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Lawfare and legitimacy:

**The wicked problem of judicial resilience at a time
of judicialisation of politics in South Africa**

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ABSTRACT

In the period from 2009-2020, South Africa has witnessed the rise of “lawfare”. Lawfare is understood as the judicialisation of politics – turning to the courts and the use of the law to resolve broadly political matters. This thesis explores the unfolding implications of the judicialisation of politics for judicial legitimacy. In the displacement of the political into the judicial the reach of the courts is expanded and the legitimacy of courts engaging in a “political” role is questioned.

Situated in the field of judicial-political dynamics, the interplay between law and politics is observed through the adoption of a historical-institutionalist model. This thesis identifies the causes of the judicialisation of politics and then traces its consequences for broader constitutional stability and the impact on the judicial institution. Guidelines for the Court to navigate lawfare to achieve institutional resilience and maintain judicial legitimacy are then proposed.

Judicialisation of politics is caused primarily through the failures of the other branches of government to fulfil their assigned constitutional role. Institutional imbalance in a dominant party democracy means that opposition parties and civil society organisations are left with little recourse but to appeal to the Court to be a constitutional bulwark. The Court is then compelled to step into the breach and fill the accountability vacuum. In identifying the causes of judicialisation, a fuller understanding of Lawfare emerges, expanding current scholarship beyond its traditionally abusive characterisation. It posits a duality to Lawfare in that it can be both an abuse of law and a last line of defence.

Through observing the judicial political interactions, a trajectory from the judicialisation of politics to the politicisation of law is mapped. The politicisation of law sees political power refocused on the courts, exposing them to political aggression and attack by the dominant party. The judicialisation of politics that seeks accountability from recalcitrant political actors asks much of the courts, at a time when ensuring executive oversight

is the most dangerous, because of the ease with which a hostile executive in a dominant party democracy can implement measures that may undermine the independence of the judiciary.

The Constitutional Court has shown a remarkable ability to navigate this era of Lawfare, remaining resolute under fire. However, the more successful the Court is in holding the line against executive abuse of power, the more the judicial route is identified as a powerful weapon to achieve more abusive political objectives.

The relationship between Lawfare and legitimacy is identified as a wicked problem that demands expanding boundaries to observe the courts influence on the political environment, and the political environment's influence on the judicial role and its legitimacy.

Through advancing a multi-dimensional paradigm of judicial legitimacy, the dialectics of judicial legitimacy are shown to be aggravated by the judicialisation of politics. In this respect it is argued that where the foundations and assumptions on which legitimacy is predicated shift, legitimacy must be re-examined. It is therefore argued that in a culture marked by an unpunished disregard of non-judicial regulatory enforcement and increasing non-compliance with judicial orders, the impulse to preserve legitimacy through a detached, formalist stance will not be sufficient. Judicial legitimacy must be relocated in the ability of the Court to be responsive. Pulled into the role of judicial statesmanship, the Court must adopt a robust approach to assertively uphold the rule of law.

In tracking the unfolding consequences of the judicialisation of politics, the Court is asked to resolve matters beyond its institutional capabilities. Absent the normative commitment to the rule of law, the internationalisation of constitutional norms, and the political interest to implement remedial orders, the Court is unable to effect workable relief. In tracing the dangers of the continued trend of Lawfare, the thesis sketches a downward spiral of reputational strength of the Court and a decline in democratic responsibility. This leads to an inability to achieve effective reform that ends in disenchantment, questioning the faith placed in the Constitution. It depicts

how the Constitutional Court as 'constitutional saviour' can unravel into constitutional blame.

The Constitutional Court has been able to hold the line in this era of Lawfare and repel assaults on its integrity and efforts to undermine its independence. However, without a broader culture of commitment to the rule of law, civil education and a suffusion of constitutional responsibility beyond the judiciary, the Court will not be able to continue to shoulder the weight of what is asked of it. This research depicts a circular model of Lawfare and legitimacy, where Lawfare is predicated on judicial legitimacy, but an overreliance on Lawfare will destroy judicial legitimacy.

Key words:

Judicial-political dynamics, Lawfare, judicialisation of politics, politicisation of law, judicial politics, constitutional patriotism, wicked problems, systems thinking, judicial legitimacy, institutional resilience, rule of law, judicial statesmanship, judicial review, democracy, public power accountability, administrative justice, separation of powers, dominant party democracy.

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LIST OF ABBREVIATIONS

AD	Appellate Division
Advocates Q	Advocates Quarterly
Afr. J. Leg. Stud	African Journal of Legal Studies
Ala. L.Rev	Alabama Law Review
Am. J. Comp. L	American Journal of Comparative Law
Am. J. Pol. Sci	American Journal of Political Science
ANC	African National Congress
Annu. Rev. Law. Soc. Sci	Annual Review of Law and Social Science.
APJEL	Asia Pacific Journal of Environmental Law
AU	African Union
Cal. L. Rev	California Law Review
Case W. Res. J. Int'l L	Case Western Reserve Journal of International Law
CC	Constitutional Court of South Africa
CCR	Constitutional Court Review
CLS	Critical Legal Scholars
Colum. L. Rev	Columbia Law Review
COSATU	Congress of South African Trade Unions
Const. Commentary	Constitutional Commentary
Deakin L.Rev	Deakin Law Review
Denv. U. L. Rev	Denver University Law Review
Duke L.J	Duke Law Journal
EFF	Economic Freedom Fighters
Fordham L.R	Fordham Law Review
Geo. J. L & Pub Pol'y	Georgetown Journal of Law and Public Policy
Geo. J. of Int'l Affairs	Georgetown Journal of international Affairs
Geo. J. on Poverty L. & Pol'y	Georgetown Journal on Poverty Law and Policy
Geo.L.J	Georgetown Law Journal
Geo. Wash. Int'l L Rev	George Washington International Law Review
Geo. Wash. L.Rev	George Washington Law Review
Harv. C.R- C.L. L. Rev	Harvard Civil Rights Civil Liberties Law Review
Harv. L. Rev	Harvard Law Review
HSF	Helen Suzman Foundation

ICC	International Criminal Court
IFP	Inkatha Freedom Party
Int'l & Comp L. Q	International and Comparative Law Quarterly
Int'l & Comp. L Q Sup. Pub	International and Comparative Law Quarterly Supplementary Publication
Int'l J. Const. L	International Journal of Constitutional Law
Iowa L. Rev	Iowa Law Review
J. L & Pol	Journal of Law and Politics
J. Legal Stud	Journal of Legal Studies
J. South. Afr. Stud	Journal of South African Studies
JAL	Journal of African Law
JSC	Judicial Services Commission
Law & Contemp. Probs.	Law and Contemporary Problems
Law & Soc. Inquiry	Law and Social Inquiry
Law & Soc'y Rev	Law and Society Review
LDD	Law Democracy and Development
LOAC	Law of Armed Conflict
Macq. L. J	Macquarie Law Journal
Marq. L. Rev	Marquette Law Review
McGill L. J	McGill Law Journal
Md. L Rev	Maryland Law Review
Mich. L. Rev	Michigan Law Review
Mod. L. Rev	Modern Law Review
N.Y.U. L Rev	New York University Law Review
NDPP	National Director of Public Prosecutions
NPA	National Prosecuting Authority
Nw. U. L. Rev	North Western University Law Review
PAIA	Promotion of Access to Information Act
PAJA	Promotion of Administrative Justice Act
PELJ	Potchefstroom Electronic Law Journal
PP	Public Protector
Public Admin Rev	Public Administration Review
Queen's L.J	Queen's Law Journal
S. Cal. L. Rev	Southern California Law Review
SACP	South African Communist Party
SADC	Southern Africa Development Community
SAJHR	South African Journal on Human Rights

SALJ	South African Law Journal
SAPL	South African Public Law
SASSA	South African Social Security Agency
SCOI	Supreme Court of India
SCOTUS	Supreme Court of the United States
SG	Superintendent General
SITA	State Information Technology Agency
Soc. Anthropol	Social Anthropology
Stan. L. Rev	Stanford Law Review
Stell L.R	Stellenbosch Law Review
Temp. Pol. & Civ. Rts L. Rev	Temple Political and Civil Rights Law Review
Tex. L. Rev	Texas Law Review
Third World Legal Stud	Third World Legal Studies
THRHR	Tydskrif vir die Hedendaagse Romeins-Hollandse Reg
Transnat'l L. & Contemp.Probs.	Transnational Law and Contemporary Problems.
TSAR	Tydskrif vir die Suid Afrikaanse Reg
Tulsa L. Rev	Tulsa Law Review
U. C. Davis L. Rev	University of California Davis Law Review
UK	United Kingdom
U Pa. L. Rev	University of Pennsylvania Law Review
U. Miami L. Rev	University of Miami Law Review
U. Toronto L J	University of Toronto Law Journal
US	United States of America
Vand. J. Transnat'l L	Vanderbilt Journal of Transnational Law
Vienna J. Int'l Const. L	Vienna Journal of International Constitutional Law
Vill. L. Rev	Villanova Law Review
Wash. & Lee L. Rev	Washington and Lee Law Review
Wash. U. J. L. & Pol'y	Washington University Journal of Law and Policy
Wis. L. Rev	Wisconsin Law Journal
Yale L.J	Yale Law Journal

CHAPTER 1

INTRODUCTION

1.1 Introduction

In June 2005, days after Jacob Zuma was removed as Deputy President by President Mbeki, the National Prosecuting Authority announced its intention to indict Zuma for corruption. Formally indicted in November 2005, by July 2006, the State sought a postponement, citing time needed to finalise its investigation. Msimang J denied the application for postponement. When the State was not ready to proceed with the prosecution when ordered, the judge struck the matter from the roll.¹ Zuma was elected to the position of African National Congress (ANC) President on the 18th December 2007. He was formally charged ten days later. Zuma's prosecution precipitated a collision course of law and politics, with the justice system in the cross fire. The judiciary found itself under great political pressure², subjected to a "virtual cacophony of orchestrated attacks on the Constitutional Court, and the judicial process", led by high level ANC leadership.³

Zuma applied to the Kwa-Zulu Natal (KZN) High Court for the charges against him to be dismissed, alleging that the charges were politically motivated to prevent his rise to power. Myriad delays in Zuma's prosecution, together with a high turnover of National Directors of Public Prosecution, meant that by the time the application for dismissal was heard, Zuma had become ANC President. The narrative was formed that it was the Court, not the 783 charges of fraud, corruption and racketeering, that stood between

¹ *Zuma v National Director of Public Prosecutions* 2009 (1) All SA 54 (N) at para 15-17

² "Courts in the Crucible" (2008) 8 *Helen Suzman Foundation Quarterly Roundtable* 6-13

³ Corder H in "Courts in the Crucible" (2008) 8 *Helen Suzman Foundation Quarterly Roundtable* 18

Zuma and his ascendancy to the highest position in the land – the President of the Republic of South Africa. Most vocal in political attack on the Court was ANC Youth League President Julius Malema:

Judges can be spoken to by any other person...knowing the tendencies of those ones who are against us. They, the 'dark forces', travel at night. They have got the potential to do anything. ...We will go to court when we are called, but we know that there is no court in this country that can provide a fair hearing for our president. Our president would never get a fair trial.⁴

In September 2008, Nicholson J for the KZN High Court found that Zuma had a legitimate expectation to make representations to the National Prosecuting Authority (NPA) and having not been afforded such opportunity, granted Zuma's application for dismissal.⁵ While the ruling would be later overturned by the Supreme Court of Appeal,⁶ the High Court judgment was of great political consequence. Nicholson's *obiter dicta* of political meddling in the prosecuting authority would be the catalyst for the ANC to recall Mbeki as President of the Republic. The judiciary – spoken of as a 'dark force' and illegitimate institution prior to the judgment – was now embraced as a legitimate source justifying the political shift that was about to take place.

With the dismissal of Zuma's prosecution, the vitriolic statements against the courts died down. But Zuma's ascendancy to President of South Africa in 2009 brought with it a deep sense of foreboding for an independent judiciary and the rule of law. The Nicholson judgment signalled the beginning of an aggravated era of Lawfare in South African jurisprudence.⁷ Lawfare is understood as the use or misuse of law to fight political battles. With each political matter dragged to the court for resolution, it is the court that is dragged into the political.⁸ It can, *prima facie*, be seen as judicialisation of politics.

⁴ Van Onselen G "Year One: How Julius Malema destroyed the NPA's case against Jacob Zuma in 365 days" (2018) *South African Institute of Race Relations Policy Paper* 13

⁵ *Zuma v National Director of Public Prosecutions* 2009 (1) All SA 54 (N)

⁶ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA)

⁷ Davis D & le Roux M *Precedent and Possibility: The (Ab)use of Law in South Africa* (2009) Juta, Cape Town 185-195

⁸ A detailed discussion on the concept of Lawfare follows below at 1.2

The impending Zuma years would require institutional fortitude and the reaffirming of the role that an independent judiciary plays in a constitutional democracy. Resilience and institutional resistance would be needed as the Constitutional Court of South Africa (CC) would be called on as the last sure bulwark to hold the line. As the era of Lawfare channelled assaults onto the very institutions supporting the rule of law, the CC would be rendered increasingly exposed and vulnerable. Focusing on the law and scholarship from the period 2009 to the end of 2020, it is clear that the judicialisation of politics, in pace and scope, has pervaded the South African jurisprudential landscape.

1.2 *Lawfare and the Judicialisation of Politics*

The phenomenon of 'Lawfare' as it has come to be known in South Africa, spring-boards off the term as coined by Comaroff and Comaroff:

...lawfare might also be a weapon of the weak, turning authority back on itself by commissioning courts to make claims for resources, recognition, voice, integrity, sovereignty....the displacement of the political into the legal or the turn to the courts to resolve an ever greater range of wrongs...which, in turn, exacerbates the resort to lawfare. The court has become the utopic site to which human agency may turn for a medium in which to pursue its ends. This, once again, is particularly so in post-colonies...in which heterogeneity had to be negotiated from the start.⁹

The term Lawfare combines 'warfare' and 'law' to mean the use of law as a tactic of war. The term was first used by Carlson & Yeoman in 1975 with the authors writing:

The search for truth is replaced by the classification of issues and the refinement of combat. Lawfare replaces warfare and the duel is with words rather than swords.¹⁰

The use of the term Lawfare in media reports, political commentary and increasingly in academic publications in South Africa¹¹ reveals that as a

⁹ Comaroff J & Comaroff J "Law and disorder in the post-colony" (2007) *Soc. Anthropol.*

145

¹⁰ Carlson J & Yeomans N "Whither goeth the law – humanity or barbarity" in Smith M & Crossley D (eds) *The Way Out – Radical Alternatives in Australia* (1975) Lansdowne Press, Melbourne

concept, Lawfare has plasticity. Understanding its attributes or efforts to define it must be linked to the sociological context in which it is used. For this reason, in illuminating the field of inquiry into Lawfare, associated terms are embraced. Judicialisation of politics is one such term.

Judicialisation of politics is “a growing reliance on adjudicative means for clarifying and settling fundamental moral controversies and highly contentious political questions.”¹² In 1995, Tate and Vallinder speculated that “judicialisation of politics may be or may become one of the most significant trends in late-twentieth century and early twenty-first century government.”¹³ Writing in 2011, Hirschl noted that “...despite the increasing prevalence of this trend, academic discourse addressing the judicialisation of politics worldwide remains surprisingly sketchy.”¹⁴

Lawfare has its more modern origins in the Law of Armed Conflict (LOAC). Stemming primarily from a military orientation, the term was used by US Major General Charles Dunlap in 2001, who described it as the “use or misuse of law as a substitute for traditional military means to achieve military objectives.”¹⁵ An overview of military-orientated scholarship understands Lawfare as an abuse of the law for nefarious purposes. Tiefenbrun argues that it is a “wrongful manipulation of the legal system.”¹⁶ This framing of Lawfare is predominantly understood within the context of insurgent tactics.

Expanding upon the characteristics of Lawfare more generally, wider observations note the objective of Lawfare extends beyond using the law to constrain the actions of one’s enemy. Lawfare can be used to galvanise resistance, to turn the people against the dominant force and seeks “*to gain a moral advantage over your enemy in the court of world opinion.*”¹⁷ Lawfare is

¹¹ See Corder H & Hoexter C “‘Lawfare’ in South Africa and its effects on the judiciary” (2017) 10 *Afr. J. Leg. Stud.* 105

¹² Hirschl R “The judicialization of politics” in Goodin R *The Oxford Handbook of Political Science* (2011) Oxford University Press 254

¹³ Tate C & Vallinder T (eds) *The Global Expansion of Judicial Power* (1995) New York University, New York 5

¹⁴ Hirschl (note 12) 262

¹⁵ Stephens D “The age of lawfare” (2011) 87 *International Law Studies: International Law and the Changing Character of Law* 327; Horton S “The dangers of lawfare” (2010) 43 *Case W. Res. J. Int’l L* 170

¹⁶ Tiefenbrun S “Semiotic definition of lawfare” (2010) 43 *Case W. Res. J. Int’l L* 52

¹⁷ Stephens (note 15) 331 (emphasis in original); Tiefenbrun (note 16) 59

thus not so much a strategy for a legal victory, but a moral battle through the exposure of an issue in an elevated forum such as a court.¹⁸ From this military centred overview of Lawfare objectives, it is clear that there are deeper undercurrents to the objectives and purposes of Lawfare. Expanding the initial understanding of Lawfare beyond its abusive characterisation may be needed.

The primary condition for Lawfare to exist is the normative faith people have in the rule of law. Through such faith, one shows commitment to law and accepts its constraints. It is this very commitment that is targeted by a lawfare strategy. Lawfare is successful where the judiciary is possessed with a moral force – “the esteem in which the judiciary is held within the psyche and soul of a nation...substantially dependent on its independence and integrity”.¹⁹ In other words, conditions where there is high regard for the rule of law and a belief in the legitimacy of the judiciary. The presence of this legitimacy is able to compel voluntary compliance, with enough moral authority to bind opposition or have an ennobling and galvanising effect.²⁰

In the discussion of Lawfare’s origins, the initial connections between legitimacy and Lawfare have been raised. In framing the focus of this thesis, these *prima facie* connections require deeper attention. Lawfare’s strategy is to capitalise on the reputational force and moral strength that a court possesses in a culture where the rule of law is highly respected. Lawfare can therefore be said to begin with legitimacy.

Accepting that South Africa now finds itself in the era of Lawfare, the jurisprudential landscape is painted by the judicialisation of politics and the politics of adjudication.²¹ As a plethora of political issues comes before the CC and the Court is dragged into politics, the impression is created of an expanded role for the Court. Accusations of an imperial judiciary, judicial

¹⁸ Austin WC & Kolenc A “Who’s afraid of the big bad wolf? The ICC as a weapon of asymmetric warfare” (2006) 39 *Vand. J. Transnat’l L* 308,324

¹⁹ *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) at para 33 (hereinafter *Helen Suzman Foundation*) referencing Mahomed I “The role of the Judiciary in a constitutional state: address at the first orientation course for new judges” (1998) 115 *SALJ* 112

²⁰ Fuller L “The forms and limits of adjudication” (1978) *Harv. L. Rev* 409

²¹ Comaroff & Comaroff (note 9) 148

overreach, and judicial usurpation are quick to follow.²² The unfolding implications of the judicialisation of politics led Davis to entitle a paper “*Has South Africa become a juristocracy? Or who runs the country?*”²³ Initiated by judicial legitimacy, this expanded role of the court in instances of judicialisation of politics and the need for the court to justify its authority returns the focus back to judicial legitimacy.²⁴

From these points emerge tentative connections and the beginnings of a circular model of Lawfare and legitimacy. The exploration of this circularity will form the central thesis of this research. This thesis will argue that while Lawfare emerges from legitimacy and depends on legitimacy, an over-reliance on Lawfare can destroy judicial legitimacy.

1.3 *An Unsettled Role*

The vulnerability of South Africa’s apex court is not new. From its creation, the conflicting demands placed on the institution required the Constitutional Court (CC) to play an unsettled role. The Constitution, as a value-driven aspirational document with a transformative mandate, demands an expansive role for the CC as the ultimate guardian. Imbued with great review powers, it is inevitably a powerful political actor.²⁵

The legitimacy of the judicial function is marked by adjudication according to law. Predictability, consistency, and stabilisation of legal meaning are core values for a nation governed by the rule of law. Yet the South African Constitution is a living document with an open textual nature, to be interpreted holistically and teleologically, guided by the spirit and not the letter of the law. Fairness, justice, social redress, social stability and unity

²² Vallinder T “When the Courts Go Marching In” in Tate C & Vallinder T (eds) *The Global Expansion of Judicial Power* (1995) New York University, New York 13

²³ Davis D “*Has South Africa become a juristocracy? Or who runs the country?*” (2006) Paper presented at the “Harold Wolpe Memorial Trust’s 54th Open Dialogue” 19 October 2006 T H Barry Lecture Theatre, Iziko Museum of Cape Town

²⁴ Botha H “The legitimacy of legal orders (1): Introducing the problem (2001) 64 *THRHR* 181

²⁵ See Klare K “Legal culture and transformative constitutionalism” (1998) *SAJHR* 146; Kentridge J & Spitz D “Interpretation” in Chaskalson M *et al* (eds) *Constitutional law of South Africa* (Juta Cape Town 1996) 55.

encapsulate the constitutional vision and speak to the evolving nature of the law towards the progressive realisation of these objectives.

Appreciating this interpretive framework, the CC's fidelity to constitutional law at times demands a broader view of the rule of law. Yet it is this same duty that may seem to give rise to judicial activism and a perception of an unmooring of the Court from the law.²⁶ The tension of obligations does not end there.

Through its edifying role, the CC has an obligation to make known to South Africans their "higher moral aspirations"²⁷ and in this sense the CC is tasked with the *creation* of a constitutional identity for the nation. The didactic role of the Court sits in contrast to political and democratic legitimacy imperatives. This need to show faith in and deference to the democratic will is particularly acute given South Africa's history, where the will of the majority was denied for so long. Furthermore, it is significant to note that because there is institutional instability in a young democracy, judicial self-consciousness will be more pronounced, at the same time as didactic force may be required.²⁸ The first iterations of the CC understood the imperative to limit its authority and effectively balanced appropriate deference with fearlessness in upholding rights.

The CC has accepted a "distinctively South African model"²⁹ of the separation of powers doctrine; holding that the doctrine must be understood within, and in response to, the unique South African experience. That

²⁶ Davis D "Deconstructing and reconstructing the argument for a bill of rights within the context of South African nationalism" in Andrews P and Ellmann S (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) Witwatersrand University Press at 219; O'Regan C "From form to substance: the constitutional jurisprudence of Laurie Ackerman" (2008) *Acta Juridica* 9; Chowdhury N "From judicial activism to adventurism: the *Goodavarman* case in the Supreme Court of India" (2014) *APJEL* 178 notes the same obligation of the Indian Supreme Court.

²⁷ Roux T *The Politics of Principle: The First South African Constitutional Court 1995-2005* (2013) Cambridge University Press at 9; See Choudhry S "After the rights revolution: bill of rights in the post-conflict state" (2010) 6 *Annu. Rev. Law Soc. Sci.* 301; Davis D *Democracy and Deliberation: Transformation and the South African Legal Order* (1999) Juta and Company Ltd, Cape Town 9

²⁸ Greenawalt K "Discretion and judicial decision: the elusive quest for the fetters that bind judges" (1975) *Colum. L. Rev* 359; Tushnet M "Preserving judicial independence in dominate-party states" (2016) 60 *N.Y.U L.Rev* 113-114 and at fn 34

²⁹ *In re: Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC) (hereinafter *First Certification Judgment*), reiterated again in *De Lange v Smuts* 1998 (7) BCLR 779 (CC) at para 60.

understanding of separation of powers, together with the CC's transformative and nation-building mandate, renders traditional lines of deferential thinking disquieting. The CC's judicial statecraft greatly extends beyond traditional parameters. Justice Sachs notes the tension within the CC's institutional role:

We are aware that we are simultaneously both heirs to a timeless international tradition, and promoters of a new constitutional jurisprudence, this in a country that both longs for transformation and desperately needs predictability.³⁰

A mechanistic, non-engaging and insulated judicial role predicated on the belief of the appropriateness of the institutional role therefore has the potential to blunt sensitivity to conditions required to sustain the rule of law.³¹ The interpretive openness that is needed to effect its role obligations results in the need for judicial engagement and discretion in constitutional choices. In turn, this duty gives rise to two concepts that are integral to notions of judicial legitimacy - the indeterminacy of constitutional law and judicial subjectivity. Both have the potential to create the perception of illegitimacy.

Why does the Constitution place such an unavoidably conflictual role on the Court? The South African Constitution was drafted in conflict. Its very architecture admits of its tensions and discordance, heterogeneity and divisions. The Court, established by the Interim Constitution, stood as a mechanism of surety and as a way to overcome an impasse in ushering in a democratic nation. It achieved this through forging a constitutional patriotism. Constitutional patriotism does not solve division but acknowledges difference. These broader tensions and the need to maintain a social stability and commitment to the Constitution must be appreciated and factored into any assessment of the CC's role. Conflicting values and competing rights claims requires creativity on the part of the CC.

The objective for the CC is to create understanding and growth and continued constitutional allegiance from all stakeholders for a stable future,

³⁰ Issacharoff S "Constitutional courts and democratic hedging" (2011) 99 *Geo. L. J* 979-980 referencing Justice Albie Sachs *The strange alchemy of life and law* (2009) 50

³¹ Du Plessis L "Between apology and utopia: the Constitutional Court and public opinion" (2002) *SAJHR* 19

alongside acknowledgment of a past that requires remedy and redress.³² Added to these challenges of stability for both the Court, Constitution and nation state is the need to navigate the discordance between the necessity for acceptance by the public and the duty to uphold human rights, particularly minority rights, not supported by the majority of the polity.³³

From these initial observations, the competing and contradictory conditions for judicial legitimacy begin to come into focus. Institutional legitimacy must thereby embrace questions of judicial overreach, judicial discretion and the unboundedness of the judicial role, the interplay between law and politics, and the relationship between judicial review and democracy.³⁴ The CC has to navigate the competing forces of constitutional fidelity, political economy and popular support that are necessary for judicial legitimacy. “Exactly how the court accomplishes this remarkable feat is insufficiently studied.”³⁵

In his work on the judicial political dynamics of the CC from 1995-2005, Theunis Roux theorises that the CC was able to navigate these tensions by appreciating the systemic interdependencies of the elements of a constitutional democracy. Where public support for the institution had yet to be established, the support offered by the ANC to the fledgling institution gave the CC time to cultivate its legitimacy.³⁶ This was in large part due to the leadership of President Mandela and the strategic jurisprudence of President of the CC (and later Chief Justice) Arthur Chaskalson. The apex court was able to determinedly usher in a new area of human rights protections predicated on dignity, equality and inclusion; and was able to

³² Davis & le Roux (note 7) 9; Yudof M “Implementation theories and desegregation realities” (1981) 32 *Ala. L. Rev* 450 quoting Frankfurter in *Cooper v Aaron* “The responsibility of those who exercise power in a democratic government is not to reflect inflamed public feeling but to help form its understanding”. Roux (note 27) 33

³³ *S v Makwanyane* 1995 (3) SA 391 (CC) at para 88 (hereinafter *S v Makwanyane*); *West Virginia State Board of Education v Barnette* 319 U.S. 624, 638 (1943): “The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts...fundamental rights may not be submitted to vote; they depend on the outcome of no elections.”

³⁴ *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC) para 155

³⁵ Post R & Siegel R “Roe rage: democratic constitutionalism and backlash” (2007) *Harv. C.R.- C.L. L. Rev* 385

³⁶ Roux (note 27) 35, 363

stand against overwhelming public opinion in securing these rights, particularly for the marginalised and vulnerable. While bold in its defence of rights, knowing that political support was crucial for the CC's stability, the Court was reticent and deferential on political issues, avoiding direct conflict with the ANC.³⁷

Roux takes the position that the stability of the judiciary has to be based on the buttressing forces of political support, public confidence and legal authority. Accepting Roux's position as a point of departure, this research will explore judicial legitimacy through studying these inter-relationships since 2009. There is unambiguous evidence to suggest that the judiciary, during the 'Zuma years' did not have the support of the dominant party. During this time, the CC was habitually confronted with the constitutionality of political actions by the dominant party, as opposition parties and civil rights organisations sought the judicial avenue for accountability.

ANC dominance is causing the pervading of the political into the legal in the form of the judicialisation of politics. Acknowledging a correlation between the democratic age and institutional security, ANC party political dominance in a young democracy creates at once a deferential responsibility on the part of the judiciary *and* a greater role that the Court is called upon to play as a bulwark against dominance. In this, the CC is increasingly vulnerable to political attack.

1.4 Dominant Party Democracy

Majoritarianism, appropriated by the dominance of the ANC³⁸, has translated into a neglect of democratic principles at a legislative and

³⁷ Brown N & Waller J "Constitutional courts and political uncertainty: constitutional ruptures and the rule of judges" (2016) 14 *Int'l J. Const. L* 831

³⁸ Bogaards M "Dominant parties and democratic defects" (2005) *Geo.J of Int'l Affairs* 30 notes the prevailing definition of dominant party democracy is a political party that has won three or more consecutive elections; others consider dominance as a party that has been freely and fairly elected to power for over 20 years. The ANC has won every democratic election in South Africa beginning in 1994. More than elections, a dominant political party generally holds a degree of societal hegemony. For the ANC in particular, this hegemony is cultivated by its history as the liberation force that fought for freedom. Ndletyana C *Anatomy of the ANC in Power: insights from Port Elizabeth 1990-2019* (2020) HSRC Press, Cape Town 5

participatory level, a lack of accountability and a dialogic breakdown.³⁹ Democratic erosion by a democratically elected party is further aggravated by overwhelming corruption and state capture (compounded by, or indeed facilitated by, administrative incompetence).⁴⁰ A dearth of ethical leadership is combined with an attitude of impunity by government. This has resulted in contempt for Court orders which places the judiciary in a directly antagonistic, conflictual position with the dominant party.⁴¹ Added to this is the calculated dismantling of horizontal accountability mechanisms found in Chapter 9 institutions. This is the landscape and context upon which the discussion of judicial politics and legitimacy is situated.

Where mechanisms for constitutional oversight in political areas have broken down, courts are approached as the last hope. "Judicial review is naturally regarded as a substitutive kind of decision-making device, filling in for democracy where democracy cannot act."⁴² When there is an appeal to the court, the court is asked to be a bulwark. Where democratic processes have failed in other spheres, it re-territorialises the judicial role as the assumptions underpinning what would normally delineate judicial engagement or non-intervention collapse. The judiciary has to embrace an expanded role to preserve the integrity of the constitutional system.⁴³

The judicialisation of politics foisting a more active, some would argue intrusive, role to counter the erosion of some other part of the constitutional system raises questions of the legitimacy of the judiciary playing such a

³⁹ "You don't understand democracy, Zuma told" *News24* 14 September 2012 <http://www.news24.com/SouthAfrica/News/You-dont-understand-democracy-Zuma-told-20120914> (date accessed - 25/09/2013) Zuma: "You have more rights because you are a majority. You have less rights [sic] because you are a minority. That is how democracy works". West R "The authoritarian impulse in constitutional law" (1988) *U. Miami L.Rev* 531

⁴⁰ Booysen S "Hegemonic struggles of the African National Congress: From cacophony of morbid symptoms to strained renewal" (2018) 2 *Africa Spectrum* 9-10

⁴¹ Choudhry S "He had a mandate: the South African Constitutional Court and the African National Congress in a dominant party democracy" (2009) *CCR* 67; Hoexter C *Administrative Law in South Africa* (2007) Juta and Company Ltd, Cape Town 216; Traynor R "The limits of judicial creativity" (1977) 63 *Iowa L.Rev* 8; Bogaards (note 38) 32

⁴² Michelman F "Dilemmas of belonging: Moral truths, human rights and why we might not want a representative judiciary" (1999) 47 *UCLA Law Review* 1236-1237

⁴³ Klug H "Constitutional authority and judicial pragmatism: politics and law in the evolution of South Africa's Constitutional Court" in Kapiszewski D, Silverstein G & Kagan R (eds) *Consequential Courts: Judicial Roles in Global Perspective* (2013) Cambridge University Press, Cambridge 108

compensatory role. Determining whether an action is legitimate is a relational consideration. Legitimacy must be determined first in relation to role and then in relation to context. The pillars of legitimacy are built on “shifting sands”⁴⁴ of contextual suppositions. When the context changes, there are shifts in what is seen as legitimate. Subsequently, a critical reflection of the response by the judiciary in terms of traditional theories of legitimacy is required. Whether the judiciary is justified in undertaking this compensatory role and how long it can continue to bear this weight, will be the focal point of this research.

1.5 Methodology

This thesis is a doctrinal study comprising an exposition of the judicial role in the constitutional system. Situated in the broader field of judicial politics, this research studies the interplay between law and politics, and the merging of the two in what has come to be known as Lawfare, or the judicialisation of politics. It further traces the implications of Lawfare for judicial legitimacy through the adoption of the historical-institutionalist model. The historical institutionalist model looks at the role of a constitutional court within its environment, and the role the institution plays within the broader system of a constitutional state, examining its inter-dependencies and influences.⁴⁵

Expanding the understanding of the paradoxes, complexity and balance required by the judicial role, this thesis will investigate the dialectical tensions of judicial legitimacy by drawing on the Constitutional Court’s review of exercises of public power from 2009 to early 2020.

The understanding that judicial legitimacy encompasses multiple conceptions emerges from a cursory view of the bifurcated responsibilities of the CC. These dialectical tensions of legitimacy posit the need to explore judicial legitimacy as a wicked problem. ‘Wicked problem’ was a term coined by town planners Rittel and Weber in 1973. *It denotes not a problem that is morally reprehensible, but rather ‘wicked’ in the sense of complicated or*

⁴⁴ Fallon R “Legitimacy and the Constitution” (2005) 118 *Harv. L Rev* 1793

⁴⁵ Whittington K “Once more into the breach: post-behavioralist approaches to judicial politics” (2000) 25 *Law & Soc. Inquiry* 617

complex.⁴⁶ From the outset, an emphatic distinction needs to be made between ‘wicked problem’ as it will be used in this research, and ‘wicked’ used to describe the apartheid system, most notably by Dyzenhaus in *Hard Cases in Wicked Legal Systems*.⁴⁷ Dyzenhaus’ usage of ‘wicked’ denotes a legal system that is oppressive and devoid of morality.

Viewed through the lens of judicial legitimacy, a wicked *problem* speaks to the idea that the achievement of one aspect of legitimacy has the potential to diminish another equally necessary aspect. For example, a mechanistic and formalist approach may shield the Court from accusations of judicial overreach; yet it may diminish the duty to achieve justice and respond to the needs of society. Understanding ‘wicked problems’ involves sensitivity

[to] the waves of repercussions generated by problem-solving action directed to any one node in the network, and we are no longer surprised to find it inducing problems of greater severity at some other node, and so we have been forced to expand the boundaries of the system we deal with, trying to internalize those externalities.⁴⁸

Working with a wicked problem demands that “systems and the interactions within them”⁴⁹ be observed. Adopting a systems-approach to a wicked problem overlaps considerably with resilience theory which can be looked to in asking how the court can remain resilient in the face of risk and preserve its integrity and independence as the era of Lawfare exposes the Court to political dangers. Resilience theory advances the proposition that

resilience of social organizations derive[s] from the systemic interdependences and inter-effects inherent in an open system. Among these are their ability to follow many paths, their cyclicity, and their ability to process and transform energy and other resources from their environments as well as to impact their environments.⁵⁰

This research will explore the relationship between Lawfare and legitimacy as a wicked problem. Through observing a broader system and tracing the

⁴⁶ Rittel H & Weber M “Dilemma’s in general theory of planning” (1973) 4 *Policy Sciences* 156

⁴⁷ Dyzenhaus D *Hard Cases in Wicked Legal Systems: South Africa Law in the Perspective of Legal Philosophy* (1991) Clarendon Press, Oxford

⁴⁸ Rittel & Weber (note 46) 159

⁴⁹ Peters G “What is so wicked about wicked problems? A conceptual analysis and a research program” (2017) 36 *Policy and Society* 385-386

⁵⁰ Aguirre B “Dialectics of vulnerability and resilience” (2007) 14 *Geo. J. on Poverty L. & Pol’y* 41

interactions, inter-dependencies, influences, and unfolding implications of power fluctuations, it traces the process of the judicialisation of politics leading to the politicisation of law, which in turn leads to the court needing to engage with the politics of adjudication.

The politicisation of law is understood as judicial actors being pulled into the political; where legal rulings are painted as a politicised ideological imposition on the part of the judge. Expanded judicial power means judicial appointments become highly politicised. Politicisation of law further sees political attack retrained onto the judiciary and its independence potentially subjected to political manipulation to achieve political objectives. In this respect, the judiciary comes under fire and its legitimacy is both questioned and undermined. The politics of adjudication involves how the court navigates this climate and what political strategies it must undertake to maintain the integrity and appearance of impartial apolitical adjudication. The politics of adjudication can also be characterised as judicial politics.

In expanding the boundaries in the assessment of judicial legitimacy, a multi-disciplinary approach is adopted, drawing on the socio-psychological, institutional-legal sociology and the political.⁵¹ This is an approach to judicial legitimacy through both the normative and positive perspective that combines to form a systems-thinking approach.⁵² This approach may be subjected to the criticism that it is a departure from traditional constitutional scholarship that is a normative undertaking encased in a doctrinal study. A multi-disciplinary approach would, it can then be argued, unacceptably conflate normative and positive approaches.

Normative theory is concerned with how a court ought to rule, remaining insulated in the realm of legal scholarship. Positive theory approaches the study of the Court from a political science or a sociological perspective.⁵³ Increasingly however, scholars are willing to admit the sociological and

⁵¹ Fallon (note 44) 1814; Woolman S "A politics of accountability: How South Africa's judicial recognition of the binding legal effect of the Public Protector's recommendations had a catalysing effect that brought down a President" (2016) 8 *CCR* at fn 4

⁵² Luhmann N "Law as a social system" (1989) 83 *Nw. U. L. Rev* 136

⁵³ Friedman B "The Politics of Judicial Review" (2005) 84 *Tex. L. Rev* 257-258; Abel R *Politics by Other Means: Law in the Struggle Against Apartheid 1980-1994* (1995) Routledge Inc, London 8

political influence on the study of law.⁵⁴ Approaching the issue of judicial legitimacy from these perspectives allows for the unremitting interactions and dynamics between the institutional structures and political powers to come more sharply into focus. An interdisciplinary methodological approach helps sketch the system as a whole, which allows for the assessing potential volatility, crises in the broader political environment, political attack or manipulation of the judicial branch that will impact on judicial legitimacy and its subsequent effectiveness in upholding the rule of law.

A multi-disciplinary approach is “neither to supplant legal reasoning nor to provide a substitute for legal wisdom, but instead to locate and understand them better.”⁵⁵ In other words, the adoption of the positive approach is to ensure the preservation of the normative. This is supported by resilience theory that holds:

The parameter of constitutional resilience does not compromise constitutional functions in a world of risk and vulnerability. Adversely, it seeks to probe how those functions are maintained and *constitutional normativity does not fade* when encountered with crisis.⁵⁶

The hyper-connectivity and complexity of a system means that navigating the system to achieve resilience and retain legitimacy is difficult. Wicked problems literature observes the “unpredictable patterns of change”⁵⁷ caused by the “interactions among variables” in a constant process of unfolding and emergence. The consequences and extent of judicial decisions made, and the conditions necessary for their effectiveness, are difficult to trace because “...for the most part, dynamical systems...cannot predict future behavior, no matter how accurately we measure the initial conditions.”⁵⁸ Towards the objective of fortifying the judicial institution, in needing to ascertain how these conditions interact, this research touches on a comparative focus to see how

⁵⁴ Hutchinson T & Duncan N “Defining and describing what we do: doctrinal legal research” (2012) 17 *Deakin L. Rev* 83-119

⁵⁵ Hutchinson A “Democracy and determinacy: an essay on legal interpretation (1989) 43 *U. Miami L. Rev* 549

⁵⁶ Contiades X & Fotiadou A “On resilience of Constitutions: What makes constitutions resistance to external shocks?” (2015) 9 *Vienna J. Int'l Const. L* 5

⁵⁷ Peters (note 49) 392

⁵⁸ Martin-Breen P & Anderies J “Resilience: A literature review” (2011) *Background Paper Bellagio Initiative* 46

the variables of public support, dominant party democracy, and institutional confidence have interacted in other nation states.⁵⁹

Within comparative investigations, a correlation between the length of time that democracy has been established and entrenched in a State and increased institutional stability is assumed. The relative youth of South Africa's democracy will therefore be a crucial variable in any comparative exercise. This aspect must be subjected to critical examination to assess where these theoretical positions about the appropriate role of the judicial institution, and how to achieve its legitimacy, will diverge in light of democratic age.⁶⁰ In drawing on comparative lessons as a predictive guide, a departure from these positions may be needed considering the expanded role that constitutional courts have played in democratised nations from 1989 onwards and the stabilising role a constitutional court plays in a young democracy.

This research will extract lessons from the judicial-political dynamics of India, Israel, the United States and United Kingdom. An overview shows that the US and the UK, particularly from 2018, have experienced a degree of inter-branch conflict where the judiciary has had to step in. Israel has seen moves to limit judicial authority through increasingly nationalistic overtures. As in South Africa, the Supreme Court of India (SCOI) has shouldered the responsibility for socio-economic transformation, expanding the judicial role beyond the traditional legal-adjudicative model.⁶¹ Particular focus must be placed on the SCOI's role in what has been described by the people of India as a saviour. Indian judicial activism occurs alongside, and because of, the de-legitimisation of democratic institutions. In undertaking this role, the SCOI has faced criticism of going beyond activism into adventurism. The South African judiciary finds itself in a similar position, as politically charged issues

⁵⁹ Tushnet (note 28) 123: "an examination of the ways in which power and law, political parties and court, interact with ideas about normative constitutionalism...such an approach is likely to be quite important as the field of comparative constitutional law continues to develop." Choudhry (note 41) 7: "comparative politics should inform our reading and the development of South African constitutional doctrine."

⁶⁰ Baum L *Judges and Their Audiences: A Perspective on Judicial Behaviour* (2006) Princeton University Press, New Jersey 65; Roux (note 27) 104-108;

⁶¹ Chowdhury (note 26) 178

are readily ceded to the judiciary for resolution. The CC, as in India, is frequently seen as the “the final bastion of hope”.⁶²

1.6 Research Questions and Framework

The charge of lawfare is designed to short-circuit the legal process...this is the ultimate danger of lawfare. It is a dangerous domestic political game that promotes an attitude of contempt towards important, earnest obligations. That attitude will never serve a democracy in the long run.⁶³

This research endeavours to unpack the above assertion through the overarching question: what are the impacts of the trend of Lawfare on the justice system in a constitutional democracy, with a narrower focus on the implications of Lawfare for the security of the judicial institution?

I adopt a three-pronged approach. I ask three questions: first, what is causing or contributing to the increasing trend of the judicialisation of politics? Second, what are the consequences of the judicialisation of politics for judicial legitimacy? Third, how has the CC responded to Lawfare and judicialisation in two key respects: a) the success of the CC in holding the line against political aggression; and b) what the nature and extent of the CC’s response in the Lawfare era needs to be to maintain judicial legitimacy?. These questions are addressed in the broad framework of Chapters 3 -7.

The law represents a relatively closed system: it must remain distinct from the open-ended spheres of morality, politics and interpretation, or forego its claims to objectivity, neutrality and determinacy....⁶⁴

A closed system ensures the distinction that is required for both legal legitimacy and the justification of the judicial role in terms of democratic theory.⁶⁵ How can this understanding of legitimacy be squared with advancing a systems-approach to legitimacy requiring an ‘opening-up’ of this

⁶² Moog R “Activism on the Supreme Court of India” (1998) 82 *Judicature* 128

⁶³ Horton (note 15) 168-169, 178-179

⁶⁴ Botha H “The legitimacy of legal orders (2): towards a disruptive concept of legitimacy” (2001) 64 *THRHR* 382 referencing Laclau and Mouffe *Hegemony and socialist strategy* (1985) at 376

⁶⁵ Nobles R & Schiff D *Observing Law Through Systems Theory* (2013) Hart Publishing, Oxford 6-7, 15

closed system? Surely the need to be insulated becomes more pressing in the judicialisation of politics that renders the court vulnerable to political attack? From this emerges the first of many wicked problems.

To remain legitimate in its role, the court must be unmoved by social consequence, and unwavering in the face of political machinations, threat or influence. Rejecting the view of resilience as ‘holding the line’, - resilience theory understands resilience not as rigidity and detachment, but as the ability to be aware of risk, to absorb the shock to the institution and then adapt in such a way that the basic functions are preserved and its core purpose can still be fulfilled.⁶⁶

How then does the judicial institution show the required degree of uncommon fortitude that is required in this era of Lawfare? In the political flowing into the legal, how does the court show sensitivity to external factors and still retain constitutional normativity? Is the public belief in an independent, fair and impartial judiciary undermined by advancing the argument that the CC needs to strategically engage in a political calculus (the politics of adjudication) to maintain its legitimacy? Does this openness go against the core feature of adjudication according to law?⁶⁷ Systems thinking is therefore both the lens used to study legitimacy *and* the field of inquiry because it itself raises legitimacy concerns.

In arguing that judicial legitimacy is comprised of multiple and paradoxical dimensions, Chapter 2 offers a conceptual overview, contrasting political legitimacy, sociological legitimacy, legal legitimacy and moral legitimacy. It sketches how these dimensions interconnect and conflict with each other; and explores the dialectical judicial responsibilities that emerge when these dimensions are seen as a composite. Having outlined the relationship between the dimensions of legitimacy, the chapter extracts key points for the assessment of legitimacy. A relationship between legitimacy and judicial-political dynamics is revealed through observing how differing levels of legitimacy alter the dynamic between a court and political actors. The

⁶⁶ Contiades & Fotiadou (note 56) 3-4

⁶⁷ Traynor (note 41) 8, in discussion of sensitivity and response, rejects what he calls “ear to the ground law”.

chapter concludes by advancing the argument that the complexity of legitimacy is analogous to the concept of a wicked problem.

Chapter 3 focuses on the disparate reasons for the flow of the political into the legal. It poses the question – what is causing the judicialisation of politics? An examination of the South African CC through a historical-institutionalist lens shows a history and a habit of legalisation of politics. This stems firstly through apartheid laws and opposition to those laws, and later through the prevalence of a rights culture and expanded public interest jurisdiction. In the primacy, elevation and illusion of the attractiveness of the law as the vehicle to fight social ills, the connection between law and politics exceedingly pronounced. This chapter sketches an historical overview of the legitimacy of the South African judiciary; before moving to a more institutionalist focus outlining the nature and role of the CC in establishing democracy.⁶⁸ Through an historical-institutionalist understanding of the role of the CC, the thesis elucidates the meaning of ‘political’ and how it will be used in this study. The chapter then proceeds to examine the political developments which are driving issues to the Court for redress.

Chapters 4 and 5 discuss the consequences of judicialisation – this being the politicisation of adjudication. The primary consequence of judicialisation is the exposure of the judiciary to political attack. The chapter traces the breakdown in the separation of powers, the measures taken to undermine judicial independence, and the development of a broader culture of an unpunished disregard for the rule of law in South Africa. Chapter 5 outlines the effects on the judicial environment when the politicisation of adjudication occurs. Two ancillary consequences of the primacy of a judicial avenue that leads to the politicisation of the law are then explored – the decline of democratic responsibility, and the shifting of blame onto the Constitution and the judicial system.

Chapters 6 and 7 address the politics of adjudication spanning both a normative argument and a positive assessment of how an ideal constitutional court should operate in a Lawfare climate to achieve effectiveness and

⁶⁸ Roux (note 27) 25

responsiveness. Narrowing focus to the South African CC, the chapter looks at how effectively the apex court has navigated the judicialisation of politics. To make this determination, it surveys the conditions of judicial effectiveness - how the Court's decisions are to be respected, accepted and implemented. In observing the limits of institutional competencies, the pronounced challenges to effective remedial action in institutional suits and orders of suspension are revealed. The ability to ensure compliance to achieve authoritative legitimacy is markedly tested when overlaid onto the characteristics of judicialisation. Chapter 7 sketches how the CC has operated in hostile conditions with increasing non-compliance with its orders.

Chapter 8 is a case study of the Office of the Public Protector from 2016-2020. It is presented at the conclusion of this research to illustrate and highlight the core elements that have emerged in the study of the interaction between Lawfare and legitimacy.

1.7 Conclusion

In 1920, Justice Holmes wrote that in the creation of the Constitution of the United States, the framers had "called into life a being," whose development

could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation.⁶⁹

Fidelity to a constitution requires engagement with the constitutional spirit. Balkin posits that to be faithful to the constitutional project is to accept that the project is never complete.⁷⁰ Cameron warns of the dangers of complacency, of thinking that an institution once built, will endure as a self-sustaining system.⁷¹ The fragility of democracy and constitutionalism demands vigilance. There must be persistent awareness of the unfolding

⁶⁹ *Missouri v. Holland* 252 U.S. 416 (1920) at 433

⁷⁰ Balkin J "Agreements with hell and other objects of our faith" (1997) *Fordham L.R* 1715

⁷¹ Cameron E "Submission on the role of the judiciary" (1998) 115 *SALJ* 438 Davis (note 27) 47; see also Lenta P "Looking sideways: constitutional interpretation, ethics and theory" (2002) *Stell L.R.* 9; Corder H "Judicial authority in a changing South Africa" (2004) *Legal Studies* 253; Botha (note 64) 379

interactions and dynamic relationships between the political, constitutional sociology and the law. This dynamism constantly renders the constitutional project, and the security of the institution that would execute that project, in a state of flux.⁷² This compels a critical appraisal of the Constitution and the judicial role required to shepherd this nation into the promised future.

Legitimacy is a vexing concept. It is the life blood of a constitutional system.⁷³ The “judicial branch is uniquely dependent on the power of legitimacy.”⁷⁴ A court’s moral force, its weight, its power, is dependent on its legitimacy.⁷⁵ Judicial authority cannot be achieved through coercion but justification. Its legitimacy stems from the faith the people have in the institution as a “citadel of public justice”.⁷⁶

Legitimacy is long to cultivate and quick to lose. It is never achieved with finality. Stability and resilience to risk depend on receptivity to external dynamics. To remain resilient and resistant, to preserve its legitimacy and shield itself from the risks of Lawfare, the judicial institution is required, it will be argued, to display sensitivity and an awareness of its environment.⁷⁷

South Africa’s judicial politics shows that Lawfare can be good or bad. Moreover, good lawfare can be painted as bad lawfare, and good lawfare can unintentionally spawn bad lawfare, necessitating an expanded definition of Lawfare beyond merely ‘abusive’. This is what makes Lawfare a “complex

⁷² Balkin (note 70) 1704; Chowdhury (note 26) 178; Klare (note 25) 156: “The judicial mind set and methodology are part of the law and therefore must be examined and revised.” van der Walt “Frankly befriending the fundamental contradiction: Frank Michelman and critical legal thought” in Botha, van der Walt, van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) Sun Press, Stellenbosch 220; O’Regan (note 26) 9: “It is an on-going constitutional project which requires a fresh legal imagination – and courage. The scope of the constitutional project thus understood continually baffles, and at times irritates and frustrates, lawyers and judges. The frustration and irritation is understandable but must be resisted if the transformative vision of our Constitution is to be pursued”.

⁷³ Wisotsky S “Beyond Legitimacy” (1978) 33 *U. Miami L. Rev* 174

⁷⁴ Cox A *The Role of the Supreme Court in American Government* (1976) Oxford University Press, New York 103

⁷⁵ Cox A “The role of the Supreme Court in American society” (1967) 50 *Marq. L. Rev* 575, 591

⁷⁶ Hamilton A *The Federalist* 78 (1788)

<https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-78> (date accessed 09/03/2020)

⁷⁷ Senge P, Scharmer O & Jaworski J *et al Presence: Exploring Profound Change in People, Organizations and Society* (2005) Nicholas Brealey Publishing, Great Britain 4-11

and contested concept”.⁷⁸ In one sense it can be an abusive manipulation of law to achieve political goals, politicising and ultimately destroying the institution of democracy in pursuit of that ill-motivated objective. In another sense, Lawfare can be a vehicle of accountability, invoked when there needs to be responsiveness to social pressures when political avenues fail.

Both types of Lawfare spring from the moral force that the judiciary can offer. This presupposes a high level of legitimacy. So on its face there should be little need for institutional concern. But this initial overview of Lawfare suggests a relationship between legitimacy and power, and deriving from this connection, power and vulnerability of the judicial institution. Counter-intuitively, threats to the sustainability of rule of law institutions, whether pernicious, calculated or unintended, emerge when legitimacy is high and complacency is low. As Ackerman warns:

But slowly, and then with grim speed, these voices fall silent...We reach a point at which it is for us, the living, to say what all their sound and fury amounted to.⁷⁹

This compels a focus on legitimacy, particularly at this time of Lawfare. Fuller describes judicialisation as parasitic, drawn to the court because of the courts' legitimacy; and the moral force derived from its non-political and independent nature.⁸⁰ Given time, a parasite changes the nature of its host organism, affecting the legitimacy that makes it so attractive and ultimately resulting in a loss of reputational strength. By Lawfare dragging the court into politics it is undermining the

very legitimacy on which it depends because the non-traditional activities of the judiciary are at odds with the conditions that ensure the moral force of its decisions.⁸¹

Using this observation as a point of departure, this thesis offers an expanded assessment of the consequences of judicialisation through tracing

⁷⁸ le Roux M & Davis D *Lawfare: Judging Politics in South Africa* (2019) Jonathan Ball Publishers Johannesburg & Cape Town 19

⁷⁹ Ackerman B “A generation of betrayal”(1996) 65 *Fordham L. R* 1523

⁸⁰ Fuller (note 20) 406

⁸¹ Chayes A “The role of the judge in public law Litigation” (1976) 89 *Harv. L. Rev* 1304. Chayes takes a differing view from Fuller, but his overview of Fuller's position is illuminating. See also Haar C *Suburbs Under Siege: Race, Space and Audacious Judges* (1996) Princeton University Press, Princeton New Jersey 9

the unfolding implications for the judicial institutional and the constitutional project as the era of Lawfare progresses. In an area beset with paradox, perhaps the greatest such paradox is that judicialisation of politics is born of judicial legitimacy but will ultimately be a danger to judicial legitimacy.⁸²

Born of legitimacy, the dangers of such judicialisation and Lawfare to the judicial institution are obscured. South Africa offers a valuable case study, as the nation, at this time, finds itself at the intersection of reputation and strength of the judicial institution and the adverse consequences of both good and bad Lawfare to judicial legitimacy, as the negative effects of the trend of judicialisation of politics begin to play out.⁸³

⁸² Hirschl (note 12) 263

⁸³ Comaroff & Comaroff (note 9) 133, 149

CHAPTER 2

THE MULTIPLE DIMENSIONS OF JUDICIAL LEGITIMACY: A CONCEPTUAL OVERVIEW

2.1 Introduction

“Legitimacy is an elusive and contested concept”⁸⁴ observes Henk Botha. Jeremy Waldron notes that “‘legitimacy’ has a rather loose meaning in political philosophy...this indeterminacy is partly a function of its neglect in political theory.”⁸⁵ Writing in 2005, Richard Fallon noted that the issue of legitimacy “rarely receives analysis.”⁸⁶

In Fallon’s attempt to bring some order to the chaotic nature of legitimacy, he articulated that legitimacy can be separated into three elements – legal legitimacy, sociological legitimacy and moral legitimacy.⁸⁷ While this research has chosen to use Fallon’s categorisation, Botha’s focus on the multi-dimensionality of judicial legitimacy should not be overlooked. While Fallon’s focus is categorisation, it is Botha who contributes to a critical appraisal of *interactions* between these dimensions. Botha chose to embrace a slightly different terminology, viewing the dimensions of legitimacy as subjectively rooted social acceptance (sociological legitimacy), objectively determined moral acceptability (moral legitimacy), and formal validity (legal legitimacy).⁸⁸

This chapter endeavours to sketch a conceptual overview of judicial legitimacy before the cyclicity of Lawfare and legitimacy can be explored in greater depth. Towards a complete understanding of the dialectical tensions of judicial legitimacy, each dimension must first be addressed as individual elements. Once each dimension’s attributes are outlined, the competing,

⁸⁴ Botha (note 24) 177

⁸⁵ Waldron J “The conditions of legitimacy: a response to James Weinstein” (2017) *Constitutional Commentary* 698

⁸⁶ Fallon (note 44) 1790

⁸⁷ Fallon (note 44) 1792

⁸⁸ Botha (note 64) 380

contradictory and interrelated nature of these dimensions can be better appreciated.

The discussion of legitimacy in this chapter is broken down into three parts. Part one explains the concepts of political legitimacy, sociological legitimacy, legal legitimacy and moral legitimacy as necessary dimensions of judicial legitimacy. It notes how each of these dimensions is achieved and sustained.

Part two outlines the contradictions and paradoxes when these elements of legitimacy are seen as a composite. Part two then moves on to address the relationship between legitimacy and judicial-political dynamics. It notes how the dynamic shifts according the degree to which the various dimensions of legitimacy are sufficiently manifest.

The chapter concludes in part three, showing how the attributes of a wicked problem reveal themselves through the dialectical tensions that this conceptual overview has observed. It thus takes the first steps in advancing one of the core arguments of this research that judicial legitimacy is a wicked problem.

2.2 *Concepts of Legitimacy*

2.2.1 Political Legitimacy

Political legitimacy is both descriptive and normative. Descriptive political legitimacy is present when the people of a nation feel that they have an obligation to the law. This duty to obey can be attained if the people have taken part in crafting and consenting to the legal system that would govern them.⁸⁹ With the collapse of transcendental authority that would characterise pre-modern systems, the authority of a legal system can only be justified by consent. Subjecting the self-determination of the people to the constraints of a constitution can only be legitimate if the constraints themselves are based on the will of the people. Through this acceptance, the duty to obey will

⁸⁹ Weinstein J “Hate speech bans, democracy and political legitimacy” (2017) *Constitutional Commentary* 534

continue to exist, even in instances of disagreement, because the legal system *as a whole* is viewed as legitimate and authoritative.

The descriptive dimension must, however, exist alongside a normative dimension. Normative political legitimacy demands that a legal system must possess an objectively moral dimension. It is thus distinct from the descriptive dimension, where people may feel a duty to obey the law despite the legal system not actually being just. The normative dimension moves beyond the positivist and then beyond formal equality, enfolding the conditions for substantive equality, inclusion and participation. These are political freedoms which are needed to ensure that procedural justice and the “conditions of respect”⁹⁰, speaking to dignity and more substantive notions of justice, undergird consent.⁹¹

Normative political legitimacy requires that the freedoms necessary to continue to participate freely in crafting a social vision that will govern the people are sustained.⁹² This brings complexity as these universal principles of justice both facilitate democratic expression *and limit* democratic self-government and political autonomy.⁹³

Constitutional sociology questions the “normative foundations of political legitimacy”⁹⁴. It seeks to understand societal motivation for accepting the normative structure and function of a constitution. Political legitimation, argues constitutional sociology, is not imposed from formalist, prescriptive, “external acts of reason”.⁹⁵ Legitimacy of constitutional norms must come from “inner-societal and historically elaborated normative structures.”⁹⁶ Obligation and legitimacy is therefore sourced in a relativistic and internal expression of society’s “self-comprehension”.⁹⁷

⁹⁰ Waldron (note 85) 714

⁹¹ Michelman F “Law’s republic” (1988) 97 *Yale L.J* 1495

⁹² Weinstein (note 89) 536-537; Weinstein J “Formal equality, formal autonomy and political legitimacy: a response to Ed Baker” (2012) 115 *West Virginia Law Review* 32

⁹³ Gledhill J “Constructivism and reflexive constitution-making practices” (2013) 51 *Raisons Politiques* 64; Issacharoff S “Fragile democracies” (2007) 120 *Harv. L. Rev* 1411

⁹⁴ Thornhill C *A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective* (2011) Cambridge University Press, Cambridge 7

⁹⁵ Thornhill (note 94) 2

⁹⁶ Thornhill (note 94) 3

⁹⁷ Thornhill (note 94) 4

Questions of political legitimacy predominantly emerge where judicial review, as the process of implementing the constraints and ensuring principles of justice, seemingly conflicts with the majoritarian will and democratic self-governance. “When political societies use constitutional law to regulate co-operation, it is thus of the utmost importance that the constitution itself is sufficiently just.”⁹⁸ Assessing political legitimacy will therefore have to critically appraise South Africa’s constitutional transition and the negotiated settlement, the constitutional project, and the judicial institution’s powers of review.

2.2.2 Sociological Legitimacy

Sociological legitimacy is sourced in the “attitudes, expectations and behaviours of citizens towards the institutions that govern them.”⁹⁹ Strong sociological legitimacy is present when there is acceptance of a court’s institutional role.¹⁰⁰ Sociological legitimacy is therefore a subjective concept that is “external and relational”¹⁰¹ to the institution. Within sociological legitimacy, sub-categories of institutional legitimacy, dispositional legitimacy, substantive legitimacy and authoritative legitimacy can be identified.

Institutional legitimacy is the belief that the court is the appropriate institution to be hearing and dealing with an issue.¹⁰² Institutional legitimacy is predicated on the perception that the court is bound by the rule of law. Judges must be seen as the mechanical servants of the law. They do not make the law, only apply the law. Judges must therefore perpetuate a

⁹⁸ Langvatn S “Legitimate but unjust just but illegitimate: Rawls on political legitimacy” (2016) *Philosophy and Social Criticism* 137

⁹⁹ Gibson J “Reassessing the institutional legitimacy of the South African Constitutional Court: new evidence revised theory” (2014) *Twenty Years of South African Constitutionalism: Constitutional Rights, Judicial Independence, and the Transition to Democracy*. New York Law School, November 13-16, 2014
<http://www.nylslawreview.com/wpcontent/uploads/sites/16/2014/11/Gibson.pdf> (date accessed 20/04/2018) at Fn 3; Ruibal A “The sociological conception of judicial legitimacy: notes of Latin American Constitutional Courts” (2010) 2 *Mexican Law Review* 349

¹⁰⁰ Fallon (note 44) 1823; Wells M “Sociological legitimacy in Supreme Court opinions” (2007) 64 *Wash & Lee L.Rev* 1064

¹⁰¹ Ruibal (note 99) 346-349; Suchman M “Managing legitimacy: strategic and institutional approaches” (1995) 20 *Academy of Management Review* 575; Botha (note 64) 371

¹⁰² Neuer H “Aharon Barak’s Revolution” (1998) *Azure* 19

“mythical image,”¹⁰³ to speak of the law in “the rhetoric of inevitability”¹⁰⁴ that reinforces legal determinacy and denies judicial creativity. Such an endeavour is to forestall the perception that ideological preference is being inserted into the judgment.¹⁰⁵ Aware that their effectiveness and authoritativeness are founded in how the court is perceived, the judicial focus is on appearance management to reinforce the perception of impartiality, independence and detachment.¹⁰⁶

Sociological legitimacy enfolds “dispositional legitimacy,”¹⁰⁷ established when

...the people believe that judges are honest, incorruptible, and guided by principles of independence, impartiality, fairness, and fealty to established law.¹⁰⁸

Botha adds courage and vision to dispositional elements which a jurist must possess. Dispositional authority draws a comparison to what is described in legitimacy literature as charismatic legitimacy or personal legitimacy. Where “the occupants of authority roles are seen, personally, as worthy of moral approval”¹⁰⁹ dispositional legitimacy as the potential to extend beyond the individual judge and legitimate the *system* which the judge serves.

The combination of *the idea* of a mechanical application of law, together with judicial disposition, cultivates symbolic potency. This symbolic potency in turn creates a positivity bias - the effect of which enhances the authoritativeness of the court and fosters a greater willingness to accept its rulings. This leads to the final sub-indicator of sociological legitimacy - authoritative legitimacy. Authoritative legitimacy speaks to the degree to

¹⁰³ Bassok O “The sociological-legitimacy difficulty” (2011) 26 *J. L. & Pol* 247-250

¹⁰⁴ Wells (note 100) 1016

¹⁰⁵ Fallon (note 44) 1840 -1841; Hutchinson A “Part of an essay on power and interpretation” (1985) *N.Y.U L.Rev* 884

¹⁰⁶ Gibson J & Caldeira G “Has legal realism damaged the legitimacy of the U.S. Supreme Court?” (2011) 45 *Law & Soc’y Rev* 196-197; Roux (note 27) 30; Hutchinson A “The rise and ruse of administrative law and scholarship” (1985) 48 *Mod. L. Rev* 314; Posner “Against constitutional theory” in O’Brien D (ed) *Judges on Judging: Views from the Bench* (2004) CQ Press, Washington DC 221

¹⁰⁷ Suchman (note 101) 578

¹⁰⁸ Ngcobo S “Sustaining public confidence in the judiciary: an essential condition for realising the judicial role” (2011) *SALJ* 8

¹⁰⁹ Botha (note 24) 185-186 drawing on Couwenberg’s legitimacy model

which state actors are willing to comply with the decisions of the court. The, prevailing paradigm suggests that the greater this authority, the less judicial decrees are met with resistance.¹¹⁰ Noteworthy is the mutually reinforcing nature of authoritative legitimacy. The more effective a court is, the more its legitimacy is increased. The more legitimate a court, the more effective its authority.

