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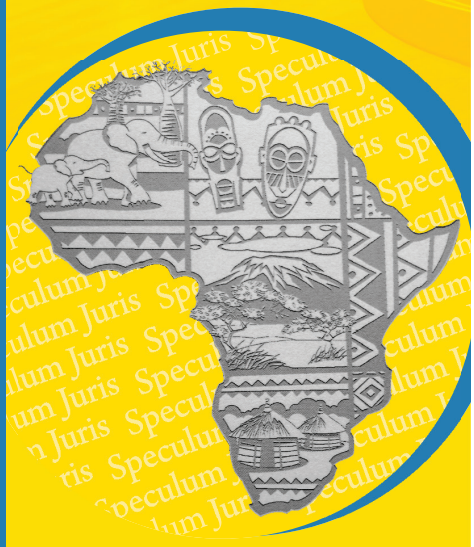

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Executive accountability and the separation of powers: Introducing the political accountability doctrine in South Africa

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Abstract

The Constitution of the Republic of South Africa, 1996 envisages that the political branches of government should be held politically accountable for their discretionary decisions, which may include cabinet appointments and dismissals, policy development, and legislative modalities for holding the executive to account. This chapter focuses on the latter area. I argue that the Constitutional Court should be commended for developing the political accountability doctrine – a useful jurisprudential tool to resolve constitutional questions that are allocated to the discretion of the political pillars of government. I argue that the judiciary can employ the political accountability doctrine to explain or defend against alleged accusations of judicial overreach or perceived substantive partisan support thereby maintaining the social legitimacy of the judiciary and encourage participatory democracy in South Africa.

Keywords: constitutional doctrine; justiciability; participatory democracy; political accountability doctrine; political questions; political disputes; separation of powers.

1 BACKGROUND

In 2016, two scholars published a paper titled "Deputy Chief Justice Moseneke's Approach to the Separation of Powers in South Africa".[1] They argued that the Constitution of the Republic of South Africa, 1996 (Constitution) envisages that the political pillars of government should be held accountable through political processes, as opposed to the judicial process, in relation to certain substantive discretionary decisions or constitutional questions as a means of preserving the separation of powers and promoting the will of the people.[2] Underpinning this proposition is an attempt to contribute to the ongoing debate around the notion of justiciability and political accountability in South Africa.

Constitutional scholars in South Africa devoted less effort reflecting on the enterprise of justiciability, particularly in relation to the adjudication (or not) of those political disputes or questions that are constitutionally allocated to the discretion of the political pillars of government.[3] Consequently, less scholarship is dedicated to the development or assessment of constitutional doctrine in this area. This is despite the clear benefits of developing constitutional doctrine as the basis of judicial decision making in this area, which has become a topical issue in South Africa.

A few years ago, Margit Cohn dedicated her research to advance the benefits of constitutional doctrine in the context of formulas used to apply justiciability doctrines.[4] In articulating the benefits of constitutional doctrine in this area, she convincingly remarked that:

> Judges who rely on established and seemingly objective tests find shelter from accusations of

1 Dyani-Mhango & Mhango "Deputy Chief Justice Moseneke's Approach to Separation of Powers in South Africa" 2017 *Acta Juridica* 75.

2 *National Treasury v Opposition to Urban Tolling Alliance* 2012 6 SA 223 (CC). (*National Treasury*) (Froneman concurring) paras 93–95 reasoned and held that "the playing field for the contestation of executive government policy is the political process, not the judicial one. The main thrust of the respondents' review is the alleged unreasonableness of the decision to proclaim the toll roads. But unreasonable compared to what? The premise of their unreasonableness argument is that funding by way of tolling is unreasonable because there are better funding alternatives available ... But that premise is fatally flawed … . The courts of this country do not determine what kind of funding should be used for infrastructural funding of roads and who should bear the brunt of that cost. The remedy in that regard lies in the political process"; *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 5 SA 171 (CC) para 308 (*Merafong*): "if voters perceive that their democratically elected politicians have disrespected them or believe that the politicians have failed to fulfil promises made by the same politicians without adequate explanation, then the politicians should be held accountable by the voters. Courts deal with bad law; voters must deal with bad politics … . A democracy such as ours provides a powerful method for voters to hold politicians accountable when they engage in bad or dishonest politics: regular, free and fair elections"; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) para 41: "council is a deliberative legislative body whose members are elected. The legislative decisions taken by them are influenced by political considerations for which they are politically accountable to the electorate"; *Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) para 186, where in upholding the proportional representation system the court held that "under a list system of proportional representation, it is parties that the electorate votes for, and parties which must be accountable to the electorate"; and *Oosthuizen v Lid van die Uitvoerende Raad Belas met Plaaslike Regering en Behuising* 2004 1 SA 492 (O) (*Oosthuizen*) where it was held that it was not open to a member of any of the legislative chambers to compel a cabinet minister to account in court for the performance of his or her duties where a legislator has failed to secure such accountability in the legislature; that ss 57 and 116 of the Constitution authorises the National Assembly and the provincial legislatures to be masters of their internal arrangements and proceedings.

3 For example, *United Democratic Movement v Speaker of the National Assembly* 2017 5 SA 300 (CC) 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"; *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC) (*Hugo*) recognising that the exercise of pardon powers is committed to the executive branch. In addition, ss 206(1) and 207(2) of the Constitution commit policing matters to the executive branch such that it is free to structure the South African Police Service without judicial scrutiny. See also, *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) para 162 (*Glenister*) where both the majority and minority justices held that the elected branches of government are at liberty to decide where to locate a specialized corruption-fighting unit. In this case the elected branches had decided to locate such unit within and not without the South African Police Service as previously was the case. The court also noted that international law matters are committed to the political branches of the state; *South African Reserve Bank v Public Protector* 2017 6 SA 198 (GP) paras 43 – 44 held that the power to amend the Constitution is constitutionally assigned to Parliament; and *Harksen v President of the Republic of South Africa* 2000 5 BCLR 478 (CC) (*Harksen*) (confirmed that matters of foreign affairs are committed to the legislative and executive branches).

4 Cohn "Form, Formula and Constitutional Ethos: The Political Question/Justiciability Doctrine in Three Common Law Systems" 2011 *American Journal of Comparative* Law 675.

> politicization, which are likely to arise whenever the case before them is sensitive or politically laden. When they apply a formula to reject a case as non-justiciable, they protect themselves from accusations of weakness, subjection to political pressure, or partisan support for the respondents' substantive position. Likewise, when judges find the case justiciable through reliance on seemingly objective tests, they shield themselves from anticipated criticism that may originate from the challenged body. In both cases, strong levels of criticism may directly endanger the social legitimacy of the judiciary. Thus, the more politically-laden the issue, the greater the utility of formalization.[5]

Unlike older constitutions, the South African Constitution is not as encrusted with a rich body of legal doctrine or constitutional theory. Since the democratic dispensation in the early 90s, what has emerged is a body of law that is not always consistently applied and a lack of commitment to the text of the Constitution.[6] This is evident in some of the many dissenting opinions in court judgments and critical academic commentaries in law journals. Since a constitution is not a self-governing instrument, but, as a tenet, communicates in general terms leaving the politically accountable pillars of government to deal with the details as the public interests may require, the development of constitutional doctrine by the judiciary is of key importance to unlock the meaning of its words in a pragmatic sense.

Professor Okpaluba, a prolific writer on South African constitutional law, often maintained that every aspect of the South African Constitution is arbitrated by members of the judiciary who approach constitutional issues brought to them from distinct juristic schools of thought or social backgrounds all of which inspire constitutional interpretation.[7] Therefore, constitutional doctrine plays a pivotal role in ensuring consistency in constitutional interpretation thereby deepening constitutionalism in a society. In the words of Professor Albertsworth, "constitutional doctrine is a legal device to keep the fundamental provisions and inhibitions of the written Constitution modern and responsive to environmental changes."[8]

However, it is important to note that there is a fundamental difference between formula and doctrine.[9] To illustrate this point, the Constitutional Court of South Africa adopted a three-pronged equality test or formula referred to as the *Harksen* test[10] to determine challenges brought under the equality provision of the Constitution.[11] The equality test is distinct from doctrine. An example of which is the doctrine of legality, which 'has … become well-established in our law as an alternative pathway to judicial review where the [Promotion of Administrative Justice Act 3 of 2000 (PAJA)][12] finds no application.'[13] The doctrine of legality holds that every exercise of public power must be expressly or impliedly authorised by law. It is predicated on the notion that:

> The exercise of public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution.[14]

Accordingly, the judiciary developed the doctrine of legality "as a safety net to give the court some degree of control over action that does not qualify as administrative under PAJA, but nonetheless involves the exercise of public power."[15] Hence, the advent of the doctrine of legality in South Africa potentially widens the concept of justiciability. Before proceeding, it is

6 See, *Glenister's* case; *S v Zuma* 1995 2 SA 642 (CC) para 17 emphasising that while courts must be conscious of the values of the Constitution, the text of the Constitution must be respected; *S v Mhlungu* 1995 3 SA 867 (CC) demonstrating lack of fidelity to the text of the Constitution; *Daniels v Campbell* 2004 5 SA 331 (CC) para 83 emphasising the importance of the text of the Constitution in the context of constitutional interpretation holding that "as our courts, duty bound as they are, give articulation to the fundamental values of the Constitution in reading statutes, the language of the text is not "infinitely malleable" but sets limits for generous reading"); I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) 136–138 discussing how the Court may have overlooked text of the Constitution, especially in the context of *S v Mhlungu*); See, Brickhill "Precedent and the Constitutional Court" 2010 *Constitutional Court Review* 79 (critical of the Court's failure to adhere to precedent); and Gauntlett "The Sound of Silence?" 2011 *Journal of South African Law* 226 (critical of the Court's jurisprudence and its inconsistences).

12 Promotion of Administrative Justice Act 2 of 2000 was enacted to give effect to the right to administrative justice.

13 *National Director of Public Prosecutions v Freedom Under Law* 2014 4 SA 298 (SCA) paras 28–29 (*NDPP*).

14 *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) para 49; *Fedsure* para 56–59 and *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) paras 17–20.

15 *NDPP* para 29.

worth mentioning that the doctrine of legality is mentioned in this chapter to briefly underscore the difference between formula and doctrine and as an example of a constitutional doctrine that has been developed and consistently applied by the judiciary in South Africa.

