CONSTITUTIONAL LIMITS ON THE APPLICATION OF THE POLITICAL QUESTION DOCTRINE: A STUDY OF KENYA, SOUTH AFRICA AND GHANA

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Plagiarism Declaration

I, **RONALD ALLAMANO ONG'UDI**, hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university. I authorise the University to reproduce for the purpose of research either the whole or any portion of the contents in any manner whatsoever.

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Abstract

Political branches are increasingly coming under the scrutiny of the judiciary under the now widely embraced principle of constitutional supremacy. What was a call to complete abstention in the face of political questions has been replaced with a call for the constitutional review of political questions as judges continue to embrace their guardianship role over the Constitution.

The principle of constitutional supremacy allows judges to intrude into terrain hitherto reserved for political branches. Intrusions, by their very nature, can be disruptive and often result in claims of judicial overreach. Over time, the judiciary has been urged to exercise deference to cure the claim of overreaching. However, principled approaches have yet to be proffered to guide the institution in the deference to employ when reviewing political questions for their constitutionality.

This study fills the gap by offering a principled approach to reviewing political questions for their constitutionality. It does this through a comparative study of three jurisdictions that have codified the principle of constitutional supremacy. The study reveals that intrusions are mandated by the Constitution itself, and it therefore also reveals the need to create a distinction between constitutionally permissible and impermissible intrusions.

The study finds that a constitutionally permissible intrusion results when courts interpret their institutional authority and the text of the Constitution in a narrow manner that respects the constitutional power and discretion committed to political branches. In contrast, an impermissible intrusion results when courts interpret their institutional authority and the text of the Constitution in an expansive manner that disregards the constitutional power and discretion committed to political branches.

The study makes three propositions as a cure to constitutionally impermissible intrusions; first, where a constitutional power has been committed to a political branch, and no discernable textual constraint on that power is evident in the text of the Constitution, judges must refrain from creating constraints foreign to the text of the Constitution as a basis for review. Secondly, when a textual interpretation of the Constitution reveals an absence of normative standards to guide a political branch in answering a constitutional question committed to it, the Constitution empowers political branches with the duty to supply normative standards, which are binding on the court. Third, where a political branch fails to supply normative standards to an indeterminate constitutional provision, the court should not take it upon itself to supply

determinacy. Its role is to direct the political branch to develop a normative framework that supplies determinacy. The three propositions offer a more predictable and stable deferential approach to the constitutional review of political questions.

Constitutionally impermissible intrusions are inherently undemocratic and sour relations between the judiciary and political branches. They arise when judges set aside fidelity to text in interpreting the Constitution and assume an interpretive role that defiles the Constitution they claim to uphold. Through the approach advanced in this study, judges will be equipped with a framework with which to hold political branches accountable in a manner that does not tread upon terrain inappropriate for judicial intervention.

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CHAPTER ONE: THE POLITICAL QUESTION IN CONSTITUTIONAL INTERPRETATION

1.0 INTRODUCTION

Political questions fall under the now well-established justiciability doctrines alongside standing, ripeness and mootness.[1] This chapter provides an overview of these doctrines before focusing on political questions. It defines political questions and the political question doctrine as restraints on the exercise of judicial power in a constitutional democracy where the principle of separation of powers applies.[2] The chapter traces the origins of the political question doctrine to Alexander Hamilton's Federalist Paper No. 78[3] and the United States Supreme Court decision in *Marbury v Madison*,[4] where the notion of certain constitutional questions being immune from judicial review was first mooted. The chapter also explores two theories explaining the application of the political question doctrine: the classical theory and the prudential theory.[5]

The classical theory is described as a theory of textual commitment, as it relies on examining the Constitution's text and language in determining whether a constitutional question has been assigned to a political branch for conclusive determination.[6] Chapter one describes the prudential theory as a theory rooted in grounds for deference outside the Constitution's text.[7] These grounds have been argued to result in an unprincipled exercise of discretion by judges when declining to exercise their constitutional power to review the actions of political branches.[8]

The chapter moves away from the traditional view that political questions are nonjusticiable as of right.[9] It advocates for a two-step inquiry when judges are confronted with political questions: first, interpretation of the Constitution to determine whether a constitutional

[1] Robert Pushaw 'Justiciability and Separation of Powers: A Federalist Approach' (1996) 81(2) *Cornell Law Review* 393, 454.
[2] Ibid at 449-451.
[3] Alexander Hamilton, Federalist Paper No. 78, 1788.
[4] *Marbury v Madison*, 5 U.S. (1 Cranch) 137 (1803).
[5] Fritz Scharpf 'Judicial Review and the Political Question: A Functional Analysis' (1996) 75(4) *Yale Law Journal* 538 – 555.
[6] Ibid at 538.
[7] Ibid at 548.
[8] Scharpf, op cit note 5 at 548.
[9] This view was espoused by the United Supreme Court in *Marbury v Madison*, 1803 (5) U.S. 1 (Cranch) where the court asserted, 'questions, in their nature political or which are, by the Constitution and laws, submitted to the Executive, can never be made in this court.'

question has been committed to a political branch for determination, and second, establishing whether a political branch has acted within the bounds of its constitutional constraints. The chapter asserts that the second inquiry results in a finding that an intrusion has been either constitutionally permissible or impermissible. A constitutionally permissible intrusion occurs when courts narrowly interpret their institutional authority and the text of the Constitution, respecting the constitutional powers and discretion assigned to political branches. Conversely, a constitutionally impermissible intrusion occurs when courts interpret their institutional authority and the constitutional text expansively, disregarding the constitutional powers and discretion entrusted to political branches. The differences inherent in the two intrusions are demonstrated through the cases of *Walter Nixon v United States*[10] and *R (Miller) v The Prime Minister & Cherry v Advocate General for Scotland*.[11]

The political question doctrine is argued to be a command of the Constitution.[12] It recognises that certain issues are inappropriate for judicial resolution, as they involve matters of policy, discretion, or prudence entrusted to political branches. Therefore, the central argument presented in this thesis is that when presented with political questions, judges should firstly acknowledge the institutional limits of the court's authority and, secondly, consistently adhere to a narrow textual interpretation of the Constitution, which respects the plain meaning of constitutional text. The chapter argues that a departure from the plain meaning of a constitutional text, which many a time results from an expansive interpretation of the courts' authority, constitutes judicial overreach and/or activism, which has the consequence of infringing upon the roles of the other branches of government and undermining the democratic process.[13]

The first part of this chapter is the introduction. The second part of the chapter conducts an overview of the justiciability doctrines before delving into the political question doctrine under the third and fourth part. The fifth explores the shared role of constitutional interpretation before examining constitutionally permissible intrusions into terrain reserved for political branches under the sixth part. The seventh part explains the textualist approach to interpretation of the Constitution. The eighth and ninth part analyses the case of *Walter Nixon v United*

[10] *Walter Nixon v United States* 1993 (506) U.S 224 (S.CT).
[11] *R (Miller) v The Prime Minister & Cherry v Advocate General for Scotland* 2019 UKSC 41.
[12] Mhango Mtendeweka Owen *Separation of Powers and the Political Question Doctrine in South Africa: A Comparative Analysis* (PHD thesis, University of South Africa, 2018) 20.
[13] Eugen V Rostow 'The Democratic Character of Judicial Review' (1952) 66(2) *Havard Law Review* 193; Jeremy Waldron 'The Core of the Case against Judicial Review (2006) 115(6) *Yale Law Journal* 1346 -1408.

States[14] and *R (Miller) v The Prime Minister & Cherry v Advocate General for Scotland*.[15] The tenth part sets out the rationale for this particular comparative study, and the eleventh part concludes the chapter.

1.1 The Political Question Doctrine and Other Justiciability Doctrines

1.1.1 Justiciability Doctrines

In its interpretation of article III, section 2 of the United States Constitution, that restricts federal courts to deciding actual 'cases and controversies',[16] the United States Supreme Court has developed a set of justiciability doctrines that are today applied by judiciaries across the world to define the boundaries of the adjudicatory power of federal courts.[17]

Ariel L. Bendor explains justiciability as dealing 'with the boundaries of law and adjudication.'[18] He writes that justiciability concerns itself 'with the question of which issues are susceptible to being the subject of legal norms or adjudication by a court of law.'[19] It follows that not all questions presented before a court can be adjudicated upon. The existence of limitations to the exercise of judicial power is acknowledged through the recognition and application of justiciability doctrines, which have gained wide acceptance within legal scholarship.

There are four widely accepted justiciability doctrines: standing, ripeness, mootness, and political question.[20] Below is a brief overview of three of the doctrines and a more detailed discussion/introduction to political questions.

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[14] Supra note 10.
[15] Supra note 11.
[16] The Constitution of the United States, art III, sec 2 provides as follows: 'The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all cases affecting Ambassadors, other public ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.'
[17] Jared P Cole 'The Political Question Doctrine: Justiciability and the Separation of Powers' 2014 *Library of Congress. Congressional Research Service* 7 and F A Hessick 'Cases, Controversies, and Diversity' (2014) 109 (1) *Northwestern University Law Review* 57.
[18] Ariel L Bendor 'Are There any Limits to Justiciability? The Jurisprudential and Constitutional Controversy in Light of The Israeli And American Experience' (1997) 7 (2) *Indiana International & Comparative Law Review* 312.
[19] Ibid.
[20] Erwin Chemerinsky 'A Unified Approach to Justiciability' (1991) 22 *Connecticut Law Review* 677.

1.1.1.1 Standing

In *Sierra Club v Morton*,[21] the United States Supreme Court described the standing doctrine as 'a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.' The standing doctrine focuses on the party appearing before the court instead of the issues being litigated.[22] The plaintiff must demonstrate a personal stake in the controversy placed before the court for resolution.[23]

1.1.1.2 Ripeness

The ripeness doctrine was described in *Abbott Laboratories v Gardner*[24] as one with the aim 'to prevent courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements.'[25] In determining whether a controversy is ripe for adjudication, the court inquires 'whether the harm asserted has matured sufficiently to warrant judicial intervention.'[26] The ripeness doctrine prevents courts from speculating on possible outcomes in a controversy yet to crystallise.

1.1.1.3 Mootness

The mootness doctrine arises 'where the parties lack a legally recognisable interest in the resolution of a case, or where the issue is no longer live.'[27] The United States Supreme Court in *United States Parole Comm'n v Geraghty (1980)* described the doctrine of mootness as follows:

> The "personal stake" aspect of mootness doctrine ... serves primarily the purpose of assuring that federal courts are presented with disputes they can resolve. One commentator has defined mootness as "the doctrine of standing set in a time frame: The requisite personal interest that

[21] *Sierra Club v Morton* 1972 (405) U.S 727, 731 (U.S.).
[22] In *Flast v Cohen* 1968 (392) U.S. 83, 99 (U.S.), the Court observed, 'the fundamental aspect of standing is that it focuses on the party . . . and not on the issues he wishes to have adjudicated.'
[23] In *Baker v Carr* 1962 (369) U.S. 186, 204 (Ct), the court explained the doctrine of standing as follows: 'Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing. It is, of course, a question of federal law.'
[24] *Abbott Laboratories v Gardner* 1967 (387) U.S. 136, 148 (U.S.).
[25] Russell W Galloway 'Basic Justiciability Analysis' (1990) 30 *Santa Clara Lara Law Review* 918.
[26] Ibid.
[27] Edwin Montefiore Borchard *Declaratory Judgments* 2 ed (1941) 35-7.

must exist at the commencement of the litigation (standing) must continue throughout its existence".[28]

Under this doctrine, the issue that precipitates legal action must remain in controversy throughout the litigation of the dispute. The United States Supreme Court pronounced itself on mootness in the case of *Mills v Green.*[29] A South Carolina citizen filed a court claim challenging the state's voter registration statute on the ground that it 'unconstitutionally abridged, impeded, and destroyed the suffrage of citizens of the state and the United States.'[30] Before the appeal could be heard and determined, the date slated for the impugned elections passed, and delegates were selected. Because the plaintiff sought to secure his right to vote in the election through the suit, the Supreme Court dismissed the appeal on the ground that there was no longer any 'actual controversy involving real and substantial rights between the parties.'

1.2 Political Questions

Geoffrey Cowper and Lorne Sossin describe a political question as 'a question which arises in litigation and which by express or implied constitutional principle is excluded from judicial determination and left for resolution by other organs of government.'[31] Jesse H. Choper, on the other hand, describes a political question as a 'substantive ruling by the Justices that a constitutional issue…should be authoritatively resolved not by the Supreme Court but rather by one (or both) of the national political branches.'[32] Mark Tushnet poses two questions in his attempt at defining political questions. First, 'who gets to decide what the right answer to a substantive constitutional question is' and, secondly, whether 'the constitution gives a political branch the final power to interpret the constitution.'[33]

Tushnet believes that the Constitution is the primary reference point when deciding whether a constitutional question amounts to a political question.[34] In the United States Constitution, for instance, the constitutional power to try impeachment is vested 'solely' in the Senate.[35] The

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[28] *United States Parole Comm'n v Geraghty* 1980 (445) U.S. 388 (SCT).
[29] *Mills v Green* 1895 (159) U.S. 651.
[30] Ibid.
[31] Geoffrey Cowper and Lorne Sossin 'Does Canada Need a Political Question Doctrine' (2002) 16 *Supreme Court Law Review* 343, 344.
[32] Jesse H. Choper 'The Political Question Doctrine: Suggested Criteria' (2005) 54(6) *Duke law journal* 1461.
[33] Ibid.
[34] Mark Tushnet 'Evaluating Congressional Constitutional Interpretation: Some Criteria and Two Informal Case Studies' (2001) 50(5) *Duke Law Journal* 1395–1425.
[35]United States Constitution, art 1, section 3, clause 6-7, states: 'The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the

United States Supreme Court has interpreted this provision to find a commitment of the constitutional power to try impeachments to the Senate and the exclusion of the judicial arm of government.[36] Therefore, a constitutional question arising from the impeachment process constitutes a nonjusticiable political question.[37] In distributing power to the three arms of government, the Constitution may expressly or by implication commit a constitutional power to a political branch and shield it from constitutional review.[38]

The nature of the interaction between the courts and political questions continues to draw mixed positions. The traditional school of thought believes that, as a matter of right, the court should dismiss the case altogether. In contrast, the modern school of thought believes courts must review the political question for constitutionality.[39] This thesis identifies a novel approach to interpreting the Constitution that respects the constitutional power assigned to political branches and prevents what this thesis describes as an impermissible intrusion.

The traditional conceptualisation of political questions places a demand on courts to 'forego their unique and paramount function of judicial review of constitutionality.'[40] Whenever a constitutional question is deemed a political question by the court, the court, in essence, says to the petitioner, 'Although you may indeed be aggrieved by an action of government, although the action may indeed do violence to the Constitution, it involves a political question which is not justiciable, not given to us to review.'[41] In *Wesberry v Sanders* (1964),[42] the United States Supreme Court opined:

> The Constitution does not confer on the Court blanket authority to step into every situation where the political branch may be thought to have fallen short. The stability of this institution ultimately depends not only upon its being alert to keep the other branches of government

United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two-thirds of the Members present. Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States; but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.'

[36] Supra note 10.

[37] Ibid. Walter Nixon's claim was dismissed by the District Court, the Court of Appeals and the Supreme Court for raising a non-justiciable political question.

[38] Peter Mulhern 'In Defense of The Political Question Doctrine' (1988) 137(1) *University of Pennsylvania Law Review* 97-176.

[39] Cole op cit note 17: Louis Henkin 'Is There a "Political Question" Doctrine?' (1976) 85(5) *The Yale Law Journal* 599.

[40] Louis Henkin 'Is There a "Political Question" Doctrine?' (1976) 85(5) *The Yale Law Journal* 599.

[41] Ibid.

[42] *Wesberry v Sanders* 1964 (376) U.S. 84 (SCT).

> within constitutional bounds, but equally upon recognition of the limitations on the Court's own functions in the constitutional system.

When courts apply the modern understanding of political questions and police the constitutional boundaries of the power exercised by a political branch, the question of what amounts to a constitutionally permissible intrusion often arises. This question must be addressed against the backdrop of the doctrine of separation of powers and the need to ensure the autonomy of political branches is not interfered with in a manner that lacks constitutional foundation.[43]

The political question doctrine was developed to shield political questions from review. Herbert Weschler writes that 'all the doctrine can defensibly imply is that courts are called upon to judge whether the Constitution has committed to another agency of government the autonomous determination of the issue raised, a finding that requires an interpretation.'[44] Ivan Rutledge finds that the doctrine 'then becomes: the political branches must determine policy and decide political questions, but the judiciary, not being a political branch, must not decide political questions.'[45]

The political question doctrine is seen as an offshoot of the doctrine of separation of powers.[46] Jared Pettinato writes, 'based on the principle of the separation of powers; the political questions doctrine limits judicial jurisdiction, and therefore power, in a number of circumstances where the other branches of government have a stronger claim to decide the issue raised.'[47] By invoking the political question doctrine, the judiciary preserves the delicate balance of power enshrined within the constitutional framework. It avoids encroaching upon domains that are more aptly resolved through the democratic mechanisms of the political branches.[48] It signifies an awareness that the resolution of certain disputes lies within the realm of the elected representatives rather than being delegated to unelected judges.[49]

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[43] Cowper and Sossin op cit note 31 at 345.
[44] Herbet Wechsler 'Towards neutral principles of constitutional law' (1959) 73(1) *Harvard Law Review* 1,7-9.
[45] Ivan C. Rutledge 'When Is a Political Question Justiciable?' (1947) 9 *Georgia Bar Journal* 394.
[46] Owen op cit note 12; Cole op cit note 17; and Stewart Pollock 'A Political Embarrassment: Jurisdiction and the Alien Tort Statute, Foreign Sovereign Immunites Act, and Political Question Doctrine' (2015) 51 (2) *California Western Law Review* 225, 240. Pollock describes the political question doctrine as 'a judicially created doctrine rooted in the principles of separation of power and judicial restraint.'
[47] Jared Pettinato 'Executing the Political Question Doctrine' (2006) 33(1) *Northern Kentucky Law Review* 61, 345.
[48] *Zivotofsky v Clinton*, 566 U.S. 189, 196 (2012).
[49] Supra note 10 (Justice White's concurring opinion).

1.3 Origin of the Political Question Doctrine

The earliest formulation of the political question doctrine is traced to Alexander Hamilton.[50] In Federalist Paper No. 78, Hamilton argued that the United States Constitution created a 'natural presumption' in favour of judicial review.[51] This 'natural presumption,' he however, acknowledged, could be rebutted by the Constitution itself through clear and express terms:

> If it is said that the legislative body are themselves the constitutional judges of their own powers and that the construction they put upon them is conclusive upon the other departments, it may be answered that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution.[52]

Writing later in Federalist Paper No. 79, Hamilton cited impeachment as one of the functions not amenable to review by the courts. He equally cited 'constitutional provisions authorising Congress to declare war and the Senate to give the President advice and consent on treaties and appointments.'[53] Hamilton, however, cautioned against a blanket insulation of legislative functions from judicial scrutiny. In his view, a decision on the justiciability of a dispute flowing from the exercise of a legislative function could only be settled by reference to the language and text of the Constitution.[54]

Hamilton's musings were to later find judicial pronouncement in the celebrated case of *Marbury v Madison.*[55] The case was filed by Marbury, one of the persons nominated by President Adams as a justice of peace in the District of Columbia. The nomination was made

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[50] Hamilton op cit note 3 and Rachel E Barkow 'More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy' (2002) 102(2) *Columbia Law Review* 240, 246.

[51] Robert J Pushaw 'Judicial Review and the Political Question Doctrine: Reviving the Federalist 'Rebuttable Presumption' Analysis' (2002) 80 *North Carolina Law Review* 1188-90: 'It is not ... to be supposed that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order ... to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought of course to be preferred; or in other words, the [C]onstitution ought to be preferred to the statute, the intention of the people to the intention of their agents. Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the [C]onstitution, the judges ought to be governed by the latter, rather than by the former. They ought to regulate their decisions by the fundamental laws.'

[52] Hamilton op cit note 3.

[53] Ibid and Tushnet op cit note 34 at 1190.

[54] Alexander Hamilton op cit note 3.

[55] Supra note 4.

by President Adams shortly before he left office after losing the presidential election of the year 1800 to President Thomas Jefferson. By the time President Adams left office, he had signed the commission appointing Marbury to office. The commission was, however, never delivered to Marbury. Marbury filed the claim against Madison, the Secretary of State under the presidency of Thomas Jefferson, seeking to have the court issue an order of mandamus compelling Madison to deliver the commission to Marbury. *Marbury v Madison*[56] is significant on many fronts. Not only did the court establish the power of judicial review,[57] but it also acknowledged the existence of a body of nonjusticiable political questions. The court admonished:

> The province of the court is solely to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the Constitution and laws, submitted to the executive, can never be made in this court.

The Court created a 'distinction between issues of law that courts must resolve and political questions they must permit others to answer.'[58] Going by the Court's formulation of the doctrine, a political question is to be discerned from its 'nature' and the text of the Constitution. Questions in their nature political refer to issues that do not commend themselves to any discernible legal criteria or standards for resolution.[59]

1.4 Theories on the Application of The Political Question Doctrine:

Two dominant theories emerged to guide the application of the political question doctrine, namely, the classical and the prudential theory. Some scholars advance a third theory, the functional theory, which calls upon judges to defer to the institutional competence of political branches where there is an evident absence of 'judicially manageable standards' for resolving a dispute before the court for adjudication.[60] The functional theory mirrors the prudential theory

[56] Robert Pushaw op cit note 1 at 449-451.
[57] Zachary Baron Shemtob 'The Political Question Doctrines: Zivotofsky versus Clinton and Getting beyond the textual-prudential paradigm' (2016) 104 (4) *Georgetown Law Journal* 1001.
[58] Mulhern op cit note 38 at 102.
[59] Bendor op cit note 18 at 315.
[60] Curtis A Bradley and Eric A Posner 'The Real Political Question Doctrine' (2003) 75 *Stanford Law Review* 1031-1090; and Richard H Fallon Junior 'Political Questions and the Ultra Vires Conundrum' (2020) 87(6) University of Chicago Law Review 1481, 1508.

and is more elaborately explained under the second limb of the prudential theory as established in *Baker v Carr*.[61] The study will, therefore, limit itself to the classical and prudential theories.

1.4.1 Classical Theory

The classical theory, also referred to as the theory of textual commitment, proceeds from the understanding that the assignment of functions to the three arms of government is a function of the Constitution.[62] A nonjusticiable political question arises if the Constitution commits the conclusive determination of a constitutional question to a political branch. Rachel Barkow describes the classical theory as 'a constitutionally based political question doctrine.'[63] She writes that 'the Constitution carves out certain categories of issues that will be resolved as a matter of total legislative or executive discretion.'[64] Judicial abstention is, therefore, a command of the Constitution and not an exercise of judicial discretion.[65] The theory has also been described as one of textual commitment, and this is because when deciding on whether a constitutional question presents a nonjusticiable political question, judges look at 'the text, structure and theory' of the Constitution.[66] Alexander Hamilton's Federalist Paper No. 78[67] and the case of *Marbury v Madison*[68] advanced the classical theory of the political question doctrine, which refers to the Constitution as the sole instrument informing judicial abstinence in the face of political questions.

The challenge that arises in applying the classical theory is one of interpretation.[69] Article I, section 3, clauses 6 and 7 of the United States Constitution reveals a clear constitutional design aimed at excluding the exercise of judicial power in the impeachment process, a position adopted by the United States Supreme Court in *Walter Nixon v United States*.[70] But, in the

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[61] Supra note 23.
[62] Cole op cit note 17 at 7. 'Political questions emanate from the Constitution itself. Courts have a duty to adjudicate cases properly presented before them, which includes interpreting the Constitution when appropriate, invoking the political question doctrine to decline to adjudicate a case'.
[63] Rachel E Barkow op cit note 50 at 247.
[64] Ibid.
[65] Owen op cit note 12. Mhango writes that 'the classical political question doctrine is not discretionary but rather a command of the Constitution'.
[66] Pushaw op cit note 1.
[67] Hamilton op cit note 3. 'If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution'.
[68] Supra note 4: 'Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court'.
[69] Martin H Redish 'Judicial review and the Political Question' (1984) 79 (5-6) *Northwestern University Law Review* 1031, 'even the classical view of the political question doctrine has unacceptably wide implication'.
[70] Supra note 10.

absence of a clear and unambiguous commitment of the determination of a constitutional question to a political branch, judges are left to their own interpretive devices, which results in the unprincipled exercise of discretion.

1.4.2 Prudential Theory

Unlike the classical theory, which treats judicial abstinence as the command of the Constitution,[71] the prudential theory treats the application of the political question doctrine as discretionary.[72] Rachel Barkow writes that 'courts have used this prudential theory to delegate judicial authority to political actors (even when the Constitution does not contemplate such a delegation) and to avoid deciding controversial cases.'[73] She finds the prudential theory as one prone to abuse, asking 'what prevents a court from avoiding a case simply because it believes the issue is too complicated or is too politically charged?'[74]

The prudential theory invites judges to consider the Constitution alongside prudential factors in deciding on the justiciability of political questions.[75] It developed to further clarify the application of the political question doctrine and is widely credited to Prof. Alexander Bickel and *Baker v Carr*.[76] Professor Bickel, the earliest proponent of this form of the doctrine, laid out the parameters of the prudential theory as follows;

> Such is the foundation, in both intellect and instinct, of the political-question doctrine: the Court's sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally... the inner vulnerability,

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[71] Owen op cit note 12.
[72] Pushaw op cit note 1 at 1166; 'In *Baker v Carr*, the Supreme Court purported to do no more than summarise and apply its precedent on political questions. In reality, however, Justice Brennan's opinion transformed this doctrine into a discretionary, case-by-case, six-factor inquiry based solely upon separation of powers, not federalism.'
[73] Barkow op cit note 50 at 253.
[74] Ibid at 263.
[75] Maurice Finkelsein, writing in 1924 mused over instances where courts may decline to exercise jurisdiction over constitutional questions placed before them. These instances to a large extent inform prudential factors under the prudential theory. He wrote: 'There are certain cases which are completely without the sphere of judicial interference. They are called, for historical reasons, "political questions." [The term] applies to all those matters of which the court, at a given time, will be of the opinion that it is impolitic or inexpedient to take jurisdiction. Sometimes this idea of inexpediency will result from the fear of the vastness of the consequences that a decision on the merits might entail. Sometimes it will result from the feeling that the court is incompetent to deal with the particular type of question involved. Sometimes it will be induced by the feeling that the matter is "too high" for the courts. But always there will be a weighing of considerations in the scale of political wisdom.'
[76] Supra note 23.

> the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.[77]

Professor Bickel identified instances where courts lacked the capacity to adjudicate disputes presented before them. His tests were motivated by his analysis of the United States Court of Appeal's Judgment in *Greene v McElroy*.[78] In that case, the appellant challenged the decision of the Secretary of the Navy to revoke his 'security clearance.' In finding that the case presented a nonjusticiable controversy, Justice Washington observed:

> The reality of the injury, however, does not mean that Greene is entitled, without more, to judicial relief. There must be a "justiciable" controversy ...one which the courts can finally and effectively decide, under tests and standards which they can soundly administer within their special field of competence. Here there is no such controversy. As we have seen, Greene makes no claim of lack of compliance by the Government with its own regulations. He attacks the Secretary's decision on its merits and as a matter of constitutional right.

The Court concluded its judgment by cautioning that, 'in a mature democracy, choices such as this must be made by the executive branch, and not by the judicial.' The United States Court of Appeals in *Greene v McElroy*[79] declined to determine the dispute because of a lack of 'judicially manageable standards.'

Prof. Bickel's instances when, in his view, the Court should refuse to hear a case were later summarised as follows:

> Judges lack the knowledge or expertise to opine on a particular matter; Judge's actions would invite considerable political backlash; or when this might put courts in conflict with the other branches.[80]

As much as Prof. Bickel sought to distinguish between 'political questions and ordinary constitutional issues,' his writings failed to bring out the difference, leaving it up to the courts to do so.[81] The United States Supreme Court was to offer later the second most authoritative

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[77] Alexander M Bickel *Least Dangerous Branch the Supreme Court at The Bar of Politics* 2 ed (1986) 114-15. 'Judges lack the knowledge or expertise to opine on a particular matter; Judges actions would invite considerable political backlash; or when this might put courts in conflict with the other branches'.
[78] *Greene v Mcelroy* 1958 (360) U.S 474 (D.C. Cir).
[79] Ibid.
[80] Shemtob op cit 57 at 1014.
[81] Ibid.

exposition of the prudential theory in *Baker v Carr,*[82] building on the prudential strands developed by Prof. Bickel.[83] Justice Brennan, delivering the opinion of the court, developed six tests to guide courts in the determination of whether a dispute raises a political question. The Judge pointed out:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department, or a lack of judicially discoverable and manageable standards for resolving it, or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due to coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[84]

The following part of this chapter looks into each of the six strands:

1.4.2.1 A Textually Demonstrable Constitutional Commitment of the Issue to a Coordinate Political Department.

The first test developed by the United States Supreme Court in *Baker v Carr*[85] sought to reinforce the application of the classical theory of the political question doctrine. Judges under this strand of thought are expected to refer to the language and text of the Constitution in deciding that the determination of a constitutional question has been committed to a political branch to the exclusion of the courts.[86] Without a textual commitment, the court must resort to prudential principles forming the second to sixth strands of the test in *Baker v Carr*.[87]

I submit that since the commitment of a constitutional question to a political branch for determination is to be gleaned from the text of the Constitution, any constraint applied by the

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[82] Supra note 23. 'The court explained the doctrine of standing as follows, 'have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing. It is, of course, a question of federal law'.
[83] Ibid. The appeal was filed by persons claiming to possess the qualifications to vote for members of the General Assembly of Tennessee representing areas where they resided. The appellants contested the constitutionality of a 1901 state apportionment statute of Tennessee that resulted in the malapportionment of voting districts. They alleged a violation of their right to equal protection of the laws guaranteed by the Fourteenth Amendment. One of the issues that arose for determination was the justiciability of the dispute
[84] Supra note 23.
[85] Ibid.
[86] Galloway op cit note 25 at 915.
[87] Supra note 23.

court in reviewing a decision by a political branch must be evident in the text of the Constitution.[88] By narrowly constructing the text of the Constitution, the court exhibits a consciousness of the limits of its institutional authority within the framework of separation of powers.[89] This consciousness is informed by the reality that the very Constitution that confers on the court the duty to police its boundaries acknowledges the place of separation of powers.[90]

1.4.2.2 Lack of Judicially Discoverable and Manageable Standards for Resolving the Dispute Before it

As alluded to earlier in the study, the functional theory of the political question doctrine mirrors the prudential theory and aptly falls under this limb of the test as laid out in *Baker v Carr*.[91] Bradley and Posner describe the functional theory as applying to instances where 'the courts lack sufficient information or expertise to make a reasoned legal decision,' signifying an absence of normative standards to determine a dispute.[92]

Under this limb of the test, the court enquires into whether a legal standard exists to resolve the constitutional question before it. The test embraces the normative and institutional justiciability concept espoused by the former Chief Justice of the Israeli Supreme Court, Aharon Barak.[93] He opined:

> Normative justiciability answers the question of whether legal standards exist for the determination of the dispute before the court… A dispute is institutionally justiciable if it is appropriate for it to be determined by law before a court. A dispute is not institutionally justiciable if it is inappropriate for it to be determined according to legal standards before a court. Institutional justiciability is therefore concerned with the question of whether the law and the courts constitute the appropriate framework for the resolution of a dispute. [94]

The United States Supreme Court in *Walter Nixon v United States*[95] sought to create an inextricable connection between the first and second tests, finding that the 'the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.' The position espoused by the Court strengthens the

[88] Shemtob op cit note 57 at 1021-1028.
[89] Ibid.
[90] Ofer Raban 'Is Textualism Required by Constitutional Separation of Powers?' (2014) 49(2) *Loyola of Los Angeles Law Review* 421-452.
[91] Supra note 23.
[92] Bradley and Posner op cit note 60.
[93] *Yehuda Ressler v Minister of Defence* 1988 HCJ 910/86 (IsrSC).
[94] Ibid.
[95] Supra note 10.

argument that the political question doctrine is rooted in the text of the Constitution. Therefore, a textual interpretation commends itself in cases that raise political questions.

Walter Dellinger and H. Jefferson Powell write that 'on some issues, only the political capacity to make judgments of prudence and policy can fulfil the Constitution's requirements.'[96] The absence of normative standards a court would rely on in deciding a constitutional question implies that the constitutional question depends on the unique 'political capacity' of political arms for determination. Jesse Chopper describes this unique political capacity in the following way:

> Marshall believed that the constitutionally established power to extradite under a treaty is properly committed to the executive department because only that branch can have a complete view of how this judgment will affect the nation's foreign relations.[97]

Ron Park writes that courts strive to preserve the doctrine of separation of powers by declining to decide on questions falling within the competence of political branches.[98] However, in practice, impermissible intrusions will many a time manifest themselves under this test. There will be instances where judges, through judicial craft, create their own judicially discoverable and manageable standards to review the constitutional question before them. When this happens, a constitutionally impermissible intrusion results.

This thesis advances the argument that in the absence of judicially discoverable and manageable standards for resolving a constitutional question committed to a political branch for determination, a presumption arises that the Constitution intended the political branch to develop normative standards that would then be binding on the court.[99] The court's duty in such an instance then becomes to determine whether the normative standards developed by political branches transgress constitutional limits.[100] The second argument that the thesis advances is that the constitutional limits the court applies when reviewing the normative standards developed by political branches must be gleaned from the text of the Constitution. In cases where a political branch fails to develop normative standards, the court's duty then becomes to

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[96] Walter Dellinger and H. Jefferson Powell 'Marshall's Questions' (1999) 2 (367) *Green Bag* 376.
[97] Choper op cit note 32 at 1468.
[98] Ron Park 'Is the Political Question Doctrine Jurisdictional or Prudential' 2016 6(2) UC *Irvine Law Review* 255, 268.
[99] Richard H Fallon Jr 'Judicially Manageable Standards and Constitutional Meaning' (2006) 119(5) *Harvard Law Review* 1274-1331.
[100] Ibid.

direct the relevant political branch to develop normative standards, as opposed to developing normative standards through judicial craft.

1.4.2.3 The Impossibility of Deciding without an Initial Policy Determination of a Kind Clearly for Nonjudicial Discretion.

Under this test, the court's inquiry is whether there is legislation, a policy document or a treaty to guide the court's determination of a constitutional question. The court under this limb is keen not to usurp the functions of legislation and policy formulation reserved for political branches. Ron Park writes:

> This factor directly asks whether there is a preliminary policy decision that has to be made by another branch of government in order to decide the case. Examples of where such a policy decision may be necessary are where Congress has not yet passed legislation on an issue, where an agency has not yet promulgated any regulations on a topic, or where a treaty has not yet been ratified between countries.[101]

The Court in *Baker v Carr*[102] observed that the Equal Protection clause provided judicial standards upon which the claim lodged by the appellants could be determined.[103] The Appeal did not require a policy determination for which legal standards were lacking. This test mirrors the second test discussed above, as an absence of policy or legislation implies an absence of legal standards.

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[101] Ron Park op cit note 97.
[102] Supra note 23.
[103] Ibid. 'We come, finally, to the ultimate inquiry whether our precedents as to what constitutes a nonjusticiable "political question" bring the case before us under the umbrella of that doctrine. A natural beginning is to note whether any of the common characteristics which we have been able to identify and label descriptively are present. We find none: the question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of government coequal with this Court. Nor do we risk embarrassment of our government abroad, or grave disturbance at home if we take issue with Tennessee as to the constitutionality of her action here challenged. Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if, on the particular facts, they must, that a discrimination reflects no policy, but simply arbitrary and capricious action. This case does, in one sense, involve the allocation of political power within a State, and the appellants.'

1.4.2.4 The Impossibility of a Court's Undertaking Independent Resolution Without Expressing Lack of the Respect Due to Coordinate Branches of Government; and the Potential of Embarrassment from Multifarious Pronouncements by Various Departments on One Question

In *Baker v Carr*,[104] the Court was mindful of the fact that certain constitutional questions are committed for determination to political branches, and any intrusion into such areas would be construed as a demonstration of lack of respect due to coordinate branches, and result in poor relations between the court and the relevant arm of government. The court warned itself of the danger of manifold decisions on the same constitutional question. The court observed:

> The question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of government coequal with this Court. Nor do we risk embarrassment of our government abroad or grave disturbance at home.

1.4.2.5 An Unusual Need for Unquestioning Adherence to a Political Decision already Made.

John Harrison writes that this limb of the test is a 'ground of nonjudicial finality.'[105] A cycle of litigation around constitutional questions committed to political branches hampers government operations. The need for finality in certain political determinations is, therefore, driven by the need to ensure the functioning of government is seamless. The court in *Baker v Carr* cited with approval its holding in *Coleman v Miller,*[106] where it held:

> In determining whether a question falls within the category of political nonjusticiable questions, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations.

Harrison writes that there are three instances where courts are prepared to attribute finality to the determinations of political arms:

> (1) When questions of sovereignty and relations among sovereigns are at stake; (2) when the case involves the process of legal enactment; and (3) when the Constitution explicitly

[104] Supra note 23.
[105] John Harrison 'The Political Question Doctrines' (2017) 67 *American University Law Review* 457 at 502.
[106] *Coleman v Miller* 1939 (307) U.S. 433.

> designates a house of Congress as Judge, either of its own members' elections or of impeachments in the Senate.[107]

The three instances point to considerations embedded in the text of the Constitution. It would then appear that judges are more inclined to decline jurisdiction on textual constitutional principles than on purely prudential principles. Although *Baker v Carr*[108] developed six tests, Rachel Barkow argues that courts have consistently applied only the first and the second tests.[109] The two tests find their roots in the Constitution..

The classical and prudential theories present unique challenges in their application. The classical theory opens itself up to ambiguity in the absence of a clear and unequivocal commitment of a constitutional question to a political branch. On the other hand, the prudential theory risks developing a haphazard body of precedent owing to the discretionary nature of its application. While both the classical and prudential theories have their challenges, integrating classical considerations into the prudential theory allows for a more nuanced approach to judicial decision-making.