When institutional loyalty is cultivated over a length of time, diffuse legitimacy is created. Confidence in the court emerges when a specific outcome is desired and then upheld by the court. Through diffuse legitimacy, support for the judicial role is sustained, even in rulings that the political branch or the public disagree with. Thus the cultivation of sociological legitimacy fosters cognitive dissonance where “loyalty toward the Supreme Court has very little to do with the ideological orientations of citizens.”¹¹¹ Stated differently, sufficiently cultivated legitimacy will sustain the belief that the judicial institution has the authority to make a decision, despite the lack of public support for the specific results that emerge from that institution.¹¹²

The cornerstone of sociological legitimacy is procedural justice and fairness. Where those who come before the court are treated with respect - to be seen, heard and acknowledged - they are more likely to accept a decision that goes against their self-interest.¹¹³ Meierhenrich describes this as a form of “affectual legitimacy.”¹¹⁴ Social-psychological literature supports the view that procedural justice maintains engagement and faith in the judicial process.¹¹⁵

¹¹⁰ Gibson (note 99) 6; Randhawa J “Understanding Judicialization of Mega-Politics: The Basic Structure Doctrine and Minimum Core” (2011) 6 *Jus Politicum* 4

¹¹¹ Gibson J “The legitimacy of the U.S supreme court in a polarized polity” (2007) 4 *Journal of Empirical Legal Studies* 523; Bassok (note 103) 243

¹¹² Ngcobo (note 108) 6

¹¹³ Tushnet M “Shut Up He Explained” (2001) 95 *Nw. U. L. Rev* 909: “When do people have reasons for affiliation themselves with a social order that produces policies on matters even if they disagree with the policies chosen? When the conditions of undominated conversation are satisfied, because those conditions ensure that even the losers have been treated respectfully and as equals”.

¹¹⁴ Meierhenrich J *The Legacies of Law: Long-Run Consequences of Legal Development in South Africa, 1652-2000* (2008) Cambridge University Press, New York 236-237

¹¹⁵ Siegel N “The virtue of judicial statesmanship” (2008) 86 *Tex. L.Rev* 1023; Weinstein (note 92) 141

Where diffuse legitimacy can achieve a separation between process and result, the court is able to make principled decisions, however unpopular, without affecting its legitimacy.¹¹⁶ Sustained sociological legitimacy can therefore create “content-independence legitimacy.”¹¹⁷ When institutions function in line with their role and expectations, maintaining “basic functional and structural” characteristics of the institution, diffuse support facilitates a “cognitive legitimization.”¹¹⁸ Support for the institution will remain despite disagreement with the institution’s outputs.¹¹⁹

Cognitive legitimacy must underscore that sociological legitimacy is not to be equated with populist support. “Organisations are legitimate when they are understandable rather than when they are desirable.”¹²⁰ Cognitive legitimacy thus separates public confidence (understandable) from public opinion (desirable). Caldeira and Gibson observe that

For the Supreme Court, public support bulks especially large; it is an uncommonly vulnerable institution. The Court lacks an electoral connection to provide legitimacy, is sometimes obliged to stand against the winds of public opinion, operates in an environment often intolerant of those in need of defence.¹²¹

Maintaining its “distinctive role in a democracy,”¹²² part of which is the protection of minorities, creates the paradox that popular support for the judiciary is premised on the court refusing to bend to populist impulses. Vitally, long term legitimacy is not sourced in populist acquiescence. Noteworthy is Lively’s succinct encapsulation of this paradox:

¹¹⁶ Stephenson M “When the devil turns: the political foundations of independent judicial review” (2003) 32 *J. Legal Stud.* 63; Audette A & Weaver C “Faith in the Court: Religious out-groups and the perceived legitimacy of judicial decisions” (2015) 49 *Law & Soc’y Rev* 1002; Gibson (note 99) 5

¹¹⁷ Langvatn (note 98) 135; Gibson (note 111) 511

¹¹⁸ Suchman (note 101) 583-585

¹¹⁹ Caldeira G & Gibson J “The etiology of public support for the Supreme Court” (1992) 36 *Am. J. Pol. Sci* 639; Tyler T & Mitchell G “Legitimacy and the empowerment of discretionary legal authority: the United States Supreme Court and abortion rights” (1994) 43 *Duke L.J* 738; Waldron J “The core of the case against judicial review” (2006) *Yale L.J* 1372: “Everyone must concede that there will sometimes be a dissonance between what they take to be the right choice and what they take to be the choice yielded by the decision procedure they regard as legitimate.”

¹²⁰ Suchman (note 101) 573

¹²¹ Caldeira & Gibson (note 119) 635

¹²² Gibson (note 111) 529 -530, 532; Bassok (note 103) 268-271

Constitutional principles held hostage to unreflective whims or instincts by either the judiciary or the public merits objection. Still, criticism of activism tends to become especially pointed when it overrides legislative enactments representing majoritarian sentiment. Decision making tied to imminent temperament more than enlightened or abiding values, however, may be short-sighted and self-destructive.¹²³

In reaction to poorly received unpopular rulings, should the court change course, or vacillate, it would be more damaging than the dissatisfaction caused by the original decision.¹²⁴

A high level of sociological legitimacy allows the court to withstand unpopular rulings. Legitimacy literature has often drawn on the apt metaphor of a reservoir to illustrate this type of diffuse legitimacy, sketching the idea that there can be reserves of legitimacy, sustaining the court even in instances of disagreement. Importantly, a reservoir still needs to be filled before its reserves can be drawn on in times of political attack or controversy. While diffuse legitimacy means that judicial legitimacy “is resilient to particular events...it is dependent on a history of events” that has fostered institutional loyalty.¹²⁵ The reservoir needs to be filled through trust and confidence cultivated through, long-earned, specific support garnered by the Court.¹²⁶

In assessing whether the judicial institution has established diffuse legitimacy, a historical overview must come into focus to determine whether, and how deeply, institutional norms and commitment to the rule of law have been embedded.

¹²³ Lively D “The imperial judiciary: occupational hazards of a constitutional society” (1989) 34 *Vill. L. Rev* 14

¹²⁴ Russell P “Judging in the 21st century” (2002) *Advocates Q* 321

¹²⁵ Suchman (note 101) 574

¹²⁶ Gibson (note 99) 26; Epstein L, Knight J & Shvetsova O “The role of constitutional courts in the establishment and maintenance of democratic systems of government” (2001) 35 *Law & Soc’y. Rev* 138: In the “dynamic model of sequential decision making by the Court and other institutional players - the Court exists as a player in the game and collects payoffs for more than one period.”

2.2.3 Legal Legitimacy

The law, in all vicissitudes of government, fluctuations of the passions, or flights of enthusiasm, will preserve a steady undeviating course; it will not bend to the uncertain wishes, imaginations, and wanton tempers of men.

John Adams, 1770¹²⁷

A court possesses legal legitimacy when it is empowered to decide a matter by law and operating within that jurisdictional competency, decides the matter through law. Herbert Wechsler's seminal work *Towards Neutral Principles* links legal legitimacy to legal reasoning that meets the requirements of neutrality, generality and consistency.¹²⁸ Fidelity to the rule of law requires that law be publicly promulgated, predictable and applied impartially. It cannot be retroactive, arbitrary or capricious. Most importantly, there "must be congruence between the official action and the declared rule."¹²⁹ Those in positions of power cannot exercise any power that is not conferred by law.

Legal legitimacy can be broken down into authoritative legal legitimacy and substantive legal legitimacy. Authoritative legal legitimacy is located in the *belief* of the binding nature of the law because it has been legally enacted – the essence of positivism. Positivism is premised on a separation of morality and law. Where acts are adopted through formally valid rules of recognition, those acts obtain the status of law, despite any underlying injustice. Thus "positivism is said to conflate legitimacy with legality."¹³⁰

By contrast, substantive legal legitimacy embraces more normative elements that demand the law possess an inner morality in order to be deemed legitimate. Dyzenhaus advances that

¹²⁷ Trial of the Boston Massacre. Adams J "Argument for the Defense" *The Trial of William Wemms, James Hartegan, William M'Cauley, [and others] for the Murder of Crispus Attucks, [and others] Superior Court of Judicature, Court of Assize, and General Goal Delivery* <https://founders.archives.gov/documents/Adams/05-03-02-0001-0004-0016> (date accessed 26/08/2020)

¹²⁸ Wechsler H "Towards neutral principles" (1959) 73 *Harv. L. Rev* 15

¹²⁹ Dyzenhaus (note 47) 18; Rosenfeld M "The rule of law and the legitimacy of constitutional democracy" (2001) 74 *S. Cal. L. Rev* 1307-1308; Henrico R "Revisiting the rule of law and principle of legality: judicial nuisance or license?" (2014) 14 *TSAR* 742-744

¹³⁰ Botha (note 64) 373-374

where equity, this nucleus of justice, is knowingly refused entry in the process of the creation of a positive law, then the law is not simply unjust, it is outright devoid of all legality.¹³¹

This pulls legal legitimacy towards moral legitimacy, discussed below.

Adjudication in accordance with neutral legal principles demands an approach insulated from considering the consequences of the judicial action.¹³² Legal legitimacy therefore requires detachment or blindness to social, political, economic consequence in applying a legal principle. The court is limited to considering only the case at hand, rejecting an *ad hoc*, outcome-based jurisprudence¹³³ and yet such decision must be based on “reasoning transcending the immediate result.”¹³⁴

Detachment demanded by legal legitimacy and a mechanical jurisprudence demanded by sociological legitimacy is not aligned with the demands of constitutionalism. This presents a major hurdle for these two dimensions of legitimacy at the level of constitutional adjudication. More specifically for the South African Constitutional Court, the apex court must pay cognisance to its duty to uphold the vision of constitutional unity, solidarity and transformation.

A modern day constitutional court is required to show judicial sensitivity to social and political consequences of its rulings. This role may be conflated with activism. But activism is an “essential effectuating mechanism for basic values.”¹³⁵ Showing restraint in the desire to create a separation between law and politics, and appear legally legitimate, may in fact be an abdication of the obligation to give expression to constitutional values. In this respect:

¹³¹ Dyzenhaus (note 47) 17 quoting Radburch G *Rechtsphilosophie* (1973) Stuttgart 344-6

¹³² Greenawalt K “The enduring significance of neutral principles” (1978) 78 *Colum. L. Rev* 985-988

¹³³ Shapiro M “The Supreme Court and constitutional adjudication: of politics and neutral principles” (1962) 31 *Geo. Wash. L. Rev.* 592; Deutsch J “Neutrality, legitimacy, and the Supreme Court: some intersections between law and political science” (1968) 20 *Stan. L. Rev* 197

¹³⁴ Wechsler (note 128) 15

¹³⁵ Lively (note 123) 21

The notion that courts must be paragons of automatism is no more sensitive to the interests of constitutional governance than unvarnished subjectivism.¹³⁶

In what could be argued as anathema to predictability and consistency, constitutional values “are powerful precisely because they can never be given concrete expression.”¹³⁷ The Constitution encapsulates a normative pluralism.¹³⁸ “If constitutional meanings could not be experienced in diverse ways, then the fabric of acceptance that surrounds the constitution might unravel.”¹³⁹ Fostering a social vision of the constitution is a moral undertaking. This indelibly requires the exercise of judicial power to embrace a moral and purposive reading of the constitution.

Constitutional adjudication is not a mechanical exercise. There is plasticity, and indeterminacy brought about by competing and contradictory values.¹⁴⁰ There is constant tension between freedom and equality; reconciliation, transformation and redistribution; “integration and emancipation”; rights and public interest, individual liberty and community respect.¹⁴¹ At the constitutional level, resolution is often not a matter of a zero-sum application of a rule. The issue presented to a court is not a question of unconstitutional versus constitutional, but rather a balancing determination of right versus right.¹⁴²

Judicial discretion, which could be viewed to a certain extent as judicial activism, is thus needed to faithfully uphold the constitution. When confronted with the indeterminacy of constitutional values, jurists endeavour to anchor judgment in clear legal authority. Legal reasoning attempts to be located in

¹³⁶ Lively (note 123) 3

¹³⁷ Seidman L “The secret life of the political question doctrine” (2004) *John Marshall Law Review* 470

¹³⁸ See van der Walt AJ “Normative pluralism and anarchy: reflections on the 2007 term” (2008) 1 *CCR* 79-80

¹³⁹ Fallon (note 44) 1811; Villa-Vincencio C A *Theology of Reconstruction: National Building and Human Rights* (1992) Cambridge University Press, Cambridge United Kingdom 52: “A nation’s Constitution is a social vision of what that nation understands itself to be.”

¹⁴⁰ Singer J “The player and the cards: nihilism and legal theory” (1984) *Yale L J* 16

¹⁴¹ Botha (note 24) 185

¹⁴² Aleinikoff T “Constitutional law in the age of balancing” (1987) 96 *Yale L.J* 949

precedent, doctrinal consistency or constitutional theory to help light the way.¹⁴³

However, the inner logic of a constitutional theory is consistent only to the extent that it *reduces* constitutional law to fit the theory.¹⁴⁴ The search for legally legitimacy can therefore, agrees Lively, be “constitutionally derogating.”¹⁴⁵ Fidelity to the Constitution would thus require that constitutional theory be approached with hesitancy. Endeavours towards positivist or formalist readings of the Constitution may thus evade legal-constitutional responsibility.¹⁴⁶

The demands of constitutionalism require widened scope for legal legitimacy. In this tension between legal legitimacy and constitutional fidelity,¹⁴⁷ Wechsler himself concedes that precedent can be re-interrogated and overruled, and constitutional interpretation cannot be value neutral and mechanical.¹⁴⁸

In this respect there is a merging of the legal and sociological aspects of legitimacy. A court fulfilling its constitutional responsibility may lead to a perception of unbounded activism. In trying to avoid such perception, the court may be abdicating its *legal* obligation. The challenge is how to dispel the perception that judicial discretion required to breathe life into and give content to constitutional values does not equate to the judge taking on a ‘political’ role that is no longer neutral and impartial. The indeterminacy of deciding between values of intractable conflict exposes the court to questions of judicial subjectivity. Such argument follows a certain zero-sum calculus whereby

¹⁴³ Hutchinson (note 55) 548; Posner R “The rise and fall of judicial self-restraint” (2012) 100 *Cal. L. Rev* 536-538; Farber D & Sherry S *Desperately Seeking Certainty: The Misguided Quest for Constitutional Foundations* (2002) University of Chicago Press, Chicago 4

¹⁴⁴ Farber & Sherry (note 143) 8-9, 124

¹⁴⁵ Lively (note 123) 11

¹⁴⁶ Dugard CJR “Some realism about the judicial process and positivism – a reply” (1981) 98 *SALJ* 387; Fletcher W “The discretionary Constitution institutional remedies and judicial legitimacy” (1982) 91 *Yale L J* 647-648; *Kruger and Another v MacGregor NO and Another* 1999 ZALC 189 at para 40: “Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion.”

¹⁴⁷ Greenawalt (note 132) 991; Deutsch (note 133) 193

¹⁴⁸ Wechsler (note 128) 19, 31; Shapiro (note 133) 596

if the analytical logic of discipline (whether law or theory) does not yield objective results, then it must flow that all outcomes are subjective and politically motivated. We need a more complex conception.¹⁴⁹

This complexity speaks to the fact that there remain elements of jurisprudence that constrain. Adjudication is not, it is argued, unmoored from reason and justification. In this sense, legal legitimacy at the constitutional level speaks broadly to the overarching obligations of “lawfulness, reasonableness and procedural fairness”.¹⁵⁰

In sum, a rigid, rule-bound concept of legal legitimacy is complicated by the nature and demands of constitutional law. The deeper interrogation of positivism by Dyzenhaus notes that legality cannot equal legal legitimacy. Two key aspects of legal legitimacy will be significant as this research progresses: One, the court must show consistency in its application of law; and two, the idea that a court must be blind to the broader social and political implications of its judgment.

2.2.4 Moral Legitimacy

Unlike legal legitimacy that focuses on validity, autonomy, and a distinction between law and morality, moral legitimacy’s focus is on justice. To this end, moral legitimacy requires consideration of the sociality of the law.¹⁵¹ Moral legitimacy rejects an insulated and passive role of judicial interpretation and requires a judicial responsibility to assess a matter in light of the consequences, ensuring fairness and justice prevails.¹⁵²

To be morally legitimate in the eyes of the people, a constitutional court must interpret the constitution in a manner that is reflective of social values

¹⁴⁹ Winter S “Indeterminacy and Incommensurability in Constitutional Law” (1990) 78 *Cal. L. Rev.* 1449-1453, Singer (note 140) 7

¹⁵⁰ Hoexter C “The Principle of Legality in South African Administrative Law” (2004) 4 *Macq. L. J.* 167

¹⁵¹ Botha H “The legitimacy of legal orders (3): rethinking the rule of law” (2001) 64 *THRHR* 528-529

¹⁵² Suchman (note 101) 580

and responsive to social needs.¹⁵³ Nurturing this democratic constitutionalism fosters allegiance rather than alienation. This necessity of inclusion is achieved through an appeal to abstract values and through “political principles, stated at a suitably high level of generality, to which all reasonable people would consent.”¹⁵⁴ And yet, abstract and laconically phrased provisions lead to the court being confronted with constitutional indeterminacy at the point of application. But it is this indeterminacy that allows all people to locate their conception of the good in the constitution, thereby having reason to show allegiance to the constitution.¹⁵⁵ To be clear, this is not speaking to a populist constitutionalism. Moral legitimacy, normatively determined, encompasses justice - this being objectively determined moral acceptability, separate from a subjective social acceptability of morality.¹⁵⁶

For a constitution to be seen as morally legitimate, it must maintain the capacity to evolve, to grow.¹⁵⁷ Law cannot be stagnant. Constitutional adjudication must be driven by the spirit of the law.

The greatest danger is that we should insulate our decisions from dissent or from further discussion or from subsequent change by couching them in terms or forms that present them as uncontested, fixed, or final.¹⁵⁸

¹⁵³ Barns C & De Klerk E “South Africa’s Multi-Party Constitutional Negotiation Process” (2002) 17 *Accord* 26: “it must be a constitution which they feel they own, a constitution that they know and feel belongs to them. We must therefore draft a constitution that will be fully legitimate, a constitution that will represent the aspirations of our people’ – Cyril Ramaphosa, Chairperson, Constitutional Assembly 24 January 1995.”

¹⁵⁴ Wells (note 100) 1045; Botha H “Rights, limitations and the (im) possibility of self-government” in Botha, van der Walt, van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003) Sun Press, Stellenbosch 17

¹⁵⁵ *Ferreira v Levin NO and Others* 1996 (1) SA 984 (CC) at para 50, Ackerman J minority opinion; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) at fn 50; Nozick R *Anarchy, State and Utopia* (Basic Books Inc Publishers, New York 1974) 311-312; Villa-Vincencio (note 139) 81

¹⁵⁶ Langvatn (note 98) 138; Botha (note 64) 379

¹⁵⁷ Aleinikoff (note 142) 961

¹⁵⁸ van der Walt A “Closure and openness on difference and democracy- a response to Justice Johan Froneman” (2001) *Stell. L.R* 28; Pound R “The scope and purpose of sociological jurisprudence” (1911) 24 *Harv. L. Rev* 596: “to a jurisprudence of conceptions, in which new situations are to be met always by deduction from old principles, and criticism of premises with reference to the ends to be sub-served is neglected. In the pursuit of principles there is a tendency to forget that law is a practical matter. The desire for formal perfection seizes upon jurists. Justice in concrete cases ceases to be their aim.”

In this evolution, the court cannot, however, be an “inert mirror reflecting current mores but an active participant in the enterprise of articulating the implications of shared purposes.”¹⁵⁹ The Constitution “assigns a role of moral leadership to the Supreme Court”¹⁶⁰, where the deeper aspirations of society must be articulated.

Constitutional adjudication depends I think, on a delicate, symbiotic relationship. The court must know us better than we know ourselves. Its opinions may, as I have said, sometimes be the voice of the spirit, reminding us of our better selves...but while the opinion of the court can help shape our national understanding of ourselves, *the roots of its decision must be already in the nation*. The aspirations voiced by the Court must be those the community is willing not only to avow but in the end to live by. For the power of the great constitutional decisions rests upon the accuracy of the Court's perception of this kind of common will, and upon the Court's ability, by expressing its perception, ultimately to command a consensus.¹⁶¹

Moral legitimacy therefore encapsulates sociological jurisprudence that asks the court to “reach just outcomes”.¹⁶² Care should be taken not to conflate sociological jurisprudence with sociological legitimacy. Sociological jurisprudence is responsiveness to social demands and warns of the “unfortunate consequences of judicial ignorance of social realities”.¹⁶³ As the CC acknowledged in one of its earliest judgments:

Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared.¹⁶⁴

Adding to the complexity of moral legitimacy, it is however crucial that in responding to the public's sense of justice, a court cannot be seen to overrule ‘under fire’ and buckle to political pressure. “The legitimacy of the Court would fade with the frequency of its vacillation.”¹⁶⁵ This is no better said than by Aharon Barak, President of the Supreme Court of Israel:

¹⁵⁹ Fuller (note 20) 378

¹⁶⁰ Posner (note 143) 532

¹⁶¹ Cox (note 74) 117-118 (emphasis added)

¹⁶² Wells (note 100) 1039; Hoexter (note 150) 167

¹⁶³ Posner (note 106) 221

¹⁶⁴ *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) at para 61 referencing Canadian Court decision *R. v. Salituro* (1992) 8 C.R.R. (2d) 173

¹⁶⁵ “To overrule under fire in the absence of the most compelling reason to re-examine a watershed decision would subvert the courts legitimacy beyond any serious question”.

It presumes a strength of spirit to withstand the passing winds of the hour, whether of the leaders or the masses.¹⁶⁶

But again, there may be instances where vacillation may be needed for normative growth. Appreciating this dual responsibility, a court cannot be reactive to the day-to-day pressures and impulses, much like the weather, but must be responsive to the prevailing climate of the era. In other words, a court should not be receptive to transient heat and passions, but must be aware of the prevailing feeling of a sea change that would require a changed moral reading of a constitution. A court must achieve the difficult task of enfolding normative growth but not transgressing into populism, it must be reflective but not transgress into servility, and it must persuade but not pontificate.¹⁶⁷

The challenge for a court is to identify when it must foster a receptivity and openness to a changed moral reading of the constitution, and when it may need to hold the line, showing a degree of insulation to pressures.¹⁶⁸

2.3 *Dialectics of Legitimacy*

2.3.1 Conflict and Interconnections

Having outlined the elements of political, sociological, legal and moral legitimacy, the tension between these dimensions when seen as a composite emerges.

Democratic legitimacy requires an apolitical stance. The authority of the court and the power of unelected judges in a democracy can only be justified by being independent and remaining insulated in their function. In spanning

Planned Parenthood v. Casey, 112 S. Ct. 2791, 2814 (1992) referenced in Tyler & Mitchell (note 119) 715 ; Fallon (note 44) 1840

¹⁶⁶ Barak A "A constitutional revolution: Israel's basic laws" (1993) 4 *Forum Constitutionnel* 84

¹⁶⁷ Bickel AM *The Least Dangerous Branch – The Supreme Court at the Bar of Politics* (1962) The Bobbs-Merrill Company Inc, USA 239: "The court is a leader of opinion, not a mere register of it but is must led opinion, not merely impose its own; Ginsburg R "Speaking in a judicial voice" in O'Brien D (ed) *Judges on Judging: Views from the Bench* (2004) CQ Press, Washington DC

¹⁶⁷ Siegel (note 115) 993

¹⁶⁸ van der Walt (note 158) 28

both political and sociological legitimacy, judgment that claims to be an application of formally autonomous law perpetuates the view that the judge is removed from the political.¹⁶⁹

Constitutional law is not autonomous. The abstract nature of conflicting constitutional values leads to indeterminacy. As a result, this demands judicial construction and balancing considerations at the point of application. Indeterminacy of constitutional law does however allow for there to be no gap in the normative visions of the people and the fidelity to the constitution.¹⁷⁰ So while the indeterminacy of law lowers aspects of sociological legitimacy, it elevates moral legitimacy through the flexibility to read provisions in such a way that aligns with an evolving sense of justice.¹⁷¹

In times of political upheaval or social unrest, there is hesitancy or self-consciousness on the part of the court. In this climate the court may question whether it is the most appropriate institution to deal with the issue (institutional legitimacy). Out of institutional concerns, a court may respond to politically heightened issues with procedural conservatism to avoid dealing with the substantive merits and implications of a case. It is in precisely these times however that moral legitimacy requires responsiveness on the part of the court.¹⁷² Remaining in line with expected behaviour will not be sufficient.¹⁷³

In this respect, the model of diffuse legitimacy is disrupted. There is a departure from legal legitimacy demanding insulation towards an increasing need for consideration of consequence. Where the need to be responsive may demand a degree of leadership to be shown by the court, it in turn raises democratic legitimacy concerns. The relationship between judicial review and democracy comes to the fore.¹⁷⁴ Thus the complexity of simultaneously

¹⁶⁹ Post R “Theorizing disagreement: reconceiving the relationship between law and politics” (2010) 98 *Cal. L. Rev.* 1319, 1347

¹⁷⁰ Klarman M “Fidelity, indeterminacy and the problem of constitutional evil” (1997) 65 *Fordham L.R.* 1739

¹⁷¹ Rostow E “The democratic nature of judicial review” (1952) *Harv. L.* (205

¹⁷² Haltom W & Silverstein M “The scholarly tradition revisited: Alexander Bickel, Herbert Wechsler, and the legitimacy of judicial review” (1987) 4 *Constitutional Commentary* 41

¹⁷³ Post & Siegel (note 35) 385 (emphasis added)

¹⁷⁴ Shapiro M “The mighty problem continues” in Kapiszewski D, Silverstein G & Kagan R (eds) *Consequential Courts: Judicial Roles in Global Perspective* (2013) Cambridge

holding these dimensions of legitimacy becomes apparent. Achieving one comes at the expense of the other.

While the discussion above has centred on the conflict between the dimensions of judicial legitimacy, it can be noted that there is also *interconnection* between these dimensions. There is, for example, interplay between legal legitimacy and moral legitimacy. Where a legal position is repeatedly not in line with evolving public consciousness and the sense of justice, not only the moral but indeed *legal* legitimacy is diminished, no matter jurisprudentially consistent and aligned with precedent.¹⁷⁵ Such was the case in *Lochner*,¹⁷⁶ where the United States Supreme Court (SCOTUS) refused to acknowledge that social redress was desperately needed. As a result, the court's formal application of law came to be seen not as law, but as the judge pursuing his political preference, cloaked in the 'law'.¹⁷⁷ From the unwillingness to depart from the constraints of conceptualism, the very objectives of a rule bound rigidity – avoiding accusations of judicial preference – emerge.

Where a court is wilfully blind to circumstance, its adherence to a legal rule to achieve legal legitimacy and avoid a politically sensitive issue, ultimately results in contempt for the legal rule and negates fidelity to the rule of law. Such an approach may seem to suggest that this embraces an unboundedness of the judicial role. Such a view must be rejected. By understanding the social environment within the legal system operates a

University Press, Cambridge 385; See Dent K & Kroeze IJ "Minority rights in the South African context: an exploration of the counter-majoritarian dilemma" (2015) 26 *Stell. L.R* 518

¹⁷⁵ Woolman (note 51) 155; *S v Makwanyane* (note 33) at para 184: "In a democracy, the law cannot afford to ignore the moral consensus of the community...if the law is out of touch with the moral consensus; whether by being too far below it or too far above it, the law is bought into contempt." Bickel (note 167) 105: "The constitution must not partake of the prolixity of a legal code and so seem false and alien to the people, who are expected to pour into it and draw from it, the sense of union and common purpose, past and future."

¹⁷⁶ *Lochner v New York*, 198 U.S. 45 (1905)

¹⁷⁷ Friedman (note 53) 265; See a more recent example in U.S case *Republican National Committee, et al. v. Democratic National Committee*, 589 U.S. ____ (2020) heard at the height of the global pandemic. In this case, the Governor of Wisconsin, due to the Corona Virus, wished to extend the time period for receiving absentee mail-in ballots for voting in the Wisconsin Primary. Such action was overturned on appeal by the Supreme Court of the United States (SCOTUS) conservative majority in a 5-4 ruling. The SCOTUS was excoriated – painted as forcing citizens to choose between putting their health at risk and exercising their right to vote – its ruling threatened the Court's own legitimacy.

judge “may play a more constructive role in shaping the development of the law in accordance with legal ideals”.¹⁷⁸

When a court is aligned with the prevailing sense of justice and morality, it can *acquire* legal legitimacy. To this point, note Wechsler’s criticism of the SCOTUS’s decision in *Brown*.¹⁷⁹ Wechsler argued that the Court’s landmark dismantling of segregation in *Brown* could not be located in any established law found at that time. *Brown* in fact overruled clear precedent. And yet, over time, the moral clarity of *Brown* would come to obtain *legal* status such that *Brown* has become the “apotheosis” in the reading of the Equal Protection Clause of the United States Constitution. Firmly established as settled law, any future jurisprudence must “claim *Brown* for itself”.¹⁸⁰

When viewed as part of systems-whole, the dimensions of legitimacy seem to contradict and interconnect with one another in the overarching effort to achieve judicial legitimacy. Having parsed each concept of legitimacy more closely, these dialectical tensions of judicial legitimacy are further compounded by obfuscation in exactly what each dimension of legitimacy wants to achieve. For example, the appeal to legal authority is motivated by a cognisance of how the decision will be received by the public and the reverberating effect on the judiciary. To avoid accusations of judicial activism, the court presents the law as arrived at mechanically. Maintaining the myth that the law is determinate, rulings are drafted in the rhetoric of inevitability.

Wechsler’s advocacy of neutral principles emerged at a time of sustained attack on the SCOTUS and in response to a body of voices that sought to limit the Supreme Court’s review powers. Wechsler’s appeal to neutral principles was a *defence of judicial review and an active court*. Wechsler looked to neutral principles as a way to shield the court from claims that it

¹⁷⁸ Dugard (note 146) 381

¹⁷⁹ Wechsler (note 128); *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) (hereinafter *Brown*)

¹⁸⁰ Karlan P “What can *Brown* do for you? Neutral principles and the struggle over the equal protection clause” 58 (2009) *Duke L.J* 1051; see also Tushnet M *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (2009) Princeton University Press, New Jersey 35 noting a Social Movement Model that can engender constitutional change.

operates as a “naked power organ.”¹⁸¹ In advancing that “neutral principles are politically powerful weapons”, Shapiro’s suggests a means-ends relationship for a political and social vision pursued by the court.¹⁸² An apolitical stance by the court is a political strategy.

While legal legitimacy demands that the court is insulated from the political, appealing to a non-political, non-consequentialist, insulated role is in fact a reactive strategy to the awareness of the dangers of being perceived as a political policy-maker. This is where obfuscation is identified. Rejecting consequential considerations in what would be seen as attempts at neutrality is not an attempt at legal legitimacy, but an attempt at consolidating sociological legitimacy. It can be concluded therefore, that these dimensions of legitimacy interact with each other in three ways – positively, negatively or in a dislocated manner.

2.3.2 Legitimacy and Judicial-Political Dynamics

Appreciating the multi-dimensionality of legitimacy, legitimacy must be assessed by approaching it as a system. Observed as a system, the interactions of political power, sociological forces, legal and institutional stability of the judiciary can be traced. How the political branches interact with the court and how the court interacts with the political branches is dependent on the level of judicial legitimacy. In this respect, there is a positive correlation between diffuse legitimacy and authoritative legitimacy. The higher the diffuse support, the more dangerous it is for political actors to ignore court orders.¹⁸³ Diffuse legitimacy, once cultivated, can be a buttressing force against judicial threats. In these instances, it is the source of the threat, not the court, who will suffer a legitimacy loss. The buttressing force compromises an engaged civil society and a unified and vigilant legal complex of academics, law societies and civil society organisations.

¹⁸¹ Wechsler (note 128) 19; Shapiro (note 133) 590, 598-599

¹⁸² Shapiro (note 133) 599, 604

¹⁸³ Caldeira & Gibson (note 119) 660-661

Factors affecting legitimacy are not static. Judicial-political and constitutional sociological interactions are dynamic. Legitimacy will be affected by a process of indirect co-ordination where one institution (the political, for example), will frame its behaviour in response to the impact made to the environment by the behaviour of other another institutions (the judiciary, for example). Thus high levels of diffuse legitimacy can create a paradigm shift in terms of political criticism and attack. The form of the political threat to judicial independence mutates.¹⁸⁴ Court curbing measures become less overt. The subtlety of political attack demands, in turn, an even greater duty on the judiciary and greater vigilance of civil society.

A legitimacy-conferring hypothesis posits that a court with sufficiently high legitimacy can legitimise and justify political action, leading to greater receptivity to the political action taken.¹⁸⁵ The institution's legitimacy-conferring ability results in political actors viewing the judiciary as instrumental, endowing the court with 'pragmatic legitimacy'. Pragmatic legitimacy can be further broken down into 'exchange legitimacy' and 'influence legitimacy'.¹⁸⁶ "Exchange legitimacy" is where the role that the institution plays and the interests of actors are somewhat aligned – so there is a benefit in the acquiescence to the role the institution plays. Interests, however, do not have to be directly aligned. There may be a greater degree of acquiescence to judicial involvement in one space that interested actors may not agree on, because these actors are deriving greater benefit from judicial decisions made in another area.¹⁸⁷ Influence legitimacy is where role players see the potential for the institution to be manipulated or influenced towards advancing an interest. Exchange legitimacy therefore capitalises on the value of the independence of the judiciary. Influence legitimacy seeks to capture that independence whilst still maintaining the guise of independence.

The paradigm of judicial legitimacy speaks to the various dimensions, the multiple aspects, that come together to form legitimacy as a complex whole.

¹⁸⁴ Baum (note 60) 64-65, 80

¹⁸⁵ Caldeira & Gibson (note 119) 638; Gibson (note 111) 513 and Fn 12; Ruibal (note 99) 351; Tyler & Mitchell (note 119) 730

¹⁸⁶ Suchman (note 101) 578

¹⁸⁷ Meierhenrich (note 114) 236-237

The assessment of legitimacy thus requires the area of focus be widened to observe these channels of influence. Within the multi-directional focus, judicial politics will be gauged by the levels of legitimacy of each dimension of legitimacy. Legitimacy can only be appropriately assessed by viewing the *entire* legal system.

Based on the observation that sociological legitimacy is tied to perception, attention has to be focused on areas where perception is framed. Lower courts are the areas where the majority of the people experience face to face interactions with the judicial system. It is the interaction at this level of the justice system that will cultivate the perception that the judicial system serves the people and is deserving of their faith in the system. It is to this end that Meierhenrich identifies the “importance of combining selective ‘impact’ litigation on the appellant level with the high volume ‘service litigation’ on the ground level”¹⁸⁸ when assessing perception throughout the system.

The focus on perception runs multi-directionally, observing how society perceives the judiciary and the judiciary’s own perception of how it is being perceived.¹⁸⁹ In this space, the judge “assume[s] the role of a social scientist”.¹⁹⁰ Awareness of “vigorous social or political movements” and political tides will aid in determining whether the judicial decision will be received favourably or poorly. It is an external focus that is sensitised to institutional concerns and the potential for repercussions on the courts.¹⁹¹ These social and political dynamics may dictate whether a court should be more assertive or show more restraint. The court must show strategic awareness of conditions of effectiveness – the respect, adherence and successful implementation of a court order. These considerations are separate from the primary determination of lawfulness and validity but are none the less crucial to the sustained faith in the court and its moral authority. Retaining this authority will allow the court to continue to make authoritative rulings, and ensure respect and implementation of its orders, towards

¹⁸⁸ Meierhenrich (note 114) 209

¹⁸⁹ Gibson (note 99) 29

¹⁹⁰ Aleinikoff (note 142) 961

¹⁹¹ Kapiszewski D, Silverstein G & Kagan R (eds) *Consequential Courts: Judicial Roles in Global Perspective* (2013) Cambridge University Press, Cambridge 25

upholding the rule of law. To be clear, this is not advocating that the rule of law yield to political or social transience. There must, however, be an acknowledgment that these factors will impact the degree to which the judiciary is perceived as legitimate.

Understanding judicial-political dynamics helps assess the threats to judicial legitimacy. Knowing the level of judicial legitimacy will help predict the interactions between the judicial and the political. It also identifies which of the dimensions of legitimacy the court will be more inclined to lean on. . For example: in instances where the court is confronted with a conflict between adherence to expected behaviour and the achievement of justice, there is tension between the sociological, legal and moral considerations. A court in a defensive position will find itself operating under the former and abandoning the latter. Even though the constitution could be extrapolated and read in a creative way towards the achievement of justice, “the need for predictability in the law and the politically exposed nature of judges,”¹⁹² may prevent a court engaging with the constitutional values in such a manner. Legal rigidity, despite a constitutional provision that contains the capacity for growth and extrapolation, reveals that a court is clinging to established law not through a legal but a sociological anxiety.¹⁹³

2.4 Conclusion

This chapter advances a conceptual understanding of judicial legitimacy that is multi-dimensional. When observed not in isolation but as a composite whole, the interactions between the dimensions have the potential to undercut one another. Endeavouring to enhance legitimacy in one dimension may in fact be inhibiting to another, equally necessary, area of legitimacy.¹⁹⁴ This is the essence of a wicked problem.

¹⁹² Rosenberg G *The Hollow Hope: Can Courts Bring about Social Change?* (1991) University of Chicago Press, Chicago 11; Subramanian S “The Indian Supreme Court ruling in *Koushal v Naz*: judicial deference or judicial abdication” (2015) *Geo. Wash. Int’l L Rev.* 719-720

¹⁹³ Traynor (note 41) 9 (emphasis added)

¹⁹⁴ Rittel & Webber (note 46) 163; Botha (note 24) 183

The judiciary may reach for democratic legitimacy through deference and strategies of judicial avoidance. But when prevailing circumstances demand redress, deference may be perceived as servility. The court may be viewed as abandoning its constitutional obligations and abdicating its role as upper guardian.¹⁹⁵ The demands of constitutional fidelity require a political sensibility, a consideration of consequences and cognisance of social stability and social solidarity. Such a demand may be viewed as anathema to legal legitimacy that commands the court to apply the law even if the heavens fall.¹⁹⁶ From a moral legitimacy standpoint, refusing to factor in these considerations may illegitimate the court in terms of democratic responsiveness.

In the fearless defence of minority rights, the court, standing against transient majoritarian sentiment or prejudice, is aligned with sociological legitimacy. Where this sociological legitimacy is not however sufficiently consolidated (diffuse legitimacy), protection of unpopular or controversial minority rights places the court in a vulnerable position. The court is exposed to attack, encompassing counter-majoritarian aspects framed in ‘democratic’ legitimacy contentions. And yet if conceptions of fairness and equality are to be viewed through the lens of populist impulse “a worse fate will befall them if they learn to trim the sails to the prevailing winds.”¹⁹⁷

The conflicting demands on the court and the interactions of these dimensions do not solely embody negative repercussions for judicial legitimacy. The enhancement of legitimacy in one area can reverberate on another area, bolstering that area’s legitimacy. For instance, high levels of sociological legitimacy from institutional reputational strength can elevate authoritative legitimacy.

While the dimensions compete and undercut one another, when seen as a dynamic system, the more troubling elements of each dimension are constrained, so that neither concept may transgress too far. The objective

¹⁹⁵ Audette & Weaver (note 116) 1006

¹⁹⁶ Post (note 169) 1321

¹⁹⁷ Rostow (note 171) 205; Langvatn (note 98) 136, see Cockrell A “Rainbow jurisprudence” (2004) *SAJHR* 2

nature demanded of moral legitimacy prevents sociological legitimacy from transgressing into subjective and potentially anti-pluralist populism. Moreover, the demand for justice prevents legal legitimacy from being denuded of morality, where oppression can be blanketed in formal validity.¹⁹⁸

The appreciation of the interactions and tensions of the social, legal and moral dimensions of legitimacy calls for a “multidimensional, non-reductionist approach to legitimacy.”¹⁹⁹ Aspects of judicial legitimacy are both contradictory and interconnected, and sensitivity needs to be shown to these inter-relationships. In research that advocates a “disruptive concept of legitimacy”, Botha’s understanding of legitimacy’s complexity aligns with one of the core objectives of this research – to square judicial legitimacy with wicked problems understanding.

The concept of a wicked problem can now be reintroduced more comprehensively. Similar to Botha’s position, addressing a wicked problem requires a non-isolated, non-linear view involving “sensitivity to the waves of repercussions that ripple through the systemic networks”.²⁰⁰ One of the key attributes of a wicked problem is the idea of unintended consequences. The system has to be widened to trace the possible unintended repercussions of judicial action. In addition to a widened systems perspective, the element of time within the system must also be imputed. Short term responses to wicked problems have the potential to translate into long term consequences, undoing any resolution that the short term response tried to achieve, and possibly exacerbating it.²⁰¹ Peters introduces a ‘super wicked’ problem to the idea of time and consequence, where increasingly there is urgency in the system needing to respond to problems.²⁰²

A further attribute of a wicked problem is that the solution to wicked problems is not objectively determinable. The response brought by different parties will be equally valid and will differ according to the lenses of their minds, their objectives and obligations. Each stakeholder will elevate different

¹⁹⁸ Botha (note 64) 381

¹⁹⁹ Botha (note 64) 380; Botha (note 24) 178

²⁰⁰ Rittel & Weber (note 46) 156

²⁰¹ Rittel & Weber (note 46) 163

²⁰² Peters (note 49) 392

aspects of the problem field, or dimensions of legitimacy, to primary importance.²⁰³ Thus, this attribute of a wicked problem finds some resonance with issues of post-modern constitutional interpretation and indeterminacy.

Acknowledging that an issue is a 'wicked problem', or contains many attributes of a wicked problem, is not easy. A wicked problem is often met with academic resistance as it forces scholars to step outside of disciplinary silos toward a multi-disciplinary approach. The multi-dimensionality of judicial legitimacy enjoins aspects constitutional sociology, psychology, political science and law, in a merging of normative and positive scholarship.²⁰⁴ Such approach will undoubtedly be met with resistance, especially from normative purists. Disciplines are resistant to an 'opening up', in the sense of looking outside their silos to consider external factors. A discipline, by its very nature, accustoms one to view things a certain way - the orientation is fixed. A discipline preserves itself by enfolding the identity and internalising the ego of its practitioner into its structure. Thus any challenge to the discipline, in the form of a competing theory, new information, or acknowledge of wicked problem space, becomes a challenge to one's very self. It is a visceral threat taken "personally and dismissively."²⁰⁵

Judicial legitimacy can be likened to a rubix cube – where attempts to try to align the colours on one side of the cube will alter the composition of colours on the other sides. Unlike a rubix cube, judicial legitimacy will never be 'solved. Attempts to reach a 'once and for all' solution will be more damaging to the judicial system's resilience than the uneasiness and unsettled judicial role that comes from accepting the need to hold simultaneously the dialectical multiple dimensions of legitimacy in suspended paradox.

²⁰³ Rittel & Weber (note 46) 163; Conklin J *Dialogue Mapping: Building Shared Understandings of Wicked Problems* (2006) John Wiley and Sons Ltd, United Kingdom Ch. 14

²⁰⁴ Peters (note 49) 393; Haltom & Silverstein (note 172) 41

²⁰⁵ Schlag P "Normative and nowhere to go"(1990) 43 *Stan. L.Rev.* fn 41

Judicial legitimacy will always remain in a state of flux, a continuing conversation demanding continued vigilance.²⁰⁶ As a wicked problem, it demands awareness of the inter-connectedness and fragility of the system; and must embrace this complexity. Attempting one solution toward legitimacy without appreciating its implications throughout the system may lead to a discounting of another dimension of legitimacy that is equally necessary.

Having focused on the concept of legitimacy, analysis of how these modalities of legitimacy are placed under strain by the increasing judicialisation of politics in the form of Lawfare can be undertaken. As Gibson observes “where the bases of legitimacy have become more fragile, legitimacy theory itself may require rethinking and reconsidering.”²⁰⁷ Before examining how Lawfare alters these concepts, the factors causing Lawfare must be addressed.

²⁰⁶ Rittel & Weber (note 46) 160-162; Peters (note 49) 386 ; Davis (note 27) 47 (emphasis added)

²⁰⁷ Gibson (note 111) 510

CHAPTER 3

THE JUDICIALISATION OF POLITICS

3.1 Introduction

This chapter elucidates the drivers of judicialisation, explaining what has contributed to the flow of the political into judicial at an increasing rate since 2009.²⁰⁸

In proposing the circular relationship between Lawfare and legitimacy, discussions of what is contributing to judicialisation and the legitimacy of the judicial institution will run in parallel as the recursive and reflexive interplay between law and politics emerges. Thus, as each aspect of judicialisation is outlined, the tension this places on the dimensions of judicial legitimacy will be discussed.

The causes of judicialisation emerge through tracing the pre-democratic judiciary's historical role and later the South African Constitutional Court's (CC) institutional role within the democratic state. This reveals that a deep connection between law and politics pervades South Africa's history and constitutional structure.

3.2 The 'Political'

It is necessary to divert briefly to problematise the notion of 'the political', and how this term is used in this study. Lawfare is the merging of law and war. Politics lies between law and war.²⁰⁹ Clarification of what is meant when speaking of the political flowing into the judicial, or the court engaging in politics, is needed. .

²⁰⁸ See Tate C "Why the expansion of judicial power?" in Tate C & Vallinder T (eds) *The Global Expansion of Judicial Power* (1995) New York University Press, New York; Hirschl (note 12) 263, 267, 271

²⁰⁹ Post (note 169) 1339

Each discipline brings its own discourses to the notions of politics and the political. At face value, political science views the law as the domain of principle and reason; and the political as the domain of power and preference.²¹⁰ But as Hirschl has argued, “there is no simple answer to the question of ‘what is political’”.²¹¹ For the purposes of this study, a deeper construction of the political involves recognising the legislative, executive and administrative sphere as the realm where policy decisions are made. Decisions emerging from these areas thereby resonate with democratic legitimacy.²¹²

However, this understanding is insufficient. As Hutchinson outlines, ‘politics’ is not “simply conflicts over the exercise and control of government power; this is only a subspecies of a larger genus.”²¹³ Thus deeper still, ‘the political’ can also refer to how people come together in the context of, and in spite of, disagreement. Politics is the process used to construct a collective identity, collective self-determination.²¹⁴ In rejecting aggregation, this kind of ‘political’ transcends majoritarianism and embraces plurality that is premised on equality, tolerance, deliberation, and participation.²¹⁵

In this construction of the political, it is accepted that the most pressing moral questions can only be decided by the democratic polity. The *manner*, in which this takes place, however, must be one where *all* feel able to move forward, knowing that majoritarian force has not overwhelmed their rights to the extent that they are unable to contest. Further opportunities to contest in the future are retained and there remains recognition of their interests.²¹⁶ Without such a potential, the political process will be rejected in its entirety by

²¹⁰ Post (note 169) 1326-1327

²¹¹ Hirschl R “The new constitution and the judicialisation of pure politics worldwide” (2006) 75 *Fordham L.R.* 728; Venter F “Judges, politics and the separation of powers” (2007) 21 *S. J.* 60; Woolman (note 51) 159

²¹² Vallinder T “The judicialization of politics – a world-wide phenomenon” (1994) 15 *International Political Science Review* 91

²¹³ Hutchinson (note 55) 552

²¹⁴ Woolman (note 51) 159

²¹⁵ Post (note 169) 1336-1340

²¹⁶ Hirschl (note 211) 743

role players who see no vindication or value in the process. Politics is thus a paradox of *maintaining disagreement* towards social solidarity.²¹⁷

A final understanding of ‘politics’ is one that is more focused on the judicial role-player. In contrasting the “impartial, disinterested, law-applying functions of a court”, Shapiro defines a judicial ‘political’ role as one that undertakes an “activist, law-making, policy-making”²¹⁸ role. The decisions emerging from this ‘political’ role are formed by the ideology or philosophy of the judge. Closely linked to this judge-centred view, Friedman’s usage of politics adopts a multi-directional understanding of politics whereby politics in law appreciates the extra-legal influence on judges. Flowing in the other direction is the acknowledgement of the potential for judicial influence on the political environment.²¹⁹

In understanding what is meant by ‘politics’, it would be remiss not to touch briefly on the Critical Legal Scholars (CLS) theory that ‘law is politics’. Critical Legal Scholarship engages with the idea that law is used in the political struggle for terms and conditions, arguing that the law is an ideological weapon of politics, entrenching a hierarchical and dominant social order.²²⁰ Through the attempt at formalist or autonomous law towards legal legitimacy, this political ideology becomes further entrenched and perpetuated through the courts’ very attempt to insulate themselves from politics.

Politics can thus be seen in three ways. The first is structural politics which would encompass the separation of powers doctrine. The second is what can be described as higher order politics, denoting the process of collective struggle and determination. The third understanding is viewing ‘politics’ as judicial ideology and preference untethered from the rule of law.

²¹⁷ Post & Siegel (note 35) 383

²¹⁸ Shapiro (note 133) 590

²¹⁹ Friedman (note 53) 258

²²⁰ Hutchinson (note 55) 557

Criticisms of legal scholarship that focused on judicial-political dynamics have focused on politics in the third sense.²²¹ It is thus crucial to distinguish between these understandings of the *real politik*. As Hutchinson explains:

[t]he idea is that the voice of the law somehow manages to retain a distinct accent and idiom that addresses politics, but is not entirely spoken for by politics²²²

is a complicated distinction. It is a distinction that is non-the-less central to an institutionalist understanding of the role of the CC and its legitimacy.

3.3 *The Institutional Heritage of the Legalisation of Politics*²²³

As outlined in the conceptual framework of the previous chapter, legitimacy must be viewed on a time-line continuum of the judicial role from past to present. Diffuse legitimacy of the judicial institution is cultivated through an unfolding of events. Assessing the legitimacy and reputational strength of the judicial institution thus requires an historical overview. This overview, in part, allows for assessing the commitment to the rule of law, the attitudes and expectations of the citizenry towards the judicial institution, and the degree of “willingness to empower legal authorities to resolve issues of public controversy.”²²⁴

“The South African legal order is in a state of crisis. The majority of the South African population see it as a discriminatory and repressive instrument of white rule.”²²⁵ Such was Dugard’s assessment of the view of judicial institution and its legitimacy in the mid 1980’s. In the early days of the CC, a critical reflection of this history formed and animated the CC’s reasoning. The CC articulated in 1996 that the

²²¹ See the criticism by Gauntlett J “Book review: The politics of principle: the first South African Constitutional Court, 1995-2005 (2014) 131 *SALJ* 704

²²² Hutchinson (note 55) 542

²²³ I borrow this phrase “institutional heritage” from Hart H “The Indian Constitution: political development and decay” (1980) 20 *Asian Survey* 436

²²⁴ Tyler & Mitchell (note 119) 798-799; Wisotsky (note 73) 177

²²⁵ Dugard (note 146) 387; Ellmann S “Law and legitimacy in South Africa” (1995) 20 *Law & Soc. Inquiry* 407

legitimacy of the law itself was deeply wounded as the country haemorrhaged dangerously in the face of this tragic conflict which had begun to traumatise the entire nation.²²⁶

A deeply ingrained tradition of formalist legal thinking, together with a core belief of role-distinction on the part of the judiciary that it should not engage with the political led to what Davis describes as “judicial neglect of legal values inherent in the South African common law”.²²⁷ Dugard has argued that the belief in a need for a strict separation between law and morality led to “moral disengagement” on the part of the courts.²²⁸ He has further argued that this belief underpinning the apartheid era judiciary’s jurisprudence was a perversion of positivism. It is, nevertheless, “*this* form of positivism, however philosophically aberrant, that has influenced the course of history.”²²⁹ This historical approach to adjudication now frames the reactionary behaviours, the critical appraisal of judicial conduct and the legitimacy of the judicial role in engaging with the morality of the law. In a 2018 case the CC wrote:

Hoexter explains that during the apartheid era, administrative law was used as “an instrument of oppression”, a means of recognizing and facilitating the use of wide discretionary power which was conferred for deliberately discriminatory ends...the courts’ generally parsimonious attitude to the administration of justice and their exaggerated deference to other branches of government, which at times made them “all willing partners displaying what virtually amounts to a phobia of any judicial intervention of the exercise of powers by administrative agencies”.²³⁰

South African legal history has thus closely associated formalism with deference.²³¹ Furthermore, that the CC still draws on this historical legacy in a case in 2018²³² speaks to its enduring presence in legal-sociological

²²⁶ *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (8) BCLR 1015 (CC) at para 1 (hereinafter AZAPO)

²²⁷ Davis (note 27) at 111; Cockrell (note 197) 7; Hoexter “Contracts in Administrative Law: life after formalism?” (2004) SALJ 597

²²⁸ Dugard (note 146) 373

²²⁹ Dugard (note 146) 376-377

²³⁰ *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* 2018 (2) BCLR 240 (CC) (hereinafter *Gijima*) at para 25 referencing with agreement Hoexter *The Transformation of South African Administrative Law since 1994 with Particular Reference to the Promotion of Administrative Justice Act 3 of 2000* (Thesis submitted in fulfilment of the requirements of the Degree Doctor of Philosophy, University of the Witwatersrand, 2009) 231

²³¹ Hoexter (note 41) 184

²³² *Gijima* (note 227)

thought. The CC continues to structure its jurisprudence in reaction to judicial history.

Judicial actions during apartheid created a “separation of legality from legitimacy”²³³ as well as forming a historical narrative of the judiciary’s complicity in human rights abuses. This is the dominant narrative of the relationship between South Africa’s judicial history and legitimacy.

Lawfare is predicated on strong compliance with law derived from the reputational strength and moral authority of a court. In the exploration of the relationship between Lawfare and legitimacy, it is difficult to see how this history, one of ostensible judicial illegitimacy, could be one of the contributing factors to judicialisation.

While not disputing the validity of the dominant narrative outlined above, it is not a full picture of South Africa’s jurisprudential history. When a widened view of judicial legitimacy encompassing the interactions between political forces and the courts’ role is considered, a dual narrative emerges, running alongside the dominant narrative.

Meierhenrich’s *The Legacies of Law* locates in South African history, the concept of the dual state, first articulated by Fraenkel. The dual state is a state that is both prerogative and normative. The prerogative state denotes a government of arbitrary power and abuse, subject to no constraints, except where formal legality is used to consolidate and entrench authoritarian power. The normative state is a state that operates subject to the rule of law.²³⁴

The apartheid model was created and sustained through law in an attempt to lend it a veneer of legitimacy (prerogative). Significantly, the architecture of apartheid created *by* law also made the apartheid structures vulnerable *to* law; at times conceding to “actually being just” otherwise the structural

²³³ Meierhenrich (note 114) 130

²³⁴ Meierhenrich (note 114) 64-65, 76, 135 adopting concepts by Fraenkel E *The Dual State: A Contribution to the Theory of Dictatorship* (1941) Translated from the German by E A Shils, in collaboration with Edith Lowenstein and Klaus Knorr, New York, Oxford University Press

'legitimacy' would collapse (normative).²³⁵ As a result, "law supplemented resistance as an instrument to fight apartheid."²³⁶ Through such a strategy of resistance and the ability, on occasion, to curb human rights abuses and uphold a higher order vision of law, the judiciary was, *to a degree*, legitimised.

The prerogative state's worst excesses were able to be challenged on formal legal grounds by the liberal lawyers and receptive judges. As Klare writes:

A conscientious judge would have been one who faithfully fulfilled his/her oath of office to carry out apartheid law, yet did so in a way calculated to undermine and nullify it, at least to mitigate the cruelty of its impact on its victims.²³⁷

However, challenging the apartheid government through the legal structures created, rather than rejecting that system in its entirety, did bestow some degree of legitimacy on that system. The law's formalist constraints could be used to uphold a normative vision of law and achieve equity. Dominant power could be curtailed in a particular case. However, the unfavourable ruling, and the loss for the government, paradoxically, further entrenched the apartheid government's power through the 'legitimacy' of holding itself bound to the laws that supported the system of inequity it had constructed.²³⁸

The idea that the rule could be used in the fight against oppression allowed the normative ideals and faith in the power of the rule of law to survive.²³⁹ When apartheid struggle actors lost the legal battle or could no

²³⁵ Thompson E.P *Whigs and Hunters: The Origins of the Black Act* (1975) Pantheon Books, New York 263

²³⁶ Meierhenrich (note 114) 140; Dyzenhaus (note 47) 268: "Thus while the general political situation of liberal democracy has hardly existed in South African the arena of parliamentary politics, the law has held the bare promise of such a situation for those engaged in extra parliamentary politics."

²³⁷ Klare (note 25) 148

²³⁸ Thompson (note 235) 264-265; Dyzenhaus (note 47) 252; Ellmann (note 225) 408: "The lawyers who represented these clients, moreover, by no means adopted courtroom strategies of total defiance; instead, their characteristic approach seems to have been to play within the rules, to press the categories of South African legal argument to their limits but still to remain within those categories."

²³⁹ Meierhenrich (note 114) 129

longer fight through law, what prevailed was “a sense of legal wrong.”²⁴⁰ In these instances, the view was not that the law was illegitimate; but that it was being used illegitimately. “The notion of the rule of law is itself an unqualified good”²⁴¹ and the *idea* of the rule of law, law as ideology, remained. Moreover, respect for the law was achieved through apartheid-era courts offering procedural justice. The court provided an avenue for

speaking in public, the opportunity to be heard and heard with some measure of respect, which the higher South African courts did provide, this desire speaks to an emotional need for communication, often manifesting itself as a need for acknowledgment.²⁴²

This acknowledgment of the Court being able to provide what was systematically denied in all other spaces, contributed, it has been argued, to the cultivation of affectual legitimacy. This does, however, raise an important question – was the Court approached because it, as an institution, was viewed as legitimate? Or was the Court approached because it was the only avenue available? The latter consideration has implications for the level of legitimacy one imputes onto the institution when crafting an historical overview.²⁴³

The dual-state concept of law, the enduring goodness of the rule of law, and all that it implied, would later impact on the negotiation and design of the future democratic South Africa. These ‘legacies of law’ established a sociological acquiescence to a constitutional avenue for democracy built on the rule of law. The new South Africa was able to be built by law and through law where “interacting adversaries converged in the idea of legalizing the future”.²⁴⁴ This was possible because a “habit of legality” had been established through this interplay between the prerogative states constraints and the normative states enduring goodness.²⁴⁵ The trust established was based on the fidelity to (forma) law shown by the apartheid government. If

²⁴⁰ Thompson (note 235) 261

²⁴¹ *Ibid* 266-267

²⁴² Meierhenrich (note 114) 236-237

²⁴³ Corder H “An extraordinary tale : review of Meierhenrich’s *Legacies of Law*” (2013) 45 *Tulsa L. Rev* fn 45

²⁴⁴ Meierhenrich (note 114) 204; le Roux & Davis (note 78) 148

²⁴⁵ Meierhenrich (note 114) 61

negotiations and transitional commitments were rooted in law, parties knew those commitments would be adhered to.²⁴⁶

The assessment of the legitimacy of the judiciary in a democratic South Africa must appreciate, and respond to, these dual positions in South Africa's history. The legacy of 'deference' in the form of timidity has to be recalibrated as deference now afforded to a democratic majority. This creates a tension within deference. Attempts to reject historical deference must not translate into activism, but the Court must remain active enough towards its transformative goals.²⁴⁷ While formalism as parsimony is to be rejected, the legacy of formalism, as a successful historical weapon in preserving the normative, remains.

3.4 *Reasons for Judicialisation*

3.4.1 The Nature of a Constitutional Court

When viewed from an institutionalist perspective, an exploration of the nature and design of a constitutional court shows that such a court is the nexus of higher order politics and law.

Third wave democratised nations are nations that transitioned into democracy after the second wave which followed the Second World War. Third wave democratisation occurred after the fall of the Soviet Union and the transition of many Eastern European nations, along with apartheid South Africa, in the early 1990's. These third wave transitions draw on some 40 years of international human rights developments in their restructuring. Transitioning nations are influenced by organisations such as the International Monetary Fund, and Regional Communities that require transitioning nations adopt democratic values if they wished to be included in those communities.²⁴⁸ Constitutional courts in third wave democracies are therefore intricately linked to the *real politik*.

²⁴⁶ Meierhenrich (note 114) 61-62

²⁴⁷ Hoexter (note 41) 184

²⁴⁸ See Huntington S "Democracy's third wave" (1991) 2 *Journal of Democracy* 12-34

Until a stable democracy can take root, a young democracy may struggle to show evidence of investment security, currency stability, economic freedom, rights protections and a “commitment to democratic governance”.²⁴⁹ In the meantime, constitutional courts can stand surety. An independent judiciary, upon which the rule of law rests, is a crucial indicator of the political health, and indeed political legitimacy, of a state. The judicial institution and its level of independence becomes the barometer for democratic stability. It is because of these conditions of a young democracy that “the inclusion of a strong judicial wing seems almost inevitable to some governmental architects”.²⁵⁰

This is certainly true for the South African (CC). The CC played a mega-political role in the nation’s democratic formation. Through its role in shaping “collective identity, nation-building” and certification of the Constitution, the Court provided a legitimising avenue for the democratic project.²⁵¹ Its role can therefore be seen as antecedent to democratic functioning, establishing the operating framework from which all politics would be born. The CC’s formation was an “institutional prerequisite for democratic competition to exist or [and] survive”.²⁵² The political role played by the CC at the time of its establishment has created a legacy where the CC is seen as an avenue for resolution of political matters. It is this legacy that contributes to judicialisation.

In the *First Certification Judgment*, the CC described its role as “the key to the resolution of the deadlock.”²⁵³ Constitutional assurances assuaged minority party fears and ultimately facilitated minority parties agreeing to a democratic transition. When it came to adopting a Constitution, it was clear that the Constitution’s legitimacy required that it be

²⁴⁹ Issacharoff (note 30) 968

²⁵⁰ Tate & Vallinder (note 13) 2

²⁵¹ Hirschl (note 9) 256-257

²⁵² Issacharoff (note 30) 970

²⁵³ *First Certification Judgment* (note 29) at para 13; Motale Z “Constitution making in divided societies and legitimacy: lessons from the South African experience” (2006) *Temp. Pol. & Civ. Rts L. Rev* 156-159

adopted by a credible body properly mandated to do so in consequence of free and fair elections based on universal adult suffrage²⁵⁴

This is aligned with the attributes of political legitimacy outlined in the previous chapter. Full participation in the constitutional project by all political parties was crucial if the Constitution was to be seen as legitimate. Vital to both these undertakings was the participation of the Inkatha Freedom Party (IFP) but the party's commitment to the process wavered.²⁵⁵ While a legal route to democracy was agreed upon, there existed deeply contested views between the negotiating parties and indeed within the parties themselves. The African National Congress's (ANC) tripartite alliance was also internally divided. Once unified by knowing what the alliance was fighting *against*, "a fundamental reorientation" was now required in working out what the alliance would fight *for*. In this fight the ideological differences between the more pragmatic ANC leadership and the more progressive nationalisation favouring the Communist Party became pronounced. These discursive positions within the ANC at the time of negotiation, would in time, lead to questions of the stability of the initial constitutional compromise.²⁵⁶

Furthermore, there was disagreement as to the role institutions should play, the extent of those roles, and what the founding documents of a democratic South Africa should do. Prior to its birth, the tension between liberationist and libertarian conceptions would colour the differing understandings of a constitutional order and the relationship between rights and democracy.²⁵⁷ The ANC, as a liberation movement, had spent decades fighting for a democratic South Africa, with rights being a fundamental tenant of what was being fought for.²⁵⁸ The ANC was now reluctant to accept the

²⁵⁴ *First Certification Judgment* (note 29) at para 12; Davis (note 27) 3

²⁵⁵ Barns & De Klerk (note 153) 30-31; Viljoen G & Venter F "A culture of negotiation: The Politics of Inclusion in South Africa" (1995) 17 *Harv. Int'l. L. Rev* 16, 80; Sisk T "The violence-negotiation nexus: South Africa in transition and the politics of uncertainty" (1993) 9 *Negotiation Journal* 77- 88; Strand P "Finalizing the South African Constitution: the politics of the Constitutional Assembly" (2001) 28 *Politikon* 56

²⁵⁶ Bond P *Elite Transition: From Apartheid to Neoliberalism in South Africa* (2000) Pluto Press, London 15-16, 201; Viljoen & Venter (note 255) 17

²⁵⁷ Du Plessis L & Corder H *Understanding South Africa's Transitional Bill of Rights* (1994) Juta, Cape Town 31-35. See also Davis (note 27) 3

²⁵⁸ See for example the ANC's adoption of *African Claims in South Africa* 1945; <http://www.anc.org.za/show.php?id=4474> (date accessed 27/06/2015); Congress of the

constraints placed on governing powers through a Bill of Rights. The ANC's support for a Bill of Rights extended only so far as those rights could aid in fostering a majoritarian democracy through elections and aid in the socio-economic objectives of the party.²⁵⁹

The Bill of Rights was treated by the majority of the population with cynicism and suspicion, viewed as a potentially obstructionist force to transformation and the new South Africa. It was seen as a way to protect and consolidate white, minority interests, not as an instrument for freedom and advancement. Emerging out of a history where the will of the majority was denied, a Bill of Rights that would possibly curtail that will in a new South Africa was difficult to accept.²⁶⁰

And yet, there was still awareness on the part of the ANC that a CC could solidify the ANC's democratic imperative. The Court could justify and legitimate the party's legislative authority and its policies. This sat in contrast to the belief that a judicial institution, charged with upholding a Bill of Rights, could limit and obstruct its policy and transformation objectives.

Conversely, minority parties feared a derogation of the protections negotiated during the settlement. Minority parties embraced the Bill of Rights as a bulwark against presumptive ANC dominance.²⁶¹ These duelling concerns colour the story of consent and acceptance of the Constitution and the CC's role.