It is also important to highlight that in South Africa, justiciability is understood to encompass most legal canons that prevent courts from adjudicating disputes, including standing,[16] mootness,[17] ripeness,[18] and the prevention of advisory opinions.[19] These justiciability canons emanate from the constitutional imperatives to respect the separation of powers doctrine and recognise the inherent limitations of judicial review.[20] What has yet to be fully developed in South Africa, as part of the family of justiciability canons, is a doctrine that deals with the resolution of questions that are constitutionally allocated to the discretion of the political pillars of government or deal with purely political questions. In other jurisdictions, justiciability is narrowly understood to only relate to those types of questions.[21]

It has been argued elsewhere that in the South African context the areas where the Constitution envisages that the political branches should be held politically accountable for their discretionary decision include: cabinet appointments and dismissals,[22] policy development,[23] and legislative modalities for holding the executive to account.[24] This chapter focuses on the latter area. I argue that the Constitutional Court should be commended for developing

16 See, *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 1 BCLR 1 (CC) paras 162–169, 223–238; *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) paras 32–35; *Port Elizabeth Municipality v Prut NO* 1996 4 SA 318 (E); *New Party of South Africa v Government of the Republic of South Africa* 1999 3 SA 191 (CC) para 106; *Kruger v President of the Republic of South Africa* 2009 1 SA 417 (CC) paras 20 - 27; *Bio Energy Afrika Free State (Edms) Bpk v Freedom Front Plus in re: Freedom Front Plus v Moqhaka Local Municipality* 2012 2 SA 88 (FB) paras 13–18; Currie & De Waal *The Bill of Rights Handbook* 72–84. See also, Z Motala & C Ramaphosa *Constitutional Law: Analysis and Cases* (2002) 103 arguing that the Constitution adopts different standards on standing depending on whether the plaintiff's case is based on a mere claim of wrongdoing on the part of the defendant, versus a claim of wrongdoing which affects rights protected in the bill of rights, and noting that in the former instance the standards are more rigid while as in the latter instance the standard for standing are more flexible.

17 See, *National Coalition of Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) para 21; *S v Dlamini* 1999 4 SA 623 (CC) para 27; *Janse van Rensburg NO v Minister of Trade and Industry* 2001 1 SA 29 (CC) paras 9–10; *President of the Ordinary Court Martial v Freedom of Expression Institute* 1999 4 SA 682 (CC) paras 7–8. See also, Motala & Ramaphosa *Constitutional Law* 115–116 (noted that mootness is not a fully developed principle in South Africa and is unlikely to mirror the American approach because even if an issue becomes moot, South African courts might still need to consider some aspects of the merits. Further noting that despite the fact that Constitutional Court in *JT Publishing v Minister of Safety and Security* 1997 3 SA 514 (CC) considered mootness as a barrier to adjudication, it is unlikely that the barrier will be absolute); and *Wiese v Government Employees Pension Fund* 2012 6 BCLR 599 (CC) paras 21–24 holding that the issues between the parties were moot due to recent legislative interventions.

18 See, *National Coalition of Gay and Lesbian Equality* para 21; *Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd* 2012 2 SA 16 (SCA) paras 16–21; *Ritcher v Minister of Home Affairs* 2009 3 SA 615 (CC) para 40; *S v Friedland* 1996 8 BCLR 1049 (W); *Transvaal Agricultural Union v Minister of Land Affairs* 1997 2 SA 621 (CC); *Minister of Education v Harris* 2001 4 SA 1297 (CC) para 19; *Legal Aid South Africa v Magidiwana* 2014 4 All SA 570 (SCA) paras 17–18; and Motala & Ramaphosa *Constitutional Law* 113 noting that Kriegler J in *Ferreira* para 199 described ripeness as serving the useful purpose of highlighting that the business of a court is generally retrospective, it deals with situations or problems that have already ripened or crystalized and not with prospective hypothetical problems.

19 *National Coalition of Gay and Lesbian Equality* para 21; *Radio Pretoria v Chairman, Independent Communications Authority of South Africa* 2005 1 SA 47 (SCA) para 15; *Rand Water Board v Rotek Industries (Pty) Ltd* 2003 4 SA 58 (SCA) para 26.

20 See, *National Treasury* and *Magidiwana v President of the Republic of South Africa* 2013 11 BCLR 1251 (CC).

21 Cohn 2011 *American Journal of Comparative Law* 683–685.

22 See, *Democratic Alliance v President of the Republic of South Africa* [2017] ZAWCHC 34 where the Court dismissed a political party's action to review the president's decision to reshuffle cabinet on the basis that the decision to reshuffle involves a political discretion which is not susceptible to judicial review.

23 *Electronic Media Network Limited v e.tv (Pty) Limited* 2017 9 BCLR 1108 (CC) paras 1–2 (held that "ours is a constitutional democracy, not a judiciocracy. And in consonance with the principle of separation of powers, the national legislative authority of the Republic is vested in Parliament whereas the judicial and the executive authority of the Republic repose in the Judiciary and the Executive respectively. Each arm enjoys functional independence in the exercise of its powers. Alive to this arrangement, all three must always caution themselves against intruding into the constitutionally-assigned operational space of the others, save where the encroachment is unavoidable and constitutionally permissible. Turning to the Executive, one of the core features of its authority is national policy development. For this reason, any legislation, principle or practice that regulates a consultative process or relates to the substance of national policy must recognise that policy-determination is the space exclusively occupied by the Executive." See also, *e.tv (Pty) Ltd v Minister of Communications* 2016 6 SA 356 (SCA).

24 *Economic Freedom Fighters v Speaker of the National Assembly* 2016 3 SA 580 (CC) (*EFF 1*); and *Oosthuizen*.

the political accountability doctrine – a useful jurisprudential tool to resolve constitutional questions that are allocated to the discretion of the political pillars of government. I advance another argument which emphasises the usefulness of the political accountability doctrine; that the judiciary can employ this doctrine to explain or defend against alleged accusations of judicial overreach or perceived substantive partisan support thereby maintaining the social legitimacy of the judiciary and encourage participatory democracy in South Africa.

2 THE NEED FOR A POLITICAL ACCOUNTABILITY DOCTRINE

At least three South African jurists recently recognised the need for the development of the political accountability doctrine. These jurists recognised this not by expressly advocating for the political accountability doctrine but by drawing our attention to the dangers of the practice by civic and political organisations to litigate or seek to resolve political questions – those that are either constitutionally allocated to the discretion of the politically accountable branches or are purely political questions – through the courts. The first instance where these dangers were pin-pointed is in *Mazibuko, Leader of the Opposition in the National Assembly v Sisulu MP Speaker of the National Assembly.*[25] In that case, the Democratic Alliance, a political party represented in Parliament,[26] sought an urgent court order against the Speaker of the National Assembly to take steps that would ensure a motion of no confidence in the President of South Africa was scheduled and voted on or before 22 November 2012. The High Court dismissed the application and issued the following warning:

> There is a danger in South Africa … of the politicisation of the judiciary, drawing the judiciary into every and all political disputes, as if there is no other forum to deal with a political impasse relating to policy, or disputes which clearly carry polycentric consequences beyond the scope of adjudication. In the context of this dispute, judges cannot be expected to dictate to Parliament when and how they should arrange its precise order of business, matters … . I regret the need to emphasise this point, but it appears to me to be vital to the future integrity of the judicial institution. An overreach of the powers of judges, their intrusion into issues which are beyond their competence or intended jurisdiction or which have been deliberately and carefully constructed legally so as to ensure that the other arms of the state to deal with these matters, can only result in jeopardy for our constitutional democracy. In this dispute, I am not prepared to create a juristocracy and thus do more than that which I am mandated to do in terms of our constitutional model.[27]

Even though the Constitutional Court later overturned the High Court's decision in *Mazibuko*, one cannot discard the views expressed above as a relevant indicator of the problem in contemporary South Africa that justifies the development of the political accountability doctrine.

The second instance was when Moseneke DCJ (as he then was) raised similar cautionary statements in two separate occasions concerning the current state of affairs where courts are routinely drawn in to resolve political disputes.[28] He explained that this practice is straining the judicial system enormously and noted that presently all disputes, including political ones, end up in court. He cited examples of student protests, battles within cabinet,[29] battles among members of Parliament,[30] battles involving independent agencies constitutionally entrusted

25 2013 4 SA 243 (WCC) 32–33. (*Mazibuko*)

26 Parliament in South Africa is made up of two houses: The National Council of Provinces and the National Assembly. In this chapter, the National Assembly will be used interchangeably with Parliament.

27 *Mazibuko*. See also, *Mazibuko v Sisulu* 2013 6 SA 249 (CC) para 83 (Jafta dissenting) arguing that "Political issues must be resolved at a political level. Our courts should not be drawn into political disputes, the resolution of which falls appropriately within the domain of other fora established in terms of the Constitution. A timely warning was issued in this case by Davis J in a judgment delivered by the High Court."

28 See, Moseneke "On Using the Courts For Political Point Scoring" http://www.powerfm.co.za/news/news/dikgang-moseneke-using-courts-political-point-scoring-fees-must-fall/ (accessed 30-11-2020). Moseneke is not the only retired judge who has responded to the concerns about the proper role of the judiciary in a democracy. Ngcobo J recently remarked that some are concerned that issues that should be resolved through the ballot box are increasingly being resolved in Bloemfontein and in Braamfontein. See, Ngcobo "Former Chief Justice, Keynote Address: Why Does the Constitution Matter?" Public Lecture at the Gallagher Estate, Johannesburg (30 June 2016); and Editorial *Business Day* 7 July 2016 (arguing that parliament is notionally the institution that should be holding the executive to account … because courts are strictly speaking not designed to solve these kinds of [political] problems).

29 *Democratic Alliance*.

30 See, *Malema v Chairman of the National Council of Provinces* 2015 4 SA 145 (WCC); *Economic Freedom*

with policing powers in South Africa.[31] He correctly observed that in a normal constitutional system, these disputes should ideally be resolved at the sites of origin before they reach the judiciary.

