasons for deferring:** Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid.

Approaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function.

Once an administrative task is completed, it is then for the court to perform its review responsibility, to ensure that the administrative action or decision has been performed or taken in compliance with the relevant constitutional and other legal standards.

Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another (CCT 110/08) [2009] ZACC 24

**Issue:** The constitutional validity of section 10(1) and (3) of the Infrastructure Act 2001 and corresponding Notices pertaining to the planning of provincial roads. The primary issue was whether
the impugned legislation arbitrarily deprived owners of their property contrary to section 25(1) of the Constitution.

Outcome/finding: For government.

Reasons for deferring: The expenses incurred by the province in relation to determinations and designs prior to the Act were based on fundamentally sound planning policy. A mass review of the designs at the instance of the state would both cripple the state financially and be extremely burdensome to implement.

Minister for Justice and Constitutional Development v Chonco and Others (CCT 42/09) [2009] ZACC 25

Issue: The application was concerned with the Minister’s failure to process applications for Presidential pardon, the consideration of which is an exclusive function of the President in terms of section 84(2)(j) of the Constitution. The question before the Court was whether this failure amounted to a breach of a constitutional obligation under section 85(2)(e) on the part of the Minister in her capacity as a member of the national executive.

Outcome/finding: For government.

Reasons for deferring: Section 84(1) of the Constitution confers upon the President a set of auxiliary powers, in addition to the principal decision-making power, to assist him in fulfilling the powers, functions and obligations placed on the President by section 84(2). The power to request assistance in the preliminary processing of pardon applications was such a power, vested in the President in his capacity as Head of State. The exercise of powers and functions under section 84 is distinct from those under section 85. The former are performed exclusively by the President and members of the Cabinet. Were the preliminary process to be considered a collective action, the result would be that a failure by the Minister to take preliminary action would prevent the President from exercising a function and power accorded solely to him, so frustrating his powers as Head of State. The President must accordingly retain the sole ability to remove his instructions, bypass the process initiated by him, or transfer the preliminary consideration elsewhere.

Mazibuko and Others v City of Johannesburg and Others (CCT 39/09) [2009] ZACC 28

Issue: The case concerned the right of access to water in section 27 of the Constitution, which provides that everyone has the right to “sufficient water”. The case considered the lawfulness of Operation Gcin’amanzi, a project the City of Johannesburg to address the severe problem of water losses and non-payment for water services in Soweto. This project involved re-laying water pipes to improve water supply and reduce water losses, and installing pre-paid meters to charge consumers for use of water in excess of the 6 kilolitre per household monthly free basic water allowance.

Outcome/finding: For Government.
Reasons for deferring: The obligation placed on government by section 27 is an obligation to take reasonable legislative and other measures to seek the progressive realisation of the right. In relation to the Free Basic Water policy, therefore, the question was whether it is was reasonable policy. The Court noted that it is implicit in the concept of progressive realisation that it will take time before everyone has access to sufficient water. The court held that it was not appropriate for a court to give a quantified content to what constitutes "sufficient water" because this is a matter best addressed in the first place by the government. The Court concluded that it could not be said that it was unreasonable for the City not to have supplied more, particularly given that, even on the applicants' case, 80% of the households in the City would receive adequate water under the policy.

Joseph and Others v City of Johannesburg and Others (CCT 4309) [2009] ZACC 30

Issue: An application for leave to appeal against a decision of the High Court which had held that there was no obligation on the City of Johannesburg and its service providers to afford procedural fairness to tenants with whom the service provider had no contractual relationship, before taking a decision to disconnect their electricity supply.

Outcome/finding: Against government.

Reasons for not deferring: When City Power supplied electricity to Ennerdale Mansions, it did so in fulfilment of the constitutional and statutory duties of local government to provide basic municipal services to all persons living in the City. When the applicants received electricity, they did so by virtue of their corresponding public law right to receive this basic municipal service. Accordingly, in depriving them of a service which they were already receiving as a matter of right, City Power was obliged to afford them procedural fairness before taking a decision which would materially and adversely affect that right.

The Local Government: Municipal Systems Act gives legislative content to the various constitutional duties of local government. Section 4(2) sets out the duties of municipal councils, which exercise the executive and legislative authority at municipal level.

These provisions impose constitutional and statutory obligations on local government to provide basic municipal services, which include electricity. The applicants are entitled to receive these services. These rights and obligations have their basis in public law. Although, in contrast to water, there is no specific provision in respect of electricity in the Constitution, electricity is an important basic municipal service which local government is ordinarily obliged to provide. The respondents were held to be subject to the duty to provide it.

Abahlali Basemjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others (CCT1209) [2009] ZACC 31

Issue: The applicants claimed that the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act was invalid because the KwaZulu-Natal legislature had no provincial power to make the
law, as it trespassed into the sphere of land tenure, a legislative competence reserved for the
national legislature. They also contended that section 16 of the Act was inconsistent with the
Constitution and invalid. Section 16 gave the Member of the Executive Council of the province
time to publish a notice in the provincial gazette determining a period within which an owner or
person in charge of land or a building that is occupied by unlawful occupiers must institute
proceedings to evict the occupiers under the PIE Act. If the owner or person failed to comply, the
municipality must bring proceedings to evict the occupiers.

Outcome/finding: Against government.

Reasons for not deferring: Section 26(2) of the Constitution, the national Housing Act and the PIE Act
all contain protections for unlawful occupiers. They ensure that their housing rights are not violated
without proper notice and consideration of other alternatives. The compulsory nature of section 16
disturbed this carefully established legal framework by introducing the coercive institution of eviction
proceedings in disregard of these protections.

The Court held that there could be no doubt that an over-expansive interpretation of section 16 was
not only strained but also offended the rule of law requirement that the law must be clear and
ascertainable. In any event, separation of power considerations required that courts should not
embark on an interpretative exercise which would in effect rewrite the text under consideration.
Such an exercise amounts to usurping the legislative function through interpretation.

The power given to the MEC to issue a notice is overbroad and irrational because it applies to any
unlawful occupier on any land or in any building even if it is not a slum and is not properly related to
the purpose of the Act, which is to eliminate or to prevent the re-emergence of slums.

Head of Department:Mpumalanga Department of Education and Another v Hoërskool Ermelo and
Another (CCT40/09) [2009] ZACC 32

Issue: A case concerning the constitutional right to be taught in an official language of one's choice
and the power of the Head of Department of Education to withdraw the function of a school
governing body to determine the school's language policy.

Outcome/finding: Against government.

Reasons for not deferring: The Court found it unnecessary to determine whether the HoD in this
case acted reasonably or not, because the exercise of his power to withdraw the function to
determine language was tainted by his simultaneous decision to appoint an interim committee to
determine the schools language policy. The Court held that the HoD failed to distinguish the power
given to him under section 22 from the power given to him under section 25. Hence his exercise of
the power was contaminated by his incorrect reliance on section 25. In short, in appointing the
committee to determine the school language policy, the HoD acted without the necessary legal
power to do so. Consequently, the withdrawal of the function, the appointment of the committee
and the subsequent alteration of the schools language policy were unlawful and were set aside.
The determination of language policy in a public school is a power that in the first instance must be exercised by the governing body. The power must be exercised subject to the limitations that the Constitution and the Schools Act or any provincial law laid down. Even more importantly it must be understood within the broader constitutional scheme to make education progressively available and accessible to everyone, taking into consideration what is fair, practicable and enhances historical redress.

Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others (CCT 31/09) [2009] ZACC 33

Issue: The case dealt with sanitation and lighting. A community in an informal settlement sought toilets: they wanted one “ventilated improved pit latrine” per household, instead of the one chemical toilet per ten families offered to them by the authorities, in the place of their existing pit latrines. The community also asked for high-mast lighting to enhance safety and access by emergency vehicles. They relied inter alia on their right of access to adequate housing.

Outcome/finding: For government, but with an order that a speedy decision be made to ease the plight of those concerned.

Reasons for deferring: The court remarked that it was tempting to order the Municipality to accept the assistance offered in order to improve the lives of at least the applicants before this Court, by describing their situation as exceptional and unique. Unfortunately though, it was not so exceptional or unique. According to the Municipality, there were 110 other similar informal settlements within its area of jurisdiction. In another 16 cases, the Municipality informed the Court, the Province had also delayed taking a decision on applications for upgrading. Elsewhere in the province and the country there were thousands more in similarly unsatisfactory circumstances. It would not be just and equitable to make an order that would benefit only those who approached a court and caused sufficient embarrassment to provincial and national authorities to motivate them to make a once-off offer of this kind.