Upon reflecting on the CC role, the connection between democratic and political legitimacy and the seeds of the judicialisation of politics are revealed. A line can be traced from the survival of normative law during apartheid, to

People's Freedom Charter 1955, <http://www.anc.org.za/show.php?id=72> (date accessed 27/06/2015); ANC's *Constitutional Guidelines for a Democratic South Africa* 1989; <http://www.anc.org.za/show.php?id=294> (date accessed 27/06/2015); *Bill of Rights for a New South Africa* 1993 <http://www.anc.org.za/show.php?id=231> (date accessed 27/06/2015)

²⁵⁹ Davis (note 26) 198; Meierhenrich (note 114) 204; See ANC *Building a United Nation: ANC Policy Proposal for the Final Constitution*, submission to the CA, 23 June 1995 at 2 quoted in Strand (note 255) 53

²⁶⁰ Sachs A "Towards a Bill of Rights for a democratic South Africa (1991) 35 JAL 21 24; Dyzenhaus D "Democracy, rights and the law" (1991) 7 SAJHR 28; Corder (note 71) 253, Cameron (note 71) 436

²⁶¹ Roux (note 27) 7; see Tushnet (note 28) 118; Issacharoff S "Constitutionalizing democracy in fractured societies" (2004) 82 Tex. L. Rev 1873

the legal avenue for nation building, to the narrative that a legal avenue is the best way to settle issues.

However, when overlaying the dimensions of political legitimacy and democratic consensus, it is clear that the new CC would not be operating on solid ground. Stated differently, while there was agreement to use a constitutional avenue for South Africa's democratic transition, this would not automatically an apex court, and the tools with which it would work, with legitimacy.

In part due to the Appellate Division's role in the implementation and maintenance of apartheid policies, and in part because of the role that a constitutional court would play going forward, there was a need to establish a new Court. This new court had to be distinguished from the legal institution that existed in South Africa's past.²⁶² Towards this goal of differentiation, the newly formed CC carefully and deliberately curated powerful symbols to re-inforce this message. The apex court adopted different coloured robes, moved to a new building and adopted a more informal approach to oral arguments. Justices rejected the traditional address of 'm'lord' and 'm'lady', and did away with a seniority-determined seating order.

Most significantly, whereas previously appeal court judges were only drawn from the ranks of senior counsel, appointments to the CC would include political activists and law professors.²⁶³ These endeavours to show a break with the past created a pervading sense political sensitivity on the part of the CC and paradoxically, a clear political stratagem towards a neutral and non-political appearance.

The Court trying to cultivate a role both in reaction to and responsive to the historical challenges led to the newly established CC facing an early threat. The case of *President of the Republic of South Africa and Others v*

²⁶² Seedorf S "Jurisdiction" in Woolman & Bishop (eds) *Constitutional Law of South Africa* (2008) 2nd Edition Juta, South Africa 3-4

²⁶³ Corder H "Building a nation: The judicial role in South Africa" (2010) 28 *Law Context: A Socio-Legal Journal* 66-69; le Roux & Davis (note 78) 185

*South African Rugby Football Union and Others*²⁶⁴ could potentially do great harm to the institution's fledgling legitimacy. The respondents in this case demanded that five Justices recuse themselves on the basis of their political histories, their close personal relationships with President Mandela, and their anti-apartheid activism. The Court held that the application impugned "the integrity of the Court as an institution,"²⁶⁵ and unanimously rejected the allegations of both the presence and appearance of bias on the part of the Justices.

In matters that came before them as apartheid-era judges, Judges Didcott, Goldstone, Kriegler and Ackermann appealed as best they could to normative legal principles to curtail the worst abuses of apartheid law. They would later be appointed to the CC.²⁶⁶ The struggle against apartheid and what it stood for was fought using the language of values equality, freedom and dignity. These values would later form the foundation of the post-apartheid constitution. Records of political activism in the struggle by the newly appointed Justices could be viewed as qualifying them to be the Constitution's stewards. Their political history was evidence that they truly embodied the values that the Constitution now asked them to preserve and protect without fear.²⁶⁷ Indeed, in an overview of judicial appointments made by the Judicial Service Commission (JSC), legal technicism is only one aspect considered. Alongside diversity and representation, "values and needs of the community", "socio-political awareness", and the upliftment of constitutional values are deemed an essential condition of a competent jurist.²⁶⁸

What does this distinction from a traditional court mean for how the CC is to be viewed? In reaction to the AD's (largely) timid approach, the CC needed to show that it would be a forum for protection of rights and offer that

²⁶⁴ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others – Judgment on Recusal Application* 1999 (4) SA 147 (hereinafter *President v SARFU*)

²⁶⁵ *Ibid* at para 7

²⁶⁶ le Roux & Davis (note 78) 29

²⁶⁷ Venter (note 211) 68

²⁶⁸ Du Bois F "Judicial selection in post-apartheid South Africa" in Malleson K & Russell P *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (2006) University of Toronto Press, Toronto 294-296,299

protection wherever it was required. The CC had to be assertive and more active in order to nurture the emerging democracy. While restraint and deference may be advised by traditional lines of legal thinking, assertiveness by the CC would be the key to institutional stability. As paradoxical as that may seem, standing against populist sentiment and being seen not to be fearful of those in political power was vital to nurturing its legitimacy.²⁶⁹ The newly formed and institutionally insecure CC had to display a “lack of hesitation”²⁷⁰ in dealing with the majoritarian political forces and popular opinion.

Locating legitimacy through assertiveness is however juxtaposed with the need to display a caution and self-consciousness. Given that South Africa is a young democracy emerging from a past where the will of the majority was denied, majoritarian party support and popular support are crucial aspects in the legitimacy paradigm. The CC thus had to acknowledge that sensitivity in this regard is necessary. Due to concerns of democratic legitimacy, deference to the decisions of duly elected representatives would have to be shown.

However, this could not be the singular orientation of the CC. Embracing a more political role towards creating the structure for a higher order political framework was equally necessary. In order to prevent the democratic project from floundering in its infancy,²⁷¹ President Mandela’s leadership in straddling these paradoxical demands of the judicial role was vital.

Judicial legitimacy is established through a sustained period of confidence in the institution built over time. With low levels of public support in the CC’s formative years, time was needed to foster legitimacy.²⁷² Unpopular decisions in the early days of the CC were made at a time when the CC was shielded by the ANC’s dominance.²⁷³ That dominance allowed the CC time to take root as an institution. The Court was able to build a legal foundation from its decisions, and to gain respect internationally, while still being able to

²⁶⁹ Lively (note 123) 3

²⁷⁰ Issacharoff (note 30) 971

²⁷¹ Issacharoff (note 30) 1003-1004

²⁷² Gibson (note 99) 17

²⁷³ Roux (note 27) 9, 37

make decisions that seemed not to have the support of the public.²⁷⁴

Additionally, the CC set about undoing apartheid law in relative calm. It was in this uncontroversial, indeed, welcomed process that the CC was able to craft a jurisprudence which would allow “the capacity to constrain national legislative majorities in the future”.²⁷⁵ Once again the connection between law and politics is highlighted as the construction of this jurisprudence was

frequently carried out with reference to pre-constitutional history. In its reference to history, courts are not reticent in their denunciation of the politics of the past and in the construction of the Constitution as an instrument of restitution for past wrongs.²⁷⁶

When assessing the legitimacy of the CC, such assessment must take place within an historical and institutionalist understanding. A constitutional court should hold political trust, stand political surety, stand up to a majoritarian dominant force in the protection of minority rights, and display a level of political sensitivity to democratic processes. It must furthermore engage in political strategy to ensure principle prevails, and the established democracy is solidified. It is clear that, from its very beginnings, there was a deep connection between fostering of a democratic framework for South Africa and the role played by the CC in what Michelman describes as “jurisgenerative”.²⁷⁷

This transition to democracy through a judicial avenue indelibly links the judicial to political. It is in this connection that the culture of judicialisation of politics emerges as “the more democracies are established by law, the easier to find a legal pathway to challenge the political”.²⁷⁸ A political resolution achieved through constitutional negotiation has created in the people of

²⁷⁴ Epstein *et al* (note 126) 138

²⁷⁵ Dixon R & Issacharoff S “Living to fight another day: judicial deferral in defence of democracy” (2016) *Wis. L.Rev* 728

²⁷⁶ Venter (note 211) 62-63; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) at para 21: “The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance.”

²⁷⁷ Michelman (note 91) 1502-1503

²⁷⁸ Kapiszewski *et al* (note 191) 10

South Africa a prevailing and “deep sense that conflicts need to be settled in [through] legal disputes”.²⁷⁹

3.4.2 Constitutional Patriotism

Through observing the “displacement of the political into the legal or the turn to the courts to resolve an ever greater range of wrongs,”²⁸⁰ Comaroff and Comaroff trace the source of judicialisation to the establishment of what can be termed ‘constitutional patriotism’ in a nation state’s journey from disorder and division to settlement:

Difference begets more law. Why? Because with growing heterodoxy, legal instruments appear to offer a means of commensuration, a repertoire of standardised terms and practices that permit the negotiation of values, beliefs, ideals and interests across otherwise intransitive lines of cleavage. Hence the flight into constitutionalism that explicitly embraces heterogeneity.²⁸¹

Accepting the Comaroffs’ observation, it is important to examine the concept of constitutional patriotism and its connection to judicialisation in greater depth. Constitutional patriotism is difficult to define. “There is, currently, no general philosophical account of constitutional patriotism available.”²⁸² It can be better understood by first noting the context in which it is found. Constitutional patriotism emerges as a response to diverse and previously divided countries.²⁸³

It enfolds the idea of social stability and cohesion, justification of political power and the fostering of civic trust through constitutional loyalty. It is

²⁷⁹ Meierhenrich (note 114) 172 quoting South African Constitutional Court Justice Laurie Ackermann

²⁸⁰ Comaroff & Comaroff (note 9) 145

²⁸¹ *Ibid* 145

²⁸² Müller J “A General theory of Constitutional Patriotism” (2008) 6 *Int’l J. Const. L* 72

²⁸³ Müller J & Scheppele K “Constitutional Patriotism: An Introduction” (2008) 6 *Int’l J. Const. L* 67; The concept was first articulated by Habermas in his questioning how, in post-Nazi Germany, his nation could be restructured and held together without appeals to a national patriotism that contributed to the atrocities that Germany had experienced. Habermas noted: “A liberal political culture is the only common denominator for a constitutional patriotism (*Verfassungspatriotismus*) that heightens an awareness of both the diversity and the integrity of the different forms of life coexisting in a multicultural society.” Habermas J *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* Translated by William Rehg (MIT Press Cambridge Massachusetts (1996 Second Printing) 500

viewed as an “attachment on the part of citizens to enduring political arrangements” created through a framework of constitutional norms and principles.²⁸⁴ Constitutional patriotism is succinctly captured by Michelman’s articulation that:

Specific exercises of political power are justified when they are validated by a set of constitutional essentials that everyone can see that everyone affected has reason to accept in light of his or her interests considering himself or herself to be one among a company of presumptively free and equal co-inhabitants; all of whom are under moral motivational pressure to find agreement on fair terms of co-operation within their necessarily shared space.²⁸⁵

Here cognitive dissonance overlaps somewhat with constitutional patriotism. Müller notes that where constitutional patriotism has sufficiently taken root in a nation, “identity becomes ‘de-centred’”. Individuals relativize what they want and what others expect from them in the light of moral concerns.”²⁸⁶ Significantly, this ability to relativize is first dependent on the ability for all to see themselves reflected in the constitution.²⁸⁷

Constitutional patriotism is thus agreeing to a *system* of law-making. There may not be, nor is it necessary, agreement with specific instances of law that emerge from that law making system.²⁸⁸ As a result there remains consent, despite disagreement. At times, however, a specific issue may spark a disagreement of such a degree that it moves beyond the specific issue and challenges attachment to the system. Moreover, the specific decision cannot be such that it affects the ability of parties to be treated fairly, as equal and free. Those whom a court finds against in a specific instance must continue to feel that the system as a whole is still fair. They and must still be able to see their interests reflected in the system.

Müller rejects the idea that constitutional patriotism is a constitutional identity. He prefers to view constitutional patriotism as a constitutional

²⁸⁴ Müller (note 282) 74-75, 80, 83

²⁸⁵ Michelman F “Morality, identity and constitutional patriotism” (1999) 76 *Denv. U. L. Rev* 1017

²⁸⁶ Müller J “The origins of constitutional patriotism” (2006) 5 *Contemporary Political Theory* 287

²⁸⁷ Malleson K & Russell P (eds) *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (2006) University of Toronto Press, Toronto 434

²⁸⁸ Michelman (note 285) 1015-1016

culture. Identity, argues Müller, is too closely linked to a written constitution, and suggests that it is “something homogenous or necessarily harmonious...an expression of an underlying national core identity.”²⁸⁹ This is precisely what Habermas was trying to avoid in his invocation of patriotism. Viewing constitutional patriotism through the lens of culture does not suppress the contest and disagreement contained in the constitution. Significantly, it underscores an expansive attachment to constitutionalism, where constitutional principles and responsibilities must suffuse all institutions and areas of civic life.

To meet the challenge of democratic responsiveness, constitutional patriotism must furthermore be capable of enfolded a re-imagining of the understanding of the principles deemed constitutionally essential. Constitutional patriotism cannot be seen as a rigid settlement, but as “contained disagreement,”²⁹⁰ that maintains the framework where all have the ability, on grounds of respect, equality and fairness, to contest the contents of shared culture. Despite commitment to constitutional principles, there may very well be disagreement at the point of application. Crucially, constitutional patriotism embraces disagreement, and as result, achieves stability.²⁹¹

Constitutional patriotism provides the language of contestation, through which actors are able to ground their claims in common attachments.²⁹² Through this language of contestation advancing a position can be located in higher order reasoning that the ‘other’ would also view as constitutionally essential. As a result, there is an attractiveness of the legal or constitutional route for grievances.

²⁸⁹ Müller (note 282) 81

²⁹⁰ Müller (note 282) 71, 75-84; Michelman (note 285) 1022

²⁹¹ Michelman (note 285) 1024-1026. The idea of a morally responsive person that accepts others as free and equal and desires social stability and the reasonableness of attaching himself or herself to constitutional essentials is a hypothetical construct. The hypothetical should be emphasised in the South African context where, given the transformative mandate and the very idea of aspirational objectives is understood as something that has not yet been attained.

²⁹² Müller (note 282) 78-80

3.4.3 Constitutional Design

Modern constitutional courts have emerged as the primary mechanisms of democratic transition in divided societies.²⁹³ Issacharoff opines that “[t]he courts are seen as indispensable actors in holding together a delicate social peace.”²⁹⁴ The role of the CC was crucial in achieving the transition in South Africa, taking on the role of “guarantor and guardian”.²⁹⁵

What are the implications of this higher order, or mega-political role on judicial legitimacy? The newly created CC was asked to succeed where others had been unable to bridge the chasm and where negotiations had reached an impasse.²⁹⁶ Crafted in conflict, the draft Constitution from the Constitutional Assembly was an unfinished, “underspecified” compromise. Weak in stability, the draft had deliberate gaps and problems or positions left unresolved that were handed over to the judicial institution to resolve.

To aid in reaching consensus “excessive rigidity in initial constitutional design” had to be avoided and appeal to abstract principles was needed.²⁹⁷ The CC could facilitate social cohesion through assuring participation and recognition of all interests in the political process.

The Constitution’s drafters sacrificed coherence of constitutional principles for the sake of greater stakeholder participation. This very incompleteness kept parties at the table and prevented the entire project from being brought to its knees. This open and abstract phrasing did, however, impose a greater role on the CC in resolving political impasses.²⁹⁸ Sunstein observes that constitutional creation

²⁹³ Motala (note 253) 147-163

²⁹⁴ Issacharoff (note 261) 1893

²⁹⁵ Rickard C “The certification of the Constitution of South Africa” in Andrews P and Ellmann S (eds) *The Post-apartheid Constitutions: Perspectives on South Africa’s Basic Law* (2001) Witwatersrand University Press 228; Issacharoff (note 30) 989; Epstein *et al* (note 126) 118-119

²⁹⁶ Issacharoff (note 261) 1871

²⁹⁷ Issacharoff (note 30) 970-986; van der Walt (note 72) 214

²⁹⁸ The Supreme Court’s role and limits under the vague and general operating framework of the Israel’s *Basic Laws*, Israel Supreme Court President Aharon Barak articulates that “The principal organ of state that must pour content into the majestic generalities, and must resolve the inherent conflicts, is the judiciary - primarily the Supreme Court. The Israeli society has imposed upon us, the Justices of the Supreme Court, the task of giving content to the molds for human rights that will befit our values.” Barak (note 166) 83

enlists silence, on certain basic questions, as a device for producing convergence despite disagreement, uncertainty, limits of time and capacity, and (most important of all) heterogeneity.²⁹⁹

This highlights an interesting relationship between trust and vagueness. In areas of good faith, the crafting of provisions is ostensibly more laconic. In; areas where there is a lack of trust between stakeholders, provisions are overly prescriptive, more detailed, and thus more constraining.³⁰⁰ The South African Constitution, however, runs counter to ideas posited by trust literature. The Constitution was drafted in vague and underspecified terms, in a low trust environment. What then was holding the trust, if not the provisions? One answer can be found in Meierhenrich's theory that trust was located through the historically formed normative view that all parties would be bound to formally rational law. A second answer (which should not be viewed as competing with the first), is that trust was achieved through the role that the CC played in standing surety between the parties.³⁰¹

It fell to the CC to articulate the aspirational vision of the Constitution, elucidating on the contours of the constitutional principles read holistically, and "the implications of shared purposes".³⁰² Once that vision was identified, certification of the text by the CC aimed to ensure that the Constitution was moored to that vision. This duality charged the CC to take into consideration, in its gap-filling role, the political and consequentialist considerations towards social stability.

Emblematic of a wicked problem, while the Constitution was used as a vehicle to legitimise constitutional democracy in the new South Africa, it placed many legitimacy problems on the CC. In terms of political legitimacy, there was consensus in the idea of a Constitution, yet a great lack of consensus, between political parties, across the spectrum of ideologies, and indeed, within the ANC itself. The implications of this lack of consensus will

²⁹⁹ Sunstein C *Designing Democracy: What Constitutions Do* (2001) Oxford University Press, New York 51; Sunstein C *Legal Reasoning and Political Conflict* (1996) Oxford University Press, New York 38-48

³⁰⁰ Bjornskov & Voigt "Constitutional verbosity and social trust" (2014) 161 *Public Choice* (2014) 91

³⁰¹ Choudhry S "Constitutional change in the 21st Century: A new debate over the spending power" (2008) 34 *Queen's Law Journal* 381

³⁰² Fuller (note 20) 378

be addressed more comprehensively in the chapters that follow. At this juncture, it suffices to posit the *prima facie* observation that political legitimacy of the Constitution is not as secure as one would hope. Moreover, drafted in conflict and compromise, the CC now has to shepherd the Constitution's abstract principles, gaps and vagueness into some working reality. This expanded role imposed on the CC strains the core elements of legal legitimacy.

From this historical and institutional examination two core points emerge: One, there is a historically-derived impulse to seek constitutional resolution on highly divisive political issues. Two, the nature of the constitutional design offers little prescription. Constitutional gaps create an onus on the CC to engage in an active, creative and progressive realisation of constitutional promises.³⁰³

Finally, what this section on the CC observes is that

law and politics interact and interpenetrate in manifold and mutually generative ways. Law is not only a political artefact of the first order; it is also a primary artificer of its political context.³⁰⁴

On consideration of its role in the political compromises, fostering of democracy and social stability, the CC's genetics indelibly comprise elements of the political.

3.4.4 Rights Culture

Botha opines that "the twentieth century has seen extensive attempts to remedy social wrongs through law."³⁰⁵ This stems from recognising the law as a liberating force. Positive obligations in the South African Constitution

³⁰³ Hirschl (note 12) 257; Sunstein (note 299) 56: "Much of the key work must be done by others, often through casuistical judgments, specifying the abstraction at the point of application".

³⁰⁴ Hutchinson (note 55) 553; Gledhill (note 93) 71; *Prince* (note 34) para 15 (Sachs J dissenting)"...has always to be done in the context of a lived and experienced, historical, sociological and imaginative reality. Even if for the purposes of making its judgment the court is obliged to classify issues in conceptual terms and abstract itself from such reality, it functions with materials drawn from that reality."

³⁰⁵ Botha (note 24) 181

give rise to the justiciability of these socio-economic obligations. The more that is asked of the government, the more is asked of the Court.

Hirschl identifies an evolutionary explanation for the judicialisation of politics, whereby constitutional rights are used as weapons to demand recognition and challenge governmental power. This is aided by a clearly enumerated Bill of Rights. The domestication of international human rights law further helps to identify the content and permissible boundaries of a right.³⁰⁶

The transformative and aspirational nature of the South African Constitution creates a 'rights-chasm' between the constitutional promise and the grass roots reality.³⁰⁷ It is precisely because of this chasm that there is an increasing number of appeals to the Court. A rights culture has led to "judicialisation from below,"³⁰⁸ where social groups seek social change through public interest law and social action law.³⁰⁹ When these rights groups are successful before the court, more groups are encouraged to use litigation as the pathway for change. These legal challenges therefore continue to feed judicialisation.³¹⁰

Further encouraging judicialisation is the opening up of *locus standi* requirements. The 17th Amendment³¹¹ now extends the jurisdiction of the CC even further to hear matters of arguable points of law and related matters rising to the level of public interest.

³⁰⁶ Hirschl R *Towards Juristocracy: The Origins and Consequences of New Constitutionalism* (2004) Harvard University Press, Cambridge 33; Hirschl (note 12) 255-256; Randhawa (note 110) 4. Comparatively, see also Gledhill A "The expansion of the judicial process in Republican India" (1964) 8 *Int'l & Comp. L.Q. Supp. Pub* 7 who notes the correlation between the emergent scope of the Bill of Rights in the newly formed Indian Constitution in 1950 and judicial expansion.

³⁰⁷ De Vos P "The 'inevitability' of same-sex marriage in South Africa's post-apartheid state" (2007) *SAJHR* 442-443

³⁰⁸ Hirschl (note 12) 263

³⁰⁹ See Baxi U "Taking suffering seriously - Social Action Litigation in the Supreme Court of India" (1985) 4 *Third World Legal Stud.* 107; *Dladla and Another v City of Johannesburg and Others* 2018 (2) SA 327 (CC)

³¹⁰ Dixon & Issacharoff (note 275) 724

³¹¹ Act 72 of 2012; see also Rautenbach I & Heleba S "The jurisdiction of the constitutional court in non-constitutional matters in terms of the Constitution Seventeenth Amendment Act" of 2012 (2013) 3 *TSAR* 407 who argue that it was the CC that "inevitably and steadily broadened its definition of constitutional matters" prior to the Amendment. The Amendment merely echoed and codified the approach already in practice by the Court.

Challenges to the legitimacy of the judiciary engaging with these rights claims emanate from accusations of judicial activism, interventionism, and the counter-majoritarian intrusion. The countervailing response to these challenges to defend judicial legitimacy is the following: Primarily, it is not the court leading the charge in a rights culture. Locating a claim in the realm of a constitutional right immediately renders the issue justiciable.³¹² It is not the court intruding in this regard. Issues are being brought to its doorstep. It must be conceded, however, that a court signals through the jurisprudential approaches of its previous rulings which cases might succeed before it.³¹³

Recognising the danger of appearing to be overly interventionist and the need to show respect to the appropriate avenues of redress, the court can adopt strategies of avoidance. Bickel proposed that for a court to preserve its legitimacy, 'not deciding' a case allows the court to uphold what he called "passive virtues".³¹⁴ Avoidance strategies include case and controversy, ripeness, mootness, etc.³¹⁵ but rather addressing the question on another ground. Through adopting a procedurally conservative, narrow approach, or relying on the principle of subsidiarity, the court can avoid deciding an issue of a constitutional right directly.³¹⁶

While mootness is a strategy that could potentially limit instances of the judicialisation of politics, the CC has recognised a public interest exception to mootness in *S v Manamela*.³¹⁷ Mootness notwithstanding, a matter will be heard if it is in the interests of justice and if the decision could offer legal guidance for future matters.³¹⁸

³¹² *Cohens v. Virginia* 19 U.S. 264 (1821) 404: "We have no more right to decline the exercise of jurisdiction which is given, then to usurp that which is not given. The one or the other would be treason to the Constitution".

³¹³ Shapiro (note 174) 385

³¹⁴ Wechsler H "Review: The Least Dangerous Branch: The Supreme Court at the Bar of Politics by Alexander M Bickel" (1966) 75 *Yale L.J* 672; Haltom & Silverstein (note 172) 29-30

³¹⁵ Currie I "Judicious Avoidance" (1999) *SAJHR* 138

³¹⁶ *Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) at para 18, fn18

³¹⁷ *S v Manamela and Another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC)

³¹⁸ *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* 2013 (3) SA 315 (SCA) at para 5

Successful litigation to enforce rights needs organizational backing and co-ordination. There is benefit in a litigant and rights groups as *amici curiae* approaching the court with a consistent legal argument, mounting a legal challenge on the same grounds. Presenting a consistent argument create the impression that the law speaks with some level of determination on the issue at hand.³¹⁹

Successfully adopting these strategies can result in an increasing number of victories in the judicial space, creating the impression that the court is always deciding against government policies. The success of rights litigation should not, however, be seen as an imposition of the court's will upon a majority elected government. Rather, it must be acknowledged that the judiciary is being receptive to the directed energies of *democratic* movements and role-players.

A noteworthy example is the litigation strategy adopted by the National Coalition for Gay and Lesbian Equality. This organisation presented a clear and consistent legal argument, rooted in a broader narrative of non-discrimination and equality. The gay rights movement was then able to build on each legal victory towards the incremental realisation of gay rights in South Africa.³²⁰

The *National Coalition's* success can be contrasted with the case of *Prince*, involving a religious use exception for marijuana. *Prince's* unsuccessful litigation strategy can, it is submitted, be attributed to a lack of organisational backing and infrastructure to build upon in making an argument for the extension of the constitutional right of religious freedom. Indeed it was the CC itself which observed that had the claim for religious

³¹⁹ O'Brien D "The imperial judiciary: of paper tigers and socio-legal indicators" (1985) 2 J. L. & Pol 19; Rosenberg (note 192) 17-18; Hirschl (note 12) 268

³²⁰ De Vos (note 307) 442-443; *Minister of Home Affairs v Fourie (Doctors for Life International, Amici Curiae)*; *Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC) at para 60, Sachs J for the majority: "The issue goes well beyond assumptions of heterosexual exclusivity, a source of contention in the present case. The acknowledgement and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage." *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (12) BCLR 1517 (CC)

exemption been made by the Church of the Rastafari and not an individual applicant, litigation may have been successful.³²¹

A new approach invoking the right to privacy for the use of marijuana was ultimately successful in the Western Cape High Court. The CC later confirmed the High Court's declaration of invalidity preventing the private use of marijuana in 2018.³²² Whether the Court in the original case in 2002 would have responded to the right to privacy argument cannot be known. But it can be speculated that the claim based on this ground would also have been unsuccessful. In the years between the two cases, the changing attitudes in society towards marijuana usage and the prevailing cultural shift is significant. Thus the difference between the *Prince* case of 2002 and the *Prince* case of 2018 offers a key aspect to judicial legitimacy. Accusations of judicial creativity or constitutional novelty when it comes to a cognisable right or the expansion of a right can be countered by describing these developments as a product of democratic expansionism.³²³

3.4.5 Administrative Justice Weaknesses

Statutory frameworks for administrative justice that should, ideally, help carry some of the Courts' burden have in fact increased the Courts' role. A legalist construction of administrative justice has tended to be used more as roadmap to challenge State power.

The Promotion of Administrative Justice Act (PAJA) has not fostered non-judicial avenues for administrative discipline and processes for good governance. Rather, it has tended to "encourage even more reliance on such review."³²⁴ The narrowness of the PAJA's confines moreover enables state actors to hide behind the statute through "unco-operative and over-formalistic

³²¹ *Prince* (note 34) at para 135-142

³²² *Minister of Justice and Constitutional Development and Others v Prince (Clarke and Others Intervening); National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton* 2018 (10) BCLR 1220 (CC)

³²³ See Lessig L "Understanding changed readings: fidelity and theory" (1994) *Stan. L. Rev.* 396

³²⁴ Hoexter (note 41) 192-193

conduct”, rather than using the legislation to help facilitate administrative justice. State actors have used the Act in a manner that displays an

utter disregard or lack of insensitivity to the culture of openness, transparency, fairness and justice on the part of administrators in this Constitutional era”.³²⁵

It has therefore fallen to the Court to uphold these values and forced a more active judicial role in administrative justice. To do so, the Court has had to depart from the conceptual constraints of the PAJA and embrace the principle of legality.

The lack of discipline and the lack of success in the facilitative function of regulatory instruments is made starkly clear by a 2011 Auditor General’s report. The report highlights that administrative actors

showed signs of a general lack of consequences for poor performance... It is also disappointing that auditees often express the view that the legislation is difficult to understand and onerous to implement. The lack of improvement in areas such as SCM, which received much attention from the AGSA, both in the provinces and at national level, however, points to a disregard for laws and regulations... noncompliance by the accounting officers is indicative of an environment where incurring unauthorised and irregular expenditure has become the norm and not the exception.³²⁶

It is clear that internal mechanisms in this regulatory space still need to be fostered. Without proper integration of administrative justice, despite the presence of the framework, aggrieved stakeholders appeal to the courts to have that regulatory framework enforced. Issues of administrative justice are channelled to the court, and therefore judicialisation continues.³²⁷ Attempts to at regulatory enforcement are greatly inhibited by obstruction in attempts to access information, lack of transparency, delay and recalcitrance - symptoms of wider democratic failings.

³²⁵ *MEC for Roads and Public Works Eastern Cape and Another v Intertrade Two (Pty) Ltd* 2006 (5) SA 1 (SCA) at para 20-21, 28. See Sec 3.4.7 below that expands further on administrative failings.

³²⁶ Auditor General of South Africa “Consolidated General Report on the Audit Outcomes of Local Government, 2010/2011” (2011) Pretoria 92-106. Auditor General’s Report referenced by Chipkin I “Whither the State? Corruption, Institutions and State-Building in South Africa” (2013) *Politikon* 224

³²⁷ *Actaris South Africa (Pty) Ltd v Sol Plaatje Municipality* 2008 JDR 0206 (NC)

Where these failures have resulted in a more active and intrusive judicial role in administrative matters, Hoexter notes the apparent willingness on the part of government actors to accept this expanded role of the Court rather than work to strengthen non-judicial effectiveness.³²⁸ It is unlikely that stronger administrative controls will emerge from the legislative area to address the shortcomings of the Act.

Further adding to the Court's docket is the ruling in *Qaukeni Local Municipality*. In this case the Supreme Court of Appeal (SCA) held that an administrative actor is "duty bound to approach a court to set aside its own irregular act."³²⁹ This is because

our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.³³⁰

A review application must therefore be brought to set the decision aside. In so doing, the Court can assess the consequences of the invalid decision. The Court has to consider unfairness to those who have, on the presumption that the administrative decision was lawful, relied on the decision and who will suffer prejudice should that decision transpire to be irregular, improper or unlawful.³³¹

3.4.6 Undoing Unlawfulness Unlawfully

Where state actors uncover that administrative action has been taken in an improper or irregular manner the state actor must then seek to have their own actions set aside.

³²⁸ Hoexter C "The future of judicial review in South African administrative law" (2000) 117 SALJ 499-500

³²⁹ *Municipal Manager: Qaukeni and Others v F V General Trading CC* 2010 (1) SA 356 (SCA) para 23; affirmed in *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (5) BCLR 547 (CC) (hereinafter *Kirland*) at para 88-90: "administrators may err, and even that they may err grossly. When they do, their actions are not nullities. They exist in fact and may have legal consequences. The solution is to challenge the decision on review."

³³⁰ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (3) All SA 1 (SCA) at para 26 (hereinafter *Oudekraal*); *Kirland* (note 329) at para 105: "It could not be ignored or withdrawn by internal administrative fiat."

³³¹ *Kirland* (note 329) at para 67

In recent years the CC has been confronted with the dilemma of administrative actors who “flout the rule of law by acting improperly or arbitrarily in the very attempt to undo unlawful conduct.”³³² The CC cases of *Khumalo*, *Kirland* and *Gijima* outlined below best illustrate the corrupt practices and maladministration that pervade administrative the system. These cases provide clear examples showing how law is being used to escape obligations.

The delay bar prescribed in Sec 7(1) of the PAJA requires that the application to set aside irregular must be brought within 180 days of becoming aware of the irregularity. Application for administrative review brought outside of this limit would have to be brought alongside an application for condonation of delay. The court will then consider whether the delay is reasonable and justifiable. The narrow application of the PAJA means that after such a length of delay, the administrative authority has no standing under the PAJA and such authority should be non-suited. This would mean that the unlawful conduct uncovered would continue. In the three cases that are the point of focus, this delay bar was being disregarded by administrative actors when instituting review proceedings to undo previous their decisions.

Asking the Court to set aside unlawful conduct in a manner that is itself unlawful has unsettled the framework of administrative justice. The CC increasingly has to embrace rationality review to hold government actors accountable. To uphold the rule of law, the principle of legality is adopted as; a “way of overcoming the all-or-nothing results that are dictated by the use of threshold concepts”.³³³

The case of *Khumalo*³³⁴ centred on an MEC for Education who had approached the Court to set aside a promotion. Before the CC, it was raised that such application was made 20 months after it was made known to the

³³² Boonzaier L “Good review, bad actors: The Constitutional Courts procedural drama” (2015) *CCR* 2, 8

³³³ Hoexter (note 150) 177

³³⁴ *Khumalo and Another v Member of the Executive Council for Education: Kwa Zulu Natal* 2014 (3) BCLR 333 (CC) (hereinafter *Khumalo*)

MEC that the minimum requirements for promotion had not been met.³³⁵ The CC noted that

we are confronted with the rather unusual situation of a state functionary seeking to establish the unlawfulness of its own institution's actions.³³⁶

Two conflicting issues of legality confronted the CC. On the one hand, the MEC is “duty bound to approach the court to set aside her irregular administrative act”.³³⁷ On the other hand, after such a passage of time, the delay should non-suit the MEC.³³⁸ Encompassed in the principle of legality is that the State should be held to their decision where there has been reliance on that decision. And yet, non-suiting the MEC for delay would lead to the unlawful action to continue to exist. Whichever way the Court turned, it was confronted with legality problems.

The Court in this case condoned the delay, noting that “a court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power.”³³⁹ As to why the MEC was *only then* approaching the Court twenty months after becoming aware of the unlawfulness of the promotion the CC felt “can only lead one to infer that she either had no reason at all or that she was not able to be honest as to her real reasons.”³⁴⁰

In the case of *Kirland*, the Respondent had approached the Court for the Superintendent General (SG) to be estopped from denying initial approval granted for construction of a hospital by an Acting SG. When Kirland applied for permission to increase the capacity of the hospital, the SG informed Kirland that the approval for construction that was initially granted was to be withdrawn, citing that the area was over-supplied. Seven months had passed since the SG had become aware of the political pressure and improper circumstances surrounding the approval, and did nothing.³⁴¹ It was only in

³³⁵ *Ibid* at para 5-10

³³⁶ *Ibid* at para 30

³³⁷ *Ibid* at para 33

³³⁸ *Ibid* at para 40

³³⁹ *Ibid* at para 44-45

³⁴⁰ *Ibid* at para 51

³⁴¹ *Kirland* (note 329) at para 15-19

response to this application by Kirland that the government raised the invalidity of the approval.

The majority of the CC held that the validity of the approval was not the issue before the Court. Government should have sought to set “aside the approval by way of formal counter-application.”³⁴² The majority’s stance was viewed by Jafta J as overly formalist. In his dissent, Jafta took the view that “corrupt practices should not escape the reach of our courts solely on the basis that no application to have them set aside was made.”³⁴³

In *Gijima*³⁴⁴, Gijima sought to enforce an agreement with the State Information Technology Agency (SITA). The Agency claimed that the agreement was void as the contract had not been entered into pursuant to procurement processes. The CC refused to allow SITA to use the law to evade responsibility for its actions. It held SITA to account, despite the unlawful contract, by concentrating on three aspects: first, Gijima repeatedly questioned the lawfulness of the agreement, noting that it was done outside of procurement processes. SITA repeatedly assuaged Gijima’s fears, assuring Gijima of the validity of the agreement. Second, SITA waited 22 months before approaching the Court to set aside the agreement based on procurement irregularity. And finally, procurement is central to SITA’s role. That it operated with such ‘ignorance’ as to the validity is not acceptable.³⁴⁵ As such, the CC held that:

Overall, it seems to us that justice and equity dictate that, despite the invalidity of the award of the DoD agreement, SITA must not benefit from having given Gijima false assurances and from its own undue delay in instituting proceedings.³⁴⁶

From *Gijima* rose the question whether the PAJA or the principle of legality applies when the State seeks to set aside its own unlawful conduct. The principal finding by the CC in *Gijima* was that the PAJA is not available when a State organ seeks a review of its own decision. *Gijima* should be viewed as

³⁴² *Ibid* at para 82. Even if the State had applied to set aside the approval – the delay bar in the PAJA would have non-suited the State.

³⁴³ *Ibid* at para 43,46 Jafta J, dissenting

³⁴⁴ *Gijima* (note 230)

³⁴⁵ *Ibid* at para 35, 42-45

³⁴⁶ *Ibid* at para 54

operating in response to the composite of cases that came before it, where the Court was again confronted with review application to undo unlawful conduct deliberately brought outside the conceptual confines of the PAJA.

Gijima is another instance whereby an individual seeks to hold an administrative actor to its initial decision. The administrative actor, in turn, raises the illegality of that initial decision as a defence. The case of *Gijima* is perhaps the clearest illustration of the strategy by the State of using the judicial process to evade responsibility and escape its commitments when it no longer suits it.

One can identify as a cause of judicialisation of politics state actors using “judicial review to evade, rather than assert, its obligations.”³⁴⁷ In his article, illustratively titled “Good Review, Bad Actors”, Boonzaier perfectly captures this far more abusive aspect of Lawfare with a degree of forthrightness that warrants quoting it at length:

all of this might bear on how the government conducts itself when the decision is made in the first place. Why bother to comply with procurement law if that is only going to make your contract harder to undo if it proves inconvenient? Any why not wilfully appoint an NDPP with skeletons in his closet so that you can undo his appointment if he shows too much independence?³⁴⁸

3.4.7 Abdication and Institutional Failings

Judicial intervention has filled the vacuum created by the absence (or lack of efficacy) of non-judicial safeguards.”³⁴⁹

Judicialisation of politics is increasingly due to the failure of institutions. South Africa’s current reality exemplifies Hirschl’s ‘functional approach’ of judicialisation of politics. The Court becomes involved in what is known as an institutional suit, dealing with institutional powers and obligations, and

³⁴⁷ Boonzaier (note 332) 4

³⁴⁸ Boonzaier (note 332) 12

³⁴⁹ Hoexter (note 328) 490-492: “its very existence is a symptom of the absence of democracy”; Hutchinson (note 106) 323: “The need for judicial review is premised on the failure of the institutional structure of democracy to ensure meaningful citizen participation in government.”

adjudicating on issues that fall into the operational purview and constitutional ambit – the function – of another institution.³⁵⁰

The lack of trust in 'democratic' institutions has resulted in judicial action moving from an "auxiliary precaution" to a "surrogate for revolution".³⁵¹ The *Edelman Trust Barometer* measures trust as the intersection of competence and ethics. The *2018 Edelman Trust Barometer Global Report* calculated South African "Trust in Government" at 14%, compared to the global average of 43%. South Africa was noted in the Report as one of the nations that experienced "extreme trust losses" from 2017-2018.³⁵² A 'demand-side' of judicialisation emerges in the abdication and abuse of constitutionally assigned prerogatives and functions.

While belief in the rule of law and an independent judiciary can indicate democratic health, seeking redress through resort to the court can indicate that democracy is ailing in other areas. By the legislature or executive's conduct or omissions, a vacuum is created. The judiciary is then asked to fill that vacuum when the people become disheartened with political mechanisms, or more accurately for South Africa, the obstructive force preventing these mechanisms from functioning.³⁵³

Demand-side judicialisation is increased in a dominant party democracy, where there is no other recourse to hold the leadership accountable. Within dominance, opposition parties feel that the judicial avenue is a more effective way of blocking exercises of public power than through parliamentary processes.³⁵⁴

³⁵⁰ Hirschl (note 306) 34

³⁵¹ O'Brien (note 319) 2-3

³⁵² *2018 Edelman Trust Barometer Global Report*. See also *2019 Edelman Trust Barometer Global Report* 9, 39; *2020 Edelman Trust Barometer Global Report* 20, 74. Ethics is further broken down into four sub-indexes of purpose-driven, honesty, vision and fairness. The unethical is described as "an ineffective agent of positive change, corrupt and biased, does not have a vision for the future and serves only certain groups of people." <https://www.edelman.com/trustbarometer> (date accessed 11/05/2020)

³⁵³ Randhawa (note 110) 5; Ferejohn J "Judicializing politics, politizing law" (2002) 65 *Law & Contemp. Probs.* 50; Chayes (note 81) 1313: "the growth of judicial power has been, in large part, a function of the failure of other agencies to respond to groups that have been able to mobilize considerable political resources and energy".

³⁵⁴ Tate (note 208) 30-31

What are the implications for judicial legitimacy of the Court being pulled into this space? Where the State is challenged for not upholding constitutional obligations, the court is approached as an avenue for institutional reform. While institutional suits are brought on grounds of constitutional infringement, the remedy is non-legal and polycentric. Fletcher comments that the involvement of the judiciary in institutional suits

...must be regarded as presumptively illegitimate... the presumption of illegitimacy may be overcome when the political bodies that should ordinarily exercise such discretion are *seriously and chronically in default*. In that event, and for so long as those political bodies remain in default, judicial discretion may be a necessary and therefore legitimate substitute for political discretion.³⁵⁵

The separation of powers doctrine prevents the usurpation of what is in the constitutional ambit of another branch. CC has been careful to appreciate the need not to “frustrate the balance of powers”.³⁵⁶ Toward the preservation of the relationship between the branches, the court has understood the need to “tread cautiously to preserve the comity”.³⁵⁷ “The playing field for the contestation of executive government policy is the political process, not the judicial one.”³⁵⁸

Deference acknowledges the competence, expertise, specialisation, knowledge and technical competence of administrative and executive role players. Moreover, administrative actors are in possession of the requisite information. “The court typically has none of these advantages and is required to recognise its own limitations.”³⁵⁹ Restraint is shown by the Court on the supposition of competence and the value placed on the deliberation that can occur in these non-judicial areas.³⁶⁰ Deference is therefore orientated around the understanding that administrative or institutional actors

³⁵⁵ Fletcher (note 146) 637 (emphasis added); see also Subramanian (note 192) 752

³⁵⁶ *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) (hereinafter *Doctors for Life*); *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) at para 44-48; see also Hoexter (note 328) 490

³⁵⁷ *Black Sash 1* (note 366) at para 10

³⁵⁸ *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) at para 93

³⁵⁹ *Industrial Development Corporation of South Africa Limited v Trencon Construction (Pty) Limited and Another* 2014 (4) All SA 561 (SCA) at para 15,18

³⁶⁰ Posner (note 143) 524

are the most able to respond effectively. Remedial orders most often use the process of deferral, premised on the respect and deference to this competence.

The supposition unravels when read in light of the factors causing judicialisation of politics. In areas of institutional incompetence, where participation is hindered, deliberation silenced and access to information obstructed the ground upon which the theory of deference is constructed shifts.³⁶¹

In this type of environment, framework of deference must, suggests Davis, move “beyond an enquiry about expertise and separation of powers towards a proper consideration of the role of the court in a constitutional democracy”.³⁶² Deference must be understood in light of the “constitutional enterprise analysed as a whole”.³⁶³ Davis therefore feels that the judiciary should not be bound to a “deferential formalism”.³⁶⁴

The CC has held that “if the administrator is found to have been biased or grossly incompetent, it may be unfair to ask a party to resubmit itself to the administrator’s jurisdiction.”³⁶⁵ In these conditions, the theory of deference should be recalibrated to weigh more favourably toward judicial involvement. The court should be able to make substitution rather than remit the matter back to the incompetent ‘competent’ institution. In such cases, the CC in *Black Sash* found that judicial intervention is justified

It is important to note that this particular role, at this particular time, is not one of the Court’s choosing. The sole reason for the litigation leading to this judgment is the failure of SASSA [South African Social Security Agency] and the Minister to keep their promise to this Court and the people of South Africa....The underlying danger to us all is that when the institutions of government established under the Constitution are undermined, the fabric of our society comes under threat.³⁶⁶

³⁶¹ Posner (note 143) 534; Rosenberg (note 192) 23

³⁶² Davis D “To Defer and then when - Administrative Law and Constitutional Democracy” (2006) *Acta Juridica* 40-41

³⁶³ Davis (note 362) 31

³⁶⁴ Davis (note 362) 37

³⁶⁵ *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* 2015 (5) SA 245 (CC) at para 54

³⁶⁶ *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening)* 2017 (3) SA 335 (CC) at para 14-15 (hereinafter *Black Sash* 1)

Deference has been viewed by the CC not as servility or timidity,³⁶⁷ but as respect. The CC has gone further to note that the respect is not unilateral and requires “reciprocal comity” between the branches.³⁶⁸ When that order is met with non-compliance and wilful disregard, comity collapses.

Further unsettling the traditional theory of deference are two issues which warrant attention: information and urgency. The theory of deference is predicated on administrative actors having the requisite information. These actors are in a better position to make internal enquiries, and pursue internal mechanisms for redress and oversight. The nature of information speaks against judicial involvement. Crucially, to foster transparency and to hold political actors accountable *in the appropriate forum*, access to information is needed by affected stakeholders. Political actors cannot be held accountable through extra-judicial or internal review mechanism where access to information is obstructed. To this point, Klaaren notes the close connection the Promotion of Access to Information Act (PAIA) has with administrative justice and identifies a lack of compliance with the Act.³⁶⁹ In 2016, the Supreme Court of Appeal (SCA) observed in *Nova Property Group* that, running counter to its objective, “the procedures of PAIA can readily be used as an instrument to frustrate and delay access to records.”³⁷⁰

In *Van Niekerk v Pretoria City Council*, it was held that:

[p]ublic authorities are no longer permitted to “play possum” with members of the public where the rights of the latter are at stake. Discovery procedures and common-law claims of privilege do not entitle them to roll over and play dead when a right is at issue and a claim for information is consequently made. The purpose of the Constitution, as manifested in s 23, is to subordinate the organs of State... to a new regimen of openness and fair dealing with the public.³⁷¹

³⁶⁷ *Bato Star* (note 356) at para 46-47

³⁶⁸ *Black Sash 1* (note 366) at para 13: “Until the forced reply to this Court’s directions there has certainly been no reciprocal comity from the Minister and SASSA in respect of the remedial order and withdrawal of the supervisory order, towards the judicial branch of government.”

³⁶⁹ Klaaren J “Three waves of administrative justice in South Africa” (2006) *Acta Juridica* 370-371

³⁷⁰ *Nova Property Group Holdings v Cobbett* 2016 (4) SA 317 (SCA)

³⁷¹ *Van Niekerk v Pretoria City Council* 1997 (3) SA 839 (T) (850A-C)

The lack of transparency is greatly inhibitory for non-judicial administrative avenues of resolution. To obtain access to information the court has to be approached to compel discovery and order the record of proceedings be made available. This judicial action is particularly necessary where information has been deliberately withheld. Where information is obstructed, the court is turned to to force an unobstructed flow of information.

In this space, the applicability of section 7(2)(a) of the PAJA could be raised that outlines the duty to exhaust internal remedies before resorting to judicial action. In *Koyabe v Minister of Home Affairs*³⁷², the CC however relied on sec 7(2)(c) of the PAJA in its articulation that where an internal remedy is ineffective or inadequate, or where reasonable steps taken for redress by an aggrieved party have been frustrated, the aggrieved party does not have to first exhaust internal mechanisms and may be justified in bypassing these mechanisms. The *Koyabe* exception is pertinent when parties have been hindered by delays, lack of information, or when reasons for decisions have not been made available so as to inhibit the party's ability to draft an appeal.³⁷³ The Court must, in these instances, allow parties to approach it for redress, contributing to the judicialisation of administrative actions in areas of institutional functioning.

Further enabling a steady flow of cases to the CC, are matters of urgency. Institutional issues may be of such a pressing nature that it forces the court to engage. When the legitimacy of such involvement is considered, the "urgency of the matter" and need to prevent suffering caused by "unjustifiable prejudice"³⁷⁴ weighs in favour of a court's involvement. This remains true for instances where deference would ordinarily dictate that the more prudent course would be a progression through administrative or legislative channels.

The Chief Justice has voiced his displeasure about urgency being used to displace the political with legal redress and force the court's hand when he stated in his dissent in *EFF 2*:

³⁷² *Koyabe v Minister of Home Affairs* 2010 4 SA 327 (CC)

³⁷³ See *Helen Suzman Foundation* (note 19) at para 27 where the CC ruled that the record of deliberations of a decision making body forms part of the record sought under Rule 53 Uniform Rules of Court.

³⁷⁴ *Trencon* (note 365) at para 25

Courts ought to frown upon rather than encourage that posture – a disregard for existing mechanisms and self-dislodgment from structures established to address concerns, instead of seeking ‘urgent’ help from Courts.³⁷⁵

The prejudice that these events can cause if not dealt with timeously makes ceding to the correct avenue difficult. Adhering to the principle of prematurity also becomes untenable if clearly inevitable harm is to be avoided. The principle of prematurity is a potential gate-keeping device to stop the court adjudicating matters. Prematurity prevented the CC from ruling on the creation of the Hawks in *Glenister 1* as the law that would create the Hawks were still in Bill form. The CC stated that “as the general proposition, legislative and comparable processes must be left to run their normal course before courts intervene.”³⁷⁶ While accepting prematurity as settled practice, the CC has held that in exceptional circumstances it would not be bound to this position. The case of *Law Society of South Africa and Others v President* leaned toward judicial intervention

where immediate intervention is called for in order to prevent the violation of the Constitution and the rule of law, courts will intervene and grant immediate relief. But intervention will occur in exceptional cases, such as where an aggrieved person cannot be afforded substantial relief once the process is completed because the underlying conduct would have achieved its object.³⁷⁷

This case sought to have President Zuma’s signing of the Southern African Development Community (SADC) Protocol 14 ruled invalid. Ordinarily, the Protocol would have had to be ratified by Parliament and as such a challenge to the President’s signing at this stage would be premature. Until Parliament assented to the Bill, the “Court lacks the competence to

³⁷⁵ *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* 2018 (2) SA 571 (CC) at para 275 Mogoeng CJ dissenting (hereinafter *EFF 2*)

³⁷⁶ *Law Society of South Africa and Others v President of the Republic of South Africa and Others* 2019 (3) SA 30 (CC) (hereinafter *Law Society*) at para 23

³⁷⁷ *Ibid* para 21-29 referencing with agreement the courts previous position in *Doctors for Life* (note 356) at para 69; see also comparatively U.K case of *Miller, R (on the application of) v The Prime Minister* [2019] UKSC 41 at para 33: “The Prime Minister’s accountability to Parliament does not in itself justify the conclusion that the courts have no legitimate role to play...Indeed if Parliament were to be prorogued with immediate effect, there would be no possibility of the Prime Minister being held accountable by Parliament until after a new session of Parliament had commenced, *by which time the government’s purpose in having Parliament prorogued might have been accomplished.*” (emphasis added).

grant any relief relating to its constitutionality.”³⁷⁸ However, the CC deemed the signature by the President to be a violation of the Constitution and the rule of law. It therefore ruled that it would not wait for the passage of the Protocol through Parliament before intervening.

Alternatively, the urgency and importance of a matter may prevent the Court from intervening. When a case has serious public interest implications, the Court may be forced to condone non-compliance and allow a *de facto* continuation of illegal practices in the institutional space. Such was the case in *Aurobindo Pharma (Pty) Ltd v The Chairperson, State Tender Board*³⁷⁹ concerning a review of the procurement process for a tender for the supply of antiretroviral drugs. Due to the importance of the services provided by the procurement contract, the High Court ruled that interdictory relief, in effect stalling the services and preventing the distribution of ARVs, could not be granted.

The Court has, however, not tolerated matters of self-created urgency. In the case of *Actaris*³⁸⁰, involving a disputed procurement contract, the respondent’s obstructionist tactics caused extensive delays. By the time the applicants had the required information to lodge an appeal, the respondent averred that the contract in issue was over half way completed and it would be “impractical to stop further implementation of the contract”. The Court noted that this argument could not be condoned where the issue was brought to that point by the respondent’s frustrating and uncooperative strategy of not providing reasons to the applicants. The Court noted that the very existence of the respondent’s tactics and the “veil of secrecy” and recalcitrance surrounding the reasons for the award of the tender should inspire further scrutiny, not remove the issue from scrutiny based on its own delay tactics.³⁸¹

A judicialised climate or the Lawfare era sees a collapse of avoidance strategies where in the interests of justice, matters of public importance, or

³⁷⁸ *Ibid* at para 24

³⁷⁹ *Aurobindo Pharma (Pty) Ltd V The Chairperson, State Tender Board* 2010 ZAGPPHC 51 at para 55

³⁸⁰ *Actaris* (note 327)

³⁸¹ *Actaris* (note 327) at para 26

issues of an urgent nature compels a decision by the Court and demands resolution.

3.4.8 Institutional Power Imbalances

Balance between the branches of government requires that the Legislature be the check on the Executive. Parliamentary oversight rests on the supposition that the Legislature is accountable to the South African people. Parliamentarians have a duty to serve the public good, and are thus obligated to elevate constitutional values above party loyalty. To fulfil this obligation, members of Parliament must have free exercise of will, free from influence, intimidation and coercion.³⁸²

In *EFF 1 v Speaker of the National Assembly*, the CC captured the ideal functioning and interaction between the National Assembly and the Executive when it articulated that:

The National Assembly, and by extension Parliament, is the embodiment of the centuries-old dreams and legitimate aspirations of all our people. It is the voice of all South Africans, especially the poor, the voiceless and the least-remembered. It is the watchdog of State resources, the enforcer of fiscal discipline and cost-effectiveness for the common good of all our people. It also bears the responsibility to play an oversight role over the Executive and State organs and ensure that constitutional and statutory obligations are properly executed. For this reason, it fulfils a pre-eminently unique role of holding the Executive accountable for the fulfilment of the promises made.³⁸³

The party structure in South Africa has, however, led to the Legislature taking its lead from the Executive.³⁸⁴ This is coupled with what Deputy Chief Justice Moseneke observes as the “remarkable concentration of the

³⁸² See generally *United Democratic Movement v Speaker of the National Assembly and Others* 2017 (5) SA 300 (CC) (hereinafter *United Democratic Movement v Speaker*)

³⁸³ *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) at para 22 (hereinafter *EFF 1*)

³⁸⁴ See *First Certification Judgment* (note 29) at para 106, 186; Bogaards (note 38) 33; Hoexter (note 41) 203: “The most representative organ of State has effectively become the least power branch of government”. See Sarkin J “South Africa’s (past present and future) relationship to the International Criminal Court and international criminal justice” in Lettinga D and van Troost L (eds) *Shifting Power and Human Rights Diplomacy: South Africa* (2016) Amnesty International Netherlands 84

President's powers of appointment" – appointments that are crucial to the institutions and agencies supportive of democratic functioning.³⁸⁵

In terms of institutional design of the co-equal branches of government, and the institutional relationship of checks and balances between these branches, it is clear that there is no balance. This imbalance has resulted in the judicialisation of matters ordinarily falling within the parliamentary remit. Due to legislative servility to President and party, the judicial branch has to fill the accountability vacuum in order to restore some balance. Davis observes of the increasing amount of cases before the Court that

implicit in all of these legal challenges has been the failure of the legislature to render accountable the executive in a fashion which is congruent with a doctrine of separation of powers.³⁸⁶

There is increasingly a resort to the CC to determine parliamentary mechanisms and procedure. *EFF 2* sought constitutional clarity on the procedure for the removal of a sitting president. In dissent, Mogoeng CJ, , endeavoured to admonish such a tactic by opposition parties, taking the view that parliamentary mechanisms are already in place, of which minority parties are "an integral and essential part of its functionality."³⁸⁷

The prevailing institutional balance does not support the Chief Justices stance. Accountability mechanisms being redirected to the Court signals that minority parties do not feel that they are an essential part of Parliament. This is supported by the 2017 CC case on whether a secret ballot could be allowed as a parliamentary mechanism involved a

deep-seated concern about just how effective Parliament's constitutionally-prescribed accountability-enforcing mechanisms are. Do they ensure that there is enforcement of consequences for failure

³⁸⁵ Moseneke D "Keynote Address – Reflections of South African Constitutional Democracy – Transition and transformation" (2014) *Mistra-Tmali Unisa Conference 20 Years of South African Democracy: So where to now?* The University of South Africa 16-18

³⁸⁶ Davis D "Separation of powers: juristocracy or democracy?" (2016) 133 *SALJ* 268-269; Booysen S *Dominance and Decline: The ANC in the time of Zuma* (2015) Wits University Press, Johannesburg 303: "The ANC majorities in the legislatures are subjugated to the executive, making a mockery of constituency and citizen representation. The president is 'king' and accountability is a foreign concept except at the nominal event level, and to a controlled extent within the ANC itself."

³⁸⁷ *EFF 2* (note 375) at para 274

to honour core constitutional obligations or is it easy to escape consequences by reason of the inefficacy of mechanisms?³⁸⁸

Further contributing to this accountability vacuum is the calculated emasculation of the operational capacity of Chapter 9 institutions. These institutions should ideally be operating as non-judicial mechanisms for oversight, anti-corruption and discipline. The most significant example is the Public Protector's (PP) finding against President Zuma. Upon the release of those findings, the ruling party sought to denude the powers of the office of the PP by taking the view that the powers of the PP are not remedial, merely recommendations to Parliament.³⁸⁹ Chapter 8 is dedicated to the vast, and wicked, implications of this judgment.

In the absence of political will to be bound by and duly enforce remedial action, horizontal accountability mechanisms are unable to play an effective role. A perception of the toothless nature of these oversight institutions forms. This subsequent lack of faith in these institutional mechanisms means that parties favour the judicial avenue.

South Africa is not alone in this imbalance. But unlike South Africa, institutional imbalance in the US and the UK emerges not from the legislature being subsumed by the executive but from an executive and legislative branch at logger-heads. Prevalent in Trump's US, there is the denigration of checks and balances between co-equal branches of government. Congressional subpoenas are ignored by the administration and orders for witnesses to appear before House Committees are blatantly disregarded. Further, information to which House Committees are lawfully entitled is not handed over by various government departments. Here both sides invoke the law in this battle. The judiciary is resorted to in order to define the contours of the executive privilege for those refusing to co-operate with Congress. It is

³⁸⁸ *United Democratic Movement v Speaker* (note 382) at para 12. Importantly, this case was decided unanimously.

³⁸⁹ Chapter 8 of this research is devoted to discussing the Public Protector in greater depth.

also resorted to by those wanting the court to compel the release of information.³⁹⁰

In the United Kingdom, Prime Minister Boris Johnson's controversial prorogation of Parliament meant that the judicial avenue was the only avenue that remained to contest his actions.

More closely aligned with the power dynamics between the executive and legislative branch in South Africa, India has faced a similar history where Indira Gandhi's dominance "led the executive branch to dominate the parliament to such a degree, that the parliament virtually lost its own self-identity."³⁹¹

With the legislative branch and the executive being *de facto* conflated as one, there is no balance and the Court has to step in as the primary accountability mechanism. Therefore it can be argued that judicialisation occurs both where there is too much of a divide or not enough of a divide between the branches.

3.4.9 Acquiescence to Judicial Power

Judicialisation of politics is further manifested, not through legislative incompetence or deliberate inaction, but through political acquiescence.³⁹² Hirschl has dubbed such acquiescence "judicialisation from the side".³⁹³ The legislative branch is more receptive to judicial assertiveness when it can be directed towards upholding legislative policies and bestowing some credibility on those policies.³⁹⁴ In this sense, the political is tapping into the 'legitimacy-conferring' ability of a strong judiciary. Judicialisation from the side provides

³⁹⁰ *U.S. Department of Justice v. Committee on the Judiciary, U.S. House of Representatives* 19A1035 U.S (2020)

³⁹¹ Randhawa (note 110) 12

³⁹² Hirschl (note 12) 257, 262, Notes "Judicial Intervention and Organisation Theory: Changing bureaucratic behaviour and policy" (1980) *Yale L.J* 517

³⁹³ Hirschl (note 12) 270; Graber M "The non-majoritarian difficulty: legislative deference to the judiciary" (1993) 7 *Studies in American Political Development* 36-37; Tate (note 354) 32

³⁹⁴ Stephenson (note 116) 62

the starkest connection between the judicialisation of politics and judicial legitimacy explored in this research.

In states where there is frequent turnover in ideologically differing governments, there is an increase in issues being driven to the court. In these political transitions, the value of the judiciary becomes heightened. The once ruling party, now in opposition, may embrace the judiciary as a means to challenge the programmes of the newly elected government. Moreover, the outgoing party may try to pack the court and entrench its ideological positions before it leaves power. For the party newly in power, the judiciary can be used to legitimise its policies.³⁹⁵ Institutional legitimacy is not endangered through this type of judicialisation from the side as involvement in the 'political' is indeed welcomed, with the legitimacy-conferring ability of the court being a crucial aspect of receptivity.

Comparatively, the legitimacy-conferring value of a strong judicial branch was identified and embraced as a strategy by President Mubarak when he ascended to power in Egypt. He bolstered his own legitimacy and strengthened his political power by strengthening the courts and the rule of law. This allowed him to paint any actions undertaken during his presidency as in line with the rule of law. It must be noted however that while he did not attack the judiciary head on, he did use the appointment process to install judicial loyalists.³⁹⁶

Acquiescence to having issues dealt with judicially can be found where the courts can be a "political scout...venturing into the political riddled with political risk, blazing a trail politicians could follow."³⁹⁷ Additionally, governmental powers may be attracted to the use of judicial review as an absolving force, particularly in 'damned-if-you-do-damned-if-you-don't' politically controversial matters. Having a court deal with the matter, allows the political actor to maintain his disagreement with the court's decision on a

³⁹⁵ Graber (note 393) 39, Geyh C *Courting Peril: The Political Transformation of the American Judiciary* (2016) Oxford University Press, New York 24

³⁹⁶ Hamed M "The politics of judicial selection in Egypt" in Malleson K & Russel P (eds) *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (2006) University of Toronto Press, Toronto 261, 270

³⁹⁷ Kapiszewski et al (note 191) 14

controversial matter and sympathise with the members of the public who also disagree. At the same time, by asserting that judicial independence must be respected, the political role player is freed from further responsibility.³⁹⁸ A case in point is the CC's finding in *Treatment Action Campaign* against President Mbeki and his government's HIV/Aids denialism, where Roux observes that

...a principled decision in favour of TAC was President Mbeki's best hope at political salvation. Completely isolated, both domestically and internationally, Mbeki's only chance of saving face lay in the issue of a court order that would force him to do what he was in any case politically compelled to do.³⁹⁹

The *Treatment Action Campaign* case challenged the reasonableness of government's policy not to make the drug Nevirapine readily and widely available to pregnant mothers to prevent the transmission of HIV from mother to child. The Court ordered that the government must, within its resources, adopt a comprehensive and co-ordinated programme. The CC ruled unanimously that the government must remove its restrictions on access to nevirapine and must permit and facilitate use of nevirapine at hospitals and clinics where medically indicated.⁴⁰⁰

Shifting controversial issues onto the court to decide on a divisive issue, the responsibility has to be borne by the court. The potential fall-out from the politically sensitive controversy results in blame being foisted not onto the political role player but onto the court. Chapter 5 will address in greater depth the detrimental implications for judicial legitimacy in times of political controversy.

3.5 Conclusion

Tracing the historical legitimacy of the South African judiciary reveals a duality to Lawfare where Lawfare can either be an "abuse of courts or the last

³⁹⁸ Graber (note 393) 42-43, Posner (note 106) 220: "political hot potatoes" that are shifted to the courts.

³⁹⁹ Roux (note 27) 299

⁴⁰⁰ *Minister of Health and Others v Treatment Action Campaign and Others (no 2)* 2002 (5) SA 721 (CC) (hereinafter *Treatment Action Campaign*) at para 135

line of defence”.⁴⁰¹ Abusive or ‘bad’ Lawfare was utilised by apartheid actors to legitimise oppressive laws. For that strategy to work, however, a commitment to the law had to be present. It is within this commitment that good Lawfare was able to be born – understood as a resort to the court as a last (and only) hope. Both types of Lawfare used the law and the courts as a pathway for politics; with that path being well worn by both the apartheid government and the resistance movement.

The habit of legality which emerged from these Lawfare tactics was able to foster a transition into democracy through a constitutional avenue. This demanded a mega-political role to be played by the newly formed CC. Thus the very architecture of the Constitution and the CC has a deeply ingrained interplay of law and politics. From the perspective of sociological constitutionalism, the duality of Lawfare in South Africa’s jurisprudential history has left a lasting legacy that matters are best solved through legal channels.

The tactic of Lawfare has been identified in this chapter as the use of the judicial route to legitimise and integrate politically motivated objectives, and evade responsibility. This is done by both engaging the court’s jurisdiction and abusing conceptual thresholds of that jurisdiction. Simultaneously, there is judicialisation of politics as appeal to the judiciary to act as a bulwark against political excesses and in response to accountability failures.

This distinction suggests that in the current South African context, ‘Lawfare’ as understood by its original meaning, may be a partial misnomer when appreciating the capacity for Lawfare to be both good and bad. Lawfare can be abusive or accountability ensuring. Care must be taken not to conflate the two as each has vastly different consequences for the assessment of judicial legitimacy.

In an effort to create a distinction between this duality, this thesis will use the term ‘judicialisation’ when denoting efforts to hold political power to account and uphold the rule of law. It will use the term ‘Lawfare’ when

⁴⁰¹ Quintal G “Abuse of courts or the last line of defence?” *Business Live* 12 May 2017 <https://www.businesslive.co.za/bd/opinion/2017-05-12-abuse-of-courts-or-the-last-line-of-defence/> (date accessed 07/10/2019)

denoting bad faith actions by actors engaging the law in an “abusive” or disingenuous manner.