1.5 Shared Role of Constitutional Interpretation

The political question doctrine frowns upon the argument that courts enjoy a monopoly in interpreting the Constitution.[110] It embraces the idea that political branches while deciding on constitutional questions placed before them, interpret the Constitution with a measure of finality as would the courts. Michael Paulsen Stokes, in support of this view, argues as follows:

> The power to interpret the law is not the sole province of the Judiciary; rather, it is a divided, shared power not delegated to any one branch but ancillary to the functions of all of them within the spheres of their enumerated powers. The President's power to interpret the law is, within the sphere of his powers, precisely coordinate and coequal in authority to the Supreme Court.[111]

Deference to political branches is an acknowledgement of the judicial limitations in decision-making. Barkow writes that at the core of the political question doctrine is an understanding that political branches are endowed with 'institutional characteristics that make them superior

[107] Harrison op cit note 105 at 460.
[108] Supra note 23.
[109] Barkow op cit note 50 at 268.
[110] Ibid at 239.
[111] Michael Stokes Paulsen 'The Most Dangerous Branch: Executive Power to Say What the Law Is' (1994) 83(2) *The Georgetown Law Journal* 217-22.

to the judiciary in deciding certain constitutional question.'[112] She further argues that the detachment of the judiciary from the electorate 'renders the court a poor fact finder and policy maker as compared to Congress and the Executive.'[113] Fritz W. Scharpf explains the limitation of the court in fact-finding. He writes that, unlike a court in an inquisitorial system, a court in an adversarial system cannot:

> Take evidence and call experts on its own initiative in order to inform itself not only of the adjudicative facts of the particular case, but also, and more importantly, of the legislative facts, that is of the sociological, economic or political data upon which the validity of a governmental measure might depend under the fact-oriented interpretation of the Constitution.[114]

James Madison wrote in The Federalist Paper No. 49 that it was 'emphatically the province and duty of the executive department, no less than the judiciary, to say what the law is.'[115] Within this interpretive role, I argue that political branches have a unique institutional capacity to supply normative standards in areas where the Constitution fails to do so. These standards, I argue, can only be reviewed against textually identifiable constitutional constraints. When a court narrowly interprets its institutional authority, it does not relinquish its interpretive role. It interprets the Constitution as conferring the prerogative to determine a constitutional question on a political arm.[116] On the other hand, when a court elects to interpret its authority expansively, it blinds itself to the constitutional power reposed in political branches to develop the law as they discharge their constitutionally ordained functions.

Whenever discretion is committed to a political branch, a court, conscious of the institutional limits of its authority, should exhibit a reluctance to impeach the exercise of that discretion. In *Chandler v DPP,*[117] Lord Radcliff brought out this approach when faced with a case challenging how a political branch had exercised a discretion to which no identifiable standards of review could be gleaned from the text of the Constitution:

> If the methods of arming the defence forces and the disposition of these forces are at the decision of Her Majesty's ministers for the time being, as we know that they are, it is not within

[112] Barkow op cit note 50 at 240.
[113] Ibid.
[114] Scharpf op cit note 5 at 525-526.
[115] Ibid.
[116] Cole op cit note 17.
[117] *Chandler v DPP* (1964) AC 763 (UKHL).

> the competence of a court of law to try the issue whether it would be better for the country that that armament or those dispositions should be different.[118]

Having established that political branches have a duty to interpret the Constitution and answer constitutional questions with a measure finality, I now analyse the nature of constitutionally mandated intrusions into the foray of political branches when courts are invited to review constitutional questions committed to political branches for resolution.

1.6 Constitutionally Permissible Intrusions into Terrain Reserved for Political Branches

As we saw above, Chief Justice Marshall warned in *Marbury v Madison*[119] that 'questions, in their nature political, or which are, by the Constitution and laws, submitted to the executive, can never be made in this court.' This thesis makes a contrary argument that questions of such a nature must indeed be posed in court. When such questions are posed, the court bears a twin duty: first, to interpret the Constitution to discern whether a constitutional question has been committed to a political branch and, secondly, to satisfy itself that the political branch has acted within the constitutional limits of its power. This argument departs from the conventional understanding that political questions are inherently nonjusticiable.[120]

The first step requires judges to carefully examine the text of the Constitution to determine whether a constitutional question has been committed to a political branch for conclusive determination. The second step of the inquiry mandates judges to interrogate whether the answer supplied by the political branch to the constitutional question has transgressed textually identifiable constitutional constraints. By employing this two-step inquiry, judges are equipped with a framework to guide their decision-making in cases involving political questions. This approach seeks to strike a delicate balance between the judiciary's duty to uphold the Constitution and its respect for the role of political branches within a constitutional democracy that subscribes to the doctrine of separation of powers. It acknowledges that, while the judiciary has a vital role in safeguarding constitutional principles, it must also exercise restraint and deference to the political process when the Constitution so demands.[121] Through a textual interpretation of the Constitution and a consciousness of the institutional limits of their authority, judges can navigate the treacherous terrain of political questions, ensuring that their

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[118] P E Nygh 'The Doctrine of Political Questions Within A Federal System page' (1963) 5 (1) *Malaya Law Review* 135.
[119] Supra note 4.
[120] Rutledge op cit note 45.
[121] Tushnet op cit note 34.

interventions are constitutionally justified and compatible with the principles of democratic governance and separation of powers.[122]

It is the nature of the second inquiry, which is constitutionally mandated, that most concerns this thesis as it has the potential of resulting in either a constitutionally permissible or impermissible intrusion. A constitutionally permissible intrusion arises when judges narrowly interpret their authority and the text of the Constitution, remaining conscious of the constitutional design to leave certain matters to the care of political branches. Through a narrow interpretation of their authority and the constitutional text, judges defer to the determinations of political branches where there is no discernible violation of a constitutional constraint. A narrow interpretation of the Constitution results when judges abide by the plain meaning of the constitutional text and avoid the temptation of ascribing meaning to constitutional text that effectively rewrites the Constitution.

By contrast, a constitutionally impermissible intrusion occurs when judges adopt an expansive interpretation of their authority and the constitutional text, disregarding the discretion and constitutional powers that political branches are constitutionally entrusted with. In such instances, judges exceed their proper interpretive role and undermine the principles of separation of powers and democratic governance. They encroach upon the domain reserved for political branches, trespassing into areas where their intervention is unwarranted and potentially disruptive.[123] An expansive interpretation of the Constitution results when judges ascribe meaning to constitutional text that is inconsistent with its plain meaning and, in effect, rewrite the Constitution.

One of the primary concerns that this thesis raises regarding impermissible intrusions is the erosion of the hallowed doctrine of separation of powers.[124] The doctrine of separation of powers is traced to Baron de Montesquieu.[125] He advocated for a tripartite structure of government comprising an Executive, Legislature and Judiciary as the antithesis of tyranny.[126]

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[122] Rostow op cit 13; Waldron op cit note 13.
[123] Suzanne Prieur 'Clair Separation of Powers: A New Look at the Functionalist Approach' (1989) 40(1) *Cape Western Reserve Law Review* 331-346.
[124] Cecil Yongo 'Constitutional Interpretation of Rights and Court Powers in Kenya: Towards a more Nuanced understanding' (2019) 27(2) *African Journal of International & Comparative Law* 219-224.
[125] James T Brand 'Montesquieu and the Separation of Powers' (1933) 12(3) *Oregon Law Review* 175. Each of the three arms was assigned clear and distinct roles. The Executive was entrusted with the role of policy making, the Legislature the role of law making and the Judiciary the role of interpreting the law.
[126] Anne M Cohler, Basia Carolyn Miller & Harold Samuel Stone Charles de Secondat Montesquieu *The Spirit of the Laws* (1989); Aristotle, writing in 350 BC, singled out three functions of government, namely, 'the deliberative, the magisterial and the judicative.'

Inherent in the tripartite structure of government was to be a robust system of checks and balances that would ensure an accountable government.[127] Walter Khobe writes that 'separation of powers does not mean the absolutism of each branch within its zone.'[128] The political question doctrine, therefore, stands as a guard against absolutism within the institution of the Judiciary as it checks on the Executive and Legislature through its expansive power of review. Charles-Louis de Secondat wrote in 1748: *The Spirit of Laws* (1748);[129]

> Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the Judge would then be the legislator. Were it joined to the executive power, the Judge might behave with violence and oppression. There would be an end to everything, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.[130]

When judges engage in constitutionally impermissible intrusions, they disrupt the delicate equilibrium of power intended by the doctrine of separation of powers. Impermissible intrusions have the result of courts unjustifiably encroaching upon the domain of political branches, thereby undermining the very essence of the separation of powers. Impermissible intrusions also raise concerns regarding judicial activism, which refers to a judicial approach to interpretation that involves judges actively shaping public policy or making decisions based on their personal beliefs rather than a strict fidelity to the tenets of the Constitution.[131] Impermissible intrusions are very likely to be found in cases where judges disregard fidelity to constitutional text by doing one of two things: creating normative standards through judicial craft in cases impacting on separation of powers and applying them in reviewing political determinations, and, secondly, finding constraints that are alien to the text of the Constitution and applying them in reviewing political determinations. These two approaches represent judicial activism as judges exceed their proper role in interpretation and substitute their own preferences for the decisions that should be made by the elected representatives in the political branches.

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[127] James Madison *The Federalist No. 51* (1961) at 322; 'If men were angels, no government would be necessary.'
[128] Walter Khobe Ochieng 'Separation of Power in Judicial Enforcement of Governmental Ethics in Kenya and South Africa' (2018) 3 *Kabarak Journal of Law and Ethics* 44.
[129] Cohler et al op cit note 125.
[130] Ibid.
[131] Keenan Kmiec 'The Origin and Current Meanings of "Judicial Activism" (2004) 92(5) *California Law Review* 1441-1477.

Impermissible intrusions undermine the democratic process by countermanding the constitutional power committed to political branches in a manner unsupported by the Constitution.[132] This means that judges undercut democratic institutions entrusted by the Constitution to midwife certain democratic processes.[133] Eugene Rostow writes:

> The separation of powers under the Constitution serves the end of democracy in society by limiting the roles of the several branches of government and protecting the citizen and the various parts of the state itself, against encroachments from any source.[134]

Political branches are made up of elected representatives of the people and are ultimately accountable to the people. Their actions are 'politically examinable' as was emphasised by the United States Supreme Court in *Marbury v Madison*.[135] Political branches, also known as democratic institutions, are more in tune with society's changing needs and values.[136] This is partly attributed to their unique institutional capacity. When judges countermand political determinations in the absence of constraints discernible from a plain reading of the text of the Constitution, they negate the democratic will of the people and the Constitution itself, resulting in claims that judicial review is undemocratic.[137]

Proponents of the idea that judicial review is undemocratic question why 'a majority of nine Justices…should be permitted to outlaw as unconstitutional the acts of elected officials or officers controlled by elected officials.'[138] They view courts' involvement in political matters as weakening their institutional integrity.[139] This position is, however, misleading. As Githu Muigai argues, judges cannot divorce themselves from politics because the Constitution itself is a political charter, making its 'interpretation a matter of great political significance.'[140] Rostov writes that proponents of the view that judicial review is undemocratic would rather the Constitution assume the interpretation assigned to it by political branches.[141]

This thesis, in its argument for a narrow interpretation of the Constitution and the court's institutional authority, does not envisage a judiciary that shies away from protecting individual

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[132] Tassaduq Hussain Jillani 'Judicial Review and Democracy' (2018) 44(2) *Litigation* 50-53.
[133] Waldron op cit note 13.
[134] Rostow op cit note 13 at 193-224.
[135] Supra note 4.
[136] Barkow op cit note 50 at 240.
[137] Waldon op cit note 13.
[138] Rostow op cit note 13 at 193
[139] Ibid 194.
[140] Githu Muigai *Constitutional Amendments and the Constitutional Amendment Process in Kenya (1964 – 1997): A Study in the Politics of the Constitution* (unpublished Ph.D Thesis, University of Nairobi, 2001) 91.
[141] Rostow op cit note 13 at 194.

rights from the excesses of political branches. As Chief Justice Robert Jackson quipped in *West Virginia State Board of Education v Barnette:*[142]

> One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no election.

The creation of a tripartite structure of government with constitutional powers conferred upon the judicial arm to constrain the exercise of executive and legislative power counsels against the argument that judicial review is undemocratic. It militates against the idea that a 'society is undemocratic unless it has a government of unlimited powers and that no government is democratic unless its legislature has unlimited powers'[143] Indeed, in a letter to James Madison, Thomas Jefferson observed, 'In the arguments in favour of a declaration of rights, you omit one which has great weight with me; the legal check which it puts into the hands of the judiciary.'[144]

Other critics of the idea that judicial review is undemocratic include Brettschneider and Eisgruber, who argue that judicial review derives its legitimacy from its ability to 'protect core democratic rights.'[145] Whereas Waldron argues that political branches are as capable as the judicial branch in securing individual rights, empirical evidence suggests otherwise.[146] As much as this paper counsels against constitutionally impermissible intrusions, it does not share the position that judicial review, as a viable tool for checking the excesses of political branches, is, in itself, undemocratic. If it is carried out correctly, it serves to ensure that the government complies with the will of the people.[147]

Constitutionally impermissible intrusions amount to rewriting the Constitution by ascribing meaning to constitutional text that contradicts its plain meaning as ratified by the people.[148]

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[142] *West Virginia State Board of Education v Barnette* 319 U.S. 624 (1943).
[143] Rostow op cit note 13 at 199.
[144] Ibid at 198
[145] Annabelle Lever 'Democracy and Judicial Review: Are they really compatible' (2009) 7(4) *Perspectives on Politics* 805, 806.
[146] Ibid.
[147] See for example the argument of David David Dyzenhaus that the 'basis for judicial review is democratic' in David Dyzenhaus 'Form and Substance in the Rule of Law: A Democratic Justification for Judicial Review? in Christopher Forsyth (ed) *Judicial Review and the Constitution* (2000) 141, 142.
[148] Lawrence B Solum' The Constraint Principle: Original Meaning and Constitutional Practice' (2017) *Social Science Research Network* 3-139.

Lawrence Solum argues that the process of amending the Constitution is people-driven and, therefore, subject to 'democratic control.'[149] He writes:

> If (1) the polity has through democratic processes ratified a text and retains the power to modify the text, and (2) the text is a constitution the communicative content of which creates constitutional law, then the combination of these two facts constitutes a reason for constitutional actors (judges and other officials) to act in compliance with the text.[150]

To maintain the integrity of the judiciary and the rule of law, it is imperative to delineate clear boundaries within which judges should operate when dealing with political questions. By interpreting their authority and the constitutional text narrowly, ascribing to constitutional text its plain meaning as understood by ordinary members of the public, judges demonstrate respect for the constitutional framework and the constitutional powers assigned to political branches. Judges can avoid impermissible intrusions by adhering to a framework that carefully balances judicial review with deference to the political branches. This approach allows for a more measured and restrained exercise of judicial power, ensuring that the judiciary remains within its proper constitutional bounds. By doing so, judges uphold the principles of constitutional governance, respect the separation of powers, preserve democratic accountability, and safeguard the rule of law.

1.7 Textualist Approach to Interpretation

A constitutionally permissible intrusion in cases that raise political questions is achieved through a narrow textual interpretation of the Constitution and the court's institutional authority. This approach aims to address two problems: the first emanates from a propensity for courts to create constraints on government absent from a plain reading of constitutional text and applying them in countermanding political determinations, [151] and the second problem arises when the constitutional text is indeterminate, and judges take it upon themselves to supply determinacy to the text, while setting aside the determinacy that could be? supplied by political branches.[152] Ofer Raban advocates for a 'principled way to decide cases in which the Constitution does not provide a clear answer.'[153] This thesis attempts a principled approach to

[149] Ibid at 73.
[150] Ibid.
[151] Tanasije Marinkovic 'Barak's Purposive Interpretation in Law as a Pattern of Constitutional Interpretive Fidelity' (2016) 9(22) *Baltic Journal of law & politics* 88, 92.
[152] James E Ryan 'Laying Claim to the Constitution: The Promise of New Textualism' (2011) 97(7) *Virginia Law Review* 1523, 1571.
[153] Raban op cit note 89.

interpreting constitutional text in cases where the text is indeterminate. It does so by urging courts to defer to the meaning supplied by political branches. Where political branches fail to supply determinate meaning, the court's duty is to direct the relevant political branch to supply determinacy to the constitutional provision through a normative framework.[154]

The study argues that in matters that impact the separation of powers within the framework of the political question doctrine, the duty to supply determinate meaning to indeterminate constitutional provisions lies with the political branches. This approach does not in any way divest courts of their guardianship role over the Constitution. Courts retain the power to strike down determinate meanings supplied by political branches that transgress clearly discernable constitutional provisions.

Textualism, as an approach to constitutional interpretation, emphasises the importance of adhering strictly to the text of the Constitution.[155] According to the textualists, judges are to interpret the Constitution based solely on the plain meaning of the words used in the text. Textualists argue that deviating from the text amounts to rewriting the law and usurping the legislature's role.[156] David Beatty describes the textualist approach in the following manner:

> The quintessential example of judicial restraint, as it follows the explicit words written down by the framers of the Constitution itself rather than attempting to alter the meaning of those words by an act of interpretation that, by definition, supplements the authoritative language of the Constitution with language written by unelected judges.[157]

For the textualist, 'if a judge can find nothing in the Constitution that limits what a democratically elected majority can do, she or he must stand aside and allow the will of the people to prevail.'[158] Textualism gained prominence as a constitutional interpretation theory in the late 20th century. At that time, conservative judges and scholars challenged prevailing approaches like originalism and living constitutionalism.[159] Originalism asserts that the Constitution should be interpreted based on the original intention of the framers at the time of

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[154] Tim Koopmans *Courts and Political Institutions: A Comparative View* (2003) ch 5.
[155] Ibid at 247-253. See also, Ofer Raban 'Is Textualism Required by Constitutional Separation of Powers?' (2014) 49(2) *Loyola of Los Angeles Law Review* 421-452, Antonin Scalia 'Common-law Courts in a Civil-Law System: The role of United States federal courts in interpreting the Constitution and laws' 70(2) *Tulane Law Review* 643-660, John F Manning 'Textualism as a Nondelegation Doctrine' (1997) 97(3) *Columbia Law Review* 673-735.
[156] Louis E. Wolcher 'A Philosophical Investigation Into Methods of Constitutional Interpretation In The United States And The United Kingdom' (2006) 13(2) *Virginia Journal of Social Policy & The Law* 239 at 247-253.
[157] Ibid at 252.
[158] David M. Beatty et al *The Ultimate Rule of Law* (2004) 40.
[159] Robert H Bork *The Tempting of America: The Political Seduction of The Law* (1990)143.

its adoption, while living constitutionalism posits that the meaning of constitutional text should be established in light of evolving circumstances and values.[160] The two approaches are considered overly flexible and allow judges to impose their own policy preferences or moral judgments on the Constitution.[161]

Textualism provides a more objective and predictable approach to interpretation, as it relies on fixed and publicly discernible meanings rather than variable and obscured intentions or values. It asserts that legal texts, including Constitutions, should be interpreted based on their plain, publicly discernible meanings, as they would have been understood by an average person at the time of their enactment.[162] To derive publicly discernible meanings from legal documents, textualism emphasises the plain, literal interpretation of the text.[163] This approach suggests that the meaning of a legal provision should be understood based on how its words were commonly interpreted at the time of its adoption.[164] It assumes that there is an objective, fixed meaning in the text, independent of the intentions of those who drafted or ratified it. Rather than delving into the intentions behind the creation of the law, the focus remains on the clear meaning of the language as it was understood by the public at the time. This method generally resists judicial reinterpretation or refinement of constitutional language, concentrating on adhering to the original text without accounting for potential consequences or changing circumstances. This approach seeks to ensure legal stability and consistency, preventing the law from being shaped by subjective judicial preferences or evolving interpretations. The focus is on the ordinary meaning of the words used, and textualists argue that this method best respects the democratic nature of lawmaking, aligning with the will of the people who ratified the text.[165]

The proposition that text has a plain meaning is not without its fair share of critics.[166] Some critics contend that language is inherently indeterminate, requiring interpretation that transcends the literal wording of the text.[167] They further contend that words cannot speak for themselves but must be contextualised within the historical, cultural, and political frameworks in which they were written. According to these critics, attributing meaning to constitutional

[160] Wolcher op cit note 155 at 253-265.
[161] Antonin Scalia & Bryan A Garner *Reading law: The interpretation of legal texts* (2012) 16
[162] Antonin Scalia *A Matter of Interpretation: Federal Courts and the Law* (1997) 22.
[163] Ibid, 23-38.
[164] Ibid, 23.
[165] Lawrence B Solum‘ The Constraint Principle: Original Meaning and Constitutional Practice’ (2017) *Social Science Research Network* 3-139.
[166] Anthony D’Amato ‘Counterintuitive Consequences of Plain Meaning’ (1991) 33 *Arizona Law Review* 529.
[167] Stephen Carter ‘Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle’ (1985) 94 *Yale Law Journal* 821–829.

provisions involves subjective judicial choices influenced by societal values and the interpreter's biases, making 'plain meaning' more of a rhetorical ideal than an achievable reality. However, this study argues that plain meaning is a stabilising mechanism that provides an objective baseline for judicial decision-making. By adhering to the text's most straightforward interpretation, courts can respect the intentions of the drafters and the ratifying populace, ensuring the Constitution remains a democratically legitimate framework.[168]

Ronald Dworkin, while accepting that text indeed has a 'plain meaning,' criticises a purely textual approach to interpretation. His critique of textualism centres on the argument that constitutional interpretation cannot rely solely on the 'four corners of the text'[169] as textualism suggests.[170] He contends that textualism fails to address the indeterminate nature of constitutional language, which often involves ambiguous terms and requires interpretation beyond the literal words themselves.[171] He argues that the Constitution is grounded in principles that its text cannot fully capture.[172] Instead, these principles must be understood in the context of contemporary moral and political values. According to Dworkin, the role of judges is to interpret constitutional provisions in light of these evolving standards of justice, suggesting that the text is insufficient on its own and must be supplemented by values and principles underpinning the society.[173] He emphasises that the Constitution, while a legal document, also reflects underlying ideals that judges should apply when supplying meaning to text.[174] Judges, when relying on extratextual principles or moral reasoning as aids to interpretation, engage in judicial overreach, which undermines the democratic legitimacy of the law.[175] While ambiguity in constitutional language is acknowledged, political branches and not judges should supply the meaning of ambiguous provisions.[176] The 'four corners of the text' provide a stable foundation for legal interpretation, preventing judges from injecting personal or evolving views into constitutional interpretation.[177] This approach ensures that interpretation remains consistent with the document's original meaning, protecting against

[168] Solum op cit 165 at 273.
[169] Antonin Scalia 'Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws' in Antonin Scalia '*Matter of Interpretation: Federal Courts and the Law* (1997) 3-47.
[170] Ronald Dworkin 'Comment' A Matter of Interpretation: Federal Courts and the Law (2018) 115-128.
[171] Ibid.
[172] Ronald Dworkin 'The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve' (1997) 65 *Fordham Law Review* 1250.
[173] Ibid, 1252.
[174] Ibid, 1252.
[175] Dworkin op cite note 172.
[176] Ibid.
[177] Scalia op cit 169.

judicial activism while maintaining a connection to democratic principles. Therefore, although Dworkin's critique highlights the potential limitations of textualism, textualism properly understood can provide a framework that prioritizes the integrity of the text and the original intent of the framers over judicial discretion and this is the argument that the paper makes.

Dworkin's critique of textualism remains relevant to date and presents a challenge when constitutional text is open-textured and judges turn to what they consider as foundational values and principles in supplying meaning. Justice Spencer Roane describes foundational values and principles in the following manner:

> Those great principles growing out of the Constitution, by the aid of which, in dubious cases, the Constitution may be explained and preserved inviolate; those land-marks, which it may be necessary to resort to, on account of the impossibility to foresee or provide for cases within the spirit, but without the letter of the Constitution.[178]

To cure the problem of judges resorting to foundational values and principles not codified within constitutional text as aids to interpretation, this study submits that founding values and principles should be expressed within constitutional text before they can be applied in supplying determinacy to open-textured constitutional provisions. The narrow textual approach that should be taken by courts when interpreting open textured constitutional values and principles was laid down by the Kenyan Supreme Court in *The Cabinet Secretary for the National Treasure and Planning & 4 others v Okiya Omtatah Okoiti & 52 others*[179]

> Courts should be careful to distinguish between values and principles on one hand, and normative rules on the other hand, to avoid overprescribing duties from principles and values which are by nature open-textured...It follows that the values and principles are optimising commands that allow duty bearers to come up with suitable measures for fulfilment of the obligations that they impose, without dictating definitive or specific actions that they ought to take.

In Kenya and South Africa, for instance, the respective Constitutions lay down values and principles in an open-textured manner. This presents a challenge when judges take it upon themselves to prescribe conduct on the part of political branches that should fulfil the constitutional values and principles, disregarding the constitutional intention to have political

[178] *Kamper v. Hawkins* 1 Va. Cas. 21 (1793).
[179] *The Cabinet Secretary for the National Treasury and Planning & 4 others v Okiya Omtatah Okoiti & 52 others* Supreme Court Petitions Nos. E 031, E032 & E033 of 2024.

branches supply determinacy to the values and principles as they discharge their constitutional functions.

While this study makes a strong case for textualism as an approach to constitutional interpretation in cases impacting on separation of powers, it acknowledges that textualism has been roundly criticised as 'overly rigid' and a 'smokescreen by conservative judges to reach ideologically acceptable outcomes.'[180] This has led to a distinction between formalistic textualism, which restricts itself to the plain meaning of text as understood by ordinary citizens, and flexible textualism, which permits judges to consider context when supplying meaning to text. Tara Leigh Grove advocates for formalistic textualism as it 'promises to better constrain judicial discretion.'[181] This study advocates for formalistic textualism as it offers a stable and predictable restraint on judges as they interpret the Constitution.[182]

Flexible textualism and living constitutionalism emphasise the limitations that arise from a strict textual reading of the Constitution. They claim there is a need for extra-textual sources that allow judges to make decisions that align with the existing realities of their time.[183] These two approaches position judges as active umpires in decision-making as opposed to formalistic textualism, which is criticised for unduly limiting judges in their interpretive role.[184] According to proponents of flexible textualism and living constitutionalism, one of the limitations arising from a strict textual reading of the Constitution, is that of attributing correct meaning to text.[185] They further point out that the limitation has strengthened the call for an originalist, also viewed as a purposive, interpretation of the Constitution, that looks at the original intention of the drafters/framers of the constitutional text.[186]

Formalistic textualism, as an approach to constitutional interpretation, invites a restrictive approach to the interpretation of text, which is at times deemed as unprogressive when compared to flexible textualism and living constitutionalism[187] Such an approach has been argued as not commending itself to jurisdictions that have embraced a transformative

[180] Neil H Buchan and Michael C Dorf 'A Tale of Two Formalisms. How law and economics Mirrors Originalsm and textualism (2021) 106 *Cornel Law Review* 591-675.
[181] Tara Leigh Grove 'Which Textualism' (2020) 134(1) *Harvard Law Review* 265-307, 269
[182] Ibid.
[183] Eliot T Tracz 'Textualism and the Living Constitution' (2024) 60(2) *Idaho Law Review* 245-262.
[184] Ibid.
[185] Ibid.
[186] Keith E Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (University Press of Kansas 1999). See also Ronald Dworkin, *Freedom's Law: A Moral Reading of the American Constitution* (1996) at 332–347.
[187] Andrei Marmor 'The Immorality of Textualism' (2005) 38 *Loyola of Los Angeles Law Review* 2063-2079.

constitutional framework. Prof. Karl Klare describes the concept of transformative constitutionalism as follows:

> A long-term project of constitutional enactment, interpretation and enforcement committed … to transforming a country's political, social institutions and power relationships in a democratic participatory and egalitarian direction.[188]

Even so, judges in jurisdictions that have embraced transformative constitutions are united in the view that judges, within their interpretive role, are constrained. The South African Constitutional Court has for instance observed:

> Courts do not run the country, nor were they intended to govern the country. Courts exists to police the constitutional boundaries, as I have sketched them. Where the constitutional boundaries are breached or transgressed, courts have a clear and express role. And must then act without fear or favour. [189]

Formalistic textualism presents itself as a viable means of constraining judges in their interpretive role. A challenge, however, presents itself when plain meaning 'is not clear enough,' necessitating the need for extra-textual sources as aides to interpretation.[190] In such cases, as under flexible textualism and living constitutionalsm, the role of reconciling textual meaning and the meaning derived from extra-textual sources is sometimes left to judges, opening up the interpretive process to the 'subjective values of judges.'[191] William Treanor argues that in assigning public meaning to text, judges ought to recover 'the conventions governing the interpretive role of particular actors as they construed' the constitutional text at the point of ratification. This approach, however, ignores the reality of an evolving society and the truism that what informed constitutional text at the point of ratification may not necessarily subsist at the point judges are called upon to interpret text. To cure this, the study finds that the role of supplying determinacy to indeterminate text ought to be left to political branches, owing to their unique 'political capacity' that this paper finds to be more in tune with the prevailing societal needs.[192]

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[188] Justice S M Mbenenge 'Transformative Constitutionalsm: A Judicial Perspective from the Eastern Cape' (2018) 32(1) *Speculum Juris* 1-7.
[189] *Mazibuko, Leader of the Opposition in the National Assembly v Sisulu MP Speaker of the National Assembly and Others* 2013 (4) SA 243 (WCC).
[190] Marmor op cit note 188 at 2063.
[191] William Michael Treanor 'Against Textualism' (2009) 103 *Northwestern University Law Review* 983-1006, at 983
[192] Walter Dellinger & H. Jefferson Powell op cit note 96.

James Ryan argues that living constitutionalism and originalism are 'largely dead'[193] and their place has been taken up by what he describes as 'new textualism.' New textualism advocates for an interpretation 'based on evidence from the text, structure, and enactment history, of what the language in the Constitution means.'[194] For the new textualist, the goal in the interpretation of constitutional text is to 'understand the semantic meaning of the language and the purposes behind the language in order to clarify, where necessary, what the words and phrases mean.'[195] Unlike originalism, which places a heavy reliance on the original intent of the framers, new textualism focuses on the original meaning of constitutional text. James Ryan writes that 'instead of attempting to divine the intent of the framers or ratifiers, the quest now is to determine the objective, original public meaning of the relevant constitutional text.'[196] Prof. Jefferson Powell presents evidence that 'the founding generation did not believe that their intent should control constitutional interpretation.' He argues that 'the founders instead believed that the meaning and purpose of the text should be derived from the public words of the text itself, not the subjective intentions of its framers or ratifiers.'[197]

The difference between textualism and new textualism lies in the approach to the interpretation of text adopted by judges. Unlike textualism, which restricts itself to text, new textualism invites interpretive aids that are to be found outside text, strengthening the discretion enjoyed by judges in attributing meaning to text.[198] When such discretion is unrestrained, judges assume interpretive roles intended for political branches.[199] A textualist approach to the interpretation of constitutional text in matters impacting separation of powers limits judicial discretion, the very harbinger of impermissible intrusions in constitutional interpretation. Allowing judges room to alter the plain meaning of constitutional text in matters impacting separation of powers ignores the constitutional design to confer discretion on political branches in political cases.

When reviewing political questions, constraints applied by judges should be evident in the text of the Constitution, and the meaning ascribed by judges to those constraints should align with their plain meaning. Where constitutional text suffers from imprecision in cases that raise political questions, I argue that the constitutional design empowers political branches to supply

[193] Ryan op cit note 152 at 1524.
[194] Ibid.
[195] Ibid at 1533.
[196] Ibid at 1525.
[197] H Jefferson Powell, 'The Original Understanding of Original Intent' (1985) 98(5) *Harvard Law Review* 885-948.
[198] Ibid.
[199] Ibid.

determinate meaning to those provisions. This approach results in courts respecting the will of the people who ratified the Constitution, limits judicial discretion and activism, and preserves the distinct roles and responsibilities of the different branches of government.[200]

The classical exposition of the political question doctrine is founded on an adherence to the text and language of the Constitution, and so are the first two strands of the prudential theory. The review of political questions, therefore, should be based on text. Constitutional text ought to inform the interaction of the court with political questions in ascribing meaning to text and prescribing the institutional authority of the court and political branches, an approach supported by formalistic textualism. The court's interaction with constitutional text in cases that raise political questions must exhibit an awareness of a constitutional design to have courts assume a controlled role in the interpretation of text and formulation of normative standards to answer vague and indeterminate constitutional text.

When a textual interpretation of the Constitution reveals an absence of normative standards to guide a political branch in answering a constitutional question committed to it, a the proper reading of the constitutional design is one which empowers political branches with the duty to supply normative standards, which would then be binding on the court, unless they contravene textually identifiable constraints within the text of the Constitution. When judges apply an approach to interpretation that defies fidelity to the text, judicial overreach will always result. Chelsea Ramsden writes:

> Judicial overreach occurs when a court acts beyond its jurisdiction and interferes in areas that fall within the executive and/or the legislature's mandate.[iii] It means the court has violated the doctrine of separation of powers by taking on the functions such as law enforcement, policy making, and law-making.[201]

This study, therefore, advances the argument that textualism offers a sound and principled method of constitutional interpretation within the separation of powers framework that is not only necessary but also appropriate for resolving cases raising political questions in three fundamental ways. First, by adhering to the text of the Constitution, courts can avoid encroaching upon the domain of the political branches. Secondly, by enforcing the text of the Constitution, courts can ensure that the political branches do not exceed their constitutional limits or infringe upon the rights and liberties of the people. Finally, by consistently and

[200] John F Manning 'Textualism and Legislative Intent' (2005) 91(2) *Virginia Law Review* 419, 420.
[201] Chelsea Ramsden 'Judicial Overreach' *Politicsweb* 14 June 2017.

coherently interpreting the text of the Constitution, courts can promote clarity and uniformity in the development of law. Textualism has long garnered praise for its fidelity to democratic principles and the separation of powers, which form the foundational tenets of this thesis.[202]

The approach I present to the interpretation of constitutional text in cases raising political questions can best be explored through two cases *Walter Nixon v United States*[203] and *R (Miller) v The Prime Minister & Cherry v Advocate General for Scotland.*[204] *Walter Nixon v United States*,[205] decided by the United States Supreme Court embraced the modern conception of the political question doctrine by applying the two-step inquiry judges engage in when presented with political questions. The Court, firstly, interpreted the Constitution to determine whether the power to try an impeachment was vested in the Senate, and secondly, interrogated whether the Senate had acted within the constitutional constraints of its power. In the three jurisdictions this study examines, Parliament, as the Senate in the *Walter Nixon* case, enjoys autonomy in controlling its internal proceedings. Through *Walter Nixon*, the study will investigate the extent to which courts can direct Parliament on the conduct of matters within its exclusive jurisdiction in constitutional democracies where the principle of constitutional supremacy has been codified. Building on *Walter Nixon*, the study will highlight what constitutes an indeterminate term and provide a foundation for the recommendation in the study that when judges are presented with indeterminate terms, they ought to direct political branches to supply such determinacy.

R (Miller) v The Prime Minister & Cherry v Advocate General for Scotland,[206] a case decided by the Supreme Court of the United Kingdom, also commends itself for this study. The three countries that this thesis examines were colonised by Britain, and as will become evident in the study, at one point embraced the doctrine of parliamentary supremacy operational in Britain before switching gears and codifying constitutional supremacy in their constitutional text. The three countries find themselves in a space where they have to play a guardianship role over the Constitution while simultaneously demonstrating respect due to political branches. When not correctly navigated, this terrain sours institutional comity between the judiciary and political branches. *R (Miller) v The Prime Minister & Cherry v Advocate General for Scotland,*[207]

[202] Tara Leigh Grove op cit note 182.
[203] Supra note 10.
[204] Supra note 11.
[205] Supra note 10.
[206] Supra note 11.
[207] Supra note 11.

suggests what a constitutionally impermissible intrusion entails. The UK Supreme Court, as I will explain, disregarded the political question doctrine altogether and proceeded to review a political determination based on constraints alien to the power bestowed on the Queen to prorogue Parliament on the advice of the Prime Minister.. The choice of *R (Miller) v The Prime Minister & Cherry v Advocate General for Scotland*[208] as a study is also aimed at demonstrating that the political question doctrine has grown beyond the borders of the United States and now finds itself influencing judicial opinions far and beyond.[209] In the United Kingdom, Hayley Lawrence writes that the political question doctrine is referred to as 'non-justiciability,' signaling an integration of the doctrine into judicial decision-making.[210] Lord Sumption, in further support of the political question doctrine in the United Kingdom, writes, 'to say that an issue is non-justiciable is to say that there is a rule of law that the court may not decide it.'[211]

1.8 *Walter Nixon v United States*[212]

Walter Nixon, a sitting Judge of the United States District Court, was convicted of committing perjury during a grand jury investigation and sentenced to five years imprisonment in 1986. The grand jury investigations were prompted by complaints that Nixon had received monetary inducement from a Mississippi businessman to influence the District Attorney against prosecuting the businessman's son. Nixon was impeached by the House of Representatives in 1989. Upon presentation of articles of impeachment to the Senate, the Senate voted to invoke impeachment Rule XI of its impeachment rules. Rule XI authorises the presiding officer to appoint a committee of senators to 'receive evidence and take testimony.' In the course of the Senate hearings, ten witnesses testified, including Nixon. After the close of the hearings, the committee presented a report to a full sitting of the Senate. Nixon and the House impeachment managers were allowed an opportunity to present their submissions before the Senate, after which the Senate voted by a majority vote exceeding two-thirds to convict Nixon of two of the articles of impeachment.

Following his impeachment, Nixon filed a claim in the District Court challenging his impeachment on the ground that 'Senate Rule XI violates the constitutional grant of authority

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[208] Ibid.
[209] The Divisional Division had upheld the political question doctrine as applicable in the case.
[210] Hayley N Lawrence 'A comparative Study of the Political Question Doctrine in the Context of Political System Failures: The United States and The United Kingdom' (2021) 16 *Duke Journal of Constitutional Law & Public Policy* 213, 228.
[211] Ibid.
[212] Supra note 10.

to the Senate to "try" all impeachments because it prohibits the whole Senate from taking part in the evidentiary hearings.' The District Court dismissed his claim as a nonjusticiable political question. The Court of Appeals upheld this finding for the District of Columbia Circuit. This resulted in the appeal before the Supreme Court. Nixon invited the Supreme Court to determine 'whether Senate Rule XI…violates the Impeachment Trial Clause, Art. I, and 3, cl. 6.'[213] Chief Justice Rehnquist, writing the Court's majority opinion, dismissed the appeal, finding that the case presented a nonjusticiable political question. Chief Justice Rehnquist's finding was informed by two considerations: the question of impeachment being textually committed to the Senate[214] and the lack of judicially discoverable legal standards upon which the court could review the impeachment process.[215] The court agreed with Nixon only to the extent that the court possessed the jurisdiction 'to review either legislative or executive action that transgresses identifiable textual limits.' The court, however, found that the word 'try' in the Impeachment Clause failed to provide normative standards upon which the court could review the manner Senate tried Nixon's impeachment.[216]

Walter Nixon v United States[217] exemplifies what I describe as a constitutionally permissible intrusion arrived at through a narrow interpretation of the court's institutional authority and constitutional text. The Constitution expressly commits the sole constitutional power to try impeachments in the Senate. Therefore, constitutional questions arising from an impeachment conducted by the Senate constitute political questions.