Reasons for not deferring: The court held that it was necessary to incorporate the need for a speedy decision in its order. The delay by the Province was the most immediate reason for the dilemma and desperate plight of the residents. As long as the status of the Settlement was in limbo, little could be done to improve their situation regarding sanitation, sufficient lighting to enhance community safety and access by emergency vehicles, as well as a range of other services. Counsel for the MEC indicated that a period of 12 months would be sufficient to finalise specialist feasibility studies and that a one month period would thereafter be required to decide whether to upgrade. It was found to be just and equitable to order the MEC to reach a decision within 14 months.
Albutt v Centre for the Study of Violence and Reconciliation and Others (CCT 54/09) [2010] ZACC 4

**Issue:** Mr Albutt, who had brought a pardon application under a special dispensation process, asked the Constitutional Court for leave to appeal against the order of the High Court. In addition, he brought an application for direct access challenging the constitutionality of section 1 of PAJA, should the Court conclude that PAJA defines the exercise of the power to grant pardon as administrative action. The President and the Minister for Justice and Constitutional Development, who were the respondents in the High Court, supported Mr Albutt’s applications. They argued that the victims of the offences in respect of which pardon was sought are not entitled to make representations before a decision to grant pardon is made. They submitted that the decision whether to grant pardon constitutes executive action and is therefore not subject to the procedural requirements in PAJA. In the alternative, they argued that if PAJA defines administrative action to include the exercise of the power to grant pardon, it is unconstitutional.

**Outcome/finding:** Against government.

**Reasons for not deferring:** The Court found that the exercise of the power to grant pardon must be rationally related to the purpose sought to be achieved by it. The executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if objectively speaking they are not, they fall short of the standard demanded by the Constitution.

Based on the context-specific features of the special dispensation process, victims must be given the opportunity to be heard in order to determine the facts on which pardons are based, namely, whether the offence was committed with a political motive. Accordingly, victims are entitled to an opportunity to be heard before the President makes a decision to grant a pardon under the special dispensation. This applied only to applications for pardon that have been brought under the special dispensation.

Poverty Alleviation Network and Others v President of the Republic of South Africa and Others (CCT86/08) [2010] ZACC 5

**Issue:** An application was brought by the residents of Matatiele, asking the Court to declare unconstitutional and invalid the Constitution Thirteenth Amendment Act of 2007 and the Cross-
Boundary Municipalities Laws Repeal and Related Matters Amendment Act of 2007, in so far as the Acts sought to relocate the Matatiele Municipality, formerly in KwaZulu-Natal, to the Eastern Cape. The applicants argued that for public participation to be meaningful, in this case, it would require the participation to have a direct outcome on the resulting legislation.

**Outcome/finding:** For Government.

**Reasons for deferring:** Parliament and the provincial legislatures have a broad discretion in determining how best to fulfil their constitutional obligation to facilitate public involvement, provided that they act reasonably.

On the issue of the rationality of the impugned legislation, the Court held that what is required is a link between the means adopted by the legislature and the legitimate governmental end sought to be achieved. It emphasised that it is not for courts to decide in which province people must live or to second-guess the option chosen by Parliament and the provincial legislatures to achieve their policy goals. It held further that a court cannot interfere with legislation simply because it disagrees with its purpose or the means by which the purpose is achieved, unless it can be shown that the objective is arbitrary or capricious.

**International Trade Administration Commission v SCAW South Africa (Pty) Ltd. Case CCT 59/09 [2010] ZACC 6**

**Issue:** The duration of, and procedure for, reviewing anti-dumping duties.

**Outcome/finding:** For Government.

**Reasons for deferring:** The court expressly raises and discusses the concept of deference. The relevant regulations meant that anti-dumping duties would lapse on expiry of a statutorily determined 5 years and 18 month period, and that the initiation of a sunset review or a judicial review does not extend the lifespan of an anti-dumping duty beyond that period. Even though it was competent for the High Court to grant an interim interdict, it was inappropriate for it to do so because it had the effect of preventing the anti-dumping duties from lapsing, pending the finalisation of SCAW’s review application.

The restraining order brought to the fore important issues related to the separation of powers between the courts and the national executive, and the issue of the potential breach of the state’s international obligations in relation to international trade. The setting, changing or removal of an anti-dumping duty is a policy-laden executive decision that flows from the power to formulate and implement domestic and international trade policy. That power resides in the heartland of national executive authority. Separation of powers and the closely allied question whether courts should observe any level of “deference” in making orders that perpetuate anti-dumping duties beyond their normal lifespan is a constitutional matter of considerable importance.

Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision
of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric.

**Tongoane and Others v National Minister for Agriculture and Land Affairs and Others (CCT100/09) [2010] ZACC 10**

**Issue:** The applicants sought confirmation of the declaration of invalidity of the Communal Land Rights Act. In addition, they sought leave to appeal against the High Court's refusal to declare the Act invalid for failure to enact it in accordance with the correct procedure and applied for direct access to challenge the validity of the Act on the basis that Parliament failed to comply with its constitutional obligations to facilitate public involvement in the legislative process.

**Outcome/finding:** Against government.

**Reasons for not deferring:** Any Bill whose provisions substantially affect the interests of the provinces must be enacted in accordance with the procedure stipulated in section 76. While the main subject-matter of a Bill (a key factor in determining legislative competence) may not affect provinces, some of its provisions may nevertheless have a substantial impact on the interests of provinces. The test for the tagging of Bills must be informed by the need to ensure that the provinces exercise their appropriate role, fully and effectively, in the process of considering national legislation that substantially affects them.

Under section 44(4) of the Constitution, when Parliament exercises its legislative authority it is “bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution.” It is implicit, if not explicit, from this provision that, where the Constitution prescribes a procedure that must be followed in enacting a law, that procedure must ordinarily be followed.

Enacting legislation that affects the provinces in accordance with the procedure prescribed in section 76 is a material part of the law-making process relating to legislation that substantially affects the provinces. Failure to comply with the requirements of section 76 renders the resulting legislation invalid.

**OFFIT Enterprises v COEGA Development Corp and Others (CCT 15/10) [2010] ZACC 20**

**Issue:** The applicants complained that the respondents had, by continued threats of expropriation of their land and other forms of conduct over a period of approximately nine years, deprived them of their entitlement to the full use, enjoyment and exploitation of their land. The applicants argued that they had thus been deprived of their property in terms of section 25(1) of the Constitution.

**Outcome/finding:** For government.
Reasons for deferring: The Court upheld the order of the Supreme Court of Appeal, and dismissed the appeal. The judgment distinguished this matter from the other cases in the Constitutional Court on the basis that it targeted conduct rather than legislation, and that the bulk of the challenge dealt with “threatened” rather than “actual” conduct. The Court held that the applicants’ complaints did not amount to a “substantial interference or limitation that goes beyond the normal restrictions on property use and enjoyment”, and commented that the conduct of which the applicants complained was not that which was envisaged by the protection afforded in the property clause of the Constitution.

Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another (CCT 34/10) [2010] ZACC 21

Issue: The nature and extent of an organ of state’s duty to act when presented with evidence that an enterprise to which it had awarded a tender, taking into account its historically shareholding, had provided fraudulent information about the true nature of its historically disadvantaged shareholding.

Outcome/finding: Against government.

Reasons for not deferring: The reason for the enactment of the Procurement Act and its regulations was to ensure that organs of state do not remain passive when credible allegations of fronting or tender irregularities come to light. The organ of state responsible for the tender is, upon becoming aware of alleged irregularities, under an obligation to investigate the matter properly.

It is not the existence of conclusive evidence of a fraudulent misrepresentation that should trigger responsive action from an organ of state. It is the awareness of information which, if verified through proper investigation, could potentially expose a fraudulent scheme.

Whenever an enterprise is plausibly accused of having furnished false information in its tender documents, the organ of state responsible for the tender is, upon becoming aware of the alleged misrepresentation, under an obligation to investigate the matter.

Law Society of South Africa and Others v Minister for Transport and Another (CCT 38/10) [2010] ZACC 25

Issue: Various persons with actionable claims affected by an amendment to the Road Accident Fund Act mounted a constitutional challenge impugning two provisions of the amendment and a regulation made under the Act. They challenged a provision abolishing road accident victims’ residual common law right to claim losses which are not compensable under the Act; another provision limiting the amount of compensation that the Road Accident Fund was obliged to pay for claims of loss of income or a dependent’s loss of support arising from the bodily injury or death of a motor accident victim; and a regulation in which the Minister for Transport prescribed medical tariffs for health services which were to be provided to accident victims by public health establishments.
Outcome/finding: For and against government – applicants only successful with claim in relation to medical tariffs.

Reasons for deferring: The Court found the abolition of a claimant's residual common law claim a necessary and rational part of an interim legislative scheme whose primary thrust was to achieve financial viability and a more effective and equitable platform for the delivery of social security services. The court found that, in this instance, the state indeed incurred obligations to realize the right to the security of the person of road accident victims. However, the court found that the abolition of the common law residual claim was a justifiable limitation of that right. Furthermore, the Court found that the cap on compensation for the loss of income or of dependents' support did not infringe the right to property as there was no arbitrary deprivation of property by the amendments, and that the right to adequate remedy had not been infringed.

Reasons for not deferring: State actors exercise public power within the formal bounds of the law. Thus, when making laws, the legislature is constrained to act rationally. It may not act capriciously or arbitrarily. It must only act to achieve a legitimate government purpose. Thus, there must be a rational nexus between the legislative scheme and the pursuit of a legitimate government purpose. The requirement is meant — to promote the need for governmental action to relate to a defensible vision of the public good and — to enhance the coherence and integrity of legislative measures

The Court found that the medical tariff for health services prescribed by the Minister was irrational because it was incapable of achieving the purpose the Minister sought, namely to enable innocent road accident victims to obtain the health services they require. The Court declared that the regulation was inconsistent with the Constitution and invalid, and ordered the Minister to make a fresh determination.

Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others (CCT 39/10) [2010] ZACC 26

Issue: The administrative fairness of the allocation of prospecting rights to a third party in terms of the Mineral and Petroleum Resources Development Act on land owned by a community.

Outcome/finding: Against Government.

Reasons for not deferring: Any application for a prospecting right under section 16 of the Act that might have the effect of disentitling a community of its right to apply for a preferent prospecting right under section 104 of the Act, materially and adversely affected that right of a community. Before a prospecting right in terms of section 16 could be granted under those circumstances, the community concerned should be informed by the Department of the application and its consequences and it should be given an opportunity to make representations in regard thereto.

The Community was entitled to adequate notice of the nature and purpose of the administrative action that was proposed in relation to the Genorah application. It was entitled to a reasonable opportunity to make representations in relation to the Genorah application. Once the administrative decision was taken the Community was entitled to a clear statement of the administrative action. It
was entitled to adequate notice of any right to a review or internal appeal. It was entitled to adequate notice of the right to request reasons in terms of section 5 of PAJA. It was entitled to reasons. None of this was done or complied with by the Department and, finally, the Community's appeal was ignored for four months before it was told to bring a review application in court. The Court remarked that this was not the way government officials should treat the citizens they are required to serve.

2011

Mvumvu and Others v Minister of Transport and Another (CCT 67/10) [2011] ZACC 1

Issue: A constitutional challenge to legislative provisions that placed a cap on the recovery of damages by the victims of motor collisions under the Road Accident Fund Act. Applicants placed on record uncontested evidence to the effect that the impugned provisions overwhelmingly affected poor black people. They stated that the vast majority of poor people in the country are black people and the mode of transport accessible to them is public transport consisting of, amongst others, taxis and buses. They further claimed that the provisions impact disproportionately on black people.

Outcome/finding: Against government, with consideration to the requirements of good government in awarding a remedy.

Reasons for deferring: In determining a suitable remedy, the courts are obliged to take into account not only the interests of parties whose rights are violated, but also the interests of good government. The Court noted that it had previously cautioned against remedies that were likely to lead to an "unsupportable budgetary intrusion". Two reasons motivated this approach. First, budget matters fall eminently within the domain of the legislature and the executive. Secondly, ordinarily courts are ill-suited to determine such matters. Parliament was best suited to determine the extent of compensation to which the applicants are entitled.

Reasons for not deferring: The Court held that, while it may be legitimate for the State to limit compensation accruing to victims of motor vehicle accidents, it had failed to show why the applicants ought to be singled out in pursuit of this purpose. There was nothing on record which indicated that the unfair discrimination the applicants were subjected to was “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”, as per the limitations clause. It was unfair for the Act to permit full compensation where two drivers had negligently contributed to an accident, while at the same time denying full compensation where the sole cause of the accident was the negligence of one driver. In both instances no fault could be attributed to passengers. The passengers affected by the cap are as innocent as those whose claims are not limited.
Glenister v President of the Republic of South Africa and Others (CCT 48/10) [2011] ZACC 6

**Issue:** Whether the national legislation that created the Directorate for Priority Crime Investigation, known as the Hawks (DPCI), and disbanded the Directorate of Special Operations, known as the Scorpions (DSO), was constitutionally valid.

**Outcome/finding:** Although most prominently against government, aspects of the decision were for government.

**Reasons for deferring:** Both the majority and the minority judgments concluded that the legislation that created the DPCI could not be invalidated on the grounds that it was irrational or that Parliament had failed to facilitate public involvement in the legislative process that led to its enactment. The Constitution did not oblige Parliament to locate a specialised corruption-fighting unit solely within the National Prosecuting Authority and nowhere else.

**Reasons for not deferring:** The Constitution imposed an obligation on the state to establish and maintain an independent body to combat corruption and organised crime. While the Constitution did not in express terms command that a corruption-fighting unit should be established, its scheme taken as a whole imposes a pressing duty on the state to set up a concrete, effective and independent mechanism to prevent and root out corruption.

The statute provided that a Ministerial Committee could determine policy guidelines in respect of the functioning of the DPCI, as well as for the selection of national priority offences. This form of oversight made the unit vulnerable to political interference.

Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others (CCT 29/10) [2011] ZACC 13

**Issue:** (a) whether the MEC fulfilled constitutional obligations in relation to the learners' right to a basic education; (b) whether the Trustees, when vindicating their property rights had any constitutional obligations vis-à-vis the learners’ right to a basic education and, if so; (c) whether the common law remedy of rei vindicatio ought to have been developed in circumstances where the learners' right to a basic education was likely not to be given effect to as a result of an eviction. These questions involved balancing competing rights: the right to a basic education on the one hand and property rights on the other.

**Outcome/finding:** Against Government.

**Reasons for not deferring:** The Court found that the MEC had a positive obligation in terms of the Constitution to “respect, protect, promote and fulfil the rights in the Bill of Rights." More specifically, the learners' right to a basic education. The MEC also had a duty in terms of section 12 of the Act to provide public schools for the education of the learners.
Minister for Safety and Security v Van Der Merwe and Others (CCT90/10) [2011] ZACC 19

**Issue:** The main question was whether search and seizure warrants were valid, despite their failure to mention the offences to which the search related. The answer depended on whether the common law intelligibility principle, properly understood, required that the offence be specified in the search and seizure warrants issued in terms of section 21 of the Criminal Procedure Act.

**Outcome/finding:** Against Government.

**Reasons for not deferring:** The intelligibility requirement had its roots in the rule of law which is a founding value of our Constitution. Some of the essential attributes of the rule of law are comprehensibility, accountability and predictability in the exercise of all power, including the power to issue warrants. It is essential therefore that the warrant be crafted in a way that enables the person on the receiving end of the exercise of this authority to know why her rights have to be interfered with in the manner authorised by the warrant. A warrant can thus not be reasonably intelligible if the empowering legislation and the offence are not stated in it.

Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others (CCT 53/11, CCT 54/11, CCT 62/11) [2011] ZACC 23

**Issue:** The purported extension of the term of office of the Chief Justice for 5 years by the President. Section 176(1) of the Constitution provides that a Constitutional Court judge holds office for a non-renewable term of 12 years or until he or she reaches the age of 70 years, whichever is the sooner, except where an Act of Parliament extends the term of office of a Constitutional Court judge. Section 8(a) of the Judges' Remuneration and Conditions of Employment Act allowed the President to request a Chief Justice who is about to be discharged from active service to continue in office as the Chief Justice for an additional period determined by the President if the Chief Justice accedes to that request. The applicants asked the Constitutional Court to declare section 8(a) of the Act inconsistent with section 176(1) of the Constitution.

**Outcome:** Against Government.

**Reasons for not deferring:** Section 176(1) had to be interpreted against the background of the constitutional imperatives of the rule of law, the separation of powers and the independence of the judiciary. The Court found that a non-renewable term of office was an important feature of these constitutional imperatives. Section 8(a) permitted the President to extend the term of office of the Chief Justice and by this surrendered and usurped the power of Parliament. Parliament alone had the power to extend a Constitutional Court judge's term of office. It therefore amounted to an unlawful delegation of a legislative power.

The term “a Constitutional Court judge” in the second half of section 176(1), properly interpreted, meant that section 176(1) did not permit the singling out of any one of the Constitutional Court judges for the extension of their terms. The Court was unanimous that the extension of the term of
office of the Chief Justice only was unconstitutional in this case. The singling out of the Chief Justice may be permitted by section 176(1) if done by an Act of Parliament of general application, rationally connected to a legitimate governmental purpose and furthering judicial independence.

**Limpopo Province v Speaker: Limpopo Provincial Legislature and Others (CCT 94/10) [2011] ZACC 25**

**Issue:** The authority of provincial legislatures to pass legislation dealing with their own financial management. Specifically, the question whether sections 2(e) and 3 of the Financial Management of Parliament Act (FMPA), read with Schedule 1 thereto, expressly assigned to provincial legislatures the power to regulate their own financial management depended, in the first place, on the proper meaning of the phrase "expressly assigned" in section 104(1)(b)(iii), and, in the second place, on the proper meaning of the provisions of sections 2(e) and 3 of the FMPA, read with Schedule 1 thereto.

**Outcome/finding:** For the Premier.

**Reasons for deferring:** If the legislative powers of the provincial legislatures were to be implied beyond those expressly set out in the Constitution, this would diminish, through an expansive reading of the Constitution, the residual legislative powers of Parliament. This would be inconsistent with the scheme of the Constitution, by which the provincial legislatures are given specific powers under the Constitution and Parliament is assigned the rest. The plenary legislative powers granted to Parliament are not to be diminished by implying legislative powers of provincial legislatures not expressly stated in the Constitution. The assignment of powers to the provinces must be expressed in clear and unequivocal language.

**Moutse Demarcation Forum and Others v President of the Republic of South Africa and Others (CCT 40/08) [2011] ZACC 27**

**Issue:** The constitutional challenge raised by the applicants was motivated primarily by their opposition to the relocation of their areas from Mpumalanga to Limpopo. They claimed that the redetermination of provincial boundaries which resulted in the relocation perpetuated apartheid-era boundaries. These boundaries were drawn, they argued, to advance ethnic residential segregation which formed the cornerstone of the apartheid policy of separate development. By separating the area called Siyabuswa from Moutse and placing the latter in Limpopo, the applicants asserted that the redetermination of provincial boundaries concerned has the effect of breaking up contiguous areas that have a shared history and infrastructure.