While noting the distinction, the complexity of Lawfare means that the same action before the court can be perceived as both judicialisation and Lawfare – depending on where one stands. The action will be perceived as judicialisation by those who feel that the accountability mechanisms have failed to effectively constrain power in the democratic space. Those who are being held accountable will experience such judicial recourse as Lawfare – a bad faith action that politicises the court and usurps the democratic mandate granted to a political actor in power by disregarding decision-making through more ‘democratic’ processes. Moreover, if the court is able to be effective, a pattern of judicialisation is perpetuated, where the use of law and the judicial system becomes not the last hope but the first resort to fight political battles.⁴⁰²

Throughout this study, a large portion of the case law involves opposition parties bringing review applications of government action. The impression created may suggest that ‘Lawfare’ implies a losing party wishing to circumvent democracy by invoking the judiciary. In such cases, Thomas Jefferson’s words may echo:

The Federalists have retired into the Judiciary as a stronghold...and from that battery all the works of republicanism are to be beaten down and erased.⁴⁰³

However, Lawfare as addressed in the international space may provide guidance as to whether judicial action initiated by an opposition party can be seen as engaging in Lawfare. Bartman notes that the timing of the legal action is necessary in making the distinction:

⁴⁰² O'Brien (note 319) 44; Ferejohn (note 353) 63-64; Harper P “Lawfare puts ANC elective at risk” *Mail & Guardian* 6 October 2017 <https://mg.co.za/article/2017-10-06-00-lawfare-puts-anc-elective-at-risk> (date accessed 09/03/2020); Serjeant at the Bar “Pace of lawfare will pick up in the year ahead” *Mail & Guardian* 6 January 2017 <https://mg.co.za/article/2017-01-06-00-pace-of-lawfare-will-pick-up-in-the-year-ahead> (date accessed 09/03/2020)

⁴⁰³ Friedman B *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (2009) Farrar, Straus and Giroux, New York 50

The key to lawfare is its use in a manipulative or exploitative fashion. Simply utilizing the international legal system to enforce valid laws would not be considered lawfare for our purposes...making a legal claim, therefore, not manipulating the system, but simply seeking redress for a legal wrong. Motives may be political at the same time however...legitimate use of the international judicial system, and although also served to make a political statement and sway international opinion, they do not reach the level of lawfare. They do not demonstrate the pre-emptive strategic use of international law system but the reactive use after a wrong, which sets them apart.⁴⁰⁴

The CC being shown to be a supra-political institution mitigates legitimacy concerns by highlighting the political role the Court. The CC's expanded review power and the justiciability of political action is in line with its institutional role and function. What does aggravate legitimacy concerns, however, is the issue of the path dependency that ripples through the democratic system. While most of the causes of judicialisation of politics traced in this chapter cannot be seen as 'abusive', Lawfare however still poses a danger to the legal system. The implications of the judicialisation of the politics unfold in a way that can result in illegitimacy - even when the Court is operating in line with its role and function. It is these consequences to which the next chapter turns.

⁴⁰⁴ Bartman C *Lawfare: Use of the Definition of Aggressive War by the Soviet and Russian Federation Governments* (2010) Cambridge Scholars Publishing, United Kingdom 5-6

CHAPTER 4

CONSEQUENCES OF JUDICIALISATION

4.1 Introduction

An expansive judicial role leads to the perception that the court is overreaching and intruding into areas that are political – counter to more normative based scholarship that would see the judicial role as insulated from the political. The Constitutional Court (CC) has previously shown deference to more policy-centric and socio-economic issues. The last decade has seen a shift to the CC showing greater scrutiny of legislative and executive action, despite falling into socio-economic parameters. It is, however, precisely because of the extensive socio-economic consequences that the judiciary is compelled to intervene.

Judicial recourse has also been sought in questions of parliamentary procedures, with the CC ruling on motions of no confidence in the President, the powers of the Speaker and secret ballots. This has led to vocal accusations over the last decade that the Court is intruding into the political, re-igniting discussions of the separation of powers doctrine.

This chapter provides a detailed overview of party political aggression towards the CC. It highlights a breakdown in the relationship between the judiciary and the ruling party. In tracing the consequences of the judicialisation of politics, it notes the potential for adverse consequences for the CC. This argument is supported by discussing four CC cases involving actions that have threatened the legitimacy and independence of the judiciary and the broader justice system. It forecasts the potential for a backlash against the Court as a politically dominant party in an antagonistic relationship can easily implement measures that threaten the independence of the Court.

In sketching a broad overview of increasing instances of impunified disregard for the law and non-compliance with court orders by those in political power, this chapter stresses the erosion of a rule of law culture in South Africa. The implications for constitutional stability and judicial authority are underscored.

4.2 *Political Attack*

The prevailing trend toward judicialisation in the South African judicial-political landscape is caused primarily by democratic failures and institutional shortcomings. As a result, the judiciary, in most cases, is placed in direct conflict with political power. Within this conflict, the legitimacy of judicial review and the constitutional project is raised within the long-debated and paradoxical tension of constitutionalism and democracy. The “more [an] autonomous and powerful judiciary weighs into issues that divide and agitate the demos, it is more exposed to the rough and tumble of democratic politics,”⁴⁰⁵ and the more it is exposed to political attack.⁴⁰⁶

The judicialisation of politics invariably leads to the politicisation of adjudication where focus is deflected onto the judges and the Court’s role. The judiciary is accused of “government by the judiciary,”⁴⁰⁷ of being an “imperial judiciary.”⁴⁰⁸ Political actors note the “tyrannical powers of judges,”⁴⁰⁹ accusing the Court of judicial overreach and being overly interventionist. There is concrete evidence of the rhetoric of political attack in South Africa, where the highest levels of African National Congress (ANC) leadership have accused the Court of being obstructionist to transformation, overly intrusive, and counter-revolutionary.⁴¹⁰

⁴⁰⁵ Russell (note 124) 317

⁴⁰⁶ Kawadza H “Attacks on the judiciary: Undercurrents of a political versus legal constitutionalism dilemma?” (2018) 21 *PELJ* 1

⁴⁰⁷ Tate & Vallinder (note 13) 24

⁴⁰⁸ See O’Brien (note 319) 1

⁴⁰⁹ Tiefenbrun (note 16) 58

⁴¹⁰ Mkhabela M “ANC’s Mantashe lambasts Judges” *Sowetan Live* 18 August 2011 <http://www.sowetanlive.co.za/news/2011/08/18/full-interview-ancs-mantashe-lambasts-judges> (date accessed – 22/06/2015); Retief H “Newsmaker- Revolution, nostalgia rule Gwede Mantashe” *News 24* 28 June 2015 <http://www.news24.com/SouthAfrica/News/Newsmaker-Revolution-nostalgia-rule-Gwede->

A few of these accusations are captured below, and, when taken together, reveal how the ANC is moulding its narrative of political attack on the judiciary:

- *“The day the judiciary tries to substitute itself into the principle of ‘the people shall govern’, it runs the risk of losing the respect of the people... [there is] no democratic order in some kind of country that is subjected to a judicial dictatorship. There is a co-ordinated liberal offensive ...by people who do not have power to seek to challenge almost any decision by the president and the executive...”*⁴¹¹ Higher Education Minister Blade Nzimande, 2011, in response to the CC setting aside the appointment by President Zuma of Mr Simelane to National Director of Public Prosecutions.
- *“The powers conferred on the Courts cannot be regarded as superior to the powers resulting from a mandate given by the people in a popular vote”*⁴¹² President Zuma, 2011
- *“There is a drive in sections of the judiciary to create chaos for governance; that’s our view...”* ANC Secretary General Gwede Mantashe, 2015⁴¹³
- *“Sections of the judiciary tend to somehow overreach into areas that one would expect even in a constitutional state to tread very, very carefully... if we don’t debate this, we run the risk of Parliamentary matters and executive matters being run by the courts.”*⁴¹⁴ Higher Education Minister Blade Nzimande, 2015

Mantashe-20150628. John V “Chief Justice hammers gratuitous criticism” *Mail & Guardian* 8 July 2015 <http://mg.co.za/article/2015-07-08-chief-justice-hammers-gratuitous-criticism> (date accessed 09/07/2015); “Zuma: I strongly believe in an interdependent judiciary” *News 24* <http://www.news24.com/SouthAfrica/News/Zuma-I-strongly-believe-in-independent-judiciary-20150709> (date accessed – 09/07/2015).

⁴¹¹ Du Plessis C “Nzimande slams judicial dictatorship” *News24* (originally for *City Press*) 17 December 2011 <https://www.news24.com/SouthAfrica/Politics/Nzimande-slams-judicial-dictatorship-20111217-2> (date accessed 20/06/2019); Molele C “ANC sets sights on Judiciary” *Mail & Guardian* 17 February 2012 <https://mg.co.za/article/2012-02-17-anc-sets-its-sights-on-the-judiciary>. (date accessed 12/04/2019); “President Zuma Keynote Address to Access to Justice conference” *Constitutionally Speaking* 8 July 2011 <https://constitutionallyspeaking.co.za/president-zumas-keynote-address-to-access-to-justice-conference/> (date accessed 25/07/2019)

⁴¹² Hartley W “Executive superior to Courts, says Zuma” *Business Day* 2 November 2011

⁴¹³ Comrie S “Gwede Mantashe singles out problematic courts” *News24* (originally to *City Press*) 22 June 2015 <http://www.news24.com/SouthAfrica/News/Gwede-Mantashe-singles-out-problematic-courts20150622> (date accessed - 23/06/2015)

⁴¹⁴ Nhlabathi H “Blade Nzimande: We are not attacking the judiciary, we are debating” *News 24* (originally to *City Press*) 8 July 2015 <https://www.news24.com/SouthAfrica/News/Blade-Nzimande-We-are-not-attacking-the-judiciary-we-are-debating-20150708> (date accessed 02/09/2019); Du Plessis C, Tau P & Makinana A “ANC tells judges to back off” *News24* 21 June 2015 <http://www.news24.com/SouthAfrica/News/ANC-tells-judges-to-back-off-20150621> (date accessed - 09/07/2015)

These publicised comments by government and high-ranking members of the ruling party subscribe to a distinctly counter-majoritarian approach. The idea of the counter-majoritarian dilemma has been cast merely as an “academic obsession”⁴¹⁵ by American scholars when writing in the context of well-entrenched and secure institutions. The comments by ANC leadership over the past decade suggest that the tension between majoritarian conceptions of democracy and judicial review must be re-examined in the prevailing South African context. It is clear that the support provided to the judiciary by ANC leadership of days past is diminishing. The political support that allowed the young CC to take a bold and principled stance in the face of unpopular public opinion, as it did in *S v Makwanyane*,⁴¹⁶ is no longer. There is now “fading of the fellowship” between the ruling party and the judiciary.⁴¹⁷

To address the “repeated and unfounded criticism from government”, a meeting took place between Mogoeng CJ, a judicial delegation, the President, Deputy President and various cabinet ministers.⁴¹⁸ The meeting was at the Chief Justice’s request, and came on the heels of the Government’s non-compliance with the High Court order to arrest Sudanese President Al Bashir. Mogoeng viewed the meeting as a way to assure the public that the judiciary will not capitulate in the face of the criticisms levelled against it. He re-iterated the critical role of the rule of law, the impartiality of the Court and noted that the judiciary will not be swayed from its constitutional mandate.

This meeting had dual consequences. On the one hand, it sought to mend the fractious relationship between the judicial branch and the government. In this sense, the meeting could be seen as the judiciary taking a political stand on attacks against its independence. But on the other hand, meetings with the government do little to cultivate a *perception* of judicial independence. Le

⁴¹⁵ Friedman B “The birth of an academic obsession: The history of the counter-majoritarian difficulty, part five” (2002) 112 *Yale L.J* 159

⁴¹⁶ *S v Makwanyane* (note 33)

⁴¹⁷ Ellmann S “The struggle for the rule of law in South Africa” (2016) *N.Y.U. L. Rev.* 85

⁴¹⁸ “Zuma in high-level meeting with SA’s top judges” *The Citizen* 27 August 2015 <https://citizen.co.za/news/south-africa/655996/zuma-in-high-level-meeting-with-sas-top-judges/> (date accessed 4/08/2019)

Roux & Davis echo the concern raised by former Constitutional Court Justice Yacoob that

structured conversation between the judiciary and the executive is not always understood by the executive or the legislature as anything more than an opportunity for warning shots to be fired in the direction of the judicial institution.⁴¹⁹

4.2.1 Separation of Powers, Relationships and Conversations

The more the judiciary is involved in ‘political’ issues, the more the perception of its expansive role raises questions of judicial aggrandisement.⁴²⁰ Accusations of intrusion into the domain of other branches have reignited a discussion in South African scholarship about the separation of powers.⁴²¹

The Constitutional Court (CC) has purposely avoided developing a rigid separation of powers framework in its jurisprudence. The general workings of the doctrine have been implemented on a case-by-case basis, showing sensitivity to contextual realities. The Constitution is supreme. On the understanding that “the exercise of all public power is subject to constitutional control,”⁴²² areas of non-justiciability and the political question doctrine are not present in South African Constitutional law. These aspects cannot, therefore, be drawn on to help determine the boundaries between the branches.

The South African judiciary is obliged to assess whether State action towards the progressive realisation of socio-economic rights is reasonable, thus there is an unavoidable intrusion into other branches of government.⁴²³ The challenge for the Court is to appreciate these positive obligations that

⁴¹⁹ le Roux & Davis (note 78) 260

⁴²⁰ Strauss P “Formal and functional approaches to the separation of powers: a foolish inconsistency” (1987) *Cornell Law Review* 518

⁴²¹ Klug H “Institutional integrity and the promise of constitutionalism: Justice Moseneke, judicial authority and the separation of powers” (2017) *Acta* 11; Cachalia F “Separation of powers, active liberty and the allocation of public resources: the e-tolling case” (2015) 132 *SALJ* 300; Mhango M “Is it time for a coherent Political Question Doctrine in South Africa: lessons from the United States” (2014) 7 *Afr. J. Leg. Stud.* 457; Ellmann (note 417) 95

⁴²² *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC) at para 48 (hereinafter *Affordable Medicines*)

⁴²³ Davis (note 386) 262-264

would require judicial engagement, while simultaneously acknowledging the need for judicial detachment, where the issue is policy-laden and polycentric. The prevailing jurisprudential position is that the Court should not inhibit the Executive from instituting policy initiatives; neither should it comment on the wisdom nor merits of the policy choice. The CC has articulated that:

As a young democracy facing immense challenges of transformation; we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly.⁴²⁴

Judicial involvement is legitimate when considering the reasonableness of the policy initiative once undertaken; determining whether any rights have the potential to be inhibited by the policy; ensuring adequate opportunity for public participation in the formulation of the policy; and holding the State to public promises and legitimate expectations when there has been reliance on such actions. The CC has held that the checks and balances that are a corollary of the separation of powers doctrine do indeed require a “necessary and unavoidable intrusion”.⁴²⁵

A deeper appraisal of separation of powers suggests that the doctrine should be viewed not as intrusion but as interaction.⁴²⁶ Any model of separation of powers requires, at its best, a dialogic relationship.⁴²⁷ Thus the understanding of the separation of powers in operation is best captured by Martha Minow:

⁴²⁴ *Premier, Province of Mpumalanga v Executive Committee Association of Governing Bodies of State Aided Schools: Eastern Transvaal* 1999 (2) SA 91 (CC) at para 41; A counter to this position that deference must be shown so as to not arrest the functioning and ability of the administrative role suggests that judicial oversight can hold the administration to constitutional parameters, and in so doing, facilitates *greater* administrative functioning. See Corder H “Without deference, with respect: a response to Justice O’Regan (2004) 121 SALJ 440

⁴²⁵ *S v Dodo* 2001 (3) SA 382 (CC) at para 16

⁴²⁶ An example of this interaction can be found in Justice Ginsburg’s dissenting opinion *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) in which the majority opinion of the SCOTUS found against redress for gendered pay discrimination based on a procedurally conservative reading of a delay bar provision. Ginsburg ended her dissent with the following entreat to the other co-equal branches of government: “This is not the first time the Court has ordered a cramped interpretation of Title VII, incompatible with the statute’s broad remedial purpose...Once again, the ball is in Congress’ court. As in 1991, the Legislature may act to correct this Court’s parsimonious reading of Title VII.” Ginsburg’s plea was heard and was corrected through legislative enactment of the *Lilly Ledbetter Fair Pay Act* of 2009.

⁴²⁷ Wisotsky (note 73) 197; *S v Mhlungu and Others* 1995 (3) SA 867 (CC) at para 129 (hereinafter *S v Mhlungu*)

[t]hat *boundaries depend on relationships*...According to this view, boundaries for organs of government are not intrinsic or predetermined but are constructed through a continual process of interaction, conflict and temporary resolution...Legitimacy of judicial conduct depends largely on the responsiveness of the other branches. Questions of separation of powers concern not so much whether one branch has invaded the prerogatives of another as whether the branches all remain able to participate in the process of mutually defining their boundaries.⁴²⁸

In cases that touch on separation of powers issues, the CC's approach has been to allow the executive or legislative branches a chance to correct the defect through suspending the declaration of invalidity and / or not to be overly prescriptive in a remedy. The Court can, for instance in matters of parliamentary procedure, rule that impugned parliamentary procedure is invalid. It can, nevertheless, rule that it is not Court's responsibility but the responsibility of Parliament to reformulate the procedure in a way that is constitutionally consistent. Where the Legislature or Executive remains able to participate, argues Ngcobo, "any concern about the legitimacy of judicial review is greatly diminished."⁴²⁹ Admittedly, the way the Court crafts the judgment can strongly direct how the procedure to be followed by Parliament is framed.⁴³⁰

In areas of technology and science, the complexity of these issues brings unknown implications. The line of evolving growth cannot be predicted. It is in these areas where democratic experimentalism is particularly necessary. Here the impulse to judicial decision resting on doctrinal absolutism is inimical to the incrementalism required when dealing with such complexity. In this regard, the court should be careful not to craft an order that terminates the interaction and conversation between the branches, and ends the ability for democratic experimentalism.

⁴²⁸ Minow M *Making All The Difference: Inclusion, Exclusion and American Law* (1990) Cornell University Press, Ithaca 359,362 (emphasis added); Strauss (note 420) 518: "In such a case, the functional question would remain – namely, has so much been taken from the functioning of Actor X to impair its core function?...so long as conventional lines of control running to each of the named heads of government are present...the issue of aggrandizement simply disappears."

⁴²⁹ Ngcobo S "South Africa's transformative Constitution: towards an appropriate doctrine of separation of powers" (2011) 22 *Stell. L. Rev.* 41-42

⁴³⁰ *United Democratic Movement v Speaker* (note 382) at para 94

What has been outlined above is a theoretical exposition of the separation of powers and the ideal interaction between the branches within a system of checks and balances. The separation of powers doctrine must now be subjected to the actual conditions pervading the South African landscape and interrogated in light of the trend of the judicialisation of politics.⁴³¹

Cachalia observes that the

South African judiciary is merely in the vanguard of a global trend which demands a re-evaluation of traditional conceptions of separation of powers between the legislature and the judiciary.⁴³²

When is judicial intervention appropriate and legitimate and when does it amount to intrusive activism beyond the judiciary's legitimate bounds? In constructing a normative separation of powers framework that would offer this guidance, two lines of thought emerge.⁴³³ The first is a model of separation of powers that is flexible and responsive, ordered around the principle of legality, ensuring accountability and preventing abuses of power.⁴³⁴ The second sees "calls for a more categorical understanding of the separation of powers."⁴³⁵

Resting on the principle of self-determination that he argues forms part of the Constitution's normative framework, Cachalia advocates democratic accountability and the resolution of issues through the democratic process. Cachalia argues that a separation of powers framework should be one that appreciates "democratic process restraint".⁴³⁶

In contrast, Davis is concerned about orientating the separation of powers around democratic accountability. He argues that this is predicated on the model on foundations that are simply not there in the current climate of

⁴³¹ Klug (note 421) 27

⁴³² Cachalia (note 421) 292

⁴³³ Cachalia (note 421) 285; Davis (note 386) 258; Mhango (note 421) 457

⁴³⁴ Davis (note 386) 260

⁴³⁵ Klug (note 421) 7-8; Mhango (note 421) 457; Seidman (note 137) 461: "The doctrine reflects a profoundly subversive judicial judgment that constitutional adjudication had its limits."

⁴³⁶ Cachalia (note 421) 298-303

democratic deficiencies.⁴³⁷ Moreover, he points to the positive obligations that are placed on the State as a result of transformative constitutionalism and the justiciability of socio-economic concerns. As a result, the contours of the separation of powers must take on a distinctly South Africa model. When Davis' two points are taken together, they underscore a contextual and responsive necessity within the doctrine. This in turn signifies the necessity of fluidity in the boundaries of judicial involvement.

Increasing instances of constitutional review place the courts as an oppositional force and create an antagonistic relationship. Judicial involvement is met with hostility and accusations of overreach, intrusion and breach of the separation of powers. Statutory review, in contrast, is less adversarial – “basing a decision on the grounds not that it is unconstitutional but merely that is unlawful, the court presents itself not as an opponent of the law-making regime, but as its loyal enforcement agent.”⁴³⁸

The CC in *Executive Council, Western Cape Legislature v President of the Republic of South Africa*⁴³⁹ understood this distinction. The Court crafted a judgment that avoided political confrontation by focusing on the legality of delegated powers rather than on a broader constitutional focus of local government powers when it came to municipal boundary demarcations prior to elections – a sticking point that had plagued South African constitutional law since certification.⁴⁴⁰ In this case, despite the CC finding against him, President Mandela's response was crucial:

This judgment is not the first, nor will it be the last, in which the Constitutional Court assists both the government and society to ensure constitutionality and effective governance.⁴⁴¹

Through the Court's strategic approach and Mandela's leadership the relationship between the judiciary and lawmakers was able to be preserved. Emerging from judicialisation of politics, cases are brought to the CC at level

⁴³⁷ Davis (note 386) 269-270: “The legislature does not appear to be able or willing to hold the executive to account and where non-litigious sites for mediation of conflict appear no longer to be present within the South African political reality.”

⁴³⁸ Shapiro (note 174) 391

⁴³⁹ *Executive Council, Western Cape Legislature v President of the Republic of South Africa* 1995 (1) BCLR 1289 (CC)

⁴⁴⁰ *First Certification Judgment* (note 29) at para 482

⁴⁴¹ Klug (note 43) 105-106

of Constitutional review and not statutory review. This is causing confrontation that does not lend itself to the type of leadership required to preserve the comity between the branches.

4.2.2 Backlash, Curtailment and Judicial Retreat

Backlash can be seen as a political attack that works to discredit and undermine the integrity of the judiciary and its independence. In elucidating dangers of the judicialisation of politics, one can look to the lessons offered from Israeli judicial-political dynamics. The expansion of the judicial role in Israel has been painted as something that:

threatens the Israeli public with an unprecedented centralization of power among a handful of like-minded judges. As President Barak himself has written, there is a zone where “the decision is made according to the personal worldview of the judge...” and “his outlook on society, law, judging and life is what directs his path.” Israelis may have good cause for concern in discovering that this subjective zone - and with it the politicization of the court - is likely to grow apace.⁴⁴²

Neuer’s prediction that judicialisation would increase in the years to come proved to be accurate. Backlash against the court quickly followed. In 2018, Israel adopted a new *Basic Law* titled *Israel - The Nation State of the Jewish People*, prompting fears that the new enactment would curtail the Supreme Court’s ability to protect human rights, particularly of minorities. Such a move by the Israeli Parliament came as a reaction to the view that the Israeli Supreme Court was overstepping and not respecting the balance of powers.⁴⁴³ During his tenure, the President of the Supreme Court Aharon Barak read Israel’s *Basic Law of Human Dignity* expansively towards the preservation of human rights and democracy in what was regarded as a constitutional revolution. Opponents of the expanded reading viewed the Court’s judicial override of legislative initiatives as prioritising human rights over Israeli solidarity, causing “social upheaval”. Critics have argued that the

⁴⁴² Neuer (note 102) 41

⁴⁴³ *Basic Law of Israel - The Nation State of the Jewish People* (2018); Bard M “Understanding Israel’s Nation State Law *Jewish Virtual Library* <https://www.jewishvirtuallibrary.org/understanding-israel-s-nation-state-law> (date accessed 26/02/2021)

Court should bend to pressing nationalism, arguing the need for the Court to embrace incrementalism and “gradual change in a polarized society.”⁴⁴⁴

Education Minister Naftali Bennet said that the [New Basic Law] bill is a necessity. ‘Today, with this law, we are telling the Supreme Court that not everything is adjudicable [sic]. In recent years, the Supreme Court has ruled out government actions and laws with too sweeping a hand. The government must govern and the justices have to judge.’⁴⁴⁵

This comparative example shows that political attack can take broadly one of two forms. The first is a narrative that the court is undermining state solidarity, and actively working to obstruct transformation and impeded revolutionary promises. The second targets the individual jurist in the form of claims of unbounded judicial subjectivity, unbridled ideology, and *ad hominem* attacks.⁴⁴⁶

It is important to distinguish backlash that takes the form of political attack on the institution and backlash that takes the form of a societal or populist pushback against a judicial ruling. (Although given African National Congress (ANC) dominance and prevailing loyalty, the political and populist may be one and the same in the South African context. The populist narrative has certainly been invoked by ANC leadership when mounting political attacks against the judiciary.) The distinction is however necessary when related to legitimacy conceptions.

Cultural backlash take the form of a populist uprising against an apex court’s intervention. Characteristic of a wicked problem, the court’s decision may trigger a backsliding to the extent that the very right the court sought to

⁴⁴⁴ Sylvetsky R “Guide to the perplexed Anglo: Israel’s Supreme Court” *Arutz Shiva Israel National News* <http://www.israelnationalnews.com/Articles/Article.aspx/21091> (date accessed 17/04/2019)

⁴⁴⁵ Sones M “Constitutional revolution would limit Supreme Court” *Israel National News* 19 December 2017 <http://www.israelnationalnews.com/News/News.aspx/239538> (date accessed 02/12/2018)

⁴⁴⁶ *President v SARFU* (note 264) at para 68: “There is an unfortunate tendency for decisions of courts with which there is disagreement to be attacked by impugning the integrity of the judges, rather than examining the reasons for the judgment...Political discontent dissatisfaction with the outcome is no justification for recklessly attacking the integrity of judicial officers.”

protect is made vulnerable.⁴⁴⁷ Because of the courts' reputational strength, the rising opposition which existed will be of greater intensity than that which existed in the democratic space, potentially stalling a rights movement and causing regression. As Siegel notes:

...when the country is bitterly divided...legal intervention at that moment might increase balkanization and thwart vindication of the very values that would justify intervention.⁴⁴⁸

However, even in opposition to a court's rulings, the backlash on a particular issue does not in itself lead to illegitimacy if it can be viewed through the lens of democratic engagement. Post and Siegel note the "potentially constructive effects of backlash."⁴⁴⁹

[Courts] have played a crucial role in leading public opinion and encouraging public action towards meeting the challenge and burden as a constitutional - that is, as a moral - obligation. The Court's stand has stimulated men everywhere to take action.⁴⁵⁰

Backlash to judicial decisions can therefore, in some instances, be a catalyst that stokes democratic embers. On the other hand, judicial involvement may result in backlash and a rallying of opposition against the Court and against the right seeking recognition. The reputational strength of the Court can breathe life into a democratic rights movement, and indeed life into its opposition, reigniting conversations and creating a recursive process of democratic constitutionalism. In this regard, there can be a paradoxical connection between democratic legitimacy and backlash against the court.

The duty placed on a constitutional court is not an easy one. "Its course cannot always be tranquil."⁴⁵¹ Despite facing opposition, the court cannot vacillate in response to political pressure. Doing so would diminish its sociological legitimacy. The judicial institution cannot, and should not, be shielded from interrogation and critical reflection. The challenge is to distinguish between judicial criticism that may stoke the democratic embers

⁴⁴⁷ See general argument posited by Post & Siegel (note 35); Waldron (note 119) 1405: "But institutionally, judicial solicitude may make things worse, or at least fail to make them much better".

⁴⁴⁸ Siegel (note 115) 993

⁴⁴⁹ Post & Siegel (note 35) 375

⁴⁵⁰ Rostow (note 171) 208

⁴⁵¹ *Cohens v Virginia* 19 U.S. 264 (1821) 387

of debate and citizen engagement;⁴⁵² and judicial attack, which can delegitimise the judiciary in the eyes of the public. The point of distinction would be whether the court, in light of the stirrings it has created and facing opposition, is “able to sustain itself in the dialogue”.⁴⁵³

The danger is when political attack moves beyond rhetoric and starts to take the form of genuine court-curbing measures; when constitutional confrontation transgresses too far into constitutional crisis. Constitutional crisis is understood as occurring when a system of government, designed so that each branch of government holds the other in check, is unable to provide effective constraint. In crisis, where there was once accountability, the courts can no longer provide a check, political power operates with impunity and court orders are met with disregard and contempt.

It is instructive to look to the American experience in this respect. In 1937, Roosevelt’s backlash against the Supreme Court in the form of court packing measures ultimately did not find support in Congress. Roosevelt’s threat, together with large electoral support for the New Deal agenda, was able to nevertheless lead the Supreme Court of the United States (SCOTUS) to divert from its rigid conceptualist stance of individual liberty that had blocked new deal policies. The Court, as a result of threatened backlash, moved to a more sociological and responsive jurisprudence.⁴⁵⁴

In the 1950’s, the “sweeping, powerful rhetoric” of SCOTUS’s anti-segregationist decision in *Brown* was met with a vitriolic response by broader society. This lack of political support for the decision led the Court to be far more cautious in its subsequent *Brown 2* mandate to the States to deconstruct its segregationist policies.⁴⁵⁵ For years after these landmark rulings, the activism once shown by this era of court reverted to timidity to such a degree that it almost “fell silent.”⁴⁵⁶

⁴⁵² du Bois (note 268) 302

⁴⁵³ Chayes (note 81) 1316

⁴⁵⁴ Burns J *Packing the Court: The Rise of Judicial Power and the Coming Crisis of the Supreme Court* (2010) Penguin Press, New York 8; Whittington K “Partisanship, norms and federal judicial appointments” (2018) 16 *Geo.J. L & Pub. Pol’y* 524

⁴⁵⁵ *Brown v. Board of Education (II)* 349 U.S. 294 (1955)

⁴⁵⁶ See Seidman (note 137) 459

More contemporary comparative forewarning of political conflict, judicial ramification and judicial timidity can be found in Russia. The Russian Constitutional Court's 1993 confrontation with President Yeltsin led to a suspended Court and a new constitution. The new constitution was interpreted by the newly constituted Court in a manner that granted better access and offered better remedies for redress which saw an increase in popular support for the Court. This popular support made Yeltsin more cautious in challenging the Court. Despite this popular support, the Court remained reticent after its fight with Yeltsin. The second era Court focused on safe cases, where it became "too cautious, [showing] too much self-restraint, and tries[d] too hard to abstain from politics."⁴⁵⁷

In the 1952 judgment in *Harris*,⁴⁵⁸ the Appellate Division (AD) set aside the *Separation of Representation of Voters Act*⁴⁵⁹. Not engaging the morality of removing coloured voters from the common voters roll, the AD ruled on procedural grounds that the Act should have been passed with a two-thirds majority, with both houses of Parliament sitting jointly. In reaction, Parliament enacted the *High Court of Parliament Act*,⁴⁶⁰ creating a High Court to sit above the AD and review its decisions, more specifically one decision – the *Harris* decision.

The AD continued to hold the line in *Harris II*,⁴⁶¹ ruling the creation of the High Court of Parliament constitutionally invalid. This led to the National Party adopting the *Appellate Division Quorum Act*⁴⁶² – a court packing measure increasing the Bench from 5 to 11 judges. In addition, Parliament passed the *Senate Act*⁴⁶³ expanding the Senate to achieve the two-thirds majority needed to remove coloured voters the Roll. When the *Senate Act* was challenged in *Collins*,⁴⁶⁴ the AD retreated. After the blatant court packing measures of the *Quorum Act*, Judges Centlivres and Hoexter

⁴⁵⁷ Epstein et al (note 126) 136-137, 154

⁴⁵⁸ *Harris and others v Minister of the Interior and Another* 1952 (2) SA 428 (AD)

⁴⁵⁹ Act 46 of 1951

⁴⁶⁰ Act 35 of 1952

⁴⁶¹ *Harris v Minister of the Interior* (no.2) 1952 (4) SA 769 (AD)

⁴⁶² Act 25 of 1955

⁴⁶³ Act 53 of 1955

⁴⁶⁴ *Collins v Minister of the Interior* (1957) 1 SA 552 (AD) Schreiner JA dissented.

changed their positions from the previous cases, siding with the majority that the *Senate Act*, despite its clear motive of packing the Senate, was valid.⁴⁶⁵ Centlivres, as Chief Justice, took it upon himself to write the judgment.

These events speak *prima facie* to the political calculus and various schemes that can be implemented to override, limit or oust entirely, judicial authority. Tracing these historical and comparative events also speaks to the connection between political attack and judicial self-consciousness. Patterns of fluctuating assertiveness, timidity and strategic retreat are evident, throughout the ages and throughout various justice systems. It emphasises a course-correcting ability of the judiciary. Institutional concerns may compel the Court to bend, so it is not broken. No doubt this was the concern facing Centlivres and Hoexter.

And yet, in this retreat, the court is confronted with a wicked problem. Retreat may in fact be a self-defeating strategy. Acknowledging the dialectical demands of legitimacy, judicial resilience may paradoxically demand assertiveness in withstanding political attack.⁴⁶⁶ Judicialisation of politics heightens this dialectic, as the court is placed in an exposed position, incredibly vulnerable to political attack. But it is a position that it is compelled to take up if it is to be responsive to the calls of institutional and political failings.

4.3 *Dominance and Dysfunction*

What emerges from the above comparative and historical sketch is that in assessing the risks of threats to judicial independence, the court must consider “proximate political dynamics”.⁴⁶⁷ A political attack on a court is most probable when a court finds itself at the dangerous intersection of dominance and the dwindling of that dominance. Dominant political power in decline can result in that dominance being used to weaken democratic

⁴⁶⁵ le Roux & Davis (note 78) 48-62

⁴⁶⁶ Seidman (note 137) 466; Tushnet (note 28) 122-123

⁴⁶⁷ Kapiszewski *et al* (note 191) 400

institutions in efforts to consolidate power.⁴⁶⁸ In addition, dwindling power brings with it the potential to engage in political threats and a resort to populist and divisive rhetoric that threatens minority rights.

When political dominance has been used to abuse and undercut other horizontal accountability mechanisms through recalcitrance and obstruction, the court is leaned on. It is clear from the above chapter that judicialisation of politics is driven by opposition parties and civil society organisations approaching the Constitutional Court (CC) to enforce accountability.

In the eyes of the dominant party, resort to the Court by weaker political parties is not seen as a valid and legitimate avenue of redress but as a political scheme, actions that constitute Lawfare. The party bringing litigation is excoriated for politicisation of the Court. This immediately places the Court in an antagonistic relationship with the politically dominant force.⁴⁶⁹ When this lack of favourability is matched with the potential for political attack that can be more easily facilitated and achieved through that dominance – the court is placed in a precarious position.

Judicialisation of politics causes a dichotomy of obligation and impulse. Facing dominant party aggression – the impulse by a court is to retreat. And yet, the conditions that are causing political aggression compel the court to be resolute. The court must stand its ground and maintain what Hamilton called “an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution.”⁴⁷⁰

Despite this antagonistic relationship, where the reputational strength of the court and faith in the independence of the institution persists, the legal avenue remains valuable. Reputational strength imbues the court with pragmatic legitimacy. Thus, a dominant party while attacking the court, still desires its protection and is still inclined to hide behind judicial processes when it needs to prevent exposure of its corruption and misconduct.

⁴⁶⁸ Issacharoff (note 30) 967; Issacharoff (note 261) 1870.)

⁴⁶⁹ Stephenson (note 116) 73-74

⁴⁷⁰ Hamilton (note 76)

While the ability to confer legitimacy means that the value of the judiciary is appreciated by political role players, it is not, however, a sufficient safeguard but is paradoxically a time of greater precariousness for the judiciary.

There remains value in maintaining the appearance of a constitutional stability. Investor confidence, as well as standing and engagement in the international community, are predicated on a legitimate, constitutionally sound order.⁴⁷¹ In this regard, the connection between democracy and constitutionalism is pronounced, with constitutionalism being used as a barometer for how democratic a nation is.

It may be prudent at this junction to divert slightly in expanding on the relationship between constitutionalism and democracy: Constitutionalism is a set of normative principles from which a more formalist, categorical, written constitution can be structured.⁴⁷² Constitutionalism encompasses a separation of powers, the rule of law, immutability of a bill of rights, an independent judiciary and effective judicial review, exercise of power subject to law, participation, and inclusiveness. Such safeguards ensure commitment from all sides and prevent exercises of abusive power. The power of the majority will be recognised whilst minority protection is ensured and the ability to contest and participate is not inhibited. Constitutionalism thus reduces violence, increases co-operation and prevents tyranny eroding a government of laws and the people's collective determination.⁴⁷³ The existence of a framework that enables the peoples will to be reflected and power constrained, ensures democracy and the ability of the people to retain democracy.⁴⁷⁴

The power of constitutionalism has a legitimating effect on a political order. As Thornhill observes in his study of constitutional sociology:

⁴⁷¹ Landau D "Abusive Constitutionalism" (2013) 47 *U. C. Davis L.Rev* 195-199, 238

⁴⁷² Fusaro C "Constitutionalism in Africa and Constitutional Trends: Brief notes from a European Perspective Federico V & Fusaro C (eds) *Constitutionalism and Democratic Transitions: Lessons from South Africa* (2006) Firenze University Press Italy 15-16

⁴⁷³ Federico V "Democratic Transitions and Constitutional Making Processes: The Role of Constitutionalism as a Mechanism of Building Consensus" in Federico V & Fusaro C (eds) *Constitutionalism and Democratic Transitions: Lessons from South Africa* (2006) Firenze University Press Italy 47-50

⁴⁷⁴ See 3.4.1 above for a more detailed discussion of how a Bill of Rights facilitated the transition to democracy; and below 7.6 judicial review and democratic legitimacy.

The Court created a legitimating framework in which the state could withdraw its power from incessant contest and reflect its authority as secured under formally enacted norms. The construction of the Constitutional Court as a custodian of rights, in short, performed the beneficial function that it enabled the state to presuppose the law as a stable normative condition of its legitimacy, so that express legal support could be invoked to implement contested political rulings.⁴⁷⁵

Therefore, the “threat is not that they will overthrow democracy, but rather that they will bend it to their own concerns,” while possessing at “least a rhetorical commitment to democracy in some form”.⁴⁷⁶ The same stands for the judicial institution – it will be perverted and abused, but not entirely destroyed. Judicial legitimacy means political attacks become subtler, and threats to independence more indirect.⁴⁷⁷ For example, according to Kende the Department of Justice’s 2012 *Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State* is seen as a veiled attempt to undermine judicial independence.⁴⁷⁸

Here focus must shift to broader areas of the justice system and the rule of law – a focus on judicial appointments, tenure, promotion; conduct and procedures of the Judicial Service Commission (JSC); the independence of the National Prosecuting Authority (NPA) and anti-corruption bodies; and the potential for the improper political influence on judges. It is on these supporting structures that judicial independence depends. Political infiltration of their operations will undercut judicial independence and the rule of law.

Case law from the years of 2011 onwards provides a clear index of political threats to judicial independence and the judicial action taken to prevent these political attempts. This thesis will highlight four of these cases: *Corruption Watch NPC and Others v President of the Republic of South*

⁴⁷⁵ Thornhill C A *Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective* (2011) Cambridge University Press, Cambridge 339

⁴⁷⁶ Landau (note 471) 219

⁴⁷⁷ Klug (note 43) 108

⁴⁷⁸ Kende M “Enforcing the South African Constitution: the fight for judicial independence and separation of powers” (2014) 23 *Transnat’l L. & Contemp. Probs.* 43

Africa,⁴⁷⁹ *Justice Alliance of South Africa v President of Republic of South Africa and Others*,⁴⁸⁰ *Freedom Under Law v Acting Chairperson: Judicial Service Commission and Others*⁴⁸¹ and *Glenister v President of South Africa*.⁴⁸² These cases illustrate how the CC has held the line against indirect threats to the independence of the judiciary and the rule of law. In doing so, a direct confrontation between executive power and the judiciary has emerged.

The case of *Corruption Watch* challenged President Zuma's decision to remove the National Director of Public Prosecutions (NDPP) and install a loyalist. President Zuma's action was just one more instance, observed the CC, of the "recent history at the NPA of...paralysing instability."⁴⁸³ The CC ruled that Zuma's conduct "compromises the independence of the office of NDPP."⁴⁸⁴

Noteworthy in this case is the CC's willingness to entertain a more abstract challenge to the power of the president to indefinitely suspend of the NDPP.⁴⁸⁵ The CC was concerned with "not only the actual exercise of unconstitutional powers but the *subtle way in which the mere existence of those powers undermines independence*."⁴⁸⁶ The Court ruled that in the absence of guidance on how the discretion to suspend an NDPP should be exercised, "this tool is susceptible to abuse. It may be invoked to cow and render compliant an NDPP or Deputy NDPP."⁴⁸⁷

The CC's willingness to entertain an abstract challenge is counter to the narrow and technical jurisprudential approach that is, conceptually, the best approach to ensure legitimacy and avoid political confrontation. From a

⁴⁷⁹ *Corruption Watch NPC and Others v President of the Republic of South Africa and Others*; *Nxasana v Corruption Watch NPC and Others* 2018 (10) BCLR 1179 (CC) (hereinafter *Corruption Watch*)

⁴⁸⁰ *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) (hereinafter *Justice Alliance*)

⁴⁸¹ *Freedom Under Law v Acting Chairperson: Judicial Service Commission and Others* 2011 (3) SA 549 (SCA) (hereinafter *Freedom Under Law*)

⁴⁸² *Glenister v President of South Africa* 2011 (3) SA 347 (CC) (hereinafter *Glenister II*)

⁴⁸³ *Ibid* at para 6

⁴⁸⁴ *Ibid* at para 28

⁴⁸⁵ Section 12(6) of the *National Prosecuting Act*

⁴⁸⁶ *Ibid* at para 39 (emphasis added)

⁴⁸⁷ *Ibid* at para 45

systems-perspective, the Court's assertiveness can be seen as an effort to preserve and defend the broader legitimacy of the justice system by protecting the integrity of the prosecutorial body. From a political science perspective, the CC's judgment was not a *direct* challenge to a sitting President. The potential for political confrontation and retribution against the Court was avoided as President Zuma was no longer President at the time judgment was issued.

An editorial on the *Corruption Watch* case would be later published entitled "Constitutional Court saves SA from the politicians".

Madlanga's ruling this week is yet another sterling illustration of how the courts have, in the absence of real political leadership, filled the gap. In recent years the ANC's top brass have climbed on every pulpit they could to complain about how the courts have 'overreached' to 'meddle' in politics. But the Abrahams ruling is yet another example of how, when corrupt politicians make unconstitutional decisions, our courts have been the last refuge of our democracy.⁴⁸⁸

Returning to the understanding that sociological legitimacy is located in role expectations of the court. These expectations are external, relational and subjectively formed. The extract of the editorial illuminates how the judicial role is being perceived. How CC decision-making is described in the media and newspapers is helpful in calculating legitimacy from a legal-sociological perspective. Media reports both capture the public's sentiment toward the Court *and* play a crucial role in *forming* perception.⁴⁸⁹ The CC's awareness that perception is a key consideration is highlighted by *Justice Alliance of South Africa v President of Republic of South Africa and Others* that challenged President Zuma's attempt to extend then Chief Justice Ngcobo's term. President Zuma was overruled in a unanimous and unattributed judgment, with Chief Justice Ngcobo recusing himself. The CC expressed the concern that the extension of the Chief Justice's term

...may raise a reasonable apprehension or *perception* that the independence of the Chief Justice and by corollary the judiciary may be undermined by external interference of the Executive. The truth

⁴⁸⁸ Editorial "Constitutional Court saves SA from the politicians" Business Live 16 August 2018 <https://www.businesslive.co.za/fm/opinion/editorial/2018-08-16-editorial-constitutional-court-saves-sa-from-the-politicians/> (date accessed 16/08/2018)

⁴⁸⁹ Baum (note 60) 135-136; Kapiszewski *et al* (note 191) 23; Geyh (note 395) 36

may be different, but it matters not. What matters is that the judiciary *must be seen to be free* from external interference.⁴⁹⁰

The third illustrative case speaks to political interference in the form of improper influence upon the judiciary. In 2007, judgment had been reserved in several cases pending against Zuma.⁴⁹¹ In connection with these cases, the Judge President of the Cape High Court, John Hlophe, allegedly approached Constitutional Court Justice Nkabinde and Acting Justice Jafta, and in what could reasonably be seen as an exertion of improper influence, urged the two Justices to rule in Zuma's favour. When disciplinary proceedings against Hlophe came before the JSC, the JSC found Hlophe not guilty of gross misconduct. The JSC's finding was subsequently overruled in *Freedom under Law v Acting Chairperson: Judicial Service Commission and Others*.⁴⁹²

The fourth and final case stems from the government's decision to dissolve the anti-corruption agency 'The Scorpions'. In *Glenister v President of South Africa*,⁴⁹³ the CC held that the agency that would replace the Scorpions did not have the requisite degree of independence. The CC was divided in this case. Of significance, this division was used as a point of attack by President Zuma:

We don't want to review the Constitutional Court; we want to review its powers. It is after experience that some of the decisions are not decisions that every other judge in the Constitutional Court agrees with.⁴⁹⁴

Justice Yacoob, at the time Acting Deputy Chief Justice, took issue with the idea that a split decision or a divided Court suggests an incorrect

⁴⁹⁰ *Justice Alliance* (note 480) at para 68 (emphasis added), and at para 75: "could be seen as impairing the precarious-won institutional attribute of impartiality and the public confidence that goes with it."

⁴⁹¹ *Thint (Pty) Ltd v National Director of Public Prosecutions and Others* (CCT 89/07); *JG Zuma and Another v National Director of Public Prosecutions and Others* (CCT 91/07); *Thint Holdings (South Africa) (Pty) Ltd and Another v National Director of Public Prosecutions* (OCT 90/07); *JG Zuma v National Director of Public Prosecutions* (CCT 92/07)

⁴⁹² *Freedom Under Law* (note 481)

⁴⁹³ The CC's view that the Hawks was not sufficiently independent was confirmed during hearings before the Zondo Commission in 2019, where it was revealed that 64 cases reported by the Reserve Bank for investigation were ignored by the Hawks. Feketha S "Shady foreign investment deals 'were ignored'" *The Mercury* 11 June 2019

⁴⁹⁴ Kende (note 478) 44; Hoexter C "The importance of dissent: two judgments in Administrative Law" (2015) *Acta Juridica* 121

application of the law. Speaking extra-judicially, Justice Yacoob emphasised that agreement between all Justices all of the time

would be an indication of a judiciary that is not sufficiently representative, and lacking the strength required for true independence and impartiality.⁴⁹⁵

While Zuma's statement is clearly a political attack, it does carry an undercurrent of belief that the law should speak with a single voice as a necessary condition of legal legitimacy. Parsing President Zuma's statement even more, there is a revealing separation between his political attack and his abstract support for the judiciary. Such attack reflects the desire to still capitalise on the legitimacy-conferring ability of an independent judiciary.

Furthermore, note the phraseology adopted by ANC officials when attacking the judiciary: "*sections* of the judiciary". These attacks are specifically directed to the Western Cape High Court and the North Gauteng High Court. This again separates abstract support from attack on specific branches and *ad hominem* attacks on judges.⁴⁹⁶ The concentration of unfavourable rulings emerging from these specific High Courts is jurisdictional reality - one that is deliberately ignored by government actors in crafting a narrative of 'judicial persecution of government' by these specific High Courts.

Zuma's dissatisfaction with the CC in the wake of *Glenister* and *Justice Alliance* led him to disregard the traditionally accepted order of succession for Chief Justice. Justice Mogoeng was appointed Chief Justice by, elevated to the position on the heels of his dissent that aligned with the government's position in *Glenister*. Comparatively, Zuma's appointment of Mogoeng is not nuanced; neither is his calculus of judicial leadership unprecedented from an historical perspective. In India, like South Africa, the most senior Justice would ordinarily become Chief Justice. "In each nation, the dominant party

⁴⁹⁵ Yacoob Z "A dynamic Constitution" (2012) presented at *Constitution Week* 12 March 2012 University of Cape Town, South Africa. <https://constitutionallyspeaking.co.za/justice-zac-yacoob-on-the-dynamic-constitution/> (date accessed 02/09/2019)

⁴⁹⁶ Du Bois (note 268) 292: "Individual judges, particular courts, and the judiciary as a whole have continued to be targets of criticism, often at least implicitly tied to their race..."

departed from that norm to signal displeasure with its constitutional court's actions."⁴⁹⁷

Zuma's actions mirror the promotion of Judge Steyn to Chief Justice over more senior Justices in the 1950s. It is also similar to the appointment and later extension of Chief Justice Rabie's tenure in the 1980's. Rabie was first appointed, in part, because of his executive-minded views made known through his report as the head of the 'Commission of Enquiry into Security Legislation', more colloquially the 'Rabie Report'. On the strength of his belief that executive action should not be reviewable and his expressed disdain for the idea of freedoms entrenched through a Bill of Rights, Rabie, a Judge of Appeal, was appointed Chief Justice of the AD. When his tenure expired in 1987, his term was improperly extended. Rabie was made Acting Chief Justice – a strategic move by the National Party to prevent the elevation of the two justices next in line for Chief - both of whom were viewed by the government as unfavourable choices.⁴⁹⁸

It is interesting to note how Zuma's attempt at political interference with judicial leadership back-fired. In 2016, the CC in *EFF 1*, under the leadership of Zuma's hand-picked Chief Justice, issued damning findings against Zuma. The, President, the apex court ruled, had failed in his constitutional obligations by refusing to adhere to the remedial orders of the Public Protector. On behalf of a unanimous CC, the Chief Justice penned a judgment that used language of biblical force. The judgment was met with wide praise from South Africans - reaffirming faith in the ability of an independent judiciary to provide a check on power. It is argued that the judgment in *EFF 1* bolstered perception of the integrity of the CC; with the ruling carrying greater force precisely because the President's 'key man' had held him to account.

In scrutinising why courts rule the way they do, in line with the multi-disciplinary focus demanded by the many interacting dimensions of legitimacy, psychology must be included as one of the indexes to consider.

⁴⁹⁷ Tushnet (note 28) 107

⁴⁹⁸ Dyzenhaus (note 47) 148, 173-174; Abel (note 53) 18

Speculative as it may be, from a psychological point of view, the very articulation in the media critical of the Chief Justice as a “political lapdog” may very well have caused him to be more forthright when overruling government action in a bid to refute that accusation.⁴⁹⁹

Tushnet’s comparative examination of various constitutional courts reveals that a politically-charged appointee to the Bench will be inculcated into the broader culture of the court.⁵⁰⁰ This is mirrored by Baum, who in his research on judicial behaviour takes the view that the professional ego and the desire to be held in high esteem by one’s colleagues on the Bench plays a significant role. Toward this goal, a judge may align him or herself more closely with arguments that are procedurally conservative. When faced with a political matter before the court, a judge may operate more in line with traditional role expectations.⁵⁰¹ These behavioural dynamics suggest that the initial political orientation of the judge concerned will be tempered.

The CC has successfully been able to hold the line against political strategies of interference and influence, both overt and veiled. The perception of the Court’s performance and its ability not to buckle under these assaults has, it can be argued, increased the legitimacy of the CC. In blocking the avenues of interference, the cases outlined above show that the Court has limited presidential power. In so doing, these failed indirect attempts at interference inevitably become direct conflict between the judiciary and the executive.

4.4 *Abusive Constitutionalism*

The above four cases involving subtle manoeuvres by political power in efforts to mould the judiciary, and the system of justice as a whole, support the argument that legitimacy alters the tactics of Lawfare. Where the judiciary

⁴⁹⁹ “South Africa rejoices as Constitution wields ‘mighty sword’” VOA News 1 April 2016 <https://www.voanews.com/a/south-africa-rejoices-as-constitution-wields-mighty-sword/3265363.html> (date accessed 30/10/2017)

⁵⁰⁰ Tushnet (note 28) 115

⁵⁰¹ Baum (note 60) 47-56

is able to block efforts to interfere, and where time and time again executive power utilised in these attempts is curtailed by the Court, the Lawfare dynamic shifts once more. The potential for a dominant party to embrace more overt mechanisms of interference emerges.

This paradigm leads to what David Landau calls “abusive constitutionalism” which he defines as the use of constitutional mechanisms of amendment by dominant parties who entrench their power by altering the constitution. While still maintaining the artifice of constitutionalism and democratic commitment, this poses a “democratic threat” to democracy.⁵⁰²

Abusive constitutionalism can be more easily achieved when a political party possesses sufficient dominance to meet the amendment thresholds laid out in a constitution. This may be countered by noting that this is precisely why constitutions have a built-in mechanism to prevent this abuse in the form of varying degrees of amendment thresholds. Rights are protected through higher amendment thresholds. The problem is that when it comes to abusive constitutionalism, rights are not the target. The potential for constitutional change that is harmful to democratic integrity and sustainability is found in constitutional provisions that have lower thresholds.⁵⁰³ As Landau notes, dominant parties “take power by attacking the constitutional structure in subtle ways.”⁵⁰⁴

Constitutional changes can be electorally focused, crafted in such a way as to prevent or obstruct effective democratic opposition. It can also target the structure of the judicial institution. Subtler tactics include manipulation of term limits and retirement age; the appointment processes for judges; expanding the Bench in a form of ‘court packing’; or the creation of judicial oversight committees or tribunals. Change can also occur by gutting the ‘integrity’ institutions that provide independent, non-judicial, mechanisms of horizontal accountability. Formally, these measures may be within the prerogative of a democratically elected body. Taking a more substantive view

⁵⁰² Issacharoff S “Constitutional courts and consolidated power” (2014) 62 *Am. J. Comp. L.* 588-589

⁵⁰³ Landau (note 471) 217

⁵⁰⁴ *Ibid* at 229

of constitutionalism, these changes can be regarded as *unconstitutional* constitutional amendments.⁵⁰⁵

The judicial response to unconstitutional constitutional amendments has been the adoption of the Basic Structure Doctrine. Formulated in *Kesavananda Bharati v State of Kerala*⁵⁰⁶ by the Supreme Court of India (SCOI), the doctrine was accepted into South African jurisprudence in the *First Certification Judgment*.⁵⁰⁷ The Basic Structure Doctrine prevents amendments to the constitution that would, as the name suggests, undercut its structural foundations, its constitutional core.

Invoking the Basic Structure Doctrine does however raise certain legitimacy challenges. No clearly enumerated constitutional provision can be drawn on when responding to occasions of abusive constitutionalism. Courts have to “invoke the highest aspirations of the constitutional order...” and draw on “deeper jurisprudential wellsprings that would justify its role”.⁵⁰⁸ The invocation of such a doctrine therefore requires judicial construction. However, the *ad hoc* development of the doctrine, as has been the case by the SCOI, invites a view of illegitimacy through the perception of unfettered judicial dictate.⁵⁰⁹

To eliminate this perception, the judicial response to abusive constitutionalism might be an attempt to adopt a more formalist conception of the doctrine. Any efforts towards a categorical conception of the basic structure will however create a rigidity and exclusivity. This will inhibit the ability of the doctrine to respond to unconstitutional constitutional amendments in a robust and flexible manner – to be able to meet the moment, to meet the abusive constitutionalism on whatever plane it appears. It must remain a broad vision.⁵¹⁰

⁵⁰⁵ *Ibid* at 260

⁵⁰⁶ *Kesavananda Bharathi v State of Kerala* A.I.R 1973 S.C 1461

⁵⁰⁷ Rickard (note 295) 253

⁵⁰⁸ Issacharoff (note 502) 589-590,604

⁵⁰⁹ Randhawa (note 110) 12-13

⁵¹⁰ *Cohens v. Virginia* 19 U.S. 264 (1821) 387: The constitution “is exposed to storms and tempests, and its framers must be unwise statesmen indeed if they have not provided it, so far as its nature will permit, with the means of self-preservation from the perils it may be destined to encounter.”

Abusive constitutionalism is by its nature amorphous. It is calculated through and in response to prevailing power-dynamics within the system. In this regard, the conditions from which abusive constitutionalism may spring cannot be known. As it is a wicked problem, the very effort of the court to prevent abuse may be the very act upon which abusive constitutionalism will be built. The fluidity of abusive constitutionalism will require corresponding fluidity on the part of a constitutional court. A constitution is a living document, and as such, it does retain enough suppleness to be able to rise and respond to emerging challenges.

Encapsulating the basic structure doctrine in some form of the categorical would also prevent amendments in the future; amendments that may be legitimately needed to keep a constitution in line with a nation's normative growth.⁵¹¹ This is imperative for the continued legitimacy of the constitutional project. Constitutional amendment and abusive constitutionalism encompasses its own form of a wicked problem in that "the same set of constitutional changes can be dangerous in one situation and innocuous or beneficial in others."⁵¹²

Moreover, when assessed in isolation, a single measure may indeed be democratically legitimate, in form *and* substance. Landau therefore posits that whether a constitutional change is abusive must be identified through observing the interactions in a systems-approach; assessing the implications and *cumulative* effect on democratic functioning.⁵¹³ In this regard Ginsburg and Huq opine that:

Some threats to liberal constitutional democracies do not announce themselves as such. They are all the more dangerous for it. The incremental erosion of liberal democracies institutional and social premises typically yields forms of concentrated state power immune from democratic oversight...It is easier to observe and evaluate a single rupture from democratic practice than it is to observe and evaluate the aggregate effect of many incremental cuts into democratic, liberal and constitutional norms....⁵¹⁴

⁵¹¹ Dixon R & Ginsburg T "Deciding not to decide: deferral in constitutional design" (2011) 9 *Int'l J. Const. L* 636

⁵¹² Landau (note 471) 230

⁵¹³ Landau (note 471) 256

⁵¹⁴ Ginsburg T & Huq A *How to Save a Constitutional Democracy* (2018) University of Chicago Press, Chicago 69,75-76

The CC has had an uneven relationship with the Basic Structure Doctrine. Choudhry points to an absence of literature concerning the CC's relationship to dominant party democracy and notes its uneven jurisprudential approach in dealing with the constitutional role within a dominant party system.⁵¹⁵ The CC's approach to certification was premised on the understanding that the Court needed to act as counterweight to dominance. This was necessary for the integrity of the constitutional structure upon which the democratic nation would be built.⁵¹⁶ In *Premier of KwaZulu-Natal and Others v President of the Republic of South Africa and Others*, the CC held that

radically and fundamentally restructuring and reorganising the fundamental premises of the Constitution, might not qualify as an 'amendment' at all.⁵¹⁷

At other times, the Court has refused to acknowledge the effect of such dominance on the functioning of democracy. The CC has been unwilling to extrapolate its nation-building mandate into a nation-sustaining mandate. In *United Democratic Movement*⁵¹⁸ the CC upheld an amendment to allow floor-crossing. It dismissed fears that floor-crossing had the potential for the ANC to swallow up smaller minority parties and "weaken multi-party democracy".⁵¹⁹ Commenting on this case, Roux notes that "a more complete denial of the Court's responsibility for protecting the *quality* of South Africa's democracy could hardly be imagined."⁵²⁰ As discussed in Chapter 3.4.8, the consequence of this dominance has indeed been institutional imbalance.

The CC's reluctance to engage with the issue of dominant party democracy and institutional imbalance has spurred greater resort to litigation for resolution. Showing deference to majority will - heightened by the previous disfranchisement of the majority of people in South Africa - is a crucial dimension for the integrity of constitutional democracy. But what the

⁵¹⁵ Choudhry (note 41) 5; see also Ferejohn (note 353) 61-62; Issacharoff (note 30) 997-998; Tushnet (note 28) 119

⁵¹⁶ *First Certification Judgment* (note 29)

⁵¹⁷ *Premier of KwaZulu-Natal and Others v President of the Republic of South Africa and Others* 1996 (1) SA 769 (CC) at para 47

⁵¹⁸ *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening ; Institute for Democracy in South Africa and Another as Amici Curiae)* (No 2) 2003 (1) SA 495 (CC) (hereinafter UDM)

⁵¹⁹ *Ibid* at para 45

⁵²⁰ Roux (note 27) 361 (emphasis added)

Court sought to avoid in refusing to confront the impact of dominant party democracy, has ultimately brought that conflict right to its doorstep. Emblematic of a wicked problem, in seeking to preserve the system, it has added strain to the very system. By refusing to engage, the “pressure is generating constitutional challenges.”⁵²¹

The invocation of the Basic Structure Doctrine by the court seems to be contingent on judicial political dynamics at the time. In the property rights case of *Golak Nath v. State of Punjab*⁵²² the SCOI held that the Indian constitution could not be amended by Parliament to the extent that such amendments inhibited fundamental rights. The assertive stance must be viewed, however, within the political climate in which the judgment occurred.

Golak Nath was handed down right before the 1967 election. Party infighting, public dissatisfaction and failure to deliver to the people caused the dominant party to suffer a large. It can be argued that the SCOI was bolstered in its anti-amendment judgment by these disaggregating factors that diminished the chances of political backlash.⁵²³ Both in India and in South Africa’s CC’s *United Democratic Movement* decision, it is suggested that the Basic Structure Doctrine will only be utilized by the court when it feels it is politically safe.

Invoking the Basic Structure Doctrine to override an amendment by a democratically elected body, based on no clearly enumerated constitutional provision, brings with it a heightened tension. Countering abusive constitutionalism is made harder when there is sufficient popular support for the amendment. Where the desired constitutional amendment is cast as the key to upliftment, and necessary to end socio-economic suffering, a constitutional court, in invalidating the unconstitutional constitutional amendment, will be vilified as deliberately obstructing that goal.

Such was Gandhi’s strategy in India after *Golak Nath* halted her government’s efforts at land reform through the 17th Amendment.⁵²⁴

⁵²¹ Choudhry (note 41) 5

⁵²² *Golak Nath v State of Punjab* A.I.R 1967 S.C. 1643

⁵²³ Randhawa (note 110) 3; Moog (note 62) 124-125

⁵²⁴ Randhawa (note 110) 12

Following election defeat in 1967, Prime Minister Indira Gandhi attacked the SCOI as obstructing social progress and upliftment. On the strength of this narrative, Gandhi came back into power in 1971.⁵²⁵ She then worked to implement constitutional amendments that would effectively strip the court of its review powers, forcing the SCOI to develop the Basic Structure Doctrine even further in *Kesavananda Bharathi*.⁵²⁶

This is particularly poignant in South Africa at present given the land reform constitutional amendment debate. When that dominance appropriates populist tensions, the judiciary is in danger of political attack if it invalidates efforts to consolidate dominance. As Landau articulates

Constitutional replacement tends to occur at moments of political crisis in a polity, and at those moments legal restraints on power tend to be inoperative. Courts attempting to enforce restraints in those environments may reach the limits of their 'zones of tolerance', and either be ignored or shut down for issuing hostile decisions.⁵²⁷

Seeking the judicial avenue to halt anti-democratic 'democratic' efforts at constitutional reform moreover draws attention to the area of the constitution that is identified by the court as the bulwark against a determined majority – with sufficient power to amend those provisions.⁵²⁸ In India, the provision of the constitution that underpinned judicial override was then amended by the dominant party. Locating evidence of this paradigm in the South African historical context, note should be taken of how Rabie CJ's judicial rulings were taken as instructive when drafting State of Emergency provisions that would oust judicial oversight.⁵²⁹

When considering the causes of judicialisation of politics, judicialisation is forcing the CC to return to its stance at the time of certification. Such a stance works from a deeper understanding of the function of democracy, and constitutional principles beyond a positivist reading of the Constitution. However, the time when it is not politically safe to engage the Basic Structure

⁵²⁵ Neuborne B "The Supreme Court of India" (2003) *Int'l J. Const. L* 489

⁵²⁶ Hart (note 223) 444; Chowdhury (note 26) 181; Subramanian (note 192) 717

⁵²⁷ Landau (note 471) 245

⁵²⁸ Tushnet (note 28) 111-117

⁵²⁹ Haysom N & Plasket C "The war against law: judicial activism and the Appellate Division (1988) 4 *SAJHR* 309

Doctrine is the time when it is most needed. The question becomes whether the Court can hold the line against the dominance, preventing abusive efforts to consolidate power while withstanding the inevitable political backlash in the form of counter-majoritarian and anti-democratic challenges.