The Supreme Court conducted a two-step inquiry. Having established that the case raised a political question, the court conducted the second inquiry to establish whether the Senate transgressed textually identifiable constitutional constraints. The Court acknowledged that the text of the Constitution does not reveal any constraint on the Senate's power to try impeachment. By design, the Constitution left it to the Senate to create normative standards to guide the impeachment process.

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[213] Ibid.
[214] Ibid.
[215] Ibid: 'The conclusion that the use of the word "try" in the first sentence of the Impeachment Trial Clause lacks sufficient precision to afford any judicially manageable standard of review of the Senate's actions is fortified by the existence of the three very specific requirements that the Constitution does impose on the Senate when trying impeachments: the members must be under oath, a two-thirds vote is required to convict, and the Chief Justice presides when the President is tried. These limitations are quite precise, and their nature suggests that the Framers did not intend to impose additional limitations on the form of the Senate proceedings by the use of the word "try" in the first sentence.'
[216] Ibid.
[217] Supra note 10.

When trying Nixon's impeachment, the Senate applied its 'Rules of Procedure and Practice in the Senate when sitting on Impeachment Trials.'[218] The case filed by Nixon challenged Rule XI for violating the impeachment trial clause because a committee of the Senate, as opposed to a sitting of the whole Senate, tried Nixon. In response to the challenge, the Supreme Court is seen to hold back against upsetting the constitutional power enjoyed by the Senate in developing procedural rules to aid it in the exercise of its constitutional power to 'try' impeachments. The Court found the procedure adopted by the Senate as binding on it in trying Nixon.[219] This finding was informed by the fact that the text of the Constitution did not supply normative standards through which the Court could review the manner in which the Senate had processed Nixon's impeachment. In this particular case, Senate supplied determinacy to the constitutional power to 'try' impeachments through its 'Rules of Procedure and Practice in the Senate when sitting on Impeachment Trials.'[220] The approach taken by the Court was possible since it remained conscious of the institutional limits of its authority and deployed a narrow construction of the text of the Constitution.

1.9 *R (on the application of Miller) (Appellant) versus The Prime Minister (Respondent), Cherry and others (Respondent) versus Advocate General for Scotland (Appellant) (Scotland)*.[221]

The case arose following the advice of the Prime Minister to the Queen in favour of the prorogation of Parliament. One of the issues presented before the Supreme Court for determination was the justiciability of the lawfulness of the Prime Minister's advice to the Queen.[222] The Court identified its role in determining the appeal as establishing whether, in the first place, a prerogative power to order the prorogation of Parliament existed and, in the event it did, whether it had been exercised within its legal limits.[223] Acknowledging that, indeed, the

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[218] Michael J Gerhardt 'Rediscovering Non-justiciability: Judicial Review of Impeachments after Nixon' (1994) 44(2) *Duke Law Journal* 231-276.
[219] Michael B Miller 'The Justiciability of Legislative Rules and 'Political' Political Question Doctrine (1990) 78(5) *California Law Review* 1341-1374; Lisa A Kainec 'Judicial Review of Senate Impeachment Proceedings: Is a Hands-off Approach Appropriate' (1993) 43(4) *Case Western Reserve Law Review* 1499-1527.
[220] Marieta Safta 'The Constitutional Review of the Standing Orders and Resolutions of the Parliament' in Spyridon Flogaitis et al (eds) Administrative Corpus Juris between Implementation, Reforms and Continuous Developments. Contributions to the 5th International Conference Contemporary Challenges in Administrative Law from an Interdisciplinary Perspective (2022) 92-105.
[221] Supra note 11.
[222] Ibid at para 27.
[223] Ibid at para 35. 'Having made those introductory points, we turn to the question whether the issue raised by these appeals is justiciable. How is that question to be answered? In the case of prerogative powers, it is necessary to distinguish between two different issues. The first is whether a prerogative power exists, and if it does exist, its extent. The second is whether, granted that a prerogative power exists, and that it has been exercised within its

prerogative power existed, the Court went on to find that its role was limited to establishing whether there was a limit on the Queen's prerogative power 'to prorogue Parliament' and, if so, whether the limit was transgressed by the Prime Minister's advice to the Queen.[224] The Court identified two limitations on the Queen's prerogative power to prorogue Parliament on the advice of the Prime Minister: the constitutional principles of parliamentary sovereignty[225] and parliamentary accountability.[226] The Court found the advice rendered by the Prime Minister unlawful since it 'had the effect of 'frustrating or preventing the constitutional role of Parliament in holding the Government to account.'[227]

The Divisional Court from which the appeal before the Supreme Court emanated found the case to present a nonjusticiable political question. The Divisional Court found that there were no judicially discoverable manageable standards upon which to review the advice rendered to the Queen:

> The Prime Minister's decision that Parliament should be prorogued at the time and for the duration chosen and the advice given to Her Majesty to do so in the present case were political. They were inherently political in nature and there are no legal standards against which to judge their legitimacy.[228]

The Divisional Court found that the considerations that informed the Prime Minister's advice were 'intensely political consideration(s).'[229] In essence, the Court found that the Prime Minister had a superior institutional capacity to advise the Queen on prorogation. The Supreme Court, on the other hand, allowed the appeal after identifying constraints and applying them in reviewing the Queen's decision to prorogue Parliament on the Prime Minister's advice. The constraints which the Court framed as constitutional principles, I argue, were developed through judicial craft since the prerogative power committed on the Queen had only one

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limits, the exercise of the power is open to legal challenge on some other basis... The second of these issues, on the other hand, may raise questions of justiciability. The question then is not whether the power exists, or whether a purported exercise of the power was beyond its legal limits, but whether its exercise within its legal limits is challengeable in the courts on the basis of one or more of the recognised grounds of judicial review.'

[224] Ibid para 37.

[225] Para 41. 'Time and again, in a series of cases since the 17th century, the courts have protected Parliamentary sovereignty from threats posed to it by the use of prerogative powers, and in doing so have demonstrated that prerogative powers are limited by the principle of Parliamentary sovereignty.'

[226] Para 50. 'That a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive.'

[227] Para 55.

[228] *R (Miller) v The Prime Minister & Cherry v Advocate General for Scotland* 2019 UKSC 41 para 51.

[229] Ibid.

identifiable constraint, being the advice of the Prime Minister.[230] By design, the prerogative power to prorogue Parliament is vested in the Queen acting on the advice of the Prime Minister. As she had acted on the advice of the Prime Minister, I argue that the Supreme Court ought to have restrained itself from countermanding the considerations that informed the Prime Minister's advice to the Queen in favour of prorogation.[231] These considerations were summarised by the Divisional Court as follows:

> …the need to prepare the Government's legislative programme for the Queen's Speech, that Parliament would still have sufficient time before 31 October 2019 to debate Brexit and to scrutinise the Government's conduct of the European Union withdrawal negotiations, that a number of days falling within the period of prorogation would ordinarily be recess for party conferences, and that the current parliamentary session had been longer than for the previous 40 years. The Prime Minister had also been briefed in Ms da Costa's submission that it was increasingly difficult to fill parliamentary time with appropriate work and, if new bills were introduced, either the existing session would have to continue for another four to six months at a minimum or they would be introduced knowing that they would fall at the end of the session. All of those matters involved intensely political considerations.[232]

The finding by the Divisional Court of an absence of normative standards upon which to review the advice rendered by the Prime Minister in favour of proroguing Parliament can be addressed by the Court directing the Prime Minister's office to develop a normative framework, which framework would then be binding on the Court as it reviews cases of a similar nature in future.[233]

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[230] Gavin Phillipson Brexit 'Prerogative and The Courts: Why did Political Constitutionalists Support The Government Side In *Miller?'* (2017) 36(2) *University of Queensland Law Journal* 311-332; and Aileen McHarg 'The Supreme Court's Prorogation Judgment: Guardian of the Constitution or Architect of the Constitution?' (2020) 24(1) *Edinburgh Law Review* 88-95.

[231] The considerations that exercised the mind of the Prime Minister in his advice to the Queen are captured in para 51 of the Judgment delivered by the Divisional Court: 'The Prime Minister's decision that Parliament should be prorogued at the time and for the duration chosen and the advice given to Her Majesty to do so in the present case was political. They were inherently political in nature, and there are no legal standards against which to judge their legitimacy. The evidence shows that a number of considerations were taken into account. We have summarised them extensively already. They included the need to prepare the Government's legislative programme for the Queen's Speech, that Parliament would still have sufficient time before 31 October 2019 to debate Brexit and to scrutinise the Government's conduct of the European Union withdrawal negotiations, that a number of days falling within the period of prorogation would ordinarily be recess for party conferences, and that the current parliamentary session had been longer than for the previous 40 years. The Prime Minister had also been briefed in Ms da Costa's submission that it was increasingly difficult to fill parliamentary time with appropriate work and, if new bills were introduced, either the existing session would have to continue for another four to six months at a minimum or they would be introduced knowing that they would fall at the end of the session. All of those matters involved intensely political considerations.'

[232] Para 51.

[233] Tim Koopmans op cit note 154.

The Divisional Court interpreted its institutional authority and the prerogative power vested in the Queen in a narrow manner, resulting in a constitutionally permissible intrusion. The UK Supreme Court, on the other hand, interpreted its institutional authority and the prerogative power vested in the Queen in an expansive manner resulting in a constitutionally impermissible intrusion.

Permissible and impermissible intrusions will often result from interactions between the court and the Executive on one hand, and the court and Parliament on the other hand. Therefore, I have fashioned two thematic areas I shall examine in the chapters that follow: parliamentary processes and the exercise of presidential power.

1.10 Rationale for the Jurisdictions and Thematic Areas of this Comparative Study.

This study interrogates three jurisdictions in the following chapters: Kenya, South Africa and Ghana. It examines two main thematic areas in the three jurisdictions: the court's intervention in parliamentary processes and the exercise of presidential power. These are the twin areas where the kinds of intrusions considered in the theoretical discussion above are bound to arise.

In navigating the two thematic areas, I have identified select cases from a pool of many other cases within the three jurisdictions where judges, through their decisions, have permissibly and impermissibly intruded into terrain reserved for political branches. The subject of political questions and separation of powers is inundated with case law. Identifying each of these cases and making them the subject of study in each of the jurisdictions will render the writing of this thesis a near impossibility. The study will instead focus on cases that have attracted comprehensive scholarship engagement owing to their significant contribution to constitutional projects in their respective countries.

The choice of Kenya, South Africa and Ghana for this comparative study is informed by the historical, legal, and constitutional commonalities and the unique trajectories these countries have taken in establishing and operationalising constitutional governance. These countries share colonial histories that introduced common law systems, which continue to shape judicial reasoning and constitutional development. Kenya and Ghana were colonised by Britain, while South Africa, though initially a Dutch colony, was later a British colony. During the colonial period, these nations operated under systems that prioritised parliamentary sovereignty. However, the post-independence period marked a significant shift as these countries embraced

constitutional frameworks that prioritised the supremacy of the Constitution over legislative and executive authority.

Kenya, South Africa and Ghana operate under Constitutions that enshrine the principle of constitutional supremacy. The Constitution of Kenya establishes that the Constitution is the supreme law of the Republic, binding all persons and state organs.[234] Similarly, the Constitution of South Africa asserts that the Constitution is the highest law, rendering any law or conduct inconsistent with it invalid.[235] Ghana's Constitution equally entrenches the supremacy of the Constitution and subordinates every conduct to the authority of the Constitution.[236] This foundational similarity provides a basis for comparing how each country navigates political questions within their legal systems.

The political contexts in the three countries further enrich this comparison. South Africa's transition from apartheid necessitated a judiciary willing to confront the issues of justice and equality.[237] This explains why judicial independence has been crucial in shaping democratic governance in post-apartheid South Africa.[238] In contrast, Kenya's post-election violence in 2007-2008 prompted reforms to ensure heightened political accountability.[239] These reforms have led to increased scrutiny by the judiciary over political processes.[240] In the case of Ghana, her constitutional journey is littered with military coups and a history of political instability,[241] thereby entrenching within her judicial framework a commitment to constraining political power and building a functional constitutional democracy. This somewhat shared chequered past involving the three countries has fostered judiciaries that are conscious of their guardianship role over the Constitution and the deferential role they should play in a constitutional democracy that embraces the principle of separation of powers.

[234] Constitution of Kenya, 2010, art 2(1).
[235] Constitution of the Republic of South Africa, 1996, s 2.
[236] Constitution of Ghana, 1992, articles 1(2) and 2(1).
[237] Dikgang Moseneke 'A Journey from the Heart of Apartheid Darkness Towards a Just Society: Salient Features of the Budding Constitutionalism and Jurisprudence of South Africa" 2013 *Georgetown Law Journal* 749.
[238] Ibid.
[239] I M Rautenbach 'Policy and Judicial Review-Political Questions, Margins of Appreciation and the South African Constitution' (2012) 1 *The Journal of South African Law* 28.
[240] Ibid.
[241] Isaac Owusu Mensah and Joanna Rice 'The Judiciary and Democracy in Ghana's Fourth Republic' (2018) 17(2) *Journal of African Elections* 49.

Kenya's Constitution 2010 is a transformative charter aimed at correcting historical injustices and addressing governance challenges.[242] It explicitly rejects parliamentary sovereignty and provides robust mechanisms for judicial oversight of political processes.[243] This draws heavily from Kenya's post-colonial struggle towards entrenching democracy and constitutionalism. Under the Constitution 2010, the judiciary is entrusted with the mandate to uphold constitutional values and principles even when such intervention means intruding in areas traditionally reserved for political actors.[244] Similarly, South Africa's post-apartheid Constitution 1996 represents a comprehensive response to a history of systemic inequality and abuse of power. It combines constitutional supremacy with an extensive bill of rights, empowering the judiciary to assume a guardianship role over constitutional values and principles. Ghana's Constitution 1992, though preceding Kenya's and South Africa's transformative frameworks, shares a similar trajectory. It emerged from a period of military rule and is characterised by its attempt to institutionalise democracy and judicial independence within a framework that respects constitutional supremacy.[245]

The Constitutions of Kenya, South Africa, and Ghana exemplify a deliberate departure from the colonial practice of parliamentary supremacy toward transformative constitutionalism. Transformative constitutionalism is not merely a theoretical construct; it has practical implications in the operation of government, the balance of power, and the protection of rights.[246] The Kenyan and South African Constitutions explicitly acknowledge the need for courts to protect constitutional principles and values against political encroachment.[247] This judicial mandate often requires courts to navigate politically charged disputes, as seen in the cases of *Mumo Matemu v Trusted Society of Human Rights Alliance*[248] in Kenya and *Economic Freedom Fighters v Speaker of the National Assembly*[249] in South Africa. While similarly empowered, the Ghanaian judiciary tends to exhibit more restraint, often deferring to political

[242] Yash Pal Ghai 'Constitutions and Constitutionalism: The Fate of the 2010 Constitution' in Godwin R Murunga, Duncan Okello and Anders Sjörgren (eds), Kenya: The Struggle for a New Constitutional Order (Zed Books 2014) ch 6.
[243] Constitution of Kenya (2010) Article 165.
[244] Ibid.
[245] Mensah and Rice op cit note 247.
[246] See the discussion on the twelve elements of Transformative Constitutionalism in Willy Mutunga 'Transformative Constitutions and Constitutionalism: A New Theory and School of Jurisprudence from the Global South?' (2021) 8 *Transnational Human Rights Review* 3-29.
[247] Constitution of Kenya 2010, arts 1(3)(c), 165, 259; Constitution of the Republic of South Africa 1996, Section 165(2), 172(1)(a) (both constitutions empower courts to act as guardians of constitutional principles, enabling them to counter political encroachments through interpretation and invalidation of unconstitutional actions).
[248] *Mumo Matemu v Trusted Society of Human Rights Alliance* [2013] eKLR
[249] *Economic Freedom Fighters v Speaker of the National Assembly and Others [2016] ZACC 11*.

branches unless clear constitutional violations are evident, as demonstrated in *Tuffour v Attorney General*.[250]

Kenya, South Africa and Ghana have taken a unified approach to the justiciability of political questions. In Kenya, the High Court has interpreted its jurisdiction under article 165(3)(d)(ii) of the Constitution as clothing it with jurisdiction to review political questions. In South Africa, the Constitutional Court has acknowledged the existence of political questions and interpreted its exclusive jurisdiction under section 167(4) of the Constitution as covering these questions.[251] This view was expressed in *Doctors for Life International v Speaker of the National Assembly and others*[252] in the following manner:

> The principle underlying the exclusive jurisdiction of this Court under section 167(4) is that disputes that involve important questions that relate to the sensitive areas of separation of powers must be decided by this Court only…It follows that where a dispute will require a court to decide a crucial political question and thus intrude into the domain of Parliament, the dispute will more likely be one for the exclusive jurisdiction of this Court.[253]

In South Africa, while there is a strong commitment to upholding the Constitution, debate still exists as to the proper role of the courts in political processes.[254] Retired Chief Moseneke expressed himself in this regard as follows:

> All these disputes have political implications. They impugn decisions of politically elected or appointed representatives. The judiciary is required to police far-reaching state governance and political decision-making for constitutional compliance. Conflict between the judiciary and the executive or the legislature is therefore inevitable. This is illustrated through cases like *Zuma;*

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[250] *Tuffour v Attorney General [1980] GLR 637 (SC)*.

[251] Section 167(4) of the Constitution of the Republic of South Africa, 1996 vests in the Constitutional Court exclusive jurisdiction over the following areas;

> decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;
> decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;
> decide applications envisaged in section 80 or 122;
> decide on the constitutionality of any amendment to the Constitution;
> decide that Parliament or the President has failed to fulfil a constitutional obligation; or
> certify a provincial constitution in terms of section 144.
> decide that Parliament or the President has failed to fulfil a constitutional obligation; or

certify a provincial constitution in terms of section 144.

[252] *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC).

[253] Ibid at para 24.

[254] Moseneke op cit note 243.

> *Shaik; Masetlha; Glenister*, where the Court was willing to weigh in on cases that have significant implications for political actors or the political process.[255]

Like Kenya and South Africa, Ghana has found political questions as justiciable. The Supreme Court in Ghana is clothed with original jurisdiction over political question.[256] In *J H Mensah v Attorney-General,*[257] Justice Acquah attempted a Ghanian formulation of the political question doctrine as practiced in Ghana:

> …if by the political question doctrine, it is meant that where the Constitution allocates power or function to an authority, and that authority exercises that power or function within the parameters of that provision and the Constitution as a whole, a court has no jurisdiction to interfere with the exercise of that function, then I entirely agree that the doctrine applies in our Constitutional jurisprudence.[258]

By comparing these three jurisdictions, the study identifies the conditions under which judicial intervention in political matters is necessary and legitimate. It examines how constitutional text, institutional design, and extra textual factors influence the court's interaction with political questions. Kenya's assertive judiciary, South Africa's balance of activism and deference, and Ghana's cautious restraint offer valuable lessons on how courts can navigate the delicate interplay between judicial review and political accountability.

This comparative analysis is also intended to serve as a catalyst for re-engineering constitutional governance in Africa and beyond. The experiences of these nations demonstrate that transformative constitutional frameworks can empower Judiciaries to safeguard constitutionalism and democracy. At the same time, they show the importance of judicial restraint in respecting the hallowed doctrine of separation of powers. The study finds that courts must avoid overreach, which can undermine democratic processes and erode public trust. Instead, they should focus on upholding constitutional principles through a principled application of the law as advocated in the study.

The selection of Kenya, South Africa, and Ghana provides a unique opportunity to explore how constitutional design influences the judiciary's role in addressing political questions. Each

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[255] Ibid at 41.
[256] The Supreme Court in the exercise of its original jurisdiction under article 130 of the Constitution of Ghana, 1992 has found the actions of political branches reviewable for the purpose of ascertaining their consistency with the Constitution
[257] *J H Mensah v Attorney-General* 1996-97 SCGLR 320 p 34.
[258] Ibid.

country's experience offers insights into the challenges and opportunities of constitutional governance. By examining these jurisdictions, this study contributes to a deeper understanding of the political question doctrine and its relevance in contemporary constitutional democracies. The analysis depicts the importance of striking a balance between judicial activism and deference, ensuring that courts fulfil their role as guardians of the Constitution without impermissibly encroaching on the prerogatives of political branches.

1.11 CONCLUSION

The concept of a tripartite structure of government, as mooted by Montesquieu in 1748, continues to permeate constitutional democracies worldwide. In a country where the doctrine of separation of powers finds residence, 'questions in their nature political'[259] will always be posed in court. And as judiciaries worldwide continue to assert their guardianship role over the Constitution, a conversation is necessary around what constitutes a permissible and impermissible intrusion into terrain occupied by political branches. This chapter has described a political question as a constitutional question committed to a political branch for determination. It has identified two schools of thought around a court's interaction with political questions, one believing that as a matter of law, the court should dismiss the case, the other believing that the court must police the constitutional boundaries of the political question, and assure itself that the political branch has acted within the limits of its power. This chapter has identified with the latter school of thought and argued in favour of a constitutionally permissible intrusion into terrain reserved for political branches as courts police constitutional boundaries. A constitutionally permissible intrusion results when courts demonstrate an awareness of the institutional limits of their authority and, therefore, embrace a narrow interpretation of their authority and the text and the Constitution. Such an approach affords political branches the amount of deference they need to execute their constitutionally ordained mandate.

[259] Supra note 4.

CHAPTER TWO: THE POLITICAL QUESTION DOCTRINE IN KENYA

2.1 INTRODUCTION

Courts in Kenya, in furtherance of their guardianship role over the Constitution, readily review political questions for their constitutionality. As explained in Chapter One, the review of political questions for their constitutionality will either result in a constitutionally permissible or impermissible intrusion. The chapter examines the nature of intrusions into two thematic areas, the impeachment of governors and the exercise of presidential power. As will become evident in the ensuing discussion, courts in Kenya are yet to strike a clear balance between what constitutes a permissible and impermissible intrusion.

2.2 Historical Background

Kenya's historical background documents the journey she has travelled from a past of unaccountable political branches to a present where the exercise of power by political branches is subjected to the dictates of the Constitution. This background is necessary in understanding the evolution of the power of judicial review in Kenya through which courts continue to intrude into terrain reserved for political branches. These intrusions are described in this chapter as either constitutionally permissible or impermissible.

In the period before the promulgation of the Constitution of Kenya, 2010 political branches were largely unaccountable as courts shied away from any form of intrusion.[1] With the promulgation of the Constitution of Kenya, 2010, judges became more assertive in their interpretive role principally on account of the principle of constitutional supremacy under which the acts of political branches are today reviewable.[2]

At independence in 1963, Kenya adopted a new constitutional order which embraced a 'Westminster-style parliamentary government led by a Prime Minister' with the Queen serving as the Head of State.[3] As Githu Muigai points out, the parliamentary system was 'a weak one with severely curtailed powers' compared to the one operational in Britain.[4] At the time, 'any

[1] Mwangi wa Gĩthĩnji & Frank Holmquist 'Reform and Political Impunity in Kenya: Transparency without Accountability' (2012) 55(1) *African Studies Review* and Migai Aketch 'Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?' (2011) 18(1) *Indiana Journal of Global Legal Studies.*

[2] Constitution of Kenya, 2010, article 2.

[3] Cornelia Glinz, 'Kenya's New Constitution: A Transforming Document or Less than Meets the Eye?' (2011) 44 (1) *Law and Politics in Africa, Asia and Latin America* 60 – 80.

[4] Githu Muigai, 'Constitutional Amendments and the Constitutional Amendment Process in Kenya (1964 – 1997): A Study in the Politics of the Constitution' (Ph.D Thesis, University of Nairobi, 2001) 91.

legislation or other administrative action inconsistent' with the Constitution was to be declared a nullity by the High Court.[5] The independence of the judiciary under the Independence Constitution was securely guarded[6] with judges serving as the last word on the 'interpretation of the constitution.'[7] Judges enjoyed security of tenure and were appointed by the Governor General on the advice of the Judicial Service Commission.[8]

In 1964, the Independence Constitution was amended to create the office of President. The President assumed the role of head of state and government.[9] This was one of the many steps towards consolidating power in the presidency and creating what HWO Okoth-Ogendo describes as an 'imperial presidency.'[10] The transition from a constitutional presidency to an imperial presidency severely limited the capacity of courts to hold the Executive accountable.[11] Githu Muigai writes:

> But as the constitutional presidency was gradually replaced by the Imperial Presidency there was a concomitant decline in the capacity of parliament and the courts to keep the executive in check. In a very real sense, the courts operated as a wing of the Attorney General's office. Initially, the Attorney General, in his presumed role as minister for justice, had been responsible for the recruitment of judges under the British Overseas Development Assistance programme. The expatriate judges recruited under this scheme were essentially compliant careerists who did not wish to be embroiled in any of the political controversies that could affect the renewal of their contracts.[12]

Under the imperial presidency, the proposition that judges could dissociate themselves from politics found judicial expression in Kenya. As explained in chapter two, judges cannot in fact dissociate themselves from politics as doing so amounts to an abdication of their solemn duty to interpret the Constitution. 'Questions in the nature political' must be addressed in court since the power to determine the constitutionality of political questions lies with the court.[13]

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[5] Ibid.
[6] Ibid at 186.
[7] Ibid at 96.
[8] Ibid at 186.
[9] Muigai op cit note 4 at 62.
[10] HWO Okoth-Ogendo, 'Constitutions Without Constitutionalism: Reflections on an African Political Paradox' in Douglas Greenberg et al (eds) *Constitutionalism and Democracy: Transitions in the Contemporary World* (1993) 65
[11] Ibid.
[12] Muigai op cit note 4 at 187.
[13] *Marbury v Madison* 5 U.S. (1 Cranch) 137 (1803).

In 1969, Kenya promulgated her second Constitution (Constitution of Kenya, 1969).[14] The Constitution of Kenya, 1969 was a consolidation of all the amendments made to the Independence Constitution.[15] Muigai points out that like the amendment to the Independence Constitution, the Constitution of Kenya, 1969 further diminished the constitutional presidency while elevating the imperial presidency:

> [A]lthough it was true that the Constitution became more streamlined and compact, it was also true that the Constitution was no longer entirely coherent in terms of its basic structures, values, and assumptions. Neither was the philosophy behind its amendment any more discernible than when the amendments first began. The Constitution and the amendment process appeared captive to the whim and caprice of the President as the Constitution became what the President wished.[16]

The post-independence judiciary was often times accused of manipulating the Constitution for 'political ends.'[17] Courts abdicated their solemn role as defenders of the Constitution in the following ways: outrightly denying themselves jurisdiction in political controversies, denying applicants *locus standi* on the ground of insufficient nexus 'to the dispute in issue', ignoring precedent so as to arrive at a politically convenient outcome, adopting a 'narrow, technical and literal interpretation even where it violated the basic intention of the constitution' and intimidation of litigants and their advocates.[18] These five approaches point to a judiciary that was averse to examining the actions of political branches not out of principle, but out of fear of the imperial presidency. In a bid to sanitize the approach to interpretation taken by courts during this period, Sir Charles Newbold opined as follows:

> The Courts derive a considerable amount of their authority and perhaps, even more (important) the acceptance of their authority, from independence of the executive, from their disassociation from matters political. In a democracy the determination of matters political rests ultimately with the will of people through the ballot box. For that purpose, the people elect the executive and the legislature and it is on these two branches that the primary responsibility rests. The third branch the judiciary is not elected and should not seek to interfere in a sphere, which is outside

[14] HWO Okoth-Ogendo 'The Politics of Constitutional Change in Kenya Since Independence, 1963-69' (1972) 71(282) *African Affairs* 9 – 34.
[15] Muigai op cit note 4 at 135.
[16] Ibid.
[17] Ibid at 189.
[18] Ibid at 189-190.

> the true function of the judges. It is the function of the Courts to be conservative, so as to ensure that the rights of the individual are determined by the rule of law.[19]

Sir Charles Newbold's attempt at dissociating judicial function from politics arose from a misunderstanding of the political question doctrine. The doctrine as explained in chapter two is not an invitation to judges to blindly dismiss political controversies. At a minimum, judges have a duty to interpret the Constitution and satisfy themselves that a political branch has acted within the constitutional constraints of its power. In fact, contrary to the position taken by Sir Charles Newbold, the determination of whether a matter is political or not rests with the court.

A paradigm shift was to take place on 27th August 2010 following the promulgation of Kenya's third constitutional document (Constitution of Kenya, 2010).[20] Unlike the charters before it, the Constitution of Kenya, 2010 entrenches the principle of constitutional supremacy.[21] Acutely aware of the history of executive patronage in the country, Kenyans made a conscious decision to subordinate every law and action by political branches to the Constitution. In *Mwangi Wa Iria v Speaker Murang'a County Assembly*,[22] Justice Onguto asserted that '[o]ur Constitution is supreme. That statement as to the supremacy of the Constitution is not a slogan. The Constitution became supreme when it was adopted.'[23] Mutakha Kangu puts forward that constitutional supremacy is to be understood by 'distinguishing it from its polar opposite system of parliamentary sovereignty.'[24] Under the principle of parliamentary supremacy, he writes, the power of Parliament to make law cannot be questioned. On the other hand, under the principle of constitutional supremacy, the Constitution serves as a limit on 'all governmental authority including the power of parliament to legislate.'[25]

Unlike the constitutional dispensations before it, the Constitution of Kenya, 2010 has expanded *locus standi*, thereby enabling ordinary citizens a platform to hold political branches to account whenever there is a violation of the Constitution.[26] The Constitution of Kenya, 2010, variously

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[19] Sir Charles Newbold, 'The Role of the Judge as a Policy Maker' (1969) 2 *East African Law Review* 127, 133.
[20] Glinz op cit note 3.
[21] Constitution of Kenya, 2010, article 2.
[22] *Mwangi Wa Iria & 2 Others v Speaker Murang'a County Assembly & 3 Others* (2015) eKLR.
[23] Ibid para 64.
[24] John Mutakha Kangu *Constitutional Law of Kenya on Devolution* (2015) 19.
[25] Ibid.
[26] Constitution of Kenya, 2010, article 22(1)(2).

described as a transformative charter[27] is 'value oriented'.[28] Article 10 of the Constitution of Kenya, 2010 outlines national values and principles of governance binding on 'all state organs, state officers, public officers and all persons' as they apply or interpret the Constitution.[29] Courts have deployed these values and principles as textual constraints when reviewing the actions of political branches, a further demonstration of the renewed vigour with which courts in Kenya are today checking on the excesses of political branches. In *The Cabinet Secretary for the National Treasure and Planning & 4 others v Okiya Omtatah Okoiti & 52 others,*[30] the Supreme Court provided a guide on the restrictive approach courts should adopt in their interpretation and application of the values and principles embedded in article 10 of the Constitution:

> Courts should be careful to distinguish between values and principles on one hand, and normative rules on the other hand, to avoid overprescribing duties from principles and values which are by nature open-textured...It follows that the values and principles are optimising commands that allow duty bearers to come up with suitable measures for fulfilment of the obligations that they impose, without dictating definitive or specific actions that they ought to take

The significance and binding nature of the national values and principles was expounded by the Supreme Court in *In the Matter of Interim Independent Electoral Commission*[31] where the Court opined thus:

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[27] In Willy Mutunga 'The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court Decisions' (2015) 1 *Speculum Juris* 6, Retired Chief Justice Willy Mutunga noted that *'[i]n 2010 Kenya adopted a new modern transformative constitution that replaced both the I969 Constitution and the post-Colonial Constitution of 1963. This was the culmination of almost five decades of struggles that sought to fundamentally transform the backward economic, social, political, and cultural developments in the country'. See, also, In the Matter of the Speaker of the Senate & Another (2013) eKLR, para 51.*

[28] *Peter Solomon Gichira v Independent Electoral and Boundaries Commission & Another* (2017) eKLR, para 37

[29]Constitution of Kenya (2010), article 10(2): 'The national values and principles of governance include; (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; (c) good governance, integrity, transparency and accountability; and (d) sustainable development.'

In the case of *Centre for Rights Education and Awareness & 2 Others v Speaker of the National Assembly & 6 Others* (2017) eKLR Justice Mativo observed that: 'The Constitution of Kenya gives prominence to national values and principles of governance. Article 10 (2) of the Constitution provides the national values and principles of governance which include the rule of law, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised. These principles are binding on all State organs, State officers, public officers and all persons whenever any of them applies, or interprets, the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions. Perhaps realizing its own ambitious project, and hence its vulnerability and fragility, the Kenyan Constitution sets, through the judiciary, its barricades against destruction of its values and weakening of its institutions by forces external to itself. Such is the responsibility of Kenya's judiciary.'

[30] *The Cabinet Secretary for the National Treasury and Planning & 4 others v Okiya Omtatah Okoiti & 52 others* Supreme Court Petitions Nos. E 031, E032 & E033 of 2024.

[31] *In the Matter of Interim Independent Electoral Commission* (2011) eKLR.

> The values and principles articulated in the Preamble, in Article 10, in Chapter 6, and in various provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya.

The following part of the chapter delves into the doctrine of separation of powers as practiced in Kenya.

2.3 Separation of Powers

Kenya has embraced the Montesquian model of separation of powers which creates three separate and distinct branches of government: the executive, judiciary, and parliament. The doctrine is implied in Kenya's constitutional architecture and design. This position was affirmed by the High Court in *Trusted Society of Human Rights v The Attorney General and others*[32] in the following manner*:*

> Although the Kenyan Constitution contains no explicit clause on separation of powers, the Montesquieuian influence is palpable throughout the foundational document, the Constitution, regarding the necessity of separating the Governmental functions.

The Constitution has circumscribed the functions of the three branches and put in place mechanisms towards ensuring that none of the branches acts in excess of its power.[33] The doctrine, as applied in Kenya, frowns upon the absolutism of any branch within its territory. In *Wilfred Manthi Musyoka v Machakos County Assembly & 4 others*,[34] Justice Odunga observed that 'the spirit and vision behind separation of powers is that there be checks and balances, and that no single person or institution should have a monopoly of all powers.'[35] The judiciary checks on the excesses of the Executive and Parliament through its power of judicial review.[36] Aware of the humongous power that rests on the shoulders of the judiciary through the exercise of its power of judicial review, Lady Justice Ndung'u warned against judicial tyranny through unprincipled incursions into terrain reserved for coordinate branches:

> The system of checks and balances that prevents autocracy, restrains institutional excesses and prevents abuse of power apply equally to the Executive, the Legislature and the Judiciary. No one arm of Government is infallible, and all are equally vulnerable to the dangers of acting ultra

[32] *Trusted Society of Human Rights v The Attorney General and others* (2012) KEHC 2480 (KLR).
[33] Constitution of Kenya, 2010, article 94, article 131 and article 159.
[34] *Wilfred Manthi Musyoka v Machakos County Assembly & 4 Others* (2018) eKLR.
[35] Ibid para 48.
[36] Emanuel Kibet & Kimberly Wangeci 'A Perspective on the Doctrine of the Separation of Powers based on the Response to Court Orders in Kenya' (2016) 1(1) *Strathmore Law Review* 1(1) 220 at 224.

> vires the Constitution. Whereas the Executive and the Legislature are regularly tempered and safeguarded through the process of regular direct elections by the people, the discipline of an appointed and unelected Judicial arm of Government is largely self-regulatory. The parameters of encroachment on the powers of other arms of Government must be therefore clearly delineated, [their] limits acknowledged, and restraint fully exercised. It is only through the practice of such cautionary measures, that the remotest possibility of judicial tyranny can be avoided.[37]

The unprincipled incursions Lady Justice Ndung'u cautions against arise when courts interpret their institutional authority and the text of the Constitution in an expansive manner that disregards the constitutional power and discretion committed to political branches. Such an approach to interpretation has the effect of unjustifiably disregarding 'the doctrine of separation of powers.'[38] To cure this, courts have taken cognizance of the political question doctrine, a tool of restraint deployed by the court when faced with constitutional questions whose determination is committed to political branches to the exclusion of the courts. The following part of the chapter delves into the place of the political question doctrine in Kenya and the constitutionally permissible intrusion into terrain reserved for the Executive and Parliament.

2.4 The Place of the Political Question Doctrine in Kenya

The political question doctrine is not a novel legal phenomenon in Kenya. Courts have had occasion to pronounce themselves on the doctrine over the years. One of its earliest considerations was in *Republic v Chief Justice of Kenya & 6 others Ex-parte Moijo Mataiya Ole Keiwua.*[39] The applicant in the case was a Judge of the Court of Appeal. He was suspended from office and a tribunal appointed by the President to investigate his conduct following a report commissioned by the Chief Justice that implicated him in 'allegations of corruption, misbehaviour, and unethical conduct.'[40] He instituted judicial review proceedings against the tribunal seeking orders barring the tribunal from investigating his conduct. The respondents filed an objection challenging the jurisdiction of the High Court to hear and determine the application. Their objection to the jurisdiction of the High Court over the tribunal was two-fold. First, they argued that the Chief Justice in the exercise of his administrative role as head of the judiciary could not be questioned by the High Court. Secondly, they contended that

[37] *Commission for the Implementation of the Constitution v National Assembly of Kenya, Senate & 2 Others* (2013) eKLR.
[38] Kibet & Wangeci op cit note 36 at 226.
[39] *Republic v Chief Justice of Kenya & 6 Others Ex-parte Moijo Mataiya Ole Keiwua* (2010) eKLR.
[40] Ibid.

questioning 'the procedure adopted by the tribunal' was an attack on the Executive. Rejecting the argument that the case raised a non-justiciable political question, the court held:

> There is a view that when acting politically and not as provided for and prescribed by the law all executive appointees' actions can only be examined politically and not legally because their acts are covered and provided for under the political question doctrine which states that being political acts they are non-justiciable and not reviewable by a court. It is our view that when the law proceeds to impose on the executive legally prescribed duties and responsibilities, the performance of which depends upon the enhancing or handling of public interest, the political officers of the executive must act consistently and according to the laws of the land.

The idea that the actions of political branches were unexaminable perished with this judgment. The Court aligned itself with the position taken in this thesis on the interaction of the court with political questions. The court bears a twin duty, firstly, to interpret the Constitution and determine whether the constitutional power to make a determination is vested in a political branch, and secondly, to establish whether the political branch has acted within the textual constraints of its power.

In *Jesse Kamau & 25 Others v Attorney General*,[41] the Court was called upon to find the inclusion of Kadhi courts[42] in the Constitution of Kenya, 1969 and the Bomas draft[43] as unconstitutional. The applicants argued that such inclusion offended their right to equal protection of the law and the doctrine of separation of state and religion. A preliminary objection was raised alleging the case raised a political question unsuitable for determination by the court. The respondent argued that the question of the establishment of Kadhi courts was committed to Parliament and the Executive by the Constitution. They further argued that the draft document was before Parliament and the Constitution of Kenya Review Commission, which bodies were better suited to consider the grievances raised by the applicants. The court placed reliance on its jurisdiction to interpret the Constitution and the supremacy clause under section 3 of the repealed Constitution to find that the question before it was justiciable.