**Outcome/finding:** For government.

The applicants did not point to any provision in the Constitution with which the impugned boundary was inconsistent. The fact that it may coincide with a boundary drawn by the apartheid government did not, in and of itself, render the Twelfth Amendment inconsistent with the Constitution.

On the evidence before the Court, it was unable to assume that the members of the Legislature knew nothing from any other source. Even if they had the skeletal report of the Portfolio Committee only,
that did not entitle a court to pronounce on the adequacy of the information at the disposal of a deliberative body such as the legislature before it makes a decision. Bearing in mind that the Provincial Legislature had a discretion to choose the method of facilitating public participation, it was undesirable for this Court to prescribe to the Legislature what a report to it should contain.

Haffejee NO and Others v eThekwini Municipality and Others (CCT 110/10) [2011] ZACC 28

Issue: When compensation for expropriation of property in terms of section 25(2) of the Constitution was to be determined. In terms of section 25(2)(b) property may only be expropriated “subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.”

Outcome/finding: For government.

Reasons for deferring: Allowing compensation to be fixed after expropriation burdened the property owner and triggered repellent memories of pre-constitutional arbitrary dispossessions. Although post-expropriation compensation burdens the property owner, making it a pre-condition would also burden the State unduly. This, in the end, was the compelling reason why the applicant’s contention could not be upheld.

President of the Republic of South Africa and Others v M & G Media Ltd (CCT 03/11) [2011] ZACC 32

Issue: First, how the state discharged the burden, under section 81(3) of PAIA, of establishing that its refusal to grant access to a record was justified; and second, the circumstances under which a court may call for additional evidence in the form of the contested record under section 80.

Outcome/finding: Essentially against government, however the majority decision granting more leeway that the minority on the s 80 issue.

Reasons for not deferring: It was apparent from a comparative analysis of the standards applied by courts in other jurisdictions with legislation comparable to PAIA that the state may discharge its evidentiary burden only when it has shown that the record withheld fell within the exemptions claimed. Exemptions are construed narrowly, and neither the mere ipse dixit of the information officer nor his or her recitation of the words of the statute is sufficient to discharge the burden borne by the state. This is consistent with the importance placed in the Constitution on the right of access to information, as well as with the scheme of PAIA, according to which disclosure is the rule and exemptions from disclosure are the exception.

However, proceedings under PAIA differed from ordinary civil proceedings in certain key respects. First, these disputes involve a constitutional right of access to information. Second, access to information disputes are generally not purely private disputes – requesters of information often act in the public interest and the outcome of these disputes therefore impacts the general health of our democratic polity. Third, parties to the disputes may be constrained by factors beyond their control in
presenting and challenging evidence. And finally, courts are empowered to call for additional evidence in the form of the contested record.

By using its powers under section 80 to call for additional evidence in the form of the record, the court is neither supplementing the state’s case nor making out a case for the requester. The object of the exercise is to prevent courts from being forced into the role of mere spectators in an adversarial process that, because of the nature of access to information claims, may not produce the factual record necessary for courts to execute their judicial function responsibly. It may be necessary for a court, in responsibly carrying out its duty to make a finding on the probabilities, to take on the inquisitorial role that is open to it under section 80. Where a court determines that it is in the interests of justice for it to invoke section 80, it does so in the public interest, for the public has an interest in information held by the state that is not exempt from disclosure being released, and the public likewise has an interest in information that Parliament determined should not be released, under Chapter 4 of PAIA, properly being protected from disclosure.

City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another (CC) [2011] ZACC 33

**Issue:** The rights of the owner of the property, Blue Moonlight Properties, and the obligation of the City of Johannesburg Metropolitan Municipality to provide housing for the unlawful occupiers of the property if they were evicted. Ultimately the question was whether the eviction of the Occupiers was just and equitable.

**Outcome:** Against government.

**Reasons for not deferring:** Besides its entitlement to approach the province for assistance, the City has both the power and the duty to finance its own emergency housing scheme. Local government must first consider whether it is able to address an emergency housing situation out of its own means. The right to apply to the province for funds does not preclude this. The City has a duty to plan and budget proactively for situations like that of the Occupiers.

The City provided information relating specifically to its housing budget, but did not provide information relating to its budget situation in general. The Court did not know exactly what the City's overall financial position was. This Court's determination of the reasonableness of measures within available resources could not be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or statutory obligations. It was insufficient for the City to state that it had not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations.

Whereas differentiation between emergency housing needs and housing needs that do not constitute an emergency might well be reasonable, the differentiation the City's policy made was not. To the extent that eviction may result in homelessness, it was of little relevance whether removal from one's home is at the instance of the City or a private property owner. The policy followed from the City's incorrect understanding of its obligations under Chapter 12 and its claim that it lacked resources. The City's housing policy was unconstitutional to the extent that it excluded
the Occupiers and others similarly evicted from consideration for temporary accommodation. The exclusion was unreasonable.

**Pheko and Others v Ekurhuleni Metropolitan Municipality (CCT 19/11) [2011] ZACC 34**

**Issue:** The lawfulness of the removal of the applicants and the demolition of their homes. The Court had to determine whether the circumstances of the case warranted forcible removal and demolition without an order of court.

**Outcome/finding:** Against Government.

**Reasons for not deferring:** Section 55(2)(d) of the Disaster Management Act (DMA) authorised evacuation to temporary shelters for the preservation of life. This meant that the DMA ordinarily applied only to temporary removal from a disaster-stricken area to a temporary shelter. It implied that those evacuated may return to their homes, if possible. This was not the case here. Evacuation is not the equivalent of eviction, much less of a demolition. On the Municipality’s own admission, no purpose would have been served by removing the applicants without demolishing their homes because they would otherwise have returned. This was not what section 55(2)(d) sanctioned.

The Municipality’s powers following upon the declaration of a local state of disaster must be exercised only to the extent that it was strictly necessary for the purposes set out in section 55(3). This meant that the powers concerned may not be used for purposes other than evacuation.

In engaging the DMA to evict the applicants and demolish their homes without an order of court, the Municipality acted outside the authority conferred by the DMA and contrary to section 26(3) of the Constitution.

**F v Minister of Safety and Security and Another (CCT 30/11) [2011] ZACC 37**

**Issue:** Whether the Minister of Safety and Security should be held vicariously liable for damages arising from the rape of a thirteen year old girl by a policeman who was on standby duty.

**Outcome/finding:** Against government.

**Reasons for not deferring:** The state, through its foremost agency against crime, the police service, bears the primary responsibility to protect women and children against this prevalent plague of violent crimes. Courts, too, are bound by the Bill of Rights. When they perform their functions, it is their duty to ensure that the fundamental rights of women and girl-children in particular are not made hollow by actual or threatened sexual violence. They must acknowledge the policy-drenched nature of the common law rules of vicarious liability, that it is the courts that have in the past fashioned and favoured them, and that now the rules must be applied through the prism of constitutional norms.
The officer who committed the rape was not in uniform, his police car was unmarked and he was not on duty but on standby. But his use of a police car facilitated the rape. That he was on standby is not an irrelevant consideration. His duty to protect the public while on standby was incipient. But it must be seen as cumulative to the rest of the factors that point to the necessary connection. He could be summoned at any time to exercise his powers as a police official to protect a member of the public. What is more, in that time and space he had the power to place himself on duty. The court was therefore satisfied that a sufficiently close link existed to impose vicarious liability.

2012

C and Others v Department of Health and Social Development, Gauteng and Others CCT 55/1 [2012] ZACC 1

**Issue:** Confirmation of an order of unconstitutionality by the High Court in respect of two sections of the Children’s Act, which did not provide for automatic judicial review when children were removed from their family environment by state officials, and placed in temporary safe care.

**Outcome/finding:** Against government.

**Reasons for not deferring:** Insufficient safeguards for situations where officials were wrong in removing the child, or where the Children’s Court ordered a removal on the basis of insufficient evidence. Remedy of reading in the requirement that the Children’s Court review all removals soon afterwards.

Premier, Limpopo Province v Speaker of the Limpopo Provincial Legislature and Others (CCT 03/12) [2012] ZACC 3

**Issue:** In a successor judgment to the earlier decision finding that provincial legislatures lacked the authority to pass legislation regarding their own financial management, the Court considered the constitutionality of similar legislation in five provinces not before it in the previous case.

**Outcome/finding:** Against the provincial legislatures.

**Reasons for (not) deferring:** The five additional provincial Acts were also found to be unconstitutional, as the provinces had not been assigned the power to regulate their financial affairs, and the Constitution did not envision the enactment of such legislation. The orders of invalidity in respect of all five Acts were suspended for 18 months in order to avoid a legislative lacuna, which would have a negative impact on good government.
Mathilda Louisa Wiese v Government Employees Pension Fund and Others (CCT 111/11) [2012] ZACC 5

**Issue:** Confirmation of declaration of invalidity of the Government Employees Pension Law, and appeal against suspension of invalidity.