In the case of Parliament, for example, the then Deputy Chief Justice noted that Parliament should have an effective dispute resolution system to resolve any differences in ways that are acceptable to all members, who will not rush to court. He was emphatic that currently South Africa places a massive burden on judges.[32] He cautioned that "we need to rethink if our democracy is working properly because one day the wall containing the volume of water that is ever increasing may just burst and we may get flooded."[33]

Moseneke J subsequently reiterated his views at the Annual Helen Suzman Lecture where he implicitly called for the political accountability doctrine. He observed that:

> Plainly, courts have become sites of resolving disputes on political power and rivalry absent other credible sites for mediating political strive. A properly functioning democracy should eschew lumbering its courts with so much that properly belong at other democratic sites or the streets. We will over time over-politicise the courts and thereby tarnish their standing and effectiveness.[34]

The last instance where attention was drawn to the dangers to judicial legitimacy was recently when Mogoeng CJ addressed the Cape Town Press Club. In his address, he acknowledged the potential danger of discrediting the judiciary in relation to litigants, who draw the courts into political disputes. Mogoeng warned and recommended that:

> those of us who are inclined to litigate as we should … make sure that we are careful about the responsibilities that we impose on our courts to deal with ... because if we push our courts to the point where they literally become raw political players we are exposing them to criticism that could have been avoidedc… We are putting them in a space that could easily cause people to delegitimize the crucial role that we play in our constitutional democracy. We owe it to posterity to challenge every wrong doing but let us be very careful in our choices … sometimes almost refusing to deal as we should with challenges of a political nature than be quick to have courts deal with them. This applies to different political parties. Shouldn't you as a political family go out of your way to resolve your internal problems ... before you go to court and only go to court if you are left with no choicec... this extends to every dispute that different political parties might have … but it also extends to disputes different political parties might have in parliament or any other setting ... let us treasure the role of our courts that we do not inadvertently place courts in an unenviable position where it has to deal with matters of a nature that it ought not ordinarily have to deal with.[35]

The normative feature in the above observations is the prudential considerations around the judicial resolution of political disputes and the risks to judicial legitimacy. As will become evident later in this chapter, Mogoeng CJ's observations are particularly significant because it is his pen that would refine the political accountability doctrine.

It is against this background that this chapter reflects on recent Constitutional Court jurisprudence that articulates and applies the political accountability doctrine to regulate the adjudication of "raw political disputes" in South Africa. This reflection is anchored by three specific cases decided by the Constitutional Court on executive and legislative accountability.

Fighters v Speaker of the National Assembly [2018] 2 All SA 116 (WCC); *Democratic Alliance v Speaker of the National Assembly* 2015 4 SA 351 (WCC); on whether the security service of parliament may eject members of parliament from the house); *Chairperson of the Nation Council of Provinces v Malema* 2016 5 SA 335 (SCA); *Democratic Alliance v Speaker of the National Assembly* 2016 3 SA 487 (CC) (declaring part of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 invalid).

31 *McBride v Minister of Police* 2016 4 BCLR 539 (GP) which concerned the independence of the Independent Police Investigative Directorate, an independent constitutional body established to investigate alleged misconduct and offences, including corruption, committed by members of the South African Police Service); *McBride v Minister of Police* 2016 2 SACR 585 (CC) (confirming the high court decision); *McBridge v Minister of Police* (J1396/15) [2015] ZALCJHB 216 (24 July 2015)granting an urgent interdict pending the constitutional challenge about the independence of the Independent Police Investigative Directorate in the high court. [Note to author: Please check citation – title cites McBridge, parties cited in header is McBride]

32 Moseneke *On Using The Courts For Political Point Scoring*.

33 Ibid.

34 Moseneke "Shades of the Rule of Law and Social Justice" 10 http://hsf.org.za/media/documents/2016-helen-suzman-memorial-lecture-transcript (accessed 30-11-2020).

35 Mogoeng "Judicial Overreach, a speech presented at the Cape Town Press Club on 25 October 2017" https://www.youtube.com/watch?v=xGAe_zHg9dw (accessed 30-11-2020).

3 RECENT JURISPRUDENCE

Since 2016, executive and legislative accountability has been a contested issue in South Africa. During this period, three important and related cases were decided by the country's apex court. I now turn to examine these cases individually.

3 1 The obligation to hold the executive to account: *Economic Freedom Fighters v Speaker of the National Assembly*

The first case, *EFF 1* came as a result of the 2014 investigative report by the Public Protector[36] into the mismanagement of funds during the security upgrades at the private home of President Zuma (as he then was) in Nkandla.[37] The report found a number of improprieties,[38] including that some of the upgrades were not related to the security of the then President's private home[39] and that he, as the ultimate guardian of state resources, failed to discharge his responsibilities and protect state resources (when he became aware of these irregularities).[40] According to the Public Protector, this failure to take reasonable corrective steps to protect state resources amounted to a violation of the Executive Ethics Act 82 of 1998 and was inconsistent with his office as contemplated in section 96 of the Constitution.[41] The Public Protector suggested remedial action including that then President repay a reasonable percentage of the cost of the measures that do not relate to security.[42] She also directed the then President to reprimand the ministers who were involved in the project.[43]

The Public Protector submitted her report to the president and the National Assembly in line with the latter's constitutional obligation to hold the executive to account.[44] For its part, the National Assembly resolved to absolve the president from liability.[45] Consequently, the President did not comply with the remedial action. This led to political uproar and a political party, the Economic Freedom Fighters, to instigate a judicial process to determine, *inter alia*, whether (1) then President Zuma failed to fulfil his constitutional obligations under sections 83,[46] 96,[47] and 181[48] of the Constitution by failing to implement the remedial action; and (2) the National Assembly failed to fulfil its constitutional obligations, in terms of sections 55[49] and 181, to hold the President accountable due to its failure to insist on compliance with the remedial action.

In a unanimous judgment, the Constitutional Court found that absent a legal challenge to set aside the Public Protector's remedial action, the President was duty-bound to comply with the remedial action. Hence, the Court declared that then President Zuma's actions breached his constitutional obligations in terms of sections 83, 181 and 182 of the Constitution in that he failed to uphold, defend, and respect the Constitution as the supreme law of the land and

36 This is an independent institution established under s 181 of the Constitution to "to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice."

37 See, Public Protector *Secure in Comfort* Report No 25 of 2013/2014, http://www.publicprotector.org/library%5Cinvestigation_report%5C201314%5CFinal%20Report%2019%20March%202014%20.pdf (*Secure in Comfort*).

38 *Secure in Comfort* 55, 57–58.

39 Including the visitor's centre, cattle kraal, chicken run, amphitheatre, marquee area and the swimming pool.

40 *EFF 1* para 65.

41 Ibid.

42 *EFF 1* para 68.

43 *EFF 1* para 2.

44 *EFF 1* para 3.

45 *EFF 1* para 12.

46 Section 83 provides in pertinent parts that "the President must uphold, defend and respect the Constitution as the supreme law of the Republic".

47 Section 96 provides in pertinent parts that "Members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation … may not … use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person."

48 Section 181 establishes six independent institutions, including the Public Protector, to strengthen constitutional democracy and it enjoins "[o]ther organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions."

49 Section 55(2) provides in pertinent parts that "the National Assembly must provide for mechanisms … to ensure that all executive organs of state in the national sphere of government are accountable to it; and … to maintain oversight of the exercise of national executive authority, including the implementation of legislation; and any organ of state."

to assist and protect the Public Protector so as to ensure her independence and impartiality.

Lastly, the Court found that the National Assembly breached its constitutional obligation to hold the President to account by adopting a resolution to absolve the President, which, in its view, amounted to second guessing the Public Protector, as opposed to launching a court challenge to set aside the remedial actions. However, the Court made some important pronouncements about the limits of judicial authority in relation to Parliament's obligation to hold the executive to account, which are germane to this chapter. It observed that the Constitution neither gives details on how the National Assembly is to discharge the duty to hold the executive to account nor outlines the mechanisms for doing so.[50] Consequently, the Court reasoned, the National Assembly must be construed as having "been given the leeway to determine how best to carry out its constitutional mandate."[51] Furthermore, the Court held and reasoned that:

> 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 … these are some of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government … . It is therefore not for this Court to prescribe to Parliament what structures or measures to establish … in order to fulfil responsibilities primarily entrusted to it. Courts … mindful of the vital strictures of their powers … must be on high alert against impermissible encroachment on the powers of the other arms of government.52

It is my view that the Court laid down the political accountability doctrine in *EFF 1*. This doctrine holds that when the text of the Constitution grants authority to a political pillar of government without prescribing how such authority should be exercised, the pillar of government concerned is deemed to have political discretion in exercising that authority and that a court, even though constitutionally bound to declare any conduct or law invalid, will abstain from prescribing how to exercise that authority.[53] It has been suggested elsewhere that the genesis of the political accountability doctrine is in the jurisprudence of Ngcobo CJ, as he then was.[54]

A careful reading of *EFF 1* reveals that underneath the political accountability doctrine is a two-pronged test that must be met for the doctrine to apply. The first prong is concerned with whether there is a constitutional text granting authority to a political pillar of government namely the legislature or executive. If the answer to the first prong is positive, this triggers the second prong which is to determine whether the constitutional text prescribes how that authority should be exercised. If yes, then the relevant branch must follow the prescripts of the Constitution in exercising that authority, and a court may intervene by prescribing or supplying substantive content to the other branches when called upon to do so if those prescripts are not adhered to. If the answer to the second question is negative then the political accountability doctrine applies and prevents the judiciary from prescribing or supplying substantive content to the relevant political branch about the issue because the Constitution gives that political branch discretion to decide the issue and for which it should be held politically accountable. The discretion enjoyed by the political branch in this context is not absolute in the sense that people will hold it accountable politically, through various means including public participation processes that require the relevant branch to justify its decisions.