> The High Court has thus a wide and unfettered discretion in the interpretation of the Constitution and review of the actions of any authority or person exercising any function under the Constitution or other law. For instance, it would be quite within the jurisdiction of the High Court to affirm and declare that in the process of calling and conducting a new constitutional

[41] *Jesse Kamau & 25 others v Attorney General* (2010) eKLR.
[42] Courts in Kenya that attend to the 'rights of inheritance, family and succession for Muslims.'
[43] Draft Constitution of Kenya (Bomas Draft), 2004.

> convention or conference, the application of the two-thirds majorities or other simple majorities would be, or would not be carried, in accordance with the applicable law.[44]

Despite the fact that a constitutional power may be vested in a political branch, courts are increasingly showing readiness to police the constitutional limits of that power. One may rightly argue that the earlier impenetrable veil of non-justiciability of political questions no longer applies in Kenya.[45] This was affirmed by the High Court in *Kenya Human Rights Commission & 3 Others v Attorney General & 3 Others; Council of Governors & 2 Others*[46] where the court held:

> These decisions leave no doubt that the jurisdiction of this court to interpret the Constitution cannot be impeached on the basis that, somehow, the question raised is a political question and for that reason, the court is debarred from entertaining it.

In *In the Matter of the Speaker of the Senate & another,*[47] the Supreme Court by a majority judgment declined an invitation to dismiss a reference filed before it on account of the political question doctrine. The Court held that institutional comity cannot be invoked to stifle the court's duty to interpret the Constitution.[48] The Court, however placed a limit on its interpretive power in the following manner:

> If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution.[49]

Three positions can be gleaned from the court's holding. First, the duty of the court in disputes that impact on the sensitive area of separation of power is to police the procedural limits of the constitutional power committed to a political branch. Secondly, the court must maintain fidelity to the text of the Constitution when identifying the constitutional constraints on the power exercised by political branches. Thirdly, normative standards created by Parliament in the form

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[44] Lawrence B Solum (2017) The Constraint Principle: Original Meaning and Constitutional Practice. *Social Science Research Network.* (January, 1) at 33.
[45] *Anthony Miano & others v Attorney General & others* (2021) eKLR
[46] *Kenya Human Rights Commission & 3 Others v Attorney General & 3 Others; Council of Governors & 2 Others* (Interested Parties) (2020) eKLR.
[47] *In the Matter of the Speaker of the Senate & Another* (2013) eKLR.
[48] Ibid para 62.
[49] Ibid.

of standing orders are binding on the court unless a textually identifiable constitutional constraint has been transgressed. These three positions, I argue, call for a narrow interpretation of the court's institutional authority and the text of the Constitution. Such an approach does not sit well with the finding by the High Court in *Jesse Kamau & 25 others v Attorney General*[50] asserting the wide and unfettered jurisdiction of the High Court. Flowing from the Supreme Court's holding, the court's jurisdiction is narrow and fettered in matters touching on the sensitive area of separation of powers.

The following parts of the chapter set out to explain the constitutionally permissible nature of intrusions into terrain reserved for the Executive and Parliament in Kenya.

2.5 Constitutionally Permissible Intrusions into Terrain Reserved for the Executive and Parliament

Political questions, which I define as constitutional questions arising in the course of litigation and whose determination the Constitution commits to political branches,[51] are reviewable in Kenya. The High Court in the exercise of its jurisdiction under article 165(3)(d)(ii) of the Constitution of Kenya, 2010 has consistently applied the two-pronged test advocated in this thesis. First, it has interpreted the Constitution to discern whether a constitutional question has been committed to a political branch for determination. Secondly, it has proceeded to establish whether the political branch has acted within the constitutional constraints on its power. In *Judicial Service Commission v Speaker of the National Assembly and 8 Others*[52] for instance, the Court held that the jurisdiction of the High Court under article 165(3)(d)(ii) of the Constitution of Kenya, 2010 empowers it to interrogate whether political branches have acted within the constitutional limits of their power. The Court noted that:

> The Constitution disperses powers among various constitutional organs. Where it is alleged that any of these organs has failed to act in accordance with the Constitution, then the Courts are empowered by Article 165(3)(d)(ii) to determine whether anything said to be done under the authority of the Constitution or any other law is inconsistent [with] or in contravention of the Constitution.[53]

[50] Supra note 40.
[51] Geoffrey Cowper and Lorne Sossin 'Does Canada Need a Political Question Doctrine' (2002) 16 *Supreme Court Law Review* 343, 344.
[52] *Judicial Service Commission v Speaker of the National Assembly & 8 Others* (2014) eKLR.
[53] Ibid para 121.

A similar position was adopted by the High Court in *Trusted Society of Human Rights Alliance & 2 Others v the AG & 2 Others*[54] where the Court held that:

> Given that the Constitution is supreme, every organ of state performing a constitutional function must perform it in conformity with the Constitution. Where the state fails to do so, the court as the ultimate guardian of the Constitution will point out the transgression.[55]

When applying the two-pronged test, judges must be conscious of the doctrine of separation of powers so as to avoid an impermissible intrusion into terrain reserved for political branches. The Constitution sets out the 'scope and methodology of its own interpretation.'[56] Article 259(d) urges an interpretation that 'contributes to good governance'. An inextricable connection exists between separation of powers and good governance. Thuwaiba Hussein writes 'if there is no separation of power there will be no rule of law and if there is no rule of law you cannot find good governance'.[57] In *Multiserve Oasis Company Ltd v Kenya Ports Authority & another,*[58] the High Court observed:

> The Constitution of Kenya, 2010, in its deliberate purpose of setting up a basis of *good governance* (Article 10), has instituted a setting of *separation of powers* (Article 1); donated the judicial authority to 'the courts and tribunals established by or under this Constitution' (Article 159(1)); and specified that 'justice shall be administered without undue regard to procedural technicalities" (Article 159 (2)(d).[59]

At the core of the clarion call for good governance is accountability. Article 159(1) of the Constitution, 2010 provides that judicial authority derives from the people. [60] The judiciary is, therefore, accountable to the people as it exercises judicial power. The people, by promulgating the Constitution 2010, agreed to a constitutional framework that dispersed power across three branches. The judiciary, therefore, remains accountable to the people by embracing an intrusion that respects the constitutional design to leave certain constitutional questions to political

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[54] Supra note 31.
[55] Ibid para 71.
[56] Willy Mutunga 'The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court Decisions' (2015) 1 *Speculum Juris* 6.
[57] Thuwaiba Hussein, *The Dimensions of The Doctrine of Separation of Power Towards Promotion of Good Governance in Tanzania* (unpublished Research, Mzumbe University, Dar es Salaam Business School, 2013)17.
[58] *Multiserve Oasis Company Ltd v Kenya Ports Authority & another* (2012) eKLR.
[59] Ibid.
[60] Kandet Kennedy Lenkamai 'Enhancing Judicial Accountability: An analysis of Kenya's legal, policy and institutional framework on performance management' (LLM Thesis, University of Nairobi, 2018) 9, 11, 30, 36, 40.

branches. An intrusion that disregards this very aspiration by the people hamstrings the separation of powers and, concomitantly, good governance.

The near limitless approach to interpretation advocated by former Chief Justice Willy Mutunga in *In the Matter of the Speaker of the Senate & Another*[61] will often result in an impermissible intrusion into the terrain of political branches under the guise of the principle of constitutional supremacy:

> In my opinion, this provision grants the Supreme Court a near-limitless and substantially-elastic interpretive power. It allows the Court to explore interpretive space in the country's history and memory that, in my view, goes even beyond the minds of the framers whose product, and appreciation of the history and circumstance of the people of Kenya, may have been constrained by the politics of the moment.[62]

One of the facets of an expansive approach to the interpretation of the court's institutional authority is a substantive review/merit-based review. This approach positions the court in an appellate position over political branches with the result that the decisional autonomy committed to political branches by the Constitution is unjustifiably usurped by the court. The Court of Appeal has come out strongly against a substantive review of the decisions of political branches as will become evident in the discussion of the *Mumo Matemu* case.[63]

This chapter makes the case for a narrow interpretation of the court's institutional authority and the text of the Constitution in cases that impact on the sensitive area of separation of powers. Such an approach expresses an awareness of the constitutional design to leave the resolution of certain constitutional questions to political branches. It avoids the pitfall judges fall into when they introduce constraints foreign to the Constitution as a basis for upsetting political determinations.[64]

The following part of the chapter conducts an analysis of cases where courts have received an invitation to intrude into areas committed to Parliament and the Executive. The section will

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[61] *In the Matter of the Speaker of the Senate & Another* (2013) eKLR.
[62] Ibid para 157.
[63] *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR: 'The High Court is entitled to conduct a review of appointments to State or Public Office to determine the procedural soundness as well as the appointment decision itself to determine if it meets the constitutional threshold. However, such review by the court is not an appeal over the opinion nor does it amount to a "merit review" of the decision of the appointing body. We find that the High Court misapplied the rationality test in adopting a standard of review antithetic to the doctrine of separation of powers.'
[64] Cecil Yongo 'Constitutional Interpretation of Rights and Court Powers in Kenya: Towards a More Nuanced Understanding' (2019) 27(2) *African Journal of International and Comparative* Law 203.

analyse cases where the High Court and Court of Appeal were invited to review impeachment proceedings and presidential appointments. Through the analysis of these cases, the chapter will establish what entails a permissible intrusion into terrain reserved for political branches.

2.6 Impeachment of Governors

Kenya's structure of Government is devolved, comprising an Executive at the national and county level. The Legislative arm is equally devolved, consisting of Senate at the national level and the County Assembly at the county level. At the national level, the Executive is headed by the President while at the county level, the Executive is headed by a Governor.

The Constitution of Kenya, 2010, and the County Government Act[65] make provision for the removal of Governors from office by way of impeachment.[66] This role is vested in the County Assembly and the Senate. The process followed in the removal of a Governor from office is initiated in the County Assembly. A member of the County Assembly, with the support of a third of the members, moves a motion for the removal of a Governor from office for consideration by the County Assembly. In the event the motion is supported by two thirds of the members, the speaker of the County Assembly notifies the speaker of the Senate who will in turn convene a sitting of the Senate to hear the charges levelled against the Governor. Senate may thereafter appoint a select committee to investigate the charges levelled against the Governor. In the event the select committee confirms the charges against the Governor, it presents its report to a sitting of the Senate for a vote. Section 33(7) of the County Government Act provides that 'If a majority of all the members of the Senate vote to uphold any impeachment charge, the governor shall cease to hold office.'

A textual reading of article 181(2) of the Constitution of Kenya, 2010 alongside section 33(7) of the County Government Act, positions the Senate as the final umpire in the impeachment process of Governors. One would therefore argue that the question of impeachment of Governors under the Kenyan context is a non-justiciable political question.[67] But the High Court, as will become evident in the discussion that follows, has taken the position that the impeachment of Governors from office is carried out under the authority of the Constitution. Consequently, the High Court is vested with jurisdiction under article 165(3)(d)(ii) of the Constitution of Kenya, 2010 to inquire into whether the County Assembly and Senate have

[65] County Governments, Act No. 17 of 2012.
[66] Constitution of Kenya, 2010, article 181 and the County Governments, Act No. 17 of 2012, section 33.
[67] Impeachment is widely categorized as a political question in many jurisdictions.

acted within the constitutional constraints of their power in arriving at a decision to remove a Governor from office.

2.6.1 Martin Nyaga Wambora Case

This was the pioneer case on the question of impeachment of governors in Kenya.[68] Martin Nyaga Wambora, the 1st petitioner, was elected into office on March 4, 2013, as the governor of Embu County. On 16th January 2014, a member of the County Assembly tabled a motion for his impeachment on the grounds of abuse of office and gross violation of the Constitution. The motion was debated and passed without the County Assembly affording Wambora a hearing.[69] The resolution impeaching him from office was thereafter forwarded to the speaker of the Senate. Senate proceeded to hear the charges against the governor and a select committee of the Senate was formed to investigate the charges. The committee found him 'liable for violation of the Public Finance Management Act 2012 the Public Procurement and Disposal Act 2005 and the Constitution of Kenya, 2010, particularly Articles 73 and 179(4) in relation to procurement of goods and services and also Public Finance Management Act, 2012'.[70] Senate subsequently passed a vote removing him from office.

One of the legal issues the High Court was invited to determine was 'whether impeachment is a political question and therefore non-justiciable.'[71] The Court, citing with approval the concurring decision of Justice Stevens in *Walter Nixon v United States*,[72] opined that a political question arises where the Constitution vests in one of the political arms the *'final responsibility for interpreting the scope and nature of such a power.'*[73] This 'final responsibility' was, however, not cast in stone. The Court adopted the majority decision in *Walter Nixon v United States* that rendered reviewable political questions that transgress 'identifiable textual limits.'[74]

The Court proceeded to circumscribe its twin role in the impeachment process: determining whether the procedure stipulated in the Constitution and County Government Act was followed in the removal of the petitioner from office, and determining whether the process violated the petitioner's fundamental rights and freedoms.[75] Even as the Court admitted it had jurisdiction

[68] *Martin Nyaga Wambora & 4 Others v Speaker of the Senate & 6 Others* (2014) eKLR.
[69] Para 298.
[70] Para 39.
[71] Para 192.
[72] *Walter Nixon v United States* 1993 (506) U.S 224 (S.CT).
[73] Para 204.
[74] Para 206.
[75] Para 208.

to hear and determine the petition, it reminded itself not to intrude impermissibly into the terrain of the County Assembly and Senate. The Court held that a review of the merits of the decision arrived at by the Senate and County Assembly would position the Court in an appellate position over the Senate and County Assembly, thereby upsetting the text of the Constitution, which assigns each branch its own duties.[76]

It was the petitioner's argument that the procedure employed at the County Assembly denied him a hearing, thereby violating his right to fair administrative action under article 47 of the Constitution.[77] The petitioner further argued that the 'accusation' levelled against him 'did not meet the threshold established under article 181 of the Constitution as they were not described as gross'.[78] The Court rejected the latter argument. The Court held that the constitutional power to determine the meaning of gross violation of the Constitution, the nature and weight of the charges against the petitioner was vested in the Senate and County Assembly.[79] Where the process was concerned, however, the Court found that the impeachment process at the County Assembly was conducted in violation of the County Assembly's standing order No. 64(1)(b), which 'requires the County Assembly to hear a person on grounds of removal from office, or in such similar circumstances, the County Assembly shall hear the person.'[80]

Dissatisfied with parts of the judgment of the High Court, Wambora filed an appeal at the Court of Appeal.[81] He was particularly dissatisfied with the High Court's finding that the County Assembly and Senate were reposed with the sole power to determine whether the charges levelled against him met the constitutional threshold of gross violation of the Constitution.[82]

Two findings by the Court of Appeal are relevant to this study. The Court, noting that the Constitution fails to define what amounts to gross violation of the Constitution, proceeded to determine the meaning of this term.[83] The second significant finding was that it was 'incumbent upon the High court to determine if the facts in support of the charges against a governor' met 'the threshold in article 181 of the Constitution.'[84] I shall return to these findings later in the discussion.

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[76] Para 254.
[77] Para 239.
[78] Para 240.
[79] Para 245.
[80] Para 305.
[81] *Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 others* (2014) eKLR.
[82] Para 14.
[83] Para 46
[84] Para 53.

In light of the textual commitment of the role of impeachment to the Senate and County Assembly, the jurisdictional challenge filed before the High Court did not come as a surprise.[85] It was expected that, in keeping with the traditional exposition of the political question doctrine, the High Court and Court of Appeal would have found the case non-justiciable.[86] Both Courts however correctly interpreted the High Court's jurisdiction under article 165(3)(d)(ii) of the Constitution as conferring on it the power to review an impeachment process conducted under the aegis of article 181 of the Constitution. Their point of departure was on the approach to the interpretation of article 181 of the Constitution.

Article 181(1)(a) of the Constitution assigns the power to determine whether a governor has grossly violated the Constitution in the Senate and County Assembly. By design, the Constitution fails to describe what constitutes a gross violation of the Constitution.[87] The implication of this then becomes that the Senate and County Assembly have a constitutional obligation to supply normative standards that are to become binding on the Court in the determination of whether a governor has grossly violated the Constitution. The normative standards developed by the Senate and County Assembly can only be set aside in the event they violate textually identifiable constitutional constraints. In the instant case however, neither the Senate not the County Assembly had created a normative framework that defined what amounted to gross violation of the Constitution. Noting this lacuna, the Court of Appeal stepped in and took upon itself the duty of supplying determinacy to article 181 of the Constitution.

The approach taken by the High Court was different. The Court expressed an awareness of the institutional limitations on the Court in the face of a constitutional design that divested the Court of the power to supply normative standards to the impeachment question. By narrowly construing its authority under article 165(3)(d)(ii) of the Constitution in a manner that was sensitive to the power of Senate and County Assembly under the impeachment process, the High Court conducted what this chapter describes as a permissible intrusion. The Court focused on policing limits that are discernable from a textual reading of the Constitution, the County Government Act, and Standing orders.[88] Its finding that the governor was not afforded a

[85] Wamuti Ndegwa 'Restoring the Limits of Judicial Adjudication: Focus on Impeachments' (2020) 4(5) *Journal of Conflict Management and Sustainable Development* 73 at 79.
[86] Ibid.
[87] Ibid at 81 "there was an absence of 'judicially discoverable and manageable standard for determining whether the members of the County Assembly had serious reason for believing that the governor committed a crime, abused office, or engaged in gross misconduct…"
[88] Yongo op cit note 62 at 220.

hearing was informed by a procedural limit contained in the County Assembly's standing orders.[89] This constraint was plainly evident in the text of the standing orders which the Court applied in conducting a review of the impeachment process.

The invitation to the High Court was similar to one extended in *Nancy Baraza v Judicial Service Commission & 9 Others.*[90] The Court was invited to make a determination on whether the allegations against the former Deputy Chief Justice amounted to gross misconduct under article 168(1)(e) of the Constitution. The Court rejected this invitation, finding that the Constitution had committed that role to the tribunal formed to investigate her conduct:

> It is not for this Court or the Commission to find that the allegations made against the petitioner did not amount to gross misconduct. In fact, according to Prof Yash Pal Ghai's 'Kenya Constitution: An instrument for change" cited by the Petitioner 'whether a conduct is gross or not will depend on the matter as exposed by the facts' which facts it is the duty of the tribunal to establish.*[91]*

Whereas the High Court refrained from supplying determinacy to article 181 of the Constitution, the Court of Appeal stepped in and took upon itself the duty of supplying determinacy.[92] Having defined what constitutes gross violation of the Constitution, the Court went further and asserted the power of the High Court to evaluate whether the charges against the governor met the constitutional threshold of gross violation of the Constitution.

The Court of Appeal's finding squarely fits into what Andrea Munyao describes as the 'over supervision of the role of one branch by another'.[93] He writes that over-supervision results when courts operate outside the 'checks and balances' anticipated by the separation of powers and usurp roles committed to coordinate branches. As the Court of Appeal observed in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others,*[94] 'such powers are, however, not a license to take over functions vested elsewhere'.[95]

Wamuti Ndegwa argues that an interpretation of article 181(1)(a) of the Constitution that confers a court with the power to determine whether the grounds for the removal of a governor

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[89] Para 309.
[90] *Nancy Baraza v Judicial Service Commission & 9 Others (2012) eKLR.*
[91] Ibid para 75.
[92] Para 46
[93] Andrea Munyao, 'An Inquiry into the Limits of Judicial Intervention in the Impeachment Process of Governors in Kenya (2020) 5 (1) *Strathmore Law Journal* 139 at 156.
[94] Supra note 63.
[95] Ibid.

from office have been satisfied 'creates juristocracy and constitutional chaos in the political life of the country.'[96] His finding is informed by a literal reading of the text of the Constitution that commits the power to remove a governor in the Senate and County Assembly.

I submit that in the absence of a normative framework that defined gross violation of the Constitution, it was not open to the Court of Appeal to assume the role of supplying determinacy to the term. By doing so, the Court of Appeal usurped a role committed to the Senate and County Assembly, thereby impermissibly intruding into their terrain. Whereas the approach taken by the High Court was commendable, the Court, besides refraining from supplying determinacy to article 181 of the Constitution, ought to have compelled the Senate and County Assembly to develop a normative framework that defined gross violation of the Constitution. The approach taken by the Court of Appeal was one that adopted an expansive interpretation of its authority and the text of the Constitution. The result, an impermissible intrusion resulted in the terrain of the Senate and County Assembly. On the other hand, the approach taken by High Court was one that adopted a narrow interpretation of its authority and the text of the Constitution. The result, a permissible intrusion resulted in the terrain of the Senate and County Assembly.

While the *Martin Nyaga Wambora* case addressed the legality of the impeachment of Wambora, another significant case was litigated alongside *Martin Nyaga Wambora,* which I shall discuss briefly. Prior to the impeachment of Martin Wambora, the High Court had issued an order stopping the impeachment process from proceeding before the County Assembly. This order was however not acted upon by the Speaker and Clerk of the County Assembly of Embu, leading to a finding by the High Court that the Speaker and Clerk were guilty of contempt. In *Mate & another v Wambora & another,*[97] the Supreme Court reversed the finding by the High Court and Court of Appeal that the two officials were guilty of contempt. In finding that neither the Speaker nor the Clerk of the County Assembly of Embu had acted in contempt of Court, the Supreme Court countermanded the authority exercised by the High Court in injuncting the impeachment process before the County Assembly, finding that 'procedural steps applicable to impeachment proceedings had not been bypassed.' The Supreme Court found that any

[96] Ndegwa op cit note 85.
[97] Mate & another v Wambora & another (Petition 32 of 2014) [2017] KESC 1 (KLR) (Civ) (15 December 2017) (Judgment)

intervention by the court in the impeachment process must come at the tail end of the impeachment process, after Senate has passed a resolution impeaching a Governor from office.

This case provided the first opportunity for the Supreme Court to pronounce itself on the impeachment process. The Supreme Court upheld the impeachment procedure and timelines laid down in the *County Government Ac*t and the County Assembly of Embu Standing Orders as a limit to the seemingly wide and expansive jurisdiction of the High Court under article 165(3)(d)(ii) of the Constitution to intrude into the impeachment process. With this finding, the Supreme Court demonstrated an awareness of the institutional limits of its authority in light of the lawful authority of the County Assembly to discharge its constitutional power to impeach a sitting Governor from office.

Significantly, the Supreme Court found the Standing Orders of the County Assembly regarding the timelines within which an impeachment process was to be concluded as binding on it as they had not transgressed an identifiable constitutional edict. The Judgment of the High Court and the Court of Appeal, on the other hand, which found the Speaker and Clerk of the County Assembly of Embu guilty of acting in contempt of court, demonstrates an expansive reading of the Court's institutional authority in a manner that runs roughshod the institutional authority of coordinate branches textual support derived from the Constitution.

2.7 The exercise of Presidential power

The exercise of presidential power in the making of constitutional appointments was challenged in the case of *Trusted Society of Human Rights Alliance v Attorney General & 2 Others.*[98] The High Court,[99] in the case, conducted what I will argue was an impermissible intrusion into terrain reserved for the Executive and Legislative branches through an application of a standard of review antithetical to the doctrine of separation of powers. The High Court decision was, however, reversed by the Court of Appeal. The Court of Appeal's decision, as will become evident, embraced a narrow interpretation of the Court's authority and the text of the Constitution in a manner that resulted in a permissible intrusion into terrain occupied by the Executive and Parliament.

[98] Supra note 32.
[99] Ibid.

2.7.1 Mumo Matemu case

The petition was filed by Trusted Society of Human Rights Alliance challenging the nomination and subsequent appointment of Mumo Matemu as chairperson of the Ethics and Anti-Corruption Commission.[100] The petitioner contended that Matemu did not meet the constitutional threshold for appointment to office. The brief facts of the dispute are as follows: the President, pursuant to Section 6 of the Ethics and Anti-Corruption Commission Act, constituted a selection panel to recruit a chairperson of the Ethics and Anti-Corruption Commission.[101] The selection panel was empowered under section 6(5)(a) of the Act to determine whether applicants for the position of chairperson met the constitutional and statutory threshold for appointment. Following the interviews, the panel recommended three names to the President for nomination as chairperson of the Commission. The President, in consultation with the Prime Minister, nominated Matemu and sent his name to Parliament for vetting and approval.[102] In line with parliamentary procedure, his name was then submitted to the Departmental Committee on Justice and Legal Affairs. The Committee found him 'unfit' to hold office and subsequently tabled a report before a sitting of the house.[103] Parliament debated the contents of the report and eventually rejected the recommendations of the parliamentary committee.[104] Parliament approved the name of Matemu for appointment into office. He was later appointed into office by the President to the position of chairperson of the Ethics and Anti-Corruption Commission.

An objection was raised against the jurisdiction of the Court to hear and determine the dispute on the basis that the exercise of jurisdiction over the dispute would amount to 'an unlawful interference with the powers vested by the Constitution on the Executive and the Legislature.'[105] Although the Court admitted that the doctrine of separation of powers required it to 'show deference to the independence of the Legislature…as well as accord the Executive sufficient latitude to implement legislative intent,' it found that its interpretive role allowed it an intrusion into terrain reserved for elected branches.[106]

[100] Para 1.
[101] Para 6.
[102] Para 7.
[103] Ibid.
[104] Para 8.
[105] Para 60.
[106] Para 64.

The High Court conceded to the constitutional design to leave the 'vetting of appointees to the Commission to Parliament' and the 'appointment to the office' to the Executive.[107] It however laid down two aspects of the law that must be satisfied for the vetting and nomination process to meet constitutional muster: a procedural test and a substantive test. While the procedural aspect limited itself to the procedure to be 'followed for the appointment to be constitutionally valid',[108] the substantive aspect required that the appointee meets 'the constitutional threshold; and qualifications for appointment.'[109] The Court placed reliance on the South African Supreme Court of Appeal case in *Democratic Alliance v The President of the Republic of South Africa & 3 Others*[110] in finding that it had an obligation to determine whether the appointee was a 'fit and proper' person, and in doing so, '*interrogate* whether the appointing authority undertook a "proper inquiry" before pronouncing whether the appointee has reached the constitutional threshold for appointment.'[111]

To determine whether the procedural and substantive aspects of the law had been satisfied, the Court applied the rationality and reasonableness tests.[112] The Court found that the two tests preserve the 'constitutional design of separation of powers.'[113] However, in this regard, the Court erred: the two tests in the manner deployed constituted the High Court as an appellate body over the decision of the President and National Assembly, thereby trampling upon the very constitutional design of separation of power it sought to preserve.

In determining whether the procedural aspect of the law was satisfied, the High Court found that merely complying with the procedural steps contained in article 132(2) of the Constitution and section 6 of the Ethics and Anti-Corruption Commission Act was not sufficient for an appointment to pass constitutional muster. To the Court, 'a proper inquiry into pertinent issues related to the appointment which were known to the appointing authority' must be conducted.[114] The Court found that although allegations were presented before the Executive and Legislature concerning the unsuitability of the Matemu, a proper inquiry was not conducted into the allegations:

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[107] Para 73.
[108] Ibid.
[109] Para 77.
[110] *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC).
[111] Para 74.
[112] Ibid.
[113] Para 78.
[114] Para 88.

> However, what we are prepared to hold at this point is that the allegations are serious enough and sufficiently plausible to warrant any reasonable person who is charged with the constitutional responsibility of assessing the integrity or suitability of the Interested Party for an appointment to a State or public office, especially one which is as sensitive as the Chairperson of the Ethics and Anti-Corruption Commission, to conduct a proper inquiry before such an appointment. [115]

Para 94 of the judgement demonstrates the folly in the rationality and reasonableness tests as applied by the court. Even though the Court admitted that it could not make a definitive finding on whether or not the Executive and National Assembly had an opportunity to consider the adverse information presented against Matemu, it proceeded to find that there was no proper inquiry into his suitability. How could a Court make such a drastic finding that overturns the findings of coordinate branches which the Constitution deems institutionally competent in the absence of concrete evidence supporting their finding? This arguably points to a court that was substituting its value judgment for that of the two coordinate arms. Such an approach exhibits an expansive interpretation of its institutional authority in a manner that disregarded the constitutional power and discretion committed to the Executive and the National Assembly in the vetting and appointment process. The Court, it appears, had its own understanding of what a proper inquiry entailed and proceeded to apply it as a yardstick in measuring the efficacy of the inquiry conducted by the Executive and National Assembly.

The Court made a further finding that the appointment of Matemu failed the substantive aspect of the law. The rationality test applied by the Court was 'whether a reasonable person or organ would plausibly make the same decision after applying the constitutional criterion.'[116] In light of the integrity questions that had been levelled against Matemu, the Court found his appointment to have failed the substantive test. To pass the test of integrity, according to the Court, a person must not have 'unresolved questions about his honesty, financial probity, scrupulousness, fairness, reputation, soundness of his moral judgment or his commitment to the national values enumerated in the Constitution.'[117] What is not evident in the Court's judgement is the normative standard the Executive and Legislature supplied to the constitutional requirement of integrity. This is crucial in light of the fact the Constitution, by its design, entrusted the Legislature and the Executive to determine whether an appointee met

[115] Para 93.
[116] Para 98.
[117] Para 107.

the threshold of integrity. In the absence of normative standards, we see the court creating judicially prescribed standards and applying them in supplanting the value judgment of the Executive and Legislature with its own. Where there is an evident absence of normative standards, I submit that it is not open to the court to create normative standards; the Court ought to have directed the National Assembly to create a normative framework that defines who a person of integrity is and what level of inquiry ought to have been conducted during the vetting process.

Following the judgment of the High Court, which nullified his appointment, Matemu filed an appeal at the Court of Appeal.[118] Amongst the questions the Court was invited to determine was whether 'the High Court in its rationality test misapplied the doctrine of separation of powers thereby usurping the powers and functions of other arms of government.'[119] The appellant argued that 'the High Court misapplied the doctrines of separation of powers and constitutional supremacy in conducting an intrusive standard of review and setting aside an appointment by other branches of Government.'[120] According to the appellant, a review by the Court of the appointment process and the legality of the 'appointment decision' amounted to an impermissible 'merit review.'[121]

Aware that the case impacted on separation of powers, the Court of Appeal was quick to caution 'there must be judicial, legislative and executive deference to the repository of the function.'[122] The Court rejected the application of the rationality and reasonableness tests by the High Court, finding that such a standard is reduced into 'an inquiry whether a reasonable person would not have reached the determination in question'[123] thereby rendering the test 'subjective' and constituting the court as an 'appellate forum over the opinion of the other branches of government.'[124] The Court held that the proper standard of review to be applied 'must be deferential.'[125] It proceeded to find that the tests of rationality and reasonableness, as applied by the High Court, failed to accommodate the doctrine of separation of power.[126]

[118] Supra note 63.
[119] Para 23.
[120] Para 45.
[121] Ibid.
[122] Para 49.
[123] Para 53.
[124] Ibid.
[125] Para 56.
[126] Para 61.

The Court of Appeal applied the means-ends rationality test, finding that such a test addressed the question of whether the 'process had a clear nexus with a determination that the candidates meet the objective criteria established in law rather than a judgment over the subjective state of mind of the decision makers.'[127] The Court of Appeal found this test to be a fact-dependent objective test.[128] The Court of Appeal distinguished the case of *Democratic Alliance v The President of the Republic of South Africa & 3 Others*[129] as applied by the High Court in finding Matemu unsuitable for office. The Court of Appeal found that unlike the Kenyan High Court's decision, the South African Constitutional Court had before it 'conclusive evidence from reports of a commission of inquiry and the Public Service Commission, both in which the appointee testified on oath, and the opposing affidavit of the President', which material was disregarded by the President. To the Court of Appeal, the Constitutional Court in *Democratic Alliance v The President of the Republic of South Africa & 3 Others*[130] relied on 'cogent' and 'tested evidence' in its finding on the suitability of Mr. Simelane to hold office.[131]

On the finding by the High Court of procedural impropriety, the Court of Appeal found that no evidence had been submitted before the High Court to substantiate the claim that no 'proper inquiry' on Matemu's suitability had been conducted.[132] The Court of Appeal found that having failed to meet the evidentiary threshold, a finding of procedural impropriety in the vetting and approval process was unsustainable.

As a demonstration of the expansive way in which the High Court interpreted its authority, the Court of Appeal faulted the High Court for concluding that there was no 'substantive debate' on the suitability of Matemu, finding the holding to have crossed a boundary.[133] The Court of Appeal highlighted the narrow approach the High Court ought to have appreciated its authority in the following manner:

> For the avoidance of doubt, we also reiterate that a court reviewing the procedure of a legislature is not a super-legislature, sitting on appeal on the wisdom, correctness or desirability of the opinion of the impugned decision-making organ. It has neither the mandate nor the institutional equipment for that purpose in our constitutional design. Moreover, the process cannot be wrong simply because another institution, for example the courts, would have conducted it

[127] Para 54
[128] Ibid.
[129] Supra note 111.
[130] Ibid.
[131] Para 62.
[132] Para 72.
[133] Para 75.

> differently. It must be accepted that the institutional environment is controlling on the manner in which an organ disposes of its issues.[134]

Unlike the High Court, which failed to interrogate the integrity questions raised against Matemu, the Court of Appeal elected to examine each allegation against the evidence presented before it. Their examination revealed that the material that had been placed before the High Court was 'not probative of any of the claims.'[135] Interestingly, the High Court 'noted the evidentiary shortcomings' but declined to pronounce itself on whether the allegation had been proven,[136] instead finding that the unresolved questions could only have been resolved by 'appropriate legal proceedings' tailored towards determining his culpability or otherwise.[137] How then is it possible that the High Court expected the Executive and the National Assembly to find Matemu unsuitable in the absence of cogent and determinative evidence? What would a proper inquiry have yielded, considering the fact that both the High Court and Court of Appeal found that the evidence presented by the petitioner was of little probative value? This reflects a Court that was not conscious of the institutional limits of its authority and, therefore, asserted itself in a non-deferential manner.

Although the High Court and Court of Appeal agreed on the commitment of the constitutional question of vetting and appointment to the National Assembly and the Executive, they disagreed on the appropriate standard of review to be employed in reviewing Matemu's appointment. While the High Court applied the rationality and the reasonableness tests, the Court of Appeal employed the rationality test within the 'means-end analysis and separation of powers framework,' finding it to be fact-dependent and objective, as opposed to the subjective test employed by the High Court. Unlike the High Court, which disregarded the facts presented before it, and opted for a subjective inquiry, the Court of Appeal focused on the facts to arrive at an objective finding. Both approaches, I, however, argue amounted to a merit review of the decision rendered by the National Assembly and the Executive.

The manner the rationality and reasonableness tests were fashioned and applied by the High Court constituted it as an appellate forum substituting its decision with that of the Executive and National Assembly. The Court of Appeal described the standard applied by the High Court

[134] Para 77.
[135] Para 86.
[136] Para 86
[137] Para 74.

as 'simplistic and subjective.' [138] The Court of Appeal was concerned with the High Court's conflation of the rationality and reasonableness tests which are distinctive in judicial practice.[139] Lauren Kohn warns against the incorporation of the grounds of review of administrative action into constitutional review, a pitfall the High Court falls into.[140] Unlike administrative review, where the court is invited to review the decision of an inferior body, constitutional review involves a review of the decision of a coordinate body, thereby calling for a more deferential approach.[141]

The rationality and reasonableness tests as applied by the High Court placed reliance on the reasonable man. But who is the reasonable man? Neither the Constitution nor the Ethics and Anti-Corruption Commission Act describe the reasonable man. And as the Court of Appeal pointed out in its judgment, it was unclear as to who the test applies to, 'the decision; the legislator or the bystander?'[142] There are no objective criteria to be applied in identifying the reasonable man. This means that the standard appeals to a subjective view as opposed to an objective view. Constitutional review of the determinations of political branches impacts the sensitive area of separation of powers. It is, therefore, imperative that an objective standard be applied, and this can only happen when the court remains conscious of the limits of its authority.

The impermissibly intrusive nature of the High Court's review becomes clear when one evaluates the Court's finding of procedural impropriety in the absence of material 'to sustain the claim touching on procedural propriety.' Secondly, the Court's finding that Matemu had not met the constitutional threshold for appointment on account of allegations which the High Court itself found to be inconclusive. The folly in the High Court's interpretation of its authority through a standard antithetical to the doctrine of separation of powers is best expressed by Cecil Yongo:

> Joel Ngugi and George Odunga interpreted the question before them broadly in favour of the constitutional principles of leadership, integrity and good governance but narrowly interpreted Matemu's constitutional right requiring accusations made to be proven before being taken into consideration and given effect.

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[138] Para 53.
[139] Para 56.
[140] Lauren Kohn 'The burgeoning constitutional requirement of rationality & the separation of powers: Has rationality review gone too far?' (2013) 130 *South African Law Journal* 810.
[141] Ibid.
[142] Para 57.

The standard as applied by the Court of Appeal had a materially different result owing to its deferential nature. While the High Court took it upon itself to supply determinacy to the normative framework under article 132(2) of the Constitution and Section 6 of the Ethics and Anti-Corruption Commission Act, the Court of Appeal restrained itself from doing so, instead, applying a standard of review that acknowledged the constitutional design to empower the selection committee and National Assembly to answer the substantive test as to whether Matemu met the constitutional and statutory threshold for appointment.

Walter Khobe writes that the Court of Appeal's decision essentially directed that 'courts should leave it to the other branches of government to make decisions on eligibility for appointment into public office.'[143] This paints a clear picture of the constitutional design embedded in article 132(2) of the Constitution and Section 6 of the Ethics and Anti-Corruption Commission Act. Whence did the High Court pluck the normative standards it employed in describing a person of integrity? The text of the Constitution confers discretion on the Executive and National Assembly to supply an answer to the constitutional question of integrity in the vetting and appointment process. Having noted an absence of determinacy in the Ethics and Anti-Corruption Commission Act, I submit that it was not open for the High Court to supply determinacy. The Court ought to have directed the National Assembly, through an amendment to the Act, to define the threshold of integrity and the nature of vetting process the National Assembly was to undertake.

Further evidence of the absence of fidelity to text in the interpretation rendered by the High Court lies in the fact that the Court found Matemu unsuitable for office on account of unresolved integrity questions, whereas article 99(3) of the Constitution provides that a person shall not be disqualified from vying for the position of a Member of Parliament 'unless all possibility of appeal or review of the relevant sentence or decision has been exhausted.' Members of Parliament and the chairperson of the Ethics and Anti-Corruption Commission are state officers bound by the provisions of leadership and integrity.[144] A narrow textual reading of the Constitution implies that unresolved integrity questions can only amount to a finding of unsuitability once a person has exhausted all avenues of appeal through a court process. The High Court was right in its finding that the unresolved integrity questions facing Matemu could

[143] Walter Khobe Ochieng 'Separation of Power in Judicial Enforcement of Governmental Ethics in Kenya and South Africa' (2018) 3 *Kabarak Journal of Law and Ethics* 44 at 49.
[144] Constitution of Kenya, 2010, article 250

only be resolved by 'appropriate legal proceedings,'[145] It was however grossly misdirected in finding him unsuitable for the office.

