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**Executive Authority and Judicial Intervention: A Lawfare Critique
into the President's Powers of Appointment**

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ABSTRACT

Lawfare has generated significant debate within the South African legal and political circles. The Courts have been lambasted for their adjudication of disputes considered to be 'political' and falling outside the scope of their judicial authority. The critique has been particularly scathing in cases dealing with the conduct of functionaries of critical constitutional institutions. This dissertation will critically evaluate the validity of this lawfare charge by focusing on the President's constitutional powers to appoint the National Director of Public Prosecutions (NDPP) and Cabinet. The dissertation will evaluate the President's power to appoint such critical constitutional functionaries within the political context of a one-party democracy which emboldens the President's power to appoint any candidate he deems fit with very few internal fetters. I will examine how this largely unconstrained power can be harmful when used for ulterior purposes that subvert constitutional democracy. Rejecting the lawfare critique, I argue that in light of the institutional arrangements of our constitutional democracy, Courts have become an increasingly important branch of government within the *trias politica* to safeguard and protect democracy and further the rule of law. I will analyse case law that display how the Courts have utilised their judicial authority to curtail irrational decision making and improper conduct by functionaries of key constitutional institutions. Relying on democratic reinforcement theory, I will argue that the Courts' intervention in these cases has been to further constitutionalism and good governance. It is not, as some of the lawfare critics suggest, a breach of the separation of powers principle or an instrument to unduly rob the political branches of their power in an improper way.

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LIST OF ABBREVIATIONS

Afr. J. Legal Stud.	African Journal of Legal Studies
ANC	African National Congress
CASAC	Council for the Advancement of the South African Constitution
Case W. Res. J. Int'l L	Case Western Reserve Journal of International Law
CC	Constitutional Court of South Africa
CCR	Constitutional Court Review
CILSA	The Comparative and International Law Journal of Southern Africa
DA	Democratic Alliance
EFF	Economic Freedom Fighters
Emory LJ	Emory Law Journal
FUL	Freedom Under Law
Int. J. Law	International Journal of Law
Int. Political Sci. Rev	International Political Science Review
J Asian Afr Stud	Journal of African and Asian Studies
JSC	Judicial Service Commission
Law democr. dev.	Law Democracy & Development
Law Soc Inq	Law and Social Inquiry
Mod Law Rev	The Modern Law review
NDPP	National Director of Public Prosecutions
NPA	National Prosecuting Authority
PAJA	Promotion of Administration Justice Act
POCA	Prevention of Organised Crime Act
Potchefstroom Electron. Law J.	Potchefstroom Electronic Law Journal

SAJHR	South African Journal of Human Rights
S. Afr. judic. educ. j.	South African Judicial Education Journal
SALJ	South African Law Journal
SAPL	Southern African Public Law
SCA	Supreme Court of Appeal
STAN. L. REV.	Stanford Law Review
Stellenbosch L. REV.	Stellenbosch Law Review
TDJ	Taiwan Journal of Democracy
UC Davis L. Rev	UC Davis Law Review
UDM	United Democratic Movement
Wash Lee Law Rev.	Washington & Lee Law Review
Yale Law J	Yale Law Journal

CHAPTER ONE: INTRODUCTION

1.1 Introduction

In the past decade, the South African Courts have been confronted with a litany of cases challenging executive conduct and the competency and ethical standing of critical actors in charge of vital constitutional institutions such as the National Director of Public Prosecutions (“NDPP”).¹ The Courts have been confronted with the herculean task of safeguarding and regulating constitutional democracy from the malaise perpetuated by state capture, nepotistic cadre deployment and widespread corruption which have plundered our society into economic, political and social decay.² The Courts’ intervention has been met with the lawfare critique. As I will explore in more detail in chapter two, lawfare refers to the situation where Courts are inappropriately used to settle political disputes. A crucial yet overlooked aspect of our constitutional design that enabled this decay are the expansive powers the Constitution bestows on the President – especially the President’s powers of appointment and dismissal. The President’s powers of appointment include the power to appoint and dismiss Cabinet Ministers and the National Director of Public Prosecutions.³ While these powers are essential for the optimal functioning of democracy, they have been abused and misappropriated in a manner that has threatened the very nature of our constitutional and democratic enterprise.⁴

¹ For example: *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC); *Democratic Alliance v Acting National Director of Public Prosecutions and Others* 2016 3 All SA 78 (GP); *Freedom Under Law (RF) NPC v National Director of Public Prosecutions and Others* 2018 (1) SACR 436 (GP); *Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others* 2018 (2) SACR 442 (CC); *Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector* 2019 3 All SA 127 (GP); *Public Protector v Commissioner for the South African Revenue Service and Others* 2022 (1) SA 340 (CC); *Public Protector and Others v President of the Republic of South Africa and Others* 2021 (6) SA 37 (CC); and *President of the Republic of South Africa v Democratic Alliance and Others* 2020 (1) SA 428 (CC).

² See for example Office of the Public Protector, *Secure in Comfort: Public Protector’s Report on Nkandla: Report by the Public Protector on an Investigation into Allegations of Impropriety relating to the Installation and Implementation of Security Measures by the Department of Public Works at and in respect of the Private Residence of President Jacob Zuma at Nkandla in the Kwa-Zulu Province* Report No: 25 of 2013/4 (19 March 2014); *Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Part 1-5* (4 January 2022); *Commission of Inquiry into tax Administration and Governance by SARS* (11 December 2018); and *Commission of Inquiry into allegations of fraud, corruption, impropriety or irregularity in the Strategic Defence Procurement Packages* Report No: 742 (“Arms Deal”) (24 June 2016).

³ I will deal in more detail on these powers in the second chapter of the thesis.

⁴ For a broad analysis of the President’s powers of appointment see generally Christina Murray and Richard Stacey ‘The President and the National Executive’ in Stuart Woolman et al (eds) *Constitutional Law of South Africa* 4 ed. See also lecture transcript of Dikgang Moseneke ‘Reflections on South African Constitutional Democracy - Transition and Transformation’ *Constitutionally Speaking* 18 February 2015 available at <https://constitutionallyspeaking.co.za/dcj-moseneke-reflections-on-south-african-constitutional-democracy-transition-and-transformation/> accessed on 26 June 2022.

Relying on the theories of ‘esoteric decision-making’ and ‘democratic process-reinforcing review’, I will argue that the concerns surrounding lawfare within the context of Courts deciding politically fraught cases concerning the President’s powers of appointment are largely overstated. Esoteric decision-making is ‘the express reliance on apolitical, technical and legal justifications to substantiate a judicial outcome that is preferred for political reasons, which remain unexpressed’.⁵ It is a valuable strategic interpretive tool used to soften the political consideration underpinning some of the Courts’ judgments in order to avoid critiques of ‘playing politics’.⁶ Democracy process reinforcing review argues that ‘where self-dealing representatives: (a) fail to fulfil their custodial responsibilities for public resources on behalf of ‘the people’; (b) engage in self-dealing; (c) are ‘captured’ by private interests; and (d) create corrupt patronage systems that threaten the entire democratic project, then the Court is well within its rights to impose binding legal constraints on the political process in order to secure accountability’.⁷

South Africa’s Presidents (both former and present) have utilised their powers of appointment in a manner incongruent with the constitutional purpose. The theories above will explain *how* (through esoteric reasoning) and justify *why* (to reinforce democracy) the Courts have had to act as a necessary check to ensure they don’t continue abusing these crucial powers. I will argue that it is perfectly legitimate for Courts to intervene in cases concerning the fitness of character of incumbents of key constitutional institutions such as the National Prosecuting Authority (“NPA”), where the other branches of government fail to execute their constitutional obligations in this regard. In this fraught scenario, Courts have become critical in establishing the parameters of governmental power.⁸

The dissertation examines the legitimacy of the Courts’ intervention and adjudication into the President’s powers of appointment – this goes to the core of the separation of powers doctrine. Accordingly, the research will assess the scope of judicial authority through an exposition of pertinent case law and will evaluate how far the Courts can and have gone in upholding the rule of law and protecting democracy and democratic institutions.⁹ In South

⁵ Lauren Gildenhuys ‘Esoteric decision-making: Judicial responses to the judicialisation of politics, the Constitutional Court and EFF II’ (2020) 36 *SAJHR* 338 at 339.

⁶ Gildenhuys op cit note 5 at 340.

⁷ Firoz Cachalia ‘Precautionary Constitutionalism, Representative Democracy and Political Corruption’ (2018) 9 *CCR* 45 at 79.

⁸ Samuel Issacharoff ‘The Era of Constitutional Courts’ in *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (2015) 194.

⁹ *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC); *Democratic Alliance v Public Protector*; *Council for the Advancement of the South African Constitution v Public Protector* 2019 3 All SA 127 (GP); *Public Protector v Commissioner for the South African Revenue Service and Others* 2022 (1)

Africa, the Courts' role in protecting democracy and democratic institutions is heightened by the fact that the Judiciary is the only truly independent arm of government. As will be further detailed later, South Africa is characterised by a pure proportional representation electoral system, in which members of the Legislature are appointed from a party list.¹⁰ In such a system, a person who votes in either provincial or national elections must vote for the political party and not the individual candidate.¹¹ The political party determines the candidates that will be nominated for election on the regional and party lists.¹² The result of such a system, is a blurring of the lines between the Legislature and the Executive. No distinct separation exists between these two arms of government. In addition to this, we have a dominant party system.¹³ In a dominant party system, the party that secures the majority of the votes in an election will be the governing party.¹⁴ Because of this system, the ordinary mechanisms of holding the elected government in power to account, do not work in Parliament, due to the majority of members of Parliament also being members of the dominant party.¹⁵ The current system of holding power to account is intended to be the most important due to the legitimacy it carries from the electoral constituencies that voted for the individual leaders that notionally should represent their interests in the National Assembly and exercise an oversight role in Parliament. However, these elected representatives have been unsuccessful at holding government to account, even when government falls short of exercising their mandate with care, propriety and diligence. Indeed, the dominant party system in South Africa places Courts in a difficult position as they have to navigate their duties of enforcing constitutional standards and defending democracy, while also retaining their credibility and instilling confidence in the eyes of the public in the face of damaging attacks by political actors.¹⁶

SA 340 (CC); and *Public Protector and Others v President of the Republic of South Africa and Others* 2021 (6) SA 37 (CC).

¹⁰ Sections 46(1) and 105(1)(d) of the Constitution of the Republic of South Africa, 1996. See also Pippa Norris 'Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems' (1997) 18 *Int. Political Sci. Rev* 297 at 303, GE Devenish 'Electoral systems and protection of minorities in order to further social and political stability and integration: the South African experience' (1998) 13 *SAPL* 111 at 119 and Dirk Kotze 'Election of the National President: South Africa's Approach and Its Implications for Presidentialism' (2019) 46 *Politikon* 443 at 445.

¹¹ *Ramakatsa and Others v Magashule and Others* 2013 (2) BCLR 202 (CC) para 68.

¹² *Ramakatsa* supra note 11.

¹³ Section 46(1)(d) of the Constitution stipulates the pure proportional electoral system for composition of the National Assembly, which has in the past entrenched the dominance of the ANC.

¹⁴ Khabela Matlosa, 'Political Parties in Southern Africa: The State of Parties and their Role in Democratization' available at <https://www.idea.int/sites/default/files/publications/political-parties-in-southern-africa-the-state-of-parties-and-their-role-in-democratization.pdf> accessed on 13 July 2022 at 38.

¹⁵ Matlosa, op cit note 14 at 31.

¹⁶ See Danwood M Chirwa and Phindile Ntliziywana 'Political Parties and their Capacity to Provide Parliamentary Oversight' in H Thuymsma (ed) *Political Parties in South Africa: Do they Underpin or Undermine Democracy?* (2017).

As mentioned earlier, the Courts' intervention in these cases has been met with critique – the central critique being that of lawfare. The lawfare charge has the serious consequence of damaging the institutional credibility, reputation and integrity of the Courts in the eyes of the public – who may view the Courts as partisan to the political factional battles of the day. This perception is dangerous as the Courts rely on the public's confidence in the power of the law and the sense of justice it produces as cornerstones in regulating law and order in a given society. This perception is already waning. Without the benefit of the purse and army, the public's trust, confidence and respect in the law are the only lynchpins that render it effective. It is, therefore, important to counter the lawfare critique. If not, the Courts will continue to be unfairly subjected to harsh criticism for certain judgments made against disgruntled political actors, many of whom comprise the Executive, who wield the necessary influence and channels of power to seriously damage the reputation of the Courts and their effectiveness when exercising their constitutional duty and suppressing an abuse of power.¹⁷ The dissertation will challenge this negative conception of lawfare and flip this critique on its head by describing how lawfare has been used as a positive thing by the Courts in upholding the rule of law and democracy.

1.2 Research Question and Significance

The core research question can, therefore, be framed as follows: Is the charge that the Courts' intervention in the cases related to the President's powers of appointment amounts to lawfare legitimate?

The research will show, contrary to the lawfare critique, that the Courts' intervention in cases related to the exercise of the President's powers of appointment was legitimate. The research aims to legitimate the Courts' intervention in cases such as the above-mentioned in an attempt to protect their integrity. It will do so by arguing that the Courts' intervention has strengthened the capacity and empowered the impartiality of critical institutions such as the NPA. It will argue that the outcome of these cases has helped insulate institutions that are central to regulating democracy from the internal politics of the majority party and from executive capture. In doing so, the research hopes to bolster the institutional integrity,

¹⁷ Dan Mafora, 'In the Throes of "the People": The Populist Challenge to South African Courts, The Midpoint Paper Series N°1/2022 (May 2022) available at <https://www.kas.de/documents/261596/10543300/Midpoint+Paper+Series+No+1-2022+In+the+Throes+of+%E2%80%98the+People%E2%80%99+The+Populist+Challenge+to+South+Africa+n+Courts.pdf/a8e67a3d-9647-4e7f-42f8-ad23542435d7?version=1.0&t=1652360061011> accessed on 3 January 2023.

legitimacy and authority of the Courts – recognising these as necessary for their institutional independence and instilling public confidence.

1.3 Methodology

This dissertation examines the intersection between law and politics with a sharp focus on the President's powers of appointment as an incident of the broader lawfare critique. The research will be conducted using doctrinal legal research methodology. Doctrinal legal research methodology involves the 'analysis of case law, arranging, ordering and systematising legal propositions through legal reasoning or rational deduction'.¹⁸ This type of methodology provides a systematic exposition of 'substantive law rules', doctrines, concepts and judicial pronouncements governing in a particular legal category.¹⁹

Grounded by this legal doctrinal methodology, I will provide a descriptive and detailed analysis of the legal principles obtained from the case law and broader literature concerning the President's powers of appointment. As a result, careful study of the case law will be situated within the broader conceptual tools of lawfare, amplified by a gentrifying body of literature. I will engage in a critical, holistic and qualitative analysis of the legal materials to support my thesis statement, whilst also identifying and addressing ambiguities and criticisms. The study will be multi-disciplinary and will draw from the neighbouring discipline of the political sciences to contextualise the political environment within which the President exercises these vast powers. The study will reveal the Courts' role in curbing an excess of political power within its institutionalised role as the ultimate guardians of democracy.

1.4 Chapter Synopsis

The dissertation will be organised into five chapters (this being the first).

Chapter 2

In the second chapter, I will situate the lawfare concerns within the specific context of the President's vast powers of appointment and define what constitutes a political case as it relates to the powers of the President to appoint. The definitional analysis will be grounded

¹⁸ Vijay M Gawas 'Doctrinal legal research method a guiding principle in reforming the law and legal system towards the research development' (2017) 3 *Int. J. Law* 128 at 129.

¹⁹ Gawas op cit note 18.

by a contextual framing of the President's vast powers being manipulated in a dominant party democracy with limited restraint on the President's powers.

Chapter 3

In the third chapter, I will critically analyse the case law with a sharp focus on the cases concerning the NPA, and the President's Cabinet. In relation to the NPA, the chapter will focus on three cases. The first case, *Democratic Alliance v President of South Africa and Others*,²⁰ the Democratic Alliance (South Africa's official opposition party) challenged the constitutionality of the appointment of Menzi Simelane as the NDPP. The second case is *Freedom Under Law (RF) NPC v National Director of Public Prosecutions and Others*.²¹ In this case, Freedom Under Law (a civil society organisation) challenged the propriety and fitness of then Deputy Director of Public Prosecutions Advocate Nomgcoba Jiba, arising out of her irrational authorisation to institute criminal prosecutions against Johan Booysen. Finally, *Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others*,²² dealt with the validity of a R17.3 million settlement agreement paid to former NDPP and the resultant lawfulness of Mr Shawn Abrahams' appointment as NDPP. The salient cases pertaining to the President's Cabinet that I will interrogate are the High Court judgments of *Democratic Alliance v President of the Republic of South Africa*,²³ and the Constitutional Court appeal of *President of the Republic of South Africa v Democratic Alliance and Others*.²⁴ These cases dealt with the rationality of the President's reshuffling of his Cabinet without the furnishing of reasons. I will unpack the factual scenarios of the cases and analyse the Courts' reasoning and its attempts at undoing the abuse of the President's powers of appointment to safeguard democracy.