There are multiple ways through which a culture of justification is promoted under South Africa's constitutional system. The political accountability doctrine is but one agency for the promotion of a culture of justification through a political process as opposed to a judicial process. In other words, consistent with section 2[55] and 172(1)[56] of the Constitution, the

50 EFF 1 para 43.
51 *EFF 1* para 87.
52 *EFF 1* para 93.
53 Ngcobo *Keynote Address* 22–23 (discussing this principle of law). See also, Knight "A Framework for Fettering" 2009 *Judicial Review* 73 and Cartier "Administrative Discretion and the Spirit of Legality: From Theory to Practice" 2009 *Canadian Journal of Law and Society* 313.
54 Dyani-Mhango & Mhango 2017 *Acta Juridica* 90–93; and Ngcobo *Keynote Address* 22–23.
55 Constitution, s 2 provides that "[t]his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."
56 Constitution, s 172(1) provides, in pertinent parts, that "[w]hen deciding a constitutional matter within its

judiciary's role ends when a declaration of invalidity is made relative to the issues, and, hence a court must abstain from prescribing to a political branch as was the case in *EFF 1*. You may recall that in *EFF 1* the Court declared the "the failure by the National Assembly to hold the President accountable by ensuring that he complies with the remedial action taken against him, is inconsistent with its obligations to scrutinise and oversee executive action and to maintain oversight of the exercise of executive powers by the President."[57] However, consistent with the political accountability doctrine the Court did not prescribe how the National Assembly ought to have exercised its obligations. The theory behind the political accountability doctrine is that separation of powers commands the substantive issue to be decided by the branch of government conferred with the discretion to determine it.[58] To do otherwise, as explained by the Court in *EFF 1* above, would be an impermissible encroachment on the powers of the other pillars of government.

In its practical application, the political accountability doctrine requires that a court must, in the first instance, interpret the text in question and determine whether and to what extent the issue is allocated to a political branch of government. If an issue falls under the political accountability doctrine, a court will abstain from taking a prescriptive approach if the text allocates discretion to determine the issue to a specific political pillar of government. Put differently, when the text of the Constitution grants discretion to a political branch, it envisages that that branch will be held politically accountable, through a system of proportional representation by party list as well as participatory democracy, in the exercise of such discretion as a mechanism to preserve the separation of powers and promote the will of the people.[59]

In his concurring opinion in *National Treasury v Opposition to Urban Tolling Alliance*,[60] Froneman J endorsed the latter proposition and found that it is a contravention of the separation of powers doctrine for a court to intrude by granting an interdict against the implementation of government policy to fund infrastructure projects by means of tolling the roads on a user-pay principle.[61] This is the case because that matter resides in the heartland of national executive.[62] Furthermore, Froneman J declared that "the playing field for the contestation of executive government policy is the political process, not the judicial one" because in his view the "courts of this country do not determine what kind of funding should be used for infrastructural funding of roads and who should bear the brunt for that cost. The remedy in that regard lies in the

power, a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency"

57 *EFF 1* para 104

58 See, for example, *Democratic Alliance v Minister of International Relations and Cooperation (Council for the Advancement of the South African Constitution Intervening*) 2017 3 SA 212 (GP) para 77 where the court declined "the invitation to pronounce on the substantive merits of South Africa's withdrawal from the Rome Statute of the ICC. That decision is policy-laden, and one residing in the heartland of the national executive in the exercise of foreign policy, international relations and treaty-making, subject, of course, to the Constitution." For further discussion of this case see, Dyani-Mhango "South Africa's (unconstitutional) withdrawal from the Rome Statute: A note on Democratic Alliance v Minister of International Relations an Cooperation" 2018 *South African Journal on Human Rights* 268.

59 *New Nation Movement PPC v President of the Republic of South Africa* 2019 5 SA 533 (WCC) paras 14, 32 (*New Nation Movement PPC*); Mhango *Justiciability of Political Questions in South Africa: A Comparative Analysis* (2019) 195–196; See also, Moseneke "Shades of the Rule of Law and Social Justice" where after cautioning against using courts to resolve political disputes observes that the highest form of public accountability is not in the courts, or in the work of the Public Protector or of the Auditor General, but it is electoral accountability which would be useful only when communities understand and embrace what is truly in their interest.). In the administrative law context, the political accountability doctrine manifests itself when Parliament grants discretion to an agency without parameters. When that happens, a democratic gap emerges, which must be bridged through democratic deliberation between the agency and the relevant individuals. See, Cartier 2009 *Canadian Journal of Law and Society* 329.

60 *National Treasury's* case.

61 The Cabinet took a decision in 2007 which approved an extensive upgrade of roads in the economic hub of the Gauteng province as part of the GFIP. *National Treasury* para 1.

62 *National Treasury* para 84. There are other matters in the Constitution that are committed to the elected branches of government. See, *Hugo* where the court recognised that the exercise of pardon powers is committed to the executive branch). In addition, ss 206(1) and 207(2) of the Constitution commit policing matters to the executive branch such that it is free to structure the South African Police without substantive judicial scrutiny. See, *Glenister* paras 65, 120 and 162 (holding that the elected branches of government are free to decide where to locate a specialised corruption-fighting unit. In this case the elected branches had decided to locate such unit within and not without the South African Police Service as previously was the case).

political process."[63]

In my view, Froneman J's opinion is a validation that the Constitution envisages political accountability to be brought to bear when it comes to the remedy for certain constitutional or political questions and that despite the fact that the case arose in the context of interdictory relief and executive policy-making, the same considerations apply in other instances where the Constitution assigns discretionary power to a branch of government. In addition, even though Froneman J's opinion predates *EFF 1*, it nevertheless advances the general premise of the political accountability doctrine and ensures that courts are conscious of their vital limits.[64] In this context, Ngcobo CJ (as he then was) recently remarked that:

> It is important also to understand that having regard to their proper role on judicial review, courts cannot provide solutions to all political, economic and social problems that afflict societies in modern times … the appropriate solution to most political, economic or social problems can only be found through the political process. These problems are usually complex and they involve many conflicting interests and may involve the use and allocation of limited resources... It is to the political process that the citizen must look for an appropriate resolution of these problems. The responsibility for the proper and effective functioning of the political process in the interests of the community rests of course with the executive and the legislature.[65]

An important point that must be made at this juncture is this: The concept of the political accountability doctrine articulated in *EFF 1* is not unique to South Africa, especially because it is predicated on the universal concept of separation of powers.[66] One can find a related concept in other jurisdictions.[67] The judgment in *EFF 1* crystallised the political accountability

63 *National Treasury* paras 93–95. See also, ss 59; 85(2)(*d*); 118; 195(1)(*e*); 72 of the Constitution. And see *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC). See also *Chief Enyi Abaribe v the Speaker Abia State House of Assembly* (2003) 14 NWLR (pt788) 466 where the court explained that "in cases involving political questions appeal for relief does not belong here. Appeal must be to an informed, civically militant electorate. In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives"; *Schneider v Kissinger* 412 F 3d 190 (2005) (in addressing concern about the effects of leaving political questions to the political process, the court reasoned that the lack of judicial authority to oversee the conduct of the executive branch in political matters did not leave executive power unchecked because political branches effectively exercise checks and balances on each other in the area of political questions); and J Story *Commentaries on the Constitution* (1905) 525 arguing that in cases involving questions exclusively of political character, the supreme authority as to these questions belongs to the political branches of government and that the remedy in such cases is solely by an appeal to people at the elections.

64 See also, Okpaluba "Can a court review the internal affairs and processes of the legislature?" 2015 *Comparative and International Law Journal of Southern Africa* 195 (discussing *Oosthuizen*).

65 Ngcobo *Keynote Address* 24.

66 For further discussion, see Dyani-Mhango & Mhango 2017 *Acta Juridica* 6–7, 16–21.

67 For instance, in his commentary, Professor Joseph Story expressed theoretical elements of the political accountability doctrine by stating that: "in measures exclusively of a political … character, it is plain, that as the supreme authority, as to these questions, belongs to the legislative and executive departments, they cannot be re-examined elsewhere. Thus, congress having the power to declare war, to levy taxes, to appropriate money, to regulate intercourse and commerce with foreign nations, their mode of executing these powers can never become the subject of re-examination in any other tribunal...yet cases may readily be imagined, in which a tax may be laid, or a treaty made, upon motives and grounds wholly beside the intention of the constitution. The remedy, however, in such cases is solely by an appeal to the people at the elections… but where the question is of a different nature, and capable of judicial inquiry and decision, there it admits of a very different consideration". Story *Commentaries on the Constitution of the United States with a Preliminary Review of the Constitutional History of the Colonies and States, Before the Adoption of the Constitution* (1833) 346–347. See also, Dyani-Mhango & Mhango 2017 *Acta Juridica*; *Attorney General Bendel v Attorney General of the Federation* 1982 10 SC 1, Fatai-Williams J explaining that one of the requirements of the separation of powers under Nigerian constitutional law is that courts should respect the independence of the legislature in the employment of its law-making powers. This, he explicated further, required courts to abstain from pontificating on the validity of domestic affairs of the legislature, including the method of employment of its law-making powers; *Japan v Shigeru Sakata* (1960) 4 *Japanese Ann International Law* 105–119 (where in refusing to determine the constitutionality of the 1952 United States-Japan Security Treaty, the court reasoned that the 1952 Treaty involved "an extremely high degree of political consideration, having bearing upon the very existence of our country as a sovereign power, and any legal determination as to whether the content of the treaty is constitutional or not is in many respects inseparably related to the high degree of political consideration or discretionary power on the part of the Cabinet which concluded the treaty and on the part of the Diet which approved it … as a rule, there is a certain element of incompatibility in the process of judicial determination of [the Treaty's] constitutionality by a court of law which has as its mission the exercise of the purely judicial function. Accordingly, unless the said [T]reaty is obviously unconstitutional and void, it falls outside the purview of the power of judicial review granted to the court."); and *Tomabechi v Japan,* 1955

doctrine leading the Constitutional Court to apply it in a subsequent case involving a motion of no confidence.

3 2 The obligation to hold the president to account via secret ballot: *United Democratic Movement v Speaker of the National Assembly*

3 2 1 Background to the UDM case

On 31 March 2017, President Jacob Zuma reshuffled the cabinet. Soon thereafter, one of the international credit rating agencies downgraded South Africa to sub-investment grade.[68] This culminated in a request by opposition political parties for the Speaker of the National Assembly to schedule a date where a motion of no confidence in the President would be debated. The Speaker agreed and scheduled the debate for 18 April 2017.[69]

Subsequent to acceding to this request, the United Democratic Movement (UDM), a minority political party represented in Parliament, requested the Speaker to prescribe a secret ballot as the voting procedure for the scheduled motion of no confidence in the President.[70] The Speaker refused to grant the request on the basis that she had no authority to prescribe the voting procedure for the motion. Based on its dissatisfaction with this response, the UDM approached the Constitutional Court for relief. The question before the court became whether the Constitution and rules of the National Assembly require, permit or prohibit the Speaker to direct that a vote on a motion of no confidence in the President be conducted by secret ballot.[71] The UDM sought an order to declare that section 102 of the Constitution requires that a motion of no confidence must be decided by secret ballot.[72]

3 2 2 The judgment

In resolving the question before the court, Mogoeng CJ, who penned the unanimous judgment, began by noting the inherent power of the National Assembly in terms of section 57 of the Constitution to control its internal arrangements. That section provides that:

> The National Assembly may—
> (a) determine and control its internal arrangements, proceedings and procedures; and
> (b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.