Walter Khobe makes the argument that the question of eligibility 'is not answerable in procedural terms, but in substantive terms, by finding out whether the appointees actually meet the constitutional standards'.[146] He rejects the Court of Appeal's abdication of its 'constitutional and judicial authority' under what he describes as a 'pretext of adhering to the doctrine of separation of powers to claim inability to intrude into the domain of the Executive.'[147] Khobe's approach diminishes the role of the co-equal arms of government in discharging their constitutional obligations. His approach is informed by the mistaken understanding that it is the sole duty of the court to supply meaning to each and every constitutional question.

Khobe further criticizes the Court of Appeal's interpretation of the Constitution as formalistic for 'envisaging only procedural scrutiny of the other arms of government.'[148] Khobe's criticism is informed by Kenya's past of Executive patronage. He shudders at the thought of a weakened Legislature and a judiciary afraid of pronouncing itself on the Constitution's vision.[149] To Khobe, the principles, values and ideals embodied in the Constitution can only be pronounced upon by the court. Khobe's approach that centralizes the interpretation of the Constitution in the institution of the judiciary is the very harbinger for impermissible intrusions into terrain reserved for political branches.

An overbearing judiciary cannot sit well with co-equal branches. It defeats the very purpose behind separation of powers. This means that courts should not pronounce themselves on the substantive terms of the eligibility of candidates. For good reason, the Constitution finds the Executive and National Assembly institutionally competent to determine whether a nominee met the constitutional threshold for appointment. A review must therefore be limited to identifying textual constrains violated by the Executive and the National Assembly in the appointment process. An invitation to the court to decide otherwise amounts to 'second

[145] Supra note 31 at para 74.
[146] Khobe op cit note 144 at 57.
[147] Ibid at 55.
[148] Ibid at 53.
[149] Ibid at 52-53.

guessing' the decision of co-equal arms which is outside the permissible review exercisable by the court in this instance.[150]

The High Court, decidedly oblivious to the statutory and constitutional limitations of its power in the vetting and approval process, embarked on a re-vetting of Matemu by re-evaluating the constitutional threshold for appointment in a subjective as opposed to objective manner. The High Court, it appears, took quite seriously the advice that 'courts must have teeth if they are to serve as the guardians of constitutionalism'[151] with disastrous ramifications on comity between the three branches of government. Courts must bite, but the degree of the bite must be within the realm of a constitutionally permissible intrusion. The Court of Appeal interpreted its authority and the text of the Constitution in a manner that upheld the decisional autonomy of the appointing authorities while at the same time policing the constitutional constraints on their power.[152] This approach resulted in what I describe as a permissible intrusion into terrain reserved for the Executive and National Assembly.

2.8 CONCLUSION

Courts have taken a consistent position in their interaction with political questions in Kenya by deeming them justiciable. They have demonstrated a readiness to review political questions for their consistency with the Constitution. In the exercise of its jurisdiction under article 165(3)(d)(ii) of the Constitution, the High Court has deployed the two-step inquiry when handling political questions: ascertain whether the constitutional power in issue has been committed to a political branch and whether the political branch has acted within the identifiable limits of that power. There is, however, an absence of consensus on the constitutionally permissible level of intrusion into terrain occupied by political branches. The High Court in *Martin Nyaga Wambora*[153] and the Court of Appeal in *Mumo Matemu*[154] were alive to the need for deference in cases touching on the sensitive area of separation of powers. The two Courts construed their authority in a narrow manner that was alive to the constitutional power committed to political branches. The narrow approach to the construction of their power resulted in what I describe as a permissible intrusion into the terrain of political branches. On the other hand, the Court of Appeal in *Martin Nyaga Wambora*[155] and the High Court in *Mumo*

[150] Ibid at 61.
[151] Supra note 31 at para 55.
[152] Yongo op cit note 62 at 222.
[153] Supra note 66.
[154] Supra note 61.
[155] Supra note 79.

Matemu[156] construed their authority and the text of the Constitution in an expansive manner resulting in what I describe as an impermissible intrusion into terrain reserved for political branches

[156] Supra note 31.

CHAPTER THREE: THE POLITICAL QUESTION DOCTRINE IN SOUTH AFRICA

3.1 INTRODUCTION

The South African judiciary remains a model judiciary across Africa on account of its fierce defence of the Constitution under the principle of constitutional supremacy. When carrying out its guardianship role over the Constitution, the Constitutional Court has often found itself conducting intrusions into terrain reserved for political branches. This chapter reviews the nature of these intrusions under two thematic areas, the exercise of presidential power and parliamentary processes. As will become evident, the Constitutional Court has largely adopted an expansive interpretation of its institutional authority and the text of the Constitution in a manner this chapter finds to amount to a constitutionally impermissible intrusion into terrain reserved for the Executive and Parliament.

3.2 Constitutional History

Like Kenya, South Africa's constitutional history documents the journey she has travelled from a past where the judiciary failed to hold political branches to account to a present where the exercise of power by political branches is subjected to the dictates of the Constitution. This background is necessary for understanding the evolution of the power of judicial review in South Africa through which courts continue to intrude into terrain reserved for political branches. These intrusions are described in this chapter as either permissible or impermissible. This chapter advances the argument that concerning matters of separation of powers within the framework of the political question doctrine, courts should first, acknowledge the institutional limits of their authority and, secondly, consistently adhere to a narrow textual interpretation of the Constitution which respects the plain meaning of constitutional text.

The era of accountability in South Africa was ushered in by the Interim Constitution and has continued under the Constitution of the Republic of South Africa, 1996 (Constitution of South Africa, 1996).[1] With the passage of the Interim Constitution, courts have played a more significant interpretive role on account of the principle of constitutional supremacy under which the acts of political branches are today reviewable.[2]

[1] Annie Singh and Moreblessing Bhero 'Judicial Law-Making: Unlocking the Creative Powers of Judges in Terms of Section 39(2) of the Constitution' (2016) 19 *Potchefstroom Electronic Law Journal* 6-9.
[2] Constitution of the Republic of South Africa, Act 200 of 1993, s 4.

South Africa has witnessed the enactment of five constitutional documents since the establishment of the Union of South Africa in 1910.[3] Her first Constitution, enacted in 1910 by the British Parliament, established the Union of South Africa by merging four British colonies: 'the Cape of Good Hope, Natal, Transvaal and the Orange River Colony'.[4] The 1910 Constitution which heavily mirrored the Westminster Constitution made no provision for a bill of rights and overtly limited the power of courts to review legislation.[5] In 1961, the second Constitution was enacted following a successful referendum to determine whether South Africa was to become a Republic.[6] Like the 1910 Constitution, the 1961 Constitution limited the power of courts to review legislation and made no provision for a bill of rights. In 1983, the third constitutional change was effected creating a tricameral parliament representative of three constituencies: whites, coloured and Indians. The 1983 Constitution, though a departure from the Westminster tradition through the creation of the office of an executive President, failed to provide legal protection to fundamental rights and freedoms and the power of courts to review legislative and executive action.[7]

In 1993 South Africa witnessed her fourth constitutional change with the passage of the Interim Constitution. The Interim Constitution was transitional in nature, intended to facilitate the drawing of a 'final constitution' that would carry the hopes and aspirations of the new South Africa following the end of apartheid.[8] The Interim Constitution was a radical departure from the past constitutional orders. It provided for review of legislative and executive action under the principle of constitutional supremacy.[9] Prior to 1993, the principle of parliamentary supremacy applied in South Africa.[10] The principle of parliamentary supremacy as applied in South Africa severely limited the expansive power of the court in judicial review.[11] John Dugard wrote in 1990:

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[3]South African History Online 'A history of the South African Constitution 1910-1996', available at *https://www.sahistory.org.za/article/history-south-african-constitution-1910-1996*, accessed on 11 May 2023.
[4] John Dugard 'A Bill of Rights for South Africa' (1990) 23 *Cornell International Law Journal* 442.
[5] Ibid. Dugard states that '…when the Appellate Division of the Supreme Court of South Africa began questioning the constitutionality of lawmaking procedures, Parliament amended the 1910 constitution to expressly exclude the power of the Court "to enquire into or to pronounce upon the validity of any law passed by Parliament," leaving no doubt as to the complete supremacy of Parliament'.
[6] South African History Online op cit note 3
[7] Dugard op cit note 4.
[8] South African History Online op cit note 3.
[9] Supra note 2.
[10] Singh and Bhero op cit note 1.
[11] The stranglehold the Executive had over the Judiciary prior to 1993 with the passage of the Interim Constitution was evident in *Harris v Minister of the Interior* 1952 (2) SA 428 after the appellate division declared the Separate Representation of Votes Act 46 of 1951 null and void on account of procedural infirmities during its passage in

> Since the establishment of the Union of South Africa in 1910, the central principle in its constitutional law has been the doctrine of parliamentary sovereignty, and by necessary extension, judicial subordination to the will of Parliament.[12]

The Interim Constitution was replaced by the fifth constitutional order following the promulgation of the Constitution of South Africa, 1996. The 1996 Constitution is described as a transformative Constitution.[13] Chief Justice Emeritus Pius Langa writes that under the Constitution 1996, 'judges bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values.'[14]

The drafting of the Constitution of South Africa, 1996 was guided by thirty-four constitutional principles contained in the Interim Constitution.[15] Constitutional Principle VI[16] contained in schedule 4 of the Interim Constitution placed an obligation upon the Constitutional Assembly to establish a tripartite structure of government in line with the principle of separation of powers. The following section explains the doctrine of separation of powers as practised in South Africa.

3.3 Separation of Powers

Mia Swart and Thomas Coggin write that 'the negotiators of the Final Constitution insisted on the clear existence of separation of powers in the final text. It is, therefore, somewhat surprising that the phrase 'separation of powers' is nowhere to be found.'[17] Although the doctrine of separation of powers is not expressly mentioned in the Constitution of South Africa, 1996 it is

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Parliament. Soon after the judgement, the then Prime Minister D F Malan declared in Parliament: 'Neither Parliament nor the people of South Africa will be prepared to acquiesce in a position where the legal sovereignty of the lawfully and democratically elected representatives of the people is denied, and where appointed judicial authority assumes the testing right, namely, the right to pass judgment on the exercise of its legislative powers by the elected representatives of the people...It is imperative that the legislative sovereignty of Parliament should be placed beyond any doubt, in order to ensure order and certainty'.
The events after the decision by the appellate division saw an increase in the number of judges from 5 to 11 judges and an expansion of the senate with the ostensible goal of securing the passage of legislation that disenfranchised voters on account of race. The expanded senate was to then pass the South Africa Amendment Act which 'revalidated the 1951 Separate Representation of voters Act'. In *Collins v Minister of the Interior* 1957 (1) SA 552 a challenge was mounted as to the validity of the Act. By a majority of 10 to 1, the expanded appellate division held that the Act was valid.

[12] Dugard op cit note 4 at 462.

[13] Chief Justice Pius Langa 'Transformative Constitutionalism' Lecture delivered at Stellenbosch University on 9th October 2006 at 353.

[14] Ibid.

[15] Constitution of the Republic of South Africa, Act 200 of 1993, Schedule 4.

[16] Ibid: 'There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness'.

[17] Mia Swart & Thomas Coggin 'The Road Not Taken: Separation of Powers, Interim Interdicts, Rationality Review and E-Tolling in *National Treasury v Opposition to Urban Tolling'* (2014) 5 *Constitutional Court Review* 346.

a part and parcel of South Africa's 'constitutional design.'[18] The doctrine was explained in the First Certification judgment[19] as follows:

> The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another.[20]

The Constitution of South Africa, 1996, creates three distinct branches of government, executive,[21] judiciary[22] and parliament,[23] and proceeds to 'regulate and control the exercise of particular powers' through a system of checks and balances.[24] This tripartite structure of government is a manifestation of the doctrine of separation of powers. One of the cases to test the efficacy of the doctrine of separation of powers in South Africa was *South African Association of Personal Injury Lawyers v Heath.*[25] The case arose following the appointment of a High Court Judge by the President as head of the Special Investigating Unit a role that required of the Judge the performance of executive functions.[26] In finding the appointment unlawful, the Court held:

> Certain functions are so far removed from the judicial function, that to permit judges to perform them would blur the separation that must be maintained between the judiciary and other branches of government.[27]

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[18] *Glenister v President of the Republic of South Africa* 2009 (1) SA 287 (CC).
[19] *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC).
[20] Ibid at para 109.
[21] Chapter 5 of the Constitution establishes the Executive arm of government and vests the executive authority of the Republic in the President.
[22] Chapter 8 of the Constitution vests Judicial authority of the Republic in the Courts. The Constitution establishes a 4-tier Court structure comprising the Constitutional Court, Supreme Court of Appeals, High Court and Magistrates Court. Section 167(3) of the Constitution vests in the Constitutional Court jurisdiction over 'constitutional matters' and appeals where the Constitutional Court finds that 'an arguable point of law of general public importance' has been raised. Section 169(1)(a) of the Constitution confers on the High Court jurisdiction over 'constitutional matters'.
[23] Chapter 4 of the Constitution establishes Parliament as the legislative arm of government comprising the National Assembly and National Council of Provinces. Under Section 43 of the Constitution, the legislative authority of the Republic is vested in Parliament and Provincial Legislatures.
[24] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC).
[25] *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC).
[26] Ibid. The Court aptly summed up the challenge before it as: 'The present case is concerned not with the intrusion of the executive into the judicial domain, but with the assignment to a member of the judiciary by the executive, with the concurrence of the legislature, of functions close to the "heartland" of executive power'.
[27] Ibid para 35.

As a demonstration of the commitment of the judiciary to upholding the doctrine of separation of powers, the Constitutional Court observed in *Minister of Health & Others v Treatment Action Campaign & Others*[28] as follows:

> [A]lthough 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.[29]

The following part delves into the development of the political question doctrine in South Africa.

3.4 The development of the Political Question Doctrine in South Africa

The earliest manifestation of the political question doctrine in South Africa was in the First Certification judgment[30] where the Constitutional Court described its limited role in the certification process in the following manner:

> …this Court has no power, no mandate and no right to express any view on the political choices made by the constitutional assembly in drafting the new text, save to the extent that such choices may be relevant either to compliance or non-compliance with the constitutional principles.[31]

The Court acknowledged the position that the drafting of the new text was the exclusive function of the democratically elected Constitutional Assembly, a legislative arm of government. It however affirmed its role in ascertaining whether the draft text was a reflection of the thirty-four constitutional principles. The First Certification judgment appears was to set the tone for the role courts would later assume in their interaction with political branches. Though the Court did not make specific mention of the political question doctrine, the philosophy underlying the holding by the Court suggests an awareness of the political question doctrine. It mirrors the holding in *Marbury v Madison*[32] where the Court admonished that 'questions in their nature political, or which are, by the constitution and laws, submitted to the executive can never be made in th[e] Court'.[33] The second pronouncement on the political

[28] *Minister of Health and others v Treatment Action Campaign and others* 2002 (5) SA 721 (CC).
[29] Ibid para 98.
[30] Supra note 19.
[31] Ibid para 27.
[32] *Marbury v Madison* 1803 (5) US 137.
[33] Ibid.

question doctrine in South Africa is traced to *Ferreira v Levin*[34] *where the Court was invited to pronounce itself on public policy. The court opined:*

> Whether or not there should be regulation and redistribution is essentially a political question which falls within the domain of the legislature and not the Court. It is not for the Courts to approve or disapprove of such policies.[35]

Subsequent pronouncements on the doctrine indicate that, whereas courts in South Africa are alive to the existence of the doctrine, they are ready to review political questions for their consistency with constitutional principles and limits. The Constitutional Court has for instance interpreted its exclusive jurisdiction under section 167(4) of the Constitution as covering political questions, which it describes as questions relating to 'the sensitive areas of separation of powers.'[36] This view was expressed in *Doctors for Life International v Speaker of the National Assembly and others*[37] in the following manner:

> The principle underlying the exclusive jurisdiction of this Court under section 167(4) is that disputes that involve important questions that relate to the sensitive areas of separation of powers must be decided by this Court only…It follows that where a dispute will require a court to decide a crucial political question and thus intrude into the domain of Parliament, the dispute will more likely be one for the exclusive jurisdiction of this Court.[38]

The Constitutional Court's jurisdiction under section 167(4) of the Constitution allows it to intrude into areas hitherto reserved for political branches. It is the nature of these intrusions that form the subject of the study. The Court, as will become evident in the subsequent discussion, is yet to strike a clear balance between a permissible and impermissible intrusion. By embracing an expansive interpretation of its authority and the text of the Constitution, the

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[34] *Ferreira v Levin* 1996 (1) SA 984 (CC).
[35] Ibid para 185.
[36] Section 167(4) of the Constitution of the Republic of South Africa, 1996 vests in the Constitutional Court exclusive jurisdiction over the following areas;
> decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;
> decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;
> decide applications envisaged in section 80 or 122;
> decide on the constitutionality of any amendment to the Constitution;
> decide that Parliament or the President has failed to fulfil a constitutional obligation; or
> certify a provincial constitution in terms of section 144.
> decide that Parliament or the President has failed to fulfil a constitutional obligation; or
> certify a provincial constitution in terms of section 144.

[37] *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC).
[38] Ibid at para 24.

court has more often than not impermissibly intruded into terrain reserved for political branches.

3.5 Constitutionally permissible intrusions into terrain reserved for the Executive and Legislature

The exercise of legislative and executive power in South Africa is constrained by the Constitution under the principle of constitutional supremacy. The Constitutional Court has assumed jurisdiction over cases challenging the exercise of executive and legislative power, which invariably impact the sensitive area of separation of powers. Once satisfied that such a case falls under its exclusive jurisdiction, the court conducts an inquiry into whether a political branch has acted within the constitutional and legal limits of its power. One would rightly argue that courts in South Africa exercise a constitutionally mandated supervisory role over political questions. This was the finding of the Constitutional Court in *Doctors for Life International v Speaker of the National Assembly and others*[39] where the Court held:

> Courts are required by the Constitution 'to ensure that all branches of government act within the law' and fulfil their constitutional obligations. This Court 'has been given the responsibility of being the ultimate guardian of the Constitution and its values.'[40]

Under the constitutional principle of legality, the Constitutional Court has adjudicated over political questions with a view towards ensuring political branches act within the constitutional and legal limits of their power. Cora Hoexter writes that the principle 'refers to a broad constitutional principle of legality that governs the use of all public power rather than the narrower realm of administrative action.'[41] In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*,[42] the Constitutional Court delineated the boundaries of the principle of legality in the following manner:[43]

> It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform

[39] Supra note 37.
[40] Ibid para 38.
[41] Cora Hoexter *Administrative Law in South Africa* 2 ed (2018) 122.
[42] *Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others* 1999 (1) SA 374.
[43] Ibid para 58.

> no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution.[44]

Although the courts' supervisory role is constitutionally mandated, I argue that constitutionally impermissible intrusions can result when courts interpret their authority and the text of the Constitution in an expansive manner that disregards the constitutional power committed to political branches. Below, this chapter looks into two thematic areas where the Constitutional Court was invited to intrude into the exercise of presidential power and parliamentary processes.

3.6 The Exercise of Presidential Power

The constitutional power committed to the President under section 84(2) of the Constitution of South Africa, 1996 has presented itself before the Constitutional Court for review. In *President of the Republic of South Africa and others v South African Rugby Football Union and others,*[45] the Constitutional Court was invited to determine whether the exercise of the President's power under section 84(2)(f) of the Constitution constituted administrative action and was therefore subject to the tenets of procedural fairness. As will become evident in the discussion below, the Constitutional Court embraced a narrow interpretation of its institutional authority and the text of the Constitution, thereby finding the President's power to appoint a commission of inquiry as a constitutional power not subject to section 33 of the Constitution, which regulates administrative action. In *Albutt v Centre for the Study of Violence and Reconciliation and others v President of the Republic of South Africa and Others*[46] another challenge was mounted to the exercise of the constitutional power committed to the President under section 84(2)(j) of the Constitution to grant pardon to offenders. In this case, the Constitutional Court engaged in what I argue was an expansive interpretation of its institutional authority and the text of the Constitution. Although this judgment also limited the review of presidential conduct to the question of legality rather than administrative law, it did so in a manner that expanded legality to encompass the requirement of procedural fairness. In the *Albutt* case,[47] the Constitutional Court, through judicial craft, 'quietly'[48] subjected the President's constitutional power under section 84(2)(j) of the Constitution to section 33 of the Constitution. The following parts of the

[44] Supra note 42 para 58.
[45] Supra note 22.
[46] *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC)
[47] Ibid.
[48] I use the word 'quietly' because even though the court declines to pronounce itself strongly on whether section 84(2)(j) of the Constitution is subject to section 33 of the Constitution, the court's holding has the same effect.

thesis conduct an analysis of these two cases as they are significant in establishing what constitutes a constitutionally permissible inquiry into terrain reserved for the Executive in South Africa.

3.6.1 *President of the Republic of South Africa and Others v South African Rugby Football Union and others*[49]

The appeal before the Constitutional Court emanated from a decision rendered by De Villiers J setting aside 'two presidential notices that appeared in the Government Gazette on 26th September 1997.'[50] One of the notices 'announced the appointment of a commission of inquiry' while the other 'declared the provisions of the Commissions Act 8 of 1947' as applying to the commission.[51] One of the grounds upon which the High Court invalidated the appointment of the commission of inquiry was the failure by the President to afford the Respondents a hearing prior to the appointment of a commission of inquiry.[52] Section 84(2)(f) of the Constitution conferred upon the President the power to appoint a commission of inquiry. The Respondents advanced the argument that the President was bound by section 33 of the Constitution to afford them a hearing before the appointment of the commission of inquiry.[53]

The Constitutional Court, by a unanimous decision, held that section 84(2)(f) of the Constitution did not 'constitute administrative action' and, therefore the requirements of procedural fairness under section 33 of the Constitution did not apply to the exercise of powers under the section.[54] The Court observed that the only explicit constraint on the power under section 84(2)(f) of the Constitution was the requirement to consult the Deputy President prior to the appointment of a commission of inquiry.[55]

The Constitutional Court was arguably faced with a political question. This can be gleaned from the language employed in section 84(2)(f) of the Constitution conferring wide and unfettered discretion on the President to appoint a commission of inquiry, the only identifiable constraint being the need to consult the Deputy President.[56] The interpretation rendered by the Court on the nature of power exercised by the President under section 84(2)(f) of the

[49] Supra note 24.
[50] Ibid at para 2.
[51] Ibid.
[52] Para 24.
[53] Para 13.
[54] Para 127.
[55] Ibid.
[56] Ibid.

Constitution is therefore significant as it lays the basis for the discussion on what constitutes a permissible intrusion into terrain reserved for the Executive. By classifying the power exercised by the President under section 84(2) of the Constitution as 'original constitutional powers'[57] subject only to 'narrow constitutional responsibilities,'[58] the Constitutional Court rejected the interpretation rendered by the High Court of section 33 of the Constitution which was not only expansive but also insensitive to the discretion conferred on the President under section 84(2)(j) of the Constitution.

Although the Court found that the constitutional powers committed to the President under section 84(2)(f) of the Constitution did not constitute administrative action, it found that the principle of legality was binding on the President.[59] This is significant in light of the debate around the expansion of the principle of legality in South Africa to cover grounds applied in the review of administrative action.[60] Constitutional review and administrative review are two distinct review processes that should not be conflated.[61] When conducting administrative review, courts interpret their authority in an expansive manner as they are reviewing the decisions of an inferior body. This is not the case when engaging in constitutional review. *President of the Republic of South Africa and Others v South African Rugby Football Union and others* [62] laid the groundwork for the opening up of the constitutional power committed to the president under section 82(2)(j) of the Constitution to review on grounds of administrative action. The Constitutional Court was to later take a cue in *Albutt*[63] and expand the principle of legality to cover procedural fairness through an expansive approach to the interpretation of its authority and the Constitution. The burgeoning of the constitutional principle of legality to cover grounds employed in the review of administrative action is bound to have devastating consequences on the doctrine of separation of powers.[64]

[57] Para 145.
[58] Ibid.
[59] Para 148.
[60] Lauren Kohn 'The burgeoning constitutional requirement of rationality & the separation of powers: Has rationality review gone too far?' (2013) 130 *South African Law Journal* 810.
[61] Ibid.
[62] Supra note 24.
[63] Supra note 46.
[64] Kohn op cit 60.

3.6.2 *Albutt v Centre for the Study of Violence and Reconciliation and others v President of the Republic of South Africa and Others*[65]

The case challenged the power conferred on the President under section 84(2)(j) of the Constitution to grant pardon to offenders claiming to have been 'convicted of offences committed with a political motive'.[66] The case was precipitated by an announcement by the former President Mbeki of a special dispensation for 'applicants for pardon who claimed that they were convicted of offences that were politically motivated.'[67] The question for determination before the Constitutional Court was whether the President was 'required, prior to the exercise of the power to grant pardon' under the special dispensation announced on 21st November 2007 to afford the victims of these offences a hearing.[68] The High Court had made two significant findings which formed the subject of the application before the Constitutional Court. First, 'the exercise of the power to grant pardon constitutes administrative action,'[69] Secondly, 'the victims of crime have a right to be heard prior to the President's decision to grant pardon under section 84(2)(j).'[70]

The Constitutional Court employed the rationality test when reviewing the constitutional power committed to the President under section 84(2)(j) of the Constitution. It held that the exercise of the power 'must be rationally related to the purpose sought to be achieved by the exercise of it.'[71] The Court reasoned that this constraint flowed from the supremacy of the Constitution.[72] The Court proceeded to find that:

> To pass constitutional muster therefore, the President's decision to undertake the special dispensation process, without affording victims the opportunity to be heard, must be rationally related to the achievement of the objectives of the process. If it is not, it falls short of the standard that is demanded by the Constitution.[73]

The Court singled out two objectives that the President sought to achieve when he announced the special dispensation process, namely, national unity and national reconciliation.[74] In

[65] Supra note 46.
[66] Para 1.
[67] Para 4.
[68] Ibid.
[69] Para 26.
[70] Ibid.
[71] Para 49.
[72] Para 50.
[73] Ibid.
[74] Para 53.

deciding the place of victims in the process, the Court drew a parallel between the special dispensation process and the Truth and Reconciliation Commission where the 'participation of victims was fundamental to the amnesty process.'[75] The Court found that 'the participation of victims is not only crucial to establishing the truth of what happened, but is also crucial to the twin objectives of nation-building and national reconciliation.'[76] The Court therefore found the exclusion of victims from the special dispensation process was irrational.

> Once it is accepted, as it must be, that the twin objectives of the special dispensation process are nation-building and national reconciliation and that the participation of victims is crucial to the achievement of these objectives, it can hardly be suggested that the exclusion of the victims from the special dispensation process is rationally related to the achievement of the objectives of the special dispensation process. [77]

Unlike the *SARFU* case,[78] where the Court rejected the argument that the constitutional power committed to the President under section 84(2)(f) of the Constitution constituted administrative action and was therefore subject to the tenets of procedural fairness under section 33 of the Constitution, the Court in this case employed a rationality test which had the result of constraining the President's constitutional power to the tenets of procedural fairness. Though the Court shied away from addressing the question whether the President's power was constrained by section 33 of the Constitution, the judgment had the same effect:

> That broad general question was not before the High Court, which should not have posed and answered it, and we need not answer it in this case. Nor should we reach the question whether PAJA, upon its proper construction, includes within its ambit the exercise of the power to grant pardon under section 84(2)(j). [79]

The judgment of the Constitutional Court, in my view, went contrary to its own finding that 'the executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives.'[80] As Lauren Kohn writes, it appears, by 'mandating victim participation' Chief Justice Ngcobo had more 'appropriate means in mind than those contemplated by the presidency.'[81] The more appropriate means can be gleaned from para 72

[75] Para 56.
[76] Para 59.
[77] Para 68.
[78] Supra note 22.
[79] Para 81.
[80] Para 61.
[81] Kohn op cit 60 at page 831.

of the Court's judgment where the Court finds that the requirement to 'afford the victims a hearing is implicit.' A constraint cannot be implicit in the absence of textual support. If a plain reading of constitutional text does not reveal a constraint on the exercise of a constitutional power, the creation of a constraint through judicial craft amounts to an impermissible intrusion.[82]

The Court acknowledged the duty placed on the President under section 83(c) of the Constitution to promote 'the unity of the nation and that which will advance the Republic.'[83] It then proceeded to expand this duty to encompass national reconciliation when crafting the twin obligations upon which it reviewed the President's constitutional power. This expansion of section 83(c) of the Constitution was informed by an address delivered by the President before a joint sitting of Parliament. In the speech, the President stated:

> As a way forward and in the interest of nation-building, national reconciliation and the further enhancement of national cohesion, and in order to make a further break with matters which arise from the conflicts of the past, consideration has therefore been given to the use of the Presidential pardon to deal with this 'unfinished business.[84]

The Court then proceeded to elevate the Presidential address to a constitutional principle sufficient to review the exercise of the President's power under section 84(2)(g) of the Constitution. In crafting this principle, the Court made a finding that national reconciliation could not have been attained without affording victims a hearing. What the Court fails to do is separate the special dispensation from the Truth and Reconciliation Commission, and this can be seen in the Court's imposition of the procedural safeguards in the Truth and Reconciliation Commission to the special dispensation.[85] The Court points out in its judgment that the special dispensation was meant to attend to the 'unfinished businesses' of the Truth and Reconciliation Commission.[86] It, however, then proceeds to conflate the amnesty process and the special dispensation process.[87] The Court assumes the place of the President and decides to chaperone the special dispensation process in a manner that disregards the multi-directional application

[82] Tim Koopmans Courts and Political Institutions: A Comparative View (2003) ch 5.
[83] Supra note 46 at para 52.
[84] Ibid at para 4.
[85] Para 61 and 65.
[86] Ibid at para 4 and 5.
[87] Para 62, 63, 64, 65

of deference, as encouraged by the Kenyan Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others*.[88]

This expansive interpretation of the Court's authority and constitutional text resulted in an application of the rationality test in a manner that impermissibly intruded into the President's constitutional power under section 84(2)(g) of the Constitution.

3.7 Parliamentary Process

Parliament serves as the legislative arm of government. It comprises the National Assembly and the National Council of Provinces.[89] To facilitate their conduct of business, section 57(1)(a) and 70(1)(a) of the Constitution confer on the National Assembly and the National Council of Provinces the power to 'determine and control their internal arrangements, proceedings and procedures.' These sections are viewed as vesting in Parliament autonomy in the conduct of its internal processes. A challenge to the manner in which Parliament has carried out its internal processes would therefore constitute a political question. The nature of what constitutes a constitutionally permissible intrusion when the court reviews the constitutional power exercised by Parliament becomes of interest. The following parts of the chapter review four (4) cases, namely, *Doctors for Life International v Speaker of the National Assembly and others,*[90] *United Democratic Movement v Speaker of the National Assembly and Others,*[91] *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*[92] and *Economic Freedom Fighters and others v Speaker of the National Assembly and another*[93] and the nature of intrusions conducted by the Constitutional Court.

3.7.1 *Doctors for Life International v Speaker of the National Assembly and Others*[94]

Doctors for Life International sought a declaration from the Constitutional Court to the effect that the NCOP and provincial legislatures, in enacting the Choice on Termination of Pregnancy Amendment Act 38 of 2004, the Sterilisation Amendment Act 24 of 2004, the Traditional Health Practitioners Act 35 of 2004 and the Dental Technicians Amendment Act 24 of 2004,

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[88] *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR
[89] Constitution of the Republic of South Africa, Act 200 of 1993, s 42(1).
[90] Supra note 37.
[91] *United Democratic Movement v Speaker of the National Assembly and others* 2017 (5) SA 300 (CC).
[92] *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).
[93] *Economic Freedom Fighters and others v Speaker of the National Assembly and another* 2018 (2) SA 571 (CC).
[94] Supra note 37.

failed to comply with their constitutional obligation to facilitate public participation 'in their legislative process as required by section 72(1)(a) and 118(1)(a) of the Constitution.'[95] The Court by a majority of 7 Judges decided in favour of the applicant, finding that Parliament indeed failed to fulfil its constitutional obligation by failing to facilitate public involvement in the passage of the health statutes.[96]

The applicant argued that public involvement required that 'public hearings must be held in respect of all legislation under consideration by a legislature whether at the national or provincial level.'[97] Parliament and the provincial legislatures on the other hand argued that an 'opportunity to make either written or oral submissions on the legislation under consideration' sufficed.[98] In answering this contention, the majority judgment described public involvement as 'the process by which the public participates in something'[99] and facilitation of public involvement as 'taking steps to ensure that the public participates in the legislative process.'[100] The majority judgment found that section 72(1)(a) of the Constitution confers on the National Council of Provinces (NCOP) a measure of discretion in the fulfilment of its obligation to 'facilitate public involvement'[101] as it did not proffer a prescription on how the obligation was to be satisfied.[102] The majority judgment however cautioned that it retained the jurisdiction to determine whether the degree of public involvement employed was to the level required by the Constitution.[103]

In determining whether the degree of public involvement employed by the NCOP and provincial legislatures sufficed, the majority judgment relied on the standard of reasonableness.[104] The majority opined that the standard was not alien to the Constitution as it appears several times in the Constitution.[105] The majority judgment then proceeded to outline factors that are to guide its determination of whether a 'legislature has acted reasonably in

[95] Para 4. Section 72(1)(a) provides 'facilitate public involvement in the legislative and other processes of the Council and its committees' while section 118 (1)(a) provides 'facilitate public involvement in the legislative and other processes of the legislature and its committees.'
[96] Para 225.
[97] Para 76.
[98] Ibid.
[99] Para 120.
[100] Ibid.
[101] Para 123.
[102] Ibid: 'The Constitution has deliberately refrained from prescribing to Parliament and the provincial legislatures what method of public participation should be followed in a given case. In addition, it empowers Parliament and the provincial legislatures to "determine and control [their] internal arrangements, proceedings and procedures" and to make their own rules and orders concerning their businesses.'
[103] Para 124.
[104] Para 126.
[105] Ibid.

discharging its duty to facilitate public involvement.'[106] These factors were, first, 'the nature and importance of the legislation,' second, the 'time and expense involved' and third, Parliament's consideration of what constitutes 'appropriate public involvement in light of the legislation's content, importance and urgency.'[107] Alongside these factors, the majority judgment laid out two aspects of the duty to facilitate public involvement, namely, 'duty to provide meaningful opportunities for public participation in the law-making process,' and 'duty to take measures to ensure that people have the ability to take advantage of the opportunities provided.'[108] The majority judgment identified public participation as the 'goal of the duty to facilitate public involvement comprehended in section 72(1)(a) of the Constitution'[109] and proceeded to prescribe 'submission of written or oral presentations' as the method through which public involvement in the law-making process is to be achieved.[110]

On the material placed before the Court in support of attempts by the NCOP and provincial legislatures to facilitate public involvement, the majority judgment found that the NCOP and provincial legislatures failed to fulfil their obligation to facilitate public involvement in passing the Traditional Health Practitioners Act 35 of 2004[111] and Choice on Termination of Pregnancy Amendment Act 38 of 2004.[112] This finding was informed by the failure of the NCOP and provincial legislatures to conduct public hearings in a number of provinces in spite of the public interest generated by the bills. On the Dental Technicians Amendment Act 24 of 2004, the majority judgment found that since it failed to generate public interest, the NCOP did not act unreasonably in failing to invite 'written representations or holding public hearings' on the bill.[113]

The minority judgement, on the other hand, pointed out that section 72(1)(a) of the Constitution 'does not require that there be public involvement as a prerequisite to the validity of the legislation passed pursuant to section 76 of the Constitution'.[114] This meant that section 72(1)(a) of the Constitution was silent as to the manner in which public involvement was to be facilitated. Additionally, the minority judgment found that the section did not require the NCOP

[106] Para 128.
[107] Ibid.
[108] Para 129.
[109] Para 141.
[110] Para 142.
[111] Para 169, 172, 174 and 175.
[112] Para 184 and 185.
[113] Para 191 and 192.
[114] Para 246.

to employ 'reasonable measures to facilitate public involvement'.[115] The minority judgment reasoned that had reasonableness been intended as the appropriate test of public participation by the drafters, this would have been expressed in the text of the Constitution.[116] The minority judgment sought to create a distinction between public involvement and public participation, finding that:

> It is impermissible to conclude that the term "public involvement" at the level of interpretation postulates as a minimum that the public must be given an opportunity to comment on draft legislation. The term is not capable of that construction. To interpret the phrase in this way would amount to re-drafting the Constitution.[117]

The minority judgment rejected the holding by the majority that it was implicit in section 72(1)(a) of the Constitution that there was an obligation on the NCOP to take reasonable steps to facilitate 'public involvement before the legislation can be said to be valid'.[118] The minority judgment advanced six grounds in support of its position, the crux of which were that the 'concept of reasonableness' could not be located in section 72(1)(a) of the Constitution, section 70 of the Constitution did not impose an obligation on the NCOP to make rules providing 'for reasonable steps to be taken to facilitate public involvement', and there was no imperative of public involvement in the national legislation process.[119] The minority judgment similarly rejected the holding by the majority that the NCOP was obliged 'to give the public a reasonable opportunity to comment on the bills'.[120] One of the grounds upon which it based its decision was section 70 of the Constitution, which empowers the NCOP to determine its own 'internal arrangements and procedures'. The minority judgment found the decision whether to afford the public an opportunity to be heard as an internal procedure to be left entirely to Parliament.[121] Having found that section 72(1)(a) of the Constitution did not place an obligation on NCOP to involve the public in its legislative processes, the minority judgment found that the imposition

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[115] Para 306.
[116] Para 308: 'The subsection does not even require the NCOP to take reasonable measures to facilitate public involvement unlike the many instances in our Constitution in which the state is obliged or permitted to take reasonable legislative measures to achieve a particular result, there is no such stipulation here. The absence of the concept of "reasonableness" or any other standard is all the more remarkable when it is borne in mind that it is employed twice in the same section and in close proximity to the words with which we are now concerned'.
[117] Para 312.
[118] Para 317.
[119] Ibid.
[120] Para 318.
[121] Para 319: 'I therefore conclude that Parliament has to decide how public involvement must be facilitated in the national legislative process and that Parliament is not obliged to ensure that reasonable steps to facilitate public involvement in that process are taken. It is by no means clear or necessarily implied that a public opportunity to be heard or comment on legislation is a pre-condition to validity of legislation according to the Constitution'.

of such a condition by the majority as an impermissible intrusion into the legislative process.[122] The minority judgment found the application lacking in merit as sections 72(1)(a) and 118(1)(a) of the Constitution did not require public involvement as a pre-requisite to the validity of any legislation passed.[123]

Doctors for Life International v Speaker of the National Assembly[124] turned on the question of the interpretation of the text of the Constitution. Whereas the majority judgment embraced an expansive approach to interpretation, introducing a constraint alien to section 72(1)(a) of the Constitution, the minority judgment ascribed to section 72(1)(a) its plain meaning finding that there was no discernible textual constraint in the text.