Chapter 4

In the fourth chapter, I will argue that sound legal justification as adopted by the Courts' development of the principle of rationality buttressed by the theoretical underpinnings of esoteric decision making and democracy process reinforcing review are a valid way of understanding and legitimating the Courts' adjudication of cases that posit major political

²⁰ *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC).

²¹ *Freedom Under Law (RF) NPC v National Director of Public Prosecutions and Others* 2018 (1) SACR 436 (GP).

²² *Corruption Watch NPC and Others v President of the Republic of South Africa and Others and Nxasana v Corruption Watch NPC and Others* 2018 (2) SACR 442 (CC).

²³ *Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector* 2019 3 All SA 127 (GP).

²⁴ *President of the Republic of South Africa v Democratic Alliance and Others* 2020 (1) SA 428 (CC).

implications in an attempt to strengthen key constitutional state institutions that have been or would have been eroded by the improper exercise of power by the Executive. I will analyse cases in which the Courts have successfully utilised these theories i.e. *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC). This chapter will show how the Courts have used the theory of esoteric reasoning as a method for the purpose of reinforcing democracy as displayed in the cases in the third chapter.

Chapter 5

In the fifth chapter, I will provide a summative and high-level overview of the salient issues traversed in the various chapters of the dissertation. I will finally conclude, by recommending alternative democratically legitimate avenues that can be used to assist the President in appointing suitable candidates of critical constitutional institutions. Such an avenue will enjoy legislature approval. Therefore, it is hoped that such a forum will quell the ongoing backlash from lawfare critics regarding the Courts' intervention due to its democratic legitimacy. In addition, such a forum should help alleviate the Courts' inordinate workload of having to adjudicate such matters.

CHAPTER TWO: LAWFARE AND THE SEPARATION OF POWERS IN A DOMINANT PARTY DEMOCRACY

2.1 Introduction

To understand the critique that there has been lawfare in South Africa, we have to start by defining lawfare and thus the separation of powers principle, especially as it relates to the limits of judicial authority. Accordingly, in this chapter, I lay the foundation for the dissertation through a critical analysis of these key concepts – lawfare and the separation of powers. In addition, the chapter will describe how the political climate characterised by a dominant party democracy enables the abuse of the President’s powers of appointment. I will then provide a two-fold analysis of the literature evaluating the strengths of both the critiques against and the proponents of the Courts’ intervention in cases concerning the President’s powers of appointment. This is to ensure a measured account is provided when critiquing that the objections surrounding lawfare are unwarranted.

2.2 Lawfare and the Separation of Powers

The earliest definitions attributed to the notion of lawfare have always centred around it as a tool utilised by states in ‘pursuit of military objectives’.²⁵ Lawfare has been described as the ‘strategy of using-or misusing-law as a substitute for traditional military means to achieve an operational objective’.²⁶ In addition, it has also been defined as ‘the abuse of the law and legal systems for strategic political or military ends’.²⁷ Tiefenbrun draws a sharp connection between law and war.²⁸ She defines lawfare as ‘a weapon designed to destroy the enemy by using, misusing, and abusing the legal system and the media in order to raise a public outcry against that enemy’.²⁹ She describes how lawfare can play out in the scenario of legal interventions designed to delegitimise and hamper the efforts of the state in eradicating terrorism.³⁰

²⁵ Scott Horton ‘The dangers of lawfare’ (2010) 43 *Case W. Res. J. Int’l L* 163 at 169.

²⁶ Horton op cit note 25.

²⁷ Ibid at 170. See also David Luban, ‘Lawfare and Legal Ethics in Guantanamo’ (2008) 60 *STAN. L. REV.* 1981 at 2020-21.

²⁸ Susan W. Tiefenbrun ‘Semiotic Definition of Lawfare’ (2010) 43 *Case W. Res. J. Int’l L* 29 at 32.

²⁹ Tiefenbrun op cit note 28 at 31.

³⁰ Ibid at 52.

Lawfare, however, has constellated into further definitions. John Comaroff uses it to characterise ‘the effort to conquer and control indigenous peoples by the coercive use of legal means’.³¹ Comaroff contextualises lawfare within the dark history of South Africa in which law was used to segregate sections of the South African society and oppress the indigenous people using the muscle of the law.³² Corder and Hoexter describe lawfare from the backdrop of three distinct periods in South Africa’s political history. Similar to the Comaroff’s foundational work, they situate the conduct of the oppressive Apartheid regime designed to ‘promote white supremacy’ and marginalise other races as one way to describe lawfare.³³ Their second definition recounts how lawfare was used as an instrument by the subjugated to resist the oppressive system through strategic litigation by non-state actors.³⁴ The third sense of the term and the more popular version, at least within the South African legal and political discourse, is how lawfare intertwines with the judicialisation of politics.³⁵ In the third sense, lawfare describes the increased ‘reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies’.³⁶ The strategic use of law for nefarious political agendas has certainly become the focal definition in contemporary usage.³⁷ For purposes of this thesis, I will frame my discussion using the third sense of the term.

Le Roux and Davis argue that lawfare can be a good or a bad thing depending on the goals it advances and how it is deployed. They state:

“Lawfare should be understood as having a duality to it; it can be a good or a bad thing. It is a good thing for adjudication to be political, in the sense that it advances the constitutional project and is undertaken by litigants and judges as an instrument to ensure that the constitutional vision is realised. However, it is a bad thing when courts become the site of pure political contestation because politicians seek to usurp

³¹ John L Comaroff, 'Colonialism, culture and the law: A foreword' (2001) *Law Soc Inq* 305-306.

³² Comaroff op cit note 31. See also Theunis Roux, 'The Constitutional Court's 2018 Term: Lawfare or Window on the Struggle for Democratic Social Transformation?' (2020) 10 *CCR* 1 at 7.

³³ Hugh Corder & Cora Hoexter, 'Lawfare' in South Africa and Its Effects on the Judiciary' (2017) 10 *Afr. J. Legal Stud.* 105 at 106. See also John Dugard 'The judiciary in a state of national crisis with special reference to the South African experience' (1987) 44 *Washington & Lee Law Review* 477.

³⁴ Corder and Hoexter op cit note 33. See also John Dugard, *Human Rights and the South African Legal Order* (1978).

³⁵ Ibid.

³⁶ Ran Hirschl 'The judicialization of politics' in Robert E. Goodin (ed) *The Oxford Handbook of Political Science* (2009).

³⁷ Ran Hirschl 'Towards Juristocracy: The origins and Consequences of the New Constitutionalism' (2004) 170.

judicial powers to achieve their objectives. In both contexts, it draws the judiciary far further into the political arena than has traditionally been the case.”³⁸

I agree with their observations and will suggest that lawfare, as we have seen it in the context of cases dealing with the President’s powers of appointment, has been a good thing. The migration of politically-charged cases to the Courts in South Africa has attracted polarising views from legal and other commentators.³⁹ The critiques have largely been centred around the suitability and indeed desirability of the Judiciary intervening in the realm of the Executive and the Legislature and the effects this might have on the separation of powers doctrine. It is against the edifice of the *trias politica* that the debate has centred around, and a closer introspection of the role the Judiciary plays in the *trias politica* is necessary to glean whether the above-mentioned attacks are warranted.

The separation of powers principle is a central feature of liberal constitutionalism – and stresses the limitation of powers of the separate branches of government.⁴⁰ The separation of powers doctrine can be described as the distribution of specific powers to each branch of government – the Legislature, the Executive and the Judiciary, which ordinarily permits a level of oversight over the other branches.⁴¹ From a conceptual standpoint, the splitting of public power into the various categories mentioned above envisages separate personnel to manage the distinct public powers.⁴² A notion of power equilibrium is said to be attained by the separation of the three layers of government which is believed to minimise the danger of one pillar of government enjoying full hegemony and threatening individual liberty.⁴³ At the conceptual level, a central purpose of the separation of powers, is that different branches must hold each other accountable. In addition, this function achieved by the separation of powers doctrine is considered central to the rule of law.

The principle of the separation of powers found favour into our constitutional scheme, due to its appealing effect of incorporating checks and balances into the *trias politica*,

³⁸ Michelle le Roux and Dennis Davis ‘Lawfare - Judging Politics in South Africa’ (2019) 15.

³⁹ For example Stephen Grootes ‘Analysis: The politics of judicial and executive overreach’ *Daily Maverick* 11 May 2017 available at <https://www.dailymaverick.co.za/article/2017-05-11-analysis-the-politics-of-judicial-and-executive-overreach/> accessed on 13 May 2022 and Hugh Corder ‘Critics of South Africa’s judges are raising the temperature: legitimate, or dangerous?’ *The Conversation* 22 August 2019 available at <https://theconversation.com/critics-of-south-africas-judges-are-raising-the-temperature-legitimate-or-dangerous-122209> accessed on 22 May 2022.

⁴⁰ A Amisah ‘Constitutionalism and law in Africa’ in Dov Ronen (ed) *Democracy and Pluralism in Africa* (1986) 14; Hoolo Nyane ‘The judicialisation of politics in South Africa: A critique of the emerging trend’ (2020) 36 *SAJHR* 319 at 323.

⁴¹ Chirwa and Ntliziywana op cit note 16 at 135.

⁴² Ibid at 137.

⁴³ Ibid.

thereby, weakening the potential abuse of power.⁴⁴ In its early jurisprudence, the Constitutional Court emphasised the need of respecting the separation of powers between the Legislature, Executive and Judiciary.⁴⁵ In *Treatment Action Campaign* the Constitutional Court stated:

“Although there are no bright lines that separate the roles of the Legislature, the Executive and the Courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation.”⁴⁶

It should be clear from the quote above that, as the Court has stated, the line as to what falls into the domain of one branch and what falls into the other is not always ‘bright’. It should be noted that the lawfare critique emerges from an unduly strained and rigid liberal conception of the separation of powers doctrine, an approach which, as will be explained below, is not the only possible conception of the separation of powers.⁴⁷

In contrast with the rigid, liberal conception of the separation of powers, Hodgson argues that it is necessary to reconsider the influence that liberalism has on the paradigmatic structure of the South African Constitution, to develop a uniquely South African doctrine of separation of powers. This conception, he argues, should account for South Africa’s social, political and economic realities.⁴⁸ From his reading of the Constitution, Hodgson suggests that the final Constitution moves away from merely requiring a formal separation of powers from the doctrine, and that the doctrine is infused with a generous and purposive import geared to enhance accountability, responsiveness and openness.⁴⁹ Hodgson suggests that ‘a purposive approach to separation of powers in South Africa lends itself to a doctrine with three major components: a doctrinal (power-controlling) element, a pragmatic (efficiency-

⁴⁴ Ibid.

⁴⁵ See *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) paras 63-65; *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC) para 46; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 66; and *De Lange v Smuts N.O* 1998 (3) SA 785 (CC) para 60.

⁴⁶ *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC) para 98.

⁴⁷ Timothy Fish Hodgson ‘The mysteriously appearing and disappearing doctrine of separation of powers: toward a distinctly South Africa doctrine for a more radically transformative Constitution’ (2018) 34 *SAJHR* 57.

⁴⁸ Hodgson op cit note 47 at 65. Hodgson builds on the works of Sanele Sibanda and Joel Modiri in calling for the development of a distinctly South African conceptualisation of the separation of powers doctrine that will more suitably carry out the demands of “transformative constitutionalism”. See Sanele Sibanda ‘Not Purpose-made –Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty’ (2011) 22 *Stellenbosch L. REV.* 482. and Joel Modiri ‘law’s poverty’ (2015) 18 *Potchefstroom Electron. Law J.* 253.

⁴⁹ Ibid at 70-75. In addition, Hodgson suggests that any conception of a South African separation of powers doctrine must be directed towards the elimination of inequality and the eradication of poverty.

driven) element and a normative (human-rights based focused) component'.⁵⁰ Hodgson suggests for a more flexible and dynamic structure of separation of powers that allows an effective response from the state to the appalling levels of inequality and poverty.⁵¹ In addition, he argues that a South African doctrine of separation of powers demands a continuous interaction between organs of state and between these branches and the people.⁵² Furthermore, Hodgson correctly discourages the application of a political question doctrine - which 'is applied to bar the judiciary from jurisdiction to hear certain matters which are considered to be intrinsically outside the realm of the Judiciary's mandate or competence'.⁵³ This is so, because a primary reason for a separation of powers doctrine is to check and remedy transgressions of a single branch by the appropriate action of another branch.⁵⁴ There is great analytical and descriptive power in Hodgson's critique of South Africa's current separation of powers framing and I am inclined to agree with his suggestions.

Former Justice Edwin Cameron provides a similarly compelling argument about the role of the separation of powers doctrine that does not only concern the strict separation of functions between the different branches of government.⁵⁵ Cameron asserts that the various branches each share the vision of realising the values of justice, dignity and equality.⁵⁶ Cameron describes how the various branches work in tandem with one another to promote the constitutional values of "accountability, responsiveness and openness".⁵⁷ This is not always a frictionless exercise, however, the various branches should remain respectfully engaged with one another as they define the limits and boundaries of each branches institutional power as they work together in responding to the manifold challenges confronting South Africa's constitutional democracy.⁵⁸

Cameron points to how it isn't always the wish of the Judiciary to encroach into the domain of the Executive or Legislature when carrying out their adjudicatory functions. However, Courts are forced to step up and provide effective relief as a result of egregious

⁵⁰ Ibid at 75.

⁵¹ Ibid at 76.

⁵² Ibid at 77.

⁵³ Ibid.

⁵⁴ Ibid. Hodgson is critical at how quick the Courts are at invoking the general diptych of "democratic legitimacy" and "institutional competence" and suggests that they be "bolder in their own decision-making".

⁵⁵ *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* 2019 (6) SA 597 (CC) para 46.

⁵⁶ *Mwelase* supra note 55.

⁵⁷ Ibid para 47.

⁵⁸ Ibid para 47 citing Sandra Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) at 67.

infringements arising out of poor government delivery.⁵⁹ Importantly, the vulnerable position of those who find themselves at the receiving end of such injustices is what reinforces the necessity of crafting 'effective, just and equitable remedies, as the Constitution requires them to do'.⁶⁰ 'They [Courts] intervene only when the evidence and arguments compel them to conclude that the Executive or the Legislature has done wrong, or has not done enough'.⁶¹ Importantly, the Courts' intervention does not seek to overstep their mark into the terrain of the government or the Executive but to support and anchor them in fulfilling their obligations.

Hodgson and Cameron's approach to the separation of powers stands in contrast with the liberal conception of the separation of powers, especially as it leaves room for the Courts to traverse the boundaries of 'function' in the pursuit of purpose. Thus, I will rely on this conception of the separation of powers as the bulwark against the lawfare critique. As will be seen in the chapters that follow – the flexible, purpose-oriented conception of the separation of powers suggested by the authors leaves room for esoteric decision making as well as democracy reinforcing review.

In addition to the conception of the separation of powers adopted above, South Africa's approach to the separation of powers has another distinct feature. There is a measure of overlap between the various branches.⁶² The overlap is largely as a result of the diffusion of power and function between the Executive and Legislative branches of government which will be explained in more detail later.⁶³ A critical understanding of the role of the Judiciary within the *trias politica* will be the focus of this dissertation. Before this discussion, it is apt to discuss what judicial authority is and what the realm and the scope of the Judiciary's powers are.

2.3 The Scope of the Courts' Judicial Authority

South Africa's commitment to constitutional supremacy has meant that the South African Judiciary has expansive powers of judicial review.⁶⁴ In light of this system of constitutional

⁵⁹ Ibid para 48.

⁶⁰ Ibid para 49.

⁶¹ Ibid para 43.

⁶² Ibid.

⁶³ See sections 55(1), 77 and 84 of the Constitution.

⁶⁴ Section 33(a) of the Constitution vests the Courts with the power to review administrative action. Section 35(3)(o) further gives the Courts the power to review decisions regarding an accused person's fair trial rights. Section 37(6)(e) provides that a court may review the unlawful detention of a detainee. In addition, section 167(3)(a)-(b) provides that the "Constitutional Court is the highest court of the Republic and may decide constitutional matters; and any other matter, if the Constitutional Court grants leave to appeal on the grounds

supremacy, the Courts have the power to strike down and declare invalid legislation which does not conform with the Constitution.⁶⁵ According to section 172 of the Constitution, the Judiciary has the authority to “declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and may make any order that is just and equitable”.⁶⁶

There are broadly two objections to this kind of judicial review – democratic illegitimacy and institutional incompetence. Democratic legitimacy denotes a democratic political system that consists of a representative Legislature where elections are held on a fair and regular basis.⁶⁷ In such a system, the elected representatives deliberate on important public issues and importantly, members of the Legislature view themselves as representatives of the public, furthering their interests and opinions in the decision-making processes.⁶⁸ Judicial review is, therefore, considered democratically illegitimate, as judges’ appointments lack this critical buy-in from the public who don’t have a hand in electing judges, who nevertheless make decisions that affect their lives. Institutional competence is best described by former Justice Kate O’Regan when she opined that ‘a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field’.⁶⁹ In relation to the Courts exercising judicial review functions, Courts shouldn’t decide matters they are not suitably qualified for. The concept of institutional competence is closely related to that of deference which will be explored in more detail shortly. Jeremy Waldron criticises the practice and wide acceptance of judicial review on two fronts. First, Waldron critiques the claim that judicial review allows judges to focus on the pertinent issues at stake when citizens are in disagreement about rights. On the contrary, he argues that in fact, judicial review distracts the Courts who tend to be preoccupied with issues such as ‘precedents, texts and interpretation’.⁷⁰ Second, Waldron describes judicial review as “politically

that the matter raises an arguable point of law of general public importance which ought to be considered by the Court”. These provisions vest the Constitutional Court with the “super appellate” power of judicial review.