**Outcome/finding:** For government.

**Reasons for deferring:** Not in the interests of justice to make a finding on the validity of the law or the appropriate remedy, as the substantive issues had become moot due to the enactment of an amendment Act.

The Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality and Another (CCT 12/12) [2012] ZACC 9

**Issue:** This was an urgent application for compliance with, or variation of, the order granted in the Blue Moonlight case, where the Court had declared the City’s housing policy to be unconstitutional and ordered the City to provide temporary accommodation to certain occupiers. This application sought to compel the City to provide temporary accommodation for a broader group of people, and to postpone the eviction date. Applicants further argued that the City would be unable to comply with the original order, as it had not meaningfully engaged with the occupiers regarding temporary accommodation.

**Outcome/finding:** For government

**Reasons for deferring:** Court held that the application should have been brought in the High Court. No case of non-compliance, or for variation, had been made out. It was unnecessary to make a finding as to whether the requirement of meaningful engagement included a substantive requirement entitling all evictees to contest the quality of temporary accommodation offered to them, since the evidence before the Court showed that the applicants would be provided with accommodation and would not be made homeless.

Minister of Home Affairs and Others v Tsebe and Others, Minister of Justice and Constitutional Development and Another v Tsebe and Others (CCT 110/11, 126/11) [2012] ZACC 16

**Issues:** Application for leave to appeal against an order by the High Court prohibiting the deportation or extradition of a person who faced a possible death penalty in Botswana. No assurance had been given to the South African government that the death penalty would not be imposed.

**Outcome/finding:** Against government.

**Reasons for not deferring:** The case could not be distinguished from the earlier decision of Mohamed v President of the RSA, which had held that a person could not be surrendered to a country where they faced the real risk of the death penalty. There were no grounds for finding that
Mohamed had been wrongly decided. Extradition or deportation to a country which refused to provide the necessary assurance, when the person faced a real risk of the death penalty being inflicted, would violate the rights to life, dignity and to freedom from cruel and inhuman treatment.

National Treasury and Others v Opposition to Urban Tolling Alliance and Others (CCT 38/12) [2012] ZACC 18

Issues: Appeal against a High Court order interdicting SANRAL from levying and collecting tolls for the use of Gauteng roads.

Outcome/finding: For Government.

Reasons for deferring: The judgment squarely raises separation of powers concerns as reasons for the decision.

The Court held that the High Court had failed to consider the significance of the principle of separation of powers, and that courts ought to refrain from entering the exclusive terrain of the executive and legislative branches, unless such intrusion was mandated by the Constitution. Courts must inquire whether it is constitutionally appropriate to grant an interdict, and must examine whether the order would encroach on the domain of another sphere of government. The High Court should have found that prejudice suffered by motorists in Gauteng if the interim interdict was not granted did not exceed the prejudice to national government and SANRAL, should the interdict be granted.

Minister of Transport and Another v Mvumvu and Others (CCT 62/12) [2012] ZACC 20

Issues: Application to extend the suspension of an order of constitutional invalidity in respect of certain sections of the Road Accident Fund Act by an additional three months, as Parliament had been unable to enact remedial legislation in time.

Outcome/finding: For government.

Reasons for deferring: Sufficient explanation, just and equitable to extend. Extended for a further 6 months.

Print Media South Africa and Another v Minister of Home Affairs and Another (CCT 113/11) [2012] ZACC 22

Issues: Constitutionality of various sections of the Film and Publications Act which required publishers other than registered newspapers to submit intended publications, which contained sexual conduct that violates or shows disrespect for the right to human dignity, degrades a person or constituted incitement to cause harm, to the Film and Publications Board for prior approval.
**Outcome/finding:** Against government.

**Reasons for not deferring:** The Court held that the system of prior classification limited the right to freedom of expression, and was not justifiable as it was not proportional, and less restrictive measures were available. The differing treatment of magazines and newspapers was found to violate the right to equality and the principle of legality. The criminalisation of a failure to submit for classification was held to be a drafting error, and declared unconstitutional.

**Democratic Alliance v President of the Republic of South Africa and Others (CCT 122/11) [2012] ZACC 24**

**Issues:** Constitutional validity of the President’s appointment of the National Director of Public Prosecutions, Menzi Simelane.

**Outcome/finding:** Against government.

**Reasons for not deferring:** In light of factors such as the criticisms of Simelane in the Ginwala Commission Report, and in a Public Service Commission report, the procedure used by the President and the Minister of Justice and Constitutional Development in appointing Mr Simelane was not rationally related to the purpose for which the power was granted, and thus the decision was constitutionally invalid.

**Schubart Park Residents’ association and Others v City of Tshwane and Others (CCT 23/12) [2012] ZACC 26**

**Issues:** The High Court had refused an application for the restoration of residence rights following a discontinuation of electricity and water supply. This had led to violent protests and the removal of all respondents by law enforcement authorities, and restricted access to the complex. The High Court had found that the building was unsafe, and ordered the residents and the City to engage and agree on temporary shelter and alternative housing, pending an enquiry into possible refurbishment. The parties were unable to do so and the High Court made a final order requiring the City to provide temporary housing until the complex had been refurbished. The application for restoration of residence rights was dismissed.

**Outcome / finding:** Against government.

**Reasons for not deferring:** The High Court order could not serve as an eviction order, and the residents were entitled to return as soon as reasonably possible. The City and the residents were directed to engage meaningfully and to report to the High Court on their progress. The City was ordered to pay the residents’ costs.
Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly (CCT 16/12) [2012] ZACC 27

Issues: Constitutional validity of Rules of the National Assembly which required an individual member of the Assembly to obtain permission from the Assembly before introducing a Bill.

Outcome / finding: Against the speaker

Reasons for not deferring: The Constitution empowered individual members of the assembly to initiate or prepare legislation; and to introduce Bills. The Constitution also empowered the Assembly to make rules to regulate its own process. Read together, these provisions did not permit rules to be made which vitiated the exercise of the constitutional powers of members.

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Motswagae and others v Rustenburg Local Municipality and Another (CCT 42/12) [2013] ZACC 1

Issues: Whether the municipality acted lawfully in authorising construction work on property occupied by the applicants without obtaining for court order for the eviction of the applicants.

Outcome/finding: Against government (municipality).

Reasons for not deferring: The Court held that the work authorised by the municipality interfered with the applicant’s peaceful and undisturbed occupation of their homes. The intrusion was so significant a disturbance that it constituted a form of eviction. The municipality must act reasonably at every stage in the process of providing housing to people within its jurisdiction. Unconstitutional conduct cannot, by definition, qualify as reasonable conduct. The municipality ought to have secured the eviction before carrying on with intrusive and objectionable construction work. An interdict should therefore have been granted.

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Issues: The right to equality before the law and equal protection and benefit before the law. The case sought to address the anomaly arising from the failure to afford divorcees of members of the Post Office Retirement Fund similar rights and advantages afforded to former spouses of members of funds subject to the Pension Funds Act and the Government Employees Pension Law.

Outcome/finding: Against government.

Reasons for not deferring: Sections 10 to 10E of the Post Office Act, the relevant provisions dealing with the administrative and financial matters of the Fund, were found to be clearly unconstitutional. The differentiation between the payment of divorced spouses’ interests regulated by the Pension...
Funds Act and the Government Employees Pension Law Amendment Act on the one hand, and the payment of divorced spouses’ interest governed by the Post Office Act on the other was found to be irrational and without basis.

**Reasons for deferring (on remedy):** The declaration of invalidity was suspended for eight months for the Legislature to cure the defect. If the unconstitutionality was not remedied within this period, a provision of the Government Employees Pension Law would be read into the Post Office Act. The Court held that Parliament and the Executive should carefully consider the consequences of failing to remedy this constitutional defect, especially how the rather extensive reading-in would affect the structure and application of the relevant legislation.

**Agri South Africa v Minister for Minerals and Energy (CCT 51/12) [2013] ZACC 9**

**Issues:** Whether mineral rights enjoyed (by Sebenza) during the subsistence of the Minerals Act were expropriated when the MPRDA took effect. The SCA had dismissed leave to appeal, holding that Sebenza’s mineral rights did not constitute property. The Constitutional Court disagreed.

**Outcome/finding:** For government.

**Reasons for deferring:** Agri SA’s argument that the state had, in terms of the correct interpretation of section 25, expropriated the mineral rights, was rejected. It disregarded the public interest and constitutional imperative to transform and facilitate equitable access to our mineral and natural resources, to which courts are enjoined to have regard when construing section 25. Unlike before, private mineral ownership rights were not to be over-emphasised at the expense of the urgent and critical need to open up equitable access to, and promote economic development through, the exploitation of mineral and petroleum resources.

Sebenza could not convert and exploit its coal rights because of its precarious financial position. The possibility to preserve and continue to enjoy the unused old order right was available to it and similarly-situated holders, but Sebenza failed to take advantage. The MPRDA cannot therefore be held to be an instrument by which Sebenza’s rights were expropriated at commencement.