4.5 Judicialisation of Politics and Declining Dominance

South Africa's 2019 electoral map shows that ANC dominance is dwindling. ANC electoral support has dropped from 67 percent of the national vote in 2004 to 57.5% in 2019 – the lowest level in the party's democratic history.⁵³⁰ This is in addition to loss of support in major economic hubs, with ANC power in Johannesburg, Tshwane and Nelson Mandela Bay below 50%. These losses meant that 25% of South Africa's wealth is located in municipalities now controlled by the opposition party the Democratic Alliance.⁵³¹ 2019 showed the lowest voter turnout since 1994, which is indicative of both dissatisfaction with the ANC and a loss of faith in democratic processes. It also signifies that there is no viable opposition party which large swaths of the population are willing to support.⁵³²

Aside from election results, other indications of ANC decline is found in the breakdown of the tripartite alliance between the ANC, the South African Communist Party (SACP) and the Congress of South African Trade Unions (COSATU). Moreover, the ANC Youth League has disintegrated and the ANC Women's League is a "hollow presence".⁵³³ Break away party Congress of the People (COPE) formed in 2008, and the formation of the

⁵³⁰ See Chipkin I "The decline of African nationalism and the state of South Africa" (2016) 42 *J. South. Afr. Stud.* 215; "South African 2019 National Election Final Results" *Business Tech* 11 May 2019 <https://businesstech.co.za/news/government/316134/south-african-national-election-2019-final-results/> (date accessed 07/08/2019)

⁵³¹ Isike C & Onapajo H "The decline of a dominant political party: the case and future of South Africa's African National Congress (ANC)" (2017) 36 *Politeia* 7

⁵³² "What low voter turnout really shows" *Mail & Guardian* 17 May 2019 <https://mg.co.za/article/2019-05-17-00-what-the-low-voter-turnout-really-shows> (date accessed 07/08/2019); Steyn Kotz J & Bohler-Muller N "Editorial: Qou Vadis? Reflections on the 2019 South African General Elections" (2019) *Politikon* 368-369

⁵³³ Booyesen (note 386) 297

Economic Freedom Fighters (EFF) in 2013 siphoned off more radical, nationalisation leaning members of the ANC.

With its dominance, the ANC and the State are entwined, with the party having large control over state resources and institutions. Cadre deployment is, as a result, not made on the basis of competence but party loyalty. Government actors engaged in malfeasance and maladministration are shielded from accountability as a reward for such loyalty.⁵³⁴ Party patronage has resulted in poor governance, lack of service delivery, rampant corruption and factionalism based on which party members have access to patronage.⁵³⁵

Motivated no longer by ideology, ANC legacy or the desire to serve their people, the ANC has become complacent in its dominance and has lost the moral legitimacy to rule. From the “ANC’s increasing distance from the people... popular scepticism and despondency arose on the back of unfulfilled expectations.”⁵³⁶

This has contributed to what Booysen identifies as declining ANC societal hegemony – hegemony being understood as “consent without coercion, unthinking endorsement, widespread legitimacy”.⁵³⁷ However, despite the falling election percentages, indicators of decline, and hegemonic unrest, loyalty to the ANC as a liberation movement cannot be discounted.⁵³⁸ De Jager and du Toit posit that ANC enjoys a “symbolic attachment” that

⁵³⁴ Ndletyana (note 38) 294-295; Booysen (note 386) 304

⁵³⁵ Isike & Onapajo (note 531) 13-15; Booysen (note 386) 298-299; Ndletyana (note 38) 319-320: “The ANC’s decline in the metro is typical of dominant parties. The party’s heroic history was the source of both its initial dominance and subsequent decline. Ordinary people flocked to join the ranks of the party and voted for it due to their reverence for and admiration of its leaders, who had sacrificed their lives for the cause of freedom, prioritising the public good over personal comforts. It was only when personal interests, rather than ideological differences, became the dominant factor in the formation of factions post-2006 that they became highly competitive with one another.”

⁵³⁶ Booysen (note 40) 7

⁵³⁷ Booysen (note 40) 9

⁵³⁸ See De Jager N & du Toit P (eds) *Friend or Foe? Dominant Party Systems in Southern Africa: Insights from the Developing World* (2013) UCT Press, Cape Town 9 See also Booysen (note 40) 13: “Community protest (frequently in response to services and government delivery on policy undertakings), however, is not necessarily an expression of failing legitimacy. For much of the first protest decade of 2005–2015, such protest coexisted with continuous pro-ANC voting.”

transcends and endures in the face of dissatisfaction, in large part due to the “collective psyche” stemming from the ANC’s role in liberation.

At election time, the party has shown the ability to come together despite discontent.⁵³⁹ This loyalty, added to the primacy of elections in the nation’s understanding of democracy, means that the manifestation of discontent with the ruling party is neither played out, nor resolved, through the ballot box. Communication between the people and their government occurs in the time *between* elections - through protests, strike action, factionalism⁵⁴⁰ and – most significantly for the purposes of this research – through litigation,⁵⁴¹ as evidenced by the 2019 High Court case of *Hanekom v Zuma*:

This litigation is a conflict aggravator. By launching this application, Mr Hanekom signals to Mr Zuma that invoking internal organisational remedies for dialogue is over...neither litigant seems inclined to engage bilaterally or within the political structures of the ANC to find a negotiated solution. Pursuing dialogue through mediation is not even a remote possibility. Manifestly, mutual distrust has broken down the relationship irretrievably. The conflict is intractable. Both litigants are stoically positioned. Preferring the battlefield of litigation, both are prepared for lawfare.⁵⁴²

South Africa seemingly operates within a strange dichotomy. It embraces, and holds with a high degree of reverence, hard won electoral democracy. Yet the fundamental purpose of electoral democracy is negated in the interests of party loyalty. Contest is diverted to other arenas of contestation. Fissures and pressure points are not addressed through the vote. Such loyalty must require a new lens through which to observe and analyse democratic theory in South Africa.

⁵³⁹ The general trend has been to oust the sitting president at the ANC National Conference in the lead up to the elections and contest the election with a new leader and new promises. Neither President Mbeki nor President Zuma saw the end of their term.

⁵⁴⁰ Woolman S “On the reciprocal relationship between the rule of law and civil society : a transformative Justice: essays in honour of Pius Langa” (2015) *Acta* 384-385: “Civil society, on the other hand, finds itself fractured, post-liberation, because its driving force – liberation – no longer obtains. The cohesion between groups joined in revolt against an authoritarian state dissipates. Various networks, associations and communities within civil society that had collaborated so well together often find themselves thrown back into those narrow subpublics: to their surprise, they are not yet members of the egalitarian pluralist social order promised by the new constitutional dispensation.”

⁵⁴¹ Chipkin (note 530) 220; see also *Ramakatsa and Others v Magashule and Others* (2013) 2 BCLR 202 (CC)

⁵⁴² *Hanekom v Zuma* (D6316/2019) [2019] ZAKZDHC 16 (6 September 2019) at para 33-34

As a consequence of declining ANC support, Chipkin observes that the “ANC is becoming a regional, ethnic party”⁵⁴³ as it entrenches its stronghold in Kwa-Zulu Natal. This is achieved, in part, through indulging traditional leadership in the Province through offers of power and land.⁵⁴⁴ The *Traditional Courts Bill*, whose object is to grant power to traditional leadership to adjudicate disputes in line with customary law and practices, was first introduced in 2008 and again in 2012. The Bill was quashed by public outcry. In March 2019, it re-emerged and was passed through the National Assembly.

The nature and timing of the Bill has been regarded by critics as an election ploy designed to pander to traditional leadership before the May 2019 national election.⁵⁴⁵ This attempt to harness traditional leadership for political gain is reminiscent of the apartheid strategy. When the 2012 version of the Bill was introduced in the National Council of Provinces, Dr Mamphela Ramphele remarked that the “Traditional Courts Bill is ‘Goodbye apartheid in 1994. Welcome apartheid in 2012.’”⁵⁴⁶ With the passage of the Bill through the National Council of Provinces in December 2020, all that remains for the Bill to become law and establish Traditional Courts is the President’s assent. The Act will undoubtedly invite constitutional challenge, forcing the Constitutional Court to tread into an area of precarious stability between customary law and constitutional law. Despite the potential for constitutional inconsistency of customary law, the Court has always been tentative in its approach toward the strange existence of these plural legal systems for the sake of broader societal stability.

The ANC’s attempts to hold onto its Zulu base have the potential to lead to balkanisation and a rise in authoritarian, anti-pluralist populism, stoking

⁵⁴³ Chipkin (note 530) 218

⁵⁴⁴ *Ibid* 221 noting the *Traditional Leadership and Governance Framework Act 41 of 2003*, *Communal Land Rights Act 11 of 2004*

⁵⁴⁵ Dalson A “The Traditional Court’s Bill - a problematic piece of Legislation” *PoliticsWeb* 9 April 2019 <https://www.politicsweb.co.za/opinion/the-traditional-courts-bill--a-problematic-piece-o> (date accessed 07/08/2019)

⁵⁴⁶ Ramphele’s comments appeared in reporting by De Waal M “The Tribal Courts Bill: Sacrificing rural people’s rights on the altar of power?” *Daily Maverick* 2 May 2012 <https://www.dailymaverick.co.za/article/2012-05-07-the-tribal-courts-bill-sacrificing-rural-peoples-rights-on-the-altar-of-power/> (date accessed 08/08/2019)

tension along ethnic and racial lines. Appeasement of traditional leadership foresees the possibility of the ANC “becoming increasingly conservative on matters of culture, gender and sexual orientation.”⁵⁴⁷ Further support for this prognosis is found in the 2012 effort to adopt an amendment to the Constitution spearheaded, by traditional leadership. The National House of Traditional Leaders submitted to the Constitutional Review Committee an Amendment Submission to Section 9 of the Constitution. The proposed amendment would remove the right not to be discriminated against on the basis of sexual orientation.⁵⁴⁸

Aggravating the tension between cultural identity politics and universal liberalism⁵⁴⁹ will cause a centrifugal force threatening to tear at the fabric of nation-building and unity achieved through constitutional patriotism. Continuing to fight this battle at the level of constitutional amendment will exacerbate an already hostile relationship between the judiciary and the ruling party. As the ruling party uses the law to consolidate its power, the judicial system is placed in the centre of the tension between minority rights protections and customary law.

4.6 *Impunified Disregard*

The South African judiciary’s continued ability to hold the line against these intrusions and threats must be weighed against an erosion of the rule of law *culture* in South Africa. In its place is a culture of corruption and a

⁵⁴⁷ Chipkin (note 530) 222-223; Stevens M “Call for ANC to address homophobic tendencies” *Mail & Guardian* 22 May 2012 <https://mg.co.za/article/2012-05-22-call-for-anc-to-address-homophobic-tendencies> (date accessed 07/08/2019); De Waal M “Traditional leaders and the fuel that fires homophobia” 25 May 2012 <https://www.dailymaverick.co.za/article/2012-05-25-traditional-leaders-and-the-fuel-that-fires-homophobia/> (date accessed 07/08/2019)

⁵⁴⁸ A caveat must be mentioned however that elevation of this proposed amendment by the Committee to a higher level of review comes in part to due to Advocate Holomisa serving as both head of the Constitutional Review Committee and member of the Council of Traditional Leaders (Contralesa). Holomisa’s involvement may create a false impression as to how much traction this issue would receive in broader enclaves of political leadership.

⁵⁴⁹ Comaroff J & Comaroff J “The struggle between the Constitution and ‘things African’”(2005) 7 *Interventions* 300-303

prevailing attitude of recalcitrance. Contempt for court orders that threatens to diminish the rule of law, as well as the authority of the judiciary.⁵⁵⁰

The Rule of Law Index published by the *World Justice Project* shows that South Africa scored 0.58 in 2019, dropping from a previous score of 0.59 in 2016 through 2018. More tellingly, in a regional assessment, South Africa ranked 5th in 2019 in sub-Saharan nations, dropping from 2nd in 2018 and 1st in the region in 2016. Of the eight indicators for the rule of law that the Report lays out, South Africa's lowest was the 'absence of corruption' that scored an overall 0.48 in 2019. Sub-indicators 'corruption in the executive' scored 0.41 and 'corruption in the legislature' scored 0.24. Furthermore, 'regulatory enforcement' scored poorly, with a score of 0.55.⁵⁵¹

Disregard of court orders tracks with a broader disregard for the rule of law in the international space. Noteworthy is the South African government's disregard of its Rome Statute obligation to arrest Sudanese President Al Bashir⁵⁵² and its re-actionist threat to leave the International Criminal Court (ICC). The South African government has transgressed far from Mandela's 1993 assertion that human rights will be the determinative guide in its foreign policy.⁵⁵³ The State maintains the *rhetoric* of commitment to human rights but this commitment is often greatly qualified by the government's concern for its relationship with the African continent, the African Union (AU) and its economic interests based on its relationship with its BRICS⁵⁵⁴ partner nations.

⁵⁵⁰ Woolman (note 540) 378

⁵⁵¹ *World Justice Project* Rule of Law Index (2016); *World Justice Project* Rule of Law Index (2018); *World Justice Project* Rule of Law Index (2019) <https://worldjusticeproject.org/our-work/publications/rule-law-index-reports> (date accessed 05/08/2019)

⁵⁵² *Southern Africa Litigation Centre v Minister of Justice And Constitutional Development and Others* 2015 (5) SA 1 (GP) The South African government was resistant from the offset when the ICC issued the initial arrest warrant for Al Bashir and only agreed after significant public pressure that Al Bashir would be arrested if he was on South African soil.

⁵⁵³ Smith K "South Africa's past, present and future foreign human rights policy and diplomacy" in Lettinga D & van Troost L (eds) *Shifting Power and Human Rights Diplomacy: South Africa* (2016) Amnesty International Netherlands 18

⁵⁵⁴ Brazil, Russia, India, China, South Africa. South African government's relationship with (but more accurately capitulation to) China has dictated foreign policy, most evident in the South African government's refusal to issue the Dalai Lama a visa to attend peace a summit.

This is evidenced by the positions taken by South Africa on various international human rights frameworks and modalities. In the United Nations, South Africa has stood against UN sanctions for Sudan and Zimbabwe retracted its support for the 2012 UN Resolution calling for Syrian President Bashar Al Assad to step down;⁵⁵⁵ and has opposed General Assembly resolutions condemning ethnic cleansing and rape as a tactic of war.⁵⁵⁶ South Africa's foreign policy has come to be viewed as a "progressive disregard for human rights", favouring rather African solidarity, the primacy of sovereignty, non-intervention, and regional 'quiet diplomacy' answers. South Africa was one of the first nations to sign the Rome Statute creating the ICC. South Africa now joins the rest of Africa in citing the 'West's' inconsistent human rights condemnations and the ICC's selective and disproportionately African focused prosecutions which render the ICC illegitimate.⁵⁵⁷

Leaving aside South Africa's international conduct, a more regional focus on South Africa's actions underscores the connection between a disregard for human rights and the denuding of judicial accountability mechanisms. At the 2011 Southern African Development Community (SADC) Summit, member States refused to reappoint members to the SADC Tribunal, nor appoint new members, resulting in a lack of a quorum. These tactics successfully suspended the Tribunal's operations. Three years later, South Africa agreed to a 2014 Protocol to remove the ability to hear human rights centred cases of individual applicants from the Tribunal's jurisdiction.

President Zuma's decision to sign the Protocol was subsequently found by the Gauteng High Court, and later confirmed by the CC in 2018, to be unlawful, irrational and unconstitutional.⁵⁵⁸ The CC rejected the State's argument that the Protocol had not yet been domesticated and was thereby not justiciable on the grounds of prematurity. The Court held that the

⁵⁵⁵ Smith (note 553) 20

⁵⁵⁶ Gerson "The despots democracy" *Washington Post* 27 May 2008 <http://www.washingtonpost.com/wpdyn/content/article/2008/05/27/AR2008052702556.html> (date accessed 31/05/2019)

⁵⁵⁷ Sarkin (note 384) 80-82

⁵⁵⁸ *Law Society of South Africa and Others v President of the Republic of South Africa and Others* 2018 (6) BCLR 695 (GP); *Law Society* (note 376) at para 46-48

effect or intent of this provision is to strip the Tribunal of its jurisdiction over individual disputes, including a challenge to what they regard as violations of the Treaty in relation to human rights, democracy and the rule of law.⁵⁵⁹

It was the view of the CC that where a position taken by SADC alters the functioning of a crucial aspect of the SADC treaty, in effect dissolving one of its institutions, that act must be undertaken through amendment processes. The use of a protocol circumvents the strictness of the amendment thresholds.⁵⁶⁰ This stance by the CC reflects a position that the Court is not willing to be deflected by the formalist or proceduralist arguments in assessing the effect of a measure on the integrity of the system and the operation of its function. The CC ruling in *Law Society* affirms a return to the Court's original relationship with the Basic Structure Doctrine discussed above.

The erosion of the commitment to these international and regional institutions cannot be viewed in isolation. Neither should they be seen as having no relevance to the operation of our constitutional project within our borders. South Africa's relationship with international and regional human rights bodies highlights areas of concern for the rule of law in South Africa, the protection of human rights domestically and the degree of authority afforded the judicial institution when it seeks to uphold the crucial features of a constitutional democracy. In *Law Society*, Mogoeng CJ connected the national vision to the State's international relations and conduct. Writing for the majority, the Chief Justice held:

Our signing the protocol is thus very weighty and significant. It announces to all that South Africa is about to make a radical paradigm shift that is inextricably tied up to who we are as a nation. Specifically, it signifies that access to justice, a commitment to the Rule of Law and the promotion of human rights would no longer be a paramount feature of our national vision and international relations. That signature of the singular most powerful constitutional being in our country also says to the SADC Member States that South Africa has shorn itself of its key responsibilities of protecting and promoting some of the values foundational to our democracy including fundamental rights. This constitutes a serious threat to the image and very essence of South Africa's constitutional democracy and citizens'

⁵⁵⁹ *Ibid* at para 16

⁵⁶⁰ *Ibid* at para 48-55

rights. Our President's signature is symbolic of a warm welcome by South Africa of the stealthy introduction of unpunished disregard for and violation of fundamental rights.⁵⁶¹

The South African government's machinations outlined above speak not only to a worrying disregard for the rule of law, but are also emblematic of a pattern of engagement that speaks to a type of Lawfare. These Lawfare patterns can be clarified through a discussion of three aspects: empty rhetoric, the universality of human rights, and economic pressures.

In 2011, South Africa took a leadership role in *Human Rights Commission Resolution 17/19* that opposed "discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity."⁵⁶² Two years later South Africa's support for Sexual Orientation and Gender Identity rights and protections vacillated. South Africa, tabled *Draft Resolution 16/L27* that proposed a working group "within the single modality and framework...within which all deliberations on sexual orientation including other initiatives and action shall be taken".

On its face, such a move seems to suggest South Africa's support and leadership on the issue. Rather, Draft Resolution 16/L27 should be seen for what it is - a forestalling tactic. The resolution was crafted in such a way that no other initiatives would be allowed to be undertaken until the working group had finished their work. It is a Lawfare strategy of engagement with the underlying motive of *preventing* engagement. It is submitted that South Africa paid lip service to the objective, while adopting obstructionist and defeatist tactics.⁵⁶³

⁵⁶¹ *Ibid* at para 31-32. Cameron J and Froneman J issued a concurring agreement; only deviating from the majority judgment by locating the President's signing of the Protocol not as a breach of international law but a violation of the Constitution. (at para 103) Given the instances of contempt for international law Cameron and Froneman's position of locating the constraints on the President's foreign policy power in the Constitution, may be the more politically punishing judgment.

⁵⁶² Jordaan E "South Africa and sexual orientation rights at the United Nations: batting for both sides" (2017) 44 *Politikon* 212-217; Abraham G "South Africa and R2P" in Lettinga D and van Troost L (eds) *Shifting Power and Human Rights Diplomacy: South Africa* (2016) Amnesty International Netherlands 69-78; Smith (note 553) 17-24

⁵⁶³ See Bartman (note 404) 7 who writes of a similar lawfare tactic by Russia of embracing legal avenues to "restrict the actions of others", conducting foreign policy through international legal frameworks merely as tactic to "buy time to prepare their military".

By 2016, South Africa joined the African Bloc in its concern that attempts at drafting Sexual Orientation rights and protection “seriously jeopardize the entire international human rights framework as they create divisions.”⁵⁶⁴ This leads to the second point. The position by the African Bloc sits in contrast to the prevailing view in South African jurisprudence, and international human rights jurisprudence, that human rights are indivisible, interconnected and interdependent. The elevation of some rights over others is oppositional to the “most basic premise of the Constitution...the unbending commitment to the dignity of the human being.”⁵⁶⁵ Dignity runs through all rights, tying the rights of one to the rights of all through “recognition on the basis of our common humanity”.⁵⁶⁶

Thirdly, the elevation of economic interests over human rights in foreign policy raises a red flag for what is already being voiced domestically – that the Constitution is obstructing progress and transformation, preventing the socio-economic conditions of the lives of South Africa from improving.

These international patterns are disconcerting for constitutional stability. The government’s foreign policies raise serious question as to its commitment to its constitutional duty to “respect, protect, promote and fulfil the rights in the Bill of Rights.”⁵⁶⁷

4.7 Conclusion

The judicialisation of politics forces an adversarial role between the government and the judiciary. In the breakdown of this relationship, the Court is exposed to political attack framed in the narrative of judicial

⁵⁶⁴ Alvelius K, Oksman K & Patanen A “South Africa attempts to stop the work of UN gay rights watchdog” (2016) <https://www.groundup.org.za/article/south-africa-attempts-stop-work-un-gay-rights-watchdog/> (date accessed 29/05/2019)

⁵⁶⁵ Davis (note 27) 38

⁵⁶⁶ Cachalia F “Constitutionalism and belonging” in Andrews P and Ellmann S (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa’s Basic Law* (2001) Witwatersrand University Press 360; *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at para 35; *S v Makwanyane* (note 33) at para 84, 111; *Prince* (note 34) at para 50; *S v Mamabolo* 2001 (3) SA 409 (CC) at para 41 (hereinafter *S v Mamabolo*)

⁵⁶⁷ Constitution of the Republic of South Africa, 1996 Section 7(2)

aggrandisement and democratic usurpation. These attacks threaten to delegitimise the judiciary through diminishing the key attributes of democratic legitimacy. Despite these attacks, where judicial legitimacy is high and the rule of law respected, the judiciary can still have a legitimating effect on political power. Appreciating this, political attacks become subtler. In the interplay between Lawfare and legitimacy, this chapter has explored how high levels of legitimacy alter the Lawfare strategies undertaken – particularly strategies that target the independence of the judiciary.

This chapter has outlined the decline in the rule of law culture in South Africa and links this decline to the disregard of judicial authority.

Within these attacks, disregard and non-compliance, the value of maintaining a rhetorical commitment to constitutional principles and the rule of law is still present. And yet embracing policies that work in direct opposition to these commitments reveals a Lawfare tactic of *engagement* designed to purposefully *evade and obfuscate* constitutional responsibilities.

CHAPTER 5

POLITICISATION OF LAW: THE JUDICIAL VIEW

5.1 *Judicialisation of Politics: Effect on the Judicial Environment*

When confronted with an ever-increasing number of politically sensitive issues, the effect on the judicial environment and judicial behaviour must be considered. Posner has expressed that “these questions have not been entirely ignored, but the literature on them is meagre.”⁵⁶⁸

From 1995-2008, the South African Constitutional Court (CC) heard an average of 24 cases per year. From 2009-2019, cases heard nearly doubled to an average of 42 cases per year. More revealing is the number of applications made. In 2009 119 applications were made from which 34 judgments were delivered. There has been a marked increase year by year. In 2019, 307 applications were made and 48 judgments delivered, slightly lower than the 332 applications made in 2018.⁵⁶⁹

⁵⁶⁸ Posner (note 106) 220

⁵⁶⁹ Statistics taken from <https://collections.concourt.org.za/handle/20.500.12144/1> (date accessed 02/06/2020); Klaaren J “Statistics” (1997) *SAJHR* 208; Klaaren J, Dagut H, Mochaba K *et al* “Constitutional Court Statistics for the 1998 Term” (1999) *SAJHR* 256; Teichner S, Hofmeyr K, Ali N *et al* “Constitutional Court Statistics for the 2001 Term” (2002) *SAJHR* 463; Jonathan Klaaren, Orit Shefer, Naseera Ali & Maboi Molepo “Constitutional Court Statistics for the 2002 Term” (2003) *SAJHR* 506; Klaaren K, Nikki Stein N & Xulu C “Constitutional Court Statistics for the 2004 Term” (2005) *SAJHR* 636; Bishop M, Chamberlain L & Kazee S “Constitutional Court Statistics for the 2007 Term” (2010) *SAJHR* 571; Brener S, Eastman M & Macleod J “Constitutional Court Statistics for the 2008 Term” (2011), *SAJHR* 566; Ongeso JP, Wentzel M, Cebile Ndebele C *et al* “Constitutional Court Statistics for the 2009 Term” (2014) *SAJHR* 572; Magaya I, Cooke M, Macchelli P & Chamberlain L “Constitutional Court Statistics for the 2010 Term” (2015) *SAJHR* 205; Viljoen J, Magaya I, Ongeso JP *et al* “Constitutional Court Statistics for the 2011 Term” (2015) *SAJHR* 219; Wentze M, Viljoen J, Samaradiwakera-Wijesundara C *et al* “Constitutional Court statistics for the 2013 term” (2016) *SAJHR* 184; Kathi T, Swemmer S, Makuwa A *et al* “Constitutional court statistics for the 2015 term” (2017) *SAJHR* 335; Makuwa A, Mhiribidi R, Chagopa A *et al* “Constitutional Court statistics for the 2016 term” (2018) *SAJHR* 122; Chagopa A, Makuwa A, Nqubeko Shezi N *et al* “Constitutional Court statistics for the 2017 term” (2019) *SAJHR* 237

Speaking in relation to the 17th Amendment, Commissioner Masutha asked Judge Basson in his interview before the JSC in April 2019:

...haven't we in the amendment, overburdened the Constitutional Court somewhat when we extended its jurisdiction beyond constitutional matters? Wasn't it better to have left it where it was, to have the Supreme Court of Appeal deal with all other matters and for the Constitutional Court to confine itself to constitutional matters? Hasn't the change in the Constitution not resulted in an unattainable [sic] situation of creating undue pressure and an overload on the Constitutional Court de facto?⁵⁷⁰

What are the consequences of an over-burdened docket? In particular, what are the consequences of the apex confronted not only with more cases, but cases of greater difficulty, and greater political salience in Lawfare times?⁵⁷¹ An overburdened docket leads to longer decision times, and an increased workload. This risks judges devolving into niche judgment writers; or showing more constraint in its approach and feeling pressure to spend less time deliberating.⁵⁷² This will reduce diversity of thought, prevent intersubjective understandings from being formed, and undermine the value of the insights that can be gained through a representative Bench engaging in deliberation.

An overburdened docket can result in government arguing that perhaps the court should be expanded, proposing 'magnanimous' reform to allow additional justices, to help share the burden. Alternatively, more government control may be required to 'fix' the problem, diverting matters to other avenues for redress through the creation of specialised courts. An overburdened docket, and a strained judiciary can be latched onto and, under the guise of aid, a nefarious and ill-motivated agenda may be pursued.

⁵⁷⁰ JSC Constitutional Court Appointment Interview Transcript <https://www.judgesmatter.co.za/wp-content/uploads/2019/08/SA-Constitutional-Court-JSC-Interview-of-Judge-A-C-Basson-Judges-Matter-April-2019-Copy.pdf> (date accessed 16/09/2019) The JSC sits as the nexus of law and politics. There is value in drawing on JSC transcripts as they contain a degree of candour regarding the challenges facing jurists that is not readily admitted in other for a.

⁵⁷¹ For more on politically salient cases and the lack of clear legal authority see Sec 6.3 below. See also chapter 3.4.6 above detailing the difficulty of the Court confronted with review applications for undoing illegality that is itself unlawful.

⁵⁷² Klug (note 43) 111: "tensions over judicial appointments and the Courts management of its case load seems to have led the court to settle into a more tractable set of roles"; O'Regan (note 26) 122

This would constitute quintessential abuse of the judicial system, falling squarely into the realm of Lawfare.

The South African government's efforts to create a Traditional Court suggest that concerns about judicial 'reform' are well founded. The proposed Traditional Court institutionalises a traditional justice system in accordance with under customary law and customary practices. Devoid of an opt-out clause to its jurisdiction and representative of a patriarchal tradition, its existence is hard to square with the constitutional values of equality and non-discrimination.

However, when the expense and access to court greatly inhibit the pursuit of justice, the attractiveness these types of specialised fora is enhanced.⁵⁷³ Lessons from the US experience shows, however, diverting matters from the court, particularly the CC, will not necessarily ease its tension. In deferring cases to other forums:

Gone is the steady bland diet of non-controversial cases which a typically unanimous High Court corrects the trial courts mistakes – which helped to keep the occasional controversy in perspective. In its stead is a spicier fare of Supreme Court cases featuring more hotly contested and often policy-laden questions of law with respect to which the intermediate appellate courts are often divided.⁵⁷⁴

Moreover, the ability for specialised tribunals to be effective in reducing the work load of the CC and Supreme Court of Appeal (SCA) would depend on enacting clear jurisdictional outlines in the tribunals enabling legislation. This is necessary to prevent issues of dual jurisdiction creating more, not fewer, matters before the judiciary. It is doubtful that the political impetus to provide such jurisdictional clarity is present given what the CC articulated in *Chirwa*.⁵⁷⁵

⁵⁷³ See objective of earlier iteration of *Traditional Courts Bill B15-2008* Sec 2 (b)(ii): "enhancing access to justice by providing a speedier, less formal and less expensive resolution of disputes". The latest form of the Bill, *Traditional Courts Bill B1B-2017* Sec 2(b)(ii) notes the objective of the Bill is "enhancing access to justice by providing a forum for dispute resolution in accordance with the principle that recognises participation by all parties;" https://www.gov.za/sites/default/files/gcis_document/201409/b15-08.pdf; (date accessed 22/09/2021); <https://www.wcpp.gov.za/sites/default/files/traditional-courts-bill-b1b-2017.pdf> (date accessed 22/09/2021)

⁵⁷⁴ Geyh (note 395) 32; Posner R "Jurisprudence of skepticism" 86 *Mich. L. Rev* 860

⁵⁷⁵ *Chirwa v Transnet Limited and Others* 2008 (4) SA 367 (CC) (hereinafter *Chirwa*)

In this case there was uncertainty as to whether the PAJA or the *Labour Relations Act 66 of 1995* was to be followed in labour disputes for public sector employees. If public sector employment could be encompassed in the PAJA the Court would hear such a matter. If public sector employees were to be governed by the Labour Relations Act, the specialised Labour Court and the Labour Appeals Court would have sole jurisdiction. Calls by the CC to correct the uncertainty and clarify the jurisdictional provisions of the LRA went unheeded.⁵⁷⁶

Measures to increase access to justice and to lower the costs associated are undoubtedly needed in South Africa. But this is precisely why the damage brought by Lawfare is so pervasive and so dangerous. Once enmeshed in a Lawfare climate, or having passed through such climate, efforts for future reform of the justice system – however well-intentioned - cannot help but be looked at through a Lawfare lens. Justice reform, and judicial reform efforts, will be met with suspicion, questioning whether the political actions undertaken are genuine or have been made for politically nefarious purposes.⁵⁷⁷

5.2 *Enfolding the Lower Courts*

To help carry the burden caused by the judicialisation of politics, the CC has endeavoured to invoke the importance of the lower courts. Comity shown to these lower branches also helps disperse the political attack from being solely trained onto the CC. As the apex court voiced in *EFF 2*:

Our High Court, specialist courts of equivalent status and Supreme Court of Appeal also deserve the opportunity to grapple with constitutional matters involving the President so that they too may contribute to the further development and enrichment of our constitutional jurisprudence.⁵⁷⁸

The CC further held in 2019 that:

Our jurisprudence emphasises that this court function better when it is assisted by the reasoned judgment (or judgments) on the relevant

⁵⁷⁶ *Ibid* at para 71; Hoexter (note 494) 128

⁵⁷⁷ Friedman (note 403) 49

⁵⁷⁸ *EFF 2* (note 375) at para 32

issues in dispute. This Court has on numerous occasions expressed itself on the undesirability of sitting as a court of first and last instance.⁵⁷⁹

However, the ability for the lower courts to help carry some weight must first require that the CC provides guidance on how to rule in hard cases. The more the CC is itself engaged in traversing the unknown, particularly in political cases, the less it can provide this guidance. The lower courts are then less able to be decisive and efficient. For example: in the case of *Democratic Alliance v Public Protector (Vrede Diary)*, the High Court had to hold back in ruling on personal costs pending the outcome of an appeal before the CC. The CC decision, also involving the Public Protector, would provide the needed clarity as to whether a personal costs order could be granted.⁵⁸⁰

Staying with the focus of lower courts, it is interesting to note how the environment of the lower courts has been altered in a time of judicialisation of politics. In cases of political consequence, the High Court and the Supreme Court of Appeal have altered the *manner* in which they hear the case. Illustrative of this point is the matter of Judge President of the Cape High Court, John Hlophe, who allegedly sought to exert influence on two sitting CC Justices to rule in President Zuma's favour. The Chief Justice, together with his entire Bench, lodged a complaint of gross misconduct against Hlophe with the JSC. The Chief Justice also forwarded the complaint to the media.

As an aside, the Chief Justice's decision to make the complaint against Hlophe public is telling. It suggests that the Chief Justice has less than full faith in the JSC to deal with the matter with integrity. Publication forced the JSC to hear the matter in the full light of day and pre-empted the potential for the Commission to sweep the matter under the rug, or deal with the matter in a dismissive or sub-par manner.

⁵⁷⁹ The CC, in showing comity with the High Court's decision to hold PP Mkhwebane personally liable for the cost, supported such a stance by acknowledging in *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at para 246 (hereinafter *Public Protector v Reserve Bank*)

⁵⁸⁰ *Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector* 2019 (7) BCLR 882 (GP) at para 4 (hereinafter *Democratic Alliance v Public Protector*)

Returning to the primary focus of the lower courts in a judicialised environment: In *Hlophe v Constitutional Court of South Africa*,⁵⁸¹ Hlophe sought a High Court interdict preventing the JSC from proceeding with the complaint. The High Court in this matter chose to sit as a court of five judges instead of the usual full Bench of three. When the High Court ruled in favour of Hlophe, Langa CJ appealed to the SCA⁵⁸² Once again, the Court decided to expand its Bench and the SCA sat as nine – an option made available to the Judge President in the *Superior Court Act* for matters of “importance”.⁵⁸³ The SCA upheld the appeal.

From these events, the necessity of the Court adopting political strategies when adjudicating political contentious matters is clear. Expanding the Bench and enlisting more judges is a strategy to immunize the Court against accusations of judicial preference, judicial subjectivity or political alignment. This speaks to the great paradox that the Court must engage with the politics of adjudication to maintain the perception of being non-political.

5.3 Judicial Appointment

The more expansive the judicial role and the more politically consequential its rulings, the more the appointment of judges becomes a primary concern to all political role-players. The politics of adjudication thus encompasses the politics of appointment. Expanded judicial power signals to political actors that a judicial appointment can be utilised towards the judiciary becoming a powerful political tool for their own political ends.⁵⁸⁴ In filling the accountability vacuum, judicialisation of politics leads the judicial institution into a space that is both unavoidably dangerous and necessary.

To mitigate some of this danger, the judiciary must be able to show that while it is possess expansive review powers, it is not unbounded and unaccountable. Judicial accountability and independence operate on a sliding scale. The Judicial Services Commission (JSC), if constituted to achieve the

⁵⁸¹ *Hlophe v Constitutional Court of South Africa and Others* 2009 (2) All SA 72 (W)

⁵⁸² *Langa and Others v Hlophe* 2009 (8) BCLR 823 (SCA)

⁵⁸³ Act 10 of 2013 Sec13(1)

⁵⁸⁴ See Malleson & Russell (note 287) 4, 422, 428

correct balance, can be the body that holds together these dichotomous imperatives. It is therefore prudent at this junction to venture deeper into the role played by the JSC more generally, and its role in the era of the judicialisation of politics.

The JSC's image has been eroded by the 2018 case of *Helen Suzman Foundation v JSC*.⁵⁸⁵ In this case, the Foundation (HSF) argued that the JSC's decision to appoint two candidates to the Western Cape High Court was unlawful and irrational.⁵⁸⁶ When the HSF sought the record of proceedings to mount such a challenge, it received only "the reasons for the decision...distilled from the deliberations by the Chief Justice."⁵⁸⁷ An interlocutory application was made for disclosure of the full record of JSC deliberations but the JSC refused to hand over the full record. The CC ruled that the JSC's closed door deliberations do form part of Rule 53 of Uniform Rules of Court. While acknowledging that historically there was no access to the record of closed door deliberations,

recently our courts have begun to diverge from this position. In what I consider to be a positive development, they place emphasis on the fact that deliberations are relevant to the enquiry as to what it is that informed the decision.⁵⁸⁸

The lack of transparency by the JSC undermines the integrity of the appointment body and then transfuses to the judge and the bench to which he or she is appointed. *Helen Suzman v JSC* once more illustrates Court needing to depart from its prior legal positions in order to ensure openness and justification. The politicisation of the appointment process and its wider implications do not end there.

5.4 Acting Judges

It has been noted above that the expanded judicial power from the judicialisation of politics leads to the politics of adjudication in which judicial appointment becomes a key focus. In the heightened politicisation of the

⁵⁸⁵ *Helen Suzman Foundation* (note 19)

⁵⁸⁶ *Ibid* at para 2

⁵⁸⁷ *Ibid* at para 3

⁵⁸⁸ *Ibid* at para 18-19

judicial appointment, appointments are often delayed. The Court then has to operate through extended periods with vacant seats.

The CC and the SCA are increasingly sitting with a number of acting judges. Following the retirement of Justice Cameron in August 2019, the CC had three vacancies for Justice on the Bench, left by Justice Nkabinde and the departure of Deputy Chief Justice Moseneke. In addition, the CC is without Zondo DCJ, while he heads the State Capture Commission – a duty extending well into 2021.

The JSC submitted a short list to fill the two vacant seats to the President in April 2019.⁵⁸⁹ Newly elected Ramaphosa waited for nearly a year before making the appointments⁵⁹⁰ – finally choosing Judges Zukisa Tshiqi and Stevan Majiedt in September 2019.⁵⁹¹

Added to this extended period of vacancy, Mogoeng CJ was absent for roughly half of the judgments in 2018 whilst fulfilling his administrative duties.⁵⁹² The Chief Justice's absences have been ascribed to his judicial stewardship role as he represents South Africa's Constitution on the world stage. This once more underscores the extra-judicial, political role of the South African Constitutional Court, in contrast to a more detached judicial role found in other nations.

The Chief Justice's periods of absence, coupled with the unfilled vacancies, resulted in a number of highly contentious political matters being heard by a CC sitting with four acting justices. These cases include *Public*

⁵⁸⁹ Pursuant to Section 174(4)(a) of the Constitution

⁵⁹⁰ Ramaphosa narrowly won election at the ANC elective conference in December 2017. His victory was fragile. With the ANC sharply divided into Pro-Zuma and Pro-Ramaphosa camps, Ramaphosa had to tread carefully and appease Zuma factions – notably making Zuma loyalist David Mabuza Deputy President of the Republic. Only three of the ANC's Top 6 leadership positions were of the Ramaphosa camp. These fractious internal party dynamics may account for why Ramaphosa was hesitant to make any bold or declaratory moves in the early months of this office, including Constitutional Court appointments. See Booysen (note 40) 25; See also "ANC Dominance Challenged" (2019) 56 *Africa Research Bulletin: Political Social and Cultural Series* 22285

⁵⁹¹ Gerber J "ConCourt Bench: Ramaphosa appoints judges Zukisa Tshiqi, Stevan Majiedt" *News24* 11 September 2019 <https://www.news24.com/SouthAfrica/News/concourt-bench-ramaphosa-appoints-judges-zukisa-tshiqi-stevan-majiedt-20190911> (date accessed 30/09/2019)

⁵⁹² Tolsi N "Mogoeng absent for more than half of ConCourt judgments" *Mail & Guardian* 16 November 2018 <https://mg.co.za/article/2018-11-16-00-mogoeng-absent-for-more-than-half-of-concourt-judgments> (date accessed 24/09/2019)

Protector v Reserve Bank that upheld the high Court's punitive and personal costs order against Public Protector Mkhwebane, and order the CC acknowledged, is made only in exceptional circumstances for extraordinary conduct worthy of the courts rebuke⁵⁹³; and *Corruption Watch* challenging Zuma's removal of the National Director of Public Prosecutions⁵⁹⁴

In February 2019, the CC heard the matter of *Jacobs v S*⁵⁹⁵ that centred on the common law doctrine of common purpose. The CC, without the Chief Justice, sat as a Bench of ten. Of those ten, four were acting appointments. Issuing four separate judgments, the CC was split 5/5. With no majority, the decision of the CC was no decision and the judgment of the High Court stood. A split decision occurred once more in October 2019 in *Ascendis Animal Health*.⁵⁹⁶

What are the implications of acting judges on the Bench? Firstly, the revolving door of acting justices impacts negatively on the familiarity and collegiality of the Bench and should not be discounted.⁵⁹⁷ The CC prides itself on being a family. Constant newcomers must surely unsettle that unity – a unity that becomes imperative to withstand political aggression. Familiarity allows each jurist's philosophical approach to be known and this knowledge can close the distance between understandings. Acting Justices have to learn on the job and this takes time, time that the CC can ill-afford in managing its already overburdened docket. This is exacerbated by the CC operating without leadership through Mogoeng's absences.

Secondly, uneasiness sits around the status of acting judges. Can a judge in an acting capacity feel secure enough to freely engage in the discourse

⁵⁹³ *Public Protector v Reserve Bank* (note 579) at para 220 and 226,

⁵⁹⁴ *Corruption Watch* (note 479)

⁵⁹⁵ *Jacobs and Others v S* 2019 (5) BCLR 562 (CC)

⁵⁹⁶ *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation and Others* 2020 (1) SA 327 (CC)

⁵⁹⁷ Mailovich C "Constitutional Court faces three vacancies if Ramaphosa delays appointments" *Business Day Live* 23 July 2019 <https://www.businesslive.co.za/bd/national/2019-07-23-constitutional-court-faces-three-vacancies-if-ramaphosa-delays-appointments/> (date accessed 02/09/2019); Kunene E "Fill the Court: South Africa's Constitutional Court and its continuity crisis" *Daily Maverick* 28 September 2018 <https://www.dailymaverick.co.za/opinionista/2018-09-28-fill-the-court-south-africas-constitutional-court-and-its-continuity-crisis/> (date accessed 02/09/2019). In his article for the *Daily Maverick* Elisha Kunene calculated that in a period of 21 months (January 2017 through September 2018) the CC had 20 different judges on the bench in an acting capacity.

framing the Court's position? Are they confident enough in their position to offer unique insights in a way that honours the representative value of that seat? Justices need to reject claims of judicial subjectivity, whilst simultaneously acknowledging that constitutional values do not speak with neutral objectivity. The way to straddle these competing obligations is to breathe life into these constitutional values through representation and diversity on the Bench. Engaging with multiple view points towards constructing *inter-subjective* understanding counters judicial subjectivity and unconscious bias and unarticulated premises.⁵⁹⁸ Chapter 7.2 below explores judicial subjectivity in greater depth.

Inter-subjectivity can only be achieved if the judge is uninhibited in expressing his or her views. A shadow of potential permanent appointment looms over acting justices. Judges are auditioning, as well as adjudicating. The freedom of perspective in interpreting the law and the "democratisation of the interpretive struggle" is tempered.⁵⁹⁹

These assertions are supported by the relationship between security and dissent, in particular Hoexter's observation of a change in Justice Zondo's jurisprudential approach. She notes that his views placed "him in the procedurally conservative camp more often than not, *particularly since his appointment to the court became permanent* on 1 September 2012."⁶⁰⁰

Unlike the 'family' fostered in the CC, revelations made to the JSC during judicial nominee interviews reveal the strain that acting judges have, albeit indirectly, placed on the collegiality of the SCA. In 2017 Judge Maya interviewed for appointment as President of the Supreme Court of Appeal. During her interview, Judge Maya confirmed that there were deep divisions between the senior and junior judges on the Court. Division were attributed to more senior judges not working with junior and acting judges in the crafting of judgments, but rather writing dissents or re-writing the judgment without

⁵⁹⁸ Singer (note 140) 3; Malleson & Russell (note 287) 435: "The political diversity that comes into play at this level relates not only to ideological differences that animate the country's system of political completion but to ideological or philosophical differences about adjudication and the proper role of the judiciary in constitutional democracy."

⁵⁹⁹ Hutchinson (note 105) 873

⁶⁰⁰ Hoexter C "The enforcement of an official promise: form substance and the constitutional court" (2015) *SALJ* 241 (emphasis added)

discourse, discussion and mentorship.⁶⁰¹ Senior judges feel that they are carrying a greater work load on an already overburdened docket in ensuring that the judgments of the junior and acting judges are up to standard.⁶⁰²

Despite the strong leadership of Maya to address the problem, the issues linger. In 2019, Judge Majiedt, in his interview for appointment to the CC, spoke of the environment in the SCA. In this regard he said:

I think women acting judges and junior judges are vulnerable because they are regarded as soft targets. And to be honest with you, I don't have the guts to go to a senior judge to say you were wrong here...the boil is festering, and it is festering and it is festering and when it bursts it is going to be ugly.⁶⁰³

A deeper concern materialises from the pattern of using acting judges, particularly when situated in a judicialised climate. Noting once again the causes of the judicialisation of politics, a large number of cases before the Court deal with executive power and the rationality of executive decisions. These cases ask an acting judge to potentially rule against the President who has the authority to decide whether a judge should be elevated to a permanent position on the CC when a vacancy arises.

When the Court makes powerful rulings on politically sensitive matters it inextricably enfold questions of separation of powers, judicial intrusion and overreach. The more these questions arise, the more the question of judicial accountability is raised. A key component in responding to these challenges is to be able to point to the judicial accountability and democratic legitimacy provided by the JSC and presidential power of appointment. Acting judges are not subject to deliberative scrutiny of an appointment process through the JSC, so, in a sense, they exercise their authority with less democratic authority.⁶⁰⁴

⁶⁰¹ JSC President of the Supreme Court of Appeal Appointment Interview Transcript at 34 <https://www.judgesmatter.co.za/wp-content/uploads/2017/06/JSC-Interview-with-Judge-M-Maya-for-President-of-SCA.pdf> (date accessed 16/09/2019)

⁶⁰² Rabkin F "SCA tensions dominate at interviews" Mail & Guardian 5 April 2019 <https://mg.co.za/article/2019-04-05-00-sca-tensions-dominate-at-interviews> (date accessed 26/09/2019)

⁶⁰³ JSC Constitutional Court Appointment Interview Transcript <https://www.judgesmatter.co.za/wp-content/uploads/2019/08/SA-Constitutional-Court-JSC-interview-of-Judge-S-A-Majiedt-Judges-Matter-April-2019.pdf> (date accessed 16/09/2019)

⁶⁰⁴ Sec 175 Constitution

Whether these implications actually emerge (the veracity of which no acting judge would want to acknowledge) is secondary to a final and overarching concern about acting justices. The fact that the CC has not decided certain judgments unanimously has already been used as a political weapon against the Court. Zuma's response to the divided *Glenister* judgment (noted above in Chapter 4.3) utilizes just such a weapon. Majority rulings of a divided court are cast as a clearly incorrect interpretation of constitutional law.

Chapter 4 discussed political attack on the court's legitimacy as a consequence of lawfare. As the pace of Lawfare increases, the more the court's authority will be challenged. And so, as with divided judgments, the potential exists for acting judges to become a point of attack, with the claim that the number of acting judges on the CC renders the judgment lacking in authority. These imputations against the Court don't have to be jurisprudential sound. It need be only a political attack said with enough conviction to erode the legitimacy of Court's judgment and resist compliance. (See discussion of non-compliance in Chapter 6.2).

5.5. *Commissions of Inquiry*

Alongside the stream of political issues seeking resolution through litigation and review, there has been a burgeoning use of commissions of inquiry. A commission of inquiry is, by design, a mechanism that sits at the intersection of law and politics, restoring public faith at times of "widespread disquiet and discontent", political controversy or crisis.⁶⁰⁵

Both the status and high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence not only in the institution or situation investigated but also in the process of government as a whole.⁶⁰⁶

In the last decade, the following high profile commissions have been instituted:

⁶⁰⁵ *Minister of Police and Others v Premier of the Western Cape and Others* 2013 (12) BCLR 1365 (CC) at para 45

⁶⁰⁶ *Ibid* at para 45 referencing *Phillips v Nova Scotia* [1995] 2 SCR 97 137-8

- (a) “Ginwala Commission”: *Fitness of Advocate VP Pikoli to hold office of NDPP* 2008
- (b) “Khampepe Commission”: *Inquiry into the mandate and location of the Directorate of Special Operations* 2008
- (c) “Arms Commission”: *Commission of Inquiry into the allegations of fraud, corruption, impropriety or irregularity in the strategic defence procurement packages* 2011
- (d) “Marikana Commission”: *Commission of Inquiry into the tragic incident at or near area commonly known as Marikana mine* 2012
- (e) “Cassim Inquiry”: *National Direction of Public Prosecutions fitness to hold office* 2015
- (f) *Commission of Inquiry into the allegations of impropriety regarding Public Investment Corporation* 2018
- (g) “Mokgoro Inquiry”: *“Enquiry into fitness of Adv Nomgcobo Jiba and Adv Lawrence Sithembiso Mrwebi to hold the Office DNDPP* 2018
- (h) “Nugent Commission”: *Commission of Inquiry into Tax Administration and Governance by SARS* 2018
- (i) “Zondo Commission”: *Commission of Inquiry into allegations of State Capture, corruption and fraud in the public sector including organs of State* 2018.⁶⁰⁷

It is noteworthy that in media reports and in common parlance, a few of these commissions have become known not through its full title or subject of inquiry, as denoted above, but by the name of the former or sitting judge charged with leading the commission.⁶⁰⁸ Naming the commission after the judge or eminent person chairing it suggests a degree of veneration to which the judge is held. The commission cloaks itself in legitimacy borrowed from the judiciary. Whether taking on the name of the “Zondo Commission” or the “Mokgoro Inquiry” is a calculated strategy, or whether it is merely a short-

⁶⁰⁷ www.justice.gov.za/commissions/commissions_list.htm (date accessed 5/06/2019)

⁶⁰⁸ *President of the Republic of South Africa v Office of the Public Protector and Others* 2018 (2) SA 100 (GP) (hereinafter *President v Public Protector*) at para 134: “In order to achieve the goals of truth-finding and restoring confidence, it is necessary that those who head the commission be perceived as independent...”

hand that emerged organically, it remains symbolic of high levels of judicial sociological legitimacy, both for the institution and individual justices, which permeates into non-judicial or pseudo-judicial fora.⁶⁰⁹

However, the tendency to use esteemed jurists to chair commissions brings with it concerns for separation of powers and the independence and integrity of the judiciary as “through the assignment to a member of the judiciary by the executive, with concurrence of the legislature, of functions close to the heartland of executive power”.⁶¹⁰ However, the prevailing climate (depicted in Chapter 3) speaks to the causal relationship between judicialisation and distrust of the executive. So while enlisting a judge to head the commission may negatively impact judicial legitimacy, the commission of inquiry would not be seen as legitimate unless a judge of integrity can be enlisted.⁶¹¹

The ‘Zondo’ Commission was created as a result of Parliament’s failure to adequately address State Capture, and the capacity of the Office of the Public Protector to deal the scope and magnitude of corruption and capture. The point to be made at this juncture is that the establishment of the Zondo Commission illustrates the interconnection between judicialisation and legitimacy. The Zondo Commission is the creation of a pseudo-judicial avenue for accountability, stepping into the vacuum created by failures of institutional oversight. This is demonstrably good lawfare.

Mirroring a form of Lawfare where there is engagement with the purpose of bad faith non-engagement, Le Roux & Davis express the concern that:

for so long as a commission is active, law enforcement agencies, politicians and those implicated point to the ongoing process, the daily media reports, the theatre of accountability, as the reason why they are not doing more to redress or address whatever it is that occurred. So we need to be supportive but also sceptical of commissions, as they often seem to *decommission inquiry*.⁶¹²

⁶⁰⁹ Manson A & Mullan D (eds) *Commissions of Inquiry: Praise or Reappraise?* (2003) Irwin Law, Canada 491: “The relative success or failure of a public inquiry does seem to turn on the personal attributes of the individual appointed.”

⁶¹⁰ *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC) at para 24 (hereinafter *Heath*)

⁶¹¹ *Ibid* at para 37

⁶¹² Le Roux & Davis (note 78) 295-296 (emphasis added)

There is thus a potential for a commission to be inhibitive and impotent.

A further anxiety is that a commission of inquiry only ends in recommendations. The political will to take up the recommendations has to be present. Far from willingness, three instances exemplify the disregard for a commission's stature. First, in *Democratic Alliance v President of South Africa and Others*, President Zuma asserted that Mr Simelane lying to the Ginwala Commission should not disqualify his appointment for National Director of Public Prosecutions (NDPP) as "the Ginwala Commission was not a Court."⁶¹³

Second, President Zuma stated in response to a 2016 preliminary Public Protector report that "the power to appoint a commission of inquiry is vested in the President who is, in any event, *not bound to accept the advice of such a commission*."⁶¹⁴

President Zuma was well aware that the Constitution assigned the power to establish a commission of inquiry to the President. When financial inducement failed to get then NDPP Nxasana to step down, Zuma threatened to establish a commission to look into the fitness of Nxasana. This was widely seen as an attempt to strong arm Nxasana into resignation and a clear abuse of a commission of inquiry.

Clearly, a dismissive attitude towards commissions of inquiry is closely linked to Zuma's leadership. The removal of Zuma as President should therefore make these above-mentioned concerns subside. And yet a prevailing attitude of contempt toward commissions remains concerning. Indeed, lack of political willingness to deal with the findings of commissions prompted the Public Protector to order, as part of the remedial action of her State Capture Report, that the commission of inquiry submit a report to

⁶¹³ *Democratic Alliance v President of South Africa and Others* 2012 (12) BCLR 1297 (CC) at para 9. (Hereinafter *Democratic Alliance* 2012). Given the number of cases where the applicant is the Democratic Alliance, Economic Freedom Fighters or the United Democratic Movement, for clarity, I will note the year the case was heard in subsequent references to help situate the case in the mind of the reader. The fact that this needs to be done illustrates the volume of cases involving political opposition parties challenging executive decision-making.

⁶¹⁴ *Public Protector v South African Reserve Bank* (note 579) at para 139 (emphasis added)

Parliament within 14 days of completing its work. As the High Court noted in *President v Public Protector*, this was a “wise and necessary precaution in order to ensure that the recommendations of the commission are implemented and not rendered nugatory.”⁶¹⁵

This section started by noting the connection between a commission of inquiry and the restoration of public faith. Where a special investigator or a commission of inquiry is called in to play an auxiliary role, the success of that role is dependent on whether the commission has adequately informed public understanding. If there is derogation of democratic institutions, if democratic norms underpinning checks and balances between the branches are strained, and if there is outright defiance of the mechanisms that allow branches to hold each other in check, resort must be to engage the public.

Aligned with assessing the judicial role within its broader system, the above discussion of commissions of inquiry also reinforces the suggestion of extra-judicial influence. When sufficiently high in reputation, the judicial branch is capable of impacting the political environment when an esteemed judge is enlisted. The idea of judicial influence is expanded upon below.

5.6 *Pervading Influence, Depleting Responsibility*

Judicialisation of politics leads to the politicisation of law. Political influence pervades the political law and the court. The interaction is not linear: just as political flows to the court, so does the legal flow into the political. Through the elevation of law as a political weapon, the use of the law and the courts start to influence politics. In nations with strong judicial review, democratic actions taken outside of the court are framed to pass constitutional muster. This has been the experience in Israel.⁶¹⁶

⁶¹⁵ *Ibid* at para 160

⁶¹⁶ Sylvetsky R “Guide to the perplexed Anglo: Israel’s Supreme Court” *Arutz Shiva Israel National News*: “It is claimed that Knesset members refrain from passing laws when they feel that they will be overturned by the court as it is today.” <http://www.israelnationalnews.com/Articles/Article.aspx/21091> (date accessed 17/04/2019) Hoexter (note 328) at 493: “However, in our system, historically so impoverished in its non-judicial safeguards, the judgments of the courts may have a considerable impact on officialdom”.

In this multi-directional flow of judicial influence “legalese slips into daily discourse [and] the practice of rights threatens not merely to become inflated but to degenerate.”⁶¹⁷ This degeneration, or a devaluing of the law through its disingenuous use, aligns with the caution that lawfare promotes an attitude of contempt for the law.

The primacy of law caused by the judicialisation of politics means that an overly formalist, legalistic view of compliance becomes the standard.⁶¹⁸ As Booysen notes, the ANC has a tendency to “accept the rules as the only rules.”⁶¹⁹ This is the quintessential aspect of lawfare: invoking a formalist ‘respect’ for the law in a way that denigrates the spirit of the law. An example is the 2012 *Democratic Alliance* case where legalism was used to hide and evade. Respondents argued that an NDPP did not have to possess integrity, honesty and conscientiousness as these qualities were only listed for Directors of Public Prosecution. They were not explicitly stated as requisite for appointment of a *National* Director. In using legalism to evade the rule of law; it falls to the judiciary to raise the underlying constitutional norms upon which the more formalist law is predicated.⁶²⁰ In doing so, the court has to repel the perception that it is straying beyond legal confines and ‘creating’ law.

In the pervading influence of legalism there is an abandonment of democratic responsibility. Both Bickel and Hirschl have reflected on the potential for judicial review to lead to an abandonment of constitutional

⁶¹⁷ O’Brien (note 319) 9; Chayes (note 81) 1294; Tate & Vallinder (note 13) 518; Ferejohn (note 353) 42-45; Posner (note 143) 524; Epstein *et al* (note 126) 125; Haltom & Silverstein (note 172) 29-30: “...the Court could minimize meddling in the democratic process while husbanding its authority for cases where intervention in defense of principle was unavoidable.”

⁶¹⁸ *Democratic Alliance* 2012 (note 613). When the question arose as to Mr Simelane’s fitness to be appointed NDPP, his representations to the CC where “legalistic and technical in nature...intent upon establishing that Mr Simelane’s conduct was not hit by the relevant legislation...and whether his conduct fell within conduct prohibited by law.”(at para 81)

⁶¹⁹ Booysen (note 386) 307

⁶²⁰ See for example the position adopted by the Supreme Court of Appeals in *Minister of Social Development v Phoenix Cash & Carry* 2007 (9) BCLR 982 (SCA) at para 2: “What I am concerned to stress is the need to appreciate the difference between formal shortcomings which go to the heart of the process and the elevation of matters of subsidiary importance to a level which determines the fate of the tender. It follows that a public tender process should be so interpreted and applied as to avoid both uncertainty and undue reliance on form.”

principles at the legislative level. Hirschl forecasts that the increasing turning to the constitution as saviour results in the “corresponding impoverishment of political discourse.”⁶²¹ When this happens, political dialogue and normative questions are shut down.⁶²² This is partly because, as has been mentioned, judicialisation breeds further judicialisation. The legal avenue becomes the favoured avenue for redress or policy change. Within the court’s expanded role comes expanded power and greater political impact. The legal avenue is more attractive for reactionary efforts that have been unable to find enough traction, and indeed, critical mass, in the democratic space.

This is the place in which the United States finds itself. A great deal could be said about the constitutional sociology of *Roe v Wade*⁶²³, its broader political landscape and its implications on the judiciary. For the purposes of this research, these implications are limited to the following: the conservative reaction to *Roe v Wade* - a highly controversial, morally charged case legalising abortion - has led to efforts to transform the SCOTUS through the appointment of reactionary judges. When Senate Republicans stalled the confirmation of Obama Supreme Court nominee Merrick Garland for over a year, the subtle tactics of a 40-year effort to transform the judiciary became overt. Denying Obama his appointment, Republicans then rushed through Trump-nominated conservative ideologues Neil Gorsuch and later Brett Kavanaugh, creating a conservative majority on the Bench.

Efforts to capture the court have resulted in an intense focus not just at the Supreme Court level but also the politicisation of the appellate levels through persistent court packing efforts.⁶²⁴ In most instances, the judicial nominees, such as Clarence Thomas or Kavanaugh, while ultimately confirmed by the Senate, barely survive the process and take their seat on the Bench bruised

⁶²¹ Bickel (note 167) 22 Hirschl (note 12) 269; Dooley “Beware of the imperial judiciary” (1978) 4 *Bar Leader* 23

⁶²² Posner (note 106) 218; Dooley (note 621) 24; Hutchinson (note 106) 314,324; Burns (note 454) 182

⁶²³ *Roe v. Wade*, 410 U.S. 113 (1973)

⁶²⁴ Whittington (note 454) 524-530

and limping. The reputational damage to the nominee then transfuses to damage the perception of legitimacy of the Supreme Court.⁶²⁵

President Trump, whose policies and behaviour cannot in any way be squared with Christian values, continues to have a rock-solid support base in the Evangelical Right. Refusing to hold Trump accountable, evangelicals are willing to look the other way when Trump abuses his office for personal gain, and shrug their shoulders when he obstructs justice, chisels out democratic institutions and derogates all constitutional and democratic norms. Trump won their unwavering support by promising to appoint pro-life, anti-gay, religious ‘freedom’ protecting conservative judges.⁶²⁶ And he has delivered – appointing 133 district court judges, 50 appellate court judges, and two Supreme Court Justices in his first three years in office,⁶²⁷ effectively charting the US judicial system on a conservative, theocratic course for generations to come.

The unfolding American story encapsulates the relationship between the pervading influence of a court in a judicialised era, the high-stakes, now blatant tactics of politicisation and judicial capture, and the decline of democratic responsibility. A retreat to the judiciary is being used to achieve what could not be achieved through the democratic process; most specifically, efforts to inhibit the very ability of the people for self-determination through curtailing voting rights and the exercise of democratic freedoms.

At its best, the constraint of constitutionalism, through the court as vigilant sentinel, will suffuse constitutional principle through all levels of government.⁶²⁸ At its worst, the constraint of constitutionalism, in a codicil that Cardozo himself acknowledges, can paradoxically result in fewer restraints

⁶²⁵ Whittington (note 454) 534-535

⁶²⁶ Fea J *Believe Me: The Evangelical Road to Donald Trump* (2018) William B. Eerdmans Publishing Company, Grand Rapids, Michigan

⁶²⁷ “Federal Judicial Appointments by President” *Ballotpedia* https://ballotpedia.org/Federal_judicial_appointments_by_president (date accessed 11/02/2020).

⁶²⁸ Cardozo B *The Nature of the Judicial Process* (1921) Yale University Press, New Haven Connecticut at 92-94

and “rough handling of civil rights” in the legislature.⁶²⁹ The demand for participation and assertion that there be fair, considered, and reasoned decisions declines. Assured by the safety net of judicial review, decisions at the legislative level are met by the public with apathy. The democratic imperative is ceded to the courts. The resort to judicial review, argues Bickel, is “lamentably too common”, and will “dwarf the political capacity of the people, and to deaden its sense of moral responsibility. It is no light thing to do that”.⁶³⁰

Despite continuing moral disagreement, constitutional resolution ends the conversation.⁶³¹ A court possessed with high levels of legitimacy has the potential to silence, silence that will fester and fester until increased pressure causes a rupture that will in the end affect judicial legitimacy. We are thus confronted with three competing aspects of diffuse legitimacy. Firstly, recall that diffuse legitimacy can sustain support for and obedience to judicial decisions, but only to the extent that the ruling takes account of one’s deepest and most enduring moral commitments. Secondly, a high level of institutional legitimacy can lead an acceptance of the decision. Thirdly, the courts’ position as minority rights defender obligates the institution to defend the controversial against popular backlash.

The appeal to an authoritative reading of the Constitution is an attempt to settle conflict. Applying the law in a way that seems to suggest its autonomy or mechanical nature of the exercise, and by rejecting the scope of interpretative differences, can ensure that the judicial role is seen to be democratically legitimate. However, interpreting the Constitution as speaking with a single, decisive voice in the rhetoric of inevitability risks under-inclusion, not just on the specific ruling, but in the *vision* of the Constitution. Thus within the attempt to resolve conflict, those who have fallen outside such interpretation no longer feel constitutional allegiance, resulting in more conflict and less stability. In reaching for democratic legitimacy, this strategy paradoxically results in a loss of democratic legitimacy by shutting down

⁶²⁹ Bickel (note 167) 22

⁶³⁰ Bickel (note 167) 21-22, see also Rostow (note 171) 193 -194; Hutchinson (note 106) 324; Dorf M “The domain of reflexive law” (2003) 103 *Colum. L Rev* 384

⁶³¹ Graber (note 393) 42

future potential to engage and contest the meaning and scope of the constitutional norm.

Moreover, the ability for the constitution to remain flexible and open ensures that the Constitution remains both democratically responsive and resilient to external realities. This allows the space for the court to operate in way that can navigate difficulties to preserve its own legal normativity. These diverging necessities to settle conflict and maintain stability through leaving things unsettled are further aggravated in the era of judicialisation of politics. In this era, the issues are not simple; they are “right at the contested boundary”.⁶³² The Court is presented with issues of “pure politics” and “collective identity questions...define (*and often divide*) whole polities.”⁶³³

The focus on the judiciary as a primary avenue for redress and policy change is made at the expense of energy and resources being directed to address issues through more traditionally ‘democratic’ avenues.⁶³⁴ Furthermore, judicial resolution “might have pre-empted any useful policy role for majoritarian institutions.”⁶³⁵

Take for example the constitutional victories for the gay rights movement in South Africa. Favoursing judicial avenues, suggestive of high judicial legitimacy, can transpire into something that is disadvantageous both for the social change sought and the court, emblematic of an unfolding wicked problem. Advancing the gay rights movement through litigation removed the focus from combatting the prejudices in public opinion. This created a great chasm between the constitutional protections espoused and the grass roots reality. As De Vos notes, seeking the objective through the court meant that there was “strong emphasis on product, to the almost total exclusion of process.”⁶³⁶

In 1992, at the beginning of South Africa mulling the idea of a Bill of Rights as the vehicle of transition into democracy, Hugh Corder warned of the

⁶³² Ferejohn (note 353) 44; O’Brien (note 319) 29

⁶³³ Hirschl (note 211) 723 (emphasis added)

⁶³⁴ Graber (note 393) 42

⁶³⁵ Tate & Vallinder (note 13) 526

⁶³⁶ De Vos (note 307) 442-443; Hirschl (note 306) 198 who notes the potential “harm [to] reformist movements by pacifying activists with the illusion of change”.