The expansive approach to interpretation of section 72(1)(a) of the Constitution is analysed by Raboshakga. [125] He writes that the majority judgement 'first looked to the whole Constitution and to the social and historic context linked to public involvement in legislative decision-making.'[126] The result of this inquiry was a finding by the majority judgment that 'public participation in the law-making process was the goal contemplated in s 72(1)(a) of the Constitution and that to hold otherwise would be contrary to, inter alia, the principles of accountability, responsiveness and openness enshrined in s 1(d) of the Constitution.'[127] The minority judgement opposed this approach to interpretation, finding that the phrase 'to ensure accountability, responsiveness and openness' does not in any way imply 'any public participation component or public involvement element.'[128] Having found that public involvement connotes public participation, the majority judgement then proceeded to establish a standard of review alien to the plain meaning of section 72(1)(a) of the Constitution.

The steps in interpretation undertaken by the majority judgment point to a clear absence of fidelity to the text of the Constitution in a matter the majority judgment described as 'pre-eminently a crucial political question.'[129] The expansive nature of interpretation rendered by the majority judgment went contrary to the doctrine of separation of powers and amounted to an impermissible intrusion into terrain reserved for political branches.

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[122] Para 317.
[123] Para 336 and 339.
[124] Ibid.
[125] Ngwako RaBoshakga 'Towards Participatory Democracy, Or Not: The Reasonableness Approach In Public Involvement Cases' (2017) 31 *SAJHR* at 8.
[126] Ibid.
[127] Ibid at 10.
[128] Supra note 37 para 275.
[129] Para 21.

While section 72(1)(a) of the Constitution directs the NCOP to 'facilitate public involvement' in its legislative processes, the section is not prescriptive on the mechanics of how the NCOP is to conduct public involvement. This allows the NCOP room to determine the parameters of public involvement through 'its internal arrangements, proceedings and procedures.'[130] Despite finding that section 72(1)(a) of the Constitution conferred on the NCOP a measure of discretion in how it was to facilitate public participation, the majority judgment proceeded to create judicially discoverable standards upon which it reviewed the steps taken by the NCOP in facilitating public involvement through a standard alien to section 72(1)(a) of the Constitution. This resulted in an impermissible intrusion into terrain reserved for Parliament. The minority judgment, on the other hand, remained cognisant of the institutional limits of its authority and avoided venturing into the prescriptive approach taken by the majority judgement:

> The Constitution has deliberately refrained from prescribing to Parliament and the provincial legislatures what method of public participation should be followed in a given case. In addition, it empowers Parliament and the provincial legislatures to "determine and control [their] internal arrangements, proceedings and procedures" and to make their own rules and orders concerning their businesses.[131]

A decision on how much public involvement is necessary is one that falls within the internal arrangement of the NCOP and Provincial Legislatures. This line of thinking can be seen in the Kenyan High Court's judgment in *Martin Nyaga Wambora v County Assembly of Embu & 37 others*[132] where the High Court rejected an invitation to determine whether the charges levelled against Wambora met the constitutional threshold for gross violation of the constitution. As was the case in *Martin Nyaga Wambora,*[133] the constitutional power to determine the nature and extent of public involvement is vested in the NCOP and Provincial Legislatures and courts must be willing to narrowly construe their authority in a manner that is sensitive to the constitutional power enjoyed by the two organs of government.

Karen Czapanskiy and Rashida Manjoo argue that, in taking into account the reasonableness of the steps Parliament had taken and the rules 'relating to public involvement,' the majority judgment demonstrated a 'deep awareness of the doctrine of separation of powers, the careful

[130] Constitution of the Republic of South Africa, 1996 s 70(1)(a).
[131] Supra note 37 para 123.
[132] *Martin Nyaga Wambora v County Assembly of Embu & 37* others 2015 eKLR.
[133] Ibid.

use of judicial discretion, and acknowledgement of the limitations faced by Court.'[134] On the contrary, the reasonableness standard, as applied by the majority judgment, resulted in an impermissible intrusion into Parliament's terrain. Though the majority judgment described the standard as objective and 'sensitive to the facts and circumstances of a particular case.'[135] it had the result of emasculating Parliament's discretion in lawmaking.

The nature of inquiry conducted by the majority judgment fits squarely into the admonition by Chief Justice Archer in *New Patriotic Party v Attorney General*:[136]

> The Constitution, 1992 gives the judiciary power to interpret and enforce the Constitution, 1992 and I do not think that this independence enables the Supreme Court to do what it likes by undertaking incursions into territory reserved for Parliament and the executive. This court should not behave like an octopus stretching its eight tentacles here and there to grasp jurisdiction not constitutionally meant for it.[137]

The finding by the majority judgment that implicit in section 72(1)(a) of the Constitution was an obligation on the NCOP to take reasonable steps to facilitate 'public involvement before the legislation can be said to be valid'[138] amounted to 'judicial legislation.'[139] The minority judgement avoided this path by sticking to the plain meaning of the constitutional text, and finding that, had the intention of the drafters of the Constitution been to impose a standard on the manner in which the NCOP undertook public involvement, nothing would have prevented them from introducing this standard in the constitutional document. The result of the approach to interpretation by the majority judgment was to constitute the Court as the NCOP and Provincial legislatures. Having constituted itself as such, the majority judgment then proceeded to 'determine and control its internal arrangements, proceedings and procedures.'[140] Evidence of this can be seen in the finding by the majority judgment that the Dental Technicians Amendment Act 24 of 2004 failed to generate sufficient interest thereby, the NCOP did not act unreasonably in failing to comply with the Court's judicially prescribed method of public

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[134] Karen Syma Czapanskiy & Rashida Manjoo 'The Right of Public Participation in the Law-Making Process and the Role of the Legislature in the Promotion of this Right' (2008) 19 *Duke Journal of Comparative & International Law* at 12-3.
[135] Supra note 37 at para 127.
[136] *New Patriotic Party v Attorney General* 1994 JELR 66360 (SC)
[137] Ibid at para 8.
[138] Supra note 37 para 317.
[139] Ezra R. Thayer likens judicial legislation to judicial usurpation in his article 'Judicial Legislation: Its Legitimate Function in the Development of the Common Law' (1891) 5 *Harvard Law Review* 4 at 172.
[140] Constitution of the Republic of South Africa, 1996 section 70.

involvement.[141] A number of questions arise, why does the Court feel superbly endowed to judge the sufficiency of public involvement and not the NCOP? Isn't the NCOP endowed with the 'political capacity' to make such a weighty determination?[142] Why didn't the Court uniformly apply its model of public involvement in assessing the validity of the health legislations? These questions arise when courts embrace an expansive interpretation of their authority and interpret constitutional text in a manner inconsistent with its plain meaning. Such an approach demonstrates a contemptuous disregard for the constitutional power committed to political branches.

3.7.2 *United Democratic Movement v Speaker of the National Assembly and Others*[143]

On 31st March 2017, President Zuma dismissed the country's finance minister and his deputy from office.[144] Following their dismissal, a motion of no confidence in the President was scheduled in the National Assembly at the behest of three political parties, namely, United Democratic Movement, Democratic Alliance and Economic Freedom Fighters.[145] One of the parties, the UDM, petitioned the Speaker for a vote by way of secret ballot on account of public interest.[146] This request by UDM was rejected by the Speaker. The Speaker held that 'she had no authority in law or in terms of the rules to determine that voting on that motion be conducted by secret ballot.'[147] The Speaker's decision formed the basis of the application before the Constitutional Court. The applicants sought a determination whether the Constitution and the rules of the National Assembly 'require, permit or prohibit' the Speaker from directing that a vote on a motion of no confidence in the President be conducted by way of secret ballot.[148] The question as framed by the Court for determination was 'whether the Constitution and Rules of the National Assembly require, permit or prohibit that voting in a motion of no confidence in the President be by secret ballot.'[149]

At para 59 of its judgement, the Court pointed out that in the absence of a prescribed manner of voting, section 57(1) of the Constitution empowers the National Assembly to identify an 'appropriate procedure.'[150] In finding that both the open and secret ballot voting procedures are

[141] Supra note 37 para 191 and 192.
[142] Jesse H. Choper 'The Political Question Doctrine: Suggested Criteria' (2005) 54(6) *Duke Law Journal* 1468.
[143] Supra note 91.
[144] Para 13.
[145] Para 14.
[146] Para 15 and 16.
[147] Para 18.
[148] Para 19.
[149] Para 49.
[150] Para 64.

constitutionally permissible,[151] the Court held that the National Assembly enjoys a discretion in electing which of the two methods to adopt.[152] The Constitutional Court interpreted rule 104(1) and (3) of the National Assembly rules as bestowing power on the Speaker to elect 'when a secret ballot would be appropriate.'[153] The Court found that the Speaker had the power to authorize the voting on a motion of no confidence by secret ballot. However, it declined to direct the Speaker to conduct the vote by way of secret ballot as 'to order a secret ballot would trench separation of powers.'[154] Additionally, the Court held the view that 'no legal basis for that radical and separation of power insensitive move' existed.[155] Though the Court declined to direct the Speaker on the method to prescribe, it remained emphatic that it was within its power to review whichever election the Speaker makes against the constitutional principle of parliamentary accountability.[156]

Prenisha Sewpersadh and John Mubangizi describe the judgment as 'the most elegant balancing of judicial vigilance, on the one hand, and respect for the doctrine of separation of powers, on the other hand.'[157] They write that even though the Court acknowledged that the Speaker is 'empowered to have a motion of no confidence in the President voted on by secret ballot,' the Court declined to prescribe the cases that would call for a vote by way of secret ballot, thereby refraining from treading upon the 'terrain of the Speaker.'[158] The approach adopted by the Court is described by Mhango and Hlaele as an application of the political accountability doctrine, which they describe in the following manner:[159]

> When the Constitution of the Republic of South Africa, 1996 confers power to a politically accountable branch of state without imposing principles or constraints on how that power should be exercised, the relevant branch has discretion to exercise that power; and "it falls outside the parameters of judicial authority to prescribe" to the relevant branch on how to implement that discretion.[160]

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[151] Para 60.
[152] Para 64: 'In sum, how best and in terms of which voting procedure to hold the President accountable in the particular instance is the responsibility constitutionally-allocated to the National Assembly'.
[153] Para 68.
[154] Para 93.
[155] Para 92.
[156] Para 86.
[157] Prenisha Sewpersadh & John C. Mubangizi 'Judicial review of administrative and executive decisions: Overreach, activism or pragmatism?' (2017) 21 *Law, Democracy and Development* 1 at 218.
[158] Ibid at 203.
[159] M. Mhango and M. Hlaele 'Something Happened on Our Way to 'A Funny Democracy': A Critical Analysis of *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* 2018 (2) SA 571 (CC) Executive Accountability in South Africa and Lesotho' (2022) 27 *Lesotho Law Journal* 1 at 24.
[160] Ibid.

Lawrence Solum finds that the Court maintained fidelity to the text of the Constitution in its interpretation of the discretion committed to the Speaker of the National Assembly, by remaining aware of the institutional limits of its authority and the constitutional design to clothe the Speaker with the power to determine the appropriate procedure for voting. [161] Banda Tinenenji writes that the 'court acknowledged that it too was constrained, and was therefore careful not to overstep its own boundaries.'[162] This, I argue, was achieved through a narrow interpretation of the Court's authority and rule 104(1) and (3) of the National Assembly Rules that deems the Speaker as competent to determine the appropriate voting procedure.[163] The Constitution, having committed to the National Assembly the power to determine its 'internal arrangements, proceedings and procedures,' can be argued to deem as binding normative standards developed by the National Assembly in furtherance of section 57(1) of the Constitution. These normative standards are the Rules of the National Assembly developed by the National Assembly.

Even as the Court declined to direct the Speaker on the voting mechanism to employ, the Judges held that they retained the residual power to review whichever election the Speaker made.[164] The Court held, 'there must always be a proper and rational basis for whatever choice the Speaker makes in the exercise of the constitutional power to determine the voting procedure.[165] This particular holding by the court attracts the attention of Bradey Slade, who proceeds to review the court's judgment through the lens of Lauren Kohn's[166] concern about an expansion of rationality review in a fashion that is insensitive to the doctrine of separation of powers.[167] His concern rests principally on the factors the Court generated to guide the speaker in deciding on a voting mechanism, which Sewpersadh and Mubagaizi liken to 'administrative law' principles.[168] The expansion of constitutional review to include traditional grounds of review of administration action is something Kohn counsels against. The danger in such an approach is the positioning of the Court in an appellate position over coordinate branches. Slade cautions that this 'expanded notion' of rationality in reviewing the Speaker's decision is somewhat

[161] Lawrence B Solum (2017). The Constraint Principle: Original Meaning and Constitutional Practice. *Social Science Research Network*. (January, 1) at 29
[162] Banda Tinenenji 'United Democratic Movement v Speaker of the National Assembly and Others (CCT89/17) [2017] ZACC 21' (2018) 1 *SAIPAR Case Review* 2 at 17.
[163] Ibid at 19.
[164] Supra note 91 at para 94.
[165] Ibid para 88.
[166] Kohn op cit note 60.
[167] Bradley V Slade 'Reviewing the Speaker's Decision: A Brief Synopsis of UDM v Speaker of the National Assembly 2017 5 SA 300 (CC)' (2021) 24 *PELJ* 1 at 3.
[168] Prenisha Sewpersadh & John C. Mubangizi op cit note 159 at 217.

similar to 'a reasonableness review.'[169] The Court of Appeal in *Mumo Matemu v Trusted Society Alliance*[170] cautioned against an application of the standard of reasonableness in constitutional review owing to its impermissibly intrusive nature.

I submit that the Constitutional Court erred in finding that it had the power to review the decision of the Speaker on which voting mechanism to employ, and thereafter proceeding to outline factors to guide the Speaker's exercise of discretion. Judicial prescription in the absence of normative standards results in an unwarranted intrusion in the institutional independence of coordinate arms. As Bradley points out:

> In this regard, in unnecessarily setting out factors that would guide the Speaker's determination on the appropriate voting procedure, the Court did not take into account any adverse consequences that its decision may have on the doctrine of separation of powers, and arguably failed to maintain an appropriate balance between ensuring "judicial supervision and accountability" on the one hand and showing the necessary respect to the democratically elected institution's mandate to govern on the other. [171]

3.7.3 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*[172]

Following a state project to effect a security upgrade to the President's private residence widely known as 'Nkandla,' several complaints were lodged with the office of the Public Protector, leading to an investigation into the project.[173] There was a concern that some of the upgrades were not security related. The complainants maintained that 'any installation that has nothing to do with the President's security amounts to undue benefit or unlawful enrichment to him and his family and must therefore be paid for by him.'[174] The investigations resulted in a finding that the President had violated sections 96(1), 2(b) and (c) of the Constitution, the Executive Members' Ethics Act and the Executive Ethics Code.[175] The findings by the Public Protector were largely informed by the fact that part of the upgrade entailed non-security-related features,

[169] Slade op cit 167 at 3.
[170] Supra note 88.
[171] Slade op cit note 167 page 13.
[172] Supra note 92
[173] Para 6 and 7.
[174] Ibid.
[175] Para 7.

therefore entailing undue enrichment.[176] The Public Protector recommended remedial action against the President in line with section 182(1) of the Constitution.[177]

The National Assembly established two committees to review the Public Protector's report and thereafter proceeded to absolve the President from liability. As a result of the absolution, the remedial action recommended by the Public Protector became of no effect.[178] Aggrieved, the applicant filed the application seeking an order 'affirming the legally binding effect of the Public Protector's remedial action directing 'the President to comply with the Public Protector's remedial action' and a declaration 'that both the President and the National Assembly acted in breach of their constitutional obligations.[179] The applicant argued that the National Assembly failed to fulfil its constitutional obligation under section 55(2) and 181(3) of the Constitution by failing to hold the President accountable.[180] They argued that the National Assembly ought to have enforced the Public Protector's report as opposed to exonerating the President.[181] The National Assembly, on the other hand, argued that by virtue of section 42(3) of the Constitution it enjoyed discretion in the manner in which it elected to deal with the report lodged by the Public Protector and that the remedial action recommended by the Public Protector was not binding on it.[182] In keeping with its duty under section 42(3) of the Constitution, the National Assembly argued that it took further steps to 'ascertain the correctness of the conclusions reached and the remedial action taken by the Public Prosecutor.'[183]

In a unanimous judgment, the Court found that sections 42(3) and 55(2) of the Constitution failed to describe with sufficient detail the manner in which the National Assembly was to fulfil its constitutional obligation of holding the National Assembly accountable.[184] As a result, the mechanics of how the National Assembly went about fulfilling its constitutional obligations

[176] Para 8 and 9.
[177] Para 10.
[178] Para 12.
[179] Para 13.
[180] Para 41: The National Assembly is also said to have breached its constitutional obligations imposed by Constitution of the Republic of South Africa, 1996 s 55(2) and s181(3) of the Constitution. Section 55(2) provides: 'The National Assembly must provide for mechanisms:
(a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and
(b) to maintain oversight of—
(i) the exercise of national executive authority, including the implementation of legislation; and
(ii) any organ of state.'
[181] Para 42 and 43.
[182] Para 85, 86 and 87.
[183] Para 85.
[184] Para 87.

were far removed from the jurisdiction of the Court. The Court proceeded to describe a 'constitutionally permissible judicial inquiry'[185] in the following manner:

> It falls outside the parameters of judicial authority to prescribe to the National Assembly how to scrutinize executive action, what mechanisms to establish and which mandate to give them, for the purpose of holding the Executive accountable and fulfilling its oversight role of the Executive or organs of State in general. The mechanics of how to go about fulfilling these constitutional obligations is a discretionary matter best left to the National Assembly…Ours is a much broader and less intrusive role. And that is to determine whether what the National Assembly did does in substance and in reality, amount to fulfilment of its constitutional obligations. That is the sum-total of the constitutionally permissible judicial enquiry to be embarked upon.[186]

Having laid out what it described as a constitutionally permissible judicial enquiry, the Court proceeded to examine the National Assembly's decision to set aside the Public Protector's findings and remedial action. This review was grounded on what the Court described as the twin duty the National Assembly bore upon receipt of the Public Protector's report. First, scrutinize the report, and secondly, hold the President to account.[187] The Court found that by setting up a parallel investigative process which resulted in the nullification of the findings and remedial actions taken by the Public Protector,[188] the National Assembly had failed to fulfil its obligations. The Court likened the process undertaken by the National Assembly to 'stepping into the shoes of the Public Protector.'[189] The Court reasoned that the appropriate forum to set aside the Public Protector's report was the Court and therefore; by setting aside the report, the National Assembly usurped the authority of the judiciary.[190]

> That said, the National Assembly chose not to challenge the Public Protector's report on the basis of the findings made by the Minister of Police and its last Ad Hoc Committee. Instead, it purported to effectively set aside her findings and remedial action, thus usurping the authority vested only in the Judiciary.[191]

In its final orders, the Court agreed with the applicant on the binding nature of the remedial action undertaken by the Public Protector in terms of section 182(2)(c) of the Constitution.'

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[185] Ibid.
[186] Para 93.
[187] Para 94 and 95.
[188] Para 98.
[189] Ibid.
[190] Para 94.
[191] Ibid.

Additionally, the resolution arrived at by the National Assembly setting aside the Public Protector's findings and remedial action were found to be inconsistent with 'section 42(3), 55(2)(a) and (b) and 181(3) of the Constitution' and therefore set aside.[192]

The Court, as will become evident, interpreted its authority as well as that of the office of the Public Protector in an expansive manner that disregarded the constitutional power of the National Assembly to exercise oversight over the office of the Public Protector. The office of the Public Protector is one of the 'state institutions supporting constitutional democracy' created under Chapter 9 of the Constitution and intended to be 'independent and subject only to the Constitution.'[193] Hoolo Nyane writes that these institutions were initially meant to 'provide oversight without having binding powers over the other three traditional branches.'[194] However, with the passage of time, the judiciary has since clothed these institutions with binding powers.[195] The progressive consolidation of power in these institutions has led some to advance the argument that 'South Africa has a constitutional scheme' that constitutes Chapter 9 institutions as a 'fourth branch of government.'[196] Be that as it may, the doctrine of separation of powers to which South Africa subscribes frowns upon the 'absolutism of each branch within its zone.'[197] The consolidation of power in the office of the Public Protector raises the fear of absolutism. Stu Woolman expressed it in the following manner:

> Both advocate Bishop and I shared a concern about turning an investigatory and problem-solving body meant to mediate disputes between the state and its 50 million citizens into an institution that might act, on rare occasion, as detective, prosecutor, judge and jury. It is possible that the latter set of powers could be used for malevolent ends against minority parties, government officials or others exercising public power who have fallen out of favour with the governing party.[198]

To guard against absolutism within the office of the Public Protector, section 182(1)(b) of the Constitution as read with section 8(2) of the Public Protectors Act empowers the National

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[192] Para 105.
[193] Constitution of South Africa, 1996 section 181(2).
[194] Hoolo Nyane 'Separation of Powers and State Institutions Supporting Democracy: Does South Africa Have A "Fourth Branch" Par Excellence?' (2021) 10 *Perspectives of Law and Public Administration* 10 at 189.
[195] Ibid at 190.
[196] Ibid.
[197] Walter Khobe Ochieng 'Separation of Powers in Judicial Enforcement of Governmental Ethics in Kenya and South Africa' (2018) *Journal of Law and Ethics* at 44.
[198] Stu Woolman, '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 *Constitutional Court Review* 159 at 177.

Assembly to exercise oversight over the office of the Public Protector.[199] This oversight role by the National Assembly is encouraged by Stu Woolman who argues 'a commitment to a politics of accountability is more deeply entrenched when state institutions share responsibility for determining their respective obligations to uphold their duties under the Constitution.'[200] But what is the nature of oversight contemplated by the Constitution? Is the National Assembly to rubber stamp decisions of the Public Protector? Aziz Z. Huq writes that this case turned on the question 'whether the Public Protector's recommendations to the president and the National Assembly pursuant to section 182(1)(c) of the Constitution were binding or precatory.'[201]

Section 182(1)(b) of the Constitution as read with section 8(2) of the Public Protectors Act confer a measure of discretion on the National Assembly in the exercise of its oversight function. The finding by the Court that only the judiciary can set aside a report tabled by the office of the Public Protector does not find textual support within the Constitution. It is the result of an expansive interpretation of the Court's institutional authority and the constitutional power of the office of the Public Protector. The fallacy in the Court's reasoning lies in the fact that the Constitution submits the office of the Public Protector to the oversight jurisdiction of the National Assembly. How then can it be argued that the National Assembly is to merely rubber stamp the Public Protector's report?

I submit that is well within the National Assembly's constitutional power to set up an investigation parallel to the Public Protector's as a way of scrutinizing a report presented before it. If for good reason the National Assembly finds the report to have been tailored towards ulterior motives unsupported by the constitutional power conferred on the Public Protector, nothing stops the National Assembly from setting aside the report.

The Constitution envisages a two-tier review process of the Public Protector's report. The National Assembly serves as the first tier, whereas the judiciary serves as the second tier. The review conducted by the judiciary must remain sensitive to the constitutional power committed to the National Assembly to oversight the office of the Public Protector. This is to be achieved

[199] Omololu Michael Fagbadebo1 & Nirmala Dorasamy 'Judicial Review as an Accountability Mechanism in South Africa: A Discourse on the Nkandla Case' (2022) 4 *African Journal of Inter/Multidisciplinary Studies* 1 at 135.
[200] Woolman op cit note 198 at 180, 181.
[201] Aziz Z. Huq 'A Tactical Separation of Powers?", Public Law and Legal Theory' (2019) 9 *Constitutional Court Review* 1 at 35.

through a narrow interpretation of the Constitution that gives effect to its plain meaning and the Court's institutional authority.

The submission of the Public Protector's report to the National Assembly triggered the Assembly's jurisdiction under section 42(3) and section 55(2) of the Constitution to 'scrutinise and oversee' the executive action in question. The mechanics of how to attain this was to be determined by the National Assembly's 'internal arrangements, proceedings and procedures.'[202] Stephen Gardbaun writes:

> The principle of the separation of powers, which guards against the consolidation of power by any one person or institution, protects against this tendency by imposing limits on judicial power that typically take a number of forms. One of these boundaries is the institutional autonomy of the legislative branch of government from judicial oversight of its internal proceedings, if not necessarily (or any longer) its external outputs.[203]

The finding by the Constitutional Court that the Public Protector's report has a binding effect raises questions as to the constitutional power of the National Assembly to oversee not only the office of the Public Protector but also executive action. Though the High Court decision in *Democratic Alliance v South African Broadcasting Corporation Limited and others*[204] was later overturned on appeal, the High Court correctly interpreted the Constitution in a narrow manner sensitive to the checks and balances contemplated by the Constitution:

> The powers and functions of the Public Protector are not adjudicative. Unlike Courts, the Public Protector does not hear and determine causes...the Public Protector relies primarily on official documents such as memoranda and minutes, and less on oral evidence…Further, unlike an order or decision of a Court, a finding by the Public Protector is not binding on persons and organs of state. If it was intended that the findings of the Public Protector should be binding and enforceable the Constitution would have said so.

By embracing an expansive interpretation of the constitutional power of the office of the Public Protector as well as the Court's, the Constitutional Court in *Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*[205] conducted what I argue was an impermissible intrusion into the constitutional power

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[202] Constitution of the Republic of South Africa, 1996 section 57(1)(a).
[203] Stephen Gardbaum, 'Pushing the Boundaries: Judicial Review of Legislative Procedures in South Africa' (2019) 9 *Constitutional Court Review* 1 at 17.
[204] *Democratic Alliance v South African Broadcasting Corporation Ltd and Others* 2015 (1) SA 551 (WCC).
[205] Supra note 92.

committed to the National Assembly to exercise oversight over the office of the Public Protector. The judgement mirrors the majority judgement in *Doctors for Life International v Speaker of the National Assembly and Others*[206] where the court through a similar approach to interpretation emasculated Parliament's constitutional power to legislate.

3.7.4 *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another*[207]

The complaint before the Constitutional Court was filed by three political parties: Economic Freedom Fighters (EFF), United Democratic Movement (UDM) and Congress of the People (COPE).[208] The Democratic Alliance was subsequently joined to the proceedings.[209] The complaint[210] before the Constitutional Court alleged that the National Assembly had failed to put in place 'mechanisms and processes to hold' President Zuma accountable following the judgment of the Constitutional Court in *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another*[211] that found him in violation of the Constitution for failing to implement the Public Protector's remedial action. The main question before the Court was whether the National Assembly was under an obligation to develop mechanisms and processes for the removal of the President under section 89 of the Constitution.[212]

The minority judgment found that although the National Assembly had not put in place a mechanism that was 'specially tailored for section 89,' part 15 of the Rules of the National Assembly provided for the mechanism of an ad hoc committee through which the President could be 'held accountable for his failure to implement the Public Protector's report or remedial

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[206] Supra note 35.
[207] Supra note 93.
[208] Para 2.
[209] Ibid.
[210] Para 154: The complaint read: 'Some six months after the Constitutional Court delivered its judgment, the National Assembly remains silent. The President has not been held to account. In particular, he has not been asked to explain his violations of the Constitution, which are self-evidently of a serious nature. He has also not been taken to task in relation to the statements he made to Parliament before the judgment of the Constitutional Court where he sought to falsely justify himself by misrepresenting the findings and report of the Public Protector and by the inaccurate portrayal of the role played by the state in the funding of the upgrades.'
[211] Supra note 89.
[212] Constitution of the Republic of South Africa, 1996 section 89 provides;
'(1) The National Assembly, by a resolution adopted with a supporting vote of at least two thirds of its members, may remove the President from office only on the grounds of—
(a) a serious violation of the Constitution or the law;
(b) serious misconduct; or
(c) inability to perform the functions of office.
(2) Anyone who has been removed from the office of President in terms of subsection (1)(a) or (b) may not receive any benefits of that office, and may not serve in any public office.'

action.'[213] The minority judgment rejected the position taken by the majority judgment that the provision providing for the establishment of an ad-hoc committee was ineffective for the realisation of the obligation under section 89 of the Constitution.[214] The minority judgement, relying on section 57(1)(a) of the Constitution, rejected the invitation to compel the National Assembly to put in place a special mechanism for section 89 of the Constitution as any such direction would infringe on the doctrine of separation of powers.[215]

The Chief Justice, in his dissenting opinion, described the majority judgment as a 'textbook case of judicial overreach' with the result of a 'constitutionally impermissible intrusion by the judiciary into the exclusive domain of Parliament.'[216] He faulted the majority judgment for arriving at a decision that lacks constitutional foundation. He pointed out two findings in particular by the majority judgment:

> (1) an institutional predetermination of the existence of a ground or a debate and voting on the impeachment of a President must be preceded by what a serious violation of the Constitution or law is and (2) that section 89 is incapable of proper implementation without special rules defining the entire process.[217]

The majority judgment, on the other hand, acknowledged that the role of impeaching a President was one committed to the National Assembly, and the determination of what entails each of the grounds of impeachment is left 'within the exclusive jurisdiction of the Assembly, and it alone is entitled to determine them.'[218] The majority judgment held that the impeachment process in the National Assembly must commence with an inquiry into the ground(s) upon which impeachment is sought.[219] To guide this inquiry, the majority judgment found that a formulation of rules specifically tailored for the process was a non-negotiable.[220] The majority judgment rejected the contention that the existing rules, although not tailored for the processed, sufficed.[221] The Court held:

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[213] Supra note 93 at para 42.
[214] Para 47.
[215] Para 75: 'This provision means that it is the National Assembly and not the Court which the Constitution gives the power to determine and control the National Assembly's own proceedings and procedures.
[216] Para 223.
[217] Para 257.
[218] Para 178.
[219] Para 180.
[220] Para 182.
[221] Para 160: 'However, it is apparent that rule 85(2) does not regulate the impeachment process. The rule was designed to govern improper and unethical behaviour by members of the Assembly. Although it also shields the President and members of the Cabinet from verbal abuse during debates in the assembly, the objective of the rule

> In the result, I conclude that section 89(1) implicitly imposes an obligation on the Assembly to make rules specially tailored for an impeachment process contemplated in that section. And, I hold that the Assembly has, in breach of section 89(1) of the Constitution, failed to make rules regulating the impeachment process envisaged in that section.

The majority judgment further rejected the Speaker's contention that rule 253, which provides for the establishment of ad hoc committees, was sufficient to effectuate section 89 of the Constitution.[222] The majority judgment directed the National Assembly to fulfil its constitutional obligation by formulating rules to govern the impeachment process under section 89 of the Constitution.

Mfundo Salukazana writes that the pre-occupation of the majority judgment was with the absence of a mechanism contemplated by section 89 of the Constitution as opposed to the 'adequacy of the current mechanism.'[223] The plain meaning of section 89(1) of the Constitution does not reveal the necessity of a mechanism specifically tailored for the impeachment process. Magabe and Odeku point out that a 'plain reading of section 89(1) of the Constitution does not suggest that special rules dealing with impeachment in terms of the section have to be made.'[224] They take the position that the majority judgment stepped outside their interpretive role and in the most intrusive manner proceeded to 'dictate' to the National Assembly the manner it was to carry out its constitutional power of impeachment.[225]

The holding by the majority judgment that the National Assembly failed to put in place a mechanism to effectuate section 89 of the Constitution is curious, considering the fact that the applicants, by their own admission, accepted that indeed a mechanism did exist through which the President could have been held to account.[226] Despite this submission, the majority judgment proceeded to find the mechanism as ineffective for the realization of the obligation under section 89 of the Constitution. This finding by the majority was arrived at following an

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is not the serious misconduct envisaged in section 89(1) of the Constitution. The rule does not refer at all to the other grounds listed in that section, upon which the President may be impeached.'

[222] Para 187-196.

[223]Mfundo Salukazana 'The bogey of judicial overreach in South Africa: A note on Economic Freedom Fighters v Speaker of the National Assembly' available at *https://ohrh.law.ox.ac.uk/the-bogey-of-judicial-overreach-in-south-africa-constitutional-Court-finds-the-national-assembly-failed-to-hold-president-to-account-as-required-by-the-constitution-economic-freedom-fighter/,* accessed on 4 January 2023.

[224] Thabo T. Magabe & Kola O. Odeku 'Concurring With the Minority Judgment Which Finds the Majority Judgment to be Judicial Overreach to the Doctrine of Separation of Powers Accentuated in the Case of Economic Freedom Fighters Vs. Speaker of the National Assembly 2018 (2) Sa 571 (Cc)' (2021) 10 *Perspectives of Law and Public Administration* 2 at 75.

[225] Ibid.

[226] Para 46.

expansive reading of the Court's authority in a manner that disregarded the National Assembly's constitutional power under section 57(1) of the Constitution.

Mhango and Hlaele fault the majority judgment on three counts: its failure to 'apply the political accountability doctrine;' its prescription to Parliament on the manner it was to 'conduct impeachment proceedings' and its 'lack of fidelity to the text of the constitution' in its interpretation of the Constitution.[227] The majority judgement usurped the discretion committed to the National Assembly in the exercise of its constitutional power to impeach the President under section 89(1) of the Constitution. The approach to interpretation where Courts find as implicit constraints not evident in the text of the Constitution, is a pointer to an expansive interpretation of the Constitution and the court's authority. A narrow textual reading of section 89(1) of the Constitution which gives effect to the text's plain meaning does not yield the results emanating from the majority judgement.[228]

The minority judgement, on the other hand, embraced a narrow textual reading of section 89(1) of the Constitution that gave effect to its plain meaning. The minority judgment similarly narrowly read its institutional authority. It acknowledged the constitutional power committed to the National Assembly by section 57(1)(a) of the Constitution over its internal arrangements, proceedings and procedures. The minority judgement rejected the invitation taken up by the Constitutional Court in *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*[229] and the majority judgment in *Doctors for Life International v Speaker of the National Assembly*[230] where the Constitutional Court embraced an expansive interpretation of the text of the Constitution and the court's authority in a manner that resulted in an impermissible intrusion into terrain reserved for coordinate arms. The majority judgment in this case, as did the majority judgment in *Doctors for life International v Speaker of the National Assembly*[231] exhibited what Mhango and Hlaele describe as a 'lack of fidelity to the text of the constitution. '[232]

[227] Mhango and Hlaele op cit note 159 at 29.
[228] Tim Kopmans op cit note 82.
[229] Supra note 92.
[230] Supra note 35.
[231] Ibid.
[232] Mhango and Hlaele op cit note 159 at 29.

3.9 CONCLUSION

South Africa has made great strides towards entrenching the doctrine of separation of powers in her territory and ensuring comity between the three arms of government. This is seen in the exclusive jurisdiction enjoyed by the Constitutional Court over cases that are likely to intrude into areas reserved for political branches. What has become evident however through the cases analysed is the fact that the Constitutional Court is yet to strike a discernible balance between what constitutes a permissible and impermissible intrusion. The judgments that have yielded what I describe as a permissible intrusion have embraced a narrow interpretation of the court's authority and of the Constitution by giving effect to the plain meaning of constitutional text. This was evident in *President of the Republic of South Africa and Others v South African Rugby Football Union and others,*[233] the minority judgment in *Doctors for Life International v Speaker of the National Assembly and others,*[234] *United Democratic Movement v Speaker of the National Assembly and Others*[235]and the minority judgment in *Economic Freedom Fighters and others v Speaker of the National Assembly and Another.*[236] A narrow reading of the court's authority and of the Constitution in cases that impact the sensitive area of separation of powers does not in any way minimise the court's guardianship role over the Constitution. In fact, it enhances the constitutional imperative of separation of powers.

The judgements I have identified as having impermissibly intruded into terrain reserved for the Executive and Parliament reflect an expansive interpretation of the court's institutional authority and of the Constitution in a manner that disregards the public meaning of the text and the constitutional power committed to political branches. These are *Albutt v Centre for the Study of Violence and Reconciliation and others v President of the Republic of South Africa and others*[237] and the majority judgements in *Doctors for Life International v Speaker of the National Assembly and others*[238] and *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another.*[239]

[233] Supra note 24.
[234] Supra note 35.
[235] Supra note 91.
[236] Supra note 93.
[237] Supra note 46.
[238] Supra note 35.
[239] Supra note 92.

Hopefully, in the fullness of time, the Constitutional Court will adopt the approach to interpretation recommended by this thesis when faced with cases that impact the sensitive area of separation of powers

CHAPTER FOUR: THE POLITICAL QUESTION DOCTRINE IN GHANA

4.1 INTRODUCTION

Like Kenya and South Africa, Ghana has codified the principle of constitutional supremacy, through which the Supreme Court, which enjoys exclusive jurisdiction over constitutional matters, continues to intrude into terrain reserved for the Executive and Parliament. This chapter shall examine the nature of intrusions conducted by the Supreme Court under two thematic areas, parliamentary process, and the exercise of presidential power. Unlike Kenya and South Africa, Ghana's Supreme Court appears weary of intrusions that are of a constitutionally impermissible nature.

4.2 Historical Background

Like Kenya and South Africa, Ghana's constitutional history documents the journey she has travelled from a past where the judiciary failed to hold political branches to account to a present where the exercise of power by political branches is subjected to the dictates of the Constitution.[1] This background is necessary for understanding the evolution of the power of judicial review in Ghana through which courts continue to intrude into terrain reserved for political branches.