The Chief Justice noted that passing a motion of no confidence in the President requires a vote supported by a majority of the members of the National Assembly. He found that since the Constitution is silent on the required voting procedure on that motion, the National Assembly is at liberty to discharge its powers under section 57(1) to determine the appropriate voting procedure in terms of which to decide a motion.[73]

In other words, Mogoeng CJ's theory is that the framers of the Constitution left open the question of the procedures for voting on a motion of no confidence in order to allow the "National Assembly itself to determine in terms of its section 57 powers what would best advance our constitutional vision or project."[74] Hence, Mogoeng held that the National

(O) 96 *Minshu* Vol.14, No.7, 1206 (which involved the constitutionality of the decision by the Prime Minister to dissolve the house of representative. The court refused to intervene in determining the constitutionality of the dissolution on the basis that the action of the Prime Minister is within the discretion of the political pillars of government). See also, Chen & Wada "Can the Japanese Supreme Court Overcome the Political Question Doctrine Hurdle?" 2017 *Washington International Law Journal* 362 where the authors argue that scholars have approved the *Japan v Shigeru Sakata* judgment popularly known as the *Sunagawa case* on three main rationales: prudential view, separation of powers and judicial competence); and Cooley *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 41 (arguing that where the a constitutional question is constitutionally addressed to the discretion of one department of government, a rule must prevail that a decision made by that department is final and not examinable by any other department or tribunal).

68 *United Democratic Movement v Speaker of the National Assembly* 2017 5 SA 300 (CC) (*UDM*) para 13.

69 *UDM* para 14.

70 *UDM* para 15.

71 *UDM* para 19.

72 Constitution, s 102(2) provides that "[i]f the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the President, the President and the other members of the Cabinet and any Deputy Ministers must resign."

73 *UDM* para 59.

74 Ibid.

Assembly has plenary powers to determine whether voting on a motion of no confidence should be held by open or secret ballot.[75]

In addition, Mogoeng reasoned that the National Assembly's power is reinforced by the fact that there are no pre-determined voting procedures in the Constitution for a motion of no confidence in the President; that this entails the Constitution neither prohibits nor prescribes an open or secret ballot in connection with a motion of no confidence in the President.[76] He correctly found that the Constitution effectively leaves it to the discretion of the National Assembly when the time comes to vote on a motion and decide on the appropriate voting procedure.[77] To confirm this discretion, Mogoeng CJ declared that "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."[78]

Mogoeng CJ further found that pursuant to its section 57 powers read with rule 104 of the National Assembly,[79] the National Assembly has delegated to the Speaker the power to decide how a particular motion of no confidence in the president is to be conducted. Specifically, Mogoeng CJ noted that whilst the question of whether a secret ballot is to be undertaken has not been explicitly provided for in the rules, it falls within the Speaker's discretion to determine that question.[80] That discretion involves political judgement.[81] In Mogoeng's words "that is her judgement call to make, having due regard to what would be the best procedure to ensure that Members exercise their oversight powers most effectively."[82]

To validate the holding in *UDM*, Mogoeng CJ emphasised that his decision that discretion to prescribe the voting procedure in a motion of no confidence resides in the Speaker "accords with the dictates of separation of powers" because "it affirms the functional independence of Parliament to freely exercise its section 57 powers."[83] It is undeniable that Mogoeng CJ's decision and reasoning in *UDM* were informed by the theory of the political accountability doctrine. Strictly speaking, his conclusions in *UDM* were anchored by the two-pronged test articulated in *EFF 1* as part of the political accountability doctrine. In fact, as I will demonstrate later in this chapter, Mogoeng would reiterate this point – that the reasoning in both *EFF 1* and *UDM* was part of a consistent application of the political accountability doctrine (without calling it by name) – in his dissenting judgment in *EFF 2.*

Underpinning the decision in *UDM* is the notion that the text of the Constitution contemplates that there should be political accountability for discretionary decisions made by the political branches. This include decisions such as whether or not the voting procedure for a motion of no confidence should be secret or open ballot, as a means to preserve the separation of powers and uphold the will of the people, and that judicial review has a limited role to play in the context of the political accountability doctrine. Nonetheless, this does not preclude a court from exercising its power of judicial review over a political branch except that the parameters of the political accountability doctrine are such that a court can review every constitutional question but may not impose prescription. Simply put, a court may make a declaration of constitutional invalidity in cases that implicate the doctrine, but it may not prescribe an outcome on how a branch of government should exercise a particular power or impose substantive content to a particular provision under dispute. It bears importance to reiterate what the Constitutional Court said in *EFF 1* that:

> 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. And these are some of the 'vital limits on judicial authority

75 Ibid.
76 *UDM* para 64.
77 Ibid.
78 Ibid.
79 Which provides that "(1) Where no electronic voting system is in operation, a manual voting system may be used in accordance with a procedure predetermined by the Speaker and directives to be announced by the presiding officer. (2) When members' votes have been counted, the presiding officer must immediately announce the result of the division. (3) If the manual voting procedure *permits*, members' names and votes must be printed in the Minutes of Proceedings."
80 *UDM* para 68.
81 See, *Glenister* para 67. See also, *Oosthuizen's* case.
82 *UDM* para 68.
83 *UDM* para 69.

> and the Constitution's design to leave certain matters to other branches of government.'[84]

The latter statement of law arguably captures the parameters of the political accountability doctrine.

3 3 The political accountability doctrine and its connection to participatory democracy

One of the unique aspects of the Constitution is that it introduced the concept of participatory democracy. Participatory democracy essentially obligates the politically accountable pillars of government to put in place mechanisms that allow for ongoing public participation in the legislative and policy-making processes.[85] In the landmark judgment of *Doctors for Life International v Speaker of the National Assembly*,[86] the Constitutional Court pronounced that the democratic government that is contemplated under the Constitution is "representative and participatory democracy which is accountable, responsive and transparent and which makes provision for the public to participate in the law-making process."[87] The Court further explained the ongoing nature of people's participation and held that:

> [T]he Constitution predicates and incorporates within its vision the existence of a permanently engaged citizenry alerted to and involved with all legislative programmes. The people have more than the right to vote in periodical elections, …They are accorded the right on an ongoing basis and in a very direct manner, to be (and to feel themselves to be) involved in the actual processes of law-making. Elections are of necessity periodical. Accountability, responsiveness and openness, on the other hand, are by their very nature ubiquitous and timeless. They are constants of our democracy, to be ceaselessly asserted in relation to ongoing legislative and other activities of government. Thus it would be a travesty of our Constitution to treat democracy as going into a deep sleep after elections, only to be kissed back to short spells of life every five years. Although in other countries nods in the direction of participatory democracy may serve as hallmarks of good government in a political sense, in our country active and ongoing public involvement is a requirement of constitutional government in a legal sense. It is not just a matter of legislative etiquette or good governmental manners. It is one of constitutional obligation.[88]

It is in this context that the political accountability doctrine and the notion of participatory democracy complement each other. In those areas where the political accountability doctrine is applied, participatory democracy is one of the means by which the will of the people is ensured and given effect to on an ongoing basis. The political accountability doctrine is strengthened through the processes of participatory democracy. And this has the larger benefit of promoting constitutionalism in South Africa through the envisaged constitutional dialogue between and among the branches of government and the people.[89] Hence, the political branches must endeavour to utilise the concept of participatory democracy to fill the democratic gap created by the political accountability doctrine. Since the courts are required to abstain from supplying substantive content to matters that fall within the doctrine's reach, one of the ways of ensuring political accountability is brought to bear is by insisting on a process of public participation in the issues involved.

Following the *UDM* decision, the Speaker of Parliament made the much-anticipated televised public announcement. In this announcement the Speaker stated: "I determine the voting in the motion of no confidence in the President on the 8th of August will be by secret ballot." The vote took place as announced and then President Zuma survived the motion of

84 *EFF 1* para 93.

85 In South Africa, the executive is constitutionally empowered to initiate legislation. Hence, participation in the law-making process implicates both the legislature and the executive. See ss 59; 85(2)(d); 118; 195(1)(e); 72 of the Constitution. See also *Doctors for Life*; and *Merafong*.

86 *Doctors for Life*.

87 *Doctors for Life* para 121.

88 *Doctors for Life* paras 230–231.

89 For a discussion of the notion of constitutional dialogue and how it strengthens the political accountability doctrine, see S Ngcobo "South Africa's Transformative Constitution: Towards an Appropriate Doctrine of Separation of Powers" 2011 *Stellenbosch Law Review* 37–48 where the author argues that the notion of constitutional dialogue is the underpinning and defining feature of South African separation of powers; and dismissed the perceived notion that when courts "strike down unconstitutional action or legislation … it is perceived as the end of the matter." To the contrary, he argues that a "dialogic theory appreciates that a judicial finding of constitutional invalidity is more often than not merely the beginning" of a dialogue among the three branches of government.

no confidence. However, the matter did not end there. As will be discussed below, a motion to impeach former President Zuma would be initiated in Parliament. A dispute over the correct procedures for impeachment was eventually brought before the Constitutional Court in *Economic Freedom Fighters v Speaker of the National Assembly.*[90]

3 4 The obligation to impeach the President via court-mandated procedures

EFF 2 was a sequel to *EFF 1* and *UDM*. The Economic Freedom Fighters and other minority political parties brought an action predicated on the perceived failure by the National Assembly to take steps to hold the President to account under section 89(1) of the Constitution as a consequence of the judgment in *EFF 1*. The main issue before the Court was whether the National Assembly, pursuant to its obligation to hold the executive to account under section 55(2), is obliged to put into place permanent mechanisms and procedures to regulate the impeachment process. The two constitutional provisions that were at the core of this dispute were sections 57 (quoted above) and section 89. Section 89 provides that:

> (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.