⁶⁵ Section 172(1)(a) of the Constitution. See also Max du Plessis ‘The legitimacy of judicial review in South Africa’s new constitutional dispensation: insights from the Canadian experience’ (2000) 33 *CILSA* 227 at 229.

⁶⁶ Section 172(a)-(b) of the Constitution.

⁶⁷ Jeremy Waldron ‘The Core of the Case against Judicial Review’ (2006) 115 *Yale Law J* 1346 at 1361.

⁶⁸ Waldron op cit note 67.

⁶⁹ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) para 48.

⁷⁰ *Ibid.*

illegitimate”.⁷¹ He slams the privileging of majority voting among a select pool of unelected and unaccountable judges, thus disregarding the valued principles of ‘representation and political equality in the final resolution of issues about rights’.⁷²

One of the ways that the Courts overcome the issues raised by Waldron, is through the development of a theory of deference. According to Hoexter, a theory of deference means:

“[A] judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinize administrative action, but by a careful weighing up of the need for – and the consequences of – judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal.”⁷³

The above theory has been endorsed by several judicial decisions.⁷⁴ The underlying assumption conveyed by this theory is that Courts should defer to the appropriate decision-maker or administrator in decisions outside of the Courts’ institutional competence.⁷⁵

⁷¹ Ibid.

⁷² Ibid. See also Jeremy Waldron, ‘Five to Four: Why Do Bare Majorities Rule on Courts’ (2014) 123 *Yale Law J* 1692 in which Waldron describes the method of counting of heads (majority decision) to settle contentious issues used by judges as “judicial majoritarianism”.

⁷³ Cora Hoexter ‘The Future of Judicial Review in South African Administrative Law’ (2000) 117 *SALJ* 484 at 501-502.

⁷⁴ See *Logbro Properties CC v Bedderson* NO 2003 (1) All SA 424 (SCA) para 21; *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd* 2003 (2) All SA 616 (SCA); and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) para 46.

⁷⁵ Malcolm Wallis ‘Do We Need Deference’ (2018) 1 *S. Afr. judic. educ. j.* 99. Wallis is, however, critical of the substantive merits of deference, which he views as an empty term that makes no difference to the outcome of a decision. Ibid at 106. See also Clive Plasket ‘Judicial review, administrative power and deference: A view from the bench’ (2018) 135 *SALJ* 502. Plasket analyses select case law to see if deference has made a difference and/or changed the outcome of a case and concludes that it hasn’t, thus in agreement with Wallis. He argues that deference is no different to the separation of powers doctrine and that it doesn’t influence the judicial reasoning process.

In contrast, Davis proposes that rather than invoking judicial restraint, the starting point should be one of judicial empowerment.⁷⁶ In describing the Courts' post-apartheid judicial review functions, Davis opines that this function should be firmly rooted in our Constitution.⁷⁷ He rightly states that the Constitution is the repository of all state power and it is the Courts' duty to protect the rights in the Constitution. Davis argues that the transformative tenor of the Constitution empowers judges to review any conduct and action and that they should do this through providing sound and persuasive judgments.⁷⁸ Courts should, therefore, proceed on the basis of being empowered by the Constitution to hold and check governmental action. I agree with Davis' arguments about the role of Courts when exercising their powers of judicial review, and it is within the framework of a constitutionally empowered Judiciary that Courts are obliged to check the abuse of executive conduct as it relates to the President's powers of appointment.

2.4 A Blurring of the Lines

Chirwa and Ntliziywana describe how, although not their primary function, the Courts have had to expand their functions to include accountability and oversight roles.⁷⁹ However, the Courts do not illegitimately engage in this exercise nor does it affect its traditional role of determining the constitutionality of legislation.⁸⁰ I will later display how the Courts are well-placed to check the abuse of power by the President and clearly delineate the contours of the President's deleterious effect on our constitutional democracy. It is undeniable, however, that the Judiciary has had to take on this function due to Parliament's ailing accountability and oversight regime.⁸¹

According to section 55(2) of the Constitution, the National Assembly is obliged to exercise oversight over the Executive.⁸² However, because South Africa's political system

⁷⁶ Dennis Davis 'To defer and then when? Administrative law and constitutional democracy: the constitutional context' (2006) 1 *Acta Juridica* 23.

⁷⁷ Davis op cit note 76 at 28.

⁷⁸ Davis builds on the work of David Dyzenhaus and Etienne Mureinik. See David Dyzenhaus 'Law as Justification: Etienne Mureinik's conception of legal culture' (1998) 14 *SAJHR* 11 and Etienne Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31.

⁷⁹ Ibid at 138.

⁸⁰ Ibid at 139.

⁸¹ *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC).

⁸² Section 55(2) provides: "The National Assembly must provide for mechanisms -
(a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and
(b) to maintain oversight of-
(i) the exercise of national executive authority, including the implementation of legislation; and
(ii) any organ of state."

is one of a dominant party system, Parliament has not always been successful in exercising its oversight role effectively. In fact, in some cases, Parliament has been found to have failed in exercising this mandate.⁸³ The failure or Parliament's ineptitude in this regard is due to, among other things, South Africa's mixed presidentialism-parliamentarism system that has produced a noxious blend of Legislature and Executive relations with the supreme power vested in the President.⁸⁴ This unique system which is enabled by South Africa's pure-proportional representation electoral system weakens legitimate parliamentary oversight due to the enforcement of strict party-discipline. The effects of which, are that the Legislature, that is largely reflective of the dominant ruling ANC party is forced to tow the party line due to the career-limiting political sanctions and consequences meted to dissident members.⁸⁵

The increase of judicial activity in forcing Parliament to exercise its oversight function over the President, as opposed to other constitutionally empowered institutions which can act as accountability mechanisms such as the Public Protector and Auditor-General, is due to the coercive nature of the Judiciary's powers, which opposition parties in particular have used for strategic and political reasons.⁸⁶ The excess of political power vested in the President, has enabled a gross abuse of the power of appointment, to further nefarious political agendas. The blurring of the lines separating the Executive and the Legislature, further weakens the Legislature's constitutionally mandated accountability role, as members of the Legislature are often hesitant to call to account a government that is made up of leaders of their party.⁸⁷ The Judiciary's role is, therefore, emboldened and becomes the only

⁸³ In *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC), the Constitutional Court found that former President Zuma was bound by the remedial orders of the Public Protector, which ordered him to pay back a portion of the amount used to build his Nkandla homestead. In *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* 2018 (2) SA 571 (CC) the majority held that the National Assembly failed to establish rules required to determine whether grounds for impeachment exist. *United Democratic Movement v Speaker of the National Assembly and Others* 2017 (5) SA 300 (CC). In *UDM* the Court held that the Speaker was empowered to prescribe that a motion of no confidence in the President be conducted by secret ballot, to enhance the effectiveness of Parliament's accountability mechanisms. This application by opposition parties, was in response to numerous failed attempts at holding former President Zuma to account through a vote of no confidence in the ordinary manner.

⁸⁴ See Susan Booysen 'Semi-presidentialism and subjugation of parliament and party in the presidency of South Africa's Jacob Zuma' (2017) 36 *Politeia* 1 at 4.

⁸⁵ See detailed discussion from Richard Calland 'Parliamentary Oversight and Executive Accountability in a Time of State Capture' (2020), submission made to the Zondo Commission on State Capture in February 2021 chapter 1.2 and *United Democratic Movement v Speaker of the National Assembly and Others* 2017 (5) SA 300 (CC) para 15. See also Hugh Corder, Saras Jagwanth and Fred Soltau Report on Parliamentary Oversight and Accountability Prepared by Faculty of Law, University of Cape Town, July 1999 chapter 2.2.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

credible accountability and oversight arm of government within the *trias politica* that checks executive power and simultaneously strengthens democracy.

2.5 President's Powers of Appointment in a Dominant Party Democracy

As already indicated, the President's powers of appointment are constitutionally ordained. Section 84(1) of the Constitution provides that the President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of 'head of state' and 'head of the national executive'.⁸⁸

The focus in this dissertation will be on the President's power to appoint Ministers and Deputy-Ministers,⁸⁹ and the National Director of Public Prosecutions.⁹⁰ I have chosen these powers as they have warranted the most judicial attention and because of the important role that the above-mentioned functionaries play in safe-guarding our constitutional democracy. It is crucial to note, that the above-mentioned powers of appointment are tempered by procedural requirements.⁹¹ However, the ultimate power to appoint will always lie with the President, due to, among other reasons, the excess of political power arising out of the President presiding over an essentially dominant party democracy.⁹² In addition to the procedural requirements, the case law has delineated principles suggesting guidelines pertaining to the President's constitutionally borne powers including the powers of appointment. These 'substantive limits' include the requirements to 'act in good faith, to not misconstrue powers',⁹³ and importantly that the President may 'exercise no power and perform no function beyond that conferred upon the law'.⁹⁴ In effect, the Courts

⁸⁸ Section 84(1) of the Constitution. See also George Barrie 'Presidential powers in South Africa - more questions than answers' (2019) 40 *Obiter* 130. See also *South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) para 131 for a detailed discussion of the President's power to appoint a commission of inquiry.

⁸⁹ Section 91(2) and 93 of the Constitution.

⁹⁰ Section 179(1)(a) of the Constitution.

⁹¹ For example, in *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC) (*Simelane* case) the Constitutional Court provided pre-jurisdictional factors that must be considered before a candidate is appointed as NDPP.

⁹² The ANC's electoral dominance has been widely reported with the African National Congress (ANC) winning its sixth consecutive national election in 2019, with a 57.5 percent majority. Pierre du Toit and Nicola de Jager 'South Africa's Dominant-Party System in Comparative Perspective' (2014) 10 *TDJ* 94.

⁹³ *SARFU III* supra note 88 para 30.

⁹⁴ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) para 58.

reinforce democracy by shoring up the constitutional institutions and accountability mechanisms on which the democratic system depends upon.⁹⁵

Although the President's powers of appointment is the primary way for the capture of independent constitutional institutions by the dominant party, the power of dismissal is equally as important.⁹⁶ Choudhry notes how the authority to dismiss allows for the manipulation of the power of appointment. He details how a dominant party leader is able to dismiss persons appointed in an impartial manner and who possess independence, to create room for a partisan hire.⁹⁷ Furthermore, the power of dismissal is utilised as a tool to enforce the concept of 'principal-agent relationships' between a dominant party and its biased appointees.⁹⁸ It is within this context, that the plethora of cases concerning the NPA will be analysed in an attempt to canvass how the President has abused his powers of appointing the NDPP to further partisan ends and thereby weakening democracy. I will then describe how the Courts have played a defining role in safeguarding the independence of the Prosecuting Authority through sometimes scathing judgments admonishing the questionable decisions taken by former NDPP's and their very fitness to hold office.⁹⁹

2.6 Presidential Powers of Appointment and the Courts' Intervention: A Good or a Bad Thing?

Theunis Roux in his attempt to grapple with the tendentious critiques of lawfare, proffers an insightful analysis of the Constitutional Courts' jurisprudence during the 2018 term to ascertain if the concerns about the Courts overstepping their mark hold any weight.¹⁰⁰ From the outset, Roux states that the concerns of lawfare are largely overstated and that when Courts are confronted with political disputes they subject that political power to constitutional standards, which is perfectly legitimate.¹⁰¹ Indeed, as Roux rightly states, 'Constitutional systems [such as South Africa] that provide for judicial review require Courts to decide

⁹⁵ Roux op cit note 32 at 32.

⁹⁶ Sujit Choudhry "He had a mandate": The South African Constitutional Court and the African National Congress in a dominant party democracy' (2009) *CCR* 13. See also *Masetlha v President of the RSA* 2008 (1) SA 566 (CC) para 77.

⁹⁷ Choudhry op cit note 96 at 57.

⁹⁸ *Ibid.*

⁹⁹ The key cases that will be considered are *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC); *Freedom Under Law (RF) NPC v National Director of Public Prosecutions and Others* 2018 (1) SACR 436 (GP); and *Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others* 2018 (2) SACR 442 (CC).

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid* at 11.

politically controversial matters'.¹⁰² More contextually relevant is how Roux responds to the Courts' inherent power to review executive acts (such as the power of appointment), for compliance with the Constitution, and how this may result in the Courts becoming enmeshed in "high-stakes political cases" and may lose its independence as a result.¹⁰³ In a rebuttal to this critique, Roux uses the *Corruption Watch* case to exemplify that the Courts being approached to invalidate an unlawful settlement agreement was an incident of it being asked to protect the integrity of a vital institution afflicted by internal struggle and its incapacity to regulate it.¹⁰⁴ What the Court did in this case was to empower a critical constitutional institution, the NPA, to play its designated role rather than migrating the internal struggle into the Court.¹⁰⁵

Davis and Le Roux, point to the lackluster and intransigent record of Parliament's ability or inability of holding the Executive accountable as the necessary impetus for the Courts to resort to lawfare.¹⁰⁶ The authors describe how 'Ministers were able to dodge committee hearings with dubious excuses, and nothing happened'.¹⁰⁷ They note that '[v]igorous and compelling speeches were made into the National Assembly, and nothing happened to the smug and seemingly untouchable members of the executive'.¹⁰⁸ Indeed, the Legislature's passivity and diffidence to hold the Executive accountable meant that the Courts had to shoulder this responsibility whilst simultaneously fulfilling its constitutional mandate to uphold the rule of law, ensuring accountability and promoting the constitutional project.¹⁰⁹ The Judiciary can be said to have been the only arm of state to have lived up to the constitutional mandate during the Zuma era.¹¹⁰

Perhaps as notably pointed out by former Deputy Chief Justice Dikgang Moseneke in a highly heralded lecture, the issue of malfeasance is as a result of the architectural design of our Constitution, which as I have already established and further noted by Moseneke, is due to the 'remarkable concentration of the President's powers of appointment'.¹¹¹ Moseneke recounts how during disputes about who should appoint a public functionary during the formulation of the final Constitution the various negotiating parties were content

¹⁰² *Ibid.*

¹⁰³ *Ibid* at 16-17.

¹⁰⁴ *Ibid* at 30-31.

¹⁰⁵ *Ibid.*

¹⁰⁶ Le Roux and Davis *op cit* note 38 at 247.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid* at 247-248.

¹¹⁰ *Ibid* at 252.

¹¹¹ Moseneke *op cit* note 4.

to vest that power in the then incumbent President, Nelson Mandela.¹¹² It was perceived that as a result of former President Mandela's elevated moral status, he would do the right thing.¹¹³ This anecdote seems highly plausible given the force of former President Mandela's personal stature, but also displays the pitfall of attaching immutable powers to well-regarded personalities due to their perceived moral standing – as this disregards the fact that these powers outlive their current occupants and can be subject to abuse.

Moseneke questions whether the democratic and constitutional project will be best served by a powerful Executive with vast powers of appointment entrenched in the President.¹¹⁴ This question is most pressing given the frequency at which appointments by the President have been subject to a legal challenge of rationality as indicated earlier and will be expounded in more detail later. Moseneke intimates that appointments by a deliberative collective, akin to the Judicial Service Commission (JSC) would be less vulnerable to the kinds and frequency of legal challenges than an appointment by a single functionary.¹¹⁵ The accuracy of this assertion is, however, questionable as past JSC judicial appointments have been subject to legal challenge.¹¹⁶ Moseneke orientates his concerns against the need of shielding appointments of 'public functionaries to institutions that grid our democracy, from the personal preferences and vagary of the appointing authority'.¹¹⁷ Moseneke's insights raise important questions on how our constitutional design is a contributing factor to our destabilised and grating political climate and serves as fertile ground for discussions of possible constitutional amendment.

On the other end of the divide, American constitutional law scholar, Adrian Vermeule proffers one of the most scathing and nuanced critiques of constraining national executive authority and the consequent ramifications that ensue.¹¹⁸ Vermeule is highly sceptical of the supposition that constraining governmental power, particularly executive power will bring about the desired effect of curbing the abuse of power.¹¹⁹ He argues that the fear or terror of governmental power which he terms "tyrannophobia" is largely unjustified.¹²⁰ Vermeule boldly asserts that where the law imposes tight barriers on the exercise of executive power

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ See *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) in which the JSC was compelled to furnish reasons as to why candidates were not appointed.

¹¹⁷ Ibid.

¹¹⁸ Adrian Vermeule "The Publius Paradox" (2019) 82 *Mod Law Rev* 1.

¹¹⁹ Vermeule op cit note 118.

¹²⁰ Ibid at 3.

'it will only result in violations that become precedents'.¹²¹ The thrust of his argument can be encapsulated in this line that 'the attempt to constrain government power ends up having perverse effects, in fact expanding government power'.¹²² He juxtaposes the perceived effect of deterring an abuse of power by constraining the exercise of executive power and the actual resultant effect of its expansion in what he terms as the "Publius Paradox".