**KwaZulu- Natal Joint Liaison Committee v MEC Department of Education, KwaZulu-Natal & Others (CCT 60/12) [2013] ZACC 10**

**Issues:** Applicant sought leave to appeal a decision by the High Court, dismissing its application to enforce payment of certain monies it claimed to be due to the schools it represented. Leave to appeal had been refused by both the High Court and SCA.

**Outcome/finding:** Against government.

**Reasons for not deferring:** No contract between the parties. The Department extended an undertaking to make payments in terms of its statutory and constitutional obligations, distinct from a
contractually enforceable obligation. However, a 2008 notice promised payments to recipients who expected payment, subject only to the possibility of due revocation.

State not obliged to pay subsidies but when it does, acts in accordance with its Constitutional duty to fulfil the right to basic education. Once the subsidy is promised, the negative rights of the learners to not have their right to education impaired is implicated. Once the due date for the payment of a portion of the subsidy had passed, this created a legally binding obligation.

A letter of May 2009 constituted an effective signal by the Department that schools henceforth could not rely on the undertaking in the 2008 notice. The court relied on the principle that retroactive termination of benefits will not be fair unless there is an overriding public interest.

Once a promise of payment is made, an official cannot unilaterally diminish the amounts to be paid after the due date has passed. Delay in payment constitutes a breach of obligations. The undertaking therefore was indeed enforceable, but on broader public law and regulatory grounds rather than bilateral agreement.

The subsidies promised in the 2008 notice could not be subject to retroactive diminution in the absence of “an overriding public interest”. Apart from budgetary cuts, there appeared to be none. The Court noted that this was by no means a radical intervention. Accountability and rationality demand that government prepare its budgets to meet payment deadlines.

**Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa and others (CCT 91/12) [2013] ZACC 13**

**Issues:** Confirmation proceedings regarding the lawfulness of a decision by the President in relation to the remuneration of Regional Magistrates and Regional Court Presidents, and implications for judicial independence.

**Outcome/finding:** For government.

**Reasons for deferring:** When the President made the determination he was exercising a power which impacts on a matter that is of importance to the independence of the Judiciary, in terms of a particular constitutional and legislative scheme, subject to clear statutory checks, balances and standards of review. The decision did not constitute administrative action and PAJA did not apply.

There was no basis for the finding that the President was “obliged to consider whether the different categories of Magistrates should be remunerated according to different salary scales”. The President was entitled to rely on the recommendation of the Magistrates’ Commission. The processes were rational. A further challenge to the procedural fairness of the decision was rejected. The decision did not amount to administrative action. An executive action may be reviewed on narrow grounds which fall within the ambit of the principle of legality. These grounds include lawfulness and rationality. Procedural fairness is not a requirement for the exercise of executive powers.

The decision by the High Court that the decision was irrational was therefore overturned.
Jacobus Johannes Liebenberg N.O. and 84 others v Bergrivier Municipality and others (CCT 104/12) [2013] ZACC 16

Issues: Application for leave to appeal against a decision by the SCA which had upheld the lawfulness of property rates imposed by the municipality over an eight – year period.

Outcome/finding: For Government (the municipality)

Reasons for deferring: The municipality had properly imposed the rates for certain years under the Local Government Transition Act, and in respect of other years had substantially complied with the relevant statutory requirements.

Sigcau v President of the Republic of South Africa and others (CCT 93/12) [2013] ZACC 18

Issues: A dispute about who the rightful ikumkani, or king, of the amaMpondon aseQaukeni was. The President had established a commission to establish whether the existing traditional leadership structures and positions were in accordance with customary laws and customs, and confirmed the Commission’s determination that the fourth respondent was the rightful king. An issue was whether the old (Traditional Leadership and Governance Framework Act) or new Act (Traditional Leadership and Governance Framework Amendment Act) applied.

Outcome/finding: Against government.

Reasons for not deferring: The Commission’s procedures were initiated and substantially completed under the old Act. The notice confirming the determination indicated that the President elected to invoke the new Act. Because of the material differences between the old Act and the new Act, a notice issued under the new Act could not be taken to have been issued under the old Act. The notice was therefore set aside, as the President purported to exercise powers not conferred on him by the provisions of the old Act.

Head of Department, Department of Education, Free State Province v Welkom High School and Another (CCT 103/12) [2013] ZACC 25

Issues: Whether the Head of the Department of Education in the Province, which issued instructions to readmit two learners excluded in terms of pregnancy policy, was authorised to instruct or compel the school principals to act in a manner contrary to an adopted policy, and to take action in contravention of such policy.

Having decided that the governing body was competent to adopt a pregnancy policy, did the Schools Act authorise them to adopt pregnancy policies that had exclusionary effects that did not take into account constitutional rights?
Did the HOD’s status as the employer of every public-school principal within the province entitle him to issue instructions requiring the latter to ignore, contravene or override policies duly adopted by the relevant school governing body?

**Outcome/finding:** Substantially against Government.

**Reasons for deferring:** No governing body may adopt and enforce a policy that undermines the fundamental rights of pregnant learners to freedom from unfair discrimination and to receive an education. The Court expressed serious concerns regarding the constitutionality of the pregnancy policies adopted by the respondent schools. The schools declined to make submissions on the constitutionality of the policies, asserting that the issue had not properly been placed before the Court. The Court therefore found that it was appropriate to refrain from making a declaration of invalidity, but invoked section 172(1)(b) of the Constitution to order the school governing bodies to review their pregnancy policies in the light of the judgment. The Court held that as a democratically constituted body representative of the interests of the school community, the school governing bodies were best placed to fashion policies that took into account the needs of their particular schools. The schools were ordered to report back to the Court on reasonable steps they have taken to review the policies.

**Reasons for not deferring:** Neither the Minister nor the Provincial Department was empowered or ideally suited to adopt a pregnancy policy for a particular public school. The Free State HOD could not, therefore, instruct the principals as he did and could not lawfully restrain the conduct of the principal.

Whilst the Free State HOD exercised executive control over the respondent schools, this did not entitle him to superimpose his own policies and countermand those of the school by fiat, simply because he is of the opinion that the latter are unconstitutional. Even if there may be instances in which an organ of state may resort to self-help in order to protect the rights in the Bill of Rights, this could never be countenanced where internal remedies are available, as were available in this instance. An argument that the Free State HOD was empowered to interfere as he did by virtue of his status as employer was rejected. The governing bodies were empowered to adopt pregnancy policies. The HOD was obliged to address his concerns with the policies in terms of his powers under the Schools Act. He did not do so, but purported to usurp an effective power of policy formulation that he did not have, and thereby acted unlawfully.

**National Society for the Prevention of Cruelty to Animals v Minister of Agriculture, Forestry and Fisheries and others CCT 120/12 [2013] ZACC 26**

**Issues:** Whether a statutory provision that required a Magistrate to decide applications for, and, issue, animal training and exhibition licences was consistent with the doctrine of separation of powers.

**Outcome/finding:** Against government (formally speaking in terms of the result of the case, although government did not oppose the declaration of invalidity)
Reasons for not deferring: Performance of this function by a Magistrate offends the separation of powers and is, therefore, inconsistent with the Constitution.

Reasons for deferring in terms of remedy: The Court suspended the declaration of invalidity for 18 months to give Parliament the opportunity to cure the defect. In the meantime sections of the Act continued to operate.

Mzoxolo Magidiwana and other Injured and Arrested Persons and others v President of the Republic of South Africa and others CCT 100/13 [2013] ZACC 27

Issues: Application for leave to appeal - sought an order for the President, Minister and Legal Aid to be compelled to provide or ensure legal aid at state expense to applicants in proceedings before the Marikana Commission of Enquiry.

Outcome/finding: For government - leave to appeal dismissed.

Reasons for deferring: Courts not have the power to order the executive branch of government on how to deploy state resources. Not in the interests of justice to grant leave to appeal in circumstances where the disputed issues still have to be determined in the main review application.

Mazibuko v Sisulu and Another (CCT 115/12) [2013] ZACC 28

Issues: Appeal against previous High Court decision; Direct access application concerning when and how a member of the National assembly could initiate a motion of no confidence against the President.

Outcome/ finding: Against government (speaker)

Reasons for not deferring: Although the appeal against the High Court’s order was dismissed, the Court finding that the Rules did not empower the Speaker to schedule a motion of no confidence if the Programme Committee had not reached consensus on tabling the motion, it granted direct access and declared Chapter 12 of the Rules invalid to the extent of its inconsistency with s 102(2) of the Constitution. The declaration of invalidity was suspended for six months. The Court allowed the Speaker’s cross-appeal against an adverse costs order in the High Court, but dismissed a similar cross-appeal by the Chief Whip.

Mail and Guardian Media Limited and others v M J Chipu N.O. (Chairperson of the Refugee Appeal Board) and others (CCT 136/12) [2013] ZACC 32

Issues: Whether section 21(5) of the Refugees Act were inconsistent with section 16(1)(a) and (b) of the Constitution to the extent that it precluded members of the public or the media from attending proceedings of the Refugee Appeal Board in all cases, and failed to confer a discretion upon the Refugee Appeal Board to allow access in an appropriate case.
Outcome/finding: Against government [Minister of Home Affairs was the third respondent].