In a majority judgment (7 to 4) Jafta J found that the *ad hoc* committee structure under the existing rules of the National Assembly did not constitute a mechanism as contemplated in section 89(1) of the Constitution. He held that section 89 implicitly imposes an obligation on the National Assembly to make rules specially tailored for an impeachment process contemplated in that section and found the National Assembly in breach of that section for failing to adopt those rules. Jafta J also concluded that before any process of removing the President from office in terms of section 89 commences, there must first be a preliminary inquiry where the National Assembly, as an institution, determines whether a listed ground exists to justify an impeachment vote.[91] He further reasoned that the drafters of the Constitution left the details of the listed grounds for impeachment of a President to be determined by the National Assembly as an institution.[92]

The problem is that Jafta J does not reconcile the silence on the obligation and details of how to hold the executive to account in terms of sections 42(2) and 55(2) of the Constitution with similar obligations set out in section 89. Should the National Assembly not have the same leeway under section 89 as it does under sections 44(2) and 55(2) of the Constitution? Why is section 89 different from sections 44(2) and 55(2) in terms of the functional independence of Parliament to freely exercise its section 57 powers? Why is the judgment in *EFF 1* not instructive when interpreting section 89? Jafta J does not address these questions. In his view, the drafters of the Constitution could not have contemplated that members of the National Assembly must individually determine what constitutes a serious violation of law or Constitution because this would result in divergent views on whether or not the grounds have been met to proceed with an impeachment vote.[93]

In the end, Jafta J dismissed, as inadequate, the existing mechanisms that provided for the establishment of an *ad hoc* committee to deal with any matter including impeachment proceedings.[94] This was despite the fact that previous motions of impeachment were lawfully

90 *Economic Freedom Fighters v Speaker of the National Assembly* 2018 3 BCLR 259 (CC) (*EFF 2*).
91 *EFF 2* para 180.
92 *EFF 2* paras 176–177.
93 *EFF 2* para 177.
94 There were two existing mechanisms under Rule 85 of the National Assembly which provides that: "A member, who wishes to bring any improper or unethical conduct on the part of another member to the attention of the House, may do so only by way of a separate substantive motion, comprising a clearly formulated and properly substantiated charge that in the opinion of the Speaker prima facie warrants consideration by the House. [the latter applies] also to reflections upon the President and Ministers and Deputy Ministers who are not members of the House." In addition, Rule 253 provides that "[a]n ad hoc committee may be established by resolution of the Assembly or during an adjournment of the Assembly for a period of more than 14 days, by the Speaker after consulting the Chief Whip and the most senior whip of each of the other parties. An ad hoc committee may only be established for the performance of a specific task."

pursued using these procedures in the rules. In his analysis, Jafta J dismissed the existing *ad hoc* committee-based mechanism because: (1) it did not provide for an answer as to what would happen if each member of the committee attaches a meaning to the word "serious" in section 89 that is different from other members;[95] (2) it did not have a standing procedure for the committee to follow in carrying out its tasks;[96] and (3) its members are represented in the same proportion as the proportion in which they are represented in the National Assembly. Explicitly, Jafta J problematised the fact that the governing political party dominated the committee.[97] He expressed this problem as follows:

> The rules relevant to the establishment of ad hoc Committees do not determine the size of a committee. Nor do they require that all parties be represented. They merely state that the resolution establishing such committee must specify the number of members to be appointed or their names. If more than one party is represented, the representation mirrors their representation in the Assembly. The majority party would have majority representation. This raises the risk of an impeachment complaint not reaching the Assembly, even if the resolution establishing the committee were to stipulate that what was before the committee may not be decided by consensus … A decision by members of the majority party in the ad hoc Committee may prevent an impeachment process from proceeding beyond the committee, to shield a President who is their party leader.[98]

To support the above proposition, Jafta J relied on the judgment in *Mazibuko v Sisulu*. In this case, the mainstream view among the justices was that the tabling of a motion of no confidence contemplated in section 102 of the Constitution, with only the support of a majority decision of a committee, was unconstitutional because: (1) it was composed of majority members of the governing party and (2) it could frustrate the vindication of the right of a member of the National Assembly to bring to the full house a motion under that section.[99] Nevertheless, there are three problems with Jafta J's reliance on *Mazibuko* instead of the doctrine as applied in *EFF 2* and *UDM* that needs to be highlighted.

First, Jafta J does not address a crucial point Mogoeng CJ underscored in his dissenting opinion in *EFF 2* where he succinctly pointed out that Jafta J misapplied the judgment in *Mazibuko*. Mogoeng CJ, who (together with Justices Jafta, Mhlantla and Zondo) dissented in *Mazibuko*, correctly observed that the primary concern that led to the finding in *Mazibuko* was that the existing rules, in that case, frustrated steps by opposition members of the National Assembly to table motions of no confidence in the President instead of enabling the exercise of that right.[100] On the contrary, none of the plaintiffs in *EFF 2* alleged that a section 89 inquiry through the existing *ad hoc* committee mechanism was frustrated by the governing party to prevent impeachment motions from being considered by the full house.[101] It was further observed by the Chief Justice that the *ad hoc* committee mechanism has been effectively used in the past, which is why *Mazibuko* did not prescribe to the National Assembly but merely provided guidance.[102]

Secondly, Jafta J paid minimum attention to or overlooked the text of the Constitution and the constitutional scheme, which expressly recognises proportional representation as a means of decision making in legislative processes.[103] The possibility that there may be a divergence of views among members of the National Assembly, as to what constitutes a serious violation of the law or Constitution, is not a problem. Rather it is a product of democratic dialogue, and more importantly, it is a deliberate constitutional design to ensure that the will of the people as proportionately represented in the legislature is reflected in Parliament's decision. Moreover,

95 *EFF 2* para 188.
96 *EFF 2* para 190.
97 Jafta J's view are not surprising because there is a understanding among some academics that the one of the "the major threat to South Africa's democracy during this time has been the governing African National Congress's entrenchment as a dominant political party. See, "Is South Africa's Constitutional Court protecting democracy?" The Conversation 26 November 2018.
98 *EFF 2* para 192.
99 *EFF 2* paras 193–195, citing *Mazibuko* para 62.
100 *EFF 2* para 263.
101 *EFF 2* para 263.
102 *EFF 2* para 261.
103 For constitutional provisions that require proportional representation in the legislative processes at the national, provincial and local government spheres of government, see ss 46, 105, 157(2), 78, 193, 198(8) of the Constitution. See, also, *New Nation Movement PPC* where the court held that proportional representation is a basic feature of South Africa's political and constitutional system.

the text was overlooked when Jafta J omitted to recognise that section 89 does not give legal authority for the establishment of a permanent impeachment committee.

In addition, Jafta J ignored the fact the principle of proportional representation dates back to the constitution-making process where 34 constitutional principles were agreed at the Convention for a Democratic South Africa to form the basis for drafting the Constitution. Principle VIII provided that "there shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters' roll, and, in general, proportional representation." When the Constitution was finally certified by the Constitutional Court, pursuant to its unique mandate captured in section 71 of the Interim Constitution of the Republic of South Africa Act 200 of 1993, it held that "under a list system of proportional representation, it is parties that the electorate votes for, and parties which must be accountable to the electorate."[104]

Recently, the High Court in *New Nation Movement PPC v President of the Republic of South Africa*[105] dismissed a legal challenge against the constitutionality of proportional representation as the preferred system to manage South Africa's political system and governance. In dismissing the lawsuit, the High Court found that "the provisions of sections 46(1)(a) and 105(a) of the Constitution accords Parliament the discretion to prescribe electoral systems for the National Assembly and Provincial Legislatures which result, in general, in proportional representation."[106] Clearly, proportional representation is one of the values cherished by the framers of the Constitution and it baffles the mind that Jafta J did not take sufficient account of the above considerations in dismissing the *ad hoc* committee structure established by the National Assembly.

Lastly, it is important not to disregard Jafta's dissenting opinion in *Mazibuko* when considering the majority judgment in *EFF 2* penned by him. An important starting point in analysing Jafta J's dissenting opinion in *Mazibuko* is that his entire disagreement with the majority was premised on the grounds that the issues raised in that case were political questions that should be resolved elsewhere and not in the courts. Jafta J described his point of departure follows:

> Political issues must be resolved at a political level. Our courts should not be drawn into political disputes, the resolution of which falls appropriately within the domain of other fora established in terms of the Constitution.

Substantively, Jafta J disagreed with the majority's finding that the rules of the National Assembly in *Mazibuko* were unconstitutional. His view was that those rules were subject to impending reform by the National Assembly itself.[107] He reasoned that "in these circumstances, the Court does not have to determine the constitutionality of the rules, which are about to change to cater for the very complaint raised by the [plaintiff]."[108] In his view, a declaration of invalidity under these circumstances would serve no "purpose because the parties concerned agree that the rules need to be amended and how this is to be done cannot be effected by this Court but by the [National] Assembly which is mandated by the Constitution to make its own rules"[109] in terms of section 57.[110]

Considering these observations, it is difficult to see the difference between the conceptual issues in *Mazibuko* and *EFF 2* that justified Jafta J's decision to switch sides to the extent of relying on a judgment that he vehemently disagreed with. To put it plainly, Jafta J disagreed with the foundation upon which was decided and yet he relied on the same judgment without a reasoned explanation. One could read this emphasis on Jafta J as an individual attack on him as a justice even though he carried majority support in *EFF 2*. On the contrary, my emphasis on Jafta J is predicated on the fact that given his views in *Mazibuko*, his vote could have swayed the case in *EFF 2*. Yet, Jafta J led the majority in advancing a line of thinking that he

104 *Certification of the Constitution of the Republic of South Africa* para 186.
105 *New Nation Movement PPC*. The Constitutional Court reversed the judgment in *New Nation Movement PPC*. See, *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* [2020] ZACC 11.
106 *New Nation Movement PPC* para 14.
107 *Mazibuko* paras 95, 116, 131–135.
108 *Mazibuko* para 132.
109 *Mazibuko* para 132.
110 Mogoeng CJ, who was part of this opinion, criticised Jafta for not consistently applying the principle in *Mazibuko* to *EFF2*.

vehemently opposed in *Mazibuko*.