“political seduction of the law”.⁶³⁷ He cautioned against looking to a Bill of Rights as a ‘cure all’ for all social injustice. Now in a judicialised culture – Corder’s warning proves prescient. Judicialisation of rights creates illusionary gains, or what Learned Hand called “false hopes.”⁶³⁸ “A rights supportive *culture* in addition to a written Bill of Rights is a necessary condition for the actual protection of civil liberties.”⁶³⁹

When there is no concrete evidence of that gain in day to day lives, it reverberates onto the judiciary, questioning the faith placed in the Constitution. When using the Constitution as an avenue for social change particularly a constitution that promises transformation, the journey along the path of transformation is crucial. The gap between aspiration and reality must be closed. No matter how strongly the protection of these goals are voiced by the Bench, nation’s people to buy into the project and be brought along that journey if there is to be enduring faith in the constitutional project.

When the debate has been ceded to the courts, what type of climate remains in the political sphere? Particularly in dominant party democracy, pursuing an action through the judicial avenue suggests that deliberation and engagement in the democratic arena has been stifled. Retreat to the Court to challenge abuse of power and demand accountability causes the aggravated abuse of power in the vacated political space. The Court, operating in response to this climate, can only be a shield for so long. In the end, that spirit of unrestrained, unaccountable rights-trampling of the democratically deficient dominance that has been fostered in this environment will lead to a disregard of the court’s authority.⁶⁴⁰ Authoritative legitimacy must encompass

⁶³⁷ Corder H “Lessons from (North) America (Beware the ‘legalization of politics’ and the ‘political seduction of the law’)” (1992) 109 *SALJ* 204; Tyler & Mitchell (note 119) 790-791; Dooley (note 621) 23: “the continued vitality of litigation may be read as a triumph of myth over reality”

⁶³⁸ Hirschl (note 306) 153 referencing Learned Hand “The Spirit of Liberty” (1944)

⁶³⁹ Hirschl (note 306) 153

⁶⁴⁰ Bickel (note 167) 23; Rostow (note 171) 205; Tushnet M (ed) *I Dissent: Great Opposing Opinions in Landmark Supreme Court Cases* (2008) Beacon Press, Boston 10 referencing *Marbury v Madison* 5 U.S. 137 (1803) 1803. Gibson J dissenting: “Once let public opinion be so corrupt as to sanction every misconstruction of the Constitution and abuse of power which the temptation of the moment may dictate, and the party which may happen to be predominate, will laugh at the puny efforts of a dependent power to arrest it in its course.”

efficiency and compliance: how probable is it that the Court's decisions will be accepted, respected, enforced and adhered to?⁶⁴¹

A judicialised culture creates at once a pervading judicial influence to hide behind legal technicism *and* results in a disregard of the judicial influence in the law-making sphere by ceding democratic responsibility.

5.7 *Shifting Blame*

*"Blame neither the Constitution nor the Courts"*⁶⁴²

By transferring responsibility to the courts, the focus is taken off the institutional and political failings that placed the issue on the courts' doorstep. The judiciary is then placed front and centre, channelling all opposition, and drawing attention away from the factors that have contributed to the climate of judicialisation.⁶⁴³

In seeking resolution, the Constitution is looked to as saviour. In part a consequence of constitutional patriotism, this is arguably a misunderstanding of the purpose of the Constitution. The Constitution should not be viewed as a saviour but as a mechanism, a roadmap and a tool to save ourselves.⁶⁴⁴ Extending the metaphor, a tool is only as useful as the capability of the craftsman who wields it. However strong the promises of the Constitution, the

⁶⁴¹ Roux (note 27) 31

⁶⁴² Bizos G "Blame neither the Constitution nor the Courts" Speech delivered when awarded an honorary doctorate by the *Centre for Human Rights University of Pretoria Faculty of Law* December 2011 <https://www.chr.up.ac.za/latest-news/103-news-archive/1734-presentation-of-honorary-doctorate-to-george-bizos-sc?highlight=WyJiaXpvcyJd> (date accessed 23/07/2019)

⁶⁴³ Graber (note 393) 43; Hirschl (note 12) 269; See Stephenson (note 116) 63 who offers a counter argument on shifting blame: "The biggest problem with this "blame deflection" explanation, though, is that it assumes a public sophisticated enough to observe that courts rather than the government made an important policy decision, but not sophisticated enough to realize that the government could manipulate or ignore the courts if it wanted to. Politicians escape blame neither from totally naive constituents (who look only to outcomes) nor from totally sophisticated constituents, who understand perfectly well the game the government is playing."

⁶⁴⁴ Madonsela T "Keynote Address Administrative Justice of South Africa Conference 5-6 March 2019, Johannesburg; Tomkins A "The role of the courts in the political constitution" (2010) 60 *U. Toronto L. J* 3; Federico (note 473) 49: "We are not maintaining that constitutionalism in itself can grant better living standards, but it contributes liberating those capacities necessary to have access to resources (material, cultural and political) from other kinds of constraint."

ability for those promises to become manifest is inexorably dependent on good governance. “An ounce of democratic prevention is better than a pound of judicial cure.”⁶⁴⁵

Asking the courts to address issues beyond its institutional competencies and unable to be resolved solely through judicial power hastens the journey from constitutional patriotism to judicial dissatisfaction. The Constitution is painted as the reason why conditions for the people cannot be made better. When the governing party is dysfunctional, blame is deflected onto other institutions, specifically the Constitutional Court (CC) and the Constitution, as the reason for lack of progress, poor socio-economic conditions and failure to deliver on the promises of the new South Africa. Illustrative is Dr Mamphela Ramphele’s view that:

There is enough concern about the utterances by ANC leaders and government officials to suggest that not all is well in our constitutional democracy...there is a clash of values between those who believe in the sanctity of our constitutional democratic foundations and those who see them as an obstacle to the second transition.⁶⁴⁶

Blame deflection has resulted in calls for a constitutional amendment so that expropriation of land without compensation would be initiated in South Africa. Amendment of section 25 of the Constitution, which would implicate and then unravel many rights in the Bill of Rights, is not, however necessary to effectively implement land reform. As former Constitutional Court Justice Sachs submitted to the High Level Panel on the issue of land reform:

Far from being a barrier to radical land redistribution, the Constitution in fact requires and facilitates extensive and progressive programmes of land reform. It provides for constitutional and judicial control to ensure equitable access and prevent abuse.⁶⁴⁷

⁶⁴⁵ Hutchinson (note 106) 323; Tate & Vallinder (note 13) 528

⁶⁴⁶ Ramphele’s comments appeared in reporting by De Waal M “The Tribal Courts Bill: Sacrificing rural people’s rights on the altar of power?” *Daily Maverick* 2 May 2012 <https://www.dailymaverick.co.za/article/2012-05-07-the-tribal-courts-bill-sacrificing-rural-peoples-rights-on-the-altar-of-power/> (date accessed 08/08/2019)

⁶⁴⁷ *Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* 206 https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HL_P_Report/HLP_report.pdf (date accessed 27/11/2018)

Prevailing legal thought supports the view that amendment of the Constitution is not needed. Land reform can be affected and transformative goals achieved, without amendment, if clear guidelines for just and equitable compensation were *legislatively* enacted.⁶⁴⁸

Chapter 3 spoke in part of the unwillingness of the Inkatha Freedom Party (IFP) to participate in the constitutional negotiation process and the perceived likelihood at the time that the IFP would boycott the 1994 election. The IFP were ultimately persuaded to participate. Detailed reporting in late 2019 brought into light what had always been in half shadow - just how IFP participation was ensured. The first democratic election was to take place on the 27th April 1994. Two days prior, on the 25th April, the *Ingonyama Trust Act* was signed into law. This Act placed 2.8 million hectares of land in Kwa-Zulu Natal into a Trust with the Zulu King as the sole trustee. This agreement ensured that the Zulu King would not lose his power when the homelands were re-incorporated into South Africa.⁶⁴⁹

The renewed debate around land reform and the amendment of the Constitution to allow expropriation can be seen, in part, as an effort to dissolve the Ingonyama Trust.⁶⁵⁰ This observation is substantiated by the recommendations of the Presidential Advisory Panel on Land Reform. The solution to facilitate constitutional stability in 1994 re-emerged as a problem for constitutional stability in 2019; a clarifying example of a wicked problem 25 years in the making.

The land reform issue speaks to a growing disenchantment in South Africa. The primacy of the Constitution means that it takes the blame as the reason why conditions cannot be better, and the promise of a better

⁶⁴⁸ Slade B, Piennar J *et al* *Submission to Parliament on the review of section 25 of the Constitution of the Republic of South Africa*, 1996 (2018) Stellenbosch University (Referenced with permission by authors, permission on file). Three Expropriation Bills have been before Parliament, in 2008, 2013 and 2015, all three and all three failed to be enacted into law.

⁶⁴⁹ Lynd H "Secret details of the land deal that brought the IFP into the 94 poll" *Mail & Guardian* 07 Aug 2019 <https://mg.co.za/article/2019-08-07-secret-details-of-the-land-deal-that-brought-the-ifp-into-the-94-poll/> (date accessed 04/11/2019)

⁶⁵⁰ *Final Report of the Presidential Advisory Panel on Land Reform and Agriculture* (2019) 46 https://www.gov.za/sites/default/files/gcis_document/201907/panelreportlandreform_0.pdf (date accessed 10/02/2020)

tomorrow has not materialised. When social and economic conditions are not addressed, the Constitution can be painted as an obstructionist force to progress, in the “mistaken belief that courts lie at the heart” of the problem.⁶⁵¹ As disenchantment grows, the more challenges to the initial compromises and political settlement find voice. Most starkly in recent years, the view that Mandela negotiated a ‘sell-out’ demonstrates the fragility of the political legitimacy of the Constitution:

Some say the Constitution has robbed us of a proper land redistribution process. Others would want to look at other clauses. Well, it's South Africa. Everything is transparent and open for debate...However, I'd still want us to handle the Constitution with care. There are many people who see it as a sell-out because there were too many compromises...We have to have a good look at the Constitution. Let's determine where the shortcomings are. Then we can start talking of clauses...It is an excellent Constitution. There are shortcomings and we might not be quite there yet, but we've come a long way.⁶⁵²

5.8 Conclusion

From the sketch of the prevailing judicial environment, the effect of judicialisation of politics has substantially increased the courts case load, leading to fractures in judicial collegiality. Due to the expansive review power the Court possesses there are absences and delays in appointments caused by the high-stakes politicisation of appointment. This leads to a demand for acting judges that has been shown to cause further judicial disquiet.

It cannot be denied that the greatly inhibitory cost, restricted access to and delay of justice in South Africa are valid reasons for judicial reform. Diverting matters into other fora may be needed to both ease the burden on the CC and cultivate faith in the justice system. But, consistent with a wicked problem, the attractiveness of the judicial avenue, highlighted by the

⁶⁵¹ Hutchinson (note 106) 323; Conklin (note 203) 18; Russell (note 124) 322; Corder H “From separation to unity: accommodating difference in South Africa’s Constitutions during the twentieth century” (2000) *Transnat’l L. & Contemp. Probs* 558

⁶⁵² October A “Possible changes to Constitution, says Ramaphosa” *News24* 8 December 2016 <https://www.news24.com/SouthAfrica/News/possible-changes-to-constitution-says-ramaphosa-20161208> (date accessed 02/02/2020; see also Devenish G “A tale of two countries” *The Witness* 17 September 2017 whose opinion piece speaks to the same rhetoric of ‘sell-out’, still prevalent a year after Ramphosa’s comments.

judicialisation of politics, leads to the potential for using reform to create pseudo-judicial structures for nefarious political agendas. This is the overriding danger of the prevalence of Lawfare. It causes any future reform, however well intentioned, to be met with suspicion and viewed through a politicised lens.

This chapter has identified further effects of the judicialisation of politics. It has charted the implications stemming from the attractiveness and high legitimacy of the judicial route showing the potential rapid descent from 'constitution as saviour' to constitutional blame. This reinforces that judicial legitimacy needs to be approached as a system so that, with clear eyes, the source of the failing can be identified and blame cannot be deflected onto the Court.⁶⁵³

The following chapter focuses on how the judicialisation of politics places cases before the Court that are most often beyond the Court's institutional competency. While the Court is bestowed with expanded review power of political actions under constitutional supremacy, it is the Courts ability to ensure compliance with its orders and achieve effective redress in these political cases through its institutional relationships that must be addressed. The chapter below discusses how this specific dimension of judicial legitimacy – achieving authoritative legitimacy – is inhibited in a judicialised climate.

⁶⁵³ Hutchinson (note 106) 294

CHAPTER 6

THE DIFFICULTY IN ACHIEVING JUDICIAL EFFECTIVENESS IN A JUDICIALISED CLIMATE

“The appellants ask of this court what is beyond its competence to grant”.⁶⁵⁴

6.1 Introduction

The previous chapter focused on the politicisation of adjudication. The dangers posed by the politicisation of adjudication that expose the court to political attack and seek to undermine its independence leads to the ‘politics of adjudication’ – traversing how a court needs to approach a political case. Judicialisation of politics seeks judicial resolution where resolution has been inhibited in other spheres. Effective redress and implementation of remedial orders does however require compliance by actors outside of the judiciary.

Compliance with a court order indicates a sufficiently high level of authoritative legitimacy. In the already present culture of non-compliance, this chapter explores the difficulty facing the Court in ensuring the implementation of its orders. Willing execution of a Court order by political actors is particularly difficult when increasing instances of political aggression toward the court suggest declining authoritative legitimacy. Where there is a breakdown in the relationship with the very actors needed to execute the remedial order, compliance becomes a challenge.⁶⁵⁵

⁶⁵⁴ Fletcher (note 146) 666 referencing Frankfurter J in *Colgrove v Green* 328 U.S. 549 (1946)

⁶⁵⁵ Trochev A & Soloman P “Authoritarian constitutionalism in Putin's Russia: A pragmatic constitutional court in a dual state” (2018) 51 *Communist and Post-Communist Studies* 202-203; Rosenberg (note 192) 15-19: Ultimately courts “lack the power to force states to act”.

6.2 Non-compliance

In 2015, the Constitutional Court (CC) in the case of *Pheko 2* stated at the outset that “disobedience towards a court order or decisions risks rendering our courts impotent and judicial authority a mere mockery.”⁶⁵⁶ The Court further held that “continual non-compliance with court orders and decisions would inevitably lead to a situation of constitutional crisis.” The CC chose to add to its judgment a list of cases where there had been non-compliance, in addition to noting that the list was not exhaustive. The CC explained that this list was

included merely to illustrate the extent and nature of the phenomenon...state parties are failing in a very serious way to meet their constitutional obligations.⁶⁵⁷

Most demonstrable are the cases involving *Allpay*.⁶⁵⁸ In the first of these cases, the Court ruled that a procurement process for the distribution of grant payments to the most vulnerable South Africans was unlawful and the tender contract was invalid. Due to the nature of the contract, however, and the disastrous effects should a social grant distribution system not be in place, *Allpay 2* suspended the declaration of invalidity. In ruling that “further disciplined accountability is needed in the initiation and execution of the new tender process”, the CC imposed a structural interdict.⁶⁵⁹

The South African Social Security Agency (SASSA) was ordered to conduct a new tender process to choose a new social grant distributor or establish the capacities for the Agency itself to undertake the task. By 2015, SASSA had decided on the latter course of action, removing the need for a

⁶⁵⁶ *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2)* 2015 (5) SA 600 (CC) (hereinafter *Pheko 2*) at para 1

⁶⁵⁷ *Ibid* at para 26-27. These cases, observes Woolman (note 51) fn 12: “indicates that the Court has grown weary of the contempt that government officials have shown for the law and their constitutional obligations. For the Court, these actions go to the heart of the legal systems legitimacy”.

⁶⁵⁸ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC) (hereinafter *Allpay 1*) and *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* 2014 (4) SA 179 (CC) (hereinafter *Allpay 2*)

⁶⁵⁹ *Allpay 2* at para 71

tender procurement process. “On accepting this assurance the Court discharged its supervisory order.”⁶⁶⁰

A full year before it was to take over payment and distribution of social grants, SASSA knew it did not possess the capacity to do so. The Agency did not notify the CC, only to bring an urgent application a month before the continuing invalid contract would terminate. In this application SASSA asked the Court for the invalid contract to be extended as no grant distribution system would be in place on 1 April 2017.

By not having processes in place to distribute social grants and by not informing the Court of this problem sooner, the CC viewed SASSA’s conduct as a disregard of the remedial order placed on SASSA in *Allpay 2*. By running out of time, the entity originally and unlawfully awarded contract was the only entity with the infrastructure in place to complete grant payments. As result, grant distribution continued through an extended contract, circumventing procurement processes required by section 217 of the Constitution.

In an application for extension the applicants argued that “there will be chaos” if the CC did not allow for the extension of the contract. During oral arguments, Khampepe J expressed her disdain for what to her mind was a blackmailing of the CC through a self-imposed urgency to “bind the court”. The harm caused to the Court’s authoritative legitimacy is perhaps best illustrated by the Chief Justice’s displeasure expressed during oral arguments: “It’s like we [the Constitutional Court] are being laughed at.”⁶⁶¹

⁶⁶⁰ *Black Sash* 1 at para 4

⁶⁶¹ Thamm M “SassaGate: The Inconvenient Plan B – did ConCourt call Sassa’s bluff?” *Daily Maverick* 9 March 2018 <https://www.dailymaverick.co.za/article/2018-03-09-sassagate-the-inconvenient-plan-b-did-concourt-call-sassas-bluff/#.WsS2US5ubIU> (date accessed 10/03/2018)

6.3 Conditions of Effectiveness

In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced...when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal.⁶⁶²

Courts forced to act in a hostile political environment increases the chances of judgments that are not efficacious, ultimately rendering the courts paper tigers.⁶⁶³ The likelihood of achieving efficaciousness and avoiding political attack can be calculated through a "tolerance interval" – a strategic model laid out by Epstein *et al.*⁶⁶⁴ The tolerance interval indicates how much creativity and assertiveness the court can show while still being able to withstand political backlashes.

The tolerance interval is calculated through four indices:

- (a) the importance of the case to political stakeholders;
- (b) the ability of the court to ground its ruling in an authoritative area of law;
- (c) the level of public support for the policy / action that is before the court; and
- (d) the level of sociological legitimacy, as determined by the perception of judicial institution in a more generalised sense, aside from the matter at hand.⁶⁶⁵

If the judiciary can remain within the tolerance interval it reduces the chances of political non-compliance and backlash. These four indices align

⁶⁶² *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at para 69 Ackerman J for the majority

⁶⁶³ Hirschl (note 12) 270-271; Ferejohn (note 353) 43

⁶⁶⁴ Epstein *et al* (note 126) 128-130

⁶⁶⁵ *Ibid*; Epstein *et al*'s observation that where the judiciary is able to "remain within the tolerance interval, the tolerance interval expands" shares great similarity with the idea of a reservoir of sociological legitimacy discussed in Chapter 2. See also Stephenson (note 116) 74-75

with a court having to navigate the competing and contradictory dimensions of democratic, legal, moral and sociological legitimacy.

Where politically salient, the chances of attack or non-compliance increase. Where legally authoritative, the chances of attack or non-compliance decrease. Where there is a high level of public support for the issue at hand, it will be ill-advised for the political role players not to comply with a remedial order. Where the judicial system is regarded highly, the ability for the court to withstand a political attack increases. In other words, through gauging the level of legitimacy of each dimensions of legitimacy, the behaviour and conduct between the judicial branch, political power and the public can be understood. The reactions of these actors will in turn determine the sustainability of judicial legitimacy. The following section looks at these attributes of a tolerance interval when subjected to the pressures of the judicialisation of politics.

6.3.1 Judicialisation and the Political Salience of the Case

In outlining the causes of the judicialisation of politics, chapter 3 showed that a large proportion of cases heard by the CC relate to the unconstitutional conduct on the part of a political actor or the functioning of an institution exercising public power. Instances of judicialisation are, by their very nature, cases that originate from the exercise of constitutional prerogatives of political actors or institutions challenged through review.⁶⁶⁶ Thus, as these judicialised matters are inherently politically salient, the tolerance interval is shortened.⁶⁶⁷

6.3.2 Clear Legal Authority

Appeals to clear, plain text legal authority are difficult in these broadly political cases. For the legitimacy of the continued constitutional project going into an uncharted future, acknowledging intractable disagreement,

⁶⁶⁶ Tate & Vallinder (note 13) 528

⁶⁶⁷ Kapiszewski *et al* (note 191) 25

and the need to show a degree of democratic deference, the Constitution is drafted in broad principle that according to Sunstein

involve[s] the constructive uses of silence, an important social and legal phenomenon. Especially in a diverse society, silence – on something that may prove false, obtuse, or excessively contentious – can help minimize conflict, allow the present to learn from the future, and save a great deal of time and expense. What is said and what is resolved in no more important than what is left out.⁶⁶⁸

The Constitution does not therefore easily lend itself to clear textual support or a plain text reading for resolution. As has been mentioned above, political cases primarily deal with prerogatives that belong in the domain of other branches. In the area of parliamentary prerogatives and procedures, the Constitution uses ‘by law’ provisions. Deliberately laconic provisions of the Constitution are to be left to be fleshed out and given life by a democratically elected body. Thereafter, future challenges before the court are to be addressed first at the statutory level, through the principle of subsidiarity. The Constitution therefore does not outline the specific contours of these prerogatives. It is silent on certain issues, delegating certain areas of competencies to more democratically legitimate spaces in the political sphere.

Noting the causes of judicialisation, these political spheres are, arguably, in default, beset with obstructionist tendencies and an inability to effectively govern within these spaces. The matter is then pushed back onto the Constitution, asking the Constitutional Court (CC) to find resolution in an area where there is, *by design*, constitutional gaps.⁶⁶⁹ The CC thus has difficulty in appealing to an authoritative, plain text reading to justify its intervention.

Willingness to engage in politically sensitive issues with greater assertiveness corresponds to “convincing textual support in the constitution itself”.⁶⁷⁰ By constitutional design, there is an absence of textual clarity, to the degree required to silence contestation. A politically fraught issue that is

⁶⁶⁸ Sunstein (note 299) 58

⁶⁶⁹ See Dixon & Ginsburg (note 511) 636

⁶⁷⁰ Fletcher (note 146) 673-691; Posner (note 106) 218

subject to legal ambiguity or where “decisions are the subject of widespread criticism, there will be much greater scope for executive disobedience.”⁶⁷¹ Linked to such a potential, there is increasing pressure to find consensus in the judgement and rule unanimously.

In 2017, two cases came before the Gauteng High Court and the CC. Both were of high political salience involving presidential power and the removal of the President. Both came on the heels of the 2016 case of *EFF 1* boldly defending the powers of the Public Protector to issue binding remedial action on the President. In 2012, the CC had also ruled against the president’s NDPP appointment.

The tolerance interval notes that the higher the level of political salience, the greater the need to locate the judgment in an area of the Constitution that is clearly authoritative. These cases are politically salient, occurring in a remarkably concentrated period, all speaking to presidential powers, the removal of the President or implicating the president in some way. The CC had time and again to stand up to and overrule a president. It needed the shield of unambiguous, plain text. All of these cases are in areas of constitutional silence. This is the danger of the judicialisation of politics.

Turning now to the first of the two cases: the previous chapter’s sketch of rule of law and impunity noted that the South African government had disregarded a High Court order to arrest Sudanese President Al Bashir.⁶⁷² This discussion on constitutional silence now focusses on the events that transpired after this non-compliance. The High Court rule that the duty to arrest Al Bashir arose from South Africa’s responsibility as a signatory to the ICC. The African National Congress subsequently threatened to leave the ICC. In *Democratic Alliance v Minister of International Relations and Cooperation*, the Gauteng High Court was asked to offer clarity and guidance on the procedure for leaving the ICC. Section 231 of the Constitution speaks only of negotiation, signing, ratification and domestication of the international agreements. The Constitution is silent on the nation turning its back on any

⁶⁷¹ Dixon & Issacharoff (note 275) 696, Hutchinson (note 106) 313: “judicial indecision subverts the claim that there is a coherent conceptual pattern”.

⁶⁷² *South African Litigation Centre* (note 552)

previously assented to international agreement and the procedure for doing so.

The Gauteng High Court, operating in this area of constitutional silence, first looked to how the Constitution outlined the process for ratification and domestication. It then inverted that process to structure a procedure for revocation of an agreement. In so doing, the High Court *constructed* a determination on whether it would be constitutionally sound for President Zuma to unilaterally revoke South Africa as a signatory to the Rome Statute, and its domestication into South African law through the *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002*.⁶⁷³

At the CC level, a further example of constitutional silence can be found in the 2012 case of *Democratic Alliance v President of South Africa and Others* that challenged President Zuma's decision to appoint Mr Simelane as NDPP. The respondents in this case argued that the Constitution is silent on the qualifications for the NDPP, noting that the Constitution only outlines that Directors of Public Prosecutions must be appropriately qualified. It does not speak to the qualifications of the National Director. It was contended that the National Director thus does not fall within the confines of that directive. Respondents argued that whether the NDPP is fit and proper, possessing the experience, conscientiousness and integrity, is therefore a political and ultimately subjective determination to be made by the President. The CC, in rejecting the overly formalist argument raised by the respondents, held that: "the Constitution by *necessary implication* requires the National Director to be appropriately qualified."⁶⁷⁴

Constitutional silence is most present in parliamentary roles and procedures. Despite this leeway afforded the parliament, the Court and the Constitution was enjoined, asked to rule on the process in the calling for a motion of no confidence by Parliament in 2013,⁶⁷⁵ whether a secret ballot in a

⁶⁷³ *Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)* 2017 (3) SA 212 (GP)

⁶⁷⁴ *Democratic Alliance* 2012 (note 618) at para 13-16 (emphasis added)

⁶⁷⁵ *Mazibuko v Sisulu and Another* 2013 (6) SA 249 (CC)

motion of no confidence in the President is permissible in 2017;⁶⁷⁶ and questions as to the parliamentary process for the impeachment of a President and the adequacy of these processes in 2018.⁶⁷⁷ Additionally, in the face of non-compliance by both the President and Parliament, the nature and extent of horizontal accountability mechanisms, specifically the powers of Public Protector, required judicial clarity.

In all these areas, the Constitution is silent in the sense that clarity of the mechanisms, procedures and powers cannot be sourced in a clearly enumerated, formalistic provision. Should constitutional gaps be interpreted in an exhaustive sense, meaning that no action can be taken where the Constitution does not speak explicitly to the issue at hand? Or does silence call for a judicial role in filling the gap, in a more liberal, constructive sense?⁶⁷⁸ Noting that absence of evidence is not evidence of absence, the CC has adopted the following position in regard to constitutional gaps:

Our Constitution embodies the basic and fundamental objectives of our constitutional democracy. Like the German Constitution, it has an inner unity, and the meaning of any one part is linked to that of other provisions. Taken as a unit [our] Constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate.’ Individual provisions of the Constitution cannot therefore be considered and construed in isolation. They must be construed in a manner that is compatible with those basic and fundamental principles of our democracy. Constitutional provisions must be construed purposively and in the light of the Constitution as a whole.⁶⁷⁹

Answers cannot always be located in a specific provision, but must be determined through an assessment of the constitutional spirit and purpose cultivated through “judicial exposition”.⁶⁸⁰ In *AZAPO*, the CC held that the Constitution “must be read holistically. It expresses an integrated

⁶⁷⁶ *United Democratic Movement v Speaker* (note 382) at para 57-58: “The Constitution is silent on the procedure. The Constitution could have provided for a vote by secret ballot or an open ballot. It did neither. Why did the Constitution leave the procedure open?” and at para 64: “It bears emphasis that the absence of a prior determination of the voting procedure by our Constitution for a motion of no confidence means that it neither prohibits nor prescribes an open ballot or a secret ballot”. The CC went on to craft an argument that noted, despite constitutional silence, the Constitution does *allow* for a secret ballot, but the decision to do so remains firmly in the prerogative of the National Assembly.

⁶⁷⁷ *EFF 2* (note 375)

⁶⁷⁸ Hutchinson (note 106) 305

⁶⁷⁹ *United Democratic Movement v Speaker* (note 382) at para 30

⁶⁸⁰ Issacharoff (note 30) 1002

philosophical and jurisprudential approach.”⁶⁸¹ The holistic nature can be further inferred from the position taken by Sachs J, in a separate but concurring judgment in *National Coalition*. Sachs regarded the “separation of rights and sequential ordering” as inappropriate and rejected the “assumption that rights have to be compartmentalised and ranked in descending order of value.”⁶⁸²

Constitutional silence requires judicial construction. This may suggest that silence allows for the judge to be unconstrained, unmoored from the law and free to impose his or her preference. (Chapter 7.2 below problematizes the relationship between formalism and judicial constrain in greater depth.) This potential is rejected by Posner’s submission that “it is when judges have such a license that there is pressure for a doctrine of judicial self-restraint.”⁶⁸³

In the judicialisation of politics, cases that concern the institutional prerogatives of the other branches are cases falling into areas of constitutional silence. As such, the Court is confronted with the dichotomy of the demand for creativity and the hesitancy of engagement.

6.3.3 Division and Dissent

In the absence of an explicit, plain text rule, the flow of the political into the legal and the merging of law and politics force the Court to grapple with normative constitutional underpinnings. It is a task that increases the chances of division and dissent amongst the Bench.⁶⁸⁴ Each instance of review before the Court forces

the inevitable descent into the concrete and the specific concomitant to the application of these general principles. This descent destroys the appearance of consensus regarding general constitutional principles.⁶⁸⁵

⁶⁸¹ AZAPO (note 226) at para 48

⁶⁸² *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (12) BCLR 1517 (CC) at para 112

⁶⁸³ Posner (note 143) 539

⁶⁸⁴ O’Brien (note 319) 49, 53

⁶⁸⁵ van der Walt (note 72) 214; Posner (note 574) 860

In most cases, the CC's jurisdiction is sought precisely because constitutional norms have been disregarded by the institution in which they belong. In this absence, it is doubtful that an exposition and extrapolation of constitutional norms and the constitutional spirit will be accepted in such a political climate. Constitutional silence or indeterminacy exposes the CC to arguments about the legitimacy of its intervention.⁶⁸⁶ Politically sensitive matters and the possibility of political attack thus require a united front. Is the CC able to offer such unity? From 1995-2008, 73% of the cases on average were decided unanimously. From the years 2009-2019 unanimous judgments fell to 64.5%.⁶⁸⁷

The case of *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another*⁶⁸⁸ centred on the impeachment mechanisms and processes for the removal of a President. Such subject matter represents a politically sensitive case of the highest degree. It would have to be matched by unanimity and solidarity on the part of the CC.

Justices on the CC refer to each other as “my brother”⁶⁸⁹ and “my sister”. It is a powerful symbolism, invoking familial trust and unity. Yet in this *EFF 2* case, the CC was divided, issuing four separate judgments. The increasing divisions around separation of powers issues and the degree, with dissent over the degree of scrutiny the judicial branch should show in traversing political matters, is most evident in the anger expressed by the Chief Justice in his dissent:

Let me lay bare my deep-seated agony and bafflement about the second judgment's refusal to recognise the discretion the Assembly obviously has...that, in my view, is an unprecedented and unconstitutional encroachment into the operational space of Parliament by Judges... not objectively based on anything but judicial

⁶⁸⁶ De Vos P “Disagreement over interpretation is what led to two different decisions in Con Court impeachment judgment” *Daily Maverick* 09 January 2018 <https://www.dailymaverick.co.za/opinionista/2018-01-09-disagreement-over-interpretation-is-what-led-to-two-different-decisions-in-con-court-impeachment-judgment/#.WuxMcqSFPIU> (date accessed 12/02/2018)

⁶⁸⁷ Constitutional Court Statistics (note 569)

⁶⁸⁸ *EFF 2* (note 375) where the CC found the “failure by the National Assembly to make rules regulating the removal of a President in terms of section 89(1) of the Constitution constitutes a violation of this section and is invalid.”

⁶⁸⁹ *Black Sash 1* (note 366) at para 45

preference, reaches over the bold and sharp bright line of separation of powers.⁶⁹⁰

Dissent is important. Its presence is indicative of a court that is independent, representative and truly deliberative.⁶⁹¹ The concern is that the increasing prevalence of division and dissent are occurring precisely at the time the judiciary needs to be a bulwark, providing a unified force to counter political attack. Out of institutional concern in a Lawfare climate, there is a need for unanimous judgments, written by 'the Court' and not by a single Justice with a majority concurring.⁶⁹²

Consistent with a wicked problems understanding that requires traces the consequences of action, a deeper exploration of unanimity compels consideration what is being lost in reaching for unanimity. The Court may lose the often unappreciated value of dissenting judgements. Dissenting judgments indicate the representative composition of the bench, reflecting a plurality of views. Unanimous judgments do not admit of the conflict and assumptions, compromises and self-examination made behind closed doors. The illusion of determinate, self-applying law continues.⁶⁹³ But acknowledging the hermeneutical struggle sees the management of appearance weakened and symbolic potency diluted, diminishing sociological legitimacy.⁶⁹⁴

The presence of dissent in precedent can play a role in future legitimacy. Through precedent past dissents can be used in the evolution of the law while still binding it to a 'legal' assertion. This counters claims that a judge, in the evolution of principle and in their duty to develop the law, is unbounded. Dissent highlights the social and political substructures of the law that render

⁶⁹⁰ *EFF 2* (note 375) at para 254,267 and 270

⁶⁹¹ See *R v S (RD)* 1997 118 (3d) 353 at para 119 where the court notes the added level of "sensitivity and compassion" gained through representation.

⁶⁹² See for example *Treatment Action Campaign* (note 400); *Allpay 1* (note 658); *Hlophe v Premier of the Western Cape Province, Hlophe v Freedom Under Law and Others* 2012 (6) SA 13 (CC)

⁶⁹³ Gibson & Caldeira (note 106) 201

⁶⁹⁴ Hutchinson (note 105) 873

such a movement from dissent to acceptance possible.⁶⁹⁵ There is a democratic value in such a journey as the people see a normative vision of the Constitution unfolding. In this regard the Constitution is ambulatory.

Through Epstein *et al*'s strategic model for institutional stability in the form of a tolerance interval, the difficulty of the Court remaining within the interval at a time of judicialisation of politics is clear. Operating outside of the tolerance interval, the Court will be met with political hostility. To maintain its legitimacy, the court has then to foster public support. This is contingent on the increasing demand for *responsiveness* by the court achieved through the effectiveness of a remedy and redress by the court. It is to this challenge of crafting effective redress and ensuring implementation of the court's remedial orders that attention is now turned.

6.4 Remedial Action in Institutional Suits

An institutional suit is a judicial challenge to the functioning and conduct of a state institution. The suit results in a remedial order that is a targeted intervention into the operation of that institution in default. The judicialisation of these institutional functions causes a change in judicial modality. Traditionally, the legal modality is one where action takes place between parties and the impact of the legal action is restricted to these parties. Legal action is backward-looking with a clear link between the legal right raised and remedy sought.⁶⁹⁶ The facts are brought by the parties and the role of the judge is passive.⁶⁹⁷ Differing from this traditional model of adjudication is a public model of adjudication. The public model is future-oriented; with an impact extending beyond the parties and beyond the process; and where the judge plays a far more active role. The traditional judicial remedy is in the form of a negative order, an injunction or a declaratory order. Remedy pertaining to institutional reform demands a "form of relief [that] does not flow

⁶⁹⁵ Edlin D *Judges and Unjust Laws: Common Law Constitutionalism and the Foundations of Judicial Review* (2010) University of Michigan Press Ann Arbor 115-116. See Tushnet (note 640); Lessig (note 323) 935

⁶⁹⁶ *Ibid* (note 146) 640

⁶⁹⁷ See Chayes (note 81) 1281

ineluctably from the liability determination, but is fashioned *ad hoc*”.⁶⁹⁸ The remedy takes on a more positive form facilitated by a supervisory role played by the court. As a result, the judge becomes a key actor in overseeing implementation of the order that “prolongs and deepens, rather than terminates the court’s involvement within the dispute”.⁶⁹⁹

The concern with remedial orders in institutional suits is that the court is pulled into a space that is policy-laden. Under the separation of powers, the court would, ordinarily, not venture into policy issues. Furthermore, institutional suits have non-legal polycentric implications. Equivalence can be drawn between polycentricism and wicked problems in that both speak to the potential for the emergence of unforeseen and unwarranted consequences. It is for this reason that institutional suits, brought under public interest litigation are known as “extended impact cases”.⁷⁰⁰

While judicial intervention in the institution may be required, a judicial remedy cannot be overly prescriptive to the extent that it inhibits an institutions flexibility to navigate through new and emerging problems. In these areas, the CC would do well to abide by the wisdom of the Supreme Court of the United States that “the Court must tread carefully in such cases, to ensure that we do not ‘embarrass the future’.”⁷⁰¹

Decision making in areas of policy is an iterative process requiring “mutual spontaneous adjustment”, predicated on an understanding of its many parts, and on the interrelationships of those parts.⁷⁰² Guided by justice and equity, remedial orders are discretionary and fashioned *ad hoc*. This flexibility is crucial to ensure successful implementation. Herein lies the challenge for the court. To ensure that the order cannot be ignored by presumably recalcitrant institutional actors, it must have a level of specificity that gives the order some ‘teeth’. But the order cannot be so specific that it overly constrains and frustrates other efforts for reform at the institutional level. Balancing these

⁶⁹⁸ Chayes (note 81) 1293-1297; Aleinikoff (note 142) 953; Hoexter (note 328) 492

⁶⁹⁹ Chayes (note 81) 1298

⁷⁰⁰ Rosenberg (note 192) 29

⁷⁰¹ *Carpenter v. United States* 585 U.S (2018) quoting with approval Frankfurter’s stance in *Northwest Airlines, Inc. v. Minnesota*, 322 U. S. 292, 300 (1944).

⁷⁰² Fletcher (note 146) 647-663

two imperatives requires “specified time-limits for compliance and retained supervisory jurisdiction.”⁷⁰³ Through the court’s intervention and supervision, a continuing relationship between the judiciary and the recalcitrant institution is created.⁷⁰⁴

The presence of these challenges in adjudicating non-legal, poly-centric policy matters mirror the complex, adaptive nature of a system that wicked problems engage. What do wicked problems in complex systems suggest for the Court in navigating compelled interventions? To provide effective remedial redress, modelling must be undertaken “to enhance the efficacy of interventions.”⁷⁰⁵ Characteristic of polycentricism, modelling acknowledges and accounts for *emergent* behaviour, inter-relationships, the effect of actions on future relationships, and appreciates of the necessity of interdisciplinary focus.⁷⁰⁶ Understanding that “review is backward-looking and unsystematic,”⁷⁰⁷ a judicial competency to embrace modelling is, however, arguably, questionable.

Embracing modelling for crafting an effective remedial order (authoritative legitimacy) is negatively correlated to the role expectation demanded by sociological legitimacy. The greater the requisite specialisation, or institutional knowledge, to be able to calibrate an effective remedy, the less distance there is between adjudicator and the area of speciality. The adjudicator can potentially be viewed, by being less detached and more engaged, as less independent. The attractiveness of resolution through the judicial avenue is born of the belief that it has “no corrupting links.”⁷⁰⁸ The increased degree of engagement by the Court in these cases of institutional reform threatens “the insulated ‘above politics’ position of courts”.⁷⁰⁹

Yet if deeper judicial involvement is not embraced towards the calculus of effective remedy, authoritative legitimacy will be difficult to maintain. Stated

⁷⁰³ Lenta P “Judicial deference and rights” (2006) *TSAR* 466-467

⁷⁰⁴ Fletcher (note 146) 640

⁷⁰⁵ Nicholson CF “*Discussion Paper No. 3: Targeting and Innovation: Review of methods for modelling systems evolution*” (2007) *International Livestock Research Institute, Nairobi, Kenya* 15

⁷⁰⁶ Nicholson (note 705) 16-18

⁷⁰⁷ Hoexter (note 328) 493

⁷⁰⁸ Rosenberg (note 192) 24

⁷⁰⁹ Rosenberg (note 192) 17

differently, an institutional suit requires that the court somehow be independent and insulated as well as adequately informed of the institutional nuances and specialisation.⁷¹⁰

Appreciating the polycentricism and complexity, literature on institutional reform and adjudication of institutional suits embraces the "science of muddling through" where "decisions are uninformed by any single, overarching theory, but rather made through a succession of incremental changes".⁷¹¹

Complex systems generate a dynamic which enables their elements to transform in ways that are surprising...which cannot be anticipated through any prior characterisation. All that can be said is that such systems have the potential for generating new behaviours...such systems cannot be simplified in the conventional way by reduction or aggregation, for in so doing so *the richness of their structure* would be lost.⁷¹²

Muddling through is squared with a wicked problems view of complex systems in that a remedy "tends to be a more continuous process of amelioration and adjustment, and promising to solve problems, wicked or otherwise, may ultimately weaken already diminished faith".⁷¹³

The imposition of orders that are too rigid and restricting negates the needed flexibility, weakens the institution's ability to respond to future problems, and restricts more effective reform through more appropriate avenues.⁷¹⁴ What must be cautioned against is the Court's desire to ensure reform by reaching for the authority of the constitution in crafting an "excessive cure". This is for two reasons. Firstly, it can arrest policy initiatives at the political level, constraining the dynamism and discretion of political role

⁷¹⁰ Chayes (note 81) 1309; *DDP Valuers (Pty) Ltd v Madibeng Local Municipality* (233/2015) [2015] ZASCA 146 (1 October 2015) at para 18

⁷¹¹ Yudof (note 32) 442, Sunstein (note 299) 63-64

⁷¹² Nicholson (note 706) 18 referencing Batty M & Torrens PM 2005 "Modelling and prediction in a complex world" (2005) 37 *Futures* 745-766 (emphasis added)

⁷¹³ Peters (note 49) 387

⁷¹⁴ *Treatment Action Campaign* (note 400) at para 114: "A factor that needs to be kept in mind is that policy is and should be flexible. It may be changed at any time and the executive is always free to change policies where it considers it appropriate to do so. The only constraint is that policies must be consistent with the Constitution and the law. Court orders concerning policy choices made by the executive should therefore not be formulated in ways that preclude the executive from making such legitimate choices."

players, State actors and administrators. This risk also extends to the judiciary hamstringing itself in future institutional suits. Thus the Court must operate in a way that is “careful not to engage itself in the least in a way which would restrict its power of initiative.”⁷¹⁵

6.5 Authoritative Legitimacy

*“subtle, and possibly more lethal, [the] sheer bureaucratic disregard for, or protracted or reluctant implementation of, unwanted rulings.”*⁷¹⁶

When other institutions will not, or cannot, reform themselves to be aligned with their constitutional responsibilities, successful reform through the judicial institution can mitigate the perception of judicial activism and overreach. Successful reform can additionally increase the favourability of the court, which can in turn make political actors more hesitant to attack the court. Should, however, the Court not be able to deliver what is sought by those seeking redress or reform, it will be the judiciary, not the failings of the other institutions, that will suffer a loss to its legitimacy.⁷¹⁷

Through organisational theory, the challenges to effective implementation of a remedy and maintenance of authoritative legitimacy in a judicialised climate are now explored “Remedial decree, rather than the finding of a constitutional violation, is commonly perceived as the key to the success or failure of the litigation.”⁷¹⁸ To achieve authoritative legitimacy, it must be appreciated that the “mere articulation of rights is not sufficient, that rights cannot be exercised meaningfully if the relief is unworkable.”⁷¹⁹ Authoritative legitimacy therefore hinges on political receptivity to reform. It is at this junction that the greatest problem of judicialisation of politics is found. Successful remedy in these cases would have to appeal to the competencies

⁷¹⁵ Jacques J “The principle of institutional balance” (2004) 41 *Common Market Law Review* 38; Fletcher (note 146) 663-668; Notes: Judicial intervention (note 392) fn 124; Martin-Breen & Anderies (note 58) 51: “Methods which attempt to prevent all crises, to sustain in the short term, can *decrease resilience* in the long term.” (emphasis added)

⁷¹⁶ Hirschl (note 12) 271

⁷¹⁷ Ferejohn (note 353) 55

⁷¹⁸ Fletcher (note 146) 638-639:

⁷¹⁹ Notes: Judicial Intervention (note 392) 537

within the institution in default. The absence of competency was the driver of judicialisation in the first place.⁷²⁰

With each ‘abnormality’ of judicialisation of politics, asking the Court to resolve that which is beyond its competencies, the probability of dwindling faith in the Court increases. In this regard, Klug notes that it is the CC that is

Caught in the cross-hairs of struggles for the realization of the extensive promise of rights entrenched in the constitution and the limitations of governmental capacity and resources.⁷²¹

How can remedial redress be calibrated in a way that ensures compliance and the implementation of reform effective? First, it must be accepted that “compliance with a legal norm is not automatic”.⁷²² The Court must have an understanding of the institution/ organisation/ administrative body in order to be able to craft an order that will be complied with and *effectively* integrated. This requires understanding the institutional behaviour that is underpinning the failure of the organisation and the reasons that have brought it to the Court’s doorstep.⁷²³ Engaging in the non-legal policy-laden space without repercussion is predicated on successfully identifying where the fault lies and the willingness of key actors in that space to internalise reform. This allows for a precise remedial order, balancing effective redress against the cost of judicial intrusion.

Learning from implementation theory, the ability to ensure compliance with the remedial order hinges on flexibility and discretion *at the institutional level*. A rigid order being imposed upon the institution may meet resistance or disregard. Discretion at the institutional level allows for an order to be safely navigated through the political realities and system complexities. Because of this need for flexibility and discretion, implementation of the remedial order can only be achieved if the role players involved in the implementation of the

⁷²⁰ See South Africa’s weak score on The *Edelman Trust Barometer* (note 352) which supports the statement that institutional competence and ethics, understood as institutions that are purpose-driven, honest, and fair, is largely absent in South Africa’s institutions/ agencies/ departments of government.

⁷²¹ Klug (note 43) 111

⁷²² Yudof (note 32) 442

⁷²³ Notes: Judicial intervention (note 392) 513-537; Posner (note 106) 221; Yudof (note 32) 445; Fuller (note 20) 360: “many well-intentioned reforms have failed because they neglected to do this”.

remedial order are “normatively committed”⁷²⁴ to the remedy. Wicked problem literature cautions that “if all stakeholders do not stay constructively engaged, it is unlikely that the capacity to solve wicked problems can be maintained for the long term.”⁷²⁵ In this sense there must be an internalisation of the order.

Internalisation contemplates the operational ability needed when it comes to remedial action. This is aligned with a wicked problem understanding that “the premise for co-operation in wicked problem settings is likely to be a common knowledge base, not command and control processes.”⁷²⁶

The level of moral authority that the Court possesses will thus be contingent on the normative commitment of institutional role players. The willingness to be normatively committed will be based on whether the court has sufficient moral authority. In identifying a relationship between the willingness to internalise the order and the level of moral authority the court possesses,⁷²⁷ the circularity of this relationship suggests that moral authority is both a product and precondition of effective implementation.

In addition, the psychological aspect of imposing remedial action must be recognised:

staff will be especially reluctant to help implement changes...rigid insistence on conformity to rules such as court orders breeds distrust, destruction of documents and an attitude of ‘I won’t do anything more than I am absolutely required to do’. Changes required by outsiders, such as courts, may be strongly resisted by administrators and staffs who, as one study suggested ‘have a practically limitless capacity to sabotage reform’.⁷²⁸

Minister of Health and Others v Treatment Action Campaign and Others (no 2) provides a clarifying example of the need for internalisation of remedial redress. The Court can order a change of direction but it is the institutional role players who have their hands on the steering wheel in areas of

⁷²⁴ Yudof (note 32) 463; Rosenberg (note 192) 35, Ellmann (note 417) 96

⁷²⁵ Weber P & Khademian A “Wicked problems, knowledge challenges, and collaborative capacity builders in network settings” (2008) 68 *Public Admin Rev* 343

⁷²⁶ Weber & Khademian (note 725) 342

⁷²⁷ Yudof (note 32) 449-451; Rostow (note 171) 208

⁷²⁸ Rosenberg (note 192) 19; see Abel (note 53) 32-38 noting that despite judicial efforts to mitigate suffering caused by apartheid pass laws, gross obstruction at the bureaucratic level in issuing permits connected to implementing judicial order was present.

polycentric policy. This case highlights that the level of judicial involvement in the remedial order is correlated to the willingness to comply with implementation.

In this case, CC engaged a non-legal, policy-laden polycentric issue⁷²⁹, but did so through remedial action far more constrained than what was desired in the applicant's prayer. Indeed it was far more constrained in remedial oversight than what the court of first instance thought appropriate. The CC refused to grant a structural interdict that would require more vigorous supervisory jurisdiction, because it noted that the political failings that precipitated the litigation had now changed. The Court held that the "requisite political will is [now] present".⁷³⁰

Compliance in institutional suits is difficult absent the crucial factors of normative commitment and internalisation. An institutional suit, by its very nature presupposes recalcitrance and obstructionism. "Wicked problems place critical emphasis on the tasks of *knowledge transmission and integration*. Knowledge transmission tasks are communication issues that are grounded in *social and political relationships*."⁷³¹ Acknowledging the necessity of relationships compounds the compliance problem. Chapter 4 traced the breakdown of the relationship between the judiciary and the ruling party in South Africa. Judicialisation of politics creates tension in the relationship between the court and institutional role players. This aggression

⁷²⁹ *Treatment Action Campaign* (note 400) at para 98:

"This Court has made it clear on more than one occasion that although there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation. This does not mean, however, that courts cannot or should not make orders that have an impact on policy."

and at para 113:

"South African courts have a wide range of powers at their disposal to ensure that the Constitution is upheld. These include mandatory and structural interdicts. How they should exercise those powers depends on the circumstances of each particular case. Here due regard must be paid to the roles of the legislature and the executive in a democracy. What must be made clear, however, is that when it is appropriate to do so, courts may – and if need be must – use their wide powers to make orders that affect policy as well as legislation."

⁷³⁰ *Treatment Action Campaign* (note 400) at para 119

⁷³¹ Weber & Khademian (note 725) 344 (emphasis added)

impedes the receptivity to reform. Staying the causes of judicialisation, it is the very absence of the attributes needed to effectively implement remedial action in these polycentric systems, which was the cause of an institutional suit in the first place.

6.6 Conclusion

When the tolerance interval is overlaid on the era of judicialisation of politics, the difficulty in maintaining the tolerance interval is revealed. Cases of political salience, and the potential for political aggression deriving from the Court's involvement, require a unified force on the part of the Court in response. Yet what is clear is that precisely when unanimous rulings are most needed, dissent is increasing. This is in part because there is an inability to locate judgment in a plain text authority, with the Court having to adjudicate in areas of political prerogative falling into areas of constitutional gaps or constitutional silence.

The judicialisation of politics therefore causes a great tension between Epstein *et al*'s first and second indicator in the sense that what is most required is the most lacking. This requires that the remaining two indices – generalised sociological support for the judicial institution and public support for the specific instance before the Court – must be of greater prevalence to maintain the tolerance interval and judicial stability.

Maintaining public support is dependent on the court being about to provide effective vindication and *realization* of constitutional promises. The CC's ability to do so is constrained by its power to carry out the practical consequences of its judgment. Institutionally ill-equipped and ill-designed to deal with what has been ceded to it, it is solely dependent on the willingness of government to accept and execute such rulings.⁷³² The very factors driving the judicialisation of politics suggest that Court orders will be, and

⁷³² Hamilton A *The Federalist* 78 (note 76): "The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments"; Ferejohn (note 353) 48-4.

increasingly are being, met with non-compliance and recalcitrance. Here the ability to be responsive is inhibited.

Most dangerously, the Court, and not failings of the legislature, becomes the source of ire as the “teasing illusion” that the Court can be the place for redress and reform is shattered.⁷³³ With research rooted in the Indian judicial landscape, Baxi advances that judicialisation exposes the judiciary to the “dynamics of disenchantment”.⁷³⁴ Baxi’s observation of disenchantment supports the central thesis of this research - the danger of the trend of judicialisation and Lawfare to judicial legitimacy. Elucidating on this danger, on, a downward spiral of reputational strength, judicialisation, path dependency, an inability to achieve effective resolution, and ultimately, a decrease in reputation has been traced.

⁷³³ Corder (note 637) 223; Rosenberg (note 192) 21 referencing *Edwards v California* 1941; Graber (note 393) 42; Traynor (note 41) 8

⁷³⁴ Baxi (note 309) 107

CHAPTER 7

TRACING THE LEGITIMACY OF INTERVENTION STRATEGIES: THE JUDICIAL RESPONSE TO JUDICIALISATION OF POLITICS

7.1 *Operating in Hostility*

Having outlined both the political attacks on the Court and the wider culture which is increasingly antagonistic to the rule of law, a modality for the Court operating within dominance and political attack can now be explored. In the judicialisation of politics, cases coming before the Court exist in a hostile climate that forces the Court to consider its own institutional security.

Where the manifestations of dominance have undermined democratic norms, a greater role by the Court to preserve these norms is needed. This will be the most dangerous time for a court *and* the time when the most is asked of it.⁷³⁵ Furthermore, where there has been a disaggregation of democratic guardrails in the other branches, it is alone in this endeavour to uphold democratic norms. The Court will find itself increasingly isolated and exposed, facing perverse consequences “when the expansion of their power meets the objectives of a powerful opponent not constrained by the conventional rules of democratic politics.”⁷³⁶

Within these judicial-political dynamics, there is an impulse on the part of the Court to retreat and insulate itself from political backlash. This strategy of reticence to preserve legitimacy must however be considered first through the courts a role obligation, the second through a long-view perspective of legitimacy.

⁷³⁵ Tushnet (note 28) 121

⁷³⁶ Tate & Vallinder (note 13) 524

When it comes to rights claims – the Court must be courageous enough to be bold in its response. Otherwise, it will diminish its legitimacy by creating the view that it is abdicating its role by refusing a cogent defence of the right. In this boldness, the Court will undoubtedly draw fire, but it cannot flee from this responsibility. Significantly, the Court must not underestimate how a galvanising recognition of a right can translate into legitimacy for that very right and for the Court.⁷³⁷ The power of judicial recognition may cultivate normative legitimacy through its role in cultural politics. This can, in a round-about way, counter the dangers faced when being forced to engage in the political economy.

Viewed from a long-term perspective, the consequences of the Court's timidity in avoiding political attack may be more crippling to its legitimacy once the dust has settled.⁷³⁸ Re-introducing the instructive lessons of sociological legitimacy, legitimacy is fostered on a timeline. As such, the potential for an enduring historical narrative that the Court abdicated its duty to protect the people in favour of its own preservation cannot be discounted.

Dugard's assessment of positivism notes this past tendency in the South African legal system.⁷³⁹ In looking to jurisprudential history of holding the line against abusive governmental power, Haysom and Plasket refer to the 'self-mutilation' of the erstwhile Appellate Division (AD) under Chief Justice Rabie in the late 1980's. The AD at this time responded to the apartheid government's abuse of emergency powers with servility. The option to temper the worst human rights abuses through the use of a formalist and legally unassailable application of the ultra-vires doctrine was available to the AD. Instead, it chose to interpret the apartheid State's security laws in a manner that ousted its own jurisdiction, even where strong precedent and established law were available to offer the AD some coverage. The presence of these legal life-rafts makes the AD's timidity even more damaging to its legitimacy. The moral strength of the AD suffered to the extent that "judicial

⁷³⁷ Klug (note 43) 105-107

⁷³⁸ Posner (note 143) 547

⁷³⁹ Dugard (note 146) 376

officers of conscience” were encouraged to resign.⁷⁴⁰ There is a lesson to be extracted from the judicial politics of 1986-1987. The AD’s endeavour to maintain its institutional security through executive-mindedness ultimately severely tarnished its reputation during the pre-democratic era.

7.2 *The Formalist Response*

Drawing on Robin West’s aptly named article “The Authoritarian Impulse”, the instinct to retreat in times of pressure or attack is particularly acute. This instinct may emerge as a result of sensitivity either the cultural politics or the prevailing political economy. West identifies that where there is a breakdown in social cohesion, courts are more inclined to turn to formalist workings and the authority of the text in seeking resolution, rather than feeling secure enough to ask creative and normative questions of the Constitution.⁷⁴¹ (This would weigh more on the side of receptivity to cultural political pressures.) This authoritative turn, what van der Walt terms “reactionary formalism,”⁷⁴² is initiated by a court’s anxiety. This anxiety can be triggered by political attack, accusations of judicial overreach or judicial subjectivity (receptivity to political economy).

However, this reflex to close down and to retreat to formalism as a means for institutional preservation must be rejected.⁷⁴³ Rigid technicism is unsuited to the transformational objectives of the Constitution that requires giving voice and content to abstract values. As has been held by Justice Sachs, the reflex to retreat would “violate its [the Constitution’s] spirit as set out in the unmistakeably plain language.”⁷⁴⁴ This is further supported by Klare who argues that:

The drafters cannot have intended dramatically to alter the substantive constitutional foundations and assumptions, yet to have left these new rights and duties to be interpreted through the lens of classical legalist methods.⁷⁴⁵

⁷⁴⁰ Haysom & Plasket (note 529) 303-333

⁷⁴¹ West (note 39) 531-552; See also Cockrell (note 197) 6

⁷⁴² van der Walt (note 138) 79; Roux (note 27) 6; see also Issacharoff (note 30) 1003

⁷⁴³ Davis (note 27) 179

⁷⁴⁴ *S v Mhlungu* (note 427) at para 111

⁷⁴⁵ Klare (note 25) 155-156; Roux (note 27) 7

The judicial duty must remain flexible, context-sensitive and dynamic. Retreat to formalism would be a flight from responsibility.⁷⁴⁶ A mechanical role undertaken by the judiciary will be institutionally illegitimate in terms of role and expectation and will create a sense of judicial abdication.

In rejecting formalist reasoning as the adequate response to attack and anxiety, South Africa's jurisprudential history does, however, make it difficult to dismiss the value of formalism in its entirety. Formalism was used successfully in the past as a way to uphold human rights in the face of oppressive laws.⁷⁴⁷ The Constitutional Court (CC) therefore has to grapple with an inheritance of formalist thinking, which Hoexter acknowledges is "not a particularly obvious enemy,"

Judicialisation of politics leads to the politicisation of the judiciary, with judges exposed to the fire and fury of political aggression. The predominant type of criticism that political actors raise when the court rules against them is not a direct challenge to the law or the Constitution. Political actors must continue to claim the law for themselves. Rather they challenge the *interpretation* of the law or Constitution. They argue that the ruling was not based on an objective application of the law but a subjective interpretation of abstract provisions. A competing reading, assuredly one that exonerates the political actors, could then be seen as just as legitimate and just as legally persuasive. In the search for the objective to protect the Court from this accusation, formalism is invoked. It is at this junction that the relationship between judicial subjectivity and formalism can be problematised.

Looking at formalism more deeply, a critical appraisal of its connection to legitimacy develops. Formalism does not speak to objectivity that would remove the judicial officer from the cross-hairs. The interpretive turn has

⁷⁴⁶ Cockrell (note 197) 8

⁷⁴⁷ Hoexter (note 227) 598; Davis & le Roux (note 7) 3-4; Cameron (note 71) 437. It must be conceded that the ability to curb apartheid excesses was not the sole result of the application of formalism. le Roux & Davis (note 78) 26 state that "these victories were the product of many interrelated factors: the quality of the lawyering, the ideology of the presiding judges, the political context in which the cases were fought, the intensity of the political struggle at the time and the nature of the factual and legal materials relevant to the particular case."

"unsettle[d] the belief that deference to linguistic form guarantees objective interpretation, uninfluenced by the interpreter's inarticulate premises."⁷⁴⁸

A post-modern interpretative scholarship would argue that formalism does not remove judicial choice from interpretation. It does masks the reasons underlying the decision and hides it behind the appearance of a clear and plain text application of law. Creating this impression "is a manifest deception that can only hinder the development of a political culture of respect for judicial independence."⁷⁴⁹ In this masking, judicial preferences can hide under the surface, un-interrogated. Counter to its very objective, appeals to formalism do not "reinforce the systemic isolation, or closure, of the legal system".⁷⁵⁰

The paradox operating here is that in claiming constraint more unconstrained approaches are allowed to pervade; whereas acknowledging the potential for being less constrained allows for greater vigilance in guarding against preference in judicial reasoning, and thus greater constraint.

Within subjectivity, an epistemological focus reveals evidence of judicial constraint through intellectual inheritance and unconscious cultural, social, and professional coherence that would channel and control the ambit of decision-making.⁷⁵¹ This is counter to the attitudinal model that sees the jurist as unconstrained and unbounded in discretionary decision-making, guided solely by ideological preference.⁷⁵² Through acknowledging the potential to be both unconstrained and informed by inarticulate premises, the jurist is able to "broaden the group to which his subconscious loyalties are due."⁷⁵³

Problematising judicial subjectivity thus requires an assessment of reflexive judicial behaviour when judges acknowledge the potential for

⁷⁴⁸ Kentridge & Spitz (note 25) 33; Klare (note 25) 162

⁷⁴⁹ Roux (note 27) 47

⁷⁵⁰ Schauer F "Formalism" (1988) *Yale L.J* 522,530; Winter (note 149) 1449; Posner (note 143) 554: "...inescapably reflect the Justices personal values, psychology, background, peer pressures, political anxieties, professional experiences, ideological inclinations and other non-legalistic factors, *often operating unconsciously*". (emphasis added)

⁷⁵¹ Lively (note 123) 22

⁷⁵² Whittington (note 45) 606

⁷⁵³ Cardozo (note 628) 176; O'Regan (note 26) 1: "His judicial conscience was always one that was 'not too sure that it is right'...such a temperament is, although fitting, a painful one for a judge."

subjectivity. Awareness of the potential for the injection of personal preference will lead the jurist to be self-aware, indeed, self-conscious about his or her role. . Judicial legitimacy operates on a sliding scale of accountability and independence. Judicial awareness can be seen as self-limiting aspect, whereby both accountability and independence can exist within the judicial role.

This self-limiting aspect of formalism can also be linked to the dimensions of legitimacy framed in this research. The effort to achieve legal consistency, justice and equality, social acceptability, support from democratic structures, efficacy and compliance create a 'role distance' or a 'role morality' that forces the jurist to be cognisant of his or her ideological orientations and distancing them from the judicial ruling.⁷⁵⁴

The CC's relationship to formalism and procedural conservatism reveals an inconsistency on the part of the Court. At times it has shown rigidity and procedural rectitude, at other times it has allowed a more flexible and robust approach to the applicants' prayers. This is evident in the disparity between *My Vote Counts*,⁷⁵⁵ *Kirland*⁷⁵⁶ and *KZN Schools*⁷⁵⁷.

In *My Vote Counts* the CC found against the applicant's demand for greater transparency in political party funding. The majority held that the applicant chose the incorrect procedural route, ruling that the challenge should have been brought under the principle of subsidiarity.⁷⁵⁸

⁷⁵⁴ Balkin (note 70) 1704 ; Winter S "Contingency and community in normative practice" (1990) 139 *U. Pa. L.Rev* 973

⁷⁵⁵ *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC) (hereinafter *My Vote Counts* (2016)) at para 7 Cameron J for the minority: "A proper appreciation of this Court's task entails a broader embrace of the range of remedies and procedural routes the Constitution affords litigants, and requires this Court to adjudicate."

⁷⁵⁶ *Kirland* (note 329)

⁷⁵⁷ *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, Kwazulu-Natal and Others* 2013 (6) BCLR 615 (CC) (hereinafter *KZN Schools*)

⁷⁵⁸ The unsuccessful applicants took its cue from the CC's demand that the issue be addressed through a frontal attack on the PAIA. Returning to the CC in 2018, the CC in *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* 2018 (5) SA 380 (CC) confirmed the High Court order that: "To the extent that PAIA excludes the disclosure of information on the private funding of independent candidates that is required for the exercise or protection of the right to vote or impart information or ideas, it is constitutionally defective." (at para 65)

Consistency is a crucial element of legal legitimacy. While the Court may embrace legal techniques to not engage in the substantive merits of a case, this is itself a political strategy not to directly engage the political. However, where there is inconsistency in the strictness or lenience shown in the procedural hurdles, legal legitimacy is diminished. Inconsistent application makes judicial action appear “arbitrary, *ad hoc*, even disingenuous.”⁷⁵⁹ The political cover that a procedural and rule-bound rigidity seeks to achieve is lost.

Through the lens of judicial politics, the impact of the inconsistent application of these techniques of judicial avoidance can be interpreted in one of two ways. Either the Court is shielding itself from the more politically tense outcomes of the case when it finds against the government (as may be the case in *Kirland*); or, the Court’s unwillingness to engage in the substantive merits of the case reads as fear and timidity in not wanting to provoke executive or legislative ire (as it may be in the case of *My Vote Counts*). Both are equally damaging to institutional legitimacy. If invoking procedural rigidity is not done consistently the objective of hiding behind formalism is defeated. Inconsistency that signals that formalism is being used out of political concerns.⁷⁶⁰

Formalism can be described as the antithesis of a systems-awareness approach in that it is a denial of substantive considerations in favour of a narrow legalism that is a rule-bound, plain text application of the law. Transgressing these bounds would not be ‘law’. Through this jurisprudential approach, the court must be blinkered to considerations of justice, equity, fairness, compelling public interest and the public good. This research argues that factoring in these considerations are imperative for sustained judicial legitimacy. (Chapter 7.5 below will further argue that consideration of these factors in judgment is not abandoning law but showing fidelity to the law.)