Vermeule, thereafter looks at select case law in which he concretises his concerns most notably by his analysis of the popularly called Travel Ban case.¹²³ He describes how an executive order from the Trump administration preventing entry from predominantly Muslim countries who fail to meet the required threshold relating to screening procedures for terrorists as set out by the administration.¹²⁴ This ban was subject to several legal challenges at lower Courts, eventually escalating to the Supreme Court where it was upheld with a judgment that firmly restated presidential power over issues concerning foreign affairs, national security and immigration.¹²⁵ Vermeule notes how the precedent set in that case may now be applied in many other instances exceeding the Courts, but 'internally within the legal institutions of the executive branch, such as the Office of Legal Counsel'.¹²⁶ He persuasively concludes that the travel ban litigation produced a "classic expression" of deference that made the President's powers more explicit and expansive.¹²⁷

At the heart of his argument, Vermeule problematises constitutional libertarianism's framing of the separation of powers doctrine, that require the constraining and tightening of power – particularly executive power by another branch of government, as a necessary requirement to minimise the risk of abuse of that power by the Executive.¹²⁸ Vermeule asserts that the attempt to rigidly constrain executive power results in generating a state of affairs that enlarges executive power – which he terms as "perversity". In addition, he observes that this state of affairs occurs when a polity is politically polarised, unstable and divided which neatly characterises the South African polity.¹²⁹

Armed with this knowledge of the "Paradox", Vermeule proposes that an undistorted understanding of constitutional regulation risk, militates towards a more capacious scope of

¹²¹ Ibid at 4-5.

¹²² Ibid at 6.

¹²³ *Trump v Hawaii* 585 U.S.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Ibid at 10.

¹²⁹ Ibid at 14.

executive power – ‘to make constitutionalism a loosely-fitting garment’, providing government sufficient powers and latitude to navigate the contours of future crises.¹³⁰ Because constitutional drafters do not have the perfect foresight to make rules catering to every possible contingencies, sufficient space must be left to the government to allow them to legitimately respond to unforeseen moral exigencies.¹³¹

The analytical power of this argument demands that executive power (including the President’s powers of appointment) be fluid, dynamic and unconstrained. They should be flexible in order to respond adequately to the changing modern conditions of a polity. Consequently, governmental power in reality pushes the boundaries of constitutional libertarian understandings of executive power and its institutionalised role in the *trias politica* and is, in fact, more robust enabling it to cater to the fluctuating demands of a democracy.

As appealing as Vermeule’s justifications are, I am of the view that the current arrangement of South Africa’s separation of powers with its constraining effect that envisages a check of executive power by the Judiciary is most suitable and appropriate in a fledgling democracy such as ours. I, however, must concede that Vermeule’s concerns have indeed proved true within our context as well. In an attempt to remedy the abuse of governmental power by the Cabinet and the President with regards to the misappropriation of public resources and funds, the Constitutional Court, in the much lauded *Nkandla* judgment, confirmed the binding nature of the Public Protectors remedial orders.¹³² The President was, therefore, forced to pay back the money spent on the security upgrades of his Nkandla residence.¹³³ This precedent has had ramifying effects in our current context of a less than desirable Public Protector, notorious for outlandish and ill-conceived decision-making, which has frequently been subject to numerous legal challenges but whose orders are nevertheless binding. In this scenario, we see how in an effort to constrain governmental power, the Courts emboldened the power of another critical functionary (the Public Protector), which has had perverse effects. Even so, cases of executive power expanding as a result of judicial oversight as argued by Vermeule are few and far-in-between within the South African context. I will, in the third chapter, unpack how the case law reveals the Judiciary, in an overwhelming majority of instances, as the only branch of the state that has

¹³⁰ Ibid at 14-15.

¹³¹ Ibid at 15.

¹³² Supra note 81 (*EFF I*).

¹³³ Ibid.

been able to curtail and remedy the effects of executive power as it relates to the President's powers of appointment, without necessarily enlarging them.

It is important to note that this thesis is not naïve to the risk that the Courts' intervention in the exercise of executive power poses. David Landau and Rosalind Dixon have argued that Courts can be co-opted by "would-be authoritarians" and can thus play a role that furthers the erosion of democratic constitutionalism.¹³⁴ The authors strikingly describe how Courts rather than political actors, can effectively undermine constitutional democracy by undertaking antidemocratic measures.¹³⁵ These actions are harder to detect due to them being cloaked with a veneer of respectability by an institution universally respected to promote 'democratic constitutional traditions and the rule of law'.¹³⁶ Courts can, therefore, be used as 'agents rather than opponents of antidemocratic constitutional change'.¹³⁷

The authors limit their definition of "abusive judicial review" to one that frustrates the minimum core of electoral democracy.¹³⁸ Following this definition, they assert that abusive judicial review is one that attacks the minimum core of electoral democracy.¹³⁹ The authors, thereafter, expose how 'judges usually do this after being either coerced or captured by antidemocratic actors, and thus become part of a regime strategy to undermine liberal democracy'.¹⁴⁰ Judges take up this injurious exercise by warping the constitutional meaning and pull-out concepts and doctrinal principles designed to shield liberal democracy in an abusive way that undermines their fundamental meaning and turns them into devices to harm liberal democracy.¹⁴¹ The authors distinguish their argument from other similar phenomena, by invoking intent as a necessary requirement for the definitional account of abusive judicial review. Judges engage purposefully in the enterprise of subverting liberal democracy.¹⁴²

¹³⁴ David Landau and Rosalind Dixon 'Abusive Judicial Review: Courts Against Democracy' (2020) 53 *UC Davis L. Rev* 1313 at 1317.

¹³⁵ Landau and Dixon op cit note 134.

¹³⁶ *Ibid.*

¹³⁷ *Ibid* at 1322.

¹³⁸ *Ibid* at 1323. The authors define minimum core as 'minimalist definition of constitutional democracy that consists of free and fair elections, with a minimum set of independent checks and balances on the elected government, rather than more maximal definitions that might contain a range of richer but far more contestable commitments such as deliberation or substantive equality'.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid* at 1326.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

The authors, thereafter, describe the various techniques employed by judges when engaging in abusive judicial review and justify their arguments in a rich and comprehensive comparative analysis of the various jurisdictions in which this phenomenon has unravelled.¹⁴³

Though conceptually appealing in its description of the various instances in which this theory has occurred, the likelihood of this anomaly occurring within the context of South Africa's constitutional democracy is rare. Such a risk may exist in the South African context, given the overbearing influence of politics in the functioning of the state as detailed earlier. However, South Africa's strong protection of judicial independence will ward off such threats.¹⁴⁴ The Courts' judicial authority as it relates to judicial review has and, in my opinion, will continue to be vigorously enforced and protected. The Courts and their judges have stood firm against attempts at being "captured" and have commendably remained resolute in upholding their constitutional duties steadfastly. Institutional safeguards have also proven effective in ensuring the Courts' independence in the light of enormous pressure to bend to countervailing political forces. South Africa's robust and active civil society will continue to step up its efforts to protect this critical arm of government.

2.7 Conclusion

It is evident that South Africa's democratic enterprise has and continues to run the risk of erosion resulting from the effects of its dominant-party status. The Courts have, therefore, had to validly intervene to constrain the ill-motivated exercise of the Executive's powers of appointment which, as argued above, does not fall foul of the separation of powers doctrine nor the Judiciary's authority as it relates to judicial review. In addition, this proposition is endorsed by academic scholars who agree to the Courts' supportive role in safeguarding

¹⁴³ Ibid at 1339. For example, the authors describe how in Burundi several reports detailed an interference by the President and his followers with the Constitutional Courts' deliberations over the application of term limits. Similarly, in Ecuador, evidence of threats by the President Rafael Correa were discovered to have been made to judges following adverse findings made by the judges regarding a public works project. A more radical example mentioned by the authors is that of the Fijian Prime-Minister's use of coercive and brute force techniques such as burning houses and vandalising judges' property to force compliance.

¹⁴⁴ Section 165(1)-(2) of the Constitution provides:

"(1) [T]he judicial authority of the Republic is vested in the courts.

(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice."

See also generally, *S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC) and Chris Oxtoby 'The Appointment of Judges: Reflections on the Performance of the South African Judicial Service Commission' (2021) 56 *J Asian Afr Stud* 34.

and enforcing democracy from the blemishes of the Executive. The pervasive influence of political power – a crucial and inescapable consequence of our constitutional design, continues to foreground critical functions of constitutional institutions and democratic politics. This is because the South African political system allocates tremendous power to political actors and parties, which is most often up for manipulation. It has, therefore, become the unenviable responsibility of the Courts to safeguard and restore the fibre of democracy from the internal skirmishes of the ANC.

CHAPTER THREE: PRESIDENTIAL POWERS OF APPOINTMENT AND THE COURTS IN ACTION: A CLASH OF THE TITANS

3.1 Introduction

This chapter will ground the conceptual principles laid out in chapter two, through a critical analysis of the case law. I will show how the Courts have had to undo the effect of unscrupulous executive conduct and appointments and as a result, shielded democracy from the vagaries of the President. I will contextualise the cases by providing an overview of the constitutional roles of the NPA and the President's Cabinet which will then be followed by an analysis of select cases pertaining to the NPA and the President's Cabinet. I will, thereafter, argue that the claims of lawfare hold no water and further assess the validity of the trenchant critiques of such interventions within the context of the cases. I will finally distil some general key observations that emerge from the cases that further legitimate the Courts' intervention.

3.2 The Courts as the Unsung Heroes of Constitutional Democracy: The Institutions, the Cases and Rationality Review

As mentioned earlier, this thesis seeks to counter the lawfare critique in the context of cases relating to the President's powers of appointment – focusing on the National Prosecuting Authority and the President's Cabinet. In order to place these cases in context, we need to explore the role that these institutions play in our constitutional democracy. The composition of the NPA and the appointment of its head is governed by section 179 of the Constitution.¹⁴⁵ The National Prosecuting Authority 'has the power to: institute and conduct criminal proceedings on behalf of the state; carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and discontinue criminal proceedings'.¹⁴⁶ The NPA, therefore, plays an important role in our constitutional democracy by investigating and enforcing prosecutions in our country and ensuring that justice is realised. It is, therefore, important that the right individual is appointed to carry out the critical discretionary powers of prosecutions vested in the head of the NPA. The Constitution and the National

¹⁴⁵ Section 179(1)(a) of the Constitution.

¹⁴⁶ <https://nationalgovernment.co.za/units/view/66/national-prosecuting-authority-of-south-africa-npa> accessed on 22 August 2022.

Prosecuting Authority Act (“NPA Act”),¹⁴⁷ provide the requirements for an individual to be appointed as an NDPP. These include that he or she must be appropriately qualified,¹⁴⁸ be a fit and proper person¹⁴⁹ and must be a South African citizen.¹⁵⁰ As will be elucidated later, former appointed NDPP’s have fallen short of these requirements, which the Courts have exposed and serve as a withering indictment reflecting the President’s abuse of his powers of appointment. The fact that no NDPP has successfully completed their term, the constant legal challenges levelled against past NDPP’s pertaining to their fitness to hold office and the continual meddling from the President into the NDPP’s functions have severely impacted the creditability of this institution as will be displayed below.

The second power of appointment that we are concerned with is the power to appoint members of Cabinet. The President’s Cabinet forms an integral part of the state’s machinery in delivering services to the general public and maintaining social welfare. Its primary role is essentially assisting the President in carrying out his or her duties. The Cabinet is responsible for the functions and powers assigned to them by the President.¹⁵¹ However, the President’s Cabinet has not carried out its mandate in this way and has been regarded as a bastion for cronyism and its composition has been viewed as a site of factional political contestation, to further agendas removed from its constitutional role.¹⁵² The Courts have had to upend this dereliction of duty, through their judgments.¹⁵³

At the core of the Courts’ jurisprudence when adjudicating matters concerning these institutions, has been the unique development of rationality review, which the Courts have used as an instrument to curtail the exercise of public power that is irrational by the functionaries.¹⁵⁴ The South African Courts have a rich jurisprudence defining the nature of

¹⁴⁷ 32 of 1998.

¹⁴⁸ Section 9(1)(a) of the NPA Act.

¹⁴⁹ Section 9(1)(b) of the NPA Act.

¹⁵⁰ Section 9(2) of the NPA Act.

¹⁵¹ Section 92(1) of the Constitution.

¹⁵² Mandy De Waal ‘Cadre deployment, cronyism and the paving of SA’s highway to hell’ *Daily Maverick* 3 August 2012 available at <https://www.dailymaverick.co.za/article/2012-08-03-cadre-deployment-cronyism-and-the-paving-of-sas-highway-to-hell/> accessed on 5 February 2022. ‘Ferial Haffajee ‘Ramaphosa changes more than a third of his Cabinet, takes state security into the Presidency, gives Mboweni a pass out of government’ *Daily Maverick* 6 August 2021 available at <https://www.dailymaverick.co.za/article/2021-08-06-ramaphosa-changes-more-than-third-of-his-cabinet-takes-state-security-into-the-presidency-gives-mboweni-a-pass-out-of-government/> accessed on 3 January 2023.

¹⁵³ For example, *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening)* 2017 (3) SA 335 (CC). In this judgment the Constitutional Court lambasts the then Minister of Social Development, Bathabile Dlamini for her dereliction of duty, resulting in the SASSA social grants of millions of South Africans being delayed.

¹⁵⁴ *Pharmaceutical Manufacturers Association of South Africa: In re ex Parte President of the Republic of South Africa and others* 2000 (2) SA 674 (CC) para 90. See also Cora Hoexter and Glenn Penfold ‘*Administrative Law in South Africa*’ 3ed (2021) 483.

rationality review. Substantive limits have, however, been placed on the Courts when reviewing the President's powers, due to the supremacy of the Constitution which vests the President with his powers.¹⁵⁵ These limits are that the President must not infringe any provisions in the Bill of Rights,¹⁵⁶ and the requirement that the President act in good faith and not misconstrue his powers.¹⁵⁷ Early conception of rationality review hinged on the observance of the principle of legality. As stated in *Fedsure* 'It seems central to the conception of our constitutional order that the legislature and the executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'.¹⁵⁸

Early jurisprudence emphasised rationality as an incident of the principle of legality, requiring the President to act rationally and in good faith.¹⁵⁹ As such, rationality has traditionally been considered to be a thin standard of review.¹⁶⁰ In *Hugo*, the Constitutional Court, in expanding on the good faith requirement when the President exercises his powers as head of state, i.e. the pardoning of prisoners, stated that rational reasons must be provided.¹⁶¹ However, a shift has developed in the Courts' conception of rationality. In *Albutt*, the Courts examined the means employed to ascertain whether they are rationally connected to the purpose sought to be achieved.¹⁶² In this case, former President Thabo Mbeki introduced a special pardoning dispensation to pardon political prisoners and to bring an end to the work of the Truth and Reconciliation Commission.¹⁶³ Former Chief Justice Sandile Ngcobo, held that victim participation was essential and as a matter of rationality victims must be heard.¹⁶⁴ The Court suggested better means to achieving the end which is a jump from the "minimum threshold requirement" displayed in *Hugo* and *SARFU*. In the *Simelane* case, the Constitutional Court expanded rationality even further by stating that every step in the process must be connected to the purpose sought to be achieved.¹⁶⁵ A deeper analysis of this decision and its consequences will follow later.

¹⁵⁵ *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 para 10.

¹⁵⁶ *Hugo* supra note 154.

¹⁵⁷ *SARFU III* para 148

¹⁵⁸ *Fedsure* para 48.

¹⁵⁹ *Ibid.* See also *Minister of Justice and Constitutional Development v Chonco and Others* 2010 (4) SA 82 (CC).

¹⁶⁰ Hoexter and Penfold op cit note 154 at 486.

¹⁶¹ *Ibid* para 64. See also *Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA). In this judgement, the SCA held that the JSC was required to provide reasons to candidates who were turned down from being appointed as judges.

¹⁶² *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (2) SACR 101 (CC) para 51.

¹⁶³ *Albutt* supra note 162 para 4.

¹⁶⁴ *Ibid* para 65.

¹⁶⁵ *Democratic Alliance v President of South Africa and Others (Simelane judgment)* supra note 1 para 37.

In other instances, the Courts revert to the thin threshold requirement of rationality. In *Justice Alliance*, the Constitutional Court rejected former President Zuma's reason for extending Sandile Ngcobo's term as the Chief Justice in order to help transform the jurisprudence of the Court by 'weeding out old wood' as irrational and not furthering a legitimate government purpose.¹⁶⁶ The Courts' powers to invalidate such action and conduct is made possible due to the fact that all exercises of public power are subject to rationality review.¹⁶⁷ As previously stated, rationality review flows from the principle of legality which provides that "all exercises of public power must, at the very least, be lawful and rational to pass constitutional muster".¹⁶⁸

3.3 The National Prosecuting Authority

3.3.1 Simelane

¹⁶⁶ *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* 2011 (5) SA 388 (CC) para 48.