Reasons for not deferring: Provision invalid to the extent it did not give the tribunal a discretion to allow access when certain requirements had been met. The initial refusal to allow the applicant to attend the hearing was made under the strict statutory regime which did not give it a discretion to relax the requirement of confidentiality. After the judgment and pending the curing of the defect by Parliament, the Appeal Board would have a discretion to relax the requirement of confidentiality. It is only proper that it be given an opportunity to exercise its discretion if it is approached again before a court of law may deal with the matter, if necessary.

Reasons for deferring (on remedy): Declaration of invalidity suspended for two years in order to give Parliament an opportunity to remedy the defect. For the purposes of a temporary remedy, the remedy of reading-in would be appropriate, pending Parliament’s curing of the defect.

Member of the Executive Council for Education in Gauteng Province and two others v Governing Body of the Rivonia Primary School and others CCT 135/12 [2013] ZACC 34

Issues: Was the Gauteng Head of Department (HOD) vested with decision-making power in relation to the admission of learners to public schools; was the HOD empowered to depart from the admission policy and admit the learner; and was the HOD’s exercise of that power reasonable and procedurally fair? The SCA had held that the conduct of the HOD in admitting the child was unlawful.

Outcome/finding: For Government on HOD powers and admittance of learner; against government on procedural fairness.

Reasons for deferring: Admission policies must be applied in a flexible manner, which cannot limit the discretion of the HOD. The SCA erred in placing admission decisions squarely in the hands of the Governing Body and not allowing for the HOD to instruct the principal to admit the learner in excess of the school’s admissions policy.

Reasons for not deferring (procedural fairness): The decision by the HOD was not exercised in a procedurally fair manner.

The Teddy Bear Clinic for Abused Children and another v Minister of Justice and Constitutional Development and another CCT 12/13 [2013] ZACC 35

Issues: Confirmation of a lower court ruling that certain provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act relating to the criminalisation of consensual sexual conduct with children of a certain age were constitutionally invalid.

Outcome/finding: Against government.

Reasons for not deferring: Impugned provisions infringed adolescent’s rights to dignity and privacy, and violate the principle of the best interests of the child. The impugned provisions criminalised
developmentally normal adolescent conduct. A moratorium was ordered on all investigations into, arrests of, and criminal and ancillary proceedings against adolescents in relation to said sections, pending Parliament’s remediying of the defects in the statute. The court ordered the Minister to expunge the convictions and sentences of any adolescent pursuant to said section and to remove their names from the Register.

**Reasons for deferring (on remedy):** Severing the invalid provisions and reading-in were inappropriate. The regulation and legislation of sexual conduct in the public interest fall squarely within the Legislature's domain, subject to the Constitution. While the provisions were patently unconstitutional, Parliament may wish to reconsider the close-in-age defence in light of the court's decision. There was a significant difference between declaring the current Act to be unconstitutional, and instructing Parliament which of a range of constitutional policy choices it should make in addressing that (un)constitutionality. Parliament was best suited to ensure that the ultimate statutory regime is decided upon in an open, inclusive and transparent manner. The court, therefore, decided that the suspension of invalidity would be suspended for 18 months in order to allow Parliament to remedy the defects in the statute.

**Patrick Lorenze Martin Gaetner and two others v Minister of Finance and two others (CCT/56/13) [2013] ZACC 38**

**Issues:** Constitutionality of sections of the Customs and Excise Act – imitation of the right to privacy. Government had conceded the unconstitutionality of section 4 but contested the extent of the invalidity; whether the declaration of invalidity should be suspended and rendered non-retrospective; and whether in the meanwhile words should be read into the impugned provisions to make them constitutionally acceptable. Question of whether reading-in as a remedy intruded into Parliament's territory?

**Outcome/finding:** Largely against Government, but with some deference on remedy.

**Reasons for not deferring:** Sections found to limit the right to privacy, not justified as less restrictive means of achieving the purpose of the Act existed. Temporary reading-in found to be permissible, just and equitable. It recognises the Legislature's ultimate responsibility for amending Acts of Parliament, and is temporary.

**Reasons for deferring (on remedy):** Retrospective invalidity would be inconsistent with jurisprudence. The declaration of invalidity was suspended, but with a tightly framed reading-in, and the suspension to be no more than six months. The Court was loath to make a distinction between routine and non-routine searches, since parliament was in the process of crafting a legislative measure to address the unconstitutionality. Legislature was to be given latitude to formulate the inner and outer reaches of the search power.

Without a suspension of invalidity, a lacuna would be created and SARS would not be able to conduct even regulatory searches. A suspension, coupled with an interim reading-in, would afford Parliament an opportunity to craft an appropriate legislative solution to remedy the constitutional defect.
Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) LTD and others (CCT 41/13) [2013] ZACC 39

Issues: The division of powers and competences between different spheres of government, as well as the proper approach to challenging public power that has been exercised under a particular statutory framework. The central question was whether sections 16 and 25 of Land Use Planning Ordinance (LUPO) had been impliedly amended or repealed because they are inconsistent with the municipal and provincial competencies delineated in the Constitution, the Systems Act and the Structures Act. A further question was whether LUPO authorised provincial authorities to decide rezoning and subdividing applications; and whether the SCA had been correct to confirm the municipality's decision to grant a subdivision application.

Outcome/finding: For government.

Reasons for deferring: In the absence of a proper and direct attack on the constitutionality of LUPO, the Court was constrained to determine any challenge to the Provincial Minister's decisions on the basis that LUPO is constitutionally valid. Found that LUPO has not been impliedly amended or repealed, and its provisions authorised provincial involvement in rezoning and subdivision applications. However, it only granted that authorisation if a municipality had elected not to decide the subdivision application itself. In the instant case, the Municipality elected to decide Lagoonbay's subdivision application. The Court therefore found that, under LUPO, the Provincial Minister was not the competent authority to grant or refuse that application, and that the municipality was best placed to make rezoning and subdivision decisions.

Lagoonbay failed to show that, to the extent that the Provincial Minister may have ignored or revisited some of the conclusions reached during the earlier approval processes, he improperly or unlawfully exercised his discretion in terms of section 36 of LUPO.

Mansingh v General Council of the Bar and Others (CCT 43/13) [2013] ZACC 40

Issues: Whether the President had the constitutional power to confer “silk” or senior counsel (SC) status on advocates.

Outcome/finding: For government

Reasons for deferring: The President's section 84(2) powers had to be viewed against the executive functions set out in section 83 of the Constitution, which acts as a catch-all provision to ensure that the President has all the power necessary to carry out the functions given under the Constitution or legislation. The wording of section 84(2) was both permissive and broad, affording a wide discretion to the President. As the President holds a position both as Head of State and as head of the national executive, he or she has power to confer honours on any category of persons. The applicant had failed to explain why these permissive powers should be limited in the way she contended. The
contextual setting of the power to confer silk plays an important role in determining what constitutes an "honour" in terms of section 84(2)(k).
PART III: CONCLUSION

What does this survey suggest?

There are cases where the Court does show deference on the grounds of comity, deferring on matters of foreign policy, including entering into extradition agreements (Quagliani) and in relation to international trade and anti-dumping policy (International Trade Administration Commission). In Opposition to Urban Tolling Alliance the Court articulates a clear unwillingness to intervene in what is seen as the exclusive domain of other branches of government. Less high profile examples of the Court deferring to exercises of power by other branches of government can be seen in Association of Regional Magistrates and Mansingh.

There are counter-examples of cases of this type where the Courts have not deferred in matters where it might have been thought that they would defer – notably Albutt’s finding on hearing victims in certain categories of pardon cases, and the high profile cases of Glenister and Simelane. Whatever the merits of those individual decisions, though, it is difficult to see them as part of a broad ongoing trend, when considered in light of the counter-examples cited in the previous paragraph.

The suggestion that some rights are especially deep-rooted and likely to elicit increased scrutiny and less deference from the Court seems to find significant support. The Court has upheld a challenge to enforce the right to vote (Richter); has asserted children’s rights (Centre for Child Law, C v Department of Health and Social Development and Teddy Bear Clinic); it has asserted the right to equality in recovering damages for road accident victims (Mvumvu); it has asserted the intelligibility principle as part of the rule of law as a requirement for the validity of arrest warrants (van der Merwe); it has ruled to protect the separation of powers and the independence of the judiciary (Justice Alliance and National Society for the Prevention of Cruelty to Animals); it has allowed the recovery of damages for rape by standby policeman (F v Minister); and it has prevented deportation when facing the possibility of the death penalty (Tsebe). Whilst all these examples are of findings against government, it is interesting to note that there is an example where the principle works in government’s favour, when the Court in Agri SA invoked the importance of transformation in accessing mineral resources.

A split between the approach in determining a rights violation and determining the appropriate remedy is also evident in some cases. In Richter, after finding a violation of the right, the Court tailored the remedy because of sensitivity to the practical challenges of implementing the order. The Court did not grant the relief sought in Nokotyane, but ordered the municipality to make a speedy decision to ease the plight of the litigants. In Mvumvu, the Court found a violation but took the practical requirements of good government into account in considering the appropriate remedy, leaving it to Parliament to determine the appropriate remedy. A similar approach was taken in the second Premier: Limpopo case, where the Court suspended order of invalidity in order to avoid legislative lacuna that would be harmful to good government.