The need for sensitivity to the broader environment in which the Court operates for sustained legitimacy is supported by Otto Scharmer, renowned

⁷⁵⁹ Boonzaier (note 332) 23-25

⁷⁶⁰ Hoexter (note 150) 177

for his work involving institutional learning of complex issues. Scharmer's research lays out a "social pathology" of institutional behaviour. Generated by what Scharmer calls "absencing", a blind-ness to the problems of the age (from which the parallel to hiding behind legalism for the purposes of this research is drawn), the trajectory mapped out is one flowing from "blindness" to "entrenching" to the point where the institution is "unable to redirect". The path ultimately ends in "institutional collapse".⁷⁶¹

Hiding behind legalism prevents the Court from engagement and edification but there is safety in being insulated and adhering to 'appropriateness' of function that reinforces the idea of judicial neutrality. This is necessary for public faith and confidence. Possessed with institutional legitimacy, the Court is able to uphold individual rights without fear, however unpopular.⁷⁶² The Court being blinkered to outside considerations and consequences therefore allows it to boldly fulfil its function.⁷⁶³ Consistent with the complexity of this issue, formalism, under this argument, does provide a source of legitimacy.

The framework of 'institutional legitimacy' predicated in role appropriateness becomes strained in times of judicialisation of politics. Particularly in matters that have arisen out of an accountability vacuum, judicial detachment will not be seen to be legally legitimate through its 'neutrality', but will rather be seen by the public as unwillingness to assist when needed.⁷⁶⁴

Constitutionalism provides a framework for contestation in the democratic space. Where democratic functioning fails, it falls to the Court to become the avenue for conversation which has been silenced in other arenas. For the sake of stable democracy, it is vitally important that conversations continue.

⁷⁶¹ This is a brief outline of the cyclical depiction by Scharmer O *Theory U: Leading from the Future as it Emerges* (2009) Berrett-Koehler Publishers, San Francisco at 306 figure 18.2

⁷⁶² This seeming paradox between popular support for the judiciary being necessary to stand against popular opinion is addressed in Chapter 2.2.2 Sociological Legitimacy.

⁷⁶³ Du Plessis (note 31) 5, 8

⁷⁶⁴ See generally Haltom & Silverstein (note 172)

A resort to formalist thinking closes down conversation; it is a “means of exclusion”.⁷⁶⁵

7.3 Detachment

For the most part, the CC has tried not to become overly interventionist nor overly prescriptive in its remedial orders. It has sought to tread lightly in matters of policy-laden poly-centricity. The Court has favoured returning the issue to the area in which resolution is most suited; albeit in a manner that facilitates greater participation and engagement between the stakeholders.⁷⁶⁶

Deferral can be an appropriate judicial strategy to preserve independence; balancing detachment and responsiveness in polycentric institutional suits. Writing in 2016, Dixon and Issacharoff noted that exploring deferral as a legitimating mechanism remains largely unexplored by constitutional scholars.⁷⁶⁷ Through suspending a declaration of validity, deferral allows the court to uphold values through wide, edifying reasoning, while still allowing the competent authority to correct the defect. Deferral imbues the issue and its resolution with democratic resonance.⁷⁶⁸ Orders of suspension initiate engagement and dialogue between the branches, returning the onus onto the Legislature or Executive to take up its constitutional responsibility.

Additionally, deferral creates a time delay between the court’s finding of invalidity and the response by the law-making body. The delay allows for the response to the court order to be less reactionary, reducing the chances of political vitriol against the court. Delay can also allow enough time for lower courts and legal scholars to embrace and internalise the reasoning of the CC.⁷⁶⁹ Cultivating a legal anchor through the dispersed support of the lower

⁷⁶⁵ Davis (note 27) 47, 70-71; Seidman L *Our Unsettled Constitution: A New Defence of Constitutionalism and Judicial Review* (2001) Yale University Press, Hartford 20; Posner (note 143) 545; see Hoexter’s (note 41) 181 view of: “... the dangers inherent in the use of a conceptual threshold such as ‘rights’. The prominence of the concept encourages the courts to treat it as the key to the problem...the presence of such concepts encourages a technical rather than a substantive approach, and they have the same capacity to distract the courts from the substance of the case”. See Van der Walt “Law as sacrifice” (2001) *SALJ* 710

⁷⁶⁶ Ellmann (note 417) 76, 96

⁷⁶⁷ Dixon & Issacharoff (note 275) 683

⁷⁶⁸ Constitution Section 172(1)(b)(ii)

⁷⁶⁹ Dixon & Issacharoff (note 275) 686-706

courts and the legal complex can be a valuable and necessary counter-weight to confrontation and opposition in institutional reform cases.

However, considering the judicialised climate caused by institutional incompetence and failure to adhere to administrative justice prescripts in the first place, reform initiated in the judicial avenue and then deferred, may not be possible.⁷⁷⁰ As a result, the Court's authoritative legitimacy may be stressed. This problem is further aggravated by the breakdown in the judicial-political relationship. It is because of this lack of trust and lack of good faith that a departure from the strategy of deferral is required.

Upon consideration of these factors contributing to judicialised that emerge from the broader political climate, it is argued that the strategy of deferral by the Court as a way of achieving judicial legitimacy must be altered. The Court must adjust to fire on all cylinders. A show of strength, sufficient to bolster others outside of the process, will place additional pressure on the recalcitrant institution to implement reform. The Court can be a catalyst, stoking the embers of extra-judicial reform through its influence. Often the insulation of function demanded by traditional legal scholarship ignores the catalytic potential that a judicial decision has on its environment,

The discussion of problems and the declaration of broad principles by the Courts is a vital element in the community experience...The Supreme Court is, among other things, an educational body, and the Justices are inevitably teachers in a vital national seminar.⁷⁷¹

A court's boldness can encourage and hasten change – provided the will for change is already there, however embryonic. Crucial for catalysing extra-judicial change is bringing humanness to the issue. Hiding behind legalism strips the humanness and emotion from the issue. Detached, rule-bound technicism in an effort to foster judicial legitimacy, avoid attack and have reform effectively adopted will not be sufficient. A court must rather show “tangible evidence of compassion.”⁷⁷²

⁷⁷⁰ See discussion of the SASSA controversy in the *Allpay* cases at 6.2 above.

⁷⁷¹ Rostow (note 171) 208

⁷⁷² Lively (note 123) 5; Rosenberg (note 192) 25-26, 32

Where courts are institutionally restrained and are able to do little more than point the way, political pragmatism must make way for bold principle and aspiration. Where the court is not institutionally competent to walk along the path, directing step by step, then the initial guidance shown to illuminate the path must be sufficiently bright.

For example, Pillay observes how the tenor of the *Joe Slovo* judgment was sufficiently strong to spark an effective catalyst outside of direct judicial remedial action.⁷⁷³

In *Joe Slovo*, the South African Constitutional Court made it clear that the government had a continuing responsibility to engage with the affected community... This gave the community some tools with which to continue fighting.⁷⁷⁴

In politically sensitive cases the Court is painfully aware of institutional legitimacy. Is it the most appropriate institution to be hearing this matter? This potential for judicial self-consciousness leads to restrained or deferential strategies. Institutional legitimacy fuels an instinct to try to push the matter back into the appropriate space. This instinct is heightened by the judicialisation of politics as the court seeks to establish its boundaries in a bid to prevent further judicialisation of politics.

Counter-intuitively however, judgment that is not deferential has the potential to *prevent* these cases coming before it. A systems-approach perspective suggests that the court should not behave with timidity. After dealing with SASSA's repeated non-compliance, the CC refused to be strong-armed by the agency's urgent application. The strength shown by the CC "shock[ed] the habitually tardy agency out of its torpor."⁷⁷⁵ By a court showing a willingness to engage assertively in a non-legal polycentric issue;

⁷⁷³ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and others* 2009 (9) BCLR 847 (CC)

⁷⁷⁴ Pillay A "Revisiting the Indian experience of economic and social rights adjudication: the need for a principled approach to judicial activism and restraint" (2014) 63 *Int'l & Comp L. Q* 395

⁷⁷⁵ Thamm M "SassaGate: The Inconvenient Plan B – did ConCourt call Sassa's bluff?" *Daily Maverick* 9 March 2018 <https://www.dailymaverick.co.za/article/2018-03-09-sassagate-the-inconvenient-plan-b-did-concourt-call-sassas-bluff/#.WsS2US5ubIU> (date accessed 10/03/2018)

it paradoxically encourages the correct decision-maker to reclaim the prerogative to fulfil such duty correctly.⁷⁷⁶

The CC's stance in *Treatment Action Campaign* offers a further example of the necessity of departing from traditional deference face of hostility. In this case the Court augmented respect for the Court and compliance with its orders stating that

The government has always respected and executed orders of this Court. There is no reason to believe that it will not do so in the present case.⁷⁷⁷

Such a statement creates the impression that within the political economy, high levels of authority legitimacy were present between the court and the dominant ruling party. However, the statement belies that the entirety of the litigation process was beset with tension and vitriolic HIV/ Aids denialism by government. Re-reading the CC's passage in light of this broader political context suggests that authoritative legitimacy was not in fact present. It can be reread as the CC demanding compliance, albeit through rhetoric that was strategically deft in its assertiveness, while at the same time avoiding a direct confrontation.⁷⁷⁸

Treatment Action Campaign affirms that judicial legitimacy within the political economy is far more complex and multidimensional. The case shows a paradoxical finding that ensuring compliance does not necessarily need to be structured around trying not to antagonise political power. Where there is hostility and recalcitrance, authoritative legitimacy will be garnered by the Court matching disregard with equally forceful assertiveness. The Mbeki lead government would eventually come to accept its legal defeat and accede to the Court's order, *despite its hostility*. Acquiescence to the Court bolstered the authoritative legitimacy of the Court.⁷⁷⁹ *Treatment Action Campaign* as a case study shows that while avoiding the fight may preserve

⁷⁷⁶ Fletcher (note 146) 639

⁷⁷⁷ *Treatment Action Campaign* (note 400) para 129

⁷⁷⁸ For the use of judicial rhetoric to avoid confrontation with political power, see Klaaren J & Roux T "The Nicholson judgment: an exercise in law and politics" (2010) 54 *JAL* 143-155

⁷⁷⁹ Ellmann (note 417) 74-75 referencing Justice Edwin Cameron in Cameron E *Justice: A Personal Account* (2014) 199-200

legitimacy; boldly entering the fray and remaining standing may garner even more. This is supported by Chayes' articulation that:

The ability of a judicial pronouncement to sustain itself in the dialogue and the power of judicial action to generate assent over the long haul become the ultimate touchstones of legitimacy. Judicial action can only achieve such legitimacy by responding to, indeed by stirring, the deep and durable demand for justice in our society. I confess some difficulty in seeing how this is to be accomplished by erecting the barrier of the traditional conception to turn aside...has always acknowledged the importance of substantive results for the legitimacy and accountability of judicial action.⁷⁸⁰ When there is a societal demand that unmet in the political (as Chapter 3 has argued as the primary cause of judicialisation of politics), an insulated role required for institutional legitimacy must expand to enfold responsiveness as a key dimension. This is consistent with the multidimensionality of legitimacy. In the abdication by institutions/ agencies / governmental departments of its constitutional responsibilities, responsiveness by the Court frames legitimate judicial action. As such, Hoexter notes that

pigeonholing of a legal problem is less important than the ability of the system as a whole to demand accountability and exert control. The crucial thing, surely, is that there should be a response from the system, not that the response be located anywhere in particular.⁷⁸¹

As the political is increasingly remanded to the legal avenue, the judicialisation of politics in South Africa places demands on the Court to become a countervailing force and find solutions. As a consequence, legitimacy as responsiveness becomes dependent on the Court being able to be effectively responded to these needs.⁷⁸²

In conclusion, in exploring judicial detachment, this section has argued that such a strategy in the time of the judicialisation of politics is not sufficient for legitimacy. Combined with the difficulty of achieving effectiveness in judicialised times (chapter 6), showing caution, clinging to quiet dogmas of authoritative understandings to spurn accusations of activism, would not

⁷⁸⁰ Chayes (note 81) 1316; see also Haltom & Silverstein (note 172) 41

⁷⁸¹ Hoexter (note 41) 183

⁷⁸² Davis & le Roux (note 7) 9, see also Moog (note 62) 124

maintain judicial legitimacy, but threaten it-. For the Constitution and the Court to endure it must be “responsive to the failures in the functioning of basic institutions.”⁷⁸³

7.4 Responsiveness

In its judgment in *Black Sash 1*, the CC held that:

It is necessary to be frank about this exercise of our just and equitable remedial power. That power is not limitless and the order we make today pushes at its limits. It is a remedy that must be used with caution and only in exceptional circumstances. But these are exceptional circumstances. Everyone stressed that what has happened has precipitated a national crisis.⁷⁸⁴

Returning to the causes of the judicialisation of politics, many of the applications before the Court seek review of government actions and the exercise of its constitutional responsibilities. In some instances⁷⁸⁵, applications are brought by the government itself for remedy of its own unlawful actions. Whether through incompetence or a more bad faith, deliberately running out the clock to circumvent legal oversight, delays in these applications often result in consequences that have already been manifested. Findings of unlawfulness under Section 172(1)(a) of the Constitution in these instances may lead to unfairness, prejudice, injustice and large-scale social disruption or crisis. Through such actions the Court is confronted with the fidelity to legal rule pulling in one direction, and of the interests of justice pulling in the other direction.

Sec 172(1)(b), however, provides that the Court can craft a just and equitable remedy, “avoiding or minimizing injustice when legality and certainty collide.”⁷⁸⁶ Here the Court is able to separate of the unlawfulness of an action and the declaration of invalidity from the just and equitable remedial action.

⁷⁸³ Levinson S & Graber M “The constitutional powers of anti-plubian presidents: constitutional interpretation in a broken constitutional order” (2018) 21 *Chapman Law Review* 152-153

⁷⁸⁴ *Black Sash 1* (note 366) at para 51

⁷⁸⁵ See *Khumalo and Another v Member of the Executive Council for Education: Kwa Zulu Natal* 2014 (3) BCLR 333 (CC)

⁷⁸⁶ *Oudekraal* (note 330) at para 36

In *Mhlope*⁷⁸⁷, despite the finding of non-compliance with a provision of the Electoral Act, the CC had to condone the non-compliance so that local government elections could proceed as scheduled. A further example is found in the *Allpay judgments*, discussed above. In this case, declaring the contract invalid and ordering that it be set aside would have left a vacuum in social grant distribution, to the detriment of millions of vulnerable South Africans. As such, the procurement contract had to continue to exist in fact, despite its unlawfulness.

What is emerging as far too routine an occurrence, particularly in procurement law adjudication, is the Court being unable to set aside an administrative act, despite its invalidity, because the contract is too near completion.⁷⁸⁸ An overburdened docket and the speed of litigation compound this problem. Located in this area of lawfulness, invalidity and remedy, a Lawfare tactic emerges, embracing a judicial avenue for redress but deliberately pushing the time limits to its limit. This effectively ties the relevant Court's hands as it is unable to set aside the unlawful conduct without causing practical upheavals. Where State actors deliberately engage in this tactic, the Court is forced into a statesmanship role in that it must assess of the broader consequences of an impugned act or conduct.

7.5 *Judicial Statesmanship, Responsiveness and the Rule of Law*

The expanded role that is asked of the Court in a judicialised era amplifies the dialectical tensions between responsiveness and justice on the one hand; and a more rule bound understanding of the law on the other. At the intersection of these tensions emerges judicial statesmanship.

Whether intervention or restraint by a court is legitimate is determined by the role and function demanded of the institution. A historical and institutional perspective of the CC acknowledges a nation-building role for

⁷⁸⁷ *Electoral Commission v Mhlope and Others* 2016 (5) SA 1 (CC) (hereinafter *Mhlope*)

⁷⁸⁸ *Chairperson: Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2005 (4) All SA 487 (SCA) (hereinafter *JFE Sapela Electronics*) at para 27-28; *Joubert Galin Searle Inc and Others v Road Accident Fund and Others* 2014 (4) SA 148 (ECP) at para 101; *Actaris* (note 327) at para 27; see generally Quinot G & Maree P "The puzzle of pronouncing on the validity of administrative action on review" (2015) CCR 27-42

the Court, one that must holding aloft a social vision. It is clear that the CC plays a role that far exceeds the parameters of a traditional court. Prior to its creation, the idea

for a separate constitutional court carried the day, at least in part because it felt that the quality of the ordinary courts' jurisprudence, based as it was on 'pure law' adjudication, would be compromised if they became involved in more 'political' cases that a Constitutional Court would have to decide.⁷⁸⁹

The barometer of the CC's institutional legitimacy should not therefore be determined through the parameters of 'pure law' adjudication. Rather, it has been argued that the CC "exercise[s] more widely, a new, fourth branch of power. Though there is no good name label for this function, it could be called something like 'articulation of values'."⁷⁹⁰

To what extent the expanded role of the CC, justified from an institutionalist perspective, is a departure from fidelity to law? The answer depends on how holistically and how deeply the idea of the rule of law is engaged. Can the conditions for the functioning of the law be accepted as part of the law?

The rule of law is a complex concept, with much debate as to its definition. Its meaning tends to emerge more clearly when it is absent in a State than when it is present. The classical conception of the rule of law narrowly encompasses the "values of consistency, stability, predictability and transparency", a strict separation of law and politics, with law being seen as neutral, apolitical and autonomous.⁷⁹¹

Rejecting apartheid-era jurisprudence, a paradigmatic shift in the understanding of the rule of law towards a conception that is more concerned with the "integrity of the *system*" exists in South Africa. The rule of law is

⁷⁸⁹ Seedorf (note 262) 4

⁷⁹⁰ Robertson D *The Judge as Political Theorist: Contemporary Constitutional Review* (2010) Princeton University Press, Princeton New Jersey 348

⁷⁹¹ Siegel (note 115) 966,1001; Post & Siegel (note 35) 375; Botha (note 151) 538; Geyh (note 395) 23

therefore oriented to the preservation “of the constitutional state rather than of the narrower Diceyan concept.”⁷⁹²

Appreciating the constitutional system in which the rule of law operates reveals that the preservation of the rule of law is dependent on maintaining social solidarity, reflecting social values and working towards a social good.⁷⁹³ In the same way, Fuller outlines that the rule of law as a narrowly prescribed, positivistic rule of law, in the sense of rule bound clarity and order, must expand to engage at a deeper level morality, fairness and good order.⁷⁹⁴

This deeper understanding of the rule of law argues that social solidarity as well as the reflection of social values in the law is both the *precondition* and the *purpose* of the rule of law. It is within this deeper understanding of the rule of law that judicial statesmanship is found. “Judges must discharge their responsibilities in ways that sustain law’s legitimacy over the long run and with respect to the nation as a whole.”⁷⁹⁵ The court must therefore pay consideration of the prevailing political conditions and social consequences of matters before it. Judicial statesmanship is therefore characterised by judgments that reflect prevailing social values and maintain social solidarity.⁷⁹⁶

Judicial statesmanship should not be seen as anathema to normative constitutional scholarship but rather as necessary to ensure preservation of the rule of law in a society as “law and politics should be mutually interdependent and sustaining.”⁷⁹⁷ Such interdependencies counter the criticism that, in the judicial-political interchange, statesmanship would be an

⁷⁹² Venter F “Arms deal, bribery and political interference: how (im)potent the (rule) of law” (2008) 125 SALJ 635-637

⁷⁹³ See Woolman S “I am large: Sachs, Whitman and democracy” (2010) 25 SAPL 59 whose explores the interconnection between individualism, pluralism and social stability

⁷⁹⁴ Fuller L “Positivism and fidelity to the law: a reply to Professor Hart” (1958) 71 Harv. L. Rev 630; Dyzenhaus (note 47) 254: “The contingent presence of these standards is necessary both for public acceptance and as an existence condition for legal systems, on our contemporary understanding of a legal system. If fundamental common law standards are eradicated the very structure of a legal system is damaged.” Henrico (note 129) 743-744

⁷⁹⁵ Siegel (note 115) 966-979, 1026; Waldron (note 85) 713

⁷⁹⁶ Cardozo (note 628) 94

⁷⁹⁷ Post (note 169) 1320; Hutchinson (note 55) 549

intrusion into political governance and a departure from the principle of legality and the rule of law.

Judicial statesmanship should not be viewed as democratically and legally illegitimate. Siegel's observation of the US case of *Lochner*⁷⁹⁸ that "the Court's fidelity to rule-of-law values likely undermined the court's legitimacy"⁷⁹⁹ highlights that the relationship between the rule of law and judicial legitimacy is deeper and more complex than a narrow characterisation allows. The *Lochner* courts inability to be responsive led the judgment to be viewed as legally illegitimate. This illustrates that fidelity to the rule of law is tethered to social responsiveness.

Towards maintaining social stability, the courts must accommodate competing values, especially when engaging in contentious, divisive and "identity defining conflicts."⁸⁰⁰ This need is no more acute than in South Africa with its diverse and divided history and, arguably, fragile social stability. Through accommodation outright winners and losers are not created and parties remain committed to constitutional avenues of engagement, rather than tearing at seams of social solidarity.⁸⁰¹

Adjudication that attempts to reach for the categorical or "attain a theoretical end-state,"⁸⁰² while achieving the determinism demanded of (narrow) legal legitimacy, is inflexible and exclusionary. The rule of law is threatened where such an approach leads to "citizens' deepest and most defining commitments"⁸⁰³ being rejected rather than acknowledged. People must be able to see themselves reflected in the law and see that the law is working for them. This fosters allegiance to the Constitution and the rule of law, rather than alienation. Moreover, the Court must appreciate that social values evolve and its judgments must reflect this normative growth. It is thus necessary to incorporate these precursors to the fulfilment and preservation

⁷⁹⁸ *Lochner v New York*, 198 U.S. 45 (1905)

⁷⁹⁹ Siegel (note 115) 971

⁸⁰⁰ Siegel (note 115) 975

⁸⁰¹ See Waldron (note 85) 697; Bickel (note 167) 64

⁸⁰² Sunstein (note 299) 60

⁸⁰³ Sunstein (note 299) 59

of the rule of law when determining whether judicial action is legally legitimate.

The preamble to the Constitution orients both the Constitution's and the judiciary's role towards healing divisions, social justice, and an understanding of unity predicated on respect for diversity.⁸⁰⁴ It can be argued the Constitutional text itself demands judicial statesmanship. This is supported by Botha's view that the:

Constitution [is] designed to be responsive to social needs. It focuses on the purposes, policies and values underlying legal norms, and enlarges the range of facts considered relevant to decisions. As a result 'the boundaries of legal knowledge' are opened up; legal institutions are moved to 'give up the insular safety of autonomous law and become more dynamic instruments of social ordering and social change'.⁸⁰⁵

The CC captured the understanding of judicial statesmanship in *President of Republic of South Africa v Modderklip Boerdery* when it noted the obligation:

to take reasonable steps, where possible, to ensure that large scale disruptions in the social fabric do not occur in the wake of the execution of court orders, thus undermining the rule of law.⁸⁰⁶

Furthermore, note Du Bois' canvass of the selection criteria for judicial nominees: diversity, representation and the upliftment of constitutional values. "Values and needs of the community" and "socio-political awareness" thus become subsumed in establishing *legal* competence.⁸⁰⁷

A clear example of judicial statesmanship is the CC's approach in the case of *AZAPO*. In this case the lawfulness of the *Promotion of National Unity and Reconciliation Act* 34 of 1995, known as the Truth and Reconciliation Act, was challenged. Specifically, the amnesty clauses of the Act were challenged on the grounds that they were in conflict with section 22 of the Interim Constitution that provided protection of the law and redress where a person's

⁸⁰⁴ See Devenish G "Interpretation 'from the bowels of the act' - an essential methodology for unqualified contextual interpretation" (1989) 106 *SALJ* 70-72 on the importance of a preamble as an interpretative guide.

⁸⁰⁵ Botha (note 151) 530

⁸⁰⁶ *President of Republic of South Africa v Modderklip Boerdery* 2005 (5) SA 3 (CC)

⁸⁰⁷ Du Bois (note 267) 294, 299; what Corder (note 424) 440 refers to as the "service emphasising objectives set by the Constitution."

rights had been violated. In deciding this case, the CC leaned on the epilogue of the Interim Constitution, holding:

Social solidarity and the task of building such a new democratic order was a very difficult task because of the previous history and the deep emotions and indefensible inequities it had generated; and that this could not be achieved without a firm and generous commitment to reconciliation and national unity.⁸⁰⁸

In the judicialisation of politics, the CC is increasingly being asked to decide cases that seemingly confront the Court with the choice between upholding law on the one hand, and achieving justice on the other. The deeper view of the rule of law sustains the argument that this moral-formal dilemma - the choice between justice and rule - is a false choice. The constitutional obligations on the Court are justice, equality, fairness and unity. Moral questions are subsumed into the legal framework. A “myopic vision of the judiciary” must be rejected.⁸⁰⁹

What remains is to ask whether the imperative of social stability that must be considered in judgments would also require that the Court consider its own institutional security in rulings? The CC has held in *Mamabolo*: “Where the judiciary cannot function properly the rule of law must die.”⁸¹⁰ This is substantiated by the US Courts view that:

If the court’s legitimacy should be undermined, then, so would the country be in its very ability to see itself through constitutional ideals.

⁸⁰⁸ *AZAPO* (note 226) at para 2. Further examples of what can be viewed as instances of judicial statesmanship can be found in customary law cases where the Court’s has attempted to hold together a social solidarity and maintain a constitutional commitment by ameliorating the antagonism that would arise from direct confrontation between the Constitution and customary law. These attempts exist even though the Constitution, as supreme law, provides that it will supersede customary law to the extent that customary law is inconsistent with the Constitution. See *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC), *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC) at para 80-87 dealing with male primogeniture; *Mahala v Nkombombini* 2006 (5) SA 524 (SE) dealing with a leadership succession claim by a woman. See generally Ntlama N “Reflections on the rejection of the right to sexual-orientation by the Institution of Traditional Leadership: lessons from South Africa” (2014) *LDD* 80-91 on the issue of trying to keep customary leadership committed to the constitutional compact and the constitutional recognition of traditional leadership in this effort towards social solidarity.

⁸⁰⁹ Edlin (note 695) 196

⁸¹⁰ *S v Mamabolo* (note 566) at para 19; *Pheko 2* (note 656) at para 1: “The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it.”

The court's concern with legitimacy is not for the sake of the Court, but for the sake for the sake of the nation to which it is responsible.⁸¹¹

Given this close connection between the Court's legitimacy and the commitment to and sustainability of the rule of law, it is argued that consideration of consequences should extend to its own institutional concerns. Such argument diverges from legal legitimacy which stresses the Court should be fearless in applying the law, even if the heavens fall.

7.6 *Judicial Review and Democratic Legitimacy*

Judicialisation of politics has led to increasingly vocalised political criticism of Court, many adopting counter-majoritarian overtones. This compels an examination of the democratic nature of judicial review and a critical appraisal of the counter-majoritarian dilemma. There exists a strange and often under-appreciated relationship between democratic theory and judicial legitimacy. The traditional view perceives the paradigm as conflictual.

This thesis has up to this point constructed the argument that the judicialisation of politics is detrimental for judicial legitimacy. Appreciating the complex nature of interactions within a system of constitutional democracy, however, it cannot be discounted that judicialisation of politics can, in some instances, *cultivate* judicial legitimacy. Upon consideration of the factors driving judicialisation a revisionist argument about majoritarianism, representation and democratic theory can develop.

This argument is developed by focusing on two aspects. Firstly, the connection between democratic legitimacy and role distinction is explored. Secondly, the assumptions underlying democratic functioning and the contours of the counter-majoritarian dilemma are subjected to a re-appraisal when operating in a judicialised climate.

To the first aspect, it is suggested by Bickel in his seminal work *The Least Dangerous Branch*, that the judiciary must have an independent and necessary function apart from other institutions in order to justify its role. In

⁸¹¹ *Planned Parenthood v Casey* 505.U.S 833 (1992); Geyh (note 395) 42

this sense, the courts legitimacy does not, indeed should not, stem from their democratic nature. The distinctive function, central to democratic legitimacy, requires it to fearlessly accept the role of principle.⁸¹²

As the guardian of principle, a court's ostensibly 'anti-democratic' approach can paradoxically foster democratic functioning. By ensuring the principles of constitutionalism have structured political interaction, majority policy can be legitimated, and accepted by minorities.⁸¹³ Through judicial assurance, those falling in the minority know that while they may have lost a transient political fight, the fundamental principles of constitutionalism remain. Their rights are assured, despite political defeat, and they possess the continued capability to engage in deliberative democratic action.

The additional avenue of contestation that the court offers prevents the losing side of a political struggle from repudiating democratic structures in their entirety. For those in the majority, the spectre of judicial review, potentially stalling or overturning objectives, makes the majority more receptive to participation and is more inclined to adhere to and accommodation of minority interests.⁸¹⁴ Crucially, the success of democratic engagement by both the minority and majority is predicated on the strength shown by the court. What exactly is meant by this?

A cursory view of democratic legitimacy may posit a more tentative or deferential judicial approach. What has been argued above is that embracing a more assertive approach can guarantee minority protections and through that, ensure social stability. Issacharoff describes this as a "strategy of reassurance".⁸¹⁵ As Michelman phrases it, the judiciary provides "institutionalized discipline that would render legislative politics trustworthy."⁸¹⁶ There is in this discussion much overlap with the surety to minorities and legitimacy to majoritarian objectives provided by the South African Constitution in Chapter 3.4.1 above. Recall that the role played by the CC was able to help foster democratic commitment and accommodation

⁸¹² Bickel (note 167) 24-25

⁸¹³ Bickel (note 167) 30-31

⁸¹⁴ Issacharoff (note 30) 990-991; Chayes (note 81) 1299

⁸¹⁵ Dixon & Issacharoff (note 275) 730

⁸¹⁶ Michelman (note 91) 1501

in a divided and diverse society. The South African experiences aids in highlighting that distinction of function is thus, paradoxically, a predicate for integration.

Viewed from a catalytic perspective, the judiciary showing legislative deference, bordering on timidity, in order to avoid anti-democratic accusations, may in itself be anti-democratic.⁸¹⁷ Alternatively, showing fortitude in not capitulating to majoritarian force is a *democratically supportive action*, spurring democratic action in its appropriate arena. Significantly, however, the reassurance that the judiciary can offer is predicated on the perception that it is institutionally removed and not engaged in the political.⁸¹⁸

Anti-democratic overtures stem from viewing the judiciary's role through short-term lenses. Through such a lens, the court may appear obstructionist to temporary political advances. The court has a long-term obligation to enduring values. Any scrutiny of judicial review must therefore be looked at through a long view lens.⁸¹⁹ Reminding society of its myriad, and at times unpopular and contradictory commitments, the judge's role must be to "integrate society to itself".⁸²⁰ Such an obligation has particular reference to South Africa's Constitution comprised of conflicting and competing values, specifically designed as an underspecified compromise to ensure unity and peace (discussed in more detail in 3.4.2 above).

Such a duty can potentially raise questions of judicial supremacy, democratic usurpation or the imposition of paternalistic will by the court. But set apart from the legislative process, the judiciary attempts to reconcile *all* democratic commitments in light of a constitutional whole; commitments that may have been forgotten in the fire and fury and which need to be reaffirmed.. Judicial review provides "the opportunity for the sober second thought".⁸²¹

⁸¹⁷ Bickel (note 167) 31

⁸¹⁸ Hirschl (note 12) 269

⁸¹⁹ Bickel (note 167) 58; Greenawalt (note 132) 999

⁸²⁰ Davis (note 27) 116 quoting M Corbett "Aspects of the rule of policy in the evaluation of our Common Law" (1987) 104 SALJ at 67

⁸²¹ Bickel (note 167) 26

When the boundaries are widened, the judicial influence on the democratic system reveals itself. In his review of Bickel's work, Wechsler wrote:

To be sure, the Court played a large part in this awakening of moral sensitivity, a fact that should forewarn us against too simplistic a conception of the discrete roles of law and politics...Mr Bickel sees the intricacy of their interplay.⁸²²

The judicial review is therefore democratically legitimate when viewed from an institutionalist perspective.

The second aspect of the relationship between democracy and judicial review can now be turned to. In trying to encapsulate the central argument against judicial review, wrestling with the idea of the judiciary as a democratically deviant institution, Bickel used the term 'counter-majoritarian dilemma'.⁸²³ The counter-majoritarian dilemma questions how it is legitimate that an unelected judiciary, through the interpretation of abstract constitutional principles, can overrule the decisions of an elected legislative branch charged with representing the will of the people. In responding to the challenges posed by the counter-majoritarian dilemma, the following arguments endeavour to show that judicial review is not in conflict with democratic theory.

Democracy is a contested and multifaceted concept, one that resists easy definition. Appreciating that the self-determination of the people through free and fair elections was denied in the past, there is a deep connection in South Africa between majority rule and an election-focused understanding of democracy. When this history is combined with the judicialisation of politics that is primarily review of elected official's exercise of power, anti-democratic assertions and the resulting view of illegitimacy of the judiciary is heightened. . While remaining cognisant of this historical legacy shaping the understanding of democracy, majoritarianism is "surely an impoverished conception of democracy."⁸²⁴ We must move beyond the electoral focused definition to engage in a deeper understanding of democracy.

⁸²² Wechsler (note 314) 677

⁸²³ Bickel (note 167) 16-23

⁸²⁴ Fuller (note 20) 367; Bogaards (note 38) 34

Democracy can be understood firstly in a minimalist, liberal and self-governing sense; secondly as republican, collective governance incorporating more substantive values to ensure effective participation; or thirdly as a more Marxist orientated conception enfolding positive obligations on the State toward social upliftment and welfare.

The CC in *Democratic Alliance v Masondo* captured democracy in the following way:

[t]he constitution does not envisage a mathematical form of democracy where the winner takes all until the next vote counting exercise occurs. Rather, it contemplates a pluralistic democracy where continuous respect is given to the rights of all to be heard and have their views considered.⁸²⁵

Having outlined the multiple aspects of democracy, the question whether judicial review is anti-democratic can now be engaged with more meaningfully. In most cases that reach the level of constitutional court challenge, the issue is not a question of constitutional versus unconstitutional. It is rather a balancing consideration; balancing conceptions of the good versus good, a right versus right. Opponents of judicial review therefore argue that it is the legislative body that is in the best position to make these balancing considerations and value choices. This is based on the supposition that the legislative branch is the most representative and deliberative body.⁸²⁶

It is vital that deliberation can be understood as “un-dominated conversation”⁸²⁷, predicated on various substantive elements of equality. It is in the potential for deliberation that is dominated that the Court plays a compensatory role to account for “discreet and insular” minorities, ensuring that they too have a voice in the political process.⁸²⁸ The CC case of

⁸²⁵ *Democratic Alliance and Another v Masondo NO and Another* 2003 (2) SA 413 (CC) at para 42

⁸²⁶ Tushnet (note 113) 911

⁸²⁷ Tushnet (note 113) 908; Friedman B “Dialogue and judicial review” (1993) *Mich. L. Rev* 580-581; *Doctors for Life* (note 356) at para 234: “A vibrant democracy has a *qualitative* and not just a quantitative dimension. Dialogue and deliberation go hand in hand. This is part of the tolerance and civility that characterise the respect for diversity the Constitution demands.”

⁸²⁸ *United States v Carolene Products Company* 304 U.S. 144 (1938)

Christian Education South Africa v Minister of Education echoes similar sentiments:

It might well be that in the envisaged pluralistic society members of large groups can more easily rely on the legislative process than can those belonging to smaller ones, so that the latter might be specially reliant on constitutional protection, particularly if they express their beliefs in a way that the majority regard as unusual, bizarre or even threatening.⁸²⁹

Where undominated deliberation and debate, undergirded by politically equality, is present, the Court would ordinarily show deference to the ‘democratic’ institution. When the constitutional norms operating in legislative processes are no longer present, “stricter judicial scrutiny” is necessary. Zylberberg states that: “[i]t is easier to justify counter-majoritarian actions when the political branch is less likely to give full effect to protected constitutional interests”.⁸³⁰ This is an extension of the reasoning behind the judiciary affording special protection to minorities.⁸³¹

Waldron bases his argument against the legitimacy of judicial review on the assumption of “democratic institutions in *reasonably good working order*.”⁸³² However, in South Africa, as Davis notes, “the problem is that this model of democracy is not functioning at present.”⁸³³ Of counter-majoritarianism, Bennet argues that:

whether the insensitive use of principled counter-majoritarianism is taken to be a difficulty in and of itself, or only if it cannot be compensated for elsewhere in the system.⁸³⁴

⁸²⁹ *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) at para 25

⁸³⁰ Zylberberg P “The problem of majoritarianism in constitutional law: a symbolic perspective” (1992) *McGill L. J.* 42

⁸³¹ Levinson & Graber (note 783) 156-157, see also Sunstein C “Naked preferences and the Constitution” (1984) 84 *Colum. L. Rev.* 1689; Kende (note 478) 48-49: “the South African Constitution did not specify this kind of judicial intervention as the correct remedy for an unfit appointee. There can be little doubt that the scope of the corruption problem influenced the Court.”

⁸³² Waldron (note 119) 1360-1362 (emphasis added)

⁸³³ Davis (note 386) 268-270

⁸³⁴ Bennet R “Counter-conversationalism and the sense of difficulty” (2001) *Nw. U. L. Rev.* 849

Whether the judiciary is operating legitimately is therefore a *relational* determination. Undertaking an examination of the democratic and majoritarian workings ‘elsewhere in the system’ is therefore required.

Institutional imbalance, political party dominance, dialogic breakdown, non-responsiveness, impunity and corruption have created a “highly toxified environment.”⁸³⁵ Cell phone blocking in parliament,⁸³⁶ MP walk outs, the use of South African Police Service reportable to the Executive instead of the Parliamentary Security reportable to the Legislature, and parliamentary sittings ending in violence, culminate in a political environment that cannot meet the requirements for political equality.

The “sense of the [counter-majoritarian] difficulty is so much greater when viewed in isolation than when they are placed in their larger democratic context.”⁸³⁷ Waldron’s assumptions that structure his opposition to judicial review crumble when assessed in light of the South African political climate of State capture,⁸³⁸ rampant corruption, the lack of accountability, and the party list-system that demands loyalty to party and not the people.⁸³⁹ As Wisotsky opines:

By exposing these undemocratic elements of the political system, it becomes easier to justify the counter-majoritarian impact of judicial review. This mode of argument has become increasingly prevalent in recent years, perhaps as a reflection of a general decline of faith in the integrity and responsiveness of the political branches of government.⁸⁴⁰

Judicial scrutiny of arbitrary and abusive exercises of public power ensures adherence to a government of laws. Doing so ensures the continuation of government of and for the people and the ability to be self-governing. As such,

⁸³⁵ *United Democratic Movement v Speaker* (note 382) at para 88

⁸³⁶ *Primedia Broadcasting (a division of Primedia (Pty) Ltd) and Others v Speaker of the National Assembly and Others* 2016 4 All SA 793 (SCA)

⁸³⁷ Bennet (note 834) 850-853

⁸³⁸ Issacharoff (note 502) 598: “In this environment, the domain of electoral politics is not so much a contest of parties or ideologies, but of access to control of state resources.”

⁸³⁹ Motale Z & Ramaphosa C *Constitutional Law: Analysis and Cases* (2002) Oxford University Press 54; Law D “A theory of judicial power and judicial review” (2009) *Geo.L.J* 723

⁸⁴⁰ Wisotsky (note 73) 192

'law' in 'government of laws' must surely stand in a circular relation with politics as both outcome and input, both product and prior-condition.⁸⁴¹

Judicial review can be facilitative of republican democracy.⁸⁴² In these conditions, the role of the judiciary ensures accountability and transparency between leaders and the people they serve, "ensuring the priority of democracy...regardless of majority will."⁸⁴³ Judicial review cannot in the current South African political culture be seen as standing against the will of the people but rather offers what Ely calls "representation-reinforcement."⁸⁴⁴

Non-intervention by the court "presupposes the existence of a range of genuinely representative and democratic political institutions".⁸⁴⁵ Where this is not the case, the traditional thinking surrounding 'anti-democratic' tendencies of judicial involvement must be examined. "Bright lines that separate the roles"⁸⁴⁶ are blurring. Judicial detachment as a legitimate judicial stance only works if the other branches are playing their part. They are not. Bearing in mind the causes of the judicialisation of politics, this discussion has proposed that judicial intervention should be regarded as legitimate judicial action.

Considering that the judiciary was bestowed a certain degree of legitimacy during apartheid (see chapter 3.3), a nagging question remains within the development of this revisionist argument. Lawfare scholarship suggests that looking to the court for resolution is driven by the reputational strength and the moral authority that a court is perceived to possess.

When looking at the reasons driving judicialisation in South Africa, it is clear that the Court is being turned to because no other avenue is available. So the question that arises is: Is legitimacy being conferred on the judiciary because of the failures of other areas, or is the Court legitimate in its own right? Is this attributing strength to the judiciary because of the failures of

⁸⁴¹ Michelman (note 91) 1501

⁸⁴² Klarman M "Majoritarian judicial review: the entrenchment problem" (1997) 85 *Geo. L.J.* 491; Bennet (note 834) 845; Tushnet (note 113) 907

⁸⁴³ Sunstein (note 299) 239-241; Zylberberg (note 830) 5

⁸⁴⁴ Ely J *Democracy and Distrust: A Theory of Judicial Review* (1980) Harvard University Press, Cambridge Massachusetts 1-9; Tate & Vallinder (note 13) 5

⁸⁴⁵ Hoexter (note 328) 493

⁸⁴⁶ *Treatment Action Campaign* (note 400) at para 98

other branches of government? Does this discolour the assessment of legitimacy along its conceptual lines, or does it mean that a court's legitimacy is relative to outside forces?

Where stemming from the former, legitimacy under the revisionist argument would not be as deeply-rooted. This questions whether operating with a 'shallower' legitimacy can withstand unfavourable rulings and still maintain support, - characteristic of sociological legitimacy. In other words, attributing legitimacy to a court operating in response to distrust of other areas may in a sense be refracted legitimacy.

7.7 Holding Public Power to Account

In light of democratic failings, institutional imbalances and the hollowing out of horizontal accountability mechanisms, it falls to the judiciary to hold accountable exercises of executive authority and public power. The Court has undertaken such a duty through expanding rationality review. It has invoked the principle of legality to uphold the rule of law, particularly where limits of the administrative justice and statutory frameworks prevent redress.⁸⁴⁷ In 2018, the CC reaffirmed its view that

The evolution of our constitutional jurisprudence culminated in a principle that recognises that rationality applies not only to the decision, but also to the process in terms of which that decision was arrived at.⁸⁴⁸

The CC used rationality review in *Democratic Alliance 2012*⁸⁴⁹ challenging President Zuma's decision to appoint Mr Simelane to NDPP, again in

⁸⁴⁷ *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at para 44; *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional; Metropolitan Council and Others* 1999 (1) SA 374 (CC) at para 58-59; *Affordable Medicines* (note 422) at para 49; *Khumalo* (note 334) at para 28; Konstant A "Administrative Action, the principle of legality and deference – the case of *Minister of Defence and Military Veterans v Motau*" (2015) 7CCR 75; Hoexter (note 600) 224

⁸⁴⁸ *Law Society* (note 376) at para 61; Kohn L "The burgeoning constitutional requirement of rationality and the separation of powers: has rationality review gone too far?" (2013) SALJ 810; *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* 1988 (3) SA 132 (A) at 152A-D

⁸⁴⁹ *Democratic Alliance 2012* (note 618)

*President of the Republic of South Africa v Democratic Alliance and Others*⁸⁵⁰ on appeal by the President after the High Court ruled that the President can be compelled to provide reasons for his cabinet reshuffle.

Rationality review has blurred the distinction between appeal and review. It has allowed the Court to engage in substantive due process, moving beyond the procedural to consider questions of justice and fairness. Price observes that this development “is a significant extension of judicial power”⁸⁵¹, imbuing the Court with what Bishop describes as “tentacular reach”.⁸⁵²

When overlaid onto the dimensions of legitimacy, particularly the elements of legal legitimacy, the concern with this development is that this power has been cultivated by the Court through an *implicit* reading of the Constitution. Moreover, Bishop has criticised the CC’s rationality review as “inconsistent and incoherent”, arguing that the differing levels of intensity from case to case cannot help dispel the assertion that rationality review is not a discretionary act.⁸⁵³ For example, in the case of *KZN Schools*⁸⁵⁴ the CC did not confine itself to the averments made and instead located the applicant’s claim in broader public law. It extended the ambit of administrative justice to include holding the State to a public promise.⁸⁵⁵ The majority justified that:

This court has previously adopted remedies for a situation where a claim is apparent from the papers and the evidence, even if it was not the cause of the action expressly advanced or argued.⁸⁵⁶

In a dissent, Jafta J took a more proceduralist and formalistic view, holding that the case must rise or fall based on what is averred in the pleadings. He argued that the “Court should not seek to pick the applicant up and make it stand upon a different case.”⁸⁵⁷ Jafta’s dissent additionally raises a concern

⁸⁵⁰ 2020 (1) SA 428 (CC)

⁸⁵¹ Price A “Rationality review of legislation and executive decisions: *Poverty Alleviation Network and Albutt*” (2010) 127 SALJ 581-582; Bishop M “Rationality is dead! Long live rationality! Saving rational basis review” (2010) 25 SAPL 337; Konstant (note 847) 69

⁸⁵² Woolman (note 540) 377

⁸⁵³ Bishop (note 851) 312-341

⁸⁵⁴ *KZN Schools* (note 757)

⁸⁵⁵ *Ibid* at para 58-59

⁸⁵⁶ *Ibid* at para 68

⁸⁵⁷ *Ibid* at para 156-158 Jafta J, dissenting

about the impact of rationality review cases on the dynamic of the CC. There are increasing divisions amongst the Justices concerning this type of jurisprudence.⁸⁵⁸ Contrasted to the approach in *KZN Schools*, the CC in *Kirland* limited itself to what was plainly sought in the application.

Varying intensity impacts legal legitimacy in terms of the consistent application of a constitutional standard and the requirement of predictability. This has resulted in calls for the principle of legality to operate from a “more principled foundation”.⁸⁵⁹ And yet, contrast this demand for consistency with Roux’s observation of the CC’s approach in its earlier years:

The Chaskalson Court’s success...is associated with its capacity, not so much to work out a single, fit-for-all-occasions review standard, but to work with the legal materials to *adjust the level of review to the requirements of democracy*.⁸⁶⁰

KZN Schools and *Kirland* can be seen as consistent approaches when looked at through a higher principle. In both cases the CC did not allow State actors to escape responsibility by relying on a formalist use of the law.⁸⁶¹ It can further be reasoned that the inconsistency is in part due to who the applicants are. *Kirland* held to stricter legal prescripts and confined itself more formalistically because it felt that:

There is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution’s primary agent. It must do right and it must do it properly.⁸⁶²

The CC’s expanded rationality review through the principle of legality attempts to fill the accountability gap left by the PAJA and to prevent public power from escaping constitutional responsibility.⁸⁶³

⁸⁵⁸ Boonzaier (note 332) 19-20

⁸⁵⁹ Konstant (note 847) 72,87

⁸⁶⁰ Roux (note 27) 44 (emphasis added)

⁸⁶¹ Boonzaier (note 332) 18

⁸⁶² *Kirland* (note 329) para 82; *Public Protector v Reserve Bank* (note 579) at para 152

⁸⁶³ Konstant (note 847) 87

7.8 *The Legitimacy of Intervention*

Human-made systems are predicated on assumptions. The assumption underpinning the separation of powers framework is that the legislature will hold the executive accountable; participation will be guaranteed; requested information will be timeously given; and delay bars will be respected. The appropriateness of judicial intervention is based on a paradigm structured around these assumptions. Where these assumptions collapse, that paradigm requires re-examination.⁸⁶⁴

Where “the stabilization of democracy is precarious, courts emerge as central actors in consolidating the constitutional order.”⁸⁶⁵ Judicial intervention toward protecting the integrity of the *system* is therefore legitimate. Through ensuring that other parts of the system are able to carry out their proper functions, the legitimacy of the decisions that emerge from these avenues is upheld.⁸⁶⁶

In so far as this is a judicial transgression, Luhmann suggests that “the concept of autonomy refers only to the system’s operative closedness, as a *condition for its openness*.”⁸⁶⁷ A crucial position that this research adopts is that the legal system’s ability to remain independent, to remain ‘closed’ and *effective in its role* is dependent on understanding the nature of the environment in which it operates.⁸⁶⁸

Judicial obligation to support the constitutional system is supported by the judicial-political dynamics that occurred in India during Gandhi’s 1975 State of Emergency. Through the Basic Structure Doctrine, the Supreme Court of India (SCOI) refused to accept the constitutionality of any amendment that would undermine the *system* of constitutionalism in India.⁸⁶⁹ Limiting the

⁸⁶⁴ Levinson & Graber (note 783) 164; Fallon (note 44) 1812; Cachalia (note 421) 298: “In constitutional jurisprudence...the idea that questions of judicial intervention and restraint depend in part on a consideration of the importance and limits of decision making through the democratic political process ...is a theme that has received little consideration in South Africa.”

⁸⁶⁵ Issacharoff (note 30) 1003

⁸⁶⁶ Fletcher (note 146) 665-666, 692

⁸⁶⁷ Luhmann (note 52) 139

⁸⁶⁸ *Ibid* at 139; Epstein *et al* (note 126) 135

⁸⁶⁹ Randhawa (note 110) 19-21

power of the ruling party, this stance by the SCOI was a direct confrontation with a “brute majority”. However, in stepping into the breach, the Court “*acquired legitimacy*”.⁸⁷⁰ This is a central point that warrants reiteration: where a branch of government or institution is overwhelmed, the institution that is able to hold the line and maintain the functioning of the system will be seen as legitimate. This is clearly emphasised by Lively:

When the executive or legislature departs from values to which an informed citizenry normally would subscribe, however, judicial displacement may be an appropriate response. Judicial activism is not by definition an institutional transgression.⁸⁷¹

Further support is found in the comparative observations of the judicial-political dynamics of the United Kingdom as recently as 2019. When Prime Minister Boris Johnson’s prorogation of Parliament was taken under review by the United Kingdom Supreme Court in September 2019, the Court approached the matter of justiciability and intervention in political matters in the following manner:

Indeed, by ensuring that the Government does not use the power of prorogation unlawfully with the effect of preventing Parliament from carrying out its proper functions, *the court will be giving effect to the separation of powers...*the court will intervene if the effect is sufficiently serious to justify such an exceptional course.⁸⁷²

This further acknowledges that judicial assertiveness into the domain of another branch of government should be tolerated when the goal of that assertiveness is to bolster the internal accountability mechanisms of the branch. To the extent that non-judicial horizontal accountability mechanisms can be re-ignited, future judicial action can be avoided. This may be in instances where, for example, the courts provided a buttressing force so that Chapter 9 institutions can effectively fulfil their role. As Choudhry argues, the judiciary must rise to be

Principal bulwarks against the capture of independent institutions by the dominant party, and should be interpreted accordingly. I term this the doctrine of “anti-capture”.⁸⁷³

⁸⁷⁰ Sathe S.P “Judicial activism: the Indian experience” (2001) 6 *Wash. U. J. L & Pol’y* 42

⁸⁷¹ Lively (note 123) 23

⁸⁷² *Miller, R (on the application of) v The Prime Minister* [2019] UKSC 41 at para 34, 50 (emphasis added)

⁸⁷³ Choudhry (note 41) 67

Where there is evidence of an unwillingness of those in whose domain the issue belongs to address the problem, the judiciary can justify its engagement and intervention will be considered legitimate. Returning to a South Africa context, it should be noted that the unwillingness of SASSA prompted stronger judicial supervision in the implementation of the remedial order. The CC encapsulated the conduct of the Agency in *Black Sash 1*:

SASSA has adopted an unhelpful and almost obstructionist stance...continued recalcitrance...That inability has compromised the continued protection of access to their right to social assistance for grant recipients. That justifies further Court supervision. But that has been proved not to be enough to coax SASSA into doing what it was constituted to do. More is required.⁸⁷⁴

Finally, when the intervention by a court corresponds with the “deep resonance in the political assumptions of our society”⁸⁷⁵, particularly when the public’s “sense of justice is sufficiently outraged”, intervention will be deemed legitimate by the public.⁸⁷⁶

7.9 Conclusion

In recognising the danger of political exposure from the judicialisation of politics, there exists the potential for self-imposed limitations by the Court. However, judicial self-consciousness and judicial detachment in an effort to preserve legitimacy can very easily transgress into abdication, diminishing legitimacy.⁸⁷⁷ In transferring political issues into the legal, the judicialisation of political shifts the predominant focus on sociological legitimacy to place greater emphasis on moral legitimacy. Moral legitimacy is understood as the ability of the court to be responsive.

Ultimately, it is the complexity of the judicial role that means that the greater the times of uncertainty and instability, there is great impulse to

⁸⁷⁴ *Black Sash 1* para 56-62 with referencing to conduct by SASSA expressed in *Allpay 2* (note 658) at para 73-75

⁸⁷⁵ Fletcher (note 146) 666

⁸⁷⁶ Posner (note 106) 218

⁸⁷⁷ See Tate & Vallinder (note 13) at 517 referring to the emergence of a “self-limiting strategy” on the part of a court.

retreat. Crucially, this is the exact time when the need for engagement becomes intensified.

Judicialisation can bolster the judiciary in terms of a re-imagining and re-location of democratic theory. However, judicial legitimacy can only hold as long as it can shoulder the excessive weight of what is being asked of it. Legitimacy is present *at this moment* in response to democratic failings of other institutions. However, adopting a long-term assessment, absent the buttressing forces of democracy, and exceeding its institutional capacity for effective redress (discussed in chapter 6.4), the judiciary, as a lone actor, cannot carry such a weight for a prolonged period. Initial observations have shown that the reputational strength of the court remains high despite the prevalence of Lawfare. Yet, when the demand for responsiveness is factored in, *prima facie* legitimacy from the favouring of the judicial avenue is extrapolated to warn that judicialisation of politics ultimately “erodes the integrity of the legal system”.⁸⁷⁸

Where a judiciary adopts a stance that bolsters other checks and balances, protecting and upholding the functioning of accountability mechanisms in other branches, such judicial action cannot be seen as an intrusion into the domain of another branch. Neither is it inconsistent with faithful adherence to the separation of powers doctrine⁸⁷⁹

However, there remains both a necessity and a danger in the Court being pulled into this space. Beginning in 2016, the Chapter 9 institution of the Public Protector, the integrity branch, has been denuded of authority. In response, the Courts have assertively enforced accountability. As the following chapter will show, judicial involvement in numerous matters involving the Office of Public Protector has, however, led to unintended consequences for the Constitutional Court and wider constitutional stability.

⁸⁷⁸ Tiefenbrun (note 16) 59-60

⁸⁷⁹ Klug (note 421) 12

CHAPTER 8

THE OFFICE OF THE PUBLIC PROTECTOR AND THE COURT: A WICKED PROBLEM CASE STUDY

*The office of the Public Protector is an important institution. It provides what will often be a last defence against bureaucratic oppression, and against corruption and malfeasance in public office that is capable of insidiously destroying the nation. If that institution falters, or finds itself undermined, the nation loses an indispensable constitutional guarantee.*⁸⁸⁰

8.1 Introduction

The Office of the Public Protector is created by Chapter 9 of the Constitution as an institution supporting constitutional democracy. Through enabling legislation, the Public Protector (PP) is charged with investigating improper conduct and impropriety in any sphere of government including maladministration, abuse of power, or unlawful or improper enrichment.⁸⁸¹ Thuli Madonsela, PP from 2009-2016, borrowed from the governing practices of the Venda tribe when she viewed the role as a 'Makhadzi' that whispers truth to the King. Madonsela articulated:

The Makhadzi, an aunt, is a non-political figure who serves as a buffer between the ruler and the people. [The Makhadzi] enhances the voice of the People while serving as the King's eyes, ears and conscience. [He ignores her] at his peril.⁸⁸²

What follows below is a case study of events transpiring around the Office of the PP since 2014. This case study is presented at the conclusion of this thesis because it encapsulates, in the broader dynamics of judicial-politics, core elements that have emerged in the course of this research exploring the relationship between Lawfare and legitimacy.

⁸⁸⁰ *The Public Protector v Mail & Guardian Ltd and Others* 2011 (4) SA 420 (SCA) at para 6 Nugent J for a unanimous court

⁸⁸¹ Sec 4 (a) and Sec 5 of Public Protector Act 23 of 1994

⁸⁸² Gqubule T *No Longer Whispering: The Story of Thuli Madonsela* (2017) Jonathan Ball Publishers, Johannesburg 79

When the PP's remedial order against President Zuma was met with disregard, Parliament was servile. Institutional imbalance (as discussed in chapter 3.4.8) led to a lack of oversight and accountability. Parliament's unwillingness to preserve and protect an oversight body effectively denuded its authority.

The Chapter 9 institution of the PP should ideally help carry the burden placed on the judicial system. It now had to add to the Courts' burden and apply to the Constitutional Court (CC) to have its orders enforced. This is demonstrably judicialisation of politics, Lawfare in a good sense, caused by the failings of other democratic institutions. The CC rose to the occasion, emphatically clarifying the power and scope of the Office of the PP. But judicial intervention did not settle the matter; quite the opposite.

As has been argued above, successful review breeds more review and judicialisation. As this chapter unfolds, what will emerge is a clarifying depiction of the events surrounding the judicialisation and resulting politicisation of the Office of the PP. It is quintessentially a wicked problem. Addressed through a legal-sociological approach, this case study suggests that the CC's bold response in protecting the Office of the PP had the unintended consequence of weaponising the Office for more abusive Lawfare to follow. Once under new leadership, the Office could be, and was, used to protect corrupt political allies and target political rivals. The politics of adjudication and the judicial strategies of both conservatism and assertiveness are traced in unpacking how the CC dealt with both these types of Lawfare.

8.2 *Nkandla*

The Office of the Public Protector's (PP) 'Nkandla Report'⁸⁸³ noted the "appalling manner in which the Nkandla Project was handled and State funds

⁸⁸³ *Secure in Comfort: Report on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal province* Public Protector Report No. 25 of 2013/14

were abused". Madonsela's remedial action held the President liable for all non-security related upgrades to his private residence.⁸⁸⁴ The President responded to this report with impunity. Rather than in enforcing the remedial action, the National Assembly chose to regard the remedial action as merely a recommendation and not a binding order.

8.3 *The effect of the CC's Nkandla Judgment*

The disregard of the Nkandla Report resulted in a CC challenge led by political party Economic Freedom Fighters (EFF). The CC was asked to pronounce binding nature of the PP's remedial powers. The Court held that by treating the PP's report as if it had no force, the National Assembly had failed in its constitutional obligation to hold the President accountable.⁸⁸⁵ The principal conclusion by the CC, noted below, triggered a myriad of unfolding events.

The Public Protector is thus one of the most invaluable constitutional gifts to our nation in the fight against corruption, unlawful enrichment, prejudice and impropriety in State affairs and for the betterment of good governance. The tentacles of poverty run far, wide and deep in our nation. Litigation is prohibitively expensive and therefore not an easily exercisable constitutional option for an average citizen. For this reason, the fathers and mothers of our Constitution conceived of a way to give even to the poor and marginalised a voice, and teeth that would bite corruption and abuse excruciatingly. And that is the Public Protector. She is the embodiment of a biblical David, that the public is, who fights the most powerful and very well-resourced Goliath, that impropriety and corruption by government officials are. The Public Protector is one of the true crusaders and champions of anticorruption and clean governance.⁸⁸⁶

These are strong words from Mogoeng CJ, writing for a unanimous court. But it can be argued that the CC needs to display such assertiveness to support the institutions that are the guardrails of democracy. Even greater

(hereinafter *Nkandla Report*) <https://dc.sourceafrica.net/documents/8074-final-report-21h00.html> (date accessed 30/09/2019)

⁸⁸⁴ *Nkandla Report* at para 11.1.1 and 11.1.3

⁸⁸⁵ *EFF 1* (note 383) at para 99

⁸⁸⁶ *EFF 1* (note 383) at para 52-53. Moreover, rejecting the arguments by the President and Parliament that the PP's power is limited to a strict reading of the Public Protector Act, the CC at para 64, held that the PP derives her power from the Constitution and not legislation.: "Just as roots do not owe their life to branches, so are the powers provided by national legislation incapable of eviscerating their constitutional forebears into operational obscurity."

assertiveness is needed when these institutions and their effective functioning are threatened.

With research rooted in legal-sociology, Woolman identifies a catalytic and reciprocal relationship between the Court and an engaged civil society and non-governmental actors. It is through this lens that Woolman understands the CC assertiveness, taking into consideration prevailing political conditions and levels of civic awareness. For example, the knowledge (and comedic derision) of the Nkandla scandal and subsequent report by the PP permeated throughout the country. An argument can be made that the CC was emboldened by civil society awareness. Knowing that it did not march alone, the CC was able to firmly and assertively engage in the “politics of accountability”. As a result of the Court’s assertiveness, civil society was, in turn, further emboldened, knowing it was supported by the moral authority of the Court.⁸⁸⁷

8.4 State Capture

Armed with the ennobling ruling of *EFF 1*, Madonsela turned her attention to the issue of State Capture in an extensive investigation. Briefly summarised, the PP began investigating whether President Zuma had allowed the notorious Gupta family to influence the appointment or removal of cabinet members and Board of Directors in State Owned Enterprises; whether there was preference in the award of state contracts; and whether President Zuma had enriched himself and his family, placing himself in a conflict of interest between his private interests and the duty he owes to his country.⁸⁸⁸

The “*State of Capture*” report was released in October 2016. In striking blue highlight, the CC bold opening paragraphs of the *EFF 1* judgment is quoted at length as a preface to the report:

⁸⁸⁷ See generally Woolman (note 51); le Roux & Davis (note 78) 210-211

⁸⁸⁸ *State of Capture* Public Protector Report No. 6 of 2016/1710-11 (hereinafter *State of Capture* Report) <http://saflii.org/images/329756472-State-of-Capture.pdf> (date accessed 06/09/2019)

For this reason, public office-bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck. It is against this backdrop that the following remarks must be understood:

“Certain values in the Constitution have been designated as foundational to our democracy. This in turn means that as pillar-stones of this democracy, they must be observed scrupulously. If these values are not observed and their precepts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude. In a State predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our democracy.”⁸⁸⁹

The Report notes that the investigation was hamstrung by a late release of funding and the non-cooperation of the President. In excruciating detail, the Report outlines the interactions between the President and the PP during the course of the investigation. These machinations are outlined here in a similarly detailed fashion as President Zuma’s conduct is largely illustrative of a Lawfare tactic to delay and obstruct.

The President was first sent a letter by the PP in March 2016 informing him of an investigation in which he was implicated and affording him the opportunity to respond.⁸⁹⁰ Several attempts were made, and ignored, before the PP was finally able to meet with the President in October 2016. At this meeting, the President requested more time. The President was of the view that Madonsela was “in a hurry to complete the investigation” – the insinuation was clear that Madonsela was abandoning procedural justice in her “rush”. The President also suggested that the matter should be taken up by the incoming PP as Madonsela’s term was shortly coming to an end.⁸⁹¹

Many issues obstructed Madonsela’s efforts: the extent of the issues that needed to be addressed, the amount of resources that would be needed, the fact that the investigation had been “hamstrung” by the late release of funds, the inadequacy of those funds.⁸⁹² These issues were compounded by the

⁸⁸⁹ *EFF1* (note 383) at para 1 and in reference to *Nyathi v Member of the Executive Council for the Department of Health Gauteng and Another* 2008 (5) SA 94 (CC) at para 80

⁸⁹⁰ *State of Capture Report* at 3.32

⁸⁹¹ *State of Capture Report* at 3.13-3.20

⁸⁹² *State of Capture Report* at 3.15 and 8.2; *President v Public Protector* (note 608) at para 139

non-responsiveness by the President and the reservations Madonsela had about her successor.

The culmination of inhibiting factors led Madonsela to order that a Commission of Inquiry into State Capture be convened. As the President was the central focus of the investigation and would be the focus of the Commission, the remedial order further ordered that the Commission be headed by a judge chosen by the Chief Justice and not the President.⁸⁹³

Zuma sought a review of the PP's remedial action, contending that the power to establish a commission of inquiry and appoint its head vests solely with the President. The Gauteng High Court upheld the remedial action, ruling that, in these exceptional circumstances, the Commission would not have credibility were the President to select his own judge. Public perception and public faith in the Commission, observed the High Court, are paramount.⁸⁹⁴

The President further submitted that the remedial action was unlawful as the PP had not reached a finding of misconduct and impropriety. But the PP could not reach a finding due to the extensive nature of the issue. The High Court held that given the *prima facie* evidence of malfeasance and corruption, the decision by the PP to order a commission of inquiry was appropriate and reasonable, given the constraints facing the Office of the PP and the magnitude of the issue.⁸⁹⁵

Where the scale of corruption is so large that the Chapter 9 institution, designed to address that corruption and hold public power to account, finds itself institutionally incapable of doing so, it has no other recourse but to enfold other mechanisms. More broadly, this highlights the responsibility of the democratic system to respond to abuse as a whole, with the elements of the democratic system playing mutually supportive and compensatory roles.

⁸⁹³ *State of Capture* Report at 8.2-8.7

⁸⁹⁴ *President v Public Protector* (note 608) at para 141-142

⁸⁹⁵ *Ibid* at para 87-85

An interesting aspect of this case is that, even when ruling against executive power, the High Court felt that it stood on firm enough ground to issue a scolding:

The review application was a clear non-starter and the President was seriously reckless in pursuing it as he has done. His conduct falls far short of the high standard expressed in section 195 of the Constitution.⁸⁹⁶

8.5 *Unintended Consequences*

The veneration that the CC bestowed on the Office of the PP in *EFF 1* had great consequence once Madonsela's tenure came to an end and her successor, Advocate Busisiwe Mkhwebane, took the reins. In what can be viewed as a clear example of a wicked problem, the CC, endeavour to prevent abuse in the democratic system, unintentionally highlighted that the power of the PP could be channelled into a Lawfare tool, perverting the justice system to target political actors and shield abusive acts from accountability.