Ghana (formerly Gold Coast) attained her independence in 1957, becoming the first sub-Saharan country to free herself from colonial rule.[2] Upon her independence, the Ghana (Constitution) Order in Council, 1957 (Constitution of Ghana, 1957) was promulgated, vesting executive control of the country in the office of Prime Minister and Head of State. The office of the Head of State was taken up by the Governor General, who served as the Queen's representative in Ghana.[3] The Constitution of Ghana, 1957 established a system of

[1] Seth Yeboa Bimpong-Buta *the Role of the Supreme Court in The Development of Constitutional Law in Ghana* (unpublished LLD thesis, University of South Africa, 2005) 77.
[2] Frimpong Kwame & Agyeman-Budu Kwaku 'The rule of law and democracy in Ghana since independence: Uneasy bedfellows?' (2018) 18 (1) *African Human Rights Law Journal* 244-265.
[3] Maame Efua Addadzi-Koom *Separation of Powers Under Ghana's Constitutional Order Since Independence: A Comparative Study of the Concept Under the 1979 and 1992 Constitution* (LLB dissertation, Kwame Nkrumah University, 2015) 19.

parliamentary supremacy akin to that operational in South Africa prior to her Interim Constitution.[4]

In 1960, Ghana promulgated her second Constitution after a successful referendum. The Constitution of Ghana, 1960 was described as republican as it transitioned the country from a constitutional monarchy[5] to a presidential system of government.[6] Unlike the Constitution of Ghana, 1957, which vested executive power in the Queen of England, the Constitution of Ghana, 1960, vested executive power in the Ghanaian President[7] and insulated executive action from judicial review.[8] The concentration of power in the office of the President under the Constitution of Ghana, 1960, severely inhibited the doctrine of separation of powers in Ghana by emasculating the judiciary's independence.[9] For instance, in 1963 the President summarily dismissed Chief Justice Arku Korssh and two Judges of the Court of Appeal from office.[10]

The third constitutional order was established in 1969 following the passage of the Constitution of Ghana, 1969. The Constitution of Ghana, 1969, made great attempts at deconcentrating the power of the office of the President. It established the principle of constitutional supremacy in Ghana, breaking away from a past where executive action was largely unexaminable.[11] Under this principle, courts played a more significant interpretive role, and readily reviewed acts of political branches that transgressed legal and constitutional limits in a largely permissible manner.

In 1979, Ghana established her fourth constitutional order, the Constitution of Ghana, 1979. A notable feature of this Constitution was the principle of constitutional supremacy which was carried over from the Constitution of Ghana, 1969.[12] The fifth constitutional order in Ghana was established in 1992 following a referendum. The Constitution of Ghana, 1992, continued with the now well-established principle of constitutional supremacy.[13] Seth Yeboa writes that

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[4] Egon Schwelb 'The Republican Constitution of Ghana' (1960) 9 (4) *The American Journal of Comparative Law* at 654 and Gordon Woodman 'British legislation as a source of Ghanaian law: From colonialism to technical aid' (1974) 7 (1) *Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 19–32.
[5] The Constitution of the Republic of Ghana, 1960 article 7 provided as follows: 'The head of state was Governor General who was responsible for representing the British Monarch in newly independent Ghana'.
[6] Wiliam Burnett Harvey 'The evolution of Ghana law since independence' (1962) 27 *Law and Contemporary Problems* 582.
[7] The Constitution of the Republic of Ghana, 1960 articles 4 & 8.
[8] Addadzi-Koom op cit note 3 at 21.
[9] Ibid.
[10] Ibid.
[11] Ibid.
[12] The Constitution of Ghana, 1979 article 1(2).
[13] The Constitution of Ghana, 1992, articles 1 & 2.

the common feature cutting across the Constitutions of 1960, 1969, 1979 and 1992 is the 'doctrine or concept of separation of powers'[14] evidenced by the 'distribution of powers of government amongst the three arms of government: the Legislature, the Executive and the judiciary.'[15] The following parts of the chapter introduce the doctrine of separation of powers as applied in Ghana.

4.3 Separation of Powers in Ghana

The doctrine of separation of powers is evident in Ghana although it is not expressly mentioned in the Constitution.[16] In *Amidu v President Kufuor*,[17] Justice Kpegah observed that the Constitution of Ghana, 1992, 'like the American Constitution, is a written Constitution underpinned by the doctrine of the separation of powers.[18] The organization of government into three branches: Executive,[19] Judiciary[20] and Parliament[21] is a demonstration of the doctrine. The Constitution has circumscribed the functions of the three branches and established itself as a check on the manner in which each branch exercises its functions. This was affirmed by Justice Wiredu in *Ghana Bar Association v Attorney General*[22] as follows: 'all arms of the State are answerable or responsible to the Constitution 1992'.[23]

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[14] Bimpong-Buta op cit note 1 at 101.

[15] Justice Kpegah documented this progression in *New Patriotic Party v Attorney-General* as follows: 'In 1960, Ghana had a constitution, 1960 which, for the first time, introduced the American concept of the doctrine of separation of powers as an important doctrinal underpinning of our Constitution—the separation of powers between the executive, the legislature and the judiciary. This was also to be the case with the Second Republican Constitution, 1969; although this Constitution provided for a ceremonial President in favour of a Prime Minister. In the case of the Third Republican Constitution, which was introduced in 1979, the presidential system of government was reintroduced with the same concept of separation of powers underpinning it. In the Constitution, 1992 which is the fourth in our history and under which we currently operate, the presidential system of government was retained and the framers consciously and meticulously allocated state authority among the executive, the legislature and the judiciary. The doctrine of the separation of powers is indicated in the discrete manner each branch of government is dealt with in chapters eight, ten and eleven of the Constitution, 1992.'

[16] *New Patriotic Party v Attorney General* 1994 JELR 66360 (SC) 44.

[17] *Amidu v President Kufuor & Others* 2001-2002 (2) GLR 510.

[18] Ibid.

[19] Chapter 8 of the Constitution establishes the executive arm of government and vests in the President executive authority.

[20] Judicial authority in Ghana is vested in a four-tier court structure comprising the Supreme Court, Court of Appeal, High Court and Magistrates Court. Article 130 of the Constitution of Ghana vests in the Supreme Court original jurisdiction in 'all matters relating to the enforcement or interpretation of this Constitution' and 'all matters arising as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or person by law or under this Constitution'. The Supreme Court in the exercise of its original jurisdiction under article 130 of the Constitution of Ghana, 1992 has found the actions of political branches reviewable for the purpose of ascertaining their consistency with the Constitution

[21] The legislature is established under Chapter 10 of the Constitution and vested with legislative power with a command that such power shall be exercised in conformity with the Constitution

[22] *Ghana Bar Association v Attorney-General* 2003-4 (1) SCGLR 250 (SC) 22 at 605.

[23] Ibid.

Asare v Asare[24] tested the efficacy of the doctrine of separation of powers in Ghana.[25] The Supreme Court was faced with a case challenging the role of the President in the constitutional amendment process, a process the plaintiff argued was exclusively committed to Parliament.[26] Justice Benin's concurring majority judgment shed light on the delicate balance courts have to strike when faced with a claim that a coordinate arm has encroached upon the domain of another branch. He stated as follows:

> Under the 1992 Constitution, a violation of the doctrine could be said to have occurred in one of two situations: firstly, where one branch interferes with the other's performance of its constitutionally assigned function; and secondly, where one branch assumes a function that more properly is entrusted to another. In both instances exclusivity of the function must be clear and certain.[27]

Courts in Ghana exhibit an awareness of the limits of their constitutional power. Chief Justice Archer's observed rather colourfully in *New Patriotic Party v Attorney General*[28] that the Supreme Court must not 'behave like an octopus stretching its eight tentacles here and there to grasp jurisdiction not constitutionally meant for it.'[29] The separation of powers doctrine is appreciated as a tool of restraint that is multi-directional in nature. In as much are courts are willing to police the constitutional and legal limits of the power exercised by coordinate arms, they, too, acknowledge the institutional limits of their authority. To prevent encroachment into terrain reserved for a coordinate arm, courts in Ghana have demonstrated a willingness to uphold the political question doctrine.

4.4 The Place of the Political Question Doctrine in Ghana

Although the political question doctrine has received considerable judicial consideration in Ghana,[30] its application continues to attract divergent positions.[31] Its earliest manifestation in Ghana can be traced to *Tuffour v Attorney General.*[32] The Court, though not making mention of the political question doctrine, opined that 'the courts do not, and cannot, inquire into how

[24] *Asare v Attorney General* 2015 GHASC 101.
[25] Ibid.
[26] Ernest Kofi Abotsi 'Amending the Constitution of Ghana: Is the Imperial President Trespassing? - A Rejoinder' (2012) 20 *African Journal of International and Comparative Law* 141 & 143.
[27] Ibid.
[28] Supra note 16.
[29] Ibid.
[30] Mtendeweka Owen Mhango 'Separation of Powers in Ghana: The Evolution of The Political Question Doctrine' (2014) *17 Potchefstroom Electronic Law Journal* 2710.
[31] Ibid.
[32] *Tuffour v Attorney-General* 1980 GLR 637 (C.A).

Parliament went about its business.'[33] The Court interpreted article 91(1) of the Constitution of Ghana, 1979, as conferring on Parliament an unfettered power to 'regulate its own procedure.' Put differently, the Court found Parliamentary standing orders to be binding on it.

Mhango argues that although the application of the political question doctrine in Ghana is debatable, there is consensus around the position that the political question doctrine 'is a function of the separation of powers principle enshrined in the Ghanaian Constitution.'[34] In *J H Mensah v Attorney-General,*[35] Justice Acquah was to formulate a uniquely Ghanaian conceptualisation of the doctrine.

> …if by the political question doctrine, it is meant that where the Constitution allocates power or function to an authority, and that authority exercises that power or function within the parameters of that provision and the Constitution as a whole, a court has no jurisdiction to interfere with the exercise of that function, then I entirely agree that the doctrine applies in our Constitutional jurisprudence.[36]

Justice Acquah's formulation of the doctrine asserts that indeed 'questions in their nature political' must be posed in court, a departure from the admonition in *Marbury v Madison.*[37] It is the nature of the court's interaction with these 'questions in their nature political' that forms the subject of this chapter. In *New Patriotic Party v Attorney-General,*[38] Justice Adade found that articles 2 and 3 of the Constitution of Ghana, 1992 vitiated against a blanket application of the political question doctrine as a bar to the justiciability of political questions. Justice Adade's finding was to later influence the Supreme Court's finding in *Justice Abdulai v The Attorney General*[39] that the political question doctrine does not apply in Ghana:

> In exercising its interpretative and enforcement mandate, the Court has power to adjudicate all and any allegations that any acts, omissions and enactments are inconsistent with and in contravention of the Constitution without the exceptions tendered to be suggested on grounds of the doctrine of political question. This Court has predominantly, on a preponderance of the authorities, long held the view that the political question doctrine does not apply within our jurisdiction.[40]

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[33] Ibid.
[34] Mhango op cit note 30 at 2711.
[35] *J H Mensah v Attorney-General* 1996-97 SCGLR 320 p 34.
[36] Ibid.
[37] *Marbury v Madison* 5 U.S. (1 Cranch) 137 (1803).
[38] Supra note 16.
[39] *Justice Abdulai v Attorney-General* [2022] GHASC 1.
[40] Ibid at page 13.

The finding by the Supreme Court in *Justice Abdulai v The Attorney General*,[41] however, contradicts decisions previously rendered by the court. In *Ghana Bar Association v The Attorney General*[42] for instance, Justice Kpegah borrowing from *Baker v Carr*[43] held that 'the specific commitment' of a matter to a political branch and the 'lack of a satisfactory criteria for a judicial determination' remain as key considerations in determining whether a matter raises a non-justiciable political question. In the same judgment, Justice Charles Hayfrom Benjamin opined:

> It seems to me therefore that by the nature of our Constitution the principle of a non-justiciable political question can only arise where the Constitution, 1992 expressly commits a particular responsibility to some arm of government.

The political question doctrine that the Court seems to reject is one that denies the court jurisdiction to interrogate political questions for their consistency with constitutional and legal limits. Indeed, case law suggests that the Supreme Court has tilted more in the direction of Justice Acquah's formulation of the doctrine. In doing so, the court has been able to fashion a permissible intrusion into terrain reserved for political branches.

4.5 Constitutionally Permissible Intrusions into Terrain Reserved for Political Branches

The subject of this chapter is to interrogate what has emerged as a constitutionally permissible intrusion in Ghana. As argued in the previous chapters, a constitutionally permissible intrusion results when courts acknowledge the institutional limits of their authority and, secondly, consistently adhere to a narrow textual interpretation of the Constitution which respects the plain meaning of constitutional text. Conversely, a constitutionally impermissible intrusion results when courts interpret their authority and the Constitution in an expansive manner that disregards the constitutional power and discretion committed to political branches. An expansive interpretation of the Constitution will see judges ascribe meaning to constitutional text that is alien to its plain meaning.

The following parts of this thesis look into two thematic areas where the Supreme Court was invited to intrude into terrain reserved for political branches: in parliamentary process and the exercise of presidential power. As will become evident, the Supreme Court has demonstrated a

[41] Supra note 39.
[42] Supra note 22.
[43] *Baker v Carr* 1962 (369) U.S. 186.

reluctance in countermanding the discretion exercised by political branches by employing a narrow construction of the court's authority and of the Constitution.

4.6 Parliamentary Process

A number of cases have been presented before the Supreme Court where the court was urged to make determinations that intrude into the decisional autonomy of Parliament. Three of such cases are relevant to this study: *Tuffour v Attorney General,*[44] *J H Mensah v Attorney General*[45] and *Asare v Attorney-General.*[46] In the three cases the constitutional power of Parliament to 'regulate its own procedure'[47] was presented before the Supreme Court for review. In the three cases, the court fashioned what I describe as a permissible intrusion into parliamentary processes by construing its power in a narrow manner that respected the constitutional power of Parliament to 'regulate its own procedure.'

4.61 *Tuffour v Attorney General*[48]

Following the promulgation of the Constitution of Ghana 1979, the President 'in consultation with the Judicial Council' nominated Mr. Justice Fred Kwasi Apaloo as Chief Justice. His name was subsequently forwarded to Parliament for vetting and approval. Parliament rejected his nomination, precipitating the suit before the Court of Appeal (which was sitting as the Supreme Court at the time).[49] The plaintiff's suit against the Speaker of Parliament and the Attorney General was founded on article 118(1) (a) of the Constitution of Ghana, 1979, which vested power in the Supreme Court 'in all matters relating to the enforcement or interpretation of any provision' of the Constitution. The plaintiff argued that although the promulgation of the Constitution of Ghana, 1979 abolished 'all public offices under the old order,'[50] a constitutional mechanism was formulated whereby 'certain office-holders were deemed to have been appointed into the equivalent offices immediately upon the coming into force of the constitution.'[51] The plaintiff argued that one such office was that of Chief Justice Fred Kwasi Apaloo and that therefore the President's act of nominating Justice Fred Kwasi Apaloo as Chief Justice and his subsequent vetting and rejection by Parliament was contrary to the Constitution.

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[44] Supra note 32.
[45] Supra note 35.
[46] *Asare v Attorney-General* (AP) unreported case number 21/2006 (15 September 2006).
[47] Constitution of Ghana 1979, article 91; and Constitution 1992, articles 110(1) and 115.
[48] Supra note 32.
[49] Ibid at page 652.
[50] Ibid.
[51] Ibid.

He founded his argument on article 127(7) and (8) of the Constitution of Ghana, 1979 which provided that judges holding offices 'immediately before' the promulgation of the Constitution of Ghana, 1979 were deemed to have been so appointed upon the coming into force of the Constitution.'[52]

A preliminary objection was raised by the Attorney General at the hearing of the suit on the 'competence of the Speaker as the 1st Defendant.'[53] One of the issues the court was called upon to determine was 'how far the court can question what, under our Constitution, has been done in, and by, Parliament.'[54] This issue flowed from the declaratory reliefs sought by the plaintiff: 'the application of the procedure in article 127(1)[55] to Mr. Justice Fred Kwasi Apaloo and his purported vetting and rejection by Parliament were in contravention of the Constitution.'[56] The Court found that parliamentary proceedings were insulated from judicial reach on account of article 96 of the Constitution 1979.[57] The Court proceeded to assert that where Parliament acts in consonance with its standing orders, its actions cannot be impeached in a court of law:

> ..and therefore the courts take judicial notice of what has happened in Parliament. The courts do not, and cannot, inquire into how Parliament went about its business…Of particular importance to us are the provisions of article 96 of the Constitution. They confer on Parliament freedom of speech, of debate and of proceedings in Parliament. The article also states categorically: "that freedom shall not be impeached or questioned in any Court or place out of Parliament." The courts cannot therefore inquire into the legality or illegality of what happened in Parliament. In so far as Parliament has acted by virtue of the powers conferred upon it by the provisions of article 91 (1), its actions within Parliament are a closed book.[58]

The Court dismissed the preliminary objection filed by the Attorney General. It framed the dispute before it as one touching on the 'status of the incumbent Chief Justice, the determination of which depends upon an interpretation of the Constitution.'[59] The Court interpreted the phrase 'shall be deemed' contained in article 127(8) of the Constitution as

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[52] Page 652.
[53] Page 638.
[54] Page 650.
[55] The Constitution of Ghana, 1979 article 127(1) provides that: 'The Chief Justice and the other Justices of the Supreme Court shall be appointed by the President by warrant under his hand and the Presidential seal, (a) in the case of the Chief Justice, acting in consultation with the Judicial Council: (b) in the case of the other Justices of the Supreme Court, acting on the advice of the Judicial Council, and with the approval of Parliament.'
[56] Supra note 32 at page 638.
[57] Ibid at page 650.
[58] Ibid.
[59] Ibid.

applying to Chief Justice Apaloo who at the time of the coming into force of the Constitution of Ghana, 1979 was a 'justice of the Superior Court.'[60]

This judgment is significant in two respects: the Court's finding that parliamentary proceedings are insulated from judicial reach on account of article 96 of the Constitution 1979 and its interpretation of article 127(8) of the Constitution of Ghana, 1979 which I shall delve into in turn. From the Court's interpretation of article 96 of the Constitution 1979, two important findings emerge. The first is that 'courts can question the decisions of Parliament but not how the decisions were arrived at' and the second is that 'courts cannot question what goes on inside or within Parliament, especially on matters pertaining to its procedure as stated in article 110(1) of the Constitution, 1992.'[61] These findings point to a Court that is ready to deem as binding normative standards developed by Parliament pursuant to its constitutional obligation to regulate its internal procedures. By doing so, the Court remains conscious of the institutional limits of its authority and is ready to read its powers in a narrow manner that is conscious of Parliament's constitutional power to 'regulate its own procedure.'[62] The approach taken by the Supreme Court is similar to the one taken by the minority judgment in *Doctors for Life International v Speaker of the National Assembly and others* [63] where the Judges held back from disturbing the constitutional power committed to the National Council of Provinces under section 70 of the Constitution of South Africa, 1996 by prescribing what would amount to sufficient public involvement in the legislative process.

The Court's interpretation of article 96 of the Constitution 1979 sheds light on what constitutes a constitutionally permissible intrusion into Parliamentary processes in Ghana. The Court appears to have adopted a non-interventionist approach which acknowledges the 'mutuality of respect' between the judiciary and Parliament, 'two constitutional sovereignties.'[64]

The second significant aspect of the judgment in *Tuffuor*[65] was the Court's interpretation of article 127(8) of the Constitution of Ghana, 1979. What the Court found, in essence, was the fact that the constitutional power committed to the President and Parliament under article 127 of the Constitution of Ghana, 1979, had not crystallized, and therefore that the question of the

[60] Page 661-2
[61] Bimpong-Buta op cit note 1 at 123.
[62] Constitution of Ghana, 1979 article 91(1).
[63] *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC).
[64] Chuks Okpaluba 'Can a court review the internal affairs and processes of the legislature? Contemporary developments in South Africa' (2015) 48(2) Institute of Foreign and Comparative Law 183, 184
[65] Supra note 32.

power of the President to nominate a Chief Justice and that of Parliament to vet and approve the Chief Justice was improperly before the court. Article 127 of the Constitution of Ghana, 1979 was to later find interpretation in the case of *Ghana Bar Association v the Attorney General*[66] where the nomination, vetting and subsequent approval of Justice Abban was challenged before the Supreme Court. The case will be discussed under the section on intrusion into the Executive's constitutional powers.

4.6.2 *J H Mensah v Attorney General*[67]

Following his re-election for a second term, President Rawlings elected to retain in office some of the ministers and deputy ministers that served in his previous term. President Rawlings held the view that their initial approval by the 1st Parliament rendered a second approval by the newly elected Parliament (2nd Parliament) unnecessary. As a consequence, the names of the ministers and deputy ministers were not presented to Parliament for approval.[68] J H Mensah, the leader of opposition in Parliament, filed a suit seeking two declarations. First, 'on a true and proper interpretation of article 78(1)…no person can, as from 7 January 1997, act as minister without the prior approval of the newly elected second Parliament'.[69] Secondly, 'a necessary incident of prior approval is the consideration and vetting of the person or persons nominated for appointment by the newly elected Second Parliament.'[70]

A preliminary objection was raised by the Attorney General. He contended that 'the process by which Parliament exercised its powers such as approval of ministerial nominations could not be questioned by the courts under the political question doctrine.'[71] Justice Aikins, writing the Court's lead judgment, placed reliance on *Powell v McCormack*[72] in finding that the Court's duty in the present case was two-pronged. Firstly, to interpret the Constitution and determine whether the Constitution committed to Parliament the power to grant prior approval to presidential nominees. Secondly, to determine the 'extent and scope of the power' and whether Parliament exceeded the textual limits of the power.[73]

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[66] Supra note 22.
[67] Supra note 35.
[68] Bimpong-Buta op cit note 1 at 126.
[69] Supra note 35.
[70] Ibid.
[71] Bimpong-Buta op cit note 1 at 127.
[72] *Powell v McCormack* 1969(395) U.S. 486 (S.Ct).
[73] Bimpong-Buta op cit note 1 at 132, 133.

The Court agreed with the plaintiff only to the extent that persons nominated to hold ministerial positions must be subjected to an approval process by Parliament. The Court, however, declined an invitation to question 'the nature of the approval process.'[74] The Court reasoned that article 101(1) of the Constitution of Ghana, 1992, committed to Parliament the constitutional power to regulate its own internal procedure by way of its standing orders and, therefore, the procedure employed by Parliament in approving persons nominated for ministerial positions was not open to challenge before the Supreme Court. The plaintiff had sought to have the Court interpret the expression 'prior approval' in article 78(1) of the Constitution 1992 to imply 'consideration and approval.'[75] Justice Ampiah, in his concurring judgment, held that the Constitution was silent on the nature of approval to be procured by Parliament.[76] It was therefore outside its constitutional power to prescribe an approval process to be employed by Parliament. He opined:

> Provided 'approval' is given to the nominees of the President, in accordance with the orders regulating Parliament's procedure, such exercise of a right could not be unconstitutional. The Constitution itself has not regulated the approval process. It is a different matter if no approval at all is given for such appointments.[77]

Mhango writes that *J H Mensah v Attorney General*[78] endorsed the 'political question doctrine in Ghana and accepts, like some commentators, that certain constitutional provisions require deference to the other branches.[79] In rendering its decision, the Court employed a narrow reading of article 78(1) of the Constitution of Ghana, 1992 by ascribing to it its plain meaning. It did so by rejecting the invitation by the plaintiff to find that the 'prior approval' implied 'consideration and approval.' The Court is also seen to follow in the footsteps of *Tuffuor*[80] in declining to interfere with Parliament's internal procedure employed in the approval process. The approach taken by the court Conjures up the political accountability doctrine advocated for by Mhango and Hlaele.[81] Under the doctrine, Courts are discouraged from reviewing political questions on the basis of 'principles or constraints' not contained in the text of the

[74] Ibid at 128.
[75] Ibid.
[76] Bimpong-Buta op cit note 1 at 132, 133.
[77] Ibid
[78] Supra note 35.
[79] Mhango op cit note 30 at 2724.
[80] Supra note 32.
[81] Mtendeweka Mhango and M Hlaele, 'Something Happened on Our Way to 'A Funny Democracy': A Critical Analysis of Economic Freedom Fighters and Others v Speaker of the National Assembly and Another 2018 (2) SA 571 (CC) Executive Accountability in South Africa and Lesotho' 2022 27(1) *Lesotho Law Journal* 23.

Constitution.[82] This approach allows political branches room to operate within the discretion conferred on them by the Constitution.

Justice Acquah attempted a Ghanaian formulation of the political question doctrine in the judgment.[83] His formulation of the doctrine, however, still leaves it open to courts through an expansive interpretation of their authority and text of the Constitution to intrude into terrain reserved for coordinate arms. Mhango writes that 'Justice Acquah fails to address the instances where the Constitution allocates power or discretion to the political branches without at the same time indicating the parameters of that discretion or power.'[84] He proceeds to describe Justice Acquah's formulation of the doctrine as a 'compromised political question doctrine'[85] because the Judge attempts to create a balance between the 'judiciary's role in checking unconstitutional government action with its duty not to usurp the political power exercised by the people through the executive and legislative branches.'[86] He finds this to be problematic because the Judge, though well intended, fails to establish the practicalities of this balance.[87]

This balance, I argue, is to be found in the approach to interpretation of the Constitution and the institutional authority of the court. By embracing a narrow interpretation of constitutional text in a manner that gives effect to its plain meaning, and of the court's institutional authority, a healthy balance is created where the court does not compromise on its obligation to interpret the Constitution and hold political branches to account on the one hand and the need to respect the constitutional power committed to political branches on the other hand. This balance was evident in the judgment delivered by the court. In finding that the ministers and deputy ministers retained in office by the President must receive parliamentary approval, the Court stood in defence of the Constitution. Similarly, by declining to direct Parliament on the manner it was to conduct the approval process, the court remained sensitive to the institutional limits of its authority and, therefore, the doctrine of separation of powers.

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[82] Ibid at 26.
[83] 'If by the political question doctrine, it is meant that where the Constitution allocates power or function to an authority, and that authority exercises that power within the parameters of that provision and the Constitution as a whole, a court has no jurisdiction to interfere with the exercise of that function, then I entirely agree that the doctrine applies in our constitutional jurisprudence. For this is what is implied in the concept of separation of powers. But if by the doctrine, it is meant that even when the authority exercises that power in violation of the constitutional provision, a court has no jurisdiction to interfere because it is the Constitution which allocated that power to that authority, then I emphatically disagree.'
[84] Mhango op cit note 30 at 2722.
[85] Ibid at 2723.
[86] Ibid.
[87] Ibid at 2724.

4.6.3 *Asare v Attorney-General*[88]

Eric Amoateng, a member of Parliament for Nkoranza North constituency, was arrested in the course of his visit to the United States and incarcerated 'on charges of unlawfully importing narcotic drugs into' the United States. The parliamentary committee on privileges considered the circumstances surrounding his absence from Parliament and granted him an indefinite leave of absence. The committee took into consideration the principle of presumption of innocence and the uncertainty around the length of time the criminal trial would take. The plaintiff challenged the indefinite leave of absence granted to Amoateng, arguing that, by virtue of article 97(1)(c) of the Constitution of Ghana, 1992, his seat had by 'operation of law' become vacant' on account of his absence from Parliament 'for at least fifteen (15) consecutive sittings.'

Article 97(1)(c) of the Constitution of Ghana, 1992, confers on the parliamentary committee on privileges the constitutional power to grant a member of Parliament leave of absence upon 'reasonable explanation.' One of the issues framed by the Court for determination was whether it was unreasonable for Parliament 'to grant' an indefinite leave of absence to a member. The Court, while citing *Tuffour*[89] with approval, proceeded to hold as follows:

> Once parliament in the performance of its functions acted within the confines of the Constitution or complies with the provisions of the Constitution, its acts are not open to the scrutiny of the courts. For article 110(1) of the Constitution allows Parliament to regulate its own procedures.

The Court found that the Constitution committed the constitutional power to examine the reasonableness or otherwise of a member's application for leave of absence to Parliament and proceeded to dismiss the claim:

> And it is Parliament which as the legislative arm of the government has been mandated by the Constitution to determine the reasonableness or otherwise of 4th defendant's explanation through the committee on privileges. And this is what parliament has done.

Whereas the plaintiff sought to have the Court carry out an evaluation of the 'reasonableness' of Amoateng's explanation to the Parliamentary committee on privileges for his absence from Parliament, the Constitution of Ghana, 1992 vests the constitutional power to make a determination of such a nature on the Parliamentary committee on privileges. There is an

[88] Supra note 24.
[89] Supra note 32.

evident absence of judicially discoverable and manageable standards upon which the Court could have reviewed the committee's exercise of discretion. The Kenyan High Court in *Martin Nyaga Wambora & 4 others v Speaker of the Senate & 6 others*[90] was faced with a similar invitation. The petitioner sought to have the Court usurp the constitutional power vested in the Senate and County Assembly to determine whether the charges levelled against the governor amounted to gross violation of the Constitution.[91] The High Court declined this invitation.

The reasonableness of an explanation presented before the Parliamentary committee on privileges constitutes a political question. This then triggers the obligation of the Court to ascertain whether the parliamentary committee on privileges acted within the constitutional limits of its power. Article 97(1)(c) of the Constitution of Ghana, 1992, does not provide normative standards on what constitutes a reasonable explanation. The constitutional design leaves it to the Parliamentary committee on privileges to determine whether an explanation is reasonable on not. Normative standards developed by the Parliamentary committee on privileges should be accepted as binding on the court unless they violate textually identifiable constitutional constraints. In the absence of normative standards, the duty of the Court is to compel Parliament to develop a normative framework that shall guide an evaluation of what amounts to a reasonable explanation in future cases.

As Mhango explains, the Court's judgment in *Asare v Attorney General*[92] has been criticized on account of its failure to justify the application of the political question doctrine in the case.[93] One particular criticism was the Court's failure to 'explain the rationale for allowing the political question doctrine to swallow the Court's explicit powers in article 99(1)(a) of the Constitution.'[94] Article 99(1)(a) of the Constitution of Ghana, 1992 confers on the High Court jurisdiction to determine whether 'the seat of a member has become vacant.' Mhango's concern lies in the fact that the Court did not justify its application of the political question doctrine, in light of the seemingly wide and unfettered power enjoyed by the Court under article 99(1)(a) of the Constitution. The Court, in this particular case, was conscious of the constitutional design embedded in article 97(1)(c) of the Constitution to have the Parliamentary committee of privileges determine the reasonableness of Hon. Amoateng's explanation for his absence from Parliament. The Court embraced a narrow interpretation of its institutional authority and the

[90] *Martin Nyaga Wambora & 4 Others v Speaker of the Senate & 6* Others (2014) eKLR.
[91] Ibid.
[92] Supra note 24.
[93] Mhango op cit note 30 at 2726
[94] Ibid.

text of the Constitution by declining, in the absence of normative standards, to judicially prescribe standards upon which it could review the determination by the Parliamentary committee on privileges.

This case presented the Supreme Court with an opportunity to develop a clear philosophy around the interpretation of the court's institutional authority and the text of the Constitution in cases that impact the sensitive area of separation of powers, an invitation the Court took up and asserted itself.

4.7 Exercise of Presidential Power

The exercise of the constitutional power conferred upon the Executive has presented itself before the Supreme Court for review. Two cases stand out for the purpose of this study, namely, *New Patriotic Party v Attorney-General*[95] and *Ghana Bar Association v The Attorney General.*[96] In *New Patriotic Party v Attorney-General,*[97] the Supreme Court interpreted the Constitution in a manner that lacked fidelity to its text, thereby conducting what I argue was an impermissible intrusion into terrain reserved for coordinate branches. On the other hand, in *Ghana Bar Association v The Attorney General*,[98] the Supreme Court interpreted its power in a narrow manner that remained sensitive to the constitutional power committed to coordinate arms in the process of appointing a Chief Justice, thereby conducting what I argue was a permissible intrusion.

4.7.1 *New Patriotic Party v Attorney-General*[99]

The plaintiff filed the suit following an announcement by the government of a program to celebrate the anniversary of the 31st December 1981 military coup. The plaintiff sought a declaration to the effect that 'the public celebration of the overthrow of the legally constituted government of Ghana on 31st December 1981, and the financing of such celebration from public funds, is contrary to the letter and spirit of the Constitution.'[100] The Court by a majority of 5:4 decided in favour of the plaintiff.

[95] Supra note 16.
[96] Supra note 22.
[97] Supra note 16.
[98] Supra note 22.
[99] Supra note 16.
[100] Page 3.

Chief Justice Archer, in his lead minority judgment, cautioned that granting the declaration sought by the plaintiff would result in three unwarranted trespasses into terrain reserved for Parliament, the Executive and the office of the Auditor General.[101] He urged that the doctrine of separation of powers counselled against such an impermissible intrusion. The Chief Justice reasoned that the 'declaration of public holidays' was within the 'exclusive domain' of political branches, to wit, the Legislature and Executive.[102] Additionally, Parliament and not the courts had the jurisdiction to remove 'any public holidays that are obnoxious and undesirable.'[103] The Chief Justice held that the Court lacked the constitutional authority to prevent the Executive from pronouncing the celebration of 31st December as the Public Holidays Law, 1989, (P.N.D.C.L. 220), which conferred such authority on the Executive, had not been amended or repealed by Parliament.[104] He found that the plaintiff's remedy lay in Parliament as it was the only body vested with the legislative authority to effect any desired amendments and/or repeal to existing legislation:[105]

> At the time the writ was filed, the President had not repealed or modified the First Schedule to PNDCL 220 which was existing and therefore the executive could rely on it. Parliament which has the power to enact laws has not also bothered to modify the First Schedule to PNDCL 220. If Ghanaians, including the plaintiff, feel very strongly about 31 December as a public holiday, the door is not closed to them. They should urge their representatives in Parliament to amend the Schedule by deleting any public holidays that are obnoxious and undesirable. It is not the function of this court to effect such amendments or repeals. It would amount to a naked usurpation of the constitutional powers of Parliament.[106]

On the prayer 'for an order directed to the government to refrain' from financing the celebration from public funds, the Chief Justice interpreted article 108 of the Constitution of Ghana, 1992 as committing to Parliament the unique role of allocating funds to government for the running of the country. The Chief Justice found this role committed to Parliament to the exclusion of the Court.[107] He proceeded to find that the only identifiable textual limit on the exercise of Parliament's power under article 108 of the Constitution of Ghana, 1992 was the office of the Auditor General established under article 187 of the Constitution of Ghana, 1992. He held that

[101] Page 13.
[102] Page 6.
[103] Page 8.
[104] Ibid.
[105] Ibid.
[106] Ibid.
[107] 'Nowhere in this article is the Judiciary mentioned'. See page 10 of the Judgment.

the office was clothed with the constitutional power to inquire into misappropriation of funds.[108] The minority judgment acknowledged the institutional limits upon the constitutional power of the Court. It interpreted the Court's institutional authority in a narrow manner in comparison to the constitutional power committed to the Executive and Parliament. This was not the case with the majority judgment.

Justice Adade, in his leading majority judgment, interpreted articles 3(4)(a) and 41(b) of the Constitution of Ghana, 1992, as imposing a duty on 'all Ghanaians to defend the Constitution 1992.'[109] He found that the intended celebrations of 31st December had the potential of glorifying the 'coup d'état of 31st December' and would weaken the resolve of Ghanaians to reject coups.[110] Justice Adade further rejected the application of public funds towards the intended celebration, reasoning that applying the funds to the celebration of the anniversary of a coup d'état would undermine Ghanaians' constitutional duty to defend the Constitution.[111]

> Article 41(f) of the Constitution, 1992 enjoins every citizen: "(f) to protect and preserve public property and expose and combat misuse and waste of public funds and property." If, as I conceive it to be, the celebration of 31 December in the circumstances in which it is sought to be celebrated is unjustified, then any expenditure of public funds in that regard will be a misuse and waste of public funds.[112]

At issue in this judgment was the interpretation of article 3 of the Constitution of Ghana, 1992 which 'refer to acts which are geared towards unlawful and violent overthrow of the Constitution, 1992.' The majority judgment found the intended celebrations unconstitutional for offending 'the spirit of the Constitution, because the celebrations signified the glorification of *coups d'état* in Ghana.'[113] Chief Justice Archer posed a valid question in his lead minority judgment, 'wherein lies the spirit of a Constitution? Is it embedded in the whole document? Or in parts of the document?'[114] He proceeded to reject reliance on the spirit of the Constitution

[108] Page 79: 'Thus, whether a particular day in a year should be celebrated as a public holiday by fan-fare and merry-making or not is a policy decision for the executive and the legislature to make. With the greatest respect, the majority decision in favour of the declarations sought in the writ was plainly an undue and unnecessary interference in the functions of the legislature and the executive. This court, in my view, should always maintain a fine balance between the need to protect constitutional rights and liberties on one hand, and the danger of too great an interference in the affairs of the executive and the legislative branches of the government on the other.'
[109] Page 32.
[110] Page 32.
[111] Page 33.
[112] Page 36
[113] Frimpong and Agyeman-Budu op cit note 2 at 261.
[114] Page 7.

as an aid in interpretation and limited himself to the 'letter and intendment' of the Constitution, 1992.'[115] Justice Abban, concurring with Chief Justice Archer's judgment, observed as follows:

> A Constitution is a living piece of legislation and its provisions are vital living principles; and the spirit of every Constitution must be collected from the Constitution itself. So is it the spirit of the Constitution, 1992 that any celebration and, for that matter, anything which reminds or has the tendency to remind Ghanaians of a coup d'etat, or of violent overthrow of a lawfully constituted government is unconstitutional? The answer to me is "no."[116]

Chief Justice Archer and Justice Abban resorted to a narrow textual interpretation of article 3 of the Constitution, 1992 that gave effect to its plain meaning. They found that the article does not reveal an intention on the part of the framers to proscribe celebrations of the nature challenged by the plaintiff. The majority judgment, on the other hand, adopted an expansive interpretation of article 3 that overrode its plain meaning with the result of an impermissible intrusion into the terrain of Parliament and the Executive. It had the effect of usurping the Executive's power in pronouncing public holidays and Parliament's constitutional power to remove public holidays that are deemed undesirable without any constitutional foundation. The reliance by the majority of the spirit of the Constitution which lacks textual support within the body of the Constitution was an impermissible intrusion.

4.7.2 *Ghana Bar Association v the Attorney General*[117]

The plaintiff challenged the President's nomination of Justice Abban as Chief Justice and his subsequent vetting and approval by Parliament.[118] He contended that Justice Abban was not a person of high moral character and proven integrity contrary to article 128(4) of the Constitution of Ghana, 1992. This contention was informed by Parliament's rejection of his nomination as a 'justice of the Supreme Court 'during the third Republic on the grounds of impropriety and dishonesty' while he was serving as chairman of a special tribunal.[119] A preliminary objection was filed by the Attorney General, challenging the jurisdiction of the Court to hear and determine the dispute. He argued that article 144(1) of the Constitution of Ghana, 1992 committed the role of appointing the Chief Justice to the Council of State,

[115] Ibid.
[116] Page 68.
[117] Supra note 22.
[118] Ibid.
[119] Supra note 22.

Parliament and the President and therefore the doctrine of separation of powers counselled against a judicial inquiry.[120]

Justice Wiredu, in his lead judgment, found that the power committed to the three organs in the appointment of a Chief Justice was limited by an obligation to act within the 'framework of the Constitution.'[121] He rejected the proposition that the appointment of the Chief Justice under article 144(1) of the Constitution of Ghana, 1992 formed a non-justiciable political question.[122] The Judge proceeded to inquire into whether the Council of State, Parliament and the President had acted within the scope and power of their authority in approving the appointment of Justice Abban as Chief Justice. On this inquiry, the Judge noted that article 146 of the Constitution provided a 'special procedure' through which questions surrounding the integrity of judges can be addressed.[123] He held that allowing the relief sought in the suit would have amounted to the unconstitutional removal of Justice Abban from office through a judicial process not contemplated under the Constitution.[124]

> We must however jealously guard against any attempt to erode the powers constitutionally vested in the court by any person. We should recognise the limitations imposed on our powers by the Constitution, 1992.