¹⁶⁷ See *Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector* 2019 3 All SA 127 (GP); *Public Protector v Commissioner for the South African Revenue Service and Others* 2022 (1) SA 340 (CC); and *Public Protector and Others v President of the Republic of South Africa and Others* 2021 (6) SA 37 (CC). In these cases, concerning the Public Protector, the Courts have invalidated conduct and action by the Public Protector arising out of the irrationality of her decisions. See also *Judicial Service Commission and Another v Cape Bar Council and Another* supra note 161 para 21 in which the SCA held that all public power must not be arbitrary or irrational.

¹⁶⁸ Michael Tsele "Coercing Virtue" in the Constitutional Court: Neutral Principles, Rationality and the *Nkandla* Problem' (2016) 8 *CCR* 193 at 205 citing *Pharmaceutical Manufacturers* paras 89-90. Other academic scholars such as Alistair Price comment on the "malleability" of the nature of rationality review applications and interpretation. See Alistair Price 'The content and justification of rationality review' (2010) 25 *SAPL* 347 at 356. Price has cautioned against the Courts interpretation and application of the rationality review insofar as it incorporates an assessment of reasonableness. Price hazards that this may well infringe on the Courts general duty to respect the political autonomy and competence of the other branches of the state in compliance with what he terms the "principle of comity". See also Lauren Kohn 'The burgeoning constitutional requirement of rationality and the separation of powers: Has rationality review gone too far?' (2013) 13 *SALJ* 811 in which she similarly shares her angst against this developing trend, with her critique focused on how the Courts conflated rationality with reasonableness when assessing whether Mr Simelane was a fit and proper person to hold office. Michael Bishop is of the view that the discretionary component that attaches to judges determining the rationality of a choice undermines the command not to second-guess the Legislature's choices and would contaminate the traditional underpinnings of a neutral inquiry. See Michael Bishop 'Rationality is dead! Long live rationality! Saving rational basis review' (2010) 25 *SAPL* 312 at 320. Tsele *Ibid* at 197, shares a similar disquiet as Bishop and argues that the Courts should adopt a neutral and principled conception of rationality that conforms with the generality requirement. This, he argues, will prevent the Courts from manipulating the rationality review to produce outcomes-based judgments. *Ibid* at 198. Bishop and Tsele's aims are noble and uncontentious but also stark and conservative. As intimated earlier, the broad factual matrix in which any exercise of public power is situated, forces the Courts to make value-judgements when determining whether the public functionary acted rationally. The Courts will inevitably have to exercise their discretion when assessing whether state officials exercised their powers rationally. This does not necessarily entail the Courts substituting, expanding or shrinking the principle at their whim, or to achieve a desirable outcome – but dutifully applying it in an appropriate fashion suited to the applicable context. See Alistair Price 'Rationality review of legislation and executive decisions: *Poverty Alleviation Network* and *Albutt*' (2010) 127 *SALJ* 580 on this point.

This judgment was a confirmation by the Constitutional Court of the decision reached by the Supreme Court of Appeal regarding the appointment of the then National Director of Public Prosecutions as constitutionally deficient.¹⁶⁹ In this case, the President ignored recommendations by the report of the Ginwala Enquiry that disciplinary proceedings be instituted against the then National Director of Public Prosecutions, Menzi Simelane resulting from the approach he took in providing evidence before the Enquiry and Public Service Commission involving a dispute concerning the proper role of then NDPP, Mr Vusi Pikoli.¹⁷⁰ The report of the Ginwala Commission, established by former President Thabo Mbeki to enquire into Mr Pikoli's fitness to hold office, severely criticised Mr Simelane's approach in making government submissions as well as the credibility of his evidence.¹⁷¹ This resulted in Mr Pikoli's suspension.¹⁷²

This prompted the then Minister of Justice and Constitutional Development, Mr Enver Surty to request the Public Service Commission to investigate Mr Simelane's conduct during the Ginwala Commission.¹⁷³ The Public Service Commission recommended disciplinary proceedings against Mr Simelane arising from his conduct before the Ginwala Commission which the Minister rejected.¹⁷⁴ The President proceeded to appoint Mr Simelane as the National Director of Public Prosecutions two days after the Minister rejected the Public Service Commission.¹⁷⁵

In the Supreme Court of Appeal, the SCA held that the President had erred in four respects in appointing Mr Simelane as NDPP which rendered the process of the decision to appoint Mr Simelane irrational.¹⁷⁶ Most important of these reasons, was the failure of the President to properly consider whether Mr Simelane was a fit and proper person for the job.¹⁷⁷ The others ways in which the President erred, were when he firmly held conviction of Mr Simelane's suitability for the role prior to actually determining his fitness for the position.¹⁷⁸ The President further incorrectly held that, absent evidence contradicting the perception that Mr Simelane was a fit and proper person, that he was indeed a fit and proper person.¹⁷⁹ Finally, the President disregarded the criticisms of the Ginwala Commission of Mr Simelane

¹⁶⁹ *Democratic Alliance v President of South Africa and Others (Simelane case)* supra note 1 para 1.

¹⁷⁰ *Ibid* para 4.

¹⁷¹ *Ibid*.

¹⁷² *Ibid*.

¹⁷³ *Ibid*.

¹⁷⁴ *Ibid*.

¹⁷⁵ *Ibid*.

¹⁷⁶ *Ibid* para 6.

¹⁷⁷ *Ibid*.

¹⁷⁸ *Ibid*.

¹⁷⁹ *Ibid*.

on the basis that the Commission was not appointed to investigate Mr Simelane, but Mr Pikoli.¹⁸⁰

In the Constitutional Court, the Minister advanced a similar argument to that in the SCA that neither the Constitution nor the Act prescribes any procedure for appointing the National Director of Public Prosecutions.¹⁸¹ The Minister submitted in his written argument that when making the decision to appoint the NDPP, the President undertook an “assessment and evaluation of the qualities, strengths and weaknesses of the person whom the President had identified for appointment”.¹⁸² The Minister stressed that the rationality test is not burdensome and that the SCA’s reasoning went beyond rationality and ‘amounted to an unauthorised intrusion into presidential and executive territory’.¹⁸³ The Minister argued that the SCA, instead applied the reasonableness standard suited for administrative action cases under PAJA, which is inappropriate for testing presidential executive power.¹⁸⁴ The DA agreed with the finding of the SCA and its reasoning and application of the principle of rationality.¹⁸⁵

The Constitutional Court in a majority judgment authored by Yacoob J, noted that the appointment of the NDPP was not a “political appointee” as contended by the Minister.¹⁸⁶ The Court also noted that in contrast with what was stated by the Minister, the qualifications of the NDPP is to be determined by Parliament as stipulated by the Constitution and not merely by the President.¹⁸⁷ The decision and evaluation as to whether a candidate is a fit and proper person, though a value judgement does not lie within the sole preserve of the President. In deriding Mr Simelane’s conscientiousness and integrity, the Court found that this critical assessment was not a matter to be determined according to the subjective opinion of the President, but rather it was a jurisdictional pre-requisite to be determined objectively.¹⁸⁸ The appointee will thus have to meet the threshold test as set out by section 9 of the NPA Act.¹⁸⁹ This then thrusts the task of determining the validity of the appointment within the purview of the Courts’ review functions.

¹⁸⁰ Ibid.

¹⁸¹ Ibid para 8.

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid para 11.

¹⁸⁶ Ibid para 16.

¹⁸⁷ Ibid para 21-22.

¹⁸⁸ Ibid para 12.

¹⁸⁹ Ibid para 20. Section 9 of the NPA Act.

Following the above analysis, the Constitutional Court then found that the decision to appoint Mr Simelane was irrational. In fleshing out the rationality review standard, the Court reasoned that rationality includes the process followed when reaching a decision:

“[W]hile each and every step in the process resulting in the decision need not be rationally viewed in isolation, the rationality of the steps taken have implications for whether the ultimate executive decision is rational. In my view, the decision of the President as Head of the National Executive can be successfully challenged only if a step in the process bears no rational relation to the purpose for which the power is conferred and the absence of this connection colours the process as a whole and hence the ultimate decision with irrationality. We must look at the process as a whole and determine whether the steps in the process were rationally related to the end sought to be achieved and, if not, whether the absence of a connection between a particular step (part of the means) is so unrelated to the end as to taint the whole process with irrationality.”¹⁹⁰

The Court found that when the Minister and the President ignored the findings of the Ginwala Commission, that revealed Mr Simelane to be dishonest but nevertheless proceeded to appoint him, this action was not rationally related to the purpose of the power which is to appoint a candidate with the requisite conscientiousness and credibility.¹⁹¹

The *Simelane* case stands out as one of the most salient cases that display the President’s important duty of appointment and the consequence of a failure to uphold this duty with the requisite probity and seriousness it deserves. This case was one of the first in a string of cases to follow during Zuma’s presidency, whereby the Court made searing indictments regarding the fitness and conscientiousness of the NDPP to perform their important functions. The judgment has, in retrospect, attracted some criticism from academic commentators due to its framing and application of the rationality review. Kohn is critical of the reasoning employed by the Constitutional Court in this case insofar as it develops the principle of rationality to include the requirement that every step in the process taken to reach the decision must be considered when determining whether a decision is rational. Kohn argues that this type of reasoning is akin ‘to a fully-fledged proportionality analysis’ which requires the assessment of the correctness of the decision itself, rather than the “rhyme or reason” enquiry.¹⁹² Kohn argues that the rationality principle has therefore been

¹⁹⁰ Ibid para 37.

¹⁹¹ Ibid para 52.

¹⁹² Kohn op cit note 168 at 826-831.

expanded beyond the requirements of the rationality test under the PAJA.¹⁹³ Kohn is critical of the Constitutional Court's expansion of the rationality requirement without a sufficient and nuanced engagement with the requisites of the separation of powers doctrine.¹⁹⁴

Price is further critical of how over-reliance on rationality may tempt Courts to veer too far into the constitutional spheres of the legislative and executive pillars of government.¹⁹⁵ Importantly, is Price's apprehension regarding whether the legal rule derived from the rationality principle – which now includes review for ignoring relevant considerations can be easily reduced to the “rhyme or reason” enquiry suggested by Kohn.¹⁹⁶ Price suggests that one way to assist judges to safeguard ‘the importance of judicial modesty and restraint’ from the dangers of a ‘jurisprudence of exasperation’,¹⁹⁷ is for judges to bear in mind the variable weight of competing considerations of institutional competence and democratic principles when engaging in judicial review in various contexts.¹⁹⁸ I disagree with both Kohn and Price's assessment of the Courts' role when exercising rationality review. Price and Kohn would prefer the Courts to exercise deference in these kinds of cases relating to executive action. However, such deference would embolden the President's discretion to appoint anyone he deems fit, which may result in the appointment of improper, unqualified candidates. In addition, candidates would not be subjected to any standardised and consistent criteria to ensure they are suitably qualified for the role.

As Karthy Govender points out, the difficulty with being too deferential to the Executive when it comes to their discretionary powers of appointment, is that different or even the same Presidents could employ varying criteria for both removal and appointment of the NDPP.¹⁹⁹ It is, therefore, unsurprising that the Constitutional Court in *Simelane* held that it would be unacceptable for the President to ‘possess a subjective discretion of appointment when the Constitution expressly requires an objective criterion of independence’.²⁰⁰

¹⁹³ Promotion of Administration Justice Act 3 of 2000.

¹⁹⁴ *Ibid* at 833.

¹⁹⁵ Alistair Price ‘The Evolution of the Rule of Law’ (2013) 130 *SALJ* 649 at 657.

¹⁹⁶ Price, *Evolution*, op cit note 195.

¹⁹⁷ These terms were famously coined by former Justice Kate O'Regan in her Helen Suzman Memorial Lecture ‘A forum for reason: Reflections on the role and work of the Constitutional Court’ (2012) 28 *SAJHR* 116 at 132.

¹⁹⁸ *Ibid* at 657-658.

¹⁹⁹ Karthy Govender ‘The Risk of Taking Risky Decisions: *Democratic Alliance v President of the Republic of South Africa*’ (2013) 5 *CCR* 451 at 458.

²⁰⁰ Govender op cit note 199.

In an interesting critique, Mhango distinguishes between an internal and external separation of powers imperative.²⁰¹ The internal is characterised by 'operating within the confines of a single branch' of government and the external separation of powers imperatives operating through interface among the different arms of government or with forces external to the branches operations.²⁰² Mhango, citing Gillian Metzger's scholarship in this regard, notes that the focus of the internal separation of powers scholarship is on the Executive branch of government specifically as it relates to presidential powers due to the risk of increased powers in a modern democracy.²⁰³ Internal separation of powers is, therefore, concerned with checks on presidential power.²⁰⁴ Mhango provides that internal separation of powers seeks to facilitate similar objectives as external separation of powers through curbing an abuse of power by working within the limits of the single branch of government.²⁰⁵ He does, however, caution that its application must still respect and be cognisant of the external aspects and not undermine the traditional checks on executive power, i.e. political accountability.²⁰⁶ Mhango's internal separation of powers critique is apt in describing the importance of the doctrine in curbing an abuse of the President's power of appointment. The potential for the abuse of power as it relates to the President's powers of appointment is heightened due to the discretionary element attached to this power. Therefore, the separation of powers doctrine and the various layers of government that comprise it are all important in minimising an abuse of power by the President, through internal checks and balances.

I agree that the Constitutional Court in exercising its constitutionally empowered judicial review functions should have explicitly stated the implications that its reasoning and findings might have on the separation of powers doctrine, especially because it invalidated a decision empowered by a constitutional provision within the domain of the Executive. Indeed, adding the proportionality ingredient into the principle of legality would render the PAJA useless and offend the principle of subsidiarity which are factors the Constitutional Court failed to consider. Nevertheless, the case is crucial in demonstrating the Constitutional Court's

²⁰¹ Mtendeweka Mhango 'Removal of the National Director of Public Prosecution: A Critique of Emerging Constitutional Jurisprudence' (2020) 35 *SAPL* 1 at 11 citing Gillian Metzger 'The Interdependent Relationship between Internal and External Separation of Powers' (2009) 59 *Emory LJ* 423.

²⁰² Mhango op cit note 201 at 11-12.

²⁰³ *Ibid* at 12.

²⁰⁴ *Ibid*.

²⁰⁵ *Ibid*.

²⁰⁶ *Ibid*.

commitment to fostering constitutional values of accountability, transparency and honesty as it relates to the National Prosecuting Authority and its head.

3.3.2 Jiba

In this case, Freedom Under Law (“FUL”) instituted a two-part application against several Respondents. In the first leg, FUL sought relief to set aside a decision taken by the then National Director of Public Prosecutions Shaun Abrahams to decline to prosecute charges of perjury and fraud brought against the third Respondent, the then Deputy Director of Public Prosecutions Advocate Nomgcoba Jiba (“Jiba”).²⁰⁷ In the second leg of the application, FUL sought relief to have reviewed and set aside the decision of the President not to suspend Advocate Jiba and the Special Director of Public Prosecutions Advocate Lawrence Sithembiso Mrwebi (“Mrwebi”) pending inquiries into their suitability to hold their respective offices in the National Prosecuting Authority (NPA).²⁰⁸ FUL sought an order instructing the President to act in terms of section 12(6)(a) of the NPA Act to suspend Advocates Jiba and Mrwebi and to institute an inquiry into their conduct.²⁰⁹ The Respondents opposed the application.²¹⁰

This case has its origins from events dating back to 2012, when Jiba was still NDPP. Jiba granted authorisations requested by the then Director of Public Prosecutions in Kwa-Zulu Natal, to institute criminal prosecutions against Johan Booyesen, a then Major in the South African Police Services on charges of racketeering in terms of section 2 of the Prevention of Organised Crime Act (“POCA”).²¹¹ Booyesen then applied to the Kwa-Zulu Natal Division of the High Court seeking to review and set aside Jiba’s decision to issue authorisations on the basis that they were irrational, arbitrary and went against the principle of legality.²¹²

FUL relied on two reports made in support of their application against the President. The first was compiled by former NDPP, Mr Mxolisi Nxasana and the other by former Constitutional Court Justice Z M Yacoob which looked into allegations of serious impropriety within the NPA, specifically on the part of Jiba and Mrwebi.²¹³ In addition, FUL relied on

²⁰⁷ *Freedom Under Law* supra note 1 para 1.

²⁰⁸ *Ibid* para 2.

²⁰⁹ *Ibid* para 3.

²¹⁰ *Ibid* para 4.

²¹¹ *Ibid* para 16.

²¹² *Ibid*.

²¹³ *Ibid* para 13.

several adverse findings made by the Courts against Jiba, in several cases which FUL contended raised serious questions regarding her very fitness to hold her respective position in the NPA.²¹⁴ The Pretoria High Court canvasses the reasons why the then NDPP Shawn Abrahams refused to prosecute Jiba. The Court disclosed records that reveal that the then NDPP Shawn Abrahams relied on a recommendation by the written delegation team led by the Regional Head: Special Commercial Crime Unit Marshall Mokgatlhe, to withdraw the charges.²¹⁵ This recommendation went against a previous opinion from the prosecution team that recommended prosecution.²¹⁶ Abrahams concluded in a press conference held later after the decision was taken, that there had been no reasonable prospects of successful prosecution.²¹⁷ He further added that the withdrawal of the charges arose from the provisions of Section 78 of POCA.²¹⁸

FUL's application is grounded on the principle of legality and rationality which, as discussed earlier, demands that the exercise of public power must be lawful and rational.²¹⁹ FUL pointed out that the power exercised by Mokgatlhe and Abrahams emanate from section 179 of the Constitution read with section 12(6) and 22(2)(c) of the NPA Act.²²⁰ As a result, public functionaries have a duty to act in accordance with these principles. Moreover, FUL persisted, relying on the *Ntlemeza*²²¹ judgment that held 'that his [Ntlemeza's] continued stay in office even for one day longer pending appeal, would erode public confidence in the police. Therefore, the delay in removing Jiba and Mrwebi from office would continue to harm the NPA'.²²² Further, FUL asserted that Abrahams and Mokgatlhe committed a cardinal error of law by their reliance of section 78 of POCA.²²³ This, they argued, is because the charges against Jiba are as a result of her conduct in her opposition to Booyesen's review application – which the Court heavily criticised.²²⁴

The Court agreed with FUL's submissions and found that the adverse findings made by the various Courts have an impact on and erodes the public confidence in the NPA. Thus, the

²¹⁴ Ibid para 14. Some of these judgments include *Booyesen v Acting National Director of Public Prosecutions and Others* 2014 8 All SA 319 (KZD); *Freedom Under Law v National Director of Public Prosecutions and Others* 2014 (1) SA 254 (GP); and *National Director of Public Prosecutions and Others v Freedom Under Law* 2014 (4) SA 298 (SCA).

²¹⁵ Ibid para 19.

²¹⁶ Ibid.

²¹⁷ Ibid.

²¹⁸ Ibid para 37.

²¹⁹ Ibid para 28.

²²⁰ Ibid.

²²¹ *Ntlemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA).

²²² Ibid para 25.

²²³ Ibid para 44.

²²⁴ Ibid para 40.

President ought to have acted swiftly when the situation called.²²⁵ The Court failed to understand what prevented the President to act for a period exceeding one year even after having been requested by the then NDPP, Mxolisi Nxasana.²²⁶

The High Court upheld the challenge and ordered that the decision taken by the NDPP to withdraw the charges against the Deputy National Director of Public Prosecutions, Jiba is reviewed and set aside.²²⁷ The Court further held that the President's failure to suspend and institute inquiries into the fitness of Jiba and Mrwebi to hold office in the NPA is reviewed and set aside. The President was also directed to institute disciplinary inquiries against Jiba and Mrwebi into their fitness to hold office in the NPA and that they be suspended pending the outcome of those inquiries.²²⁸ This case is important in displaying how the President erred in appointing Jiba and Mrwebi in their respective roles as Deputy Director of Public Prosecutions and Special Director of Public Prosecutions. The case shows the callousness in which both Jiba and Mrwebi exercised their duties and the little regard they had for their roles as demonstrated by their improper conduct during their respective tenures. Most concerning, is the failure of the President to take action against these incumbents after they were found guilty of misconduct by various Courts. This prompted the High Court to issue a directive compelling the President to institute inquiries against Jiba and Mrwebi. This case displays how the Courts have had to correct a failure of the President in taking appropriate action against incompetent functionaries that he appointed. Such action cannot be considered improper and out of step, but critical in preserving the proper functioning and integrity of the National Prosecuting Authority.

3.3.3 Nxasana

In a similar vein, the Court clamped down on money-grabbing political despots who abuse their power when it comes to the appointments of the head of the NPA in the *Corruption Watch* case. In *Corruption Watch*, the applicants consisting of Corruption Watch NPC ("Corruption Watch"), Freedom Under Law NPC ("FUL") and Council for the Advancement of the South African Constitution ("CASAC") sought an order confirming the extensive orders

²²⁵ Ibid para 94.

²²⁶ Ibid para 93.

²²⁷ Ibid para 108.

²²⁸ Ibid.

of constitutional invalidity made by the Gauteng Division, Pretoria High Court. The Constitutional Court confirmed all the orders made by the High Court.

The events leading to the dispute emanated from the President's stated intention to establish a commission of inquiry into the fitness of then NDPP, Mr Mxolisi Nxasana's fitness to hold office, arising out of Mr Nxasana's previous criminal convictions for "violent conduct" consisting of divisive comments that had the effect of bringing the NPA into disrepute which was reported in the media.²²⁹ In addition, the alleged non-disclosure of facts surrounding the circumstances of prosecutions previously faced by Mr Nxasana were motivating factors.²³⁰ Communications between Mr Nxasana and the President revealed that Mr Nxasana was not prepared to vacate the office as there was no basis for him to. He further stated that he would, however, consider stepping down if he was compensated for the remainder of the contract period.²³¹ The former President then began setting up the commission to inquire into the fitness of Mr Nxasana to hold office. This commission never commenced. This was due to fruitful negotiations between former President Zuma's legal advisor Mr Hulley and Mr Nxasana which resulted in a settlement agreement being signed by Mr Nxasana on 9 May 2015.²³²

In terms of the settlement agreement, Mr Nxasana would resign from his position as NDPP after receipt of a R17.3 million settlement payment.²³³ On 18 June 2015, former President Zuma appointed Advocate Shaun Abrahams as the incumbent NDPP.²³⁴ This appointment is particularly telling given Shaun Abrahams' unwillingness or poor track record at prosecuting former President Zuma and his family, leading many to view Abrahams as a Zuma loyalist. Among Abrahams' criticised omissions was declining to charge officials associated with allegations of state capture by the Gupta family whom Zuma had infamously close ties with.²³⁵ A further controversial decision by Abrahams was his refusal to charge Duduzane Zuma, former President Zuma's son with culpable homicide following a crash of his Porsche into a minibus taxi in 2014, killing two passengers.²³⁶ Abrahams had, therefore, engaged in conduct that created the impression that he was on former President Zuma's

²²⁹ *Corruption Watch* supra note 1 para 7.

²³⁰ *Ibid.*

²³¹ *Ibid.*

²³² *Ibid* para 11.

²³³ *Ibid.*

²³⁴ *Ibid* para 13.

²³⁵ Kimon de Greef 'Ouster of Zuma loyalists Bolsters South Africa's Corruption Fight' *The New York Times* 13 August 2018 available at <https://www.nytimes.com/2018/08/13/world/africa/south-africa-corruption-shaun-abrahams.html>, accessed on 19 September 2022.

²³⁶ *Ibid.*

side and his staunch supporter which would be made more apparent following his appointment as NDPP.

The pertinent issues the Constitutional Court had to determine were whether '(a) the settlement agreement and, therefore, Mr Nxasana's vacation of the office of NDPP are constitutionally valid; (b) Mr Nxasana should be required to repay the R17.3 million settlement payout; (c) the appointment of Advocate Abrahams as NDPP is constitutionally invalid; [and] (d) section 12(4) and (6) of the NPA Act is constitutionally invalid'.²³⁷

Justice Madlanga, writing for the majority, described the specific benefits conferred to the NDPP under section 12(8) of the NPA Act.²³⁸ Amongst others, he stated that they ensure its (NPA's) independence and shields it from improper influence.²³⁹ He notes how the President was "bent" on getting rid of Mr Nxasana at all costs.²⁴⁰ Madlanga then considered how the President had used his power as the President, involving himself in a personal dispute, when he tried to buy out Mr Nxasana. In justifying this assertion, Justice Madlanga questioned the reasons as to why he didn't proceed with the inquiry against Mr Nxasana if his intention wasn't to oust him as NDPP.²⁴¹ It is "interferences" such as these that Madlanga cautions compromise the independence of the office of the NDPP.²⁴² Madlanga states that it is constitutionally not compliant for an NDPP to vacate office outside of the capped provisions of section 12(8) of the NPA as this would raise the real possibility of NDPP's being bought out of office.²⁴³ Madlanga, therefore, held that Mr Nxasana's vacation of office and the obligation to pay the sum of R17.3 million was constitutionally invalid.²⁴⁴

Madlanga then considered whether the appointment of Advocate Abrahams was constitutionally invalid. Madlanga relied on the *Oudekraal*²⁴⁵ principle to conclude that given that Mr Nxasana vacated his office in a constitutionally invalid manner, 'it follows that the appointment of Advocate Abrahams is constitutionally invalid'.²⁴⁶

²³⁷ Ibid para 16.

²³⁸ Ibid.

²³⁹ Ibid para 23.

²⁴⁰ Ibid para 26.

²⁴¹ Ibid para 27.

²⁴² Ibid para 28.

²⁴³ Ibid.

²⁴⁴ Ibid para 19.

²⁴⁵ The Oudekraal Principle as stated by the Supreme Court of Appeal in *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) para 31 provides that "Thus the proper enquiry in each case – at least at first – is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. If the validity of consequent acts is dependent on no more than the factual existence of the initial act, then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court".

²⁴⁶ Ibid para 35.

Madlanga thereafter dealt with whether section 12(4) and section 12(6) of the NPA Act were constitutionally valid. Section 12(4) concerns the extension of the term of office of an NDPP whilst section 12(6) provides for the indefinite suspension of an NDPP by the President without compensation or with compensation as may be determined by the President.²⁴⁷ Relying on *Justice Alliance*,²⁴⁸ Madlanga asserted that the 'President's power to extend an NDPP's term of office undermines the independence of the office'.²⁴⁹ He accordingly confirmed the High Court's declaration of invalidity.²⁵⁰

In dealing with the constitutional invalidity of section 12(6), Madlanga deemed the power to suspend without pay and for an indefinite period "particularly egregious".²⁵¹ Madlanga found the provision of the Act that provides that an NDPP or Deputy NDPP 'shall receive no salary or such salary as may be determined by the President problematic due to there being 'no guidance whatsoever on how and on what bases the President may exercise the discretion to (a) allow receipt of a salary and (b) determine its quantum'.²⁵² Madlanga noted how this may be subject to abuse and how the prospect of not earning an income may influence an NDPP and Deputy NDPP to compliancy.²⁵³ He noted that this tool may undermine the integrity of the 'offices of the NDPP and Deputy NDPP and, indeed, of the NPA itself'.²⁵⁴ The Constitutional Court, therefore, concluded that section 12(6) is constitutionally invalid.²⁵⁵

This decision has not been without its detractors. Most notably, Mhango criticises the Constitutional Court for considering and determining the abstract review of sections 12(4) and 12(6) of the National Prosecuting Authority Act and thereby going against its well-established jurisprudence and precedent on justiciability and mootness.²⁵⁶ The rationale behind this principle is that Courts should not adjudicate a matter that does not present an 'existing or live controversy' and that Courts exist to determine tangible legal disputes.²⁵⁷ He argues that the stance taken by the Court undermines legal certainty. I do not agree that in all instances the Courts should be confined to the dogmatic and limited cave of precedent. Whilst legal certainty is important, the Constitutional Court has the broader duty and role of

²⁴⁷ Ibid para 36.

²⁴⁸ *Justice Alliance* supra note 166.

²⁴⁹ Ibid para 42.

²⁵⁰ Ibid para 44.

²⁵¹ Ibid para 45.

²⁵² Ibid.

²⁵³ Ibid.

²⁵⁴ Ibid.

²⁵⁵ Ibid para 48.

²⁵⁶ Ibid at 15-16.

²⁵⁷ Ibid.

not only considering legal disputes before it but considering its impact on a broader socio-cultural and constitutional scale. Its decisions should cater for future scenarios and safeguard the entire constitutional democratic system. Notwithstanding the fact that it is perfectly within the Constitutional Courts' ambit to declare legislation unconstitutional insofar as it is contrary to constitutional values. I submit that the Constitutional Court was merely vindicating its constitutional duty.

The *Freedom Under Law* and *Corruption Watch* cases demonstrate how the NPA has struggled to maintain its independence and carry out its functions without fear and favour due to the overwhelming influence of the Executive and political forces which has severely hampered its reputation, credibility and functionality. These cases also display how the Courts have, through their legally mandated duties, appropriately rebuked forces weakening the NPA's critical role, by reinforcing its independence and the impartial role it ought to play in exercising its powers of prosecution.

The NPA's rocky history, displays the Courts' role, as the only arm of government which is able to insulate the NPA from the corrosive influence of the Executive and political branches of government. The Courts have ensured the NPA's independence and impartiality safeguarding its important prosecutorial role in our constitutional democracy. One, however, cannot escape the role that our constitutional design which provides the President with the power of appointing the NDPP, plays in engendering these turpitudes. A possible solution, as will be discussed in Chapter five, is a constitutional amendment providing that the NDPP should be appointed by a body, akin to the Judicial Service Commission. I will deal extensively with the substantial benefits of this recommendation in chapter five.

3.5 The Cabinet

3.5.1 Reshuffle

As discussed earlier in the chapter, according to section 91(2) and 93(1) of the Constitution the President is empowered to appoint his Cabinet.²⁵⁸ This power is a power he exercises as head of the Executive. It is also a power that has received judicial attention for the manner in which the President has utilised his discretion to appoint his Cabinet.

²⁵⁸ Section 91(2) and 93(1) of the Constitution.

This case concerned the legal challenge by the Democratic Alliance of a reshuffle of the National Executive (Cabinet) by the then President, Jacob Zuma.²⁵⁹ A significant consequence to this reshuffle was the replacement of Pravin Gordhan with Malusi Gigaba as Minister of Finance.²⁶⁰ The High Court noted the shock of the public upon the announcement of this reshuffle, especially with regards to the changes of the Minister of Finance and Deputy Minister of Finance who perform critical functions relating to the control of the public purse.²⁶¹ The Court also pointed to how these changes was an effort to further corruption the country had been engulfed in.²⁶² The decision prompted the Democratic Alliance (DA) to file an urgent application using Rule 53 of the Uniform Rules of Court to the Pretoria High Court to have the decision reviewed.²⁶³ The rule facilitates the dispatchment of the record to an applicant, in this case, containing reasons for the President's reshuffle of his Cabinet.²⁶⁴ The rule promotes the proper and efficient administration of justice.²⁶⁵ The rule 'appl[ies] *mutatis mutandis* to an application for the reviewing and setting aside of an executive order and decision'.²⁶⁶ The President, however, contended that the provisions of rule 53 do not apply to an application to review an executive decision.²⁶⁷

In its interpretation of rule 53 of the Uniform Rules of Court, that includes executive conduct within the bounds of its applicability, the Court re-iterated that the power to take decisions is vested in the President in accordance with s 91(2) of the Constitution.²⁶⁸ The Court further noted that the President's power to appoint is wide-ranging but is nonetheless, even though 'distinctly political in nature' constrained by the principle of rationality and sections 83(b) and (c) of the Constitution.²⁶⁹ Importantly, the Court, citing *Helen Suzman Foundation v Judicial Services Commission*, noted that the purpose of rule 53 is to 'facilitate and regulate

²⁵⁹ As at October 2017, former President Zuma had reshuffled his Cabinet eleven times. See Dineo Bendile 'President Jacob Zuma implements his 11th Cabinet reshuffle' *Mail & Guardian* 17 October 2017 available at <https://mg.co.za/article/2017-10-17-president-jacob-zuma-implements-his-12th-cabinet-reshuffle/> accessed on 5 February 2023.

²⁶⁰ *Democratic Alliance v President of the Republic of South Africa* supra note 1 para 5.

²⁶¹ *Ibid.*

²⁶² *Ibid.*

²⁶³ *Ibid.* Rule 53(3) provides that:

"The registrar shall make available to the applicant the record despatched to him or her as aforesaid upon such terms as the registrar thinks appropriate to ensure its safety, and the applicant shall thereupon cause copies of such portions of the record as may be necessary for the purposes of the review to be made and shall furnish the registrar with two copies and each of the other parties with one copy thereof, in each case certified by the applicant as true copies. The costs of transcription, if any, shall be borne by the applicant and shall be costs in the cause."

²⁶⁴ *Ibid* para 33.

²⁶⁵ *Ibid* para 28.

²⁶⁶ *Ibid.*

²⁶⁷ *Ibid* para 21.

²⁶⁸ *Ibid* para 17.

²⁶⁹ *Ibid* para 18.

applications for review by granting the aggrieved party seeking to review a decision of an inferior court, administrative functionary or state organ, access to the record of the proceedings in which the decision was made, to place the relevant evidential material before court'.²⁷⁰ 'By facilitating access to the record of the proceedings under review, the rule enables the courts to perform their inherent review function to scrutinise the exercise of public power for compliance with constitutional prescripts'.²⁷¹ According to the Court, the rule is necessary to facilitate the 'convenient administration of justice'.²⁷² The High Court thus held that the provisions of rule 53 apply to an application to review and set aside an executive order or decision.²⁷³ In addition, the High Court held that 'the applicant is entitled to call for the President to furnish reasons for his decisions as well as the relevant part of the record that formed the basis upon which the decisions were taken'.²⁷⁴ This judgment challenges the idea that the President's powers of appointment are purely political and should be subject to little restraint. The fact that the Court was willing to find that all executive decisions, even those with a 'distinctly political nature' are reviewable, is indicative of the Courts' willingness to extend rationality review to curb the potential of an abuse of power and the proliferation of corruption.