To fully grasp the repercussions of *EFF 1*, it is necessary to go back a few steps. In 2016 newly installed National Director of Public Prosecutions Shaun Abrahams charged then Minister of Finance Pravin Gordhan with fraud. This prompted civil society uproar, placing sufficient pressure on Abrahams to withdraw the charges. In abusing the law for the criminalisation of political adversaries, Abrahams' conduct resulted in the National Prosecuting Authority losing credibility and independence.⁸⁹⁷ At the same time, the role of the PP, buoyed by the CC as a crusader, a champion, the biblical David – endowed with moral authority and legitimacy, was in the forefront of the South African people's consciousness as an Office to be revered. After attempts to remove Gordhan through criminal prosecution failed, the new PP

⁸⁹⁶ *Ibid* at para 187

⁸⁹⁷ Munusamy R "Abrahams' backfire: Gordhan charge leads to anti-Zuma front" *Daily Maverick* 19 October 2016 <https://www.dailymaverick.co.za/article/2016-10-19-abrahams-backfire-gordhan-charge-leads-to-anti-zuma-front/> (date accessed 15/05/2019)

Mkhwebane, clothed in the refracted legitimacy of Madonsela's tenure, used the Office of the PP to target Gordhan.⁸⁹⁸

In *Gordhan v Public Protector and Others*⁸⁹⁹, Gordhan approached the Pretoria High Court for a review of the PP's Report against him and an interim interdict suspending the implementation of the remedial order pending review. Gordhan alleged bias and ulterior motive on the part of Mkhwebane, asserting that the PP was "incompetent, irrational and negligent in the performance of her duties". Mkhwebane countered that the review application was an assault on the dignity of the PP, weakening her office and her effectiveness.⁹⁰⁰

While agreeing that "much of the [remedial] orders are vague, contradictory and/or nonsensical," the High Court stopped short of addressing bias and ulterior motive. Adopting a restrained approach, it held that these aspects need not be considered for the purposes of the interim interdict.⁹⁰¹ The High Court found in favour of Gordhan and granted the interdict.⁹⁰² Mkhwebane subsequently approached the CC for leave to appeal, only to later withdraw her application.

Of interest is President Ramaphosa involvement in the matter. In an opposing affidavit, Ramaphosa asked the CC to consider the appeal. He argued that the findings against the PP in multiple cases before the High Court

have given rise to a heated and at times vituperative public debate that is potentially damaging to the Executive, the Public Protector and the Courts... It is accordingly in the clear public interest for this Court to assist to end the vituperative public debate by exercising its authority.⁹⁰³

⁸⁹⁸ Report on an investigation into allegations of violation of the executive ethics code by Mr Pravin Gordhan, MP as well as allegations of maladministration, corruption and improper conduct by the South African Revenue Services Public Protectors Report No. 36 of 2019/20 at para 8

⁸⁹⁹ *Gordhan v Public Protector and Others* 2019 3 All SA 743 (GP) (hereinafter *Gordhan v Public Protector*)

⁹⁰⁰ *Ibid* at para 14, 36-40

⁹⁰¹ *Ibid* at para 41-48 41, 43

⁹⁰² *Ibid* at para 62

⁹⁰³ Ramaphosa opposing affidavit in *Public Protector v Gordhan and Others* CCT233/19 at para 7.3, 7.5

Ramaphosa's prayer to the CC came at the same time Mkhwebane released *Report 37 of 2019/20* investigating Ramaphosa for ethics violations.⁹⁰⁴ This report also came clothed in the authority vested in it by the CC ruling in *EFF 1*, once again boldly stating at the beginning of the report the Court's reference to the PP's sharp and mighty sword ready to chop off the head of impunity.

As Ramaphosa's affidavit to the CC indicates, *Gordhan v Public Protector* is not the first instance where the Courts have found against Mkhwebane. In *Democratic Alliance v Public Protector*⁹⁰⁵ the High Court set aside her Report into Vrede Dairies.⁹⁰⁶ Mkhwebane's Report was challenged on the grounds that it was significantly narrower in scope than the preliminary report compiled by Madonsela. The final report ignored key complaints that procurement prescripts had not been adhered to. Mkhwebane's report also dismissed Report by the National Treasury showing that the Free State Department of Agriculture had issued a company connected to the Vrede Dairy Project close to R150 million *after* the Treasury concluded that the agreement with that company was unlawful. Furthermore, the preliminary reports adverse findings against the Department of Agriculture, an MEC, and the Provincial Premier were omitted from Mkhwebane's final report.⁹⁰⁷

To justify these actions, Mkhwebane borrowed from what was *at the time* a legitimate constraint on Madonsela's Office. Lack of institutional capacity and finance to tackle overwhelming corruption had prevented Madonsela from fully investigating the extent of State Capture. Mkhwebane used these limitations as a way to explain her refusal to fully address the complaints,

⁹⁰⁴ *An investigation into allegations of a violation of the executive ethics code through an improper relationship between the President and African Global Operations (AGO), formerly known as BOSASA* Public Protector Report No.37 of 2019/20 http://www.pprotect.org/sites/default/files/legislation_report/REPORT%20BOSASA.pdf (date accessed 22/09/2019)

⁹⁰⁵ *Democratic Alliance v Public Protector* (note 580)

⁹⁰⁶ *Report into complaints of maladministration against the Free State Department of Agriculture in respect of non-adherence to Treasury prescripts and lack of financial control in the administration of the Vrede Integrated Dairy Project* Public Protector Report No. 31 of 2017/18 <http://www.publicprotector.org/?q=content/report-no-31-201718-complaints-maladministration-against-free-state-department-agriculture> (date accessed 22/09/2019)

⁹⁰⁷ *Democratic Alliance v Public Protector* at para 44, 68

effectively shielding key role players from accountability.⁹⁰⁸ The High Court in this case made a cost order against Mkhwebane, ruling that her handling of the Vrede Dairies Report warranted making her personally liable for 7.5% of the costs of the legal action.

In *South African Reserve Bank v Public Protector and Others*⁹⁰⁹ the applicant lodged an urgent application to review and set aside an aspect of remedial action ordered by Report No. 8 of 2017/18.⁹¹⁰ The challenged remedial action was Mkhwebane's order that provisions of the Constitution be amended to require that there be "regular consultation between the Bank and Parliament to achieve meaningful socio-economic transformation."⁹¹¹ The amendment would, in effect, strip the Reserve Bank of its independence. The release of the report precipitated a Rand depreciation and investor flight. The High Court granted the application to set aside the remedial order but remained confined to a narrow approach to the applicant's urgent prayer, refusing to grant a declaratory order that Mkhwebane had abused her office.⁹¹²

The issue of the independence of the Reserve Bank is significant from a historical perspective. Mkhwebane's order of a constitutional amendment exhumes old disagreements and divisions within the ANC, divisions that were never really laid to rest in the first place. During the early stages of constitutional negotiations in 1993, the independence of the Reserve Bank was a bone of contention between the more moderate faction of the ANC and the COSATU aligned factions.⁹¹³ Mkhwebane's Reserve Bank Report highlights the conflicting ideologies within the ANC in 2018. More worryingly, it is one of many indicators pointing to a disaggregation underlying

⁹⁰⁸ *Ibid* at para 85

⁹⁰⁹ *South African Reserve Bank v Public Protector and Others* 2017 (6) SA 198 (GP) (hereinafter *Reserve Bank v Public Protector*)

⁹¹⁰ Report on allegations of maladministration corruption, misappropriation of public funds and failure by the South African Government to implement the CIEX Report and to recover public funds from ABSA Bank Public Protector Report No. 8 of 2017/18 <http://www.publicprotector.org/?q=content/report-no8-201718-allegations-maladministration-corruption-misappropriation-public-funds-and> (date accessed 04/12/2019)

⁹¹¹ Report 8 of 2017/2018 at 7.2.1 outlined in *Public Protector v Reserve Bank* (note 579) at para 22.

⁹¹² *Public Protector v Reserve Bank* (note 579) at para 142-143

⁹¹³ See Bond (note 256) 75

constitutional settlement and commitment. This unravelling of constitutional consent poses a danger for the view that the Constitution, and by extension, the judiciary possess political legitimacy.

In *Absa Bank Limited and Others v Public Protector and Others*⁹¹⁴ the applicants averred that there was “reasonable apprehension of bias” on the part of the PP.⁹¹⁵ The High Court once again refused to grant a declaratory order that the PP had abused her office. The Court side stepped the issue by holding that the declaratory order could not be granted as it did not form one of the prayers in the application. The applicants in turn argued that the extent of the abuse of the PP’s office can only reveal itself through the answering affidavits. A declaratory order that there was abuse could not have been known nor requested of the Court in the initial application.⁹¹⁶

This procedurally conservative approach notwithstanding, the High Court did make a *de bonis propriis* order against the PP, making her personally liable for costs. The Court held that:

The Public Protector did not conduct herself in a manner which should be expected from a person occupying the office of the Public Protector...She did not have regard thereto that her office required her to be objective, honest and to deal with matters according to the law and that a higher standard is expected from her.⁹¹⁷

Moreover, while not engaging the issue of abuse of office, the High Court did set aside the PP’s remedial orders. The same was held in *Democratic Alliance v Public Protector* where the High Court judged that “it would not be appropriate to refer the matter back to her.”⁹¹⁸

Refusing to remit the Report is a revealing departure from the classical conception of the separation of powers doctrine. Usually, the Court favours remittal to the competent authority. Throughout these PP cases, the High Court, and the CC when on appeal, have refused to engage the substantive

⁹¹⁴ *Absa Bank Limited and Others v Public Protector and Others* 2018 (2) All SA 1 (GP) (hereinafter *ABSA v Public Protector*)

⁹¹⁵ *Ibid* at para 83-85, 93-95; *Public Protector v Reserve Bank* (note 579) at para 139-142

⁹¹⁶ *Ibid* at para 112-122. On the relationship between having the requisite informing to draft an application and the court decision to limit itself to the papers before it, see firstly *Administrative Justice Weaknesses* at 3.4.5 and *Helen Suzman Foundation v JSC* in at 5.3, and secondly, discussions of *Kirkland* and *KZN Schools* at 7,7 above.

⁹¹⁷ *Ibid* at para 120-121

⁹¹⁸ *Democratic Alliance v Public Protector* (note 580) at para 159

question of bias, competence or abuse of the Office of the PP. And yet a broader view of the CC's jurisprudence shows that the Court most often refuses remittal when there is the "potential bias or incompetence of an administrator".⁹¹⁹ This strongly suggests that the court does feel that Mkhwebane has abused her office. It's just not willing to say so.

8.6 *De Bonis Propriis and a Motion of No Confidence*

When the PP appealed the High Court's personal costs order (*de bonis propriis*) made in the *Reserve Bank* judgment, the CC held that

a higher duty is imposed on public litigants, as the Constitution's principal agents, to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights.⁹²⁰

The CC chose not to engage the issue of *de bonis propriis*, reasoning that it should not interfere with an exercise of true discretion of the High Court. Such ruling allowed it to avoid conflict with the PP and preserve comity between it and the lower levels of the judiciary.

In the case of *President of the Republic of South Africa v Public Protector* (2020), the High Court concluded that the recklessness of the PP, "deserve[s] the opprobrium of the court."⁹²¹ Granting an order for personal costs indicates the increasing anger of the Courts in regard to the abuse of legal processes through bad faith actions. In *Gauteng Gambling Board and Another v MEC for Economic Development, Gauteng Provincial Government* the SCA felt that it was regrettable that a personal costs order had not been included in the prayers when it issued a stinging rebuke:

The MEC, in her responses to the opposition by the Board, appeared indignant and played the victim. She adopted this attitude whilst acting in flagrant disregard of constitutional norms. She attempted to turn turpitude into rectitude...It is time for courts to seriously consider holding officials who behave in the high-handed manner described

⁹¹⁹ *Trencon* (note 365) at para 40

⁹²⁰ *Public Protector v Reserve Bank* (note 579) at para 154

⁹²¹ *President of the Republic of South Africa v Office of the Public Protector* 2020 (5) BCLR 513 (GP) at para 211

above, personally liable for costs incurred. This might have a sobering effect on truant public office bearers.⁹²²

In his dissent in *Public Protector v Reserve Bank*, the Chief Justice voiced his concern that the pattern of punitive personal costs “for State functionaries acting in their official capacity...is likely to have a chilling effect on their willingness to confront perceived or alleged wrongdoing.”⁹²³ Mogoeng CJ’s awareness of the potential for adverse consequences of the Court’s disciplining of state functionaries is illustrative of a wicked problem.

The cases discussed in this chapter show that the courts have time and again found Mkhwebane’s work to be greatly lacking (no more clearly indicated than by her belief that it is within the power of the PP to order an amendment of the Constitution). The culmination of these multiple review applications of her orders led to Parliament questioning her fitness to hold office and taking steps towards implementing a motion of no confidence in Mkhwebane. Mkhwebane threatened court action against Parliament should this go ahead, asserting that there are no rules in place for her impeachment.⁹²⁴

Noteworthy is that the Justice Committee of Parliament has referred the process for removal to the Rules Committee for clarification. This can be seen as an effort to follow a procedure that is legally water-tight, with the goal of pre-empting any legal challenge to the removal. This development tentatively suggests that, emerging out of court-centred accountability jurisprudence, Parliament, under new leadership, is beginning to take up its democratic oversight responsibility.

8.7 Analysis

Congruent with a central characteristics and trajectory of the judicialisation of politics traced in this research, this case study on the Office of the Public

⁹²² *Gauteng Gambling Board and Another v MEC for Economic Development, Gauteng Provincial Government* 2013 (5) SA 24 (SCA) at para 54

⁹²³ *Ibid* at para 6

⁹²⁴ Davis G “Parly Justice Committee refers process of removing Mkhwebane to Modisa” *Eye Witness News* 27 August 2019 <https://ewn.co.za/2019/08/27/parly-justice-committee-refers-process-of-removing-mkhwebane-to-modise> (date accessed 22/09/2019)

Protector supports the argument that successful judicial challenges breed more review challenges. The moral legitimacy of the Court was able to bestow moral authority on the PP. This unintentionally signalled that the Office of the PP could be used as a powerful Lawfare weapon. Under Mkhwebane's leadership, the Office of the PP was politicised and used to target political opponents, shield corrupt State actors and whitewash evidence of corruption. In her own words Mkhwebane's states:

Some of the major challenges are baseless accusations that I am involved in ANC factions, that I am biased in favour of one of the factions, and that I am targeting the President [Ramaphosa] and the Minister of Public Enterprises [Gordhan]. The narrative is that I am part of the so-called 'push back' against efforts to fight corruption within state-owned enterprises, as supposedly spearheaded by the President and the Minister.⁹²⁵

The more the Office of the PP is politicised and abused through these Lawfare efforts, the more litigation emerges as Mkhwebane's remedial orders are brought on review. The more instances of successful review invalidating PP reports, the more it sends a signal boost that the judicial route is the most potent route. The more the Court hears review applications against a state functionary, the more it faces political attack. In trying to hold the line against the politicisation of an institution, the Court becomes exposed to accusations that it is the Court itself who is politicised.

Judicial legitimacy is further strained by the differences between Madonsela and Mkhwebane. The 'good lawfare' use of the courts to enforce the accountability of Madonsela's reports and the 'bad lawfare' of Mkhwebane's abuse of the law has understandably led to different rulings by the Courts. Erroneously conflating these two types of lawfare actions has resulted in allegations of inconsistency in legal reasoning by the Court. Speaking at the University of Johannesburg, Mkhwebane said:

As things stand now, for anyone to successfully challenge the powers of the Public Protector, all they need to do is show up to the court and

⁹²⁵ Mkhwebane "Key Note Address" University of Johannesburg. Reported in Somdyala K "Mkhwebane on allegations that she is targeting Ramaphosa, Gordhan: 'Why should I turn a blind eye'" *News24* 06 September 2019 <https://www.news24.com/SouthAfrica/News/mkhwebane-on-allegations-that-she-is-targeting-ramaphosa-gordhan-why-should-i-turn-a-blind-eye-20190906>

they will be granted the relief they seek. This is how radically the legal position regarding the Public Protector has changed.⁹²⁶

Implicit in this statement is that the Court is not being impartial. Such political rhetoric has the potential to undermine the Court's legal legitimacy. Public confidence and an informed citizenry are crucial components to legitimacy. However jurisprudentially sound the decisions of the Court, it is the narrative of the court's performance portrayed in the media is the primary driver in framing that perception.

Zuma's bold recalcitrance toward the Office of the PP has ensured that the South African public are attuned to the matters involving the PP, but perhaps not sufficiently informed as to the nuanced contours of the issues. In heightened political matters, there is a need for the Court to help frame the nation's people understand of its ruling, and obtain an accurate perception.

Detracting from this imperative is a competing impetus felt by the court to scribe lengthy and legally sophisticated judgments, painstaking tracing the precedential route to justify its judgment. This is done in an effort to dispel any accusation of political preference in the ruling. The more the latter objective is pursued, the more the former objective of public understanding is potentially sacrificed. Here the multi-dimensional rubix cube of competing demands for judicial legitimacy can be re-invoked.⁹²⁷

An overview of PP case law shows that both the High Court and CC are trying to be responsive to the immediate harm that PP's reports cause to the applicants. They are also adopting a procedural rigid stance in refusing to grant the applicant's desired declarator of abused her office. The Court has shown that it is not willing to traverse any further than what is required for the interim relief sought. The CC has similarly avoided venturing into the question of abuse of office.

Restricting itself to this approach and remaining within the confines of the interim application is an interesting approach by the Court, particularly when

⁹²⁶ Somdyala K "Judiciary's position on Public Protector's powers 'radically changed' since I took over – Mkhwebane" *News24* 07 September 2019
<https://www.news24.com/SouthAfrica/News/judiciarys-position-on-public-protectors-powers-radically-changed-since-i-took-over-mkhwebane-20190907>(date accessed 21/09/2019)

⁹²⁷ See chapter 2.3

there it has shown more lenience in cases like *KZN Schools*⁹²⁸ where the application was deficient.⁹²⁹ The Court's unwillingness to accept a prayer that emerges from the court papers but not specifically pleaded, nor one that is specifically pleaded, but not needed in determining immediate relief, is a curious stance in an era of corruption. Obstruction and recalcitrance inhibit access to information prior to the matter being aired through the review process. The extent of the abuse, and determination of grounds and relief, cannot be known until disclosure is forced through discovery.

The curious stance by the Courts in demanding procedural correctness can be more clearly understood when considering two factors: one, the Courts is sensitive to the politically heightened issues axiomatic to reports by the PP. They are thereby more constrained when invalidating a report.

Two, the Courts have a duty to help preserve, protect and uplift Chapter 9 institutions so that, when functioning with integrity, those institutions have the capacity to help carry the weight of preserving and protecting democracy. A declarator that the PP abused her office would be damaging to the *Office* of the PP. The Court has a duty to protect the future of the Office, so that, when under new leadership, it can once again assume its important and constitutionally supportive work. In other words, the Court has to fix the structural damage done to the Office, but in way that does not metaphorically bring the building down on itself. A declaration of abuse may have brought the building down.

This may explain why the High Court and the CC have been both assertive, in trying to fix the damage, and restrained, in trying to preserve the Office for the future. This view can be supported by the personal costs order made against Mkhwebane in both *Absa v Public Protector* (upheld by the CC in *Public Protector v Reserve Bank*), and in the *Democratic Alliance v Public Protector (Vrede Diaries)*. The personal costs order signifies a distinction between the actor and the institution, the PP and the true purpose of the Office.

⁹²⁸ *KZN Schools* (note 757)

⁹²⁹ See discussion of *KZN Schools* in section 7.7 above

However, avoiding declaring that the PP abused her office is the appropriate strategy *up to a point*. Once the political machinations reach an inflection point – it behoves the Court to step in, and, as Ramaphosa pleaded in his affidavit, “end it”.

8.8 Conclusion

Through treating the PP remedial orders as merely recommendations, Parliament failed to hold the President to account. Judicial assertiveness towards bolstering the Office of the PP was a necessary role undertaken by the Court when a horizontal accountability mechanism is denuded of its authority. Through the lens of the politics of adjudication, the Court’s assertiveness can be seen as an effort to enhance the effectiveness of the Office of the PP. In doing so, the court keeps open another avenue for addressing accountability failures. Such assertiveness is shown, in part, in the hope that this could stem the tide of politically charged matters flowing to the Court’s doorstep. What it did, however, was to create more judicialisation.

The boldness of the CC in *EFF 1* can be ascribed to an engaged citizenry that offered a buttressing force, and a declining ANC dominance that lowered the risk of excoriating a recalcitrant political party. However, the *EFF 1* case showed a reverence for the PP that had the unintended consequence of pointing out the Office in different hands could potentially be a great avenue for Lawfare.

While the Courts have been able to block Mkhwebane’s Lawfare at every turn, the events during her tenure will cause lasting damage and colour any action by a future PP for a period to come. Any reports from the Office of the PP will now be looked at through a politicised lens – greatly diminishing the authority and moral weight of the Chapter 9 institution. Moreover, removal of a PP, which Mkhwebane’s conduct has precipitated, should not be something that becomes par for the course. The Office must stand apart from the fire and fury of the political arena if it is to effectively engage in that arena. Mkhwebane’s weaponising of her Office has ensured that it is an institution acutely placed into the realm of political manoeuvres.

CHAPTER 9

CONCLUSION

*“Now who will stand on either hand,
And keep the bridge with me?”*

“Horatius at the Bridge”
Thomas Babington Macaulay, 1842

9.1 *Looking Back*

This thesis has traced the implications of the unfolding trend of the judicialisation of politics and its effects on the judiciary. Exploring the interactions between Lawfare and judicial legitimacy, this thesis has problematised such a relationship as a wicked problem. It has posited the need for addressing judicial legitimacy through widening the system boundaries to appreciate the interdependencies and interrelationships of law and politics.

When this research began, a caveat had to be noted with regard to institutional stability: the democratic age of a nation generally results in a more deeply rooted and more secure judicial institution able to withstand opposition or controversy in the execution of its role. It was proposed that when transposing, for the most part, US-situated paradigms of judicial-political dynamics onto South Africa, cognisance would have to be taken of the US’s maturity and South Africa’s relatively democratic infancy.

This caveat was proposed at the time Donald Trump became President of the United States. This caveat must now be re-examined in light of ‘Trumpist’ efforts to dismantle and undermine American institutions, embrace authoritarian tropes and disregard the rule of law. Three years into his presidency, the echo of Ackerman’s forewarning that constitutional decline

occurs “slowly and then with grim speed”⁹³⁰ is heard. Trump has weaponised the criminal justice system, proclaimed that Article II of the US Constitution means that the power of the president is total, dismissed multiple Inspectors General from numerous departments, maligned career political operators and civil servants who speak truth to power, and has responded to attempts at congressional oversight with impunity.

In the beginning, Trump’s actions, while concerning, did not cause full alarm warnings. There was faith in the continued ability and strength of American institutions to withstand his encroachments. The belief that democratic institutions would be a sufficient bulwark offered a false surety. This belief led to complacency that tempered the tenor of the moral outrage against the president.

As a result of Trump’s complete disregard of the unarticulated norms and assumptions that underpinned democratic institutions, these norms have to be overtly acknowledged and engaged with. As a result, constitutional scholars, reeling from what they deem the “severe crisis in American constitutional democracy”⁹³¹ place added concentration on the scope of the judicial role as the final line of defence.

So, Levinson & Graber argued in 2018 that when the judicial parameters are determined by constitutional norms and assumptions that are no longer present due to the unethical leadership, the judicial role must adjust to compensate. The authors advocate a jurisprudential approach similar to what the South African Courts have themselves been forced to adopt in the last decade – an expanded rationality review. The Court in this space must respond to bad faith actions by applying a stricter scrutiny. This is a departure from the stance of deferential acceptance of the rationale for decisions put forward by actors in power.⁹³²

In short, in response to Trump, the US judiciary is being asked to be the bastion, to be Horatius keeping the bridge. The SCOTUS however, has not

⁹³⁰ Ackerman (note 79) 1523

⁹³¹ Levinson & Graber (note 783) 139

⁹³² Levinson & Graber (note 783) 163-168

yet risen to be this force, just the opposite. Beginning with *Citizens United*⁹³³ in 2010, its voting rights decisions have all but constitutionalised Republican efforts at voter suppression, dismantled voter protections, given corporations voice in elections and ignored gerrymandering of voting districts.⁹³⁴ The unwillingness of the SCOTUS to prevent the dismantling of democratic guardrails, together with the bad faith politics of its appointment process, all feed into the perception that the SCOTUS is a politicised institution.⁹³⁵

This thesis has focused on South African judicial-political dynamics in the context of burgeoning judicialisation from 2009-2020. Running concurrently, the past decade globally has seen decreasing faith in the value of liberal constitutional democracy in many nations, not just the United States, but for example also in Hungary, Russia, Israel, Venezuela, and Turkey; a decline spanning developed and developing nations, mature and young democracies.

The rise of authoritarian impulses, both leading to, and existing alongside increasingly insulated and nationalistic interests, is eroding global partnerships and international frameworks for human rights and the liberal democratic model.⁹³⁶ These patterns are traced not to overt democratic collapse. Rather there is an erosion of rule of law institutions through their deliberate disassembling; hastened along by a diminishing of trust in establishments and democracy-supporting structures.

While maintaining a nominal commitment to constitutional democracy, the heart of rule of law institutions is eroded through subtle incursions, manipulation and abusive constitutionalism. That democratic power can be

⁹³³ *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010)

⁹³⁴ See *Shelby County v. Holder*, 570 U.S. 529 (2013) that dismantled the Voting Rights Act; *Husted v. A. Philip Randolph Institute*, No. 16-980, 584 U.S. ____ (2018) purging voter registration rolls; *Rucho v. Common Cause*, No. 18-422, 588 U.S. ____ (2019).

⁹³⁵ Liptuk A "Rulings on Wisconsin Election Raise Questions About Judicial Partisanship" *The New York Times* 7 April 2020
<https://www.nytimes.com/2020/04/07/us/politics/wisconsin-elections-supreme-court.html>
 (date accessed 10/04/2020)

⁹³⁶ Dixon R & Landau D "1989–2019: From democratic to abusive constitutional borrowing" (2019) *Int'l J. Const. L.* 489 ; Ginsburg & Huq (note 514) 8,69-77; Dawood Y "The fragility of constitutional democracy" (2017) 77 *Md. L. Rev* 192

used to destroy democracy in the name of democracy speaks to the complexity and incredible paradox that is democratic constitutionalism.

The role that rule of law institutions play in this climate moves into critical focus. The very institutions that are being called upon as the last refuge to guard constitutional democracy are themselves subject to pernicious attacks, and are being used to destroy what they are designed to protect. Often these threats are veiled, capitalising on the moral force and hence legitimacy-conferring ability that the institution possesses.

It highlights a situation where a judiciary holds the potential to be both a crucial bulwark standing against unlawful political power *and* used by political actors for abusive ends. Both these potentials are predicated on, rely on, and are caused by the moral force and authority that the judiciary exudes in a democratic system. Such a trajectory highlights both the power and the fragility of rule of law institutions. These global patterns, I would argue, are the face of Lawfare in the 21st Century.

9.2 *The South African Crucible*

Comaroff and Comaroff's prediction that South Africa's Lawfare challenges "foreshadow a global future under construction" has indeed unfolded.⁹³⁷

As lawfare foists a more active and expansive role onto the CC and judicialisation of politics is embraced to counter the democratic erosion in other spheres, South Africa's specific judicial-political dynamics can offer valuable lessons for the unravelling implications for judicial legitimacy more generally.

Is judicialisation foisting an illegitimate role onto the Court through intrusion into the political? Whether the judiciary in dealing with these political matters was a departure from a normative commitment to the rule of law was approached through crafting a clear understanding of the nature and role of a

⁹³⁷ Comaroff & Comaroff (note 9) 133,149

constitutional court by examining how the CC has navigated 'Lawfare' matters.

A conceptual framework of legitimacy first had to be constructed.⁹³⁸ This framework posited judicial legitimacy as a multi-dimensional concept. It proposed viewing judicial legitimacy as - an entwined dialectic of moral, legal, sociological and political elements. South Africa provides an interesting crucible within which this conceptual framework can be understood, as each dimension of legitimacy is heightened in South African jurisprudence. The South African context and experience allows for envisioning the nature of each dimension, and what each conception must pursue, with greater clarity.

Apartheid entrenched and effectuated the codification of oppression and discrimination through legal architecture. These laws, sourced in parliamentary sovereignty, were formally compliant and legally valid, yet devoid of substantive morality. This historical legacy demands that legality, or legal validity, not be equated with legitimacy. It demands that justice and equity be present within the law and achieved through the workings of the law.

The use of law as a means of ideological struggle, entrenching dominance and inequality, should also lead to the idea of legitimacy being more attuned to skepticism about the legitimising power of law. Vigilance to the "power relations lurking beneath a veneer of formally equal treatment"⁹³⁹ may be required. It is this same history where democracy was denied that illuminates the first principles of democratic legitimacy. The will of the people must prevail, framing an institutional self-consciousness on the part of the judiciary.

The South African crucible further highlights moral legitimacy as the Constitution aspires towards upliftment and transformation, unity and nation-building. Whereas a narrowly conceived conception of positivism views legal

⁹³⁸ See Chapter 2 above

⁹³⁹ Woolman (note 793) 75; see generally Hutchinson A & Monahan P "Law, politics and the critical legal scholars: the unfolding drama in American Legal thought" (1984) *Stan. L. Rev.* 199; Winter S "For what it is worth" (1992) *Law & Soc'y Rev* 795; Singer (note 140) 6: "legal reasoning is a way of simultaneously articulating and masking political and moral commitment."

legitimacy as a separation of law and morality, the Constitution is not devoid of morality, neither is it value neutral. It is neutral only in so far as it shows fairness and impartiality to those that come before the Court; and neutral in that morality must be framed by the dictates of the constitutional spirit, not determined by the dictates and preferences of the jurist.

The constitutional spirit of inclusion means that legitimacy will be assessed by the degree to which fidelity to this objective has been shown. What this research has revealed is that responsiveness is paramount for legitimacy. The Court must therefore show sensitivity to the political and social environment if it is to achieve justice, equity and social stability.

Through an exposition of the CC's objectives the 'wicked problem' nature of the judicial role has been revealed. It is a role that exists in a suspended paradox. Its nation-building mandate conflicts with its democratic self-consciousness and resulting deference; its aspirational demands may fuel a degree of activism and yet this may create the impression of a paternalistic imposition on the will of the people.

By understanding judicial legitimacy as a composite of many dimensions, these dichotomous and yet interconnected elements show how caution and deference can transgress into timidity and abdication of function. Yet a transformative interpretive mandate, together with rights protection, can be perceived as judicial activism, usurpation and counter-majoritarianism.⁹⁴⁰ Each requirement of legitimacy raises a competing demand for legitimacy; each judicial duty that is fulfilled undercuts or exacerbates an equal imperative.⁹⁴¹

Adopting a systems-thinking approach to these dimensions of legitimacy has revealed the interactions between law and politics and has allowed for sketching the stages of a cyclical relationship between Lawfare and judicial legitimacy.

⁹⁴⁰ Du Plessis (note 31) 39

⁹⁴¹ Roux (note 27) 5

9.3 *Born of legitimacy*

The tactic of Lawfare begins with legitimacy. It is a strategy predicated on the faithful commitment and respect for the rule of law to bind, capitalising on the integrity of an independent and fair judiciary to compel compliance. Through the enduring and “unqualified good”⁹⁴² of the rule of law, the tactic of Lawfare seeks to utilize the moral authority of the court in controversial and contentious issues to compel a desired action.

This is clearly evident in apartheid structured by and effectuated through the law rule *by law*. And yet, through seeking to brush oppression with a veneer of legitimacy to compel compliance, normative undercurrents of the law were able to survive. The court was able to provide the space for opposition to apartheid to be given voice. This history speaks to both the liberating and abusive potentials of law.

At the time of the democratic transition, these historical instances proved that both sides would credibly commit and be bound by law. Thus, a legal path to a democratic future had been created. Through this trust, a Constitution could be given life, forging a constitutional patriotism to bind a diverse and divided nation.

The habit of legality, combined with this constitutional patriotism and its aspirations, provided the tools and the language for political battles to be fought through the law. While always present in South Africa’s judicial and political history, the path for the judicialisation of politics was now far more greatly illuminated.

9.4 *From illegitimacy to legitimacy*

It is in the displacement of the political to the judicial and in the expanding reach of the court that the proper role of the judiciary in a democracy is raised.

⁹⁴² Thompson (note 235) 266

Whether this intervention in the political is a legitimate involvement or an illegitimate intrusion depends first on how 'politics' is framed. This research has framed politics beyond the imposition of preference. It has understood politics as a concept that denotes how people live collectively despite disagreement, while remaining committed to the systems they have created within which that disagreement will take place.

Having examined the judicial legitimacy through a historical-institutionalist approach, it has been argued that the CC is an inherently political institution. It is an institution that was, and continues to be, called upon at the point of impasse, holding the interests of all parties, and establishing surety. At its birth, it fostered democracy. The Court created the framework for collective self-determination despite disagreement. The institutional role played by the CC supports the position that the Court has not operated as insulated from the broader democratic system. The Court impacts its environment and the environment impacts on the Court in a system of dynamic interactions.

The traditional view of a separation of law and politics for legitimacy is therefore not cognizable within the nature of the CC and its expanded role. Expectation of resolution where other avenues have failed compels a 'political' role in confronting broadly political and constitutional questions. This translates into the judiciary being viewed as a saviour in Lawfare times. Political issues brought to the Court are paradoxically aligned with the role and expectation of the CC, disrupting the view of sociological legitimacy that demands an apolitical stance. In examining the drivers of judicialisation, this research suggests an inverted causation. The rise of judicialisation is not causing an expanded role for the court. The expanded court role is making judicialisation possible.

In these instances of the judicialisation of politics, the judiciary is approached as the last bulwark. It is compelled to uphold democratic norms that have suffered a diminution through corruption, incompetence, obstruction and lack of transparency. Due to lack of compliance with non-judicial regulatory enforcement and administrative justice, judicial review applications are predominantly brought by opposition parties and civil society

organisations as a way of seeking oversight on executive decision making and a counter-weight to the ANC's dominance. Faced with these highly charged political matters, the CC has shown courage during the 'Zuma Years'. It has been able, as has been argued above, to maintain a high degree of legitimacy, sustaining a reverence and public confidence from a sociological perspective.⁹⁴³

When the primary causes of judicialisation of politics are considered, the view that the court engaging in these broadly political matters is democratically illegitimate cannot stand. Based on the identified relationship between democratic distrust and judicial legitimacy the assumptions underlying democratic theory must be re-interrogated. In light of the recalcitrant disregard for the rule of law and democratic norms in 'democratic' spaces, of the argument of judicial overreach deteriorates

When it is focused toward preservation of the integrity of the system, the judiciary is justified in undertaking this compensatory role in response to institutional failure. In providing the space for deliberation, transparency, responsiveness and accountability, judicial involvement that is presumptively illegitimate *will become* legitimate where governmental departments and agencies are chronically in default.

Advancing a *systemic* analysis of institutional legitimacy, the Court, in the execution of its role, and remaining faithful to its role in the constitutional structure, while *prima facie* being seen as anti-democratic or counter-majoritarian, can have a catalytic effect on democratic practices. Consistent with the complexity of a wicked problem, judicial action that appears delegitimising may, in fact and effect, not be so when the system's boundaries are widened. Indeterminacy can, in one respect, be seen as unfettered judicial choice, leading to claims of illegitimacy. Indeterminacy therefore necessitates the democratisation of the constitutional project, countering the lack of the objective through intersubjective understandings of

⁹⁴³ Kende (note 478) 49; Gibson (note 99) 24; Ellmann (note 417) 97

the Constitution through representation and diversity on the Bench.⁹⁴⁴ In another respect, indeterminacy means at once that people can see themselves vindicated in the constitutional text *and* must see themselves in the eyes of the Justices who would interpret the indeterminate text. Here indeterminacy is able to help foster a constitutional allegiance. The ability for the Constitution to endure exists in its broad language, aspiration and values. This endurance has to be paid in the coin of judicial openness so as to breathe life into constitutional values.

Conversely, it has also been shown that measures that appear legitimate, such as embracing a formalist approach to adjudication, can unravel into illegitimacy when the objective of that measure is interrogated more deeply and its impact within the larger system is traced. Whether judicial action is legitimate or illegitimate can only be appropriately assessed by viewing the system as a whole. The assumptions that underlie the institutional role delineations seem to disintegrate through lawfare and the judicialisation of politics. These boundaries must be drawn in relation to the functioning of the system.⁹⁴⁵

This thesis has highlighted the connection between dependence and independence for judicial legitimacy. To remain *resilient*, awareness in the form of sensitivity to its environment and inter-relationships between the Court and the political branches is needed by the Court. In this respect, a departure from a more purely adjudicative model is required. Considerations of external ramifications, particularly in areas of socio-economic stability, compel the Court to engage in judicial statesmanship that ensures social cohesion and the upliftment of social values.⁹⁴⁶ More challenging, are instances where the Court is confronted by matters that have vast consequences. In these cases, (discussed above in chapter 7.4), an unlawful situation must continue to ensure social stability, justice and equity.

⁹⁴⁴ Hutchinson (note 105) 873; Dixon R “A democratic theory of constitutional comparison” (2008) 56 *Am. J. Comp. L.* 956

⁹⁴⁵ Luhmann (note 52) 141, 143

⁹⁴⁶ Contiades & Fotiadou (note 56) 10

If the Court is not receptive to the environmental pressures and not responsive in this regard, it will be perceived as a flight from responsibility. A systems approach to judicial legitimacy has shown that restraint must at times yield to didacticism and fortitude. Insulation and detachment would traditionally structure judicial involvement. A multi-dimensional paradigm of legitimacy has revealed that legitimacy, may at times, need to shift to emphasises judicial responsiveness. The court in these situations needs to provide reaffirmation and guidance for role players outside of the institution. Non-compliance and unpunished disregard have demanded a change in the judicial stance from deference and comity to excoriation and anger.⁹⁴⁷ This thesis has shown that should the Court not undertake this role, the judiciary will lose legitimacy. In a Lawfare climate, what may be a legally legitimate approach to adjudication (narrowly understood) will cause the Court to lose moral authority. The formalist must yield to the moral.

Adopting such a role may appear to be abandoning a normative legal stance. However, as argued in chapter 7.5, both the preconditions and the objectives of the rule of law compel an internalisation of external factors needed to sustain the integrity of the constitutional system. Engaging in judicial statesmanship to preserve these preconditions is therefore showing fidelity to constitutional normativity.⁹⁴⁸

In the relationship between Lawfare and legitimacy, the duality of Lawfare means it can either be accountability-ensuring or abusive. Where ‘Lawfare,’ or more accurately judicialisation, has been invoked to ensure accountability, such action is legitimate. And yet, what emerges in numerous cases, across jurisdictions and legal systems, is the word “exceptional”. As the CC stated in *Mhlope*:

It bears emphasis that this is an exceptional case that cries out for an exceptional solution or remedy to avoid a constitutional crisis which could have grave consequences. It is about the upper guardian of our Constitution responding to its core mandate by preserving the

⁹⁴⁷ Van Zyl “The judiciary as a bastion of legal order in challenging times” (2009) 12 *PELJ*

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⁹⁴⁸ Luhmann (note 52) 146; Levinson & Graber (note 783) 146-147

integrity of our constitutional democracy. And that explains the unique or extraordinary remedy we have crafted...⁹⁴⁹

The use of exception reflects a discomfort felt by the Court in having to be in this space. This reflects the cyclical dynamics explored as the core of this research – even the characterisation of judicialisation of politics as ‘good Lawfare’, while legitimate, has the capacity to unravel into illegitimacy.

9.5 *From legitimacy to illegitimacy*

Alive to the ‘wicked problem’ nature of the relationship between the judicialisation of politics and judicial legitimacy, the potential for negative consequences exists alongside the positive relationship that has been summarised directly above. This demands looking past the legitimacy established by the institutionalist obligations to a critical examination of the parasitic potentials of judicialisation. (Highlighted by the Public Protector case study in chapter 8)

The identification and examination of the multiple factors that have led to the judicialisation of politics (outlined in chapter 3) displaces accusations of anti-democratic or counter-majoritarian judicial role. It is, however, the *appearance* of judicial intrusion and activism that remains a central concern. This perception is not aided by the public statements that have been made by the ruling party (chapter 4) that the apex court is obstructionist and ‘counter-revolutionary’.

The CC has faced accusations that it is usurping power, and claims that the nation is being ruled not by the democratic will of the people, but by unelected judges. Critics of the judiciary’s involvement contend that the Court is being used as an instrument by losing political parties who cannot advance their policies through the democratic route or through the vote. They further argue that it is these actors bringing these cases to the Court who are politicising the judiciary.

⁹⁴⁹ *Mhlope* (note 787) at para 137 further referenced in agreement by Froneman J in *Black Sash 1* at para 43; see also *Law Society* (note 376)

This politicisation of law results in a focus on the judge as an individual and judicial subjectivity. Global patterns of the politics of judicial appointment reveal the hypocrisy where a judge's favourable judicial ideology is the basis for judicial appointment; whereas an unfavourable appointment sees politicians turn ideology against the judge. The judicial nominee then faces accusations that he or she is a politician in robes who legislates from the Bench, and is not a principled constitutionalist faithful to the law.

The South African story shows that judicialisation of politics has taken the form of the Court increasingly being used to confront and override executive power. Through this, an antagonistic relationship between the Court and the executive and legislature emerges. Boundaries harden in response to political aggression, causing confrontation and inhibiting the interaction between the branches. The fractious relationships caused by the judicialisation politics up ends the, comity, and constitutional partnership that should frame any understanding of a separation of powers doctrine. (Chapter 4.2.1)

The more the Court engages in the political, the more its legitimating symbols are diluted. This distinction is the key to justifying judicial review within a democratic nation. Institutional legitimacy is premised on role distinction in that "a constitutional court's success is associated with its capacity to differentiate itself as a *legal actor*"⁹⁵⁰ distinct from political institutions and removed from engagement in the political.⁹⁵¹

Thus the perception of principled decision making – being blinkered to the consequences - and the avoidance of the perception of Court politics or political compromise – is the *sine quo non* of legitimate constitutional adjudication.⁹⁵²

One of the main implications of the judicialisation of politics has been the politicisation of law and the wider justice system encompassing a backlash against judicial involvement; developments that undermine judicial independence and limit judicial power. From the comparative lessons drawn

⁹⁵⁰ Roux (note 27) 4; Tushnet (note 180) 51. See above Chapter 2.2.2 'Sociological Legitimacy'.

⁹⁵¹ Post (note 169) 1325; Audette & Weaver (note 116) 1002-1003

⁹⁵² Tyler & Mitchell (note 119) 708; Gibson & Caldeira (note 106) 204; Bassok (note 103)

from India, Israel and Russia and the historical account of South Africa in the 1950s and 1980's, a consistent pattern emerges where judicial assertiveness in effectively constraining executive power is followed by measures taken against the institution that lead to judicial timidity.⁹⁵³

Political backlash is more easily facilitated through ruling party dominance. The judiciary is thus faced with the dichotomy of obligation and impulse. There is an impulse to shield itself from attack and diminish the changes of the institution being derided. This, however, sits in tension with its judicial duty to uphold the rule of law against encroachment and preserve the constitutional system. In doing so, the judiciary will inevitably elicit assaults on the institution.

Facing attack from the judicialisation of politics creates the need for the court to engage in judicial politics to appear non-political. Cultivating the symbols of 'sitting above the fray' (internal focus) is, paradoxically however, a calculated political strategy (based on external awareness) to be able to possess the resilience to uphold institutional integrity (normative preservation). In cases of political consequences, the Supreme Court of Appeal and the Gauteng High Court, for example, have expanded the Bench and endeavoured to reach for unanimity.

Unavoidably thrust into this space, the need to establish the accountability of the Court, in the sense of what it is that is constraining the Court, is vital. Some of the ways that the Court can constrain some of the plethora of political cases coming before it is through adopting jurisdictional hurdles. Outlined in chapters 3.4.4 and 3.4.7, the judicialisation of politics, however, has caused these avoidance techniques to collapse. Matters of urgency and the interests of justice demand that the Court intercede rather than deflect engagement. The Court is obliged to be responsive to public interests, the larger public good, and ensure fairness to aggrieved parties. As such, the court is unable to argue that matters like these should first progress through more 'democratic' pathways before the Court engages jurisdiction.

⁹⁵³ Efforts at judicial undermining and curtailment and comparative patterns of judicial timidity have been traced in chapter 4.2.2 above.

A further challenge to judicial legitimacy is that ‘judicialised’ cases operate in constitutional gaps. Rather than be able to find apparent safety in a clearly explicit plain text reading, the judiciary has to engage holistically with the spirit and the normative underpinnings of the Constitution. This leads to a perception of judicial law-making and constitutional novelty. This constitutional ‘indeterminacy’ increases divisions and dissent on the Bench (discussed in chapter 6.3). Unity is needed to be a bulwark, to show assertiveness when engaging in cases centring of political power and resilience when exposed to political attack. Judicialisation of politics causes division at a time when unity is most needed.

These challenges to operating with ‘legal legitimacy’ are further compounded by confusion as to the correct legal pathway to challenge administrative action. In obstructing access to records of decision-making and through a lack of transparency, an applicant is unable to locate the specific grounds of review. The CC has, at times, accepted this applicant as a bewildered litigant. It has accommodated non-state parties by not confining applicants to the pleadings raised.

In contrast, the Court has held public officials to a higher duty, a higher review standard. Through the principle of legality, the court ensures fairness and justice. In holding public power to account, the rule of law is upheld. The Court’s approach can therefore be seen to meet the demands of legal and moral legitimacy. Compounded by the limitations of the administrative justice statute, the use of the principle of legality has spawned even more pathways to challenge administrative actions. This returns the issue once more to bewilderment about the specific grounds of review.

Consistency is imperative for a narrower view of the rule of law and legal legitimacy.⁹⁵⁴ However, when both are looked at cumulatively, and taking a narrower view of the rule of the law, in terms of predictability and consistency, the inconsistency of the Court’s positions for non-state actors and state-actors may be seen to diminish its legal legitimacy. Recall the wicked problem nature of the multi-dimensionally of judicial legitimacy – the

⁹⁵⁴ Discussed in Chapter 7.7

achievement of one diminishes the other. For the principle of legality, the wicked problem is revealed even within the single dimension of legal legitimacy.

Furthermore, the inconsistency does not help the appearance of an adversarial or oppositional position by the Court against the government. This is not helped by the CC being sharply divided on this issue.

A crucial submission of this research has been that the barometer of judicial legitimacy is calculated through the institution's inter-relationships in the broader political space.⁹⁵⁵

The judicialisation of politics takes the shape of an institutional suit, where the Court is enlisted to demand an organisation, agency, department or institution take a specific action. These cases are brought to the Court because of obstruction and recalcitrance within those institutions. But any remedial action ordered by the court, and the efficaciousness of that order, requires receptivity to reform. This demands an internationalisation and willingness on the part of the institution in default to accept and execute the court's order. In other words there must be a normative commitment on the part of the institution in default. Unfortunately, this is an appeal to competences the lack of which was the driver of judicialisation in the first place. The difficulty of enforcing relief in a judicialised climate will affect the court's legitimacy.

As has been shown in chapter 6.4, workable relief by the Court in these poly-centric, policy-laden cases necessitates an understanding of the behaviours and dynamics of the institution under scrutiny. A remedial order must be structured in such a way that it is prescriptive enough to ensure compliance but flexible enough to allow the institution under scrutiny the discretion to respond to the poly-centric consequences of its mandate.

Where lack of willingness meets hostility toward the court, remedial orders cannot be effectively implemented. Where reciprocal relationships between the branches have broken down the effectiveness of judicial intervention will

⁹⁵⁵ Whittington (note 45) 608

be inhibited, and authoritative legitimacy will be diminished. This aligns with the view that the ability to navigate a wicked problem space depends on relationships.⁹⁵⁶ These interconnections emerging from the study of institutional suits, once more supports this thesis's argument that judicial legitimacy must be engaged with an a wicked problem that must be approached by widening the system boundaries,

But is effective remedial action, successfully implemented, actually what is sought in a Lawfare climate? A more military-oriented understanding of Lawfare suggests that *legal* victory is not the primary goal. The aim of Lawfare is a *moral* victory.⁹⁵⁷ In most cases of judicialisation of politics the CC has been a catalyst for consequences, spurred by the Court's *authority*, but not necessarily flowing directly from the Court's remedial order.

As this research has shown, the danger of the judicialisation of politics is the loss of legitimacy to the Court in the long run. Obfuscating such a claim is the successful use of the law and the courts, predicated on judicial legitimacy. Yes the objective of the role player using the Court as a forum to galvanise has been shown to be successful in specific instances; and yes, the judiciary possesses enough legitimacy to withstand political attack and remain relatively unscathed. It may potentially even *gain* legitimacy by standing up to political aggression. Crucially however, is observing the wider culture of a pernicious turned accelerating and overt disregard for the rule of law and non-compliance with court orders by governmental actors. Such events, continuing unabated, will ultimately undermine the moral authority of the Court.

Focusing on its impact on the larger constitutional system, chapter 5.6 has argued that judicialisation of politics results in a decline in democratic self-governance and cedes democratic responsibility to the Court. In elevating the Constitution as saviour, blame to be misplaced. This can lead to disenchantment with the Constitution. This is of great concern, particularly given the prevalence of statements over the last few years suggesting that

⁹⁵⁶ Ritchey T "Wicked Problems: modelling social messes with morphological analysis" (2013) *Acta Morphologica Generalis* 5 referencing Jonathan Rosenhead (1996) 5

⁹⁵⁷ Military focused understanding of Lawfare noted in Chapter 1.2

there was not consent but compromise around the time of negotiations. The exhumation of these discursive positions surrounding constitutional commitments is increasingly leading to challenges that the Constitution is a 'sell out'. Notwithstanding the loss to the Constitution's political legitimacy, when this is added to the increasing instances of Lawfare, sociological legitimacy is also at risk. With each judgment the Court risks losing symbolic potency. The Court should not speak often, so that when it does speak, it is listened to. When removed from the political, the Court can husband enough authority to garner acceptance despite disagreement.

This thesis has problematised the relationship between judicialisation of politics, Lawfare and the various dimensions of legitimacy, tracing the implications for sustained judicial legitimacy. The principal findings of this research reveal that turning to the Court to resolve wrongs both increases institutional legitimacy by filling the democratic vacuum *and* runs the risk of diminishing institutional legitimacy.

Appreciating the multiple dimensions of legitimacy within a wicked problems understanding, the complexity judicial resilience requires appropriate attention to the *emergent* consequences of such solutions. This is because the system of judicial-politics can be sketched as two concentric circles. There is the larger system of judicial political dynamics, formed interactions of constitutional sociology, political economy and cultural politics. Within this larger system is the smaller system of interacting dimensions of legitimacy at the institutional level. These two systems feed in and out of one another.

It is therefore not a static system, but a stigmergic process. How the political interacts with the judicial will be shaped by the level of temporal legitimacy of the court at that time. In other words, the wider system will feed into the smaller systems dynamics. So too will the Court navigate its own legitimacy concerns by considering the political economy and cultural politics of the broader system. For example, it has been shown that where judicial legitimacy overall is high, authoritative legitimacy is created where the political ignores judicial orders to its detriment. As such, the judiciary can operate in relative security. High levels of judicial legitimacy do however

expose the court to parasitic actions leeching off its legitimacy, and more pernicious and thus more dangerous political efforts to capture the court.

While a distinction between judicialisation of politics has been argued, this research has also observed an interrelationship between the two. By highlighting the effectiveness of pursuing objectives through the judicial process, successful judicialisation becomes a catalyst for more abusive Lawfare. Actors are inclined to use the law in bad faith. Instances of abusive Lawfare include using the law to silence opposition, to target political enemies, abuse threshold requirements for jurisdiction, deliberately run out the clock, induce self-created urgency, and manifest consequences that pre-empt judicial injunction. More insidiously, abusive Lawfare can be seen as engagement in a legal process with the bad faith objective of inhibiting, stalling or undermining the process.

Chapter 3.4.6 outlined Lawfare efforts to evade responsibility through the categorical rigidity of administrative justice statutes. To prevent Lawfare ultimately fostering an attitude of contempt for the rule of law and the judicial process, the Court has expanded the common law doctrine of the principle of legality to counter This expansion does however create the perception of an unmooring of the judicial from a textualist application of the law and exposes the Court to political accusations of judicial law-making.

Resulting from the expanded role of the Court from judicialisation of politics and its associated dangers, there has been an impulse to be overly prescriptive on where the court can and cannot tread. This is particularly evident in the separation of powers scholarship during the Lawfare years. This study of Lawfare and legitimacy should caution against reactively codifying democratic norms in response to abuse. Lawfare exists in the interstices of codified laws. It feeds off formalist rigidity. Lawfare's lifeblood is categorical rigidity.

This is acutely evident in South Africa's experience with its administrative justice framework that seeks to classify and thus constrain. The requirement to invoke the PAJA to ensure public power accountability has been used to

evade responsibility⁹⁵⁸. , and has triggered the need for the principle of legality and an expanded rationality review to uphold the rule of law. If we are to accept the issue of Lawfare and legitimacy as a wicked problem, cognizance must be paid to the fact that:

Wicked problems, by their nature, defy categorization within a strict rules-based system that seeks to divide complex systems and problems into more manageable parts.⁹⁵⁹

While the Court is exposed to accusation of activism in the era of Lawfare, the impulse to categorise in response to such an accusation must be resisted.

The wicked nature of this problem is that even where the Court is successful in staving off Lawfare, more pernicious consequences of Lawfare still emerge. Where the Court is holds the line against threats to the rule of law, and where the Court is assertive in bolstering other accountability mechanisms and institutions, the more it shows itself to be a powerful weapon, making the institution vulnerable to capture and abuse.

It is for this reason, that future Lawfare, it is predicted, will operate more overtly through politicisation of judicial appointments towards a more wholesale capture of the institution. However, this tactic of working through rule of law institutions is effective *only as long as* the institution is viewed as independent and respect for the rule of law prevails. If the Court is used as a vehicle to implement desired policies and actions, the Court has to stay operational for the capture to work.⁹⁶⁰ It has to maintain, at the very least, its *appearance* of legitimacy if the purpose of Lawfare wants to be achieved – using the law to compel compliance out of reverence for the rule of law. When this gambit of court capture transgresses too far, the judiciary will be viewed as a partisan, highly politicised body. In pushing Lawfare too far for too long, legitimacy is lost.

⁹⁵⁸ See case of *Gijima* described above at chapter 3.4.6

⁹⁵⁹ Weber & Khademian (note 725) 342

⁹⁶⁰ See Senator Sheldon Whitehouse speech to the United States Senate. Transcript of speech found at Whitehouse, S “The scheme 4: A new constitutional right for dark money” (2021) <https://www.whitehouse.senate.gov/news/speeches/the-scheme-4-a-new-constitutional-right-for-dark-money> (date accessed 14/09/2021)

9.6 Judicialisation and Identity Politics

“A people is an assemblage of reasonable beings bound together by a common agreement as to the objects of their love.”

St Augustine ⁹⁶¹

The cases flowing to the CC discussed in this research have been cases centring on political accountability. This is not to ignore the other objective of the Constitution – the protection of fundamental human rights. Requiring justification for exercises of power helps protect human rights, and in this sense the two objectives are connected. In the final analyses, this thesis has highlighted another connection: the success of accountability politic before the court creates the impression that the judicial route is the most effective avenue for making claims of identity. As is already occurring in the US, this forewarns that judicialisation will push courts into identity politics. Particularly when the ideological struggle is being lost in broader society, this struggle will be taken to the courts doorstep. This is not to deny the distinction between the court as an avenue for minority voices to seek recognition and inclusion, as opposed to using the judicial avenue as a means of advancing ideologies that are distinctly anti-pluralist.

When identity politics are brought to the court’s doorstep, the cognitive dissonance needed for institutional legitimacy is threatened. This threat is amplified when it is combined with the rise of post-truth. Antithetical to adjudication’s “higher responsibility to rationality,” the elevation of fluctuating passions, flights of enthusiasm, and wanton tempers⁹⁶² over reason will be a centrifugal force pulling apart social solidarity.⁹⁶³ Right in the middle of this tension sits the court. Increasingly the ‘religious freedom’ cases before the SCOTUS seek a constitutional stamp on religiously sanctioned discrimination

⁹⁶¹ Saint Augustine of Hippo *The City of God* Book 19, Chapter 24

⁹⁶² Adams (note 127)

⁹⁶³ Strong S “Alternative Facts and the Post-Truth Society: Meeting the Challenge” (2017) 165 *U. Pa. L. Rev.* 137; Fuller (note 20) 366-367: “Adjudication is, then, a device which gives formal and institutional expression to the influence of reasoned argument in human affairs. As such it assumes a burden of rationality not borne by any other form of social ordering. A decision which is the product of reasoned argument must be prepared itself to meet the test of reason. The higher responsibility towards rationality is at once the strength and the weakness of adjudication as social ordering.” Siegel (note 115) 995; Issacharoff (note 93) 1426 quoting the Indian Supreme Court in *Prabhoo*, A.I.R.1996 S.C. at 1124

in the name of religious freedom. This greatly exacerbates an already intractable tension between the anti-establishment clause and the free exercise clause of the first amendment. Pulled into this ideological arena, constitutional courts have to decide whether to be “key guardians of secular or moderate interests against the increasing popularity of principles of theocratic governance.”⁹⁶⁴

As in the US, traces of this tension in South African jurisprudence are reflected in tension between customary law and the Constitution. These battles are fought at the constitutional level, in the language of law, seek to disavow constitutional commitments. The elevation of struggles into the judicial realm means that increasingly actors are seeking constitutional recognition *for a rejection* of the constitutional vision.⁹⁶⁵

A constitutional system is most legitimate when it allows the people to live out their conception of good, based on their deepest moral commitments. If this is achieved, people see themselves reflected in the Constitution. The people are able to locate their own interests in showing fidelity to the constitutional project. From this reflection of the centre, there can then be a paradoxical ‘de-centring’ whereby one is able to reason outward from the constitutional essentials to which one is committed to enfold otherness. This is the very essence of uBuntu, an infolding of the otherness.

Constitutional commitment is virtuous, but it is also hard. It asks us to exist in the duality that while we may not agree with a constitutional decision, we understand it, believe in its validity and in the authority of the system to make such decision. Enduring constitutionalism demands that we hold these conflicting notions in suspended paradox.

Significantly however, when this duality is overlaid onto the times that we live in, an already difficult duty becomes so much harder. The global climate is marked by the rise of fundamentalist movements and thinking. When chaos and unsettlement become unnerving, certainty is craved. Suspending

⁹⁶⁴ Hirschl (note 12) 270

⁹⁶⁵ Comaroff & Comaroff (note 549) 302-303

ideas towards appreciative inquiry and holding these dialectic understandings become harder in global patterns of polarisation and balkanisation.⁹⁶⁶

When identity politics, understood as that which frames and fuels one's deepest commitments, come before the court, the fabric of constitutional patriotism begins to tear. Judicialisation of identity politics, at its best, can ensure the inclusion of otherness in the democratic project. It can ask a constitution to expand the circle of 'we the people' who are assured of its protection. At its worst, it may lead to refusal to accept a decision that is deemed an affront to one's moral commitments. It may also result in a decline in allegiance to the constitution, diminished confidence in the rule of law and a loss of respect for the court.

In this space, the inextricable link between the freedoms we afford each other, on the understanding that one's freedom is contingent on protecting the freedom of another, is broken. This fracturing causes division and social instability. A court then has to embrace its more political role and engage in statesmanship to somehow reflect the value being demanded of the identity claim as well as try achieving social stability. Social stability cannot be achieved without both the recognition and mitigation of the claim.

This tentative link between the success of Lawfare and its potential to generate identity politics is of great concern - concern that is not adequately reflected by the brevity of the submission here, which space precludes. It remains a concern which demands deeper consideration and which will demand much attention of constitutional scholars in the future.

9.7 *An engaged citizenry: the only sure bulwark*⁹⁶⁷

In its introduction to its *2011 Rule of Law Index* the World Justice Project quoted former South African Chief Justice Arthur Chaskalson: "Where there's

⁹⁶⁶ Scharmer (note 761) 4; Senge *et al* (note 77) 8

⁹⁶⁷ Roosevelt F "Fireside chat on the recession" 14 April 1938
<https://teachingamericanhistory.org/library/document/fireside-chat-on-the-recession/> (date accessed 06/02/2020)

a *culture* of respect for the rule of law, it is a bulwark against injustice.”⁹⁶⁸ The underlying objective of this research was driven by a simple question: how can the CC, as a rule of law institution, be preserved, protected and defended? Through a wicked problems understanding of systems thinking, it has concluded that continued independence is remarkably dependent. Institutions do not exist in self-perpetuation and must be supported by a constitutional culture.

If the prevalence of Lawfare over the past decade has seemingly blurred the clear line boundaries between law and politics, it has also allowed for the clearer observation that there was always movement across these boundaries. Law flows between the courts and civil society – with society informing law, and law through the courts, informing society.⁹⁶⁹ Law is formed through history, through experiences. It is how we understand ourselves, what we promise to become, and what is demanded of us to get there. In is, in short, what *constitutes* us.

Society cannot be free, self-governing and stable without the rule of law. The rule of law cannot endure unless it is underpinned by a stable society enmeshed in a constitutional culture that endeavours to uphold it.⁹⁷⁰ Internalisation of constitutional norms must permeate through all levels of government, law enforcement, civil society, the fourth and fifth estates, and most crucially, educational spheres.

This thesis has problematised both Lawfare and judicialisation’s impact on judicial legitimacy. It has traced dangers of this continued phenomenon for the institution. Advancing judicial legitimacy as a wicked problem, it has shown the kinetic challenges that emerge for the court in its very efforts to mitigate the dangers of Lawfare.

An engaged and understanding citizenry can be the bulwark against the negative consequences of persistent Lawfare and judicialisation of politics. These negative consequences have been identified in the course of this

⁹⁶⁸ *World Justice Project Rule of Law Index* (2011) at <https://worldjusticeproject.org/our-work/publications/rule-law-index-reports> (date accessed 05/08/2019); Habermas (note 283) 499

⁹⁶⁹ Woolman (note 540) 376

⁹⁷⁰ Fose (note 662) Kriegler J at para 27

research as a decline of democratic responsibility, shifting blame onto the Court and the Constitution, exposure to political aggression and vulnerability to judicial capture.⁹⁷¹

If society understands the imperative of an independent judiciary, attempts to deride that independence, under whatever name or guise, will awaken the immune system of the nation in the form of a “norm-based resistance.”⁹⁷² An engaged citizenry can prevent political dominance from threatening judicial independence, provided the public is aware of when they need to be concerned and what they need to be concerned about.

Noteworthy, however, is that high levels of judicial legitimacy change the nature of political aggression towards the institution. The reverence afforded to judicial independence and the rule of law will alter the strategy the dominant party when it seeks to shift blame. Attacks, manipulation and capture become far more subtle and veiled. Identifying warning signs becomes harder. This alters areas of concern of which the public needs to be aware.

Cognizant that we are dealing with a wicked problem, on its face, actions by a democratically elected, dominant party may not be perceived as threatening. This sits alongside the observations that have been made above that the court is often left to do the dirty work. The judicialisation of political issues places blame on the court for issues beyond its purview and its ability to provide effective, enforceable remedies.⁹⁷³

This reinforces the argument that judicial legitimacy must engage the idea of public confidence and civic education at a deeper and more systemic level. Public perception that the judiciary is legitimate is crucial if the institution is to endure. The court must engage with the public, showing sensitivity and responsiveness to the normative unfolding vision and pressures. The public, however, must be under equal obligation to engage in an understanding of the system and the limits of the institutional function. In doing so, blame can

⁹⁷¹ Depicted in Chapter 5.3, 5.6, 5.7, and 4.2

⁹⁷² Tushnet (note 28) 118, 109

⁹⁷³ Corder (note 651) 558; *S v Makwanyane* (note 33) at para 25 *in re* constitutionality of death penalty that agreement could not be reached on in constitutional negotiating process; see Moog (note 62) 124 noting this tendency in India of letting the court do the dirty work.

be assigned correctly, and accountability democratically ensured. What is needed is civic understanding and a civic education that align with the national story, fostering constitutional norms and a comprehension of democracy and what democracy asks of us.

It has been posited above that the judicialisation of politics in South Africa has caused an abdication of democratic responsibility. Encouragingly, however, it is precisely because the CC is seen as the last great hope, the last sure bulwark, that the apex court is provided greater reverence and protection. In this sense, the institutional failures that have precipitated the judicialisation of politics may have reached such a stage of decline in South African democracy that civil society is starting to become reinvigorated through rallying to protect the Court.⁹⁷⁴

Judicialisation asks the Court to carry a burden it should not be carrying alone. Upholding the rule of law cannot be the sole responsibility of the Court. The CC has shown a remarkable ability to be Horatius, keeping the bridge that promises a move from an authoritarian past to a future built on a culture of justification.⁹⁷⁵ What is important to remember about Horatius, however, is that he never thought that he alone could hold off the Etruscan onslaught. Indeed, his actions were largely self-sacrificial. He sought only to hold the line long enough for others to muster their forces. In bravely holding the line, he ennobled those whom he served to do the same.

⁹⁷⁴ The *World Justice Project* shows that under the index 'Open Government – civic participation, South Africa in 2019 scored 0.70, significantly higher than 2018's score of 0.65. *World Justice Project Rule of Law Index* (2018) 136; *World Justice Project Rule of Law Index* (2019) 134 <https://worldjusticeproject.org/our-work/publications/rule-law-index-reports> (date accessed 05/08/2019); Van Onselen (note 4) 16

⁹⁷⁵ Mureinik E "A bridge to where? Introducing the interim Bill of Rights" (1994) *SAJHR* 31

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