There are several instances where the Court is seeks to defer to other branches of government on the basis of some manifestation of the institutional expertise argument. In AParty, the Court is sensitive to the practical difficulty of implementing the order asked for. In Koyabe, it upholds the
need to pursue internal remedies with the affected administrative agency before approaching the courts. The practical difficulties of implementation are also recognised in Reflect-All 1025. There are many instances of the Court ordering Parliament to remedy legislation (for example in Brümmer), rather than the Court reading in its own interpretation.

In Poverty Alleviation Network and Moutse Demarcation Forum the Court defers on boundary demarcation, disavowing any second guessing of legislative choices. In International Trade Administration Commission the Court is expressly concerned not to intrude into a policy-laden, polycentric issue. In Law Society v Minister for Transport, the Court requires the Minister to make the fresh medical tariff determination. In Mvumvu, the Court is worried about budgetary intrusion, and leaves the determination of the appropriate levels of compensation to parliament. In Ngewu, the Court gives Parliament time to remedy the defect in the impugned legislation, while make provision for reading-in to come into operation if this is not done. The Court follows a similar approach in Gaetner. And in Welkom High School, the Court empowers school governing bodies as being best placed to review pregnancy policies.

The surveyed cases do not seem to support the theory that the Court is more likely to defer in socio-economic rights cases. Whilst the impugned policy in Mazibuko was upheld, there is an otherwise fairly steady stream of cases where the court has not deferred, particularly on evictions: for instance Joe Slovo (requiring alternative accommodation and meaningful engagement), Abahlali (which presents an interesting dynamic by invoking national legislative framework against the provincial, as well as a majority argument against an over-expansive interpretation due to legal certainty), Blue Moonlight Properties (where the Court was willing to interrogate the budgetary information put forward by the City, and find the impugned housing policy unreasonable), and Schubart Park.

This trend may reflect a shift in the types of socio-economic rights cases coming before the Court rather than a radical change in the Court’s approach. And it is notable that the Court is conscious of the impact of its decisions – in Nokotyane, for example, it is careful to avoid a ‘queue jumping’ situation and does not allow the group that went to court to benefit before others.

It is also important to note the subtle dynamics at play in many of the cases, which are seldom captured by some of the more blanket and absolute criticism of the courts alleged over-reaching. For example, in Justice Alliance, the Court is concerned with protecting parliament’s power. This highlights that there are other dimensions to the separation of powers than ‘Court vs The Rest” – the principle also applies as between Executive and Legislature.

There are also interesting dynamics when different parts of government come up against each other in litigation. The Abahlali decision tests a national legislative scheme against provincial law.\textsuperscript{151} And when parts of government litigate against each other, as in the Premier: Limpopo Province cases, the standard critiques of judicial over-reach don’t seem to work.

It is noteworthy, then, that deference again operates on more than one level – for example in Abahlali, whilst it might be said that the court was not deferent to the provincial legislation, it is upholding a national legislative framework that other branches of government had put in place –

\textsuperscript{151} See further Klug, “Finding the Constitutional Court’s Place”, 20 – 29.
therefore, arguably, deferring to the expertise of those branches to establish national housing policy. In light of these dynamics, it would be difficult to imagine how critics of the court could argue that the court should defer to one aspect and not the other.

It might also behove government to think about why it “loses” particular kinds of cases, rather than blaming the courts for usurping their functions. A good example of what seems an especially ill-conceived litigation strategy is the Tsebe case. Bearing in mind the strongly anti-death penalty posture evinced in the Court’s previous decisions in Makwanyane and Mohamed, the factual circumstances of Tsebe must have made it difficult to see how the denial of extradition could be overturned. The arguments put up by government are strikingly weak, especially considering that, in any legal system, it will likely take considerable force of argument to persuade the highest court to overrule one of its own decisions. Surely the weaknesses in the case must have been apparent, and yet the matter was still argued in the Constitutional Court. The principle of non-extradition to face the death penalty is a well-established one internationally, as well as in South African case law in the Mohammed case. The decision making process that led to the case being taken to the highest court at all is surely a big part of the problem.

Indeed, the more one looks at the issue, the more complex it becomes, and the more apparent it is that one needs to look more deeply than a simple ‘the courts are too deferential or not deferential enough’ dichotomy. For example, Hoexter has criticised the drafting of the Promotion of Administrative Justice Act (PAJA) for failing to facilitate the creation of an integrated system of administrative law, and for not reducing “the primacy of judicial review”152 – indeed, suggesting that it was likely to become even more prominent than under the previous system of parliamentary sovereignty.153 Hoexter argues that the Act focuses on concepts such as a decision, right, affect, direct and external – and “thus encourages judges and lawyers to spend their time working out the content of these concepts, instead of working out the factors relevant to judicial intervention and non-intervention.” Hoexter further argues that the Act tries to confine judicial scrutiny to the narrowest category of cases, which she suggests may goad judges to intervene as much as possible when they are able to.154 If this criticism is correct, then it means that at least some of the problems (whatever they might be) with administrative law review are due, at least to some extent, to legislation – drafted and passed by Parliament.

It is also worth noting that, while the courts have been subjected to criticism from government and the ruling party for supposedly over-reaching, there have been opposing criticisms that the courts have not been going far enough in holding government to account.155 Indeed, with reference

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152 Hoexter, “Future of Judicial Review”, 495, and for a detailed critique see 513 – 519.

153 Ibid., 498. Hoexter’s concern, based in part on the experience in Australia, is that codification tends to encourage lawyers to test the limits of review.


specifically to the Court’s socio-economic rights jurisprudence, Deputy Chief Justice Moseneke has acknowledged that "some have made out a compelling case that the Constitutional Court has been excessively deferential to the political branches."\textsuperscript{156}

There are indications in some of the judgments of the Court’s concern with government compliance, or lack thereof, with its orders. Regarding the 2009 judgments, Klug makes the following remarks:

"Government’s responsiveness to the courts and public claims of rights are also matters of concern to the Constitutional Court, which repeatedly sought ... to remind government ... of [its] duty to be responsive to litigants and to ensure that ... barriers that inhibit access to justice or other means of making government transparent and accountable are not unduly burdensome."\textsuperscript{157}

Klug highlights, \textit{inter alia}, the decision in \textit{Brümmer}, striking down the 30 day limit on appeals in PAIA; the decision in \textit{Von Abo} upholding a lower court decision due to the state’s failure to appeal; and the Court’s deprecation in \textit{Van Straaten} of the state’s failure to respond to a case before the Court, noting that this was not the first such occurrence.\textsuperscript{158} To this can be added the decisions in \textit{Ngewu} and \textit{Gaetner}, highlighted above, which provide for reading-in to ‘kick in’ if Parliament does not remedy the identified unconstitutionality. Does this suggested that the Court is concerned with a possible lack of timeous response by Parliament?

It is worth making an obvious but important point: it is all very well talking about the need to respect the constitutional role of other arms of government, but the converse is also true. As Roux points out, the doctrine of separation of powers “also concern the extent of permissible legislative and executive intrusion into the judicial domain, and between the executive and legislative branch ...”\textsuperscript{159}

None of this is to suggest that the Court’s decisions in the surveyed period are beyond criticism. Commentators have expressed concern about a failure to engage coherently with the requirements of the separation of powers doctrine in several of the decisions.\textsuperscript{160} Kohn argues that the decisions in \textit{Albutt} and \textit{Simelane} are illustrative of a trend to dilute the principle of legality, and particularly of rationality, at the expense of reliability and certainty in the law.\textsuperscript{161} But it does not seem, at least when looking at the cases surveyed here, that it could fairly be said that the Court has been systematically over-reaching its institutional role, and usurping the democratic functions of other branches of government. Whilst there may be some decisions that can be argued to infringe the separation of

government what to do; it only rules on the consistency with the Constitution of government’s proposed remedial steps.

\textsuperscript{156} Moseneke, “Striking a Balance”, 21.

\textsuperscript{157} Klug, “Finding the Constitutional Court’s place”, 31.

\textsuperscript{158} Klug, “Finding the Constitutional Court’s place”, 31.

\textsuperscript{159} Roux, “Politics of Principle”, 367.

\textsuperscript{160} See Kohn, “The Burgeoning Constitutional Requirement”, 812 – 813.

powers, there are numerous examples of decisions that have plainly and clearly deferred to the other branches.

One has to ask, in response to critics of the judiciary – what is the alternative? To return to a system of Parliamentary sovereignty, even if it were legally possible, would have dramatic consequences. In the words of Moseneke:

“[I]f we were to recall the past, parliamentary sovereignty would re-install Parliament as the sole arbiter of the rationality and reasonableness of the measures it passes. The will of the majority in Parliament would be unrestrained. Socio-economic rights which are now justiciable and are a significant bulwark in favour of the vulnerable, worker rights which are now constitutionally entrenched, and other fundamental rights would be enjoyed at the pleasure of Parliament. But ... that is the constitutional option through which apartheid, Nazism, Fascism and post-colonial Africa blossomed.”

Of course, that is not to say that a state without a justiciable constitution inevitably becomes a fascist one. But it does draw attention to real and good reasons why a system of constitutional supremacy might be introduced. It ought not to be discarded, and the courts ought not to become scapegoats, because of frustration on occasions when other branches of government are overruled by the courts.