Some commentators have observed that South Africa's Constitution was approved with the goal of transforming society from its oppressive history.[111] In that sense, the Constitution is a transformative project geared towards achieving transformative goals.[112] It is widely accepted that in order to achieve transformative constitutionalism, the judiciary must engage in transformative adjudication.[113] One of the strong proponents of transformative adjudication, the late Langa CJ, once observed that transformative adjudication requires that judicial decisions should be capable of being substantively justified in terms of the rights and values enshrined in the Constitution.[114] In his seminal academic contribution on the subject, Langa observed that it is no longer sufficient for the judiciary to rely on the authority of Parliament as justification for judicial decisions since under a transformative Constitution the judiciary bears the fundamental responsibility to justify its decisions "not only by reference to authority, but by reference to ideas, rights and values".[115] In other words, Langa's point is that judges are not expected simply to apply the law but to justify their decisions with reference to the text, design, history and values of the Constitution. This is important if respect for judicial decisions is to flow "from the cogency of the reasons given for them rather than the authority with which they are given".[116]

Langa's propositions were endorsed and incorporated in the Code of Judicial Conduct, which requires judges to give reasoned judgments.[117] To put it differently, reason-giving has been embraced as one of the most important methods through which judges are held accountable.[118] This requirement is expressly encapsulated in Article 9 of the Code of Judicial Conduct, which provides in pertinent parts that "reasons for decisions must be clear, cogent, complete and succinct."[119]

Based on the above observations, I make two brief recommendations. First, I propose that the majority judgment in *EFF 2* should be scorned because it was not well reasoned or decided based on principle.[120] Secondly, I advocate that in a future case the Court should account to the nation by re-affirming the political accountability doctrine as a constitutional doctrine to be employed by the judiciary in the resolution of constitutional questions that are allocated to the discretion of the political pillars of government.[121] In the process of re-affirming the doctrine,

111 See, Moseneke "The Fourth Bram Fischer Memorial lecture: Transformative adjudication" 2002 *South African Journal of Human Rights* 309; Langa 2006 *Stellenbosch Law Review* 351; Mhango "Transformation and the Judiciary" in Hoexter & Olivier (eds) *The Judiciary in South Africa* (2014) 80–81. See also, *S v Makwanyane* 1995 3 SA 391 (CC) para 262: "What the Constitution expressly aspires to do is to provide a transition from [the] grossly unacceptable features of the past to a conspicuously contrasting "future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex".

112 See, Dyani-Mhango "A Call for the Transformation of the South African Insurance Industry: An Analysis of the Insurance Bill 2016" 2019 *Statute Law Review* [Would the author kindly provide page number].

113 See, Moseneke 2002 *South African Journal of Human Rights* 314–318; Langa 2006 *Stellenbosch Law Review* 353–354; Dyani-Mhango 2019 *Statute Law Review* 80–81.

114 Dyani-Mhango 2019 *Statute Law Review* 80–81, citing Langa 2006 *Stellenbosch Law Review* 353.

115 Dyani-Mhango 2019 *Statute Law Review* 80–81.

116 Ibid.

117 See, Judicial Service Commission Act 9 of 1994: Code of Judicial Conduct (2012) (Code of Judicial Conduct); Dyani-Mhango 2019 *Statute Law Review* 75; and Corder "Judicial Accountability" in Hoexter & Olivier (eds) *The Judiciary in South Africa* (2014) 232–235.

118 Dyani-Mhango 2019 *Statute Law Review* 75.

119 See, Code of Judicial Conduct, art 9.

120 See, Gauntlett "The Sound of Silence?" 2011*Journal of South African Law* 226 criticising the Constitutional Court for its record of delivering decisions that are not well-reasoned or clear; and Tsele "Coercing Virtue" in the Constitutional Court: Neutral Principles, Rationality and the Nkandla Problem" 2016 *Constitutional Court Review* 193–194 suggesting that the Constitutional Court's decision involving the powers of the public protector in *EFF1* was not well reasoned.

121 Courts account by giving written reasons that are clear and cogent. See, Dyani-Mhango 2019 *Statute Law Review* 80–85.

the Court should elucidate the following points of law:

(a) the role of separation of powers in the application of the political accountability doctrine, which should include outlining the role of the judiciary as a constitutional interpreter.[122] It is not difficult to discern from the judgments in *EFF 1* and *UDM* that the political accountability doctrine operates as a function of separation of powers because it ensures that the judiciary maintains "the Constitution's design to leave certain matters to other branches of government and not to prescribe to Parliament how it ought to fulfil responsibilities primarily entrusted to it."[123] Besides, the Constitution contemplates that the politically accountable branches of government should be held accountable by the people through the political and not judicial process in relation to bad or dishonest political decisions, particularly those made in terms of their discretionary powers under the Constitution.[124]

(b) the Court should make plain the weight it will give to the Constitution's text, history, structure and political context when determining whether the political accountability doctrine applies in a given case.[125] This is useful because it will remove the uncertainties brought about by the majority decision in *EFF 2*.

(c) the Court should, consistent with Article 9 of the Code of Judicial Conduct, clarify why the political accountability doctrine was not an appropriate jurisprudential tool to resolve the dispute in *EFF 2*. There is sufficient evidence to suggest that the political accountability doctrine should have been applied in *EFF 2*. The obvious criticism to make of Jafta J's majority opinion is that it does not enunciate a principle that would enable lower courts and legislatures to determine the scope of their autonomy over internal legislative arrangements.

4 THE DISSENTING VIEWS IN *EFF 2*

For the sake of completeness, it is critical for us to address general and individual points made by the two dissenting justices in *EFF 2*. There were two dissenting opinions in the *EFF 2*, which I examine separately below. However, I need to state upfront that the main point of departure in both dissenting opinions can be summarised into a single inquiry: whether the functional independence of the National Assembly, pursuant to section 57 and the separation of powers, extends to the autonomy to determine its own impeachment procedures.?[126]

4 1 Zondo DCJ's dissenting opinion

Zondo DCJ penned the first opinion. At the heart of Zondo DCJ's dissent was his profound commitment and fidelity to the principle of separation of powers; that the National Assembly, and not the courts, has the power, pursuant to section 57 of the Constitution, to determine and control its own proceedings and procedures. In other words, for Zondo J whether or not the National Assembly should establish a permanent impeachment committee or utilise an *ad hoc* committee was an internal matter for the National Assembly to decide and the judiciary had no business to intervene.

Furthermore, Zondo J advanced a distinct justiciability argument that deserves considerable attention. He made an important observation that in 2014, the National Assembly established

122 Currie & De Waal *The Bill of Rights Handbook* 394 fn184 arguing that courts are not solely responsible for interpreting the Constitution; and Imam & Egbewole "Judicial Activism and Intervention in the Doctrine of Political Questions in Nigeria: An Analytical Exposition" 2011 *African Journal Of Law and Criminology* 50; Fisher & Devins *Political Dynamics of Constitutional Law* (1992) 10 arguing that the elected branches have both the authority and the competence to engage in constitutional interpretation; *Attorney General v Tinyefuza* Const. Appeal No.1 of 1997 (SC) (Uganda) holding that the judiciary is not the only constitutional organ with interpretive power.

123 *EFF 1* para 93.

124 See *National Treasury* (Froneman J concurring); Mhango & Dyani-Mhango 2017 *Acta Juridica*; and; *Merafong* paras 308–309. *Fedsure* para 41; *Certification of the Constitution of the Republic of South Africa* para 186; and *Oosthuizen*.

125 There is a suggestion in the dissenting judgment that majority may have succumbed to a perceived overwhelming popular opinion to have the president removed from office and warned against a judiciary that is not impartial, particularly in an environment where a constitutional crisis looms large or has already set in. See, *EFF 2* paras 235–241.

126 This question was the premise of the entire judgment of the US Supreme Court in a case involving the impeachment of a federal judge. See, *Nixon v United States* 506 US 224 (1993).

an *ad hoc* committee to determine whether the President committed a serious violation of the Constitution in relation to the upgrades at his private residence. That committee never completed its task because Parliament was dissolved ahead of the general elections in 2014. Following the election of a new Parliament, the leader of opposition wanted the President to be subjected to an impeachment process under section 89 in relation to Sudan President Al Bashir's departure from South Africa despite an existing court order requiring that he should not be allowed to leave the country.[127] Pursuant to this, the National Assembly established a sub-committee to consider the opposition's request as well as whether a special mechanism should be put in place for all section 89 proceedings. In other words, the National Assembly was scheduled to decide on whether or not to establish a permanent impeachment committee in terms of section 89 of the Constitution.

All political parties, including those who brought the lawsuit in *EFF 2*, were represented in that sub-committee and were invited to make proposals to that question, but before doing do so the representatives requested an opportunity to consult their political principals on what proposals to make.[128] The representatives never returned to the sub-committee with their proposals. Instead, the opposition parties, linked to those representatives, instituted this lawsuit. According to Zondo J, instead of going to court, the plaintiffs should have sent their representatives back to the sub-committee, and in his view, the Court's decision should have been to send the matter back to Parliament in order for that parliamentary process to be completed.[129] From a legal point of view, this would be in keeping with respect for the parliamentary process that was capable of being resolved without court intervention. What is more, Zondo J's thinking is consistent with the Court's jurisprudence.[130]

Simply put, for Zondo DCJ the issue before the Court was not justiciable either because the political accountability doctrine commanded so or because the issue was not ripe for adjudication given the ongoing parliamentary process aimed at addressing the same question put before the Court. To support Zondo J's observations, Mogoeng CJ made an important and related point that:

> When approached for intervention, this Court's role is to help only those who are constitutionally incapable of helping themselves. And, if the solution has already been provided and it is within the applicants' remit to address their own problem effectively, this Court is duty-bound to let them do it themselves. Mindful of the dictates of separation of powers, this ought to be even more so when help-seekers are the bearers of the primary constitutional responsibility, in another arm of the State, to do what they seek to achieve through an order of this Court. … It would be quite concerning if a court were to grant an order that does not serve or advance any practical purpose and in circumstances where that order deals with what has been achieved already or could be improved on if only cooperation were forthcoming from applicants, in a process that is already under way.[131]

To elaborate, Zondo J noted with disapproval that what the plaintiffs sought to do in *EFF 2* was to bypass the democratic process of which the impending impeachment procedure was constitutionally regarded to be the product.[132] He further observed that, pursuant to section 53(1)(c) of the Constitution, a litigant cannot ask a court to make a decision, such as to establish a permanent committee of Parliament, that should be the outcome of a democratic process in the National Assembly when he fears that the majority in the National Assembly might not support the decision he wants.[133] On these justiciability grounds, Zondo would have dismissed

127 See, Dyani-Mhango "South Africa's Dilemma: Immunity Laws, International Obligations, and the Visit by Sudan's President Omar Al Bashir" 2017 *Washington International Law Journal* 535.