The Constitutional Court heard an appeal launched by former President Zuma following an unsuccessful appeal in the Supreme Court of Appeal.²⁷⁵ The SCA dismissed the appeal following the development of former President Zuma's resignation and the appointment of President Cyril Ramaphosa and the subsequent reshuffle that ensued.²⁷⁶ In agreement with the Democratic Alliance, the SCA held that the matter is moot as both parties withdrew the review application following the change of leadership.²⁷⁷ The SCA disagreed with former President Zuma's contention that notwithstanding the mootness, the High Court's order has extended the ambit of rule 53 to executive actions which 'amounts to a usurpation of the powers of the Rules Board'.²⁷⁸

Former Chief Justice Mogoeng Mogoeng, writing for the majority, seemed to agree with the SCA's outcome. Mogoeng stressed the point that the Court was not called upon to decide whether every executive decision, including those that are inherently political, fall within the

²⁷⁰ Ibid para 35.

²⁷¹ Ibid para 25.

²⁷² Ibid.

²⁷³ Ibid para 30.

²⁷⁴ Ibid para 33.

²⁷⁵ *President of the Republic of South Africa v Democratic Alliance and Others* supra note 1.

²⁷⁶ Ibid para 8.

²⁷⁷ Ibid.

²⁷⁸ Ibid para 10.

scope of rule 53.²⁷⁹ He further noted that the issue was not debated.²⁸⁰ He ruled, without making a ruling on the applicability of the principle to this matter, that executive decisions are generally reviewable under rule 53.²⁸¹ Mogoeng noted that the application brought by the Applicant is for leave to appeal against an interlocutory order and that it is generally not in the interests of justice to for interlocutory relief to be subject to appeal.²⁸² What militated against the appeal being heard, was that the matter that gave birth to the interlocutory order had been withdrawn by both parties.²⁸³ Mogoeng ultimately dismissed the application for leave to appeal.²⁸⁴

In a dissent written by Jafta J, Jafta disagreed with the majority and was of the view that it is in the interests of justice to interpret rule 53 to provide guidance for future cases.²⁸⁵ Jafta reasoned that a similar dispute of this kind would arise in the future and that an interpretation of rule 53 would provide assistance in future litigation if a dispute arises in the course of the President exercising his section 91 constitutional rights to appoint and dismiss a Minister.²⁸⁶ Jafta further disagreed with the High Court judgment's assessment, that rule 53 applies to the review of executive decisions notwithstanding the fact that the application does not extend to executive decisions, because of the illogic that flows from excluding executive decisions from it.²⁸⁷ Jafta states that such an interpretation stretches purposive interpretation unjustifiably so.²⁸⁸ Jafta, thereafter, closely considers the language used in rule 53 and asserts that the High Court failed to keep fidelity to the language used in rule 53 despite concession by the Court that on face value, the language used in rule 53, does not extend to executive decisions.²⁸⁹ In addition, Jafta provides that should the High Court judgment be left intact, it would place the President in an untenable position as he cannot ignore the rule or decide if it applies to him or not, once review papers are served on him under rule 53.²⁹⁰ Jafta found that there would have been reasonable prospects of success, and accordingly, would have granted leave to appeal and upheld the appeal.²⁹¹

²⁷⁹ Ibid para 25.

²⁸⁰ Ibid.

²⁸¹ Ibid para 26.

²⁸² Ibid para 27.

²⁸³ Ibid para 28.

²⁸⁴ Ibid para 40.

²⁸⁵ Ibid para 42.

²⁸⁶ Ibid para 52.

²⁸⁷ Ibid para 57.

²⁸⁸ Ibid.

²⁸⁹ Ibid para 60.

²⁹⁰ Ibid paras 61-62.

²⁹¹ Ibid para 88.

Although the Courts chose not to engage with the merits of the case, I agree with the approach taken by the lower Courts leading up to the majority decision in the Constitutional Court. The outcome promotes transparency in the decision-making process of the President, which is important and strengthens democracy. The provision of reasons emanating from the decisions taken by public office bearers and constitutional functionaries has been recognised by our Courts as a vital component of not only procedural fairness,²⁹² but has also been incorporated into the principle of rationality.²⁹³ The provision of reasons further helps curb an abuse of the President's power to appoint his Cabinet for reasons removed from the purpose of executing their important roles. Although, unintended, the Courts have yet again been critical in promoting the noble value of transparency, important for our constitutional democracy through mandating the provision of reasons from those that exercise public power.

3.6 Conclusion

The cases demonstrate how the Courts have had to shoulder the onerous task of curbing the menacing abuse of the President's powers of appointment. The cases analysed show how the Courts have validly intervened in such cases, to support and equip critical institutions of democracy in fulfilling their roles. The Courts have, therefore, attempted to restore the institutional integrity of the NPA and were willing to consider this even in the context of Cabinet. As the only branch of government that is truly independent, the Courts have an elevated obligation to maintain democratic order and constitutionalism which they have done. The concerns regarding lawfare are, therefore, as I will illustrate in more detail below, largely overstated.

²⁹² See section 5 of PAJA. See also *Koyabe and Others v Minister for Home Affairs* 2010 (4) SA 327 (CC) paras 56-70; *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Another* 2003 2 All SA 616 (SCA) para 40; and *Kiva v Minister of Correctional Services and Another* [2006] ZAECHC 34.

²⁹³ See *Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA).

CHAPTER FOUR: THEORISING THE COURTS' INTERVENTION: A CLOSER LOOK AT THE COURTS' METHOD AND PURPOSE

4.1 Introduction

This chapter will provide two theoretical frameworks that help us to best understand what the Courts are doing when deciding cases concerning executive conduct and in particular the President's powers of appointment. I will explain the theories of esoteric decision-making and democracy process reinforcing review and how these theories describe how the Courts validly constrain the sometimes-arbitrary exercise of power by the President to preserve and promote democracy. I will further display how esoteric reasoning was used by the Courts to reinforce democracy. It appears from the case law that when democracy is threatened, the Courts are more willing to step-up and intervene and constrain governmental power to preserve and reinforce constitutional democracy. The above-mentioned theories enable one to understand and legitimate the Courts' purpose in this regard.

4.2 Esoteric decision-making

Lauren Gildenhuys defines esoteric decision-making as “the express reliance on apolitical, technical and legal justifications to substantiate a judicial outcome that is preferred for political reasons, which remain unexpressed”.²⁹⁴ “Esoteric decision-making techniques include, among others, prevailing on narrow or apolitical sources of law; using technical, formalist modes of reasoning; and exploiting the indeterminism of the separation of powers”.²⁹⁵ As seen in the case law examined in chapter three, the Courts have most notably used a variable and contested standard of rationality review to render the President's decisions unlawful and unconstitutional. Gildenhuys argues that the Courts use esoteric reasoning to “downplay” the weight of political considerations when making politically consequential determinations.²⁹⁶ They do so by engaging in “strategic non-disclosure of political considerations underlying its judgments”.²⁹⁷ The Courts use esoteric reasoning to protect their institutional security and legitimacy.²⁹⁸

²⁹⁴ Ibid. Gildenhuys builds on the work of Conrado Hubner Mendes who first discussed the theory in the South African context. See Conrado Hubner Mendes 'Fighting for their place: Constitutional courts as political actors – A reply to Heinz Klug' (2010) 3 *CCR* 33.

²⁹⁵ Ibid.

²⁹⁶ Ibid.

²⁹⁷ Ibid at 349.

²⁹⁸ Ibid at 344.

When applying esoteric reasoning, some of the political considerations that account for the Courts decision-making process include ‘the court’s evaluation of the surrounding political constraints acting upon it; its anticipation of how its judgment will be received by other political actors; the potential impact of the decision on democratic stability or single-party hegemony; and whether the judgment is likely to render the court subject of attacks on its independence’.²⁹⁹ In *Simelane* for instance, the Court was confronted with the perception that would arise from its interference with the process followed by the President when exercising his power to appoint the NDPP. In this case the Constitutional Court, by enlisting criteria that the President must consider when appointing the NDPP, arguably stretched rationality review from the “minimum threshold requirement” it was, to procedural rationality. The Court expanded the rationality review to reach a particular outcome, which they didn’t previously do. By deploying the acceptable legal technique of attaching criteria for the appointment of critical functionaries, the Court used esoteric reasoning to legitimate an outcome that found Mr Simelane unfit for the position of NDPP.

Similar considerations informed the decisions in *Freedom Under Law* and *Corruption Watch*. In *Corruption Watch*, the Court invalidated the settlement agreement entered into by former President Zuma and Nxasana. The Court reasoned, that the President should not have the power to suspend an NDPP without pay and for an indefinite period, as this would threaten the integrity of the NDPP and NPA.³⁰⁰ The Court made a value judgement on what the NDPP’s independence ought to look like, whilst also determining the scope of the President’s power. The Court has a desired outcome in mind, one that protects the reputation and integrity of the NPA, but hides the purpose it seeks to achieve by employing a legally defensible technique of interpretation and factual analysis to reach a just outcome. Similarly in *Freedom Under Law*, the Courts made a value judgement in concluding that Jiba lacked the integrity and conscientiousness required for someone occupying her position through a factual assessment of her conduct during her tenure.³⁰¹ This was coupled with the objective evidence of her impropriety shown by the slew of judgments deriding her conduct and integrity. The consequence of which, resulted in the Court invalidating an improper decision she had taken to dismiss a public official. These cases invalidated decisions and the consequent appointments of the functionaries, in a bold fashion that surely warranted

²⁹⁹ *Ibid.*

³⁰⁰ *Ibid.*

³⁰¹ *Ibid.*

the Courts' consideration of factors such as its perceived independence as it relates to its democratic legitimacy and how the judgments might be received by the political branches.

In *Reshuffle*, in which the Court ruled that the President's reshuffle was irrational in the absence of reasons, was probably the most damning of the cases in which the Court had to contend with these considerations. Indeed, these "political considerations" are inescapable within the politically charged environment characterising South Africa's constitutional jurisprudence and will invariably feature in the resultant judgments. The Constitutional Court, however, was more tentative in making a determinative finding to the rationality of the President's reshuffle. Although the Constitutional Court reached a similar outcome to the High Court, it refrained from determining the merits of the case on the grounds that both parties had withdrawn the application for review following the resignation of former President Zuma and the consequent withdrawal of the interlocutory application by both parties.³⁰² The Constitutional Court applied its jurisdictional rules to determine whether to hear the matter or not, to the altered factual position of the parties, and reached the outcome that the matter was moot. As a result, the Constitutional Court left the High Court decision, that extended rationality review to include executive action, intact. The effect of the Court's decision promoted presidential accountability as it relates to Ministerial appointments. However, due to its reliance on legal technical rules of justiciability, the Courts' cannot be criticised for breaching the separation of powers or overstepping its bounds.

4.3 Esoteric decision-making considering the Cases

This theory's greatest appeal for the context of my argument, is how it can be used to describe how the Court reasons to avoid the perception of breaching the separation of powers by relying on technical and legal devices to achieve a preferred outcome. This theory further provides an illustration of how adjudicators can go about executing their adjudicatory functions in a manner that doesn't open them up to unwarranted criticism. They can do so by providing legally sound and justifiable reasoning which in any event is a core part of their adjudicative functions. This duty is more pressing in cases that concern the functions and powers of the Executive. It is further this legal convention, that protect it from the impermissible influence of external factors.³⁰³

³⁰² *President of the Republic of South Africa v Democratic Alliance and Others* 2020 (1) SA 428 (CC) para 8.

³⁰³ *Ibid* at 5.

As noted earlier in the discussion, *Simelane* is a lodestar case that demonstrates how the Courts have validly decided a politically contentious case speaking to the heart of the separation of powers concerns. The Court was confronted with the arduous task of adjudicating the validity of the appointment of a functionary (NDPP) within the President's discretion to appoint. Criticism pertaining to the democratic legitimacy of such a decision by the Courts loomed large. Although these considerations factored into the Courts' reasoning, they were not hamstrung by such considerations. As noted in the previous chapter, by merely developing the principle of rationality to find that the appointment of Simelane was irrational, the Court veered away from the more searching inquiry of motive, which is reminiscent to a reasonableness assessment, undesirable for measuring executive conduct.³⁰⁴ As a result, the Court aided democracy, strengthening this key institution's capacity to carry out its duties through the appointment of suitable and appropriately qualified individuals.

Similarly, in *Freedom Under Law*, the Courts deployed rationality grounds to invalidate the decisions taken by Jiba in her capacity as deputy NDPP. The political considerations concerned the legitimacy and indeed institutional competence of the Courts in determining the rationality of functions carried out by Jiba in the course and scope of her employment. However, the continuation of Jiba and Mrwebi would erode the functioning of the NPA and threaten the very important prosecutorial role it plays in our constitutional democracy.

Furthermore, the Court in *Reshuffle* ruled it irrational for the President to reshuffle his Cabinet of Ministers without providing reasons. The political considerations that informed this decision are jarring. Most striking is the separation of powers concern of a Court prescribing a process the President has to take when dismissing members of his own Cabinet – a chiefly and traditionally uncontested personal power of the President. The Courts, however, were more concerned with how the instability created by constant reshuffles had on the ability of the Ministers to carry out their important service delivery roles that affected millions of ordinary citizens. The Constitutional Court, as mentioned above did not concern itself with the merits as the matter had become moot. It did, however, suggest that all exercises of public power – which include presidential powers are subject to rationality review.³⁰⁵ While not making a definitive finding on this, they seemed to accept that the President's appointment decisions could be overturned on the basis of irrationality.

³⁰⁴ Ibid.

³⁰⁵ Ibid para 280.

They accordingly intervened, using rationality to invalidate former President Zuma's umpteenth reshuffle.

These decisions are peppered with political considerations of the day – but the Courts' intent is far less sinister than that advocated for by lawfare critics. The Courts are chiefly concerned with the stability of good governance and the preservation of democracy.

4.4 Democracy process reinforcing review

The Courts have used esoteric reasoning to protect and reinforce democracy. Accordingly, their actions are, in the context of a commitment to constitutional democracy – legitimate and ought to be treated as an ordinary exercise of judicial power not a breach of the separation of powers or 'lawfare'. Perhaps the most appealing theoretical account that helps explain the Courts' purpose in adjudicating cases concerning executive action is that of democracy process reinforcing review best explained by Firoz Cachalia. Cachalia describes it as a 'precautionary device for managing risks associated with the exercise of power in a representative democracy'.³⁰⁶ The purpose of this "precautionary constitutionalism" is to safeguard the integrity of institutions of democracy and insulate them from the perverse influence of corruption.³⁰⁷ The theory provides that:

"Where self-dealing representatives: (a) fail to fulfil their custodial responsibilities for public resources on behalf of 'the people'; (b) engage in self-dealing; (c) are 'captured' by private interests; and (d) create corrupt patronage systems that threaten the entire democratic project, then the Court is well within its rights to impose binding legal constraints on the political process in order to secure accountability."³⁰⁸

Cachalia convincingly asserts that when "self-dealing" representatives through their corruption inflict harm to the health of democracy 'as a system of self-government and democratic representation,' then the Judiciary can override the usual separation of powers limitations and enforce "democracy-reinforcing review" to vindicate the constitutional guarantee of self-government.³⁰⁹ Self-government or "self-rule" is the system that gives recognition to the democratic process enabling the peoples elected representative to rule

³⁰⁶ Cachalia op cit 7 note at 50.

³⁰⁷ Ibid at 50-51.

³⁰⁸ Ibid at 79.

³⁰⁹ Ibid at 52.

and is tempered by legally binding restrictions on the ‘political process of collective decision-making’.³¹⁰

Cachalia buttresses his core arguments on the work of John Hart Ely’s theory of “representation-reinforcing review”. Ely proposed that Courts should be placed in the central position as arbiters and guardians of the democratic process itself as opposed to being relegated to the indifferent position of “second-guessing” the decisions of the citizens’ elected representatives on crucial moral questions.³¹¹ Ely’s appeal supports the ideal of our democratic process grounded in the shared precommitment that we ought to respect the will of the people as expressed through their elected representatives. As noted in chapter two, our system of judicial review by unelected judges challenges this ideal of representative democracy, through the ability of judges to override decisions taken by the elected representative (antimajoritarian dilemma).³¹² However, Cachalia’s theory provides that when such elected representatives fail to execute their duties with propriety, then the Courts’ intervention is legitimate when necessary to protect democracy itself. This theory flips the antimajoritarian dilemma on its head and helps illustrate how the Judiciary’s intervention becomes necessary to protect democracy from the shortfalls of democratically elected representatives which has been displayed in the previous chapter.

Ely grounds his theory on the back of an American case *Carolene Products*.³¹³ This case justified judicial intervention in order to protect United States’ citizens who were unable to defend themselves through pluralist bargaining in a democratic and representative process.³¹⁴ In *Carolene Products*, the Supreme Court of the United States was able to justify its heightened level of scrutiny in cases with ‘discrete insular minorities’.³¹⁵ The Courts, in order to protect constitutional democracy, can legitimately apply a heightened level of judicial scrutiny. This case demonstrated the need for judicial intervention for the proper functioning of democratic process and by extension constitutionalism, where minorities rights were violated. The Court prioritised the protection of minorities’ constitutional rights

³¹⁰ Ibid at 54-55.

³¹¹ Ibid at 56-67. See JH Ely *Democracy and Distrust: A Theory of Judicial Review* (2002).

³¹² See section 165 of the Constitution that deals with the judicial authority of the Courts. See also section 172 of the Constitution which vests the Constitution with the power to declare invalid laws that are enacted by Parliament elected by the citizens. See finally Jeremy Waldron ‘The Core of the Case against Judicial Review’ (2006) 115 *Yale Law J* 1346 in which he makes a compelling argument against judicial review.

³¹³ *United States v Carolene Products Company* 304 US 144 at 152-153 (1938).

³¹⁴ Ibid at 57.

³¹⁵ *Carolene Products* supra note 313, Justice Fiske Stone’s footnote number four, provided that the Court would apply a new form of heightened scrutiny in instances where the law conflicted with fundamental human rights and where the political process is dysfunctional. This marked a radical shift from the Courts prioritisation of property rights to individual rights.

over private property rights, signaling a major development in the US constitutional jurisprudence.

Moreover, Ely's theory emphasises a second component of "principle/agent accountability" between the electorate and their representative. This second leg appreciates that there exists a relationship between the citizens and their chosen representatives which can disintegrate when representatives act in self-serving ways contrary to democratically legitimate roles.³¹⁶ The Courts then step in to remind such representatives of their roles in the judgments analysed and in turn help strengthen democracy by ensuring that they act in the best interests of the citizens they represent. The "constitutionally cognizable process harms" including state capture and political corruption, which representatives perform in concert with private actors, legitimate the Courts' intervention to undo the harm caused by this "dysfunctional process" that harm the functioning of our democracy.³¹⁷

Democracy process reinforcing review is the theory that best explains the Courts' purpose when it decides on matters pertaining to executive and governmental conduct in a way that conforms to its ordinary judicial review functions but also remedies the failings of democracy necessitated by derelict representatives. In this instance, judicial review acts 'as a substitutive kind of decision-making device, filling in for democracy where democracy cannot act'.³¹⁸ When elected representatives act in self-serving ways, symptomatic of South Africa's democratic landscape, typified by the misfortunes of state capture and widespread corruption perpetuated by those who are supposed to foster clean governance and propriety, the Courts are one of the forums to hold these actors accountable and remedy the impact of this conduct.³¹⁹ This is a noble and noteworthy act of democratic service on the part of our Judiciary and not an opportunistic backdoor attempt at swindling power from the other branches of government. Contrary to the abusive power-grabbing notions mostly appended to lawfare, the cases analysed in chapter three demonstrate that 'lawfare can be a vehicle of accountability, invoked when there needs to be responsiveness to social pressures when political avenues fail'.³²⁰

³¹⁶ Ibid.

³¹⁷ Ibid.

³¹⁸ Kate Dent *Lawfare and legitimacy: The wicked problem of judicial resilience at a time of judicialisation of politics in South Africa* (Phd Thesis, University of Cape Town, 2021) 11.

³¹⁹ Other than judicial intervention and the Parliamentary oversight mechanisms that have been dealt with extensively in this thesis, the Constitution provides other avenues in which we hold the President accountable. Chapter 9 institutions such as the Public Protector and the Auditor-General play an important role in ensuring government upholds its constitutional obligations. See section 181(1) of the Constitution. In addition, sections 89 and 102 provide for impeachment and vote of no confidence mechanisms.

³²⁰ Dent op cit note 318 at 22.

4.5 Democracy process reinforcing review considering the Cases

In *Simelane*, the Constitutional Court remedied an improper appointment which could have posed severe threats to the institutional integrity of the NPA and negatively impacted on the ability of the incumbent to carry out their duties in a fit and proper manner. In addition, the appointment of an improper incumbent would not only have had significant ramifications from an internal functions point of view, but it would also have posed a threat to the external reputation of the NPA. The waning reputation of the NPA would have been further damaged by the perceived lack of integrity by such a vital constitutional institution.³²¹ The stakes of mitigating this perception and irrational appointment were borne by the Courts, in which it adequately stepped up its efforts. The Courts, in this case and as suggested by Roux, shore up the institutional failings of critical constitutional institutions and in turn promoted democracy.³²² Similarly, in *Freedom Under Law*, the Courts' invalidation of certain decisions made by Jiba and the Courts' robust criticism of Jiba's conduct in prior matters concerning her that had received judicial attention cast a heavy cloud over the credibility and reputation of the NPA. The risk that runs with the public's waning faith and trust in the NPA, is that it produces a lowly perception of the consequences that attach to wrong-doing and crime which might lead to an increase in these turpitudes. The prospect of a lawless society necessitated by those who are supposed to prevent it, was a necessary impetus for the Courts' intervention in cases concerning the NPA. In a similar vein, the pernicious vices that attach with money and the corruption that it attracts was a similar depravity that the Courts wanted to suppress in the *Corruption Watch* case, in which the Constitutional Court invalidated a settlement agreement and certain provisions of the NPA Act and determined whether it undermined the independence of the NDPP.³²³ We see how the Courts empowered the NPA to fulfill its vital role and further democracy this way.

In *Reshuffle*, the High Court was aware of the political nuances that inform the appointment and dismissal of Ministers. They were further aware of the turbulence such instability in the Cabinet poses for South Africans who depend on the critical services provided by the departments headed by such Ministers. The Courts thus cleverly laid down the principle of providing reasons from the President in the event of a reshuffle. The Courts reinforced a salient principle that the exercise of any public power must be justified. This prevents

³²¹ See Martin Schönsteich 'A story of trials and tribulations The National Prosecuting Authority, 1998 – 2014' (2014) 50 *SA Crime Quarterly* 5.

³²² *Ibid.*

³²³ *Ibid* at 30-31.

arbitrariness and an abuse of power and promotes the foundational constitutional values of openness, transparency and importantly accountability. These are all crucial requirements for a prosperous democracy. Although not addressing the merits of the case, the Constitutional Court's decision had the same effect by not altering the High Court decision. In fact, one could argue that it endorsed it, by asserting that executive action can be reviewed in terms of rule 53.

4.6 Conclusion

Esoteric decision-making most adequately describes how the Courts used legal devices to achieve a specific end while also protecting judicial legitimacy. Democracy process reinforcing review on the other hand, most effectively justifies the Courts' intervention in such matters when seeking to vindicate the democratic system as a whole from the shortcomings of democracy enabled by self-serving representatives. The theories interrelate in how one describes a method (esoteric reasoning) and the other describes the purpose - reinforcing democracy. However, the Courts do not always have to take on this expanded role and are usually forced to by circumstances that induce harm to democracy. If all actors within the *trias politica* were mindful of their roles and dutifully executed their mandates responsibly, the Courts wouldn't be thrust into this contentious arena. Given the institutional difficulties faced by Parliament and the Executive in this regard, additional accountability and democracy reinforcing structures that enjoy democratic legitimacy are envisaged to supplement the ailing branches of government.

CHAPTER FIVE: CONCLUSION

5.1 Introduction

This concluding chapter will sum up the main arguments advanced in the dissertation through a brief overview of the salient points raised in the various chapters. I will then, finally conclude, by offering recommendations in which additional democratically supported mechanisms can be created to assist in constraining the President's powers of appointment to prevent further unlawful use and abuse.

5.2 Chapter Synopsis

In the first chapter, I laid out the structural groundwork which I would use to embark on the research. I noted the importance of the research, and the difficulty the core issues gave rise to. I further briefly described the theoretical frameworks that would be used to justify the Courts' intervention as well as map out the method I would use to answer my research question. Finally, I provided a brief overview of what I would argue in the various chapters.

The main research question, I sought to answer was: Is the charge that the Courts' intervention in the cases related to the President's powers of appointment amounts to lawfare legitimate? I went about answering the question by engaging in an analysis of the literature describing the South African political environment in which the President exercises his powers of appointment. This included the one-party system and semi-presidentialism-parliamentarism system which emboldens the President's powers even further. I, thereafter, concretised the literature by evaluating the case law that showed how the Courts have had to undo an abuse of power through irrational appointments by the President of constitutional functionaries using the confines of the law. I also sought to explain what the Courts *do* in these cases through the theories of esoteric decision-making. Further, I displayed how esoteric reasoning is the method that the Courts use to reinforce democracy.

I chose to interrogate this research question, as the lawfare charge that is frequently attached when the Courts have to adjudicate cases relating to the President's powers of appointment has had a negative impact on the credibility and reputation of the court system which is undesirable. The Courts' efficacy is through its independence and public support and such harmful assertions delegitimises the Courts in the eyes of the public. The question is important to buttress the position that Courts do not breach the separation of powers

doctrine by intervening in cases that threaten democracy, instead, they help promote constitutional democracy.

Moving to the core chapters, in the second chapter I explored the meaning(s) of lawfare, situating them within the President's vast powers of appointment. I also grappled with the implications the core issues have on the separation of powers concerns and the scope of judicial authority and the difficult position Courts in dominant party systems find themselves in. In the third chapter, I critically analysed several cases that demonstrated the incompetence of select office bearers of critical constitutional institutions and how the Courts have played an instructive role in remedying the nonfeasance of these functionaries. The case law displayed the various instances in which the various NPA Executives have fallen short of the yardstick of competence and integrity in executing their duties. These character and technical shortcomings have severely compromised the effectiveness of their offices to carry out their duties. I further displayed how the Courts' intervention in these cases, has been paramount in reinforcing constitutional democracy and good governance. In the fourth chapter, I displayed how the theories of esoteric decision-making and democracy process reinforcing review, can be used to help understand the Courts' intervention and legitimate it from critiques of overzealous and illegitimate encroachment into the political realm. In addition, I displayed how esoteric reasoning was used for the purpose of reinforcing democracy.

5.3 Recommendation to establish an Independent Appointment Body

The thesis has challenged the contentions that bedevil the Courts' seemingly unwarranted intervention, through a systematised legal and doctrinal exposition of how it has, in fact, empowered our democratic landscape. However, the Courts have no doubt been increasingly over-burdened by cases of this nature, which have robbed it of time to address other pressing cases. The Courts' overwhelming case load and the consequent delays that follow from such a reality, impedes on access to justice. Ally and Boonzaier comprehensively describe the inefficiency of the Constitutional Court over the past few years through a study investigating the Courts' operational and administrative challenges during the Mogoeng era.³²⁴ The authors, show how the Courts' case and workload has significantly increased

³²⁴ Nurina Ally and Leo Boonzaier 'The Constitutional Court's Efficiency: Statistics from the Mogoeng Era, 2010-2021' (2022) 12 *CCR* 317 at 318.

since 2013 which has contributed to its inefficiency.³²⁵ Any attempt to lighten the Courts' hefty workload is to be encouraged and it is through this tack that I recommend that alternative democratically legitimate mechanisms or forums be adopted to help filter the candidates the President may appoint to take charge of critical constitutional institutions.

A recommendation of this nature has three primary benefits. First, and as mentioned above, is to lighten the case load of the Courts which continue to be inundated with matters concerning leaders of constitutional institutions failing to execute their roles. Second, it will ensure only the most qualified and best candidates are shortlisted for these positions. Third, and most important – due to the democratic character of such a body, it will pacify the unfair attacks of bureaucratic zealots who criticise the Courts' interference as an impermissible breach of the separation of powers doctrine. These benefits and others will be explained in more detail later. I will now suggest the form, scope and nature of this recommended body.

I recommend the establishment of a legislated and democratically elected body akin to the JSC, to be tasked with compiling a list of suitable candidates to occupy key critical and constitutional institutions. The JSC is a constitutionally empowered body designed to vet, interview and compile a shortlist of candidates, recommending them for judicial appointment.³²⁶ The JSC's composition contains a broad representation of the legal profession, Judiciary and political parties.³²⁷ The broadly based selection panel for the appointment of judges provides a check and balance to the power conferred on the President to make such appointments.³²⁸ The diversity of stakeholders from the various branches of government adequately addresses the separation of powers concerns as these representatives will help dilute the concentration and discretion of power on the President who will have to appoint a candidate recommended from this body. A broad and multifarious combination of viewpoints on candidate's suitability will no doubt legitimate this process of appointment.

Section 178(6) of the Constitution further empowers the JSC to establish its own procedures.³²⁹ The selection of candidates is supposed to be 'grounded in processes that

³²⁵ Ally and Boonzaier op cit note 324 at 319-320.

³²⁶ See section 174(4) of the Constitution.

³²⁷ *S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 para 108.

³²⁸ *S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening)* supra note 327.

³²⁹ Section 178(6) of the Constitution. See also Nomthandazo Ntlama 'The implications of the decision in *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) 8 on the functioning of the South African Judicial Service Commission' (2020) 24 *Law democr. dev* 248 at 250.

seek to ensure the appointment of candidates who possess the technical and professional expertise including attributes to act independently, both personally and institutionally, in the adjudication of matters brought before them'.³³⁰ However noble the intention of the provision conferring the JSC with autonomy to regulate its processes was, it has since been used to further purposes removed from determining the suitability of candidates to hold judicial office. The JSC and its commissioners have been criticised for the improper and irrelevant questioning of candidates, its politically centered posture, its combative interview processes and the general conduct of its commissioners. It has also been lambasted for its recommendation of appointment of certain candidates to the President and for not applying consistently the threshold of scrutiny and criteria to some candidates.³³¹ Moreover, the JSC has been criticised in how it has implemented its own processes.³³²

Although the recommended body will function like the JSC, it will be composed of a wide variety of critical stakeholders, experts and policy advisors and relevant functionaries who will be tasked at vetting, interviewing and compiling a shortlist of suitable candidates for nomination to the President. The exact composition of such a body is beyond the scope of this mini-thesis. The task of such a body will be advisory and not prescriptive, except to the extent that the President must elect a candidate nominated by such a body. The discretionary nature of the President's powers of appointment will, therefore, be limited to the extent that the President will not have free reign to appoint a candidate they deem fit *carte blanche*. Importantly, unlike the JSC's clear criteria focused on the candidate's character and technical competencies and other important factors such as gender, the candidate's commitment to transformation will be assessed. Such a body will veer as far as possible from politically focused interviews which is a precondition that will be expressed in the criteria with consequences attaching to non-compliance. Such an intervention will naturally limit this body's autonomy to regulate its own processes, which is quite different to how the JSC operates.

Given that this suggestion goes against the President's constitutionally ordained powers of appointment, a constitutional amendment giving effect to such powers and repealing the current model is envisaged. In addition, this body will be informed by constitutionally and deliberatively accepted guiding principles and criteria when it comes to the selection and interviewing of candidates to ensure fairness and unanimity in the process. A process of

³³⁰ Ntlama *op cit* note 329 at 251.

³³¹ *Ibid* at 252.

³³² *Ibid*.

public participation is also suggested to include ordinary members of society's viewpoints and opinions concerning those that will serve them at this important institution. This will also enhance the legitimacy of such a body and the commitment to participatory democracy.³³³

5.4 Advantages of an Independent Appointment Body

The benefits of such a body are manifold. As indicated, a body formed out of a constitutionally and democratically supported process is best likely to enjoy the support of the public given its participatory and deliberative character. It will further appease especially those who are opposed to the consolidation of power when it comes to the President's powers of appointment. This will, in turn, reduce litigation that overburden our Courts when they exercise such powers. As previously indicated, the exact composition of this body is beyond the scope of this dissertation – however, there are some guiding principles that should be considered in the design of this body. A body such as the one contemplated will be composed of experts in good governance and relevant experts of the various constitutional institutions. It will also consist of representatives of political parties who will ensure the public's interests are ventilated in these proceedings. The appointment of representatives from political parties, modelling a similar appointment procedure to members of the JSC, will further the democratic ideal of the process and ensure that the general public – a section of society that often is excluded from such deliberations, is represented. This ties in with democracy process reinforcing theory's main purpose of reinforcing ailing democratic processes. This is over and above the public participation component that will serve a similar purpose. Such a body is intended to be neutral, impartial and unbiased when appointing these critical functionaries which are factors seriously plaguing the current process of appointing, given the political character that informs these decisions by the President as argued in earlier parts of the dissertation. The diversity of the panel, in terms of its composition, guided by a set criterion will ensure accurate, relevant and probing reflections of the candidate's suitability to hold office. It is envisaged that these safeguards will ensure the integrity of the process and limit the overbearing political influence that tend to dominate such proceedings as seen in past JSC proceedings.

³³³ See *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) paras 101-137. See also Ngwako Raboshakga 'Towards participatory democracy, or not: The reasonableness approach in public involvement cases' (2015) 31 *SAJHR* 5.

5.5 Conclusion

It is hoped that the above recommendations should soothe the concerns of sceptics critical of the Courts' intervention in cases pertaining to the President's powers of appointment. Using South Africa's politically potent environment as a laboratory test, this dissertation has critiqued the validity of lawfare as it relates to the Courts' legitimate role of undoing the President's unlawful conduct when it comes to his powers of appointment. The dissertation has shown that the injurious "lawfare" claim is unfounded and overstated and has revealed through a careful synthesis and consideration of the relevant social, political, legal and economic factors that the Courts' intervention has and is always motivated by the intention to safeguard democracy. Its role is perfectly legitimate and does not offend the separation of powers doctrine. The Courts have demonstrated admirable zeal in upholding constitutionalism and fulfilling its constitutional role and it is hoped that its tenacity in this regard may rub off on the other ailing branches of government.

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