The concurring opinions of Justices Bamford Addo and Charles Hayfrom Benjamin cited article 115 of the Constitution of Ghana, 1992, as a bar to a judicial inquiry into the approval of Justice Abban as Chief Justice.[125] They equally singled out article 146(6) of the Constitution of Ghana, 1992, which confers the constitutional power to remove a Chief Justice from office in the President, and not the courts.[126] Justice Kpegah, furthermore, found that there were no judicially discoverable manageable standards by which to adjudicate the dispute.[127] The Judge found that the Constitution failed to describe 'who a man of high moral character and proven integrity' is and left the determination to the President and Council of State and Parliament. He opined that the courts cannot substitute their notion of 'high moral character and proven

[120] Page 604.
[121] Ibid.
[122] Page 607.
[123] Page 611-12.
[124] Page 610-12.
[125] Page 617.
[126] Page 618.
[127] Page 652.

integrity' with that of Parliament.[128] Like the other Judges, Kpegah likened the suit to an attempt at removing Mr. Justice Aban from office unconstitutionally through a judicial process.

A narrow textual reading of article 128(4) alongside article 144(1) of the Constitution of Ghana, 1992 that gives effect to its plain meaning reveals that the question of the moral character and integrity of Justice Abban is one the Constitution commits to the President, Council of State and Parliament.' This view is held by Justice Kpegah who held that the determination by the President, Council of State and Parliament on the 'moral character and proven integrity' of a person was binding on the court.[129] Having made a decision as to the moral character and integrity of Justice Abban, the plaintiff's recourse was to be found in article 146 of the Constitution of Ghana, 1992 which lays out a procedure for the removal of the Chief Justice from office. Asare writes that the plaintiff's claim 'sought to remove Justice Abban from the bench without following the constitutional procedures for removing a judge from the bench.'[130] The invitation the plaintiff extended to the Court was one aimed at having the Court read its institutional authority in an expansive manner that disregarded the constitutional power of the Council of State, Parliament and the President in the appointment process.

The facts presented before the Supreme Court in this case mirror those of *Democratic Alliance v President of South Africa and others*[131] where the Constitutional Court in South Africa was called upon to make a determination on whether the presidential appointment of Mr. Menzi Simelane as National Director of Public Prosecution was 'within the bounds of the Constitution.'[132] The applicant contended that Mr. Simelane was not 'fit and proper' for the job as prescribed under the National Prosecution Authority Act.[133] The Constitutional Court applied the rationality test within the means ends analysis in reviewing Mr. Simelane's appointment. The Court took cognizance of the adverse findings against Mr. Simelane arising from the Ginwala Commission, and the recommendation made by the Public Service Commission for disciplinary action against him and found 'an absence of a rational relationship between means and ends:'[134]

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[128] Page 600.
[129] Page 652.
[130] Asare Stephen Kwaku, 'Accounting for judiciary performance in an emerging democracy – Lessons from Ghana' 2006 4 (12) *Botswana Law Journal* 57-111 at 84.
[131] *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC). The holding by the Constitutional Court is however radically at variance with the holding by the Ghanaian Supreme Court.
[132] Para para 1.
[133] Para 5, 21.
[134] Para 89.

> The absence of a rational relationship between means and ends in this case is a significant factor precisely because ignoring prima facie indications of dishonesty is wholly inconsistent with the end sought to be achieved, namely the appointment of a National Director who is sufficiently conscientious and has enough credibility to do this important job effectively. The means employed accordingly colour the entire decision which falls to be set aside. [135]

Section 179(1)(a) of the Constitution of South Africa, 1996 vests in the President the constitutional power to appoint the National Director of Public prosecution. Section 9(1)(b) of the National Prosecuting Authority Act[136] provides that such appointed person must be a 'fit and proper person.' The determination of fit and proper is left to the discretion of the presidency. In *Simelane*, the Constitutional Court usurped the discretion and proceeded to make a prescription of what constitutes fit and proper, adopting an expansive interpretation of its authority and conducting what I describe as the unconstitutional removal of Simelane from office, a role vested in the President under the National Prosecuting Act.[137]

The Ghanaian Supreme Court read its power in a narrow manner, conscious of the fact that questions around the integrity or otherwise of Justice Abban were far removed from its power, and demonstrated an awareness of a constitutional mechanism to hold Justice Abban accountable for any questions around his integrity. The approach taken by the Supreme Court ought to have been embraced by the South African Constitutional Court in *Simelane*.[138] Courts are meant to be guardians of the Constitution; this role must, however, be carried out in a manner that respects the nature of a constitutional democracy given to the doctrine of separation of powers.

4.8 CONCLUSION

Though judges appear divided on the application of the political question doctrine in Ghana, the Supreme Court's interpretation of article 96 of the Constitution 1979 in *Tuffour*[139] continues to be cited with approval in myriads of subsequent decisions.[140] The Supreme Court appears to have provided Parliament with an impenetrable shield to 'regulate its own procedure' and thereby operate within the scope and power conferred on it by its standing orders. *J H Mensah*

[135] Ibid.
[136] Section 6 of the National Prosecuting Authority Act 32 of 1998.
[137] National Prosecuting Authority Act no. 32 of 1998.
[138] Supra note 141.
[139] Supra note 32.
[140] Bimpong-Buta op cit note 1.

v Attorney General[141] and *Asare v Attorney General*[142] demonstrate a reluctance on the part of the Court to impeach a discretion conferred on Parliament in the absence of textually demonstrable limits. The deference employed by the Supreme Court is possible on account of the narrow manner the court interprets its authority and the text of the Constitution.

In the exercise of the executive's power, the Supreme Court has countermanded political determinations in a manner this thesis considers impermissibly intrusive. This was seen in *New Patriotic Party v Attorney-General*[143] where the Court 'stretched its tentacles' in the words of Chief Justice Archer into territory reserved for the Executive, Parliament and the Auditor General. Though the Court exhibited restraint in *Ghana Bar Association v the Attorney General*[144] the standard employed in an inquiry into parliamentary processes and executive action appears dissimilar, with more deference being extended to parliamentary processes.

[141] Supra note 578.
[142] Supra note 254.
[143] Supra note 393.
[144] Supra note 396.

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

5.1 OVERVIEW OF THE STUDY

Judiciaries across Africa continue to grapple with their rightful place within the separation of powers framework. While, on one hand, there is a growing call for a more passive and deferential role to be played by the judiciary, on the other hand, there are growing calls for the judiciary to take up a more active and, at times, domineering role within its polycentric relationship with political branches.[1] Consequently, judiciaries are finding themselves at crossroads, uncertain of the path to take, as the reality of totalitarian leaders continues to emerge.[2] These leaders clamp down on the decisional independence of judges, with an increasingly aggressive claim that judges who act contrary to the leaders' policies are against the people. In Kenya, for instance, there is always a clarion call for the vetting of judges to weed off corrupt officers every time decisions are handed down that run contrary to the expectations of the political elite.[3]

Judges in Kenya, South Africa and Ghana do not operate in isolation; their call to a progressive interpretation in defense of the Constitution is shared. Unlike South Africa and Ghana, where the Constitutional Court and the Supreme Court, respectively, are vested with exclusive jurisdiction over questions that impact on separation of powers, in Kenya, the High Court enjoys original jurisdiction over questions of such a nature.[4] Therefore, depending on how an individual judge interprets the Constitution when presented with a constitutional question impacting on separation of powers, they are branded as either conservative or activist.[5] Conservative judges are frowned upon, while activist judges are celebrated as acting in defense of the Constitution.[6] A cure to this dichotomy in approach, when judges are called upon to review political questions, is found in the principled approach this thesis advocates for. A study of the three jurisdictions has revealed some commonalities and differences in the approach courts take when handling political questions. All three jurisdictions have codified the doctrine of constitutional supremacy and have settled on the position that political questions are

[1] Robin West 'Progressive and Conservative Constitutionalism' (1990) 88 *Michigan Law Review* 641-721.
[2] Martin Shapiro 'Judicial Independence: New Challenges In Established Nations' (2013) 20(1) Indiana Journal of Global Legal Studies 253-277.
[3] Gloria Mmoji Vuluku *Assessing the Legal Impact on Trust in Public Institutions: A case of the Judiciary in Kenya* (unpublished LLM thesis, University of Nairobi, 2015).
[4] Constitution of Kenya, 2010, art 165(3)(d).
[5] William Gacheche Gichuki *Judicial Activism vs. Judicial Restraint Debate: A Case for a Balanced Approach in the Exercise of Judicial Review in Kenya* (unpublished LLM thesis, University of Nairobi, 2021).
[6] Vuluku op cit note 3.

justiciable within their territory. The divergence in approach arises in terms of how the court should interpret the Constitution. While some courts embrace a narrow interpretation of the Constitution and their institutional authority, other courts embrace an expansive interpretation of the Constitution and their institutional authority. This thesis conducted a comparative study of the three jurisdictions. Below, I summarise their areas of commonalities and divergence.[7] These areas of commonalities and divergence are distilled from the two thematic areas the study investigates: parliamentary processes and exercise of presidential powers.

5.2 Commonalities: The Basis of Judicial Authority in Political Questions

5.2.1 The Doctrine of Constitutional Supremacy

Constitutional supremacy is a shared principle in Kenya, South Africa, and Ghana, giving the judiciary the authority to review political questions. It ensures that no branch of government exceeds its constitutional boundaries, empowering courts to invalidate actions inconsistent with constitutional provisions. This principle forms the basis of constitutional review and serves as a safeguard against the abuse of power by political branches.

In Kenya, constitutional supremacy is explicitly established in article 2(1) of the Constitution,[8] which declares the Constitution as the supreme law and binding on all persons and state organs. Courts have invoked this principle to review and invalidate executive and legislative action that contravene constitutional standards. In *Mumo Matemu v Trusted Society of Human Rights Alliance*, the High Court[9] and Court of Appeal[10] asserted the jurisdiction of the Court to review presidential appointments for their constitutionality, the only point of divergence being the standard of review applied by the two Courts. This case highlighted the judiciary's role in ensuring that political determinations adhere to constitutional principles. Similarly, in *Martin Nyaga Wambora v County Assembly of Embu & 37 others,*[11] the High Court and subsequently the Court of Appeal[12] upheld the authority of the Court to intervene in an impeachment process to ensure compliance with the Constitution. These judgments demonstrate that constitutional

[7] This approach to research compares two variables and is explained in detail in Seyed Mojtaba Miri and Zohreh Dehdashti Shatirokh 'A Short Introduction to Comparative Research' at https://www.researchgate.net/publication/336278925_A_Short_Introduction_to_Comparative_Research accessed on 8th December 2024.
[8] Constitution of Kenya 2010, article 2(1).
[9] *Trusted Society of Human Rights v The Attorney General and others* (2012) KEHC 2480 (KLR)
[10] *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR.
[11] *Martin Nyaga Wambora & 4 Others v Speaker of the Senate & 6 Others* (2014) eKLR.
[12] *Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 others* (2014) eKLR.

supremacy demands strict adherence to the Constitution, even in processes traditionally reserved for political branches.

The supremacy of the Constitution is equally central in South Africa, where Section 2 of the Constitution establishes its primacy over all laws and conduct.[13] The Constitutional Court has consistently reinforced this principle through its decisions. In *Doctors for Life International v Speaker of the National Assembly & Others,*[14] the Constitutional Court established that 'the supremacy of the Constitution requires that the obligations imposed by it must be fulfilled.'[15] The point of departure between the majority and minority judgment was on the nature of interpretation adopted by the judges. Whereas the majority judgment embraced an expansive approach to interpretation, introducing a constraint alien to section 72(1)(a) of the Constitution, the minority judgment ascribed to section 72(1)(a) its plain meaning finding that there was no discernible textual constraint in the section. This judgment demonstrates that, while well-intentioned, the principle of constitutional supremacy can be hijacked by judges to perpetuate judicial activism. In *Economic Freedom Fighters v Speaker of the National Assembly & Others*,[16] the Constitutional Court interpreted its authority as well as that of the office of the Public Protector in an expansive manner that disregarded the constitutional power of the National Assembly to exercise oversight over the office of the Public Protector. This was demonstrated in its finding on the binding nature of the Public Protector's remedial action. The finding by the Constitutional Court further demonstrates that, while the principle of constitutional supremacy remains a viable tool in constraining the exercise of political power, when improperly applied, it has the effect of sanctioning impermissible intrusions into terrain reserved for political branches.

In Ghana, constitutional supremacy is articulated under article 1(2) of the Constitution,[17] which empowers the judiciary to invalidate any law or action inconsistent with the Constitution. The Supreme Court has demonstrated an awareness of this principle in its interaction with political questions. While courts under the principle of constitutional supremacy readily review political questions in Ghana, they remain deferential in their approach, often adhering to the text of the

[13] Constitution of the Republic of South Africa, 1996 Section 2.
[14] *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC). See section 3.7.1 of this Thesis above.
[15] Ibid at para 38.
[16] *United Democratic Movement v Speaker of the National Assembly and others* 2017 (5) SA 300 (CC). See section 3.7.3 of this Thesis above.
[17] Constitution of Ghana 1992, article 1(2).

Constitution as their guiding north. In *Tuffour v Attorney-General*[18] and *New Patriotic Party v Attorney-General,*[19] the Supreme Court, under the aegis of the principle of constitutional supremacy, reviewed and nullified parliamentary and executive actions, respectively, that were contrary to constitutional norms. The Supreme Court adopted a deferential approach to parliamentary processes in *Tuffuor*, finding that 'courts can question the decisions of Parliament but not how the decisions were arrived at' and secondly that 'courts cannot question what goes on inside or within Parliament, especially on matters pertaining to its procedure as stated in article 110(1) of the Constitution, 1992.'[20] However, *New Patriotic Party,* the Court adopted an expansive interpretation of the Constitution, aided by extra-textual factors, with the result of what this study to be an impermissible intrusion.[21] These two cases demonstrate that, like Kenya and South Africa, the principle of constitutional supremacy has been enforced in Ghana leading to intrusions that are either permissible of impermissible, further highlighting the need for restraint when judges are called upon to review political questions.

Despite their shared reliance on the principle of constitutional supremacy, in Kenya, courts have often placed preference on policing *procedural* compliance with constitutional norms rather than reviewing the merits of the decisions of other branches of government. By contrast, the South African Constitutional Court has often engaged substantively with political questions, reflecting the transformative aspirations of her Constitution. In Ghana, the judiciary has balanced judicial intervention with respect for the autonomy of political branches, intervening decisively only when evident constitutional violations occur.

5.2.2 Justiciability of Political Questions: A Shared Judicial Mandate

Courts in Kenya, South Africa, and Ghana have rejected the classical American exposition of political questions as inherently non-justiciable. In these jurisdictions, courts affirm their responsibility to adjudicate constitutional issues, even when they intersect with political matters. This modern approach recognises that constitutional supremacy and the rule of law necessitate judicial oversight of political processes to ensure compliance with constitutional standards. Courts in these countries have consistently emphasised their role as the final arbiters of constitutional compliance. This detailed examination illustrates how courts in Kenya, South

[18] See the discussion in *Tuffour v Attorney-General* 1980 GLR 637 (C.A). Section 4.6.1 of the Thesis above.
[19] *New Patriotic Party v Attorney General* 1994 JELR 66360 (SC), Section 4.7.1 of this thesis above.
[20] Seth Yeboa Bimpong-Buta *the Role of the Supreme Court in The Development of Constitutional Law in Ghana* (unpublished LLD thesis, University of South Africa, 2005) 77, 123.
[21] The majority judgment found the intended celebrations unconstitutional for offending 'the spirit of the Constitution, because the celebrations signified the glorification of *coups d'état* in Ghana.

Africa, and Ghana have approached political questions with a shared commitment to constitutional governance while addressing why they do so in a manner that reflects their unique legal traditions and constitutional contexts.

Courts in Kenya have adopted a principled approach to political questions, emphasising the need for procedural compliance and adherence to constitutional standards. Courts have established that constitutional review is indispensable in upholding the rule of law, particularly in matters where political actions may infringe upon constitutional principles. The case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others*[22] exemplifies this approach. The High Court nullified the appointment of a public official on the ground that the process violated the constitutional standard of integrity. While the Court of Appeal reversed the High Court judgment by applying a standard of review different from that applied by the High Court, both Courts were united in their finding that the Court had a duty to review the appointment for its procedural compliance with the law. Despite the inherently political nature of the decision, the Court asserted its jurisdiction, underscoring the fact that constitutional review is essential to maintaining constitutional accountability. This decision reflects the Kenyan judiciary's commitment to ensuring that political questions are subjected to constitutional scrutiny when necessary.

In *Mumo Matemu,* the Court highlighted that constitutional review is not merely a mechanism to resolve legal disputes but a means to protect the constitutional order. The Constitution, as the supreme law, obligates all state actors to act within its bounds. When political determinations fail to meet these requirements, the judiciary has a duty to intervene. This stance is rooted in the understanding that an unchecked exercise of political power can undermine public confidence in constitutional governance. By addressing political questions through the lens of constitutional compliance, the Court in *Mumo Matemu* reinforced its role as a guardian of democratic accountability.[23]

A similar commitment to constitutional oversight is evident in *Martin Nyaga Wambora v County Assembly of Embu & 37 others.*[24] In this case, the High Court nullified the impeachment of a governor, citing procedural irregularities that contravened constitutional safeguards.[25] The Court emphasized that political processes, including impeachment proceedings, must adhere

[22] Supra note 9.
[23] Andrea Munyao, 'An Inquiry into the Limits of Judicial Intervention in the Impeachment Process of Governors in Kenya (2020) 5 (1) *Strathmore Law Journal* 139 at 156.
[24] Supra note 11.
[25] Ibid.

strictly to constitutional and procedural standards. By intervening, the judiciary ensured that the principles of fairness and legality were upheld. This decision demonstrates that the Kenyan judiciary views its role as not limited to resolving disputes but as an essential part of upholding constitutional governance. The emphasis on procedural compliance reflects a broader judicial philosophy that prioritizes the rule of law over political expediency.

The Constitutional Court in South Africa has adopted a broader and more substantive approach to the review of political questions, reflecting the transformative aspirations of the country's constitutional framework. The South African Constitution enshrines participatory democracy, accountability, and transparency as core principles, and the judiciary has not only actively enforced these values but also demonstrated a willingness to assign meaning to them and sanction conduct that runs afoul of these values. The Constitutional Court, for instance, in *Doctors for Life International v Speaker of the National Assembly & Others,*[26] 'first looked to the whole Constitution and to the social and historic context linked to public involvement in legislative decision-making.'[27] The result of this inquiry was a finding by the majority judgment that 'public participation in the law-making process was the goal contemplated in s 72(1)(a) of the Constitution and that to hold otherwise would be contrary to, inter alia, the principles of accountability, responsiveness and openness enshrined in s 1(d) of the Constitution.'[28] The Court's established that participatory democracy is not merely a theoretical ideal but a practical requirement for legitimising legislative processes. The approach by the majority judgment, which is criticised in the study, reflects the substantive engagement the Constitutional Court has with political questions.

The Constitutional Court's willingness to engage substantively with political questions is informed by the transformative nature of the country's Constitution. Courts in South Africa are tasked with addressing systemic injustices and fostering democratic accountability. This approach is distinct from the procedural focus of Kenyan courts. It reflects South Africa's unique constitutional context, where judicial intervention is often necessary to address the legacies of apartheid and promote social justice.[29]

In Ghana, the Supreme Court has similarly asserted its jurisdiction over political questions, emphasising its duty to uphold constitutional governance. Ghana's Supreme Court has

[26] Supra note 14.
[27] Ibid.
[28] Ibid at 10.
[29] Dikgang Moseneke 'A Journey from the Heart of Apartheid Darkness Towards a Just Society: Salient Features of the Budding Constitutionalism and Jurisprudence of South Africa" 2013 *Georgetown Law Journal* 749.

demonstrated a balanced approach, intervening decisively when constitutional violations are plainly evident from the text while respecting the autonomy of political branches in other instances. In *J H Mensah v Attorney-General,*[30] while the Supreme Court asserted its constitutional authority to review the President's decision to retain in office some ministers and deputy ministers in the absence of parliamentary approval, it rejected the invitation to question 'the nature of the approval process.'[31] The Court reasoned that article 101(1) of the Constitution of Ghana, 1992 committed to Parliament the constitutional power to regulate its own internal procedure by way of its standing orders and, therefore, the procedure employed by Parliament in approving persons nominated for ministerial positions was not open to challenge before the Supreme Court. The approach taken by the Ghanaian Supreme Court reflects a deeper understanding of the doctrine of separation of powers. While the judiciary has been proactive in addressing plainly evident constitutional violations, it has also shown deference to political branches where constitutional compliance is not in issue. This balance ensures that the courts fulfil their duty to uphold the Constitution without unnecessarily encroaching on the functions of other branches of government.

The rejection of the classical American view of political questions as inherently nonjusticiable is rooted in the recognition that constitutional governance requires judicial oversight to prevent abuses of power. In Kenya, South Africa, and Ghana, courts have embraced this responsibility, affirming their role as guardians of constitutional principles. By reviewing political questions through the framework of constitutional compliance, the judiciary ensures that governance practices align with the rule of law. This modern approach reflects a shared commitment to protecting democratic values and maintaining the integrity of constitutional frameworks.

This rejection is also grounded in these countries' unique constitutional and historical contexts. The judiciary's focus on procedural compliance in Kenya reflects the need to strengthen governance structures and ensure accountability in a rapidly evolving political environment. In South Africa, the transformative aspirations of the Constitution necessitate substantive judicial engagement with political questions to address systemic inequalities and promote social justice. In Ghana, the judiciary's balanced approach reflects an understanding of the importance of both judicial oversight and respect for political autonomy in maintaining constitutional governance.

[30] *J H Mensah v Attorney-General* 1996-97 SCGLR 320 p 34.
[31] Ibid at 128.

Courts in these three countries have consistently demonstrated that constitutional review is compatible with addressing political questions and essential for upholding constitutional democracy. By rejecting the notion of nonjusticiability, they affirm that the Constitution is the supreme law and that all government actions are subject to its authority. This modern approach underscores the judiciary's indispensable role in ensuring that political processes serve the public interest and adhere to constitutional principles.

5.3 Divergences: Unique Judicial Approaches to Political Questions

While Kenya, South Africa, and Ghana share a foundational commitment to constitutional supremacy and the justiciability of political questions, their judicial approaches differ markedly. The constitutional frameworks, historical developments, and judicial philosophies unique to each jurisdiction inform these divergences. The differences highlight how each country tailors its judicial practices to its governance realities, illustrating the dynamic application of the political question doctrine across varying contexts.

Kenyan courts often focus on procedural compliance rather than delving into the substantive merits of political questions. This approach reflects a cautious judicial philosophy that balances oversight with deference to the political branches. The courts' procedural focus is evident in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others*,[32] where the Court of Appeal underscored the need for adherence to constitutional standards in political appointments. Despite the politically charged nature of the case, the Court carefully avoided making a substantive judgment on the suitability of the appointee. Instead, it concentrated on ensuring that the appointment process complied with the Constitutional. This illustrates how Kenyan courts maintain their legitimacy by anchoring their decisions in clear constitutional mandates, thereby avoiding the perception of overreach into political territory. Similarly, the High Court in *Martin Nyaga Wambora v County Assembly of Embu & 37 others*[33] nullified an impeachment process on the grounds of procedural irregularities. The Court's intervention was not directed at the substantive merits of the governor's conduct but focused exclusively on whether the impeachment proceedings adhered to constitutional and statutory safeguards. By limiting its review to procedural compliance, the Court reinforced its commitment to upholding constitutional governance without unnecessarily encroaching on the functions of political branches. This restrained approach ensures that judicial oversight respects the autonomy of the

[32] Supra note 10.
[33] Supra note 11.

Parliament and the Executive while safeguarding the rule of law. On appeal, while Court of Appeal upheld the High Court's Judgment, it asserted a more intrusive role in the impeachment process by firstly, pronouncing itself on the threshold of impeachment and secondly, empowering the Court to review the grounds of impeachment against the threshold established by the Court. The study has found the approach taken by the Court of Appeal as impermissibly intrusive.

The emphasis by Kenyan courts on procedural integrity reflects its cautious interpretation of separation of powers. By limiting themselves to procedural compliance, courts strike a delicate balance between fulfilling their constitutional mandate and avoiding undue interference into political processes. This approach is particularly significant in a political environment where judicial activism could be perceived as a challenge to democratic institutions.[34] Kenyan courts, therefore, prioritise fostering respect for constitutional processes over engaging in substantive evaluations of political decisions.

In contrast, the Constitutional Court of South Africa has taken a more transformative approach, engaging substantively with political questions to address systemic injustices and promote constitutional values. This approach is deeply rooted in the transformative aspirations of the South African Constitution, which envisions a democratic order founded on human dignity, equality, and social justice. The Constitutional Court has largely interpreted its constitutional mandate expansively, intervening in political processes when necessary to uphold these constitutional values and principles. In *Doctors for Life International v Speaker of the National Assembly & Others,*[35] the Constitutional Court insisted on the necessity of public participation in the legislative process, declaring it a constitutional requirement. The Court's decision underscored that participatory democracy is not merely a theoretical concept but a practical obligation that legislative bodies must fulfil. The Court reaffirmed its commitment to fostering inclusivity and accountability in governance by ensuring public involvement in law-making. This case exemplifies how the South African Constitutional Court has engaged substantively with political questions to enforce constitutional principles, even when doing so would invite an impermissible intrusion into terrain reserved for political branches. Further, the Court's decision in *United Democratic Movement v Speaker of the National Assembly & Others* demonstrated the Court's willingness to address issues of political accountability.[36] The Court,

[34] Vuluku op cit note 3.
[35] Supra note 14.
[36] *United Democratic Movement v Speaker of the National Assembly and others 2017* (5) SA 300 (CC). See section 3.7.2 of the Thesis above.

though declining to direct the Speaker to conduct the vote by way of secret ballot, asserted its mandate to review whichever election the Speaker made against the constitutional principle of parliamentary accountability. The Court created a careful balance between asserting its guardianship role over constitutional values and principles and the need to safeguard the discretion committed to the office of Speaker. This intervention reflects the Court's proactive role in shaping democratic governance, ensuring that political processes are conducted in a manner consistent with constitutional values and principles. The decision also highlights the Court's readiness to interpret its institutional mandate expansively, addressing procedural compliance and the substantive implications of political actions. South Africa's judiciary, therefore, represents an activist force in the country's constitutional framework. In its substantive engagement with political questions, the Constitutional Court has sought to address the structural inequalities and governance challenges that have persisted since the end of apartheid, often times trouncing political actors who share a similar constitutional mandate. This activist approach distinguishes South Africa's judiciary from its Kenyan counterpart, as it goes beyond procedural review to actively shape the country's democratic and governance trajectory.

Ghana's judiciary adopts a more restrained and balanced approach, emphasising the importance of respecting the autonomy of political branches while intervening decisively when constitutional violations are evident. This balanced approach reflects Ghana's constitutional design, which seeks to harmonise judicial oversight with the separation of powers. The courts carefully avoid overreach, intervening only when political actions contravene evident constitutional principles. In *Tuffour v Attorney-General*,[37] the Supreme Court found that its intervention in internal parliamentary processes was unwarranted when there was no discernible violation of the Constitution, thereby upholding the doctrine of separation of powers. The Court's decision demonstrates deference to the autonomy of political branches, emphasising the importance of preserving the constitutional balance of power. This approach ensures that the judiciary does not unnecessarily encroach upon the functions of the legislature or executive. This balanced approach is further evidenced in *Asare v Attorney-General*[38] and *Ghana Bar Association v Attorney General*[39]where the Supreme Court declined to supply normative standards to constitutional standards whose determinacy was to be supplied by political branches. Ghana's judiciary, therefore, exemplifies a nuanced approach that balances

[37] Supra note 18.
[38] *Asare v Attorney General* 2015 GHASC 101.
[39] *Ghana Bar Association v Attorney-General* 2003-4 (1) SCGLR 250 (SC) 22 at 605.

respect for the institutional competence of political branches with the need to uphold constitutional principles. This careful calibration ensures that judicial interventions are perceived as necessary and legitimate rather than as overreaching or politically motivated.

The differences in judicial approaches among Kenya, South Africa, and Ghana highlight the adaptability of the political question doctrine to diverse constitutional contexts. Kenyan courts emphasize procedural compliance, ensuring that political processes adhere to constitutional and statutory requirements. This restrained approach reflects a cautious interpretation of the separation of powers, prioritising respect for political autonomy while safeguarding the rule of law. In contrast, South Africa's judiciary adopts a transformative stance, engaging substantively with political questions largely on account of its transformative Constitution. Ghana's judiciary balances intervention and deference, ensuring that constitutional governance is upheld without undermining the separation of powers. This balanced approach reflects a commitment to maintaining institutional harmony while protecting constitutional principles.

The case-by-case application of the political question doctrine in these jurisdictions demonstrates the contextual dynamics that shape judicial decisions. The judiciary's role in addressing political questions is not uniform but influenced by each country's constitutional design, historical context, and governance challenges. These differences illustrate the versatility of the political question doctrine as a tool for upholding constitutional governance, demonstrating how courts adapt their practices to meet the unique needs of their societies. It is because of these reasons that there has been a great tension between the political branches of government and the judiciary.

5.4 Way forward

To provide a lasting solution to the tensions between the judiciary and political branches, this study set out to interrogate an approach to interpreting constitutional texts in cases that impact separation of powers. This approach yields two outcomes: first, it allows the courts to play their guardianship role over the Constitution, and second, it respects the constitutional terrain of political branches. Significantly, the study limited itself to questions impacting separation of powers, as opposed to cases where courts are invited to pronounce themselves on fundamental rights and freedoms. With the latter, the judiciary is allowed a constitutional mandate to develop

the law, thereby calling for an approach to interpretation that goes beyond the text of the Constitution and may rightly so rely on extra textual factors.[40]

The study defined the body of constitutional questions directly impacting separation of powers as political questions, a nomenclature traced to Alexander Hamilton.[41] Hamilton conjured up the idea of a body of questions ill-suited for judicial determination, which arise from a clear implication of constitutional text. Hamilton's musings at the time did not have any judicial backing. However, this backing was to emerge in *Marbury v Madison*,[42] where the United States Supreme Court laid the groundwork for the application of the political question doctrine as a tool for judicial deference. While *Marbury v Madison*[43] made a pronouncement that questions of a political nature cannot be 'made' in court, this study takes a different position, finding that such questions must, in fact, be 'made' in court. The approach taken by the thesis is a detachment from the traditional conception of the political question doctrine, which views political questions as inherently non-justiciable, to a modern conception of the doctrine, which allows courts the duty to review political questions for constitutionality.

The three countries chosen for this study have all codified the principle of constitutional supremacy within their constitutional text. The principle, as established in the three chapters, has subordinated the actions of political branches to the discipline of the Constitution, with judges playing a central role in finding whether political determinations are within the four corners of the Constitution. The duty of locating these determinations within constitutional text invariably yields intrusions that are either constitutionally permissible or impermissible. While the study found constitutionally permissible intrusions to foster relations between political branches and the judiciary, constitutionally impermissible intrusions had the contrary result and are deemed to be visit violence on the very Constitution they purported to defend.

While judges may frown upon the idea that their role in interpreting constitutional text can be limited, this is the constitutional design intended by the constitutional imperative of separation of powers, which creates a constitutional democracy where power is dispersed across three co-equal branches of government.

[40] Vincent J Samar 'Rethinking Constitutional Interpretation to Affirm Human Rights and Dignity' (2019) 47(1) *Hastings Constitutional Law Quarterly* 83-144.
[41] Alexander Hamilton, Federalist Paper No. 78, 1788.
[42] *Marbury v Madison*, 5 U.S. (1 Cranch) 137 (1803).
[43] Ibid.

The study has identified a principled approach to interpreting the Constitution rooted in constitutional text within this limited interpretive role that yields constitutionally permissible intrusions. The study finds that a constitutionally permissible intrusion results when judges construe the text of the Constitution and their institutional authority in a narrow manner that respects the constitutional design to leave certain constitutional questions for determination by political branches. Judges do so in one of two ways: first, abiding by the plain meaning of constitutional text and avoiding the temptation of creating constraints alien to the text when countermanding political determinations. Secondly, judges intrude permissibly when they defer to the normative standards supplied by a political branch in those circumstances where the Constitution fails to supply normative standards to guide a political branch in answering a constitutional question committed to it. By deferring to the political branches, the court acknowledges the unique institutional capacity of political branches to make 'judgments of prudence and policy.'[44]

The study finds that an impermissible intrusion, on the other hand, results when courts employ an expansive approach to the interpretation of constitutional text and their institutional authority in a manner that unjustifiably disregards the discretion and constitutional power committed to political branches. An expansive approach to interpretation will have judges ascribing meaning to constitutional text that contradicts the text's plain meaning. Such an approach will also see judges creating constitutional constraints where none is discernable from a plain reading of the constitutional text. An expansive approach to interpreting constitutional text arises when judges are not conscious of the institutional limits of their authority.

Having established the nature of these intrusions and when they arise, the study isolated the steps which courts need to take whenever they face political questions. The nature of deference the study advocates is anchored in the text of the Constitution, thereby offering a more principled and stable approach. For there to be stability in relations between political branches and the judiciary in matters that impact on separation of powers, the study has made three firm propositions: first, where a constitutional power has been committed to a political branch, and no discernable textual constraint is evident in the text of the Constitution, judges should refrain from creating constraints foreign to the text of the Constitution as a basis for review when that power is exercised or when that function is fulfilled. Second, when a textual interpretation of the Constitution reveals an absence of normative standards to guide a political branch in

[44] Walter Dellinger & H. Jefferson Powell 'Marshall's Questions' (1999) 2 (367) *Green Bag* 376.

answering a constitutional question committed to it, the constitutional design empowers political branches with the duty to supply normative standards, which would then be binding on the court. Third, where a political branch fails to supply normative standards to an indeterminate constitutional provision, the court should refrain from taking it upon itself to supply determinacy. Its role is to direct the political branch to develop a normative framework that supplies determinacy.[45]

The study has interrogated whether Kenya, South Africa and Ghana have applied the suggested principled approach. The study identified cases in the three jurisdictions under two thematic areas, parliamentary processes and presidential appointments, which often attract intrusions by the judiciary. The thesis examined cases in Kenya that challenged impeachment proceedings and presidential appointments. The study found the principled approach applied to executive action,[46] while in the impeachment of Governors, the Court of Appeal assumed the role of supplying determinacy to article 181 of the Constitution contrary to the constitutional design that intended the County Assembly and Senate to do so.[47]

The study found that the South African Constitutional Court had interpreted its exclusive jurisdiction under section 167(4) of the Constitution as covering the sensitive area of separation of powers.[48] In the two thematic areas examined, parliamentary processes and executive action, it is evident that South Africa has assumed a mixed approach.[49] There seems to be no discernable pattern employed by the Constitutional Court as it swings from permissible

[45] In Kenya, this approach was adopted by the High Court in the case of *Martin Nyaga Wambora* where the Court declined to supply determinacy to what actions constituted a gross violation of the Constitution, instead directing the Senate to provide meaning to the constitutional provision. It was also evident in the deferential approach adopted by the Court of Appeal in *Mumo Matemu*, where the Court declined to supply determinacy to the constitutional value of Integrity in the manner urged by the Respondents. In South Africa, this approach was evident in *United Democratic Movement* where the Constitutional Court declined to direct the Speaker on the 'appropriate procedure' to adopt in voting on the motion of no confidence against the President. Instead, the Court directed the Speaker to exercise her discretion in adopting the appropriate procedure. In Ghana, this approach was evident in *J H Mensah* where the Supreme Court declined to supply determinacy to the approval process of ministers and their assistants, finding that only Parliament had the constitutional power to determine the nature of the approval process to be undertaken by Parliament. It was also evident in *Asare* where the Supreme Court declined to determine what constitutes a reasonable explanation for the absenteeism of a member of Parliament from parliamentary sittings. The Court found that this power was vested in the Parliamentary Committee on Privileges.

[46] Supra note 10.

[47] Supra note 12.

[48] Supra note 14.

[49] In both thematic areas studies, the Constitutional Court conducts permissible and impermissible intrusions leading to a finding by the study that no discernible philosophy exists on the courts engagement with political questions.

intrusions to impermissible intrusions in each thematic area, primarily because of its transformative Constitution.

In the two thematic areas examined in Ghana, the study found that Unlike Kenya, where the court was more averse to intruding impermissibly into parliamentary processes, in Ghana, the Supreme Court, which enjoys exclusive jurisdiction over political questions, conducts intrusions this study finds to be of an impermissible nature when reviewing executive action.[50]

Significantly, though a mixed approach emerges in each of the three countries, the study has demonstrated that the principled approach proposed is not an abstraction but a workable formula for reviewing political questions. The challenge in applying the principled approach would be an affinity for judges in the three jurisdictions to resort to extra-textual factors in their interpretation of text in light of the tortured political and cultural past the three countries have endured.[51] Additionally, an approach that applies an expansive interpretation to the values and foundational principles contained in the Constitutions of the respective countries may present a potent challenge against the call for impermissible intrusions.[52] The call by the Kenyan Supreme Court in *The Cabinet Secretary for the National Treasury and Planning & 4 others v Okiya Omtatah Okoiti & 52 others*[53] should be heeded in the three countries as they interpret their respective foundational values and principles as contained within the text of the Constitution:

> Courts should be careful to distinguish between values and principles on one hand, and normative rules on the other hand, to avoid overprescribing duties from principles and values which are by nature open-textured...It follows that the values and principles are optimising commands that allow duty bearers to come up with suitable measures for fulfilment of the obligations that they impose, without dictating definitive or specific actions that they ought to take.[55]

[50] The Supreme Court in the exercise of its original jurisdiction under article 130 of the Constitution of Ghana, 1992 has found the actions of political branches reviewable for the purpose of ascertaining their consistency with the Constitution

[51] This approach is evident in *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) and *New Patriotic Party v Attorney General* 1994 JELR 66360 (SC) 44.

[52] This was the approach adopted by the Court of Appeal in Kenya as it interpreted article 10 of the Constitution on national values and principles of governance.

[53] *The Cabinet Secretary for the National Treasury and Planning & 4 others v Okiya Omtatah Okoiti & 52 others* Supreme Court Petitions Nos. E 031, E032 & E033 of 2024.

[55] Para 147

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