128 *EFF 2* para 59.

129 This is exactly the stance Justice Jafta took in *Mazibuko v Sisulu* and yet when presented with the same set of facts in *EFF 2* he omitted to advancing the same legal reasoning to arrive at a logical conclusion. This demonstrates Justice Jafta's inconsistency.

130 See also, *Glenister v President of the Republic of South Africa* 2009 1 SA 287 (CC) (where the court ruled that it cannot intervene in a parliamentary process that is not completed).

131 *EFF 2* para 236.

132 *EFF 2* para 73.

133 Okpaluba 2015 *Comparative and International Law Journal of Southern Africa* 195. During his tenure, President Zuma had consistently argued that opposition parties in South African required lessons in democracy. He argued that they run to court on matters that should be debated politically in the National Assembly. Zondo's observations confirm Zuma's arguments. See, SABC Digital News "Opposition parties approach courts due to lack of political knowledge: Zuma" https://www.youtube.com/watch?v=9R1b253fPnY&feature=youtu.be (accessed 30-11-2020).

the lawsuit.

4 2 Mogoeng CJ's dissenting opinion

To complement the Zondo DCJ's opinion, Mogoeng CJs dissenting opinion was anchored around the notion that the majority's judgment constitutes "a textbook case of judicial overreach," which he explicated as "a constitutionally impermissible intrusion by the judiciary into the exclusive domain of Parliament."[134] Mogoeng's opinion focused squarely on separation of powers imperatives and what he found as the unacceptable failure by the majority to consistently adhere to the text and political accountability doctrine articulated and applied in *EFF 1* and *UDM*. In his reasoning about the Courts' application of the political accountability doctrine in the latter two cases, Mogoeng CJ clarified the intimate relationship between the doctrine and the separation of powers. He explains that:

> We said in EFF 1 that ours is a less intrusive role and that we are not to prescribe to the National Assembly what mechanics to adopt for holding the President accountable … Similarly, in UDM we chose not to prescribe a secret ballot voting procedure to the Assembly for a motion of no confidence ... Our appropriate self-restraint was again informed by our ever-abiding consciousness of the vital strictures of our powers and our super-alertness to impermissible encroachment on Parliament's powers. We could, many would reasonably argue with some force, have decided that a secret ballot was the only appropriate voting procedure for a motion of no confidence. But sensitivity to the dictates of separation of powers forbade us. For, it is for the National Assembly to make that choice, not the judiciary. Respect for separation of powers again constrained us from directing the Speaker to schedule a debate on a motion of no confidence on a particular date. We remitted the request to the Speaker to have the motion tabled in terms of whatever procedure she considered appropriate.[135]

Turning his attention to Jafta 's majority opinion and how it failed to adhere to the political accountability doctrine, Mogoeng CJ observed and concluded that:

> This time around, we [the majority led by Jafta] are even specific about size, representations, procedure, provision for the entirety of the process, avoiding abuse of majority representation, institutional predetermination of grounds before debating and voting on impeachment. That, in my view, is an unprecedented and unconstitutional encroachment into the operational space of Parliament by Judges.[136]

Mogoeng's last point of emphasis and deep-seated agony was around the majority's refusal to recognise the National Assembly's discretion in the text of the Constitution over the impeachment process. He found that no provision, including sections 57 or 89 of the Constitution, nor best practice was relied upon by the majority to substantiate its inflexible conclusions that (1) a debate and voting on the impeachment of the President must be preceded by an institutional predetermination of the existence of a ground or what a serious violation of the Constitution or law is and (2) section 89 is incapable of proper implementation without rules defining the entire process.[137] Based on the above, the Chief Justice held that, pursuant to section 57 and 89 read with the political accountability doctrine, the National Assembly must be left to enjoy its constitutionally guaranteed functional independence to determine which procedures would best work for it when dealing with the impeachment of the President.[138]

5 CONCLUDING REMARKS

Since former President Zuma's administration, the need for the courts to develop and sustain constitutional doctrine on how to regulate the resolution of political questions that end up in the court became apparent. As mentioned above, a number of jurists have implicitly called for this development citing concerns about the legitimacy of the judiciary and others. Zuma himself made this call in 2010 in Parliament during the farewell address of the Sandile Ngcobo CJ (former) and said that:

> We reiterate our view that there is a need to distinguish the areas of responsibility between the

134 *EFF 2* para 223. See also, Froneman J's concurring opinion responding to Mogoeng CJ paras 279–286.
135 *EFF 2* paras 252–253.
136 *EFF 2* para 253.
137 *EFF 2* para 247.
138 *EFF 2* paras 263, 247.

> judiciary and the elected branches of the state, especially with regards to policy formulation. The executive, as elected officials, has the sole discretion to decide policies for government. The principle of separation of powers means that the encroachment of one arm of the state on the terrain of another should be discouraged, and there should be no bias in this regard. We respect the powers and role conferred by our Constitution on the legislature and the judiciary. At the same time, we expect the same from these very important institutions of our democratic dispensation. The executive should be allowed to conduct its administration and policy-making work as freely as it possibly could. The powers conferred on the courts could not be regarded as superior to the powers resulting from a mandate given by the people in a popular vote. To provide support to the judiciary and free the courts to do their work, it would help if political disputes were resolved politically.[139]

I argue that at the time of Zuma's speech, a political accountability doctrine was in the making and would be refined in *EFF 1* and *UDM*. Mogoeng's Court should be commended for responding to the concerns raised by Zuma and other stakeholders by articulating the political accountability doctrine.

Nevertheless, the lack of legal certainty in applying the political accountability doctrine in *EFF 2* is worrying and should be corrected in a subsequent judicial opinion. In his early writings about the idea of law, Gustav Radbruch, a prominent German legal theorist, argued that there are three elements that make up the idea of law namely, (1) justice; (2) expediency; and (3) legal certainty.[140] Radbruch correctly asserted that legal certainty was the most important element within the theory of law. For a young constitutional democracy like South Africa, legal certainty in its emerging jurisprudence is of paramount importance in order to deepen constitutionalism. The text of the Constitution and precedent are the most important legal instruments through which legal certainty can be achieved, particularly in a common-law country such as South Africa.[141]

After *EFF 2*, a few questions remained unresolved. Uncertainty remains as to why the political accountability doctrine was not deemed applicable in that case. There is also uncertainty as to whether the judgment in *EFF 2* was driven by the desire to facilitate the removal of then President Zuma from office using the law as hinted by the dissent? What are the implications of *EFF 2* for other provisions such as sections 177[142] and 194[143] of the Constitution, which similar to section 89, give the National Assembly authority to remove a judge, public protector, or auditor general through a resolution supported by two-thirds majority without prescribing the procedures to be followed? Even more relevant, what implications does *EFF 2* have for section 130(3) of the Constitution, which governs the removal of a premier of a province in South Africa and the wording of which is identical to section 89? Does *EFF 2* require the National Assembly and the provincial legislatures to establish standing committees in relation to the removal of these public officials? These are relevant questions to ask at this stage as South Africa develops constitutionalism.

In addition, we must also read these cases in light of the political context wherein they arose and were decided. A plausible political science reading of *EFF 2* and related cases is that the Constitutional Court gave the benefit of the doubt to opposition forces – this includes opposition political parties and some non-governmental organisations – whenever they cried foul during the Zuma era. One illustration of this is *EFF 2*, where instead of allowing the political

139 Zuma "Judiciary must respect separation of power" https://www.politicsweb.co.za/documents/judiciary-must-respect-separation-of-powers--jacob (accessed 30-11-2020). See also, Editorial "SA Is Courting Abuse" *Business Day* 7 July 2010, http://www.businesslive.co.za/bd/opinion/editorials/2016-11-22-editorial-sa-is-courting-abuse/ (accessed 30-11-2020) (behind this bewildering number of cases lies a deep constitutional issue, the notion of a separation of powers between the operational, legislative and judicial arms of government. Increasingly, the courts are being called upon to settle disputes that, arguably, should be dealt with by other constitutional or political institutions, and that the courts should not be the port of call in a political dispute).

140 Radbruch "Legal Philosophy" in *The Legal Philosophies of Lask, Radbruch and Dabin* (1950) 107–108.

141 Posner *How Judges Think* (2010) 345.

142 Section 177 provides that "[a] judge may be removed from office only if the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members."

143 Section 194 provides that "the Public Protector, the Auditor-General … may be removed from office only on the ground of misconduct, incapacity or incompetence and the adoption by the Assembly of a resolution calling for that person's removal from office. A resolution of the National Assembly concerning the removal from office of the Public Protector or the Auditor-General must be adopted with a supporting vote of at least two thirds of the members of the Assembly."

process in Parliament, which commenced in 2015 as pointed out by Zondo J, to conclude, the Court intervened on the instance of political parties who were themselves part of that process in Parliament.[144]

In this chapter, I have problematised the Constitutional Court's unprincipled approach to constitutional interpretation on matters involving executive and legislative accountability. I have argued that the majority judgment in *EFF 2* should be rejected because, in my view, bad facts can only make bad law if judges fashion a decision to create an outcome dictated by what appear to be "popular" facts instead of an outcome based on a principle of constitutional law. No matter what bad political facts President Zuma may have created or what crimes he may have committed, he was elected by the National Assembly and could only be removed by the same body. The courts should not have allowed bad case law to be created in order to facilitate an outcome perceived to be dictated by those facts.

I have argued that the Constitutional Court should be commended for articulating and applying the political accountability doctrine in its earlier cases. This doctrine is a useful tool to resolve constitutional questions that are allocated to the discretion of the political pillars of government. The Constitutional Court can utilise the political accountability doctrine to defend against accusations of perceived judicial overreach or partisan political support – taking sides on an issue that divides the African National Congress (ANC) and opposition political parties – thereby maintaining the social legitimacy of the judiciary. In short, the political accountability doctrine is a useful tool to prevent and manage the prudential considerations highlighted by Justices Davis, Moseneke and Mogoeng. The Court should, therefore, develop the political accountability doctrine and clarify its scope because a properly articulated and applied doctrine can encourage participatory democracy and promote the will of the people in South Africa.

144 For a general proposition that courts will not intervene until a parliamentary process has been completed, See, *Glenister v President of the Republic of South Africa*; *Doctors for Life* paras 54–69; and *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC).