



**UNIVERSITY *of the*
WESTERN CAPE**

**A Critical analysis of political corruption within the
Executive and the role of the Constitution**

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DECLARATION

I, Siphesihle Kati, hereby declare that the work contained in this thesis is my own and that it has not been submitted before for any other degree at any other university. The sources consulted or cited have been indicated in full.

S.Kati

Siphesihle Kati

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LIST OF ABBREVIATIONS

AU	African Union
EFCC	Economic and Financial Crimes Commission
EMEA	Executive Members Ethics Act No. 82 of 1998
INEC	Independent National Electoral Commission
NBC	National Boundaries Commission
NDPP	National Director of Public Prosecutions
NPA	National Prosecuting Authority
PACCA	Prevention and Combatting of Corrupt Activities Act
PEPs	Politically Exposed Persons
POCA	Prevention of Organised Crime Act
SAPS	South African Police Service Act
SIU	Special Investigating Unit
TI	Transparency International
VOC	Verenigde Oostindische Compagnie
ZACC	Zimbabwe Anti-Corruption Commission

TITLE

A critical analysis of political corruption within the executive and the role of the Constitution.

KEYWORDS

Executive

Political corruption

Constitution

Democracy

Discretionary powers

Judiciary

Transparency

Accountability

National Assembly

Government



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Abstract

The achievement of constitutionalism in South Africa is often applauded for its pivotal liberation that it laid upon individuals through bureaucracy, human rights, institutionalism, and moral science. However, there should be a level of consideration for the idea of constitutionalism having also opened a gap that enables societies to operate in a destructive manner. Particularly, this paper asks whether in South Africa the current transformative constitutionalism grants permission for political corruption to exist within its civilisation. This study is meant to execute a critical analysis of the Constitution of the Republic of South Africa 1996 (1996 Constitution). Precisely focusing on the constitutional obligations set in Chapter 5 of the Constitution and its contribution on the rife of political corruption and disturbance among other constitutionally guaranteed provisions.

Since the early 1900s, constitutional law in South Africa has always been a participating factor regarding the instability of the state, specifically when it comes to the powers given to the ruling government. Therefore, the relationship between political corruption and constitutional law is not a new age dilemma. However, there is a lack of literature contribution on the issue.

This study will uncover the relationship between constitutionality and political corruption using the qualitative method based on legislation, judicial precedent, publications, and literature reviews. The aim of this research is to provide clarity within the battle of political corruption. This assessment is to touch on the history of constitutional law in South Africa and the constitutional obligations that are currently at war.

This paper will also provide a constitutional analysis amongst the African governments that share similar governance patterns with South Africa and their relations with constitutional law while examining the current status of corruption within those states, in hopes of grasping useful recommendations that could give direction to the possibility of revisiting the anti-corruption legal instruments in South Africa.



CHAPTER 1

INTRODUCTION

1.1 Background

South Africa has followed a pattern of power imbalances and oppression supported by governance authority for over 300 years, that meant being built on the exploitation of the majority for profit.¹ Therefore, writing a paper on the crisis of political corruption that the country faces within the 21st century is not a new revelation.

South Africa is known to have achieved its constitutional era from 1910, however, what is cut out from history is the constitutional arbitrary laws created from 1910-1994 which were not only oppressive but facilitated political corruption. The history of South Africa's constitutional era will fully be discussed in chapter two of this paper. The segregationist laws between 1910-1990 were a form of competition dispositions while eliminating Africans from setting foot within the labour market.² Thus, confirming the government to descent from a despotism reign of legal frameworks.

Today, South Africa faces a different kind of crusade. Political corruption is at an all-time high and inequality still reigns up till this present time and still the majority suffers. In other words, political corruption in South Africa is now a form of character that describes the country itself.³

¹ Van Vuuren *Apartheid grand corruption: Assessing the scale of crimes of profit in south Africa from 1976 to 1994* (2006) 2.

² Mbaku J 'Rule of law, state capture, and human development in Africa' (2018) 33 *American University International law review* 779.

³ Chipkin V 'Whiter the State? Corruption Institutions and State: Building in South Africa' 2013 *Politikon* 212.

1.2 Research problem

Constitutionalism requires that a government is to be established by a constitution encompassing all its empowerments, limitations, and obligations.⁴ The question this research has to answer is, how can constitutional requirements, restrictions, and empowerments impact and encroach upon other constitutional rights, in addition to being feeble and unrestricted enough to encourage political corruption?

This study argues that the political design of Chapter 5 of the 1996 Constitution provides for a legal pathway for the executive to facilitate political corruption. Chapter 5 of the 1996 Constitution created ‘a complicated, and sometimes unclear, set of legal and political relationships.’⁵ Therefore, allowing Chapter 5 of the 1996 Constitution to bring about a clashing constitution as it defames the anti-corruption provisions that are provided within the constitution itself.

This research is necessary because it aims to address and find solutions for the daily debilitating reality that follows many South Africans that were promised an equal, open, and free democratic society. The betrayal from the national executive branch in South Africa is incomprehensible as the citizens are faced with the actual cost of a double-dealing democracy, inefficient economy, and privileged status that is not well-earned.

⁴ Mangu AMB *Separation of powers and federation in African constitutionalism: The South African case* (unpublished LLM thesis, University of South Africa, 1998) 1.

⁵ Chiloane TT *An analysis of the constitutionality of the President’s reliance on pregorative powers as the basis of appointing and dismissing cabinet members-An interrogation of the meaning of section 91(2) of the Constitution* (unpublished LLM thesis, University of Pretoria, 2018) 8.

1.3 Research questions

The main research question to be answered by this study is, how do the executive discretionary powers under the 1996 Constitution facilitate political corruption? To fully evaluate this question, these questions must be asked:

- How does Chapter 5 of the 1996 Constitution present unrestricted constitutional discretion to the national executive government?
- What consequences does the 1996 Constitution put forward in respect of ineffective oversight measures against the national executive branch?
- How do the anti-corruption provisions found within the 1996 Constitution promote and uphold the fundamental values prescribed in section 1 of the 1996 Constitution?

1.4 Literature survey

There have been several works of literature that has defined corruption within the past 30 years, but there has been no universal definition that has been agreed upon.⁶ The perception of corruption varies among countries and over time raises questions regarding whether it is consistent across these contexts.⁷ As a result, there are numerous sorts, forms, and levels of corruption which present a very complicated and varied problem.

However, the author enormously infers that corruption is a persistent indicator of poor governance and that it is typically in the form of theft, bribery, conflicts of interest with government authority, fraud, misappropriation, extortion, election rigging, use of public funds for private benefit, tampering with procurement procedures, and fabrication of financial records.⁸ In this light, corruption within public offices, public sectors, or institutions will be

⁶ Myint U 'Corruption: Causes, Consequences and Cures' (2000) 7 *Asia-Pacific Development Journal* 33.

⁷ Myint U 'Corruption: Causes, Consequences and Cures' (2000) 7 *Asia-Pacific Development Journal* 34.

⁸ Klitgaard RE *Corrupt cities: a practical guide to cure and prevention* (2000) Institute for Contemporary Studies 95.

regarded as types of political corruption. As a consequence, political corruption is referred to as the highest level of corruption is involved since it involves the abuse of governmental authority.⁹ “Political corruption is often perceived to be a characteristic of a government in developing countries”.¹⁰ This paper will look at how South Africa’s democratic system practices the previously stated types of political corruption.

For the purposes of this paper, the three branches of government namely the legislature, executive, and judiciary which make up a democratic system will be the focus of the investigation into political corruption and the role of Chapter 5 of the 1996 Constitution.

It is widely acknowledged that one of the most enduring illnesses of human society is the corruption of public officials and institutions.¹¹ When people have the excessive ability to make discretionary judgements within an environment that requires little openness regarding decision-making processes, those environments will be more prone to experience corruption.¹² In essence, “the greater the discretionary power, the stronger the impulse to give in to bribery”.¹³

The political corruption song has been sung by the South African government since the ages of Jan Van Riebeeck.¹⁴ Jan Van Riebeeck, who would create South Africa's first form of government, arrived in the Cape after being restored by the Dutch East India Company after being fired for misusing his position to advance his personal financial interests.¹⁵

⁹ Myint U ‘Corruption: Causes, Consequences and Cures’ (2000) 7 *Asia-Pacific Development Journal* 53.

¹⁰ Lodge T ‘Political corruption in South Africa’ (1998) 97 *African Affairs* 160.

¹¹ Ceva E & MP ‘Political corruption (2017) *University of Pavia* 2.

¹² Ceva E & MP ‘Political corruption (2017) *University of Pavia* 3.

¹³ Mungiu A ‘Contextual Choices in Fighting Corruption: Lessons Learned’ (2011) *Social Science Research Network* 53.

¹⁴ Friedman S ‘How corruption in South Africa is deeply rotted in the country’s past and why that matters’ available at <https://theconversation.com/how-corruption-in-south-africa-is-deeply-rooted-in-the-countrys-past-and-why-that-matters-144973> (accessed 19 January 2021).

¹⁵ Friedman S ‘How corruption in South Africa is deeply rotted in the country’s past and why that matters’ available at <https://theconversation.com/how-corruption-in-south-africa-is-deeply-rooted-in-the-countrys-past-and-why-that-matters-144973> (accessed 11 September 2023).

The Dutch, led by Van Riebeeck, tasked slaves with gathering provisions and water for visiting Verenigde Oostindische Compagnie (VOC) ships when they arrived in 1652 and established a post at the Cape of Good Hope.¹⁶ As a result, the first Dutch governor abused his position of power to oppress the KhoiKhoi people for his own benefit. The Dutch would then take over land violently as a result of this.¹⁷ Colonialism quickly turned its attention to the Cape. Owing to these conditions, a cruel class structure was established, with the Dutch acting as the ruling elite and the native people acting as slaves or servants in which the Dutch used not only the land of the KhoiKhoi people but forced the KhoiKhoi people to harvest minerals and resources to gain profit of the Dutch.¹⁸ By the end of the 1600s, the Dutch had therefore taken control of much of the Cape.¹⁹

The issue of Van Riebeeck's theft of indigenous peoples' land rights and personal autonomy played a significant role in the first of many battles that the native inhabitants of Southern Africa would wage against the colonialist administration.²⁰ Friedman additionally pointed out that, that era would go on to be marked by tax evasion due to the acts of the Dutch.²¹ Corrupt practices are therefore nothing new in Southern Africa, where it is widely believed to be ingrained from the administration.²²

¹⁶South African History Online 'The Dutch and the Khoisan' available at <https://www.sahistory.org.za/article/dutch-and-khoisan> (accessed 19 October 2023).

¹⁷ South African History Online 'The Dutch and the Khoisan' available at <https://www.sahistory.org.za/article/dutch-and-khoisan> (accessed 19 October 2023).

¹⁸ South African History Online 'The Dutch and the Khoisan' available at <https://www.sahistory.org.za/article/dutch-and-khoisan> (accessed 19 October 2023).

¹⁹ South African History Online 'The Dutch and the Khoisan' available at <https://www.sahistory.org.za/article/dutch-and-khoisan> (accessed 19 October 2023).

²⁰ South African History Online 'Conquest: 1600s-1800s' available at <https://www.sahistory.org.za/article/conquest-1600s-1800s> (accessed 19 October 2013).

²¹ Friedman S 'How corruption in South Africa is deeply rotted in the country's past and why that matters' available at <https://theconversation.com/how-corruption-in-south-africa-is-deeply-rooted-in-the-countrys-past-and-why-that-matters-144973> (accessed 19 January 2021).

²² Friedman S 'How corruption in South Africa is deeply rotted in the country's past and why that matters' available at <https://theconversation.com/how-corruption-in-south-africa-is-deeply-rooted-in-the-countrys-past-and-why-that-matters-144973> (accessed 19 January 2021).

In *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC), the Constitutional Court emphasised that corruption endangers the essence of democracy.²³ The Constitutional Court further pinpointed that corruption has the power to compromise and threaten the constitutional order to respect, protect, promote, and fulfil democratic ethics, the rule of law, the institutions of democracy and the foundational values of the 1996 Constitution.²⁴ Thus, the immense emphasis on constitutionality being guarded.

Judge Aurther Chaskalson provides that the abuse of public power leads to a significant loss in democratic pride as a progressive state and the fundamental values of human dignity, equality, and the advancement of human rights thus chip away.²⁵

Hyslop brought about the remembrance of the political transition in 1994, and how the Mandela administration made it part of their campaign to tackle and centralise the issue of corruption within the public officials.²⁶ Which Evans fairly disputed as qualifying as the lesser priorities during that transition into democracy.²⁷ However, Bruce notes that the new democratic South Africa introduced a set of rules, regulations, legislation, and institutions have been designed to protect the integrity of public officials and politicians that are constitutionally empowered.²⁸

Fuo mentions that part of the 1994 democratic rule that ushered in the 1996 Constitution was for the governance instruments put in place to ensure that resources are properly allocated, that there is a regulation on people's behaviours, and that there is an understanding and resolving

²³ *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) para 57.

²⁴ Naidoo S *The South African Criminal Law's response to the crimes of fraud and corruption within local government* (unpublished LLM Dissertation, University of Pretoria, 2016) 18.

²⁵ Hollands G *Corruption in infrastructure delivery: South Africa A case study* (2007) 6.

²⁶ Hyslop J 'Political Corruption: Before and After Apartheid' 2006 *Journal of Southern African Studies* 786.

²⁷ Evans G 'Mandela was a flawed icon. But without him South Africa would be a sadder place' available at <https://theconversation.com/mandela-was-a-flawed-icon-but-without-him-south-africa-would-be-a-sadder-place-142826> (accessed 26 April 2021).

²⁸ Bruce D 'Control, discipline and punish? Addressing corruption in South Africa' (2014) 48 *South African Crime Quarterly* 50.

of societal issues and for a prosperous future of the public.²⁹ The Constitutional Court has been reported in, *Ramakatsa and Others v Magashule and Others* 2013 (2) BC 6R 202 (CC), to have assigned authority unto the political parties to ensure that the weight of the 1996 Constitution is effectuated.³⁰

However, Naidoo has alluded that the democratisation of South Africa ‘inherited the institutional legacy corruption’³¹ and that the transition allowed for ‘favourable conditions on the contribution of corrupt activities’.³² This theory is supported by the study of Mattes on the democracy of South Africa, as he states that, the structure of South Africa’s 1996 Constitution is crippled by the branches of government insistence to treat the constitutional order as a sport.³³ Unfortunately, this has contributed to what Mubangizi states as the “unrealised constitutional dream”.³⁴ Although, Fagbadebo has highlighted that public office-bearers who ignore their constitutional obligations do so at their peril’.³⁵

In 2023, the Transparency International Corruption Index, which is in charge of keeping track of how corruption is perceived, ranks South Africa as the 72nd most corrupt nation out of 180, with a score of 43% in terms of corruption within the context of governance.³⁶

The National Assembly, Judiciary, and other anti-corruption agencies within Chapter 9 are given the authority to maintain supervision over all governmental bodies and the executive

²⁹ Fuo ON ‘Constitutional basis for the enforcement of executive policies that give effect to socio-economic rights in South Africa’ (2013) 16 *Potchefstroom Electronic Law Journal* 14.

³⁰ *Ramakatsa and Others v Magashule and Others* 2013 (2) BC 6R 202 (CC) para 9.

³¹ Naidoo V ‘The politics of anti-corruption enforcement in South Africa’ (2013) 31 *Journal of Contemporary African Studies* 3.

³² Naidoo V ‘The politics of anti-corruption enforcement in South Africa’ (2013) 31 *Journal of Contemporary African Studies* 3.

³³ Mattes RB ‘South Africa: Democracy without the people?’ (2002) 13 *Journal of Democracy* 23.

³⁴ Mubangizi JC ‘Corruption in South Africa: the politics, the law and all shenanigans in between’ 2020 *University of Free State* 1.

³⁵ Fagbadebo O ‘Interrogating the constitutional requisites for legislature oversight in the promotion of accountability and good governance in South Africa and Nigeria’ (2018) 11 *Insight on Africa* 39.

³⁶ Brand D ‘The seven things new leaders need to do to fix South Africa’ available at <https://theconversation.com/the-seven-things-new-leaders-need-to-do-to-fix-south-africa-117624> (accessed 16 January 2021).

branch under the 1996 Constitution in order to ensure accountability. Therefore, accountability from the executive is a constitutional need along with the guarantee of oversight from the National Assembly, Judiciary, and other anti-corruption agencies within Chapter 9, and it should not be considered as merely a choice of deployment at any given moment. These procedures of checks and balances over the executive branch of government are a fundamental constitutional value and ensures that resources are properly allocated and that the abuse of state power is dealt with accordingly.³⁷

1.5 Methodology

This research paper will embrace the qualitative desktop study approach, as much consideration will be given to various Constitutions, cases, international legal instruments and other legislations, journal articles and books.

1.6 Chapter outline

The following should be noted as this thesis will compose of five chapters.

Chapter 1: Introduction

Chapter one provides the background of why this study is deemed necessary by the author. It highlights the main research questions that are to be answered within the study and aims to grant context to the research. Additionally, this chapter provides the research instruments that are to be used to facilitate this research.

Chapter 2: History of the relationship between the executive and political corruption

Chapter two allows the reader to get an understanding of the relationship between South Africa and government authority and while highlighting the country's long standing rife of corruption

³⁷ Fagbadebo O 'Interrogating the constitutional requisites for legislature oversight in the promotion of accountability and good governance in South Africa and Nigeria' (2018) 11 *Insight on Africa* 39.

before constitutional law was even introduced. Chapter two calls attention towards the acceptance of democracy within South Africa and the change it aimed to bring for the state and its people. Furthermore, this chapter explains to the reader that it is within this democratic sphere and constitutional supremacy that the people suffer, and the state along with its resources are abused.

Chapter 3: Constitutional discretion and political corruption in South Africa

Chapter three is the main focal point of the study, where it draws the attention to the constitutional clauses addressing the executive authority that disrupt the vision of what was meant by a free, open, and democratic South Africa. This chapter highlights the consequences of a corrupt executive branch that is rewarded by the Constitution and further highlights the existing compromise of the fundamental constitutional principles of accountability, transparency, justice, accessibility to information, public participation, freedom, equality, and human dignity.

Chapter 4: Constitutionality and political corruption in Zimbabwe, Nigeria, and Botswana: Lessons for South Africa

Chapter four highlights to the reader that political corruption is not only a South African problem but exists across Africa despite the acceptance of democracy and constitutionalism while aiming to show that although there are differing levels of political corruption within the African states, particularly Zimbabwe, Nigeria and Botswana. Chapter four grants context as to why the three African states are examined and their similar features to South Africa and what can South Africa learn from their approach to political and constitutional relations.

Chapter 5: Recommendations and conclusion

Chapter five grants a summary of why the critical analysis of political corruption and its relationship with the executive authority and the role of the Constitution was important. The

chapter highlights the important findings of the study and suggests various approaches to combat and prevent political corruption. Subsequently, the chapter closes off by asking the reader to place the findings of the study, the resolutions brought forward, and the reality of the state within the capacity levels of the state.



CHAPTER 2

HISTORY OF THE RELATIONSHIP BETWEEN THE EXECUTIVE AND POLITICAL CORRUPTION

The significance of constitutionalism can never be underplayed. A constitution emulates the chronicle of a state and sets the tone for its characteristics. This chapter discusses constitutional law in South Africa dating back a little over a century ago. The purpose of this chapter is to analyse the theory of inherent political corruption by testing the hypothesis of genetic executive corruption facilitated by constitutional law and or the rule of law in hopes of making sense of the reality of the relationship between constitutionalism and political corruption that we have today in South Africa.

Close attention will also be paid to the 1996 Constitution and this chapter will analyse the contribution that democratisation has had on political corruption in South Africa. The goal of this chapter is to deepen the face value of the South African history as more than featuring colonialism, apartheid, and democracy but to also relate the history of the country to the current government's excessive use of constitutionally empowered discretion in order to abuse state resources.

2.1 The modern state of South Africa

As a result of the turbulent past of the legal and political system of South Africa, there was an occurrence of an unequivocal mandatory legal and political redressing which subsequently birthed a reformed contemporary legal and political state. Notably, the way decisions were taken, and authority exerted.³⁸

The modernistic age of South Africa's legal system and its politics derives its standards from the 1996 Constitution. A constitution is a set of principles and values that distributes and manages the powers and responsibilities of recognised parties.³⁹ It clarifies the boundaries between the government and state citizens.⁴⁰ The country's governance habits are intricately closer to the birth of the county's governance laws which within the context of South Africa carry a heavily complex legacy. 27 years after the introduction of a democratic constitutional order, the country is outweighed primarily by violations of fundamental rights and the abuse of state resources.⁴¹

2.2 Political corruption before constitutionalism

In South Africa, since the times of Van Riebeeck, the use of power to steal national resources formed its identity in politics. In 1660, Van Riebeeck was accused of the theft of land rights from the KhoiKhoi people within the Cape through intimidation and violence.⁴² The background is that a war broke out as the KhoiKhoi people led by Aushumato, who were

³⁸ Rossouw MC *Democracy in action: Public participation and the progressive realisation of socio-economic rights* (unpublished LLM thesis, University of the Western Cape, 2017) 21.

³⁹ Mueni P 'Jan Van Riebeeck biography: death, facts and life achievements' available at <https://briefly.co.za/30792-jan-van-riebeeck-biography-death-facts-life-achievements.html> (accessed 23 June 2022).

⁴⁰ Kruger R 'The South African Constitutional Court and the rule of law: The Masethla judgment, a cause for concern?' (2010) 13 *Potchefstroom Electronic Law Journal* 472.

⁴¹ Corruption Watch 'The time is now' 2017 Annual Report 3.

⁴² Mueni P 'Jan Van Riebeeck biography: death, facts and life achievements' available at <https://briefly.co.za/30792-jan-van-riebeeck-biography-death-facts-life-achievements.html> (accessed 23 June 2022).

fighting to maintain their rightful land that was being threatened by the Dutch as they were forced settlement within the Cape for the purposes of enriching themselves with the resources found on the Cape.⁴³ Unfortunately, the influence of Van Riebeeck and his intrusion of on the Cape was successful.⁴⁴ Subsequently, as the leader of the Dutch, Van Riebeeck issued out permits to ship slaves from Batavia and Madagascar to the Cape, to use for his interests in farming benefits along the Liesbeek River.⁴⁵

Notably, it should be mentioned that Van Riebeeck's character was stained long before he came to South Africa. Overseas he was well known for his professional ethics of privatising business funds for personal use.⁴⁶ There was no surprise of his administration bearing the crumbs of corruption, mainly through tax evasions and fraudulent public officials.⁴⁷ Let it not be forgotten that while in the VOC in a trade mission in Japan during the mid-1600's, he occupied a position as an assistant surgeon, and later 'it was discovered that he was using the trading station for his personal gains'.⁴⁸

The use of authority for personal gain, as this paper discusses, is not only illegal but also unethical because it entails actively choosing to act outside of established legal frameworks while in a position of authority. More especially, since Van Riebeeck was involved in the formation of the first forms of government in South Africa that set vested interests and power

⁴³ Mueni P 'Jan Van Riebeeck biography: death, facts and life achievements' available at <https://briefly.co.za/30792-jan-van-riebeeck-biography-death-facts-life-achievements.html> (accessed 23 June 2022).

⁴⁴ Mueni P 'Jan Van Riebeeck biography: death, facts and life achievements' available at <https://briefly.co.za/30792-jan-van-riebeeck-biography-death-facts-life-achievements.html> (accessed 23 June 2022).

⁴⁵ South African History Online 'Johan Anthoniszoon "Jan" Van Riebeeck available at <https://www.sahistory.org.za/people/johan-anthoniszoon-jan-van-riebeeck> (accessed 11 December 2021).

⁴⁶ Erasmus J 'Corruption- We have to acknowledge its centuries-old existence' available at <https://www.corruptionwatch.org.za/corruption-a-centuries-old-tradition-that-we-have-to-acknowledge/> (accessed 27 June 2021).

⁴⁷ Erasmus J 'Corruption- We have to acknowledge its centuries-old existence' available at <https://www.corruptionwatch.org.za/corruption-a-centuries-old-tradition-that-we-have-to-acknowledge/> (accessed 27 June 2021).

⁴⁸ Mueni P 'Jan Van Riebeeck biography: death, facts and life achievements' available at <https://briefly.co.za/30792-jan-van-riebeeck-biography-death-facts-life-achievements.html> (accessed 23 June 2022).

relations and established the rules and the terms of access of political and economic use, which today have been characterised to be important in understanding the conditions enabling corruption within the state.⁴⁹

Governance involves the management of the state's affairs in a form of politics, societal structure, and economics and the way in which the power and authority relating to such affairs are exercised.⁵⁰ Thus, it is understandable that the state's administration today is seen as lacking in justice and fairness. "Patterns of history cast long shadows in governance."⁵¹ As such, a history of immoral activity of such corrupt deeds is an indication of a trait that is motivated by the willingness to subordinate the rule of law to one's own goal.

The British rule within South Africa, from the late 1700s to the mid-1900s has earned no exclusion from the list of corrupt governance. The beginning of the 1800s were met with the removal of Governor Sir George Yonge due to allegations of corruption and had an unfortunate ending of using a slave trade for personal gain by this regime. December 1799 was met with Yonge's arrival at the Cape.⁵² The way Yonge conducted his government, and his personal life were both regarded as lacking in integrity.⁵³ Accusations were made against Yonge throughout his tenure as governor, claiming that he had a frivolous and careless approach to governance.⁵⁴ One of the allegations against Yonge was that when Macartney, a British Statesman, had instituted restrictions on slave trades in order to avoid particular shortages of labourers as the

⁴⁹ Mueni P 'Jan Van Riebeeck biography: death, facts and life achievements' available at <https://briefly.co.za/30792-jan-van-riebeeck-biography-death-facts-life-achievements.html> (accessed 04 October 2023).

⁵⁰ Department for International Development 'The Politics of Poverty: Elites, Citizens and States: Findings from ten years of DFID-funded research on Governance and Fragile States 2001-2010' (2011) *London: DFID* 3.

⁵¹ Department for International Development 'The Politics of Poverty: Elites, Citizens and States: Findings from ten years of DFID-funded research on Governance and Fragile States 2001-2010' (2011) *London: DFID* 18.

⁵² Wright L 'A Question of Honour: Anne Barnard, social justice and the Henriad' (2020) 33 *Shakespeare in Southern Africa* 90.

⁵³ Wright L 'A Question of Honour: Anne Barnard, social justice and the Henriad' (2020) 33 *Shakespeare in Southern Africa* 90.

⁵⁴ Wright L 'A Question of Honour: Anne Barnard, social justice and the Henriad' (2020) 33 *Shakespeare in Southern Africa* 90.

Macartney's as the restrictions prohibited slave sales in the Colony unless they had permission from London, Yonge was said to have taken a sizable payment from renowned slave trader Michael Hogan, which allowed him to benefit from a shipment of illegal commodities that included about 1600 slaves from Mozambique.⁵⁵

His successor, Sir Charles Somerset had nothing new to offer but an expansion of the illicit use of state funds to expand his property ownership.⁵⁶ During his reign, public funds were used for suspicious public works, and associates within his reach were able to share in the fruits of public administration amongst each other during his incumbency from 1814⁵⁷ and would use his position to imprison or banish those who would choose to make reports on his actions much like the period of the conflict between the governor, Messrs Pringle, and Fairbairn.⁵⁸

During Somerset's reign, reporting on acts such as the cruel treatment of the British settlers in what is now the Eastern Cape was not allowed at the time, thus freedom of expression, including journalistic freedom, was deemed to be at stake.⁵⁹ Somerset and his administration instituted rules prohibiting the airing of grievances or discussion at public gatherings about the illicit activities conducted by his administration, in addition to a policy that prohibited the creation of an independent press that would not be subject to these rules.⁶⁰ Nonetheless, in the second issue of *The South African Journal* in 1824, Pringle discussed the anti-slavery movements in addition to the blatant corruption and "irregularities" in the Somerset

⁵⁵ Wright L 'A Question of Honour: Anne Barnard, social justice and the Henriad' (2020) 33 *Shakespeare in Southern Africa* 90.

⁵⁶ Dall N & Blackman M 'Historical odds: If you're expecting JZ to don orange overalls, don't you're your breath' available at <https://www.dailymaverick.co.za/opinionista/2021-03-30-historical-odds-if-youre-expecting-jz-to-don-orange-overalls-dont-hold-your-breath/> (accessed 15 August 2021).

⁵⁷ Erasmus J 'Corruption- We have to acknowledge its centuries-old existence' available at <https://www.corruptionwatch.org.za/corruption-a-centuries-old-tradition-that-we-have-to-acknowledge/> (accessed 27 June 2021).

⁵⁸ Chip B 'The Rogues' Gallery-350 years of corruption in South Africa' available at <https://bluechipdigital.co.za/insights/the-rogues-gallery-350-years-of-corruption-in-south-africa/> (accessed 11 November 2021).

⁵⁹ Rabe A 'Luta Continua: A history of media freedom in South Africa' (2020) *African Sun Media* 51.

⁶⁰ Holdridge C 'Laughing with Sam Sly: the cultural politics of satire and colonial british identity in the Cape Colony, c. 1840-1850' (2010) 36 *Kronos* 33.

administration.⁶¹ Following that, Pringle, and Fairbairn were subjected to the governor's deplorable acts, which included signing and distributing petitions sent to London in protest.⁶² The governor's measures of intimidation and repression extended not just to Pringle and Fairbairn but also to their associates.⁶³ It would take four years for freedom of expression within the Colony to have validity before the British Parliament.⁶⁴

What Somerset and Yonge had in common with the manner they chose to run their administration and its relation to corruption is that they used corruption as a mechanism for power and domination through the weakening of formal institutions, formal regulations and create an imbalance with the application of established regulations. This type of use of power is still embodied within South Africa. Former President Zuma, who resembled Somerset, had a history of suing his media opponents in an effort to quell criticism and scrutiny as well as to deflect attention from his own pending investigations into using state power for personal means.⁶⁵

In this ongoing case, Zuma has taken Karyn Maughan to court for allegedly leaking his medical records through a written piece detailing his health status which were abstracted from open court records, subsequently accusing them of breaching the National Prosecuting Authority Act.⁶⁶ Maughan has asserted that Zuma is persistently attempting to postpone the start of his criminal trial for illicit activities of corruption, and that the allegations he has filed on amounts to nothing more than reflection of Zuma 's misuse of

⁶¹ Church J 'Access to information: the hallmark of democracy with reference to the Protection of Information Bill and three historical incidents' (2011) 17 *Fundamina: A Journal of Legal History* 43.

⁶² Church J 'Access to information: the hallmark of democracy with reference to the Protection of Information Bill and three historical incidents' (2011) 17 *Fundamina: A Journal of Legal History* 44.

⁶³ Church J 'Access to information: the hallmark of democracy with reference to the Protection of Information Bill and three historical incidents' (2011) 17 *Fundamina: A Journal of Legal History* 44.

⁶⁴ Church J 'Access to information: the hallmark of democracy with reference to the Protection of Information Bill and three historical incidents' (2011) 17 *Fundamina: A Journal of Legal History* 44.

⁶⁵ Harber A 'Zuma cocks a snook at press freedom and the justice system as he takes a top reporter to court' available at <https://www.dailymaverick.co.za/article/2022-09-09-zuma-cocks-a-snook-at-press-freedom-and-the-justice-system-as-he-takes-a-top-reporter-to-court/> (accessed 21 October 2023).

⁶⁶ *Maughan v Zuma and Others* 2023 (5) SA 467 (KZP) para 16.

the legal system.⁶⁷ Maughan has protested and has stated that if the court should allow these accusations made against her to proceed ahead, Zuma would be let to succeed in his delaying tactic.⁶⁸

Much like his predecessors, the staple of abuse of authority for personal benefits would continue to find room within governance during Paul Kruger's administration in the Transvaal. The development of the 1852 Sand River by the Boer leaders had established an agreement which forbid slavery and the trading of slaves north of the Vaal River.⁶⁹ As a result of the 1852 Sand River a transfer authoritative standing to the Kruger administration took place.⁷⁰ Unfortunately, the transfer of authority to implement the 1852 Sand River served as no use as it was used to facilitate the practise of slave-raiding persisted, strengthening the institution of slavery.⁷¹ To be precise, the Sand River Convention of 1852 resulted in the creation of laws for the South African Republic (SAR) that forbid the ownership of slaves and the conduct of slave raids.⁷² In addition, President Martinus Pretorius and Commandant-General Paul Kruger were among the SAR officials for the fight toward anti-slavery.⁷³ It was regrettably discovered that both of the officials had been the leaders of the raids.⁷⁴

The Kruger administration would continue to use political interests and official authority once again to dominate the legal system to attain power during The Leander Starr Jameson Raid in return of a turnover that favoured his administration. There were a large number of British

⁶⁷ *Maughan v Zuma and Others* 2023 (5) SA 467 (KZP) para 18.

⁶⁸ *Zuma v Downer and Another* (788/2023) [2023] ZASCA para 3.

⁶⁹ Morton F 'Slave-Raiding and Slavery in the Western Transvaal after the Sand River Convention' (1992) 20 *African Economic History* 99.

⁷⁰ Morton F 'Slave-Raiding and Slavery in the Western Transvaal after the Sand River Convention' (1992) 20 *African Economic History* 99.

⁷¹ Morton F 'Slave-Raiding and Slavery in the Western Transvaal after the Sand River Convention' (1992) 20 *African Economic History* 99.

⁷² Morton F 'Slave-Raiding and Slavery in the Western Transvaal after the Sand River Convention' (1992) 20 *African Economic History* 99.

⁷³ Morton F 'Slave-Raiding and Slavery in the Western Transvaal after the Sand River Convention' (1992) 20 *African Economic History* 99.

⁷⁴ Morton F 'Slave-Raiding and Slavery in the Western Transvaal after the Sand River Convention' (1992) 20 *African Economic History* 99.

occupiers in Johannesburg during 1895 that were deemed to be a threat to overthrow Paul Kruger's administration, which Kruger had perceived as British invaders.⁷⁵ As the governing leader of the Transvaal, Paul Kruger took immediate action to ensure the independence from the colony. Since Kruger believed that the British invaders posed a threat to the Boers' independence, he conspired to weaken their authority,⁷⁶ Kruger and his administration made an effort to soften some of the regulations governing mineral resources within the Transvaal which was to increase the taxes on the mineral resources that he deemed that the British invaders had sought after within the Transvaal as the mineral resources contributed to about a nine-tenth of the Transvaal public money.⁷⁷ As a result, there were significant taxes on mining transactions in the Transvaal.⁷⁸ Additionally, there were indications of bribery and corruption among Paul Kruger's government officials, which resulted from prices on mineral resources being raised to the point that the high bidders could only obtain them for mining-related purposes.⁷⁹ These actions made the raid subside.⁸⁰ Interestingly, at the end of Paul Kruger's governance, it was reported that gold worth 800 000 pounds and 1.5 million pounds in coins and gold from the SA Mint, National Bank and some gold mines was removed on the order of Kruger.⁸¹ Five years later, John Holtzhausen admitted that the Kruger and his administration

⁷⁵ Beck RB *The history of South Africa* (2000) 89.

⁷⁶ Academic Accelerator 'James Raid' available at <https://academic-accelerator.com/encyclopedia/jameson-raid> (accessed 12 October 2023).

⁷⁷ Ugwukah AC 'Re-appraisal of the Jameson Raid of 1895/1896 and Its Implications for South African History' (2021) 2 *AIPGG Journal of Humanities and Peace Studies* 2.

⁷⁸ Ugwukah AC 'Re-appraisal of the Jameson Raid of 1895/1896 and Its Implications for South African History' (2021) 2 *AIPGG Journal of Humanities and Peace Studies* 12.

⁷⁹ Ugwukah AC 'Re-appraisal of the Jameson Raid of 1895/1896 and Its Implications for South African History' (2021) 2 *AIPGG Journal of Humanities and Peace Studies* 13.

⁸⁰ Ugwukah AC 'Re-appraisal of the Jameson Raid of 1895/1896 and Its Implications for South African History' (2021) 2 *AIPGG Journal of Humanities and Peace Studies* 19.

⁸¹ Erasmus S 'Paul Kruger, Jacob Zuma and the missing millions' available at <https://www.news24.com/Fin24/paul-kruger-jacob-zuma-and-the-missing-millions-20171110> (accessed 17 July 2021).

had employed him and two other men to bury two million pounds' worth of gold, coins, and diamonds.⁸²

Shortly after Kruger had fled the Transvaal on the anticipation of the British reign would assume, the Governor of the Cape Colony Cecil John Rhodes' succeeded Kruger and Rhodes' run came to be known as the focal point of corruption within the British rule in South Africa.⁸³ Rhodes was known to mingle within the procurement processes, particularly with regards to the De Beers mine contract, where rearrangements of terms were constant in order to personally enrich both the De Beers mine and Rhodes.⁸⁴ Rhodes was appointed to the De Beers Mine Board in 1875.⁸⁵ With the use and compromise of his role as governor, Rhodes had the power to enact laws, access, and control property rights, whilst pursuing his own interests in the De Beers mining.⁸⁶ As a result, the De Beers mine had developed a model to raise prices by managing the supply side while extensively promoting and selling the product to increase demand, thus, the model sought to manipulate both supply and demand concurrently. The model by De Beers mine was implemented with the support of the Rhodes administration and by 1888 had virtually gained total control over all South African diamond production and distribution.⁸⁷ Therefore, the creation of DeBeers mine involved a simultaneous endeavour to

⁸² Rare Coin Investment 'The Mystery of the Missing Kruger Millions' available at <https://rarecoins.co.za/the-mystery-of-the-missing-kruger-millions/> (accessed 18 October 2023).

⁸³ Mashele P 'Corruption the defining trait of SA politics, from Oom Paul to Juju' available at <https://www.sowetanlive.co.za/opinion/columnists/2018-09-17-corruption-the-defining-trait-of-sa-politicians-from-oom-paul-to-juju/> (accessed 17 July 2021).

⁸⁴ The Anchor 'Corruption begets corruption: A look into Cecil Rhodes' available at <https://www.theanchor.co.zw/corruption-begets-corruption-a-look-into-cecil-rhodes/> (accessed 29 July 2021).

⁸⁵ Newbury C 'Technology, Capital, and Consolidation: The Performance of De Beers Mining Company Limited, 1880-1889' (1987) 61 *The Business History Review* 5.

⁸⁶ Newbury C 'Technology, Capital, and Consolidation: The Performance of De Beers Mining Company Limited, 1880-1889' (1987) 61 *The Business History Review* 23.

⁸⁷ Newbury C 'Technology, Capital, and Consolidation: The Performance of De Beers Mining Company Limited, 1880-1889' (1987) 61 *The Business History Review* 33.

control diamond pricing by forming a monopoly over production and distribution of diamonds.⁸⁸

The author found it necessary to explore the history of governance and its relations to political corruption as the author deems that history has the ability to provide information on governance background which could help indicate the character of governance structures that often informs the rules and development of the country.⁸⁹ Thus, the author maintains that it is important to note that the exploitation of legally valid authority for personal interest within governance does not go through an overnight elimination process. Therefore, the governance before constitutional law within the state would naturally have influenced the rule of law and defined the eras of constitutionality in South Africa that this chapter aims to follow, criticise, and prove such.

2.3 The constitutional law within South Africa

South Africa is documented to have experienced four eras of constitutional law. Each bearing an imprint on the current state of the political landscape. An analysis follows that:

2.3.1 The South Africa Union Act of 1909

South Africa is the manifestation of negotiations that transpired in 1908 between the four self-governing colonies that existed at the time, known as the Cape of Good Hope, Natal, Transvaal, and Orange River, at the National Convention.⁹⁰ All four colonies came to be recognised as one, and were to be governed by the South Africa Union Act of 1909 (1909 Constitution).⁹¹

⁸⁸ London D&E ‘De Beers the rise and fall of a unique monopoly’ available at <https://londonde.com/blogs/news/de-beers-the-rise-and-fall-of-a-unique-monopoly> (accessed 21 October 2023).

⁸⁹ *S v Zuma* 1195(4) BCLR401(CC) para 15.

⁹⁰ Shepard WJ ‘The Constitutional Union of South Africa’ (1909) 3 *American Political Science Review* 385.

⁹¹ Shepard WJ ‘The Constitutional Union of South Africa’ (1909) 3 *American Political Science Review* 386.

During the National Convention there were underlying obligations for adherence amongst the colonies in exchange for a solidly established Union and as well as a legitimate origin of constitutional law.⁹² Nonetheless, according to Shepard these have gained the reputation to have been a ‘clumsy solution for the country’s capital executive and civil service’.⁹³

Allowing constitutionality within what was coined as the Union of South Africa meant that a constitutional leverage was centred on the legislature and the executive. Discretionary inequality existed within Parliament through the hierarchy that was only concentrated on the House of Representatives and the Senate.⁹⁴ The executive competency was attained by a Cabinet of ten (10) Ministers, who oversaw Parliament led by the Governor-General and the Prime Minister, representing the British Royal Family.⁹⁵

The 1909 Constitution in fulfilling the British colonial influence, otherwise called the British Westminster system mandated that the executive government be vested in the King and to be delegated to the Governor-General.⁹⁶ This meant that South Africa had not yet made way for a Presidential role. The reality of the executive within the 1909 Constitution had been that the Governor-General was to administer his authority on the advice of the Executive Council.⁹⁷ The only exemption for the Governor-General was based on the control and administration of native affairs.⁹⁸

⁹² Ross R A *concise history of South* (1999) 89.

⁹³ Ross R A *concise history of South* (1999) 89.

⁹⁴ Beck RB *The history of South Africa* (2000) 98.

⁹⁵ Beck RB *The history of South Africa* (2000) 98.

⁹⁶ Dicey AV & Keith AB *Constitutional Reflections: The Correspondence of Albert Venn Dicey and Arthur Berriedale Keith* (1996) 41.

⁹⁷ Dicey AV & Keith AB *Constitutional Reflections: The Correspondence of Albert Venn Dicey and Arthur Berriedale Keith* (1996) 41.

⁹⁸ Dicey AV & Keith AB *Constitutional Reflections: The Correspondence of Albert Venn Dicey and Arthur Berriedale Keith* (1996) 41.

2.3.2 The Republic of South Africa Constitution Act 1961 (1961 Republican Constitution)

The 1961 Republican Constitution holds significance as it brought South Africa independence from the British Westminster system which made South Africa the “Republic of South Africa” through a constitutional referendum to eradicate the Union of South Africa created by the 1909 Constitution.⁹⁹ This meant for the constitutional law of South Africa at the time in terms of governance that the President replaced the British monarch and the then Republican state of South Africa would function in a bicameral legislature consisting of a House of Assembly and a Senate.¹⁰⁰

However, the parliamentary sovereignty still remained, and as such, the House of Assembly and Senate had authority over the President and his cabinet.¹⁰¹ Parliamentary sovereignty over the executive did not function as means of oversight, as the House of Assembly and the Senate were seen to have absolute authority over any other institution in the state, including the executive and the judiciary.¹⁰² The features of the judiciary included independence but also had relations with the government, as the executive branch had the authority over the judiciary.¹⁰³

Section 59 of the 1961 Republican Constitution stated that:

‘Parliament shall have the sovereign legislative authority in and over the Republic and shall have full power to make laws for the peace, order and good government of the Republic.’¹⁰⁴

⁹⁹ Parliamentary Liaison Office ‘South Africa’s Parliamentary System: From Westminster to Hybrid?’ (2015) *Briefing Paper 380 2*.

¹⁰⁰ Parliamentary Liaison Office ‘South Africa’s Parliamentary System: From Westminster to Hybrid?’ (2015) *Briefing Paper 380 2*.

¹⁰¹ Parliamentary Liaison Office ‘South Africa’s Parliamentary System: From Westminster to Hybrid?’ (2015) *Briefing Paper 380 3*.

¹⁰² Seedorf S & Sibanda S ‘Separation of powers’ (2008) 2 *Constitutional Law of South Africa* 5.

¹⁰³ Parliamentary Liaison Office ‘South Africa’s Parliamentary System: From Westminster to Hybrid?’ (2015) *Briefing Paper 380 3*.

¹⁰⁴ Republic of South Africa Constitution Act, 1961.

Another important feature that was introduced by the 1961 Republican Constitution was the protection of State President's dignity and reputation and thus in section 13 of the 1961 Republican Constitution provided the State President with immunity from criticism.¹⁰⁵

The Republican state of South Africa maintained the white dominance within societal, economic, and political realms through a discriminatory electoral structure that disenfranchised non whites even after its independence.¹⁰⁶ This domination is described as the apartheid system.

The 1970s met South Africa with global resistance with the manner in which it administered its state, and the state was urged to eradicate the apartheid system. The apartheid government at the time were warned that should it not comply with the dismantle of the apartheid system it was to be subject to a set of sanctions which included the international adoption of trade, economic, and foreign investment, and transaction withdrawals against the state.¹⁰⁷

To combat this, the executive used grand corruption as means for reputational control, involving dishonest practices by senior officials resulting in large scale misappropriation. The Transparency International describes grand corruption as “the abuse of high-level power that benefit a few at the expense of many.”¹⁰⁸ The executive used departments such as the department of information, the department of defence, and the department of homeland.¹⁰⁹

In 1978, Balthazar Johannes Voster, the State President of South Africa at the time, was caught in a scandal that accused him of abusing state resources for reputational benefit.¹¹⁰ Much like Somerset, his predecessor, and Zuma, his successor, Voster had aimed on suppressing the

¹⁰⁵ Devenish GE ‘The Republican constitution of 1961 revisited: a re-evaluation after fifty years’ (2012) 18 *Fundamina* 9.

¹⁰⁶ Devenish GE ‘The Republican constitution of 1961 revisited: a re-evaluation after fifty years’ (2012) 18 *Fundamina* 4.

¹⁰⁷ Barnes C ‘International isolation and pressure for change in South Africa’ (2008) *Accord Issue* 19 36.

¹⁰⁸ Transparency International ‘Grand Corruption’ available at <https://www.transparency.org/en/our-priorities/grand-corruption> (accessed 19 October 2023).

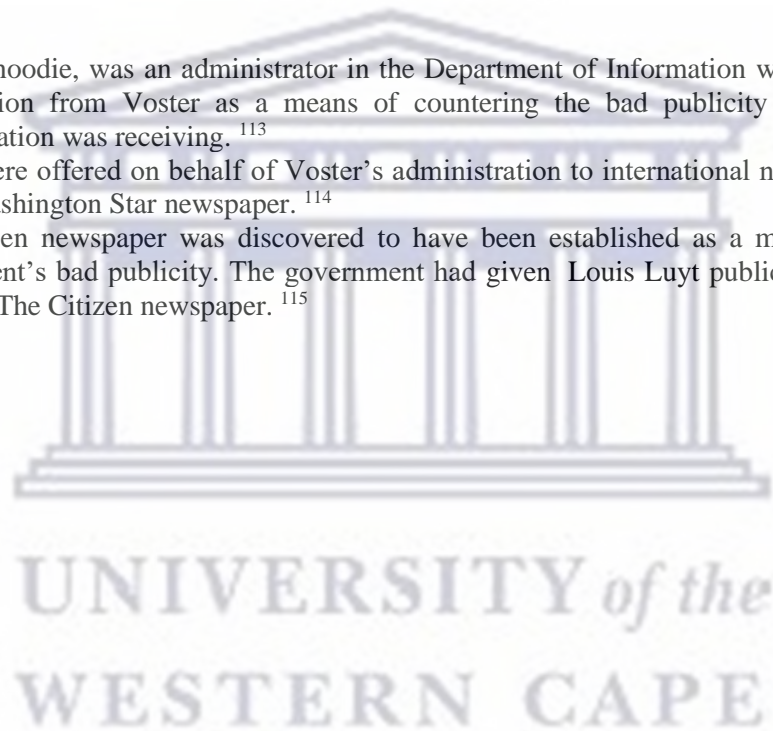
¹⁰⁹ Lodge T ‘Political Corruption’ (1997) 425 *University of the Witwaterstrand Institute for Advanced Social Research* 7.

¹¹⁰ South African History Online ‘The Information Scandal’ available at <https://www.sahistory.org.za/article/information-scandal> (accessed 11 October 2023).

national and international reports on the government's maladministration and effect of the apartheid system on its non-white citizens. Thus, "the government opted for their own propaganda war."¹¹¹ Consequently, in 1979 a Commission of Inquiry was appointed, namely the Erasmus Commission, and it was to investigate Connie Mulder's, the Minister of Department of Information and the Bureau of State Security, along with the state's Intelligence that was headed by General Hendrik van den Bergh.¹¹²

The findings of the Erasmus Commission were that:

- a. Eschel Rhoodie, was an administrator in the Department of Information who accepted about R64 million from Voster as a means of countering the bad publicity that the Voster's administration was receiving.¹¹³
- b. Bribes were offered on behalf of Voster's administration to international news agencies such as the Washington Star newspaper.¹¹⁴
- c. The Citizen newspaper was discovered to have been established as a means to cover the government's bad publicity. The government had given Louis Luyt public funds in order to establish The Citizen newspaper.¹¹⁵



¹¹¹ South African History Online 'The Information Scandal' available at

<https://www.sahistory.org.za/article/information-scandal> (accessed 11 October 2023).

¹¹² South African History Online 'The Erasmus Commission's report implicates Rhoodie, Mulder and van den Bergh in SA's infamous Information Scandal' available at <https://www.sahistory.org.za/dated-event/erasmus-commissions-report-implicates-rhodie-mulder-and-van-den-bergh-sas-infamous> (accessed 11 October 2023).

¹¹³ South African History Online 'The Erasmus Commission's report implicates Rhoodie, Mulder and van den Bergh in SA's infamous Information Scandal' available at <https://www.sahistory.org.za/dated-event/erasmus-commissions-report-implicates-rhodie-mulder-and-van-den-bergh-sas-infamous> (accessed 11 October 2023).

¹¹⁴ South African History Online 'The Erasmus Commission's report implicates Rhoodie, Mulder and van den Bergh in SA's infamous Information Scandal' available at <https://www.sahistory.org.za/dated-event/erasmus-commissions-report-implicates-rhodie-mulder-and-van-den-bergh-sas-infamous> (accessed 11 October 2023).

¹¹⁵ South African History Online 'The Erasmus Commission's report implicates Rhoodie, Mulder and van den Bergh in SA's infamous Information Scandal' available at <https://www.sahistory.org.za/dated-event/erasmus-commissions-report-implicates-rhodie-mulder-and-van-den-bergh-sas-infamous> (accessed 11 October 2023).

2.3.3 The Republic of South Africa Constitution Act 1983 (1983 Constitution)

The peak of the unstable governmental state culminated during the 1980s. This was necessary for the counterattack, which aroused outrage within the public after the promulgation of the 1983 Constitution, where whites remained in power and blacks were completely excluded.¹¹⁶ During the time of the 1983 Constitution, it had been 70 years later since the introduction of constitutional law in South Africa and it had been understood at the time that indeed a Constitution was the strongest weapon in facilitating inequality.¹¹⁷ The opinion at that time on corruption and the effect of the 1983 Constitution were noted to be:

- a. 'The Constitution continuously depriving the broad masses of blacks of their political rights.'¹¹⁸
- b. 'The Constitution turning coloureds and Asians into second class citizens.'¹¹⁹
- c. 'The Constitution keeping the ultimate control within the minority class.'¹²⁰

At this point, the principle of parliamentary sovereignty was respected as far as possible. Although constitutional sovereignty was proving to be a threat, the violations of human rights and freedoms were nowhere near being diminished.¹²¹ From the 1980s to the early 1990s, the administration experienced constitutional hegemony.¹²² The promotion of a President placed

¹¹⁶ Jisheng X 'Evolution of South Africa's Racist Constitutions and the 1983 Constitution' (1987) 16 *African Issues* 21.

¹¹⁷ Jisheng X 'Evolution of South Africa's Racist Constitutions and the 1983 Constitution' (1987) 16 *African Issues* 21.

¹¹⁸ Jisheng X 'Evolution of South Africa's Racist Constitutions and the 1983 Constitution' (1987) 16 *African Issues* 21.

¹¹⁹ Jisheng X 'Evolution of South Africa's Racist Constitutions and the 1983 Constitution' (1987) 16 *African Issues* 21.

¹²⁰ Jisheng X 'Evolution of South Africa's Racist Constitutions and the 1983 Constitution' (1987) 16 *African Issues* 21.

¹²¹ Seedorf S & Sibanda S 'Chapter 12-Separation of powers' in De Vos Pierre *Constitutional Law of South Africa* (2014) 17.

¹²² Seedorf S & Sibanda S 'Chapter 12-Separation of powers' in De Vos Pierre *Constitutional Law of South Africa* (2014) 17.

with supreme authority with no substantial restrictions on power guaranteed oppression.¹²³ This is recalled as the lowest point of constitutionality in the country.¹²⁴

2.3.4 The Interim Constitution Act 200 of 1993 (Interim Constitution)

The interim constitutional turmoil was to be expected considering the transfer of power relations to majority rule and subsequently eliminating the apartheid system. The preamble of the Interim Constitution provided that:

‘There is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms.’¹²⁵

South Africa was then faced with the reality that it was no longer operating as a parliamentary sovereignty but aimed for constitutional democracy.¹²⁶ The Interim Constitution served as a peace treaty to end the dispute once enacted.¹²⁷

The Certification of the Amended Text of the Constitution of the Republic of South Africa 1997 (2) SA 97 traces back the accentuation of the Interim Constitution and the groundbreaking values that were laid including the supremacy of the Constitution, the authority of the Constitutional Court, the nonexistence of constitutional tyranny, qualified branches of government and the practice of legitimate authority, and mindful governance.¹²⁸

The Interim Constitution is South Africa’s first supreme constitutional law. The Interim Constitution also contains the Declaration of Human Rights which establishes the Bill of Rights

¹²³ Seedorf S & Sibanda S ‘Chapter 12-Separation of powers’ in De Vos Pierre *Constitutional Law of South Africa* (2014) 17.

¹²⁴ Seedorf S & Sibanda S ‘Chapter 12-Separation of powers’ in De Vos Pierre *Constitutional Law of South Africa* (2014) 17.

¹²⁵ The Interim South African Constitution, 1993.

¹²⁶ SAHO ‘A history of the South African Constitution 1910-1996’ available at <https://www.sahistory.org.za/article/history-south-african-constitution-1910-1996> (accessed 30 March 2021).

¹²⁷ SAHO ‘A history of the South African Constitution 1910-1996’ available at <https://www.sahistory.org.za/article/history-south-african-constitution-1910-1996> (accessed 30 March 2021).

¹²⁸ Basson D ‘South Africa’s Interim Constitution’ (1996) 2 *Journal of South African Law* 412.

that embodies the central values of dignity, equality, and freedom in its sentiment.¹²⁹ Therefore, the Bill of Rights is for the people of the state that ensures that their rights and freedoms are properly secured from the threats of governmental abuse.¹³⁰ In the words of the late Chief Justice Langa:

‘The Constitution resides in a history which involves a transition from a society based on division, injustice, and exclusion from democratic process to one which respects the dignity of all citizens and includes all in the process of governance.’¹³¹

2.3.5 The Constitution of the Republic of South Africa, 1996 (1996 Constitution)

The history of South Africa explains in detail that the support of any constitution does not accompany constitutionalism, because the true status of constitutionalism is obtained through the supremacy of the constitution.¹³² Thus, according to this analysis, South Africa did not participate in a constitutional government until the year constitutional supremacy was achieved.

Within the democratic governance of the 1996 Constitution, the President is an integral component in an efficient government within the Republic and therefore is subjected to significant constitutional obligations.¹³³ The Constitutional Court in *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708, held that ‘under our new democratic constitutional framework, the exercise of all governmental authorities, including the performance of the President's responsibilities remains subject to the provisions of the 1996 Constitution, which serves as the highest law. When this is not done, the Court can examine

¹²⁹ Mwaniki MM *Language planning in South Africa: Towards a language management approach* (unpublished Doctor of Philosophy, University of Free State, 2004) 40.

¹³⁰ Mwaniki MM *Language planning in South Africa: Towards a language management approach* (unpublished Doctor of Philosophy, University of Free State, 2004) 51.

¹³¹ Classens A & Budlender G ‘Transformative Constitutionalism and Customary Law’ (2014) 6 *Constitutional Court Review* 98.

¹³² Mangu AMB *Separation of powers and federalism in African Constitutionalism: The South African case* (unpublished LLM thesis, University of South Africa, 1998) 2.

¹³³ *United Democratic Movement v Speaker of the National Assembly and Others* 2017 (8) BCLR 1061 (CC) para 6.

and overturn the use of that authority.¹³⁴ In *President of the Republic of South Africa v South African Rugby Football Union* 1997 (10) BCLR 1059, the Constitutional Court emphasised that the principle of legality mandates an official with the discretionary privilege of executive powers to conform and use the power within its bounds.¹³⁵

The President elect assumes the role of individually acting as the Head of the Executive and Head of State.¹³⁶ The President receives the constitutional authority to appoint his cabinet from the Members of the National Assembly¹³⁷. Rights are reserved for parliament regarding removal of the Cabinet within section 102 of the 1996 Constitution on the grounds of serious misconduct.¹³⁸

The President is not required to consult the cabinet when making decisions as Head of State.¹³⁹ Ministerial responsibilities are embodied within the national executive and leads the administration of state departments.¹⁴⁰ The cabinet is to always operates in a way that reflects national unity, and should hold collective responsibility for policies and performance of the government in accordance with section 92(2).¹⁴¹ The Constitutional Court in *Von Abo v President of the Republic of South Africa* 2009 (10) BCLR 1052 (CC), emphasised the idea that how the rest of the cabinet execute their responsibilities should not be a reflection on the Head of State .¹⁴² In simpler terms, those who ought to voluntarily hold legal authority shall bear the costs of that role.

¹³⁴ *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 para 10.

¹³⁵ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (10) BCLR 1059 para 34.

¹³⁶ See section 84(1) of the Constitution of the Republic of South Africa, 1996.

¹³⁷ See section 91(2) of the Constitution of the Republic of South Africa, 1996.

¹³⁸ Chiloane TT *An analysis of the constitutionality of the President's reliance on prerogative powers as the basis of appointing and dismissing cabinet members-An interrogation of the meaning of section 91(2) of the Constitution* (unpublished LLM thesis, University of Pretoria, 2018) 17.

¹³⁹ The Department of Constitutional Development "Constitutional Handbook for Members of the Executive" 1999 *National Democratic Institute for International Affairs and Constitutional Concepts* 24.

¹⁴⁰ See section 85(2) of the Constitution of the Republic of South Africa, 1996.

¹⁴¹ See section 92 (2) of the Constitution of the Republic of South Africa, 1996.

¹⁴² *Von Abo v President of the Republic of South Africa* 2009 (10) BCLR 1052 (CC) para 40.

2.4 Democracy co-existing with oppression

Transformative constitutionalism was definitely a revolution that uttered previous laws and customs that be transformed in the new democratic South Africa.¹⁴³ Unfortunately, after 27 years since South Africa became a democratic nation, the country is one of the most corrupt countries in the world with an unemployment and economic stagnation.¹⁴⁴

Nearly three decades later, South Africa's democratic constitutional law era is met with dissonance. The state is still hung upon its roots of division among racial groups, ethnicity, and classes.¹⁴⁵ As much as democracy brought so much hope equal, fair, and free country, South Africa was eventually met with the idea that it could not function without the features of oppressional roots embedded within history.

The Constitutional Court in *Suzman Foundation v President of the Republic of South Africa and Others* 2014 (4) BCLR 481 (WCC) confirmed that 'corruption is plainly rampant in modern-day South Africa' while the political reform and relations of the country makes uncovering corruption claims more difficult'.¹⁴⁶ From the very beginning, South Africa should have been met with the expectation of obstacles into the transition of democracy and considered political corruption as one of the inherent challenges that the "new government" was to tackle.

Subsequently, the author maintains that there should have been no surprise to the political dysfunctionality that can still be found within the governance of the country, as can be seen

¹⁴³ The Department of Justice and Constitutional Development, by the Democracy, Governance and Service Delivery Research Programme of the Human Sciences Council- *Assessment of the Impact of Decisions of the Constitutional Court and Supreme Court of Appeal on the Transformation of Society Final Report* (2015) 2.

¹⁴⁴ Moseneke D 'Corruption and its threat to democracy' (2020) 9 *African Law Review* 5.

¹⁴⁵ Picard LA & Mogale T *The limits of Democratic Governance in South Africa* (2015) 2.

¹⁴⁶ Sewpersaah P & Mubangizi JC 'Using the law to combat Public Procurement Corruption in South Africa: Lessons from Hong Kong' (2017) 20 *Potchefstroom Electronic Law Journal* 1.

within this chapter and will be further will expanded on by the author in chapter three, as South Africa suffered over 300 years of injustice and abuse of power.

The Court in *Weziwe Tikana-Gxotiwe v Bantubonke Harrington Holomisa* (890) 2020 enumerates some of the recent political corruption incidents that are collapsing the state of South Africa. Presently:

- a. 'The country has witnessed how corruption has crippled state-owned entities like Eskom, the South African Broadcasting Corporation (SABC), the Passenger Rail Agency of South Africa (PRASA), the South African Revenue Services (SARS) and a fair number of municipalities.'¹⁴⁷
- b. 'Former President Jacob Zuma faces charges of, amongst others, corruption.'¹⁴⁸
- c. A former Premier, John Black, presently serves a term of 15 years' imprisonment after having been convicted of corruption.'¹⁴⁹
- d. 'A National Commissioner of the South African Police Service and former head of Interpol was convicted of corruption in 2010.'¹⁵⁰
- e. 'A Provincial Commissioner of South African Police Service pleaded guilty and was convicted of corruption.'¹⁵¹
- f. 'After the death of the first democratically elected President of the country, Nelson Mandela, a large sum of money was made available by the state to transport members of the public to a memorial service. Presently some officials and politicians are being charged with amongst others corruption for having allegedly pocketed some of that money.'¹⁵²

2.5 Effects of the rule of law on good governance and political corruption

The Constitutional Court in *Pharmaceuticals Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 defended the use of the rule of law to prevent and combat political corruption, affirming that the exercise of public power by administrative and other officials should not be based on irrational and arbitrary decisions.¹⁵³

The Court in *Hanekom v Zuma* 2019 ZAKZDHC 16 reminded public officials that their functions involve not only the stated requirements, but also an impact based analysis, which

¹⁴⁷ *Weziwe Tikana-Gxotiwe v Bantubonke Harrington Holomisa* (890/ 2020) ZAECGHC para 13.

¹⁴⁸ *Weziwe Tikana-Gxotiwe v Bantubonke Harrington Holomisa* (890/ 2020) ZAECGHC para 13.

¹⁴⁹ *Weziwe Tikana-Gxotiwe v Bantubonke Harrington Holomisa* (890/ 2020) ZAECGHC para 13.

¹⁵⁰ *Weziwe Tikana-Gxotiwe v Bantubonke Harrington Holomisa* (890/ 2020) ZAECGHC para 13.

¹⁵¹ *Weziwe Tikana-Gxotiwe v Bantubonke Harrington Holomisa* (890/ 2020) ZAECGHC para 13.

¹⁵² *Weziwe Tikana-Gxotiwe v Bantubonke Harrington Holomisa* (890/ 2020) ZAECGHC para 13.

¹⁵³ *Pharmaceuticals Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 para 17.

means that public officials must act within the characteristics held by the constitutional preamble when fulfilling their constitutional obligations.¹⁵⁴

The lack of improvement during the first two decades of democracy on the role of the national executive in combatting political corruption has eroded the optimism and trust for a transformative constitutional state for South Africa.¹⁵⁵

Chapter two analysed the governance before constitutional law within the state and its influence within the four constitutional law eras in South Africa. The inherited governance within South Africa has persistently increased over the years and has created an unstable governmental state within a constitutional order of governance. As much, the South African constitutional law supremacy period of about three decades which promotes a state governance that embodies checks and balances through transparency, accountability, fairness and justice has struggled to balance between the infection of political corruption within government and providing a stable state that operates within the best interests of its citizen.



¹⁵⁴ *Hanekom v Zuma* 2019 ZAKZDHC 16 para 58.

¹⁵⁵ Kinsell A *Post-apartheid political culture in South Africa 1994-2004* (unpublished Master of Arts thesis, University of Florida, 2009) 71.

CHAPTER 3

CONSTITUTIONAL DISCRETION AND POLITICAL CORRUPTION

IN SOUTH AFRICA

There are many times that scholars find themselves criticising the 1996 Constitution and this is despite receiving global appraisals for an innovative transformative impact. This chapter aims to do the same. The argument presented is that a constitution is a legal instrument at the end of the day that governs the functioning of a nation. Thus, this paper submits that chapter 5 of the 1996 Constitution and other supporting constitutional discretionary clauses grant exceeding authority to the executive branch of government. As a result, the phrase “too much power corrupts” has materialised and finds its application within the state of governance in South Africa.

This chapter will provide evidence that the anti-corruption legal instruments encouraged by the 1996 Constitution are at risk for ineffectiveness and may hinder the success of such instruments should the oversight executive agents have unlimited constitutional discretion. More than that, this chapter will provide evidence that other constitutionally supported anti-corruption institutions also fall victim to the abuse of the national executive authority. What is more important is demonstrating that the examination of the designated "innovative and transformative Constitution" will reveal that Chapter 5 of the 1996 Constitution makes it difficult for the values and principles that form part of section 1 to be carried out.

An analysis of the independent institutions and legal frameworks derived from constitutional mandates against the use of discretion by the national executive authority in a way that would result in an unreasonable violation of other constitutional provisions aimed at preventing political corruption will be used to support this analysis further.

3.1 Constitutionalism and executive authority

The author argues that it can be assumed that the intention of constitutionalism was to form a structured governmental institution that functions for the sole purpose of providing for a stable society. Notably, the functions of a constitution are to be understood as stipulated in the following:

- a. Provides the legal framework to government.¹⁵⁶
- b. Prescribes substantive elements and procedures for government.¹⁵⁷
- c. Assigns governmental authority and responsibility.¹⁵⁸
- d. Prescribes the relationship between the state and the people as well as
- e. Defines the relationship between the organs of government.¹⁵⁹

This paper submits that although a foundation has been laid for good governance, democracy, and rule of law, it is within the realisation of these principles that there exists a gap for the abuse of power. For constitutionalism to function properly, there needs to be a form of governing authority that ensures the implementation and interpretation of the contents that are required to be embodied within a constitutional state.

Thus, the elements of constitutionalism that are open for question and analysis within this paper are:

- a. The recognition and protection of fundamental rights and freedoms.¹⁶⁰
- b. The separation of powers.¹⁶¹
- c. An independent judiciary.¹⁶²

¹⁵⁶ Young EA 'The Constitutive and Entrenchment Functions of Constitutions: A Research Agenda' (2007) 10 *University of Pennsylvania Journal of Constitutional Law* 399.

¹⁵⁷ Young EA 'The Constitutive and Entrenchment Functions of Constitutions: A Research Agenda' (2007) 10 *University of Pennsylvania Journal of Constitutional Law* 399.

¹⁵⁷. Young EA 'The Constitutive and Entrenchment Functions of Constitutions: A Research Agenda' (2007) 10 *University of Pennsylvania Journal of Constitutional Law* 399.

¹⁵⁸ Young EA 'The Constitutive and Entrenchment Functions of Constitutions: A Research Agenda' (2007) 10 *University of Pennsylvania Journal of Constitutional Law* 399.

¹⁵⁹ Young EA 'The Constitutive and Entrenchment Functions of Constitutions: A Research Agenda' (2007) 10 *University of Pennsylvania Journal of Constitutional Law* 399.

¹⁶⁰ Fombad CM 'Constitutional Reforms and constitutionalism in Africa: Reflections on some current challenges and future prospects' 2011 *University of Pretoria* 2.

¹⁶¹ Fombad CM 'Constitutional Reforms and constitutionalism in Africa: Reflections on some current challenges and future prospects' 2011 *University of Pretoria* 2.

¹⁶² Fombad CM 'Constitutional Reforms and constitutionalism in Africa: Reflections on some current challenges and future prospects' 2011 *University of Pretoria* 2.

d. Institutions that support democracy.¹⁶³

The author highlights that these constitutional provisions attempt to serve an additional purpose, which include acting as anti-corruption constitutional procedures, although not being addressed in the 1996 Constitution expressly. Moreover, the Transparency International expressed that despite a constitution's ability to support and contain anti-corruption laws, the constitution itself may actually work against that goal.¹⁶⁴

3.2 Analysing chapter five of the 1996 Constitution

According to the author, the failure to enforce appropriate limitations on government authority has had its reputational stain amongst the multiple regimes of South Africa, whether be it in the reign of the Dutch, British, apartheid tyranny or constitutionalism, it always has the tragic ending of a nation's abuse along with its resources. Van Staden described it as the state's inherent desire to always seek to increase its authority.¹⁶⁵

The author holds that the impact of the state of governance will necessitate the application of a more comprehensive understanding of constitutional law, but it is important to take the constitutional provisions at face value and attempt to analyse their ultimate purpose when applying interpretive lenses onto the 1996 Constitution. The Court in *Bato Star Fishing (Pty) Ltd v Minister of Environment Affairs and Tourism and Others* 2004 (4) SA 490 established a norm for constitutional criticism and mandated that any study of the 1996 Constitution's provisions must always be done in the context of and in accordance with the spirit, meaning, and goals of the Bill of Rights.¹⁶⁶

¹⁶³ Fombad CM 'Constitutional Reforms and constitutionalism in Africa: Reflections on some current challenges and future prospects' 2011 *University of Pretoria* 2.

¹⁶⁴ Transparency International *Anti-Corruption Clauses in Constitutions* (2014) 2.

¹⁶⁵ Van Staden M 'Constitutional rights and their limitation: A critical appraisal of the Covid-19 lockdown in South Africa' (2020) 20 *African Human Rights Law Journal* 486.

¹⁶⁶ *Bato Star Fishing (Pty) Ltd v Minister of Environment Affairs and Tourism and Others* 2004 (4) SA 490 para 72.

The most fundamental premise of the executive branch's perspective within constitutional law is that they bear an independent constitutional obligation to interpret and apply the 1996 Constitution¹⁶⁷ and 'the power to interpret the law includes the power to interpret the 1996 Constitution'¹⁶⁸, which may lead to dangerous exercise of power as the executive authority to interpret the law is so well established.¹⁶⁹ It is submitted that the basis of argument in this study stands on the premise that chapter 5 causes a strain on the realisations of anti-corruption constitutional provisions intended by the democratic constitutional reform.

3.2.1 Section 83- The President

Democracy in South Africa was achieved after centuries of living in political dysfunctionality. The "strong and resilient features" of the democratic institutions that support the preservation and defence of human rights in the face of political unrest are the fundamental reason for the 1996 Constitution's popularity. Determining the branches of government and outlining who and what they have control over was one of the primary goals of the 1996 Constitution to enable the stability of the state. Subsequently, the author provides that 1996 Constitution aimed to enable those in positions of constitutionally granted leadership to contribute significantly to the functioning of the state. For this reason, "unity of the nation which will advance the Republic" is demanded in section 83(c).¹⁷⁰

Section 83(c) places an objective standard of good faith on the President when exerting his powers both as the Head of Executive and the Head of State. The aim of this was to help the nation move past the historical injustices brought about by the apartheid regime. In light of section 83(c), the author states that the President, therefore, vests the power to govern the

¹⁶⁷ Powell HJ 'The President's Authority Over Foreign Affairs: An Executive Branch Perspective' (1998) 67 *George Washington Law Review* 556.

¹⁶⁸ Easterbrook FH 'Presidential review' (1989) 40 *Case Western Reserve Law Review* 905.

¹⁶⁹ Easterbrook FH 'Presidential review' (1989) 40 *Case Western Reserve Law Review* 905.

¹⁷⁰ See section 83 of the Constitution of the Republic of South Africa, 1996.

national government which subsequently requires that the President whether within his role as the Head of State or as Head of the Executive is to always keep what is best for the country on the forefront.¹⁷¹ Thus, when assessing presidential decisions, it should be measured against this mandate. This would mean that “unity” within section 83 of the 1996 Constitution suggests that the President is to seek guidance when needed and to be corrected when the need arises.

Furthermore, the author argues that section 83 transfers legal capacity to the President and this section lays down the pinnacle standard that requires the President to enforce constitutionalism by respecting the supremacy of the 1996 Constitution.¹⁷² Constitutional supremacy is articulated as:

‘The ground norm of a nation and its provisions that are superior to any other law and should any inconsistency or contravention through any other law or authority, constitutional supremacy renders such a law or action null and void to the extent of that inconsistency or contravention.’¹⁷³

Constitutional supremacy is correlated with the highest form of discretion in the performance of constitutional powers and obligations.¹⁷⁴ Despite this, the presidential power in South Africa’s democratic system does not meet the standards listed in section 1 of the 1996 Constitution which delineates the core principles of the 1996 Constitution and outlines the kind of societal order that the 1996 Constitution has strived to achieve for almost thirty years within a constitutional and democratic framework.

The President is the root of the problem, according to Georgieva and Krsteski's research on the genesis and outlook of corruption in South Africa.¹⁷⁵ Regardless of the government's various

¹⁷¹ See section 83 of the Constitution of the Republic of South Africa, 1996.

¹⁷² See section 83(b) of the Constitution of the Republic of South Africa, 1996.

¹⁷³ Usang OI ‘Supremacy of the Constitution of the Federal Republic of Nigeria 1999 VIS-A VIS The Overt Violations of the Federal Character Principles in the Fourth Republic by’ (2022) 6 *African Journal of Law and Human Rights* 172.

¹⁷⁴ Usang OI ‘Supremacy of the Constitution of the Federal Republic of Nigeria 1999 VIS-A VIS The Overt Violations of the Federal Character Principles in the Fourth Republic by’ (2022) 6 *African Journal of Law and Human Rights* 173.

¹⁷⁵ Krsteski NGH ‘Corruption in South Africa: Genesis and outlook’ (2017) 5 *Journal of Process Management – New Technologies, International* 52.

efforts to combat corruption and the 2011 ruling in *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC), where the Constitutional Court ruled that the government must fight corruption by putting in place efficient procedures and taking appropriate action¹⁷⁶, the power and influence of politics and private business have continued undermining the effectiveness of these efforts.¹⁷⁷ Consequently, the presidential decree of South Africa has become less relevant and valuable because of its current opaque and incomprehensible shape, as will be discussed in more detail below.

3.2.2 Section 84- Powers and functions of the President as the Head of State

The President as the Head of State is mandated to ensure the effectiveness and integration of democracy throughout the nation rather than serving his authority within the political components that occasionally find themselves linked to the role of the President.¹⁷⁸

According to the author and as described in chapter two, the constitutionally facilitated presidential authority to act alone is derived from the British Crown, within the British Westminster constitutional law era, rather than the national executive of that time, parliamentarism dominated at that time. This is illustrated in the 1909 Constitution as a British Imperial Strategy and Imagination which was acquired as a settlement agreement between the Dutch and the British following the Anglo-Boer war of reign, as the means by which constitutionalism was to be introduced into South Africa.¹⁷⁹

During that period, it was customary for the British Crown to function as the Head of State within South Africa and to use prerogative powers that were not subject to checks and

¹⁷⁶ *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) para 18.

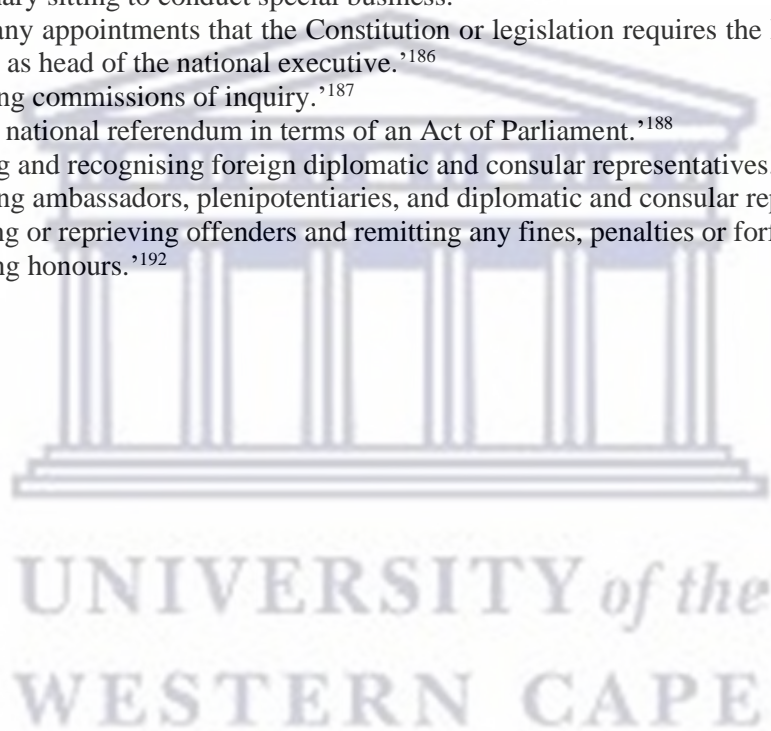
¹⁷⁷ Krsteski NGH 'Corruption in South Africa: Genesis and outlook' (2017) 5 *Journal of Process Management – New Technologies, International* 52.

¹⁷⁸ Murray C & Stacey R *The President and the National Executive* (2013) 112.

¹⁷⁹ Steward A 'The British Government and the South African Neutrality Crisis, 1938-39' (2008) 23 *The English Historical Review* 947.

balances.¹⁸⁰ This implied that the British Crown had complete discretion to use these powers as it saw fit.¹⁸¹ The author maintains that those prerogative powers still exists in section 84(2) of the 1996 Constitution today which state that the Head of State acts alone without the need for consultation when exercising section 84(2). These include:

- a. 'Assenting to and signing Bills.'¹⁸²
- b. 'Referring a Bill back to the National Assembly for reconsideration of the Bill's constitutionality.'¹⁸³
- c. 'Referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality.'¹⁸⁴
- d. 'Summoning the National Assembly, the National Council of Provinces or Parliament to an extraordinary sitting to conduct special business.'¹⁸⁵
- e. 'Making any appointments that the Constitution or legislation requires the President to make, other than as head of the national executive.'¹⁸⁶
- f. 'Appointing commissions of inquiry.'¹⁸⁷
- g. 'Calling a national referendum in terms of an Act of Parliament.'¹⁸⁸
- h. 'Receiving and recognising foreign diplomatic and consular representatives.'¹⁸⁹
- i. 'Appointing ambassadors, plenipotentiaries, and diplomatic and consular representatives.'¹⁹⁰
- j. 'Pardoning or reprieving offenders and remitting any fines, penalties or forfeitures.'¹⁹¹
- k. 'Conferring honours.'¹⁹²



¹⁸⁰ Woolman S & Swanepoel J 'Constitutional history' (2009) 1 *Constitutional Law of South Africa* 15.

¹⁸¹ Woolman S & Swanepoel J 'Constitutional history' (2009) 1 *Constitutional Law of South Africa* 15.

¹⁸² See section 84 of the Constitution of the Republic of South Africa, 1996.

¹⁸³ See section 84 of the Constitution of the Republic of South Africa, 1996.

¹⁸⁴ See section 84 of the Constitution of the Republic of South Africa, 1996.

¹⁸⁵ See section 84 of the Constitution of the Republic of South Africa, 1996.

¹⁸⁶ See section 84 of the Constitution of the Republic of South Africa, 1996.

¹⁸⁷ See section 84 of the Constitution of the Republic of South Africa, 1996.

¹⁸⁸ See section 84 of the Constitution of the Republic of South Africa, 1996.

¹⁸⁹ See section 84 of the Constitution of the Republic of South Africa, 1996.

¹⁹⁰ See section 84 of the Constitution of the Republic of South Africa, 1996.

¹⁹¹ See section 84 of the Constitution of the Republic of South Africa, 1996.

¹⁹² See section 84 of the Constitution of the Republic of South Africa, 1996.

3.2.2.2 *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC)

The 1997 case, the *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) was the first case that attempted to unpack the President's powers as Head of State and on the reviewability of the Head of State's constitutional discretion and would test the preconceived notion about the absolute authority that is held by the Head of State.

In 1994, within his constitutional ambit under section 82(1)(k) of the Interim Constitution, former President Nelson Mandela and his two Deputy Presidents at the time enacted the Presidential Act No. 17, that would pardon the remainder of the sentences of the category of direct relevance to these proceedings was "all mothers in prison on 10 May 1994, with minor children under the age of twelve (12) years."¹⁹³ The controversial category that led to the court proceedings, qualified a pardon to all mothers in prison on a certain date who had minor children under the age of 12 years, however, did not do the same for fathers.¹⁹⁴ Democratic constitutional law would consider this discriminatory and requires the determination of whether such discrimination is unfair or not.

3.2.2.3 Equality within the democratic constitutionalism of South Africa

When it comes to enforcing and protecting the value of equality it is important for the court to be guardian against the state from discriminating directly or indirectly.¹⁹⁵ The author describes this as a constitutional value that requires that enforcing agents of state legislation, and the executive branch, to balance that discretion and operate within constitutional ethics that hold the Bill of Rights as one of the cornerstones of this state.

When a court is presented with a statute or legislative provision that is claimed to be unconstitutional because it violates the principle of equality, the court has to apply the devised

¹⁹³ *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 2.

¹⁹⁴ *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 2.

¹⁹⁵ Deane T & Brijmohanlall R 'The Constitutional Court's approach to equality' (2003) 44 *Sabinet African Journals* 97.

three-step process, established in *Harksen v Lane* 1997 (11) BCLR 1489 to assess whether the provision is fair or not. Once the discrimination has been proven, its unfairness must also be proven.¹⁹⁶ Even if it is determined that the discrimination was unfair, the next step will be to try to defend it using the limitation clause.¹⁹⁷

The Constitutional Court agreed that the President's power to pardon or reprieve convicts under section 82(1) of the Interim Constitution constituted an ancillary of prerogative power as the Head of State.¹⁹⁸ The difference is that this presidential power was, under section 82(1), subject to judicial review.¹⁹⁹ In spite of the fact that it was proved that discrimination on the basis of gender existed, the majority of the Constitutional Court determined that this discrimination was not unjustified.

To assess if the impact was unjust, it was necessary to consider the group that had been disadvantaged, the type of authority used, and the type of interest that had been impacted.²⁰⁰ According to the majority of the Constitutional Court, even while the pardon may have denied fathers a chance that it gave women, it cannot be stated that it fundamentally diminished men's sense of equal value and dignity.²⁰¹

The author challenges the majority decision, arguing that the Constitutional Court erred in this case and that its reasoning was rigid and blind to the ideology that the president's exclusive role as the Head of State violated an essential founding constitutional trait "equality." The author also claims that the court focused too much on the question of whether the President has the authority to definitively grant the pardon instead of protecting central empowerment of the Bill of Rights.

¹⁹⁶ *Harksen v Lane NO and Others* 1997 (11) BCLR 1489 para 53.

¹⁹⁷ *Harksen v Lane NO and Others* 1997 (11) BCLR 1489 para 49.

¹⁹⁸ *Harksen v Lane NO and Others* 1997 (11) BCLR 1489 para 13.

¹⁹⁹ *Harksen v Lane NO and Others* 1997 (11) BCLR 1489 para 52.

²⁰⁰ *Harksen v Lane NO and Others* 1997 (11) BCLR 1489 para 52.

²⁰¹ *Harksen v Lane NO and Others* 1997 (11) BCLR 1489 para 67.

In addition to supporting former President Mandela's assertion that the decision was made with the children's best interests in mind, the author wants to make clear that, however, the President and other branches of government are subject to all laws. In cases like *Hugo*, the President's unique power as Head of State permits it to deviate from the 1996 Constitution. The author uses *Hugo* to demonstrate that although the judiciary can correct misinterpretations of the Head of State, it is not always able to guard the Head of State's prerogative character from conflicting fundamental constitutional rights. This is particularly relevant in view of the court's constitutional order-defending role as established by the 1996 Constitution, particularly considering that inequality is frequently mentioned as the main obstacle to growth and change in South Africa's post-apartheid.²⁰²

Judge Kriegler in *President of the Republic of South Africa v Hugo* (1997) 6 BCLR 708 (CC) at para 74, is quoted as stating:

‘The South African Constitution is primarily and emphatically an egalitarian Constitution. The supreme laws of comparable constitutional states may underscore other principles and rights. But in light of our own particular history, and our vision for the future, a Constitution was written with equality at its centre. Equality is our Constitution’s focus and its organising principle.’²⁰³

The 1996 Constitution within its preamble necessitates that the government enforce laws at the state level to combat unfair discrimination and advance equality. De Vos states that:

‘Equality, freedom and human dignity rights should be interpreted as giving effect to the promise of equality.’²⁰⁴

Given this, the author suggests that the decisions made by the Head of State should be scrutinised by a variety of constitutional defenders and should be measured against the constitutional fundamental principles in section 1 of the 1996 Constitution. The political

²⁰² Smith A ‘Equality constitutional adjudication in South Africa’ (2014) 14 *African Human Rights Law Journal* 611.

²⁰³ *President of the Republic of South Africa v Hugo* (1997) 6 BCLR 708 (CC) 74.

²⁰⁴ De Vos P & Jaco B ‘Same-sex marriage, civil unions and domestic partnerships in South Africa: Critical reflections on an ongoing saga’ (2007) 124 *South African Law Journal* 79.

character of the constitutional defenders appointed for presidential oversight is very complicated, thus there is a need for refinery.

3.2.2.4 Separation of powers and constitutionalism in South Africa

This paper further argues that the list of responsibilities falling under the President's purview as the Head of State still raises doubts about the 1996 Constitution's adherence to the principle of separation of powers, which aims to establish a balance between the legislative, executive, and judicial branches. Particularly in this instance, a separation between the judiciary and the executive.

The separation of powers ought to be the centre of governance in South Africa and subsequently that goal would be furthered through non-conflicting constitutional discretions which would centre the boundaries of each state organ. The introduction of the separation of powers between the branches of government was very important for South Africa and marked a significant progression given the history of the country and government overlapping its powers.

‘The doctrine of separation of powers seeks to restrict the dominance of either an individual or institution while holding the components of government.’²⁰⁵ Accordingly, this questioning should really leave an unsettling stance towards the democratic nature of South Africa as the doctrine of separation of powers is one of the fundamental pillars of democracy.

Currently, each of the branches of government has identifiable functions and responsibilities that aim to serve the state and its citizens and are accompanied by checks and balances that ensure openness, responsiveness, and accountability.²⁰⁶ The court is one of the tools used by

²⁰⁵ Magabe TT & Kola OO ‘Separation of powers, checks and balances and judicial exercise of self-restraint: An analysis of case law’ (2021) 42 *Obiter* 3.

²⁰⁶ Munzhedzi PH ‘The role of Separation of powers in ensuring public accountability in South Africa: Policy versus Practice’ 2017 *International Conference on Public Administration and Development Alternatives (IPADA), The 2nd Annual Conference on The Independence of African States in the Age of Globalisation* 80.

the system of checks and balances to hold the other branches of government responsible and declare any decision or action taken by the legislative or executive branch to be unlawful or unconstitutional as the court serves as the guardian and protector of the 1996 Constitution.²⁰⁷

As such, the idea of checks and balances enables the other branches of government to monitor instances in which one branch dissipates its authority or carries out actions for which it is not authorised and prevents the misemployment of authority. Thus, there must be a devoted understanding amongst the branches on the analysis of the doctrine to differentiate between institutional interests, personal interests, and governmental interests.²⁰⁸

The Court in *Van Rooyen v The State* 2002 (8) BCLR 810 (CC) maintained that:

‘Where constitutional text is informative with respect to a separation of powers issue, it is important not to leap over that text in favour of abstract principles that one might wish to see embodied in our regime of separated powers, but that might not in fact have found their way into our Constitution’s structure’²⁰⁹

Some authors argue that there was foresight between the branches of government overlapping their functions for the efficient exercise of their powers. Majapelo has been quoted as saying that:

‘Sight should not be lost of the fact that the complete separation of powers is not possible, neither in theory nor in practice. Some overlapping is unavoidable; given the fact that we talk here of spheres of what is in fact one government.’²¹⁰

Hence, the judicial authority was put in place to be the ultimate oversight authority to ensure that there is an existence of checks and balances between each branch, of course guarding their boundaries with interfering with the desired functioning capacity of each organ of state. This will be explored later in this chapter.

²⁰⁷ Kruger R ‘The Ebb and Flow of the Separation of Powers in South African Constitutional Law – the Glenister Litigation Campaign’ (2015) 48 *Law and Politics in Africa, Asia and Latin America* 58.

²⁰⁸ Kruger R ‘The Ebb and Flow of the Separation of Powers in South African Constitutional Law – the Glenister Litigation Campaign’ (2015) 48 *Law and Politics in Africa, Asia and Latin America* 58.

²⁰⁹ *Van Rooyen and Others v The State and Others* 2002 (5) SA 246 para 34.

²¹⁰ Mojapelo PM ‘Doctrine of separation of powers: a South African perspective’ 2013 *Advocate* 37.

3.2.3 Section 86- Election of President

A country's institutional qualities and overall systemic effectiveness depend on the government's branches' capacity to cooperate, and exercise discretion responsibly. Therefore, control within these branches, and even more so, the application of that control to maintain the orderly operation of the state and its harmonious coexistence for the common good, are also crucial factors that contribute to the stability of a state.

One of the ways to demonstrate harmony between constitutional law and government power within a democratic sphere is the promotion of an electoral system. Section 19 of the 1996 Constitution, the right to vote, affirms representation and public participation as one of the core values of democracy.²¹¹ Section 87 of the 1996 Constitution, requires the President to swear or affirm that he will be faithful to the Republic and the 1996 Constitution when he takes office, and is required to therefore stop serving as a member of the National Assembly within five days thereafter.²¹²

The constitutional mandate that a person can only be elected to the National Assembly under our current electoral system if their name is on a party list and the fact that only political parties have the authority to remove such an elected member from office for non-party-affiliated offences exacerbates the idea of “best interests of the party first”.²¹³ As such, what procedures are in place to ensure that parliament members do not place above party politics and interests when exercising their constitutional mandates?

The criticism from the author is that in South Africa, a leader of an elected political party is the one that is set to be the President elect which is where the author enquires about the influence

²¹¹ See section 19 of the Constitution of the Republic of South Africa, 1996.

²¹² See section 87 of the Constitution of the Republic of South Africa, 1996

²¹³ *Economic Freedom Fighters v Speaker of the National Assembly* [2016] ZAWCHC 210 para 18.

of politics unto the integrity of the President. The author submits that the contrast with the authority passed by the right to vote is between the obligation that the President has to prioritise the needs of the citizens, which should be of more concern for the President, and the complicated political ideals from the President's political party that he might incur. "Meaning, in the event of conflict between upholding constitutional values and party loyalty, their irrevocable undertaking to in effect serve the people and do only what is in their best interests must prevail".²¹⁴

There is no denying that a wide range of non-political situations have the potential to weaken the authority of the President. However, considering the variety of factors influencing the power of the executive branch and the continual exchanges between political ideas, institutions, and practices, the President may find himself engulfed by political rhetoric.

Hence, the President elect can be said to easily find himself overwhelmed by political ideals of his political party and transform presidential leadership into political patronage. The term political patronage speaks to the gatekeeping of positions, resources, and various opportunities of government for those who are dedicated to the mutual expectations and desires using state authority.²¹⁵ "It is important to establish how extensive is political interference, influence or pressure unto the executive branches' exercise of discretion".²¹⁶

3.2.3.1 The Zondo Commission Inquiry and party politics within the executive

The Zondo Commission of Inquiry of State Capture (Zondo Commission) thoroughly examined how dominant party politics arise inside the executive branches' exercise of their constitutionally assigned authority in its 2022 report. The Zondo Commission was quoted as stating "understanding the role of the African National Congress (ANC) is vital to

²¹⁴ *Hanekom v Zuma* (D6316/2019) [2019] ZAKZDHC 16 para 67.

²¹⁵ Beresford A 'Power, Patronage, and gatekeeper politics in South Africa' (2015) 114 *African Affairs* 228.

²¹⁶ *Zuma v National Director of Public Prosecutions* [2009] 1 All SA 54 (N) para 176.

understanding state capture in South Africa.”²¹⁷ The ANC has been the ruling party in South Africa for last 29 years. The Zondo Commission commented that the national executive of the ANC has a disproportionate amount of authority, and as a result, the legislature just obeys the orders of the central government²¹⁸ as such the allegations that were discussed were:

- a. ‘The veracity of allegations that the then Deputy Minister of Finance, Mr Mcebisi Jonas, and Ms Vytjie Mentor, a Member of Parliament, 6 were offered positions in cabinet by members of the Gupta family.’²¹⁹
- b. ‘All the business dealings of the Gupta family with government departments and SOEs to determine whether there were irregularities, undue enrichment, corruption and/or undue influence in the award of contracts, mining licences, government advertising or other governmental services.’²²⁰
- c. ‘President Zuma’s role in the alleged offer of cabinet positions to Mr Jonas and Ms Mentor.’²²¹
- d. ‘President Zuma’s role in relation to the alleged corrupt offers and Gupta family involvement in the employment of cabinet members and directors of SOE boards.’²²²
- e. ‘Whether President Zuma acted improperly and in violation of the Executive Ethics Code.’²²³
- f. ‘The role and conduct of the cabinet in holding banks accountable for withdrawing banking facilities for Gupta owned companies and whether it was appropriate for cabinet to assist private business in this regard.’²²⁴

The author merely seeks to provide information about the state capture at Transnet for the intended purpose of this paper and to justify the argument of dominating party politics in the executive branch.

The key components of Transnet’s state capture included:

- a. ‘The appointment of Gupta associates to key positions within Transnet.’²²⁵

²¹⁷ Zondo RMM ‘State Capture, Corruption and Fraud in the Public Sector Including Organs of State’ (2022) *Report: Part III Vol. 1: State Capture Established* 132.

²¹⁸ Bronstein V ‘Reconciling regulation or confronting inconsistency? Conflict between national and provincial legislation’ (2006) 22 *South African Journal on Human Rights* 286.

²¹⁹ Zondo RMM ‘State Capture Established, President Ramaphosa’s Evidence and the Role of the ANC and Parliamentary Oversight’ (2022) *Report: Part VI Vol. 2: State Capture Established* 270.

²²⁰ Zondo RMM ‘State Capture Established, President Ramaphosa’s Evidence and the Role of the ANC and Parliamentary Oversight’ (2022) *Report: Part VI Vol. 2: State Capture Established* 271.

²²¹ Zondo RMM ‘State Capture Established, President Ramaphosa’s Evidence and the Role of the ANC and Parliamentary Oversight’ (2022) *Report: Part VI Vol. 2: State Capture Established* 271.

²²² Zondo RMM ‘State Capture Established, President Ramaphosa’s Evidence and the Role of the ANC and Parliamentary Oversight’ (2022) *Report: Part VI Vol. 2: State Capture Established* 271.

²²³ Zondo RMM ‘State Capture Established, President Ramaphosa’s Evidence and the Role of the ANC and Parliamentary Oversight’ (2022) *Report: Part VI Vol. 2: State Capture Established* 271.

²²⁴ Zondo RMM ‘State Capture Established, President Ramaphosa’s Evidence and the Role of the ANC and Parliamentary Oversight’ (2022) *Report: Part VI Vol. 2: State Capture Established* 271.

²²⁵ Zondo RMM ‘State Capture Established, President Ramaphosa’s Evidence and the Role of the ANC and Parliamentary Oversight’ (2022) *Report: Part VI Vol. 2: State Capture Established* 299.

- b. 'The kickback agreements between CNR/CSR/CRRC and Mr Essa's companies.'²²⁶
- c. 'The inclusion of Gupta linked companies as supplier development partners on Transnet contracts.'²²⁷
- d. 'The money laundering arrangements between Regiments and the companies associated with Mr Essa and Mr Moodley.'²²⁸
- e. 'The payment of cash bribes to officials and employees associated with Transnet presumably for their role in facilitating transactions that favoured the Gupta enterprise.'²²⁹

The Zondo Commission discovered evidence dated back to 2009 showing that, between 2009 and 2018, that there was a strategy to place specific individuals in positions of authority in order to start a concerted attempt to access and re-direct funds and benefits in significant procurements.²³⁰ This cooperation was orchestrated by the Gupta family and its affiliated businesses.²³¹

The intent was for the collaboration on upcoming purchases and guide Transnet's procurement procedure in a way that would reduce the influence of its operational functionaries or keep out of important decision-making processes.²³² Thus, state capture was initiated following Ms. Ramos' 2009 resignation as Group Chief Executive Officer (GCEO) President Zuma appointed Mr. Gigaba from the legislature, a Gupta associate, to the position of Minister of Public Enterprises in November 2010.

As part of his duties, Minister Gigaba rebuilt the Transnet board with his personal favourite candidates which resulted in the selection of Mr. Molefe as GCEO. Evidence was submitted by the Zondo Commission indicating that Mr. Molefe, a frequent visitor to the Gupta

²²⁶ Zondo RMM 'State Capture Established, President Ramaphosa's Evidence and the Role of the ANC and Parliamentary Oversight' (2022) *Report: Part VI Vol. 2: State Capture Established* 299.

²²⁷ Zondo RMM 'State Capture Established, President Ramaphosa's Evidence and the Role of the ANC and Parliamentary Oversight' (2022) *Report: Part VI Vol. 2: State Capture Established* 299.

²²⁸ Zondo RMM 'State Capture Established, President Ramaphosa's Evidence and the Role of the ANC and Parliamentary Oversight' (2022) *Report: Part VI Vol. 2: State Capture Established* 299.

²²⁹ Zondo RMM 'State Capture Established, President Ramaphosa's Evidence and the Role of the ANC and Parliamentary Oversight' (2022) *Report: Part VI Vol. 2: State Capture Established* 299.

²³⁰ Zondo RMM 'State Capture Established, President Ramaphosa's Evidence and the Role of the ANC and Parliamentary Oversight' (2022) *Report: Part VI Vol. 2: State Capture Established* 299.

²³¹ Zondo RMM 'State Capture Established, President Ramaphosa's Evidence and the Role of the ANC and Parliamentary Oversight' (2022) *Report: Part VI Vol. 2: State Capture Established* 299.

²³² Zondo RMM 'State Capture Established, President Ramaphosa's Evidence and the Role of the ANC and Parliamentary Oversight' (2022) *Report: Part VI Vol. 2: State Capture Established* 298.

Saxonwold complex, was appointed GCEO at Transnet and subsequently at Eskom, with support from the Gupta family.²³³

It is thus not unexpected that Transnet contracts worth over R41 204 billion were erroneously granted in favour of organisations connected to the Gupta company.²³⁴ This sum amounts to 72.21% of the total state payments for contracts.²³⁵ Transnet was ultimately burdened by the enormous financial losses brought on by the excesses, fraud, and corruption.

This brings up the question that the author finds so perplexing, how come the African National Congress (ANC), which is composed of the majority of parliamentarians, supported a president who so blatantly abused state power to avoid being charged with corruption between 2008 and 2018? Who seems to have enriched himself, his pals, and his associates through his office?²³⁶ Specifically, who was at the focus of a widely reported controversy just over the use of public monies to construct an extravagant mansion for himself among his impoverished rural supporters in Nkandla, KwaZulu-Natal?²³⁷

There is undoubtedly a conundrum for the executive and its relations to politics. The conflict of interest of the current constitutional validity of the dominant party endorsement is brought to light by the ethical quandaries in politics and administration of government power. The important aspect of politics in the executive branch is the confluence of dishonest and illegal behaviour that undermines the entire democratic political system rather than operating in the interests of the state.

²³³ Zondo RMM 'State Capture Established, President Ramaphosa's Evidence and the Role of the ANC and Parliamentary Oversight' (2022) *Report: Part VI Vol. 2: State Capture Established* 299.

²³⁴ Zondo RMM 'State Capture Established, President Ramaphosa's Evidence and the Role of the ANC and Parliamentary Oversight' (2022) *Report: Part VI Vol. 2: State Capture Established* 318.

²³⁵ Zondo RMM 'State Capture Established, President Ramaphosa's Evidence and the Role of the ANC and Parliamentary Oversight' (2022) *Report: Part VI Vol. 2: State Capture Established* 318.

²³⁶ Southall R 'Zuma: party leadership as electoral liability' (2014) 41 *Review of African Political Economy* 324.

²³⁷ Southall R 'Zuma: party leadership as electoral liability' (2014) 41 *Review of African Political Economy* 324.

3.2.4 Section 91- Cabinet

Acting as the Head of Cabinet is an ancillary function to the Head of Executive. In order to establish his cabinet, the President nominates a Deputy President and Ministers and determines each of their functions, allocating portfolios that are appropriate to the roles, and entrusting a cabinet member to government matters within the National Assembly.²³⁸ Consequently, it is considered that the cabinet represents the executive branch on a state level. According to constitutional law, no one other than the President may have an influence on the appointment or delegation of cabinet responsibilities.²³⁹ The author argues that in this regard presidential arm is stretched in a manner that almost gives the impression that his authority as the Head of Cabinet is absolute despite the political nature of that role.

Another item on the President's constitutional discretionary arm is the selection of his cabinet within the National Assembly, which is entrusted with holding the executive branch accountable in line with section 55 of the 1996 Constitution²⁴⁰ with the assistance from the Executive Ethics Code (Code). The Code establishes guidelines and compliance procedures for the appointment of the executive branch's cabinet which include the members of the cabinet having to disclose particulars of all his/her financial interests to the Secretary of Cabinet within the prescribed timeframe, which period commences on the day of the swearing in.²⁴¹ The Zondo Commission shows that the cabinet selection process is open to scrutiny.

The Head of Executive's exclusive power to choose his cabinet without seeking approval of an impartial third party and subsequently the threat it poses to South Africa's democracy are reflected in the Zondo Commission on State Capture findings. In December 2015, Zuma allowed members of the Gupta family and his son to participate in the process of removing and

²³⁸ Murray C & Stacey R *The President and the National Executive* (2013) 118.

²³⁹ Murray C & Stacey R *The President and the National Executive* (2013) 118.

²⁴⁰ See section 55 of the Constitution of the Republic of South Africa, 1996.

²⁴¹ Madonsela TN 'State Capture' (2016) *Report No.6 of 2016 /17* 67.

appointing Nene, the Minister of Finance.²⁴² This was a violation of the Code, as Zuma is obligated to select, appoint, and remove Ministers in a way that is legal and compliant with the Code.²⁴³

The Zondo Commission found that the Gupta family had prior knowledge that the Minister of Finance was to be removed within 6 weeks. It was exposed that the Deputy Minister Jonas was in line to replace Minister Nene as the Gupta family offered him the role in exchange for extending favours to their family business.²⁴⁴ The Zondo Commission obtained records that provided that the then Deputy Minister Jonas alleging that the offer for a position of Minister of Finance was linked to him being required to extend favours to the Gupta family.²⁴⁵ This then would have been in conflict with section 2(3)(c) of the Code which prohibits a member of the executive from acting in a way that is inconsistent with their position.²⁴⁶

However, at the end it was Minister Van Rooyen who replaced Minister Nene and there are multiple occasions highlighted by the Zondo Commission that account for the placement of Minister Van Rooyen at the Saxonwold area, one of the Gupta family residences, on at least seven occasions including on the day before he was announced as Minister.²⁴⁷ This explicit intrusion for the dignity of the executive branch of government, according to the author is even more dangerous as Van Rooyen also served as the member of parliament which as variously pointed out in this paper that it is responsible for the oversight of the executive branch. Thus, furthering the point made by the author that the President is exposed to select persons that may serve private interests instead of the interest of the government and its people.

²⁴² Madonsela TN 'State Capture' (2016) *Report No.6 of 2016 /17* 29.

²⁴³ Madonsela TN 'State Capture' (2016) *Report No.6 of 2016 /17* 34.

²⁴⁴ Madonsela TN 'State Capture' (2016) *Report No.6 of 2016 /17* 343.

²⁴⁵ Madonsela TN 'State Capture' (2016) *Report No.6 of 2016 /17* 343.

²⁴⁶ Madonsela TN 'State Capture' (2016) *Report No.6 of 2016 /17* 344.

²⁴⁷ Madonsela TN 'State Capture' (2016) *Report No.6 of 2016 /17* 14.

The Zondo Commission documented further involvement of the Gupta family in the appointment and dismissal of Ministers and directors of state-owned enterprises (SOEs) resulting in the improper and corrupt award of state contracts and benefits to the Gupta family's business empire.²⁴⁸ Members of cabinet, a former cabinet minister and other persons testified that the Gupta family offered bribes and or posts in exchange for certain benefits and that the president and or his family members were either present or facilitated the meetings.²⁴⁹ The Gupta family was reportedly compensated billions of rands in state contracts, therefore it was not unexpected that it was discovered that they helped Zuma purchase a R331 million home and assisted his son, Duduzane Zuma, in purchasing an R18 million luxury property in Dubai.²⁵⁰

The author argues that the failure of the cabinet members who testified to disclose these interactions not only undermined their constitutional obligations to preserve the stability and integrity of the government, but also violated section 34 of the Prevention and Combating of Corrupt Activities Act, 12 of 2004. This section requires those in positions of authority who know or should have reasonably suspected that someone else has committed an offensive act to report that knowledge or suspicion to any designated official.²⁵¹

Although the author must mention that a five-year term restriction for the National Assembly is established under Section 91(3) of the 1996 Constitution, which also allows the president to select two cabinet members from outside the National Assembly.²⁵² The resolution to the argument is the establishment of an independent body dedicated to the monitoring of cabinet

²⁴⁸ Wolf L 'The Remedial Action of the "State of Capture" Report in Perspective' (2017) 20 *Potchefstroom Electronic Law Journal* 49.

²⁴⁹ Wolf L 'The Remedial Action of the "State of Capture" Report in Perspective' (2017) 20 *Potchefstroom Electronic Law Journal* 2.

²⁵⁰ Wolf L 'The Remedial Action of the "State of Capture" Report in Perspective' (2017) 20 *Potchefstroom Electronic Law Journal* 5.

²⁵¹ See section 34 of the Prevention and Combating of Corrupt Activities Act, 12 of 2004.

²⁵² Murray C & Nakhjavani SA 'Republic of South Africa' (2006) *Federalism and Foreign Relations*, 216.

selection without any inquiries having to be instituted in order to qualify the selection process of the ministers to have been impartially scrutinised. In addition, the author holds that aside from having to select cabinet members, the selection process of the cabinet members does not ensure that persons selected for the position are qualified.

In support of the argument made by the author, Klein states that:

‘It is inconceivable that the system of appointments can be left unreformed. The national interest demands that the government operates under efficient and professional leadership which requires that the appointment procedure be transparent, and not driven by party political interests but to be made in accordance with objective criteria.’²⁵³

As previously said, oversight is necessary to determine if the executive branch of government is carrying out its constitutionally mandated responsibilities in an acceptable manner. Put another way, strengthening democracy, and decreasing corruption depend on the regulatory function being carried out effectively. Maganpoe gave a thorough explanation in terms of the argument made by the author on the political relations between parliament and the executive and the role of the 1996 Constitution. Maganpoe explained:

‘The argument is not whether the Constitution has not provided an adequate separation of powers but rather that the relationship created between the legislature and the executive creates room for a lack of effective executive accountability.’²⁵⁴

²⁵³ Klein D ‘New report shows the state of corruption in South Africa’ available at <https://www.occrp.org/en/daily/15751-new-report-shows-the-state-of-corruption-in-south-africa> (accessed 23 February 2022).

²⁵⁴ Maganoe S ‘Legislative Oversight and Executive Accountability in South Africa’ (2023) 26 *Potchefstroom Electronic Law Journal* 3.

3.2.5 Section 92- Accountability and responsibilities

Much like the President, the Ministers within their roles as a representative of cabinet, are subject to the standard of acting within the best interests of citizens. This function is extended by the Ministers' responsibility to ensure that state departments preserve state efficiency and service delivery.²⁵⁵ In *Mthembu-Mahanyele v Mail & Guardian Ltd and Another* [2004] 3 ALL SA 511 (SCA), the SCA provided that “the state, and its representatives, by virtue of the duties imposed upon them by the 1996 Constitution, are accountable to the public.”²⁵⁶

After the achievement of democracy, the political system of the country was expected to guarantee individual freedom and political equality including the efficient delivery of integrity within the civil service, public institutions, public services, government affiliated corporations, and the government itself.²⁵⁷ This would mean that getting rid of all the existing features of abuse of state resources for personal compensation and an additional elimination of the limited consequences that public officials have been subjected to. Thus, removing the ideology of the governing elite in the executive branch is supported by constitutional cornerstone as discussed in chapter two.

In *Premier of Mpumalanga v Executive Committee of State aided Schools, Eastern Transvaal* 1999 (2) BCLR 151 (CC), the Constitutional Court shared that the ability of the executive to exercise their legal capacity efficiently determines the democratic state of a nation.²⁵⁸

Among the fundamentals of democracy is indeed the involvement of parliament in overseeing the executive and is deeply embedded with the responsibility to maintain the executive answerable for its conduct and evaluate it in consideration of its adherence with the 1996 Constitution. Additionally, section 92(2) of the 1996 Constitution in support reiterates that the

²⁵⁵ Sojo A *Limiting Government: An introduction to Constitutionalism* (1999) 176.

²⁵⁶ *Mthembu-Mahanyele v Mail & Guardian Ltd and Another* [2004] ZASCA 67 para 66.

²⁵⁷ Aaken AV, Salzberger E & Voigt S ‘Criminal prosecution of public figures: confusion within the executive branch’ (2004) 15 *Constitutional Political Economy* 263.

²⁵⁸ *Premier of Mpumalanga v Executive Committee of State aided Schools, Eastern Transvaal* 1999 (2) SA 91 para 41.

roles taken by the members of the executive require a duty to report individually and collectively to Parliament.²⁵⁹

The concoction of parliamentary oversight measures derives from constitutional values of democracy, accountability, transparency, and public involvement.²⁶⁰ This oversight and accountability model sets guidelines for a variety of oversight procedures, including committee oversight, oversight visits, budget votes, questions for executive reply, member comments, notices of motion, discussions on issues of public significance, and constituency work.²⁶¹

Section 92(2) of the 1996 Constitution provides that:

“Members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.”²⁶²

Khampepe J provided that the authority given to public officials can only stretch as far as the boundaries within that authority enables them to, thus, the intention of the authority can be overpowered.²⁶³

The role of parliament is further extended as it bears the authority to lay the structure on the relations within government and establish what the parliament deems appropriate mechanisms and procedures to facilitate government arrangements and undertakings.²⁶⁴ The endangerment of section 92 of the 1996 Constitution is supported by the parliament’s history of not sufficiently ensuring that when the executive is in breach of its duties that such an act is followed by detention, prosecution or impeachment.²⁶⁵

²⁵⁹ See section 92(2) of the Constitution of the Republic of South Africa, 1996.

²⁶⁰ *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others* (2014) ZACC 32 para 167.

²⁶¹ *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others* (2014) ZACC 32 para 96.

²⁶² See section 92 of the Constitution of the Republic of South Africa.

²⁶³ *Head of Department, Department of Education, Free State Province v Welkom High School and Another* 2014 (2) SA 228 (CC) para 1.

²⁶⁴ *Adonisi and Others v Minister for Transport and Public Works Western Cape and Others; Minister of Human Settlements and Others v Premier of the Western Cape Province and Others* ZAWCHC 87 para 41.

²⁶⁵ *Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 487 (CC) para 17.

In 2022, allegations against President Cyril Ramaphosa surfaced as it was alleged that he conducted a serious misconduct that compromised his duty to the state as the President of the Republic, and herein created a conflict between his official responsibilities and private interests.²⁶⁶ It was alleged that Ramaphosa directed a member of the Presidential Protection unit, General Wally Rhoode, to deal with burglary and theft issues on the private farm of the President.²⁶⁷ The issue came in as it was submitted that the President misused his authority as the Head of the Presidential Protection Unit.²⁶⁸

The Presidential Protection Unit was established to ensure the personal protection of cabinet members and within the investigation conducted by the parliament it was determined that at the time that Ramaphosa gave the instruction to Rhoode, his life was not in danger, thus Ramaphosa was supposed to have reported the matter in terms of the law.²⁶⁹ This act by Ramaphosa extended his authority for his own personal benefit and was deemed to constitute misconduct and unlawfulness on the part of the President.²⁷⁰ Subsequently, a motion of no confidence was submitted by the parliament members, specifically, parliament members within the opposing party. Unfortunately, even after the discovery of the abovementioned allegations, parliament members voted 231-131 which meant that the motion of confidence did not pass.²⁷¹ Moseneke DCJ in *Mazibuko v Sisulu and Another* 2013 (11) BCLR 1297 (CC) provided that:

²⁶⁶ Ngcobo SS, Mapisa T & Sello M 'Report of the 89 Independent Panel: Appointed to Conduct A Preliminary Enquiry on the Motion proposing a section 89 Enquiry' (2022) 1 *Report of the Section 89 Independent Panel - Parliament of the Republic of South Africa* 4.

²⁶⁷ Ngcobo SS, Mapisa T & Sello M 'Report of the 89 Independent Panel: Appointed to Conduct A Preliminary Enquiry on the Motion proposing a section 89 Enquiry' (2022) 1 *Report of the Section 89 Independent Panel - Parliament of the Republic of South Africa* 4.

²⁶⁸ Ngcobo SS, Mapisa T & Sello M 'Report of the 89 Independent Panel: Appointed to Conduct A Preliminary Enquiry on the Motion proposing a section 89 Enquiry' (2022) 1 *Report of the Section 89 Independent Panel - Parliament of the Republic of South Africa* 5.

²⁶⁹ Ngcobo SS, Mapisa T & Sello M 'Report of the 89 Independent Panel: Appointed to Conduct A Preliminary Enquiry on the Motion proposing a section 89 Enquiry' (2022) 1 *Report of the Section 89 Independent Panel - Parliament of the Republic of South Africa* 5.

²⁷⁰ Ngcobo SS, Mapisa T & Sello M 'Report of the 89 Independent Panel: Appointed to Conduct A Preliminary Enquiry on the Motion proposing a section 89 Enquiry' (2022) 1 *Report of the Section 89 Independent Panel - Parliament of the Republic of South Africa* 5.

²⁷¹ Corruption Watch 'The year that was-review of Parliament's 2022' available at <https://www.corruptionwatch.org.za/the-year-that-was-parliament-2022-review/> (accessed 26 October 2023).

‘The right to initiate and move a motion of no confidence in terms of section 102(2) of the 1996 Constitution is perhaps the most important mechanism that may be employed by Parliament to hold the executive to account, and to interrogate executive performance.’²⁷²

The possible consequences of section 92 of the 1996 Constitution not being amended continues to invite abuse of authority by government members and other public officials and in which this reporting line for the government branch often results in a compromise of the country’s democracy and political system that ensure the state’s just use of rules of law and authority. The author further argues that is that section 92 of the 1996 Constitution makes the probability of efficient accountability for corruption or corrupt acts by cabinet members difficult and low thus affecting the quality of the rule of law within the state. Thus, the change in parliamentary authority overseeing the executive branch is supported by the author that the institutional separation of branches that share overlapping powers and authority to check and balance each other. The author expresses that the separation of powers should mean independent powers from any possible government affiliation.

3.5.6 Section 102- Motions of no confidence

A motion of a vote of no confidence is typically instituted against the President on the grounds of a violation of constitutional law, misconduct, inability to perform the duties required by the President.²⁷³ The grounds of removal are not exclusive, however, would have to be constitutionally justifiable when questioned.

A resolution or a motion of no confidence in the legislature may frequently be proposed by any member of the legislature.²⁷⁴ Before it is presented, the branch would evaluate it and choose whether to accept it.²⁷⁵ Thus, it implements one of the core principles of democratic systems,

²⁷² *Mazibuko v Sisulu and Another* 2013 (11) BCLR 1297 (CC) para 45.

²⁷³ Mohiadin A ‘Unchecked executive power: Lessons in effective government design’ 2008 *SAIIA Occasional Papers Series* 1.

²⁷⁴ *United Democratic Movement v Speaker of the National Assembly and Others* 2017 (8) BCLR 1061 (CC) para 45.

²⁷⁵ *Mazibuko v Sisulu and Another* 2013 (11) BCLR 1297 (CC) para 57.

according to which the executive branch may only remain in power with the support of the majority of the legislature as the legislature represents the people of the state.²⁷⁶ This constitutional motion is essential to our democratic system because it is the means by which the Constitution maintains the ongoing obligation between parliament and the governing body to maintain stability of the state.

In *United Democratic Movement v Speaker of the National Assembly and Others* (CCT89/17) [2017] ZACC 21, Mogoeng CJ acknowledged and highlighted the importance that any act that needs to be achieved through a vote within the legislative branch of government with the aim of seeking what is in the best interest of the Republic and its citizens, must be done with the embodiment of fairness and fearlessness.²⁷⁷ Thus, he supported the method of voting by a secret ballot.²⁷⁸

The author takes the stance by the Chief Justice of the Constitutional Court as means of acknowledging that both the legislature and the executive exist within a political realm that at times share similar interests which might influence and affect how parliamentary members oversee the government and how members of the executive exercise their authority within government.

The legislature must be able to perform their duties without undue influence, intimidation, or fear of disapproval by others. However, the decision in *United Democratic Movement v Speaker of the National Assembly and Others* (CCT89/17) [2017] ZACC 21 the Constitutional Court held that, to institute a motion of no confidence against President using a secret ballot was not binding as was clearly based on the case-by-case basis.

²⁷⁶ *United Democratic Movement v Speaker of the National Assembly and Others* 2017 (8) BCLR 1061 (CC) para 28.

²⁷⁷ *United Democratic Movement v Speaker of the National Assembly and Others* 2017 (8) BCLR 1061 (CC) para 73.

²⁷⁸ *United Democratic Movement v Speaker of the National Assembly and Others* 2017 (8) BCLR 1061 (CC) para 73.

As previously discussed, in 2022, President Ramaphosa was accused of using state authority for his private use and a failed motion of no confidence was instituted against him. The most important part to mention was that motion of no confidence was not done using a secret ballot this time around. This leads for the author to put into question if it can be determined by the Chief Justice of the highest court in the country that indeed the process and procedure when instituting a motion of no confidence needs protection from political influence as a measure to ensure thorough oversight of the executive branch, why would the legislature not freely embed the use of the secret ballot within the procedure of section 102 of the 1996 Constitution as parliament is empowered to determine its own oversight procedures and arrangements?

In *United Democratic Movement v Speaker of the National Assembly and Others* (CCT89/17) [2017] ZACC 21 it was stated that the motion of no confidence institution through a secret ballot “was of obviously high importance, and that the public interest necessitated the guarantee of a truly democratic outcome that could be achieved through the secret ballot.”²⁷⁹

The author also puts into question the power given to the Speaker of the National Assembly to determine whether a secret ballot is necessary for the motion of no confidence as prescribed in *United Democratic Movement v Speaker of the National Assembly and Others* (CCT89/17) [2017] ZACC 21. The Speaker is elected every presidential term, or should a vacancy become available, by a majority vote of parliament, which would be the vote of the ruling party.²⁸⁰ The Speaker is empowered as the head spokesperson of parliament and takes on responsibilities such as presiding over sittings of parliament and maintaining order and

²⁷⁹ *United Democratic Movement v Speaker of the National Assembly and Others* 2017 (8) BCLR 1061 (CC) para 15.

²⁸⁰ *United Democratic Movement v Speaker of the National Assembly and Others* 2017 (8) BCLR 1061 (CC) para 53.

ensuring the application of rules.²⁸¹ Thus, the author questions how the empowered authority granted to the Speaker can be protected from politisation.

Often when the minority parties within parliament complain about the legislature's decisions, there is no room that is left open to allow them to pass critique.²⁸² Blame is cast on the constitutional structure for the ineffectiveness of oversight mechanisms as it allows for most members of the ruling party to dominate parliament. Minority parties can be subject to conducts such as intimidation, overpowering, bias procedures, and the coercion of the minority when instituting such oversight mechanisms.²⁸³ It is submitted that it is the minority party that appears to always seek to hold the executive branch accountable within parliament even if that battle is often lost as previously demonstrated. Whether politics are the core reason for the minority party to be at the front seat of instituting oversight mechanisms over the executive use of authority remains to be determined.

3.3 Politisation of the anti-corruption oversight institutions

In light of section 7(2) of the 1996 Constitution which obliges the state to take reasonable and effective measures to respect, protect, promote, and fulfil constitutional rights, citizens had high hopes for a stable post-apartheid South Africa. Unfortunately, despite being a democratic nation for 29 years, South Africa has had to operate under a corrupt system that is characterised by cronyism, nepotism, and patronage networks as well as overt corruption in certain state-

²⁸¹ Parliamentary Monitoring Group 'The Role of Speaker of the National Assembly' available <https://pmg.org.za/blog/The%20Role%20of%20Speaker%20of%20the%20National%20Assembly> (accessed 26 October 2023).

²⁸² Munzhedzi PH 'Fostering public accountability in South Africa: A reflection challenges and successes' (2016) 12 *The journal for Transdisciplinary Research in the Southern Africa* 632.

²⁸³ Buhlungu S, Daniel J, Southali R & Lutchman J *State of the nation: South Africa* (2007) 443.

owned businesses.²⁸⁴ This corruption has been evident in the country's political interests and needs, as will be discussed below.

Although the implementation of the theory of anti-corruption regime has been repeatedly presented in the state, those regimes are being overwhelmed by the ongoing rise in conflicts between the executive branch's private economic affairs and governmental authority, as well as by the emergence of new strategies for misusing public resources and independent agencies tasked with defending the nation's freedom, stability, and dignity. The author's goal is to expose the shortcomings of the present approaches taken to combat corruption and to highlight the harm it does to the nation's political growth and constitutional order.

The argument presented by the author in this research must reinforce that the criticism is not aimed at painting the narrative that the 1996 Constitution's principles, values, and fundamentals are superfluous. The argument presented here is simply that the 1996 Constitution has allowed the executive branch to have their hands in too many constitutional empowered institutions that are to ensure the practise of good governance and demonstrate the democratic values and principles enshrined in the 1996 Constitution.

In *Helen Suzman Foundation v President of the Republic of South Africa* 2015 (1) BCLR 1 (CC), the Constitutional Court drew a staple for anti-corruption mechanisms and said that the function of an anti-corruption institution must be inter linked with constitutional values.²⁸⁵ These anti-corruption mechanisms are autonomous democratic entities with constitutional authority. The common practice is that chapter 9 of the 1996 Constitution institutions are to ensure that the government is not part of the problem, instead part of the solution when it comes

²⁸⁴ Campbell J 'South Africa's Ramaphosa Tackles Corruption and Strengthens His Hand' available at [South Africa's Ramaphosa Tackles Corruption and Strengthens His Hand | Council on Foreign Relations \(cfr.org\)](http://www.cfr.org) (accessed 26 October 2023).

²⁸⁵ *Helen Suzman Foundation v President of the Republic of South Africa* 2015 (1) BCLR 1 (CC) para 16.

to corruption in South Africa, and that these institutions are designed to monitor government actions independently.²⁸⁶

The determination of an independent institution is to be reflected in each function it possesses and it is to be noted that ‘justice can never be adequately pursued only as a goal or an idea but also reflected by the means employed’.²⁸⁷ Thus, extension to the executive of the constitutional discretionary powers that serve to tie up loose ends of rules and regulations that are unable to be expressly accounted for within the law as the branch of government that is entrusted with implementing the law. There for an element of independence is granted to the executive to head anti-corruption institutions empowered by chapter 9 of the 1996 Constitution. It is submitted that it is within this independence that officials make capital of or arguably are allowed to commit corruption.

Although, the Constitutional Court in *Glenister v President of the Republic of South Africa and Others* 2011(3) A 347 (CC) (Glenister II) provided that independence is needed to allow independent institutions to function effectively, however, oversight from the member of the executive does not expropriate the independence element.²⁸⁸ The Constitutional Court reasoned that what affects enforceability and effectivity is not political interference but the intensity of political oversight.²⁸⁹

It is submitted that the biggest threat identified to anti-corruption agencies is the obligation to report their findings to the special Cabinet Committee, a procedure tainted by the centralised political control. The true nature of an anti-corruption entity, its form, and structure have a lasting impact on their effectiveness and their ability to protect themselves from undue political

²⁸⁶ See section 181 of the Constitution of the Republic of South Africa, 1996.

²⁸⁷ Ford CA ‘Watching the Watchdog: Security Oversight Law in the New South Africa’ (1999) 3 *Michigan Journal of Race of Law* 71.

²⁸⁸ *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) para 142.

²⁸⁹ *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) para 215.

interference.²⁹⁰ However, due to the contamination of institutions, some chapter 9 institutions have been affected by their poor performance and this has limited their credibility.²⁹¹ Criticism falls on politicisation. The list of anti-corruption agencies that have fallen victim to the politisation of the reporting mandate are:

3.3.1 Public Protector

The confirmation of autonomy being a pillar of effective governing is not an unfamiliar concept. The Office of the Public Protector is constitutionally acclaimed to be independent and impartial as per section 181 of the 1996 Constitution. The SCA has reinforced the importance of this office by referring to the institution as a guardian who is to guarantee that the government discharges its responsibilities without fear, favour, and prejudice.²⁹² The Office of the Public Protector is considered to be one of the verifications of the South African democracy.

According to section 182 of the 1996 Constitution, the Public Protector is given proper jurisdiction using national laws to exam any practice in state affairs or public administration in any sphere of power.²⁹³ These alleged practices' must be suspected of being inappropriate or resulting in illicit conduct.²⁹⁴ Subsequently, the Public Protector must denounce these alleged practices' and take the appropriate corrective measures.²⁹⁵ In addition, except in special circumstances, the report issued by the Public Protector must be made public.²⁹⁶

In section 193 of the 1996 Constitution, the President upon the suggestion of the National Assembly appoints the Public Protector. Subsequently, section 194 of the 1996 Constitution stipulates that the National Assembly has the right to remove the Public Protector for

²⁹⁰ Reeves C 'After Glenister: The case for a new dedicated agency' 2012 *Institute for Security Studies* 25.

²⁹¹ Reeves C 'After Glenister: The case for a new dedicated agency' 2012 *Institute for Security Studies* 25.

²⁹² *South African Broadcasting Corporation Soc Ltd v Democratic Alliance and Others* [2015] 4 ALL SA 719 (SCA) para 2.

²⁹³ See section 182(1) of the Constitution of the Republic of South Africa, 1996.

²⁹⁴ See section 182(1) of the Constitution of the Republic of South Africa, 1996.

²⁹⁵ See section 182(1) of the Constitution of the Republic of South Africa, 1996.

²⁹⁶ See section 182(5) of the Constitution of the Republic of South Africa, 1996.

misconduct, incompetency, and incapacity and that the National Assembly can govern a pass of resolution calling for the removal of the Public Protector.²⁹⁷ According to the 1996 Constitution, only a resolution approved by at least two thirds of the National Assembly's members may remove the Public Protector from office.²⁹⁸

Furthermore, as stated in section 181(5) of the 1996 Constitution, the Office of the Public Protector is answerable to the National Assembly and is required to provide an annual report to the National Assembly detailing its operations and fulfilment of its duties.²⁹⁹ The authors' concern comes in due to the current status of political form and reputation of the National Assembly as detailed throughout this paper, and this could endanger the constitutional process currently dangerous and especially because of the consistent behaviour of the ANC, which forms majority of the National Assembly, as being unashamed of moving away from the embodiment of the spirit of the 1996 Constitution when it comes to embracing the doctrine of separation of powers or politics and government.³⁰⁰

The author argues that as a result of the lack of respect and contempt for constitutional supremacy and the purpose of the doctrine of separation of powers, the executive and legislative bodies seem to consider the position of the Public Protector as an intervention from their ultimate goals as will be demonstrated with the case law below.

The author holds that the Office of the Public Protector continues to be an important institution that provides for the ability to defend government against corruption and embezzlement within public institutions through investigative powers and remedial actions that are constitutionally

²⁹⁷ See section 194 of the Constitution of the Republic of South Africa, 1996.

²⁹⁸ See section 194 of the Constitution of the Republic of South Africa, 1996.

²⁹⁹ Section 181(5) of the Constitution of the Republic of South Africa, 1996.

³⁰⁰ Thipanyane T 'Strengthening Constitutional Democracy: Progress and Challenges of the South African Human Rights Commission and Public Protector' (2015) 60 *New York Law School Review* 125.

empowered. Subsequently, the author holds that under no circumstances should this office find itself undermined.

However, 2011 had exposed the Office of the Public Protector as a vulnerable institution to political interference with its discretion to investigate economic crimes affecting the state. Then, the National Commissioner of the South African Police Service, Bheki Cele was facing allegations that included the unlawful police lease agreements and was subsequently suspended from office.³⁰¹ The Public Protector released a report stating that Cele's conduct was found to be illegal, however, the remedial action was referred to a board of inquiry appointed by the President that lacked investigative powers.³⁰² In the end there resided the absence of liability on the part of the National Commissioner and now the greatest disrespect to South Africa's founding values of democracy is that Cele now holds office as the Minister of Police, the individual that is associated with criminal acts.³⁰³

In 2016, Thuli Madonsela, the former Public Protector, in her report into state capture, identified 11 illicit offences that implicated former President Jacob Zuma and his counterparts in a corruption scandal.³⁰⁴ The report contained allegations of attempted bribes against the former Deputy Minister of Finance, Mcebisi Jonas, who was one of Zuma's counterparts who had been listed to have committed illicit offences within the report that he within his duty

³⁰¹ Kinnes I & Newham G 'Freeing the Hawks: Why an anti-corruption agency should not be in the SAPS' 2012 *South Africa Crime Quarterly* 35.

³⁰² Kinnes I & Newham G 'Freeing the Hawks: Why an anti-corruption agency should not be in the SAPS' 2012 *South African Crime Quarterly* 35.

³⁰³ Kinnes I & Newham G 'Freeing the Hawks: Why an anti-corruption agency should not be in the SAPS' 2012 *South African Crime Quarterly* 35.

³⁰⁴ Du Toit P 'The state capture inquiry: what you need to know available at <https://www.news24.com/news24/Analysis/the-state-capture-inquiry-what-you-need-to-know-20180819> (accessed 20 August 2022).

transferred his state power to the infamous Gupta family and thus had inefficient procedural protocol when he was tasked with constitutional mandates.³⁰⁵

Madonsela, therefore, called for a remedial action on her findings. This did not go undisputed by Zuma. However, the remedial action was judicially confirmed and thereby led into the establishment of the Zondo Commission which concluded in 2022.

The ordered remedial actions were that:

- a. 'The President to appoint, within 30 days, a commission of inquiry headed by a judge solely selected by the Chief Justice who shall provide one name of the President.'³⁰⁶
- b. 'The National Treasury to ensure that the commission is adequately resourced.'³⁰⁷
- c. 'The judge to be given the power to appoint his/her own staff and to investigate all the issues using the record of this investigation and the report as a starting point.'³⁰⁸
- d. 'The commission of inquiry to be given powers of evidence collection that are no less than that of Public Protector.'³⁰⁹
- e. 'The commission of inquiry to complete its task and to present the report with findings and recommendations to the President within 180days. The President shall submit a copy with an indication of his/her intentions regarding the implementation of Parliament within 14 days of releasing the report.'³¹⁰

The *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* 2015 (4) All SA 719 (SCA) demonstrated one of the long-standing legal battles between the executive branch and the Public Protector regarding the enforceability and binding of a remedial action made by the Public Protector. In this case a report was released from the Office of the Public Protector containing the allegations of suspicious dealings of Mr Motsoeneng, who was the acting Chief Operating Officer (COO) at the South African Broadcasting Corporation (SABC) for his dishonesty over the false portrayal of his credentials, misuse of authority, and inappropriate behaviour in the appointment, raises in pay, suspensions, and terminations of different SABC executives indicating that Mr. Motsoeneng had therefore been

³⁰⁵ Du Toit P 'The state capture inquiry: what you need to know available at <https://www.news24.com/news24/Analysis/the-state-capture-inquiry-what-you-need-to-know-20180819> (accessed 20 August 2022).

³⁰⁶ Madonsela TN 'State Capture' (2016) *Report No.6 of 2016 /17* 353.

³⁰⁷ Madonsela TN 'State Capture' (2016) *Report No.6 of 2016 /17* 354.

³⁰⁸ Madonsela TN 'State Capture' (2016) *Report No.6 of 2016 /17* 354.

³⁰⁹ Madonsela TN 'State Capture' (2016) *Report No.6 of 2016 /17* 354.

³¹⁰ Madonsela TN 'State Capture' (2016) *Report No.6 of 2016 /17* 354.

given permission by "successive boards to operate above the law."³¹¹ Furthermore, in respect to Mr. Motsoeneng, the Public Protector had found that:

- a. 'His appointment as Acting COO was irregular.'³¹²
- b. 'The former Chairperson of the SABC Board, Dr Ben Ngubane, had acted irregularly when he ordered that the qualification requirements for the appointment to the position of COO be altered to suit Mr Motsoeneng's circumstances.'³¹³
- c. 'His salary progression from R1.5 million to R2.4 million in one fiscal year was irregular.'
- d. 'He had abused his power and position to unduly benefit himself.'³¹⁴
- e. 'He had fraudulently misrepresented, when completing his job application form in 1995 and thereafter in 2003 when applying for the post of Executive Producer: Current Affairs, that he had matriculated.'³¹⁵
- f. 'He had been appointed to several posts at the SABC despite not having the appropriate qualifications for those posts.'³¹⁶
- g. 'He was responsible, as part of the SABC management, for the irregular appointment of the SABC's Chief Financial Officer.'³¹⁷
- h. 'He was involved in the irregular termination of the employment of several senior staff members resulting in a substantial loss to the SABC.'³¹⁸
- i. 'He had unilaterally and irregularly increased the salaries of various staff members which resulted in a salary bill escalation of R29 million.'³¹⁹

Moreover, the Public Protector discovered that the Department of Communications, under the directive profile of the then Minister of Communications, Pule, had unduly meddled in the SABC's operations and the organisation's human resources practises, which were flagrantly improper and amounted to maladministration, with Mr. Motsoeneng's help.³²⁰

³¹¹ *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* 2015 (4) All SA 719 (SCA) para 5.

³¹² *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA) para 6.

³¹³ *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA) para 6.

³¹⁴ *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA) para 6.

³¹⁵ *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA) para 6.

³¹⁶ *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA) para 6.

³¹⁷ *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA) para 6.

³¹⁸ *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA) para 6.

³¹⁹ *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA) para 6.

³²⁰ *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* 2015 (4) All SA 719 (SCA) para 27.

The Public Protector directed the Board of the SABC as means of a remedial action to ensure that:

- a. 'All monies are recovered which were irregularly expended through unlawful and improper actions from the appropriate persons.'³²¹
- b. 'Appropriate disciplinary action was taken against Mr Motsoeneng for his dishonesty relating to the misrepresentation of his qualifications, abuse of power and improper conduct in the appointments and salary increments of certain staff and for his role in the purging of senior staff members resulting in numerous labour disputes and settlement awards against the SABC.'³²²
- c. 'Any fruitless and wasteful expenditure that had been incurred as a result of irregular salary increments to Mr Motsoeneng is recovered from him.'³²³

Rather than carrying with the Public Protector's corrective measures, the SABC Board decided to name Mr. Motsoeneng the organisation's permanent COO as the Minister of Communications, the SABC, and Mr. Motsoeneng all disagreed with the report's conclusions.³²⁴ Thus, the effectiveness of the Public Protector's report and remedial action were undermined by this conduct.

The SCA ruled that the Office of the Public Protector has the authority to issue binding conclusions, and that the state organs that would be impacted by such conclusions must either abide by them or submit them for judicial review.³²⁵ Although attention should be given to the fact that although remedial actions are binding, it is important to keep in mind that allegations made within the report are exactly those, allegations. The court of law is the only one permitted to confirm those allegations. As much as the Office of the Public Protector has a high-ranking status within democracy, that does not mean that the judiciary will agree with it. Thus, the

³²¹ *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA) para 8.

³²² *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA) para 8.

³²³ *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA) para 8.

³²⁴ Govender K & Swanepoel P 'The Powers of the Office of the Public Protector and the South African Human Rights Commission: A Critical Analysis of SABC v DA and EFF v Speaker of the National Assembly 2016 3 SA 580 (CC)' (2020) 23 *Potchefstroom Electronic Law Journal* 9.

³²⁵ *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA) para 47.

Office of the Public Protector must make decisions that are both substantively and procedurally sound.³²⁶

3.3.2 Judiciary

Constitutional law identifies the judiciary as one of the custodians of the 1996 Constitution to evaluate the enactment of the discretion comprised by the executive and may interfere should it not fit the standard. Additionally, in *De Lille and Another v Speaker of the National Assembly* (1999) 4 All SA 241 (A), the Court provided that the 1996 Constitution has set new standards for the judicial role in evaluating public power which has given the judiciary the discretion to subject parliament to judicial review over the obligation set in section 55(2) of the 1996 Constitution, in the event of an ineffective oversight authority over the executive.³²⁷ Should the judiciary discover that the executive in performing its duties has moved outside the legislated scope, if necessary and capable, the judiciary must fulfil the oversight mandate. The Constitutional Court in *Van Rooyen and others v S and others* 2002(8) BCLR 810 (CC) further accorded the judiciary with the authority to perform non-judicial duties which includes the ability to halt the executive from consummating illegitimate mandates.³²⁸

It is submitted that despite the constitutional authority placed by section 165(2) of the 1996 Constitution in which it details the judiciary as the highest ranked custodian of the Constitution, it is still subject to the risk of unwarranted influence. For instance, in *Nkabinde v Judicial Service Commission* 2016 (11) BCLR 1429 (CC), John Hlophe was accused of using his judicial power for the purposes of interfering in a matter that involved the former President Jacob Zuma.

³²⁶ *South African Boarding Corporation Soc Ltd and Others v Democratic Alliance and Others* 2015 (4) All SA para 45.

³²⁷ *De Lille and Another v Speaker of the National Assembly* (1999) 4 All SA 241 (A) para 6.

³²⁸ *Van Rooyen and others v S and others* 2002(8) BCLR 810 (CC) para 231.

3.3.2.1 *Nkabinde v Judicial Service Commission 2016 (11) BCLR 1429 (CC)*

In 2005, the Scorpions searched the offices of Zuma and Thinth (Pty) Ltd and seized documents within their possession.³²⁹ Accordingly, Zuma and Thinth challenged the lawfulness of the searches and seizures.³³⁰ The basis of the issue began in 2008, where Hlophe JP, who was a judge presiding within the Constitutional Court, visited his two colleagues, Jafta AJ and Nkabinde J, who were also judges of the Constitutional Court. It is critical to note that at the time Hlophe made the visit to Jafta and Nkabinde, both Jafta and Nkabinde were members of the Court hearing several related cases concerning Zuma.³³¹ It was discovered that even before 2008, Hlophe had been a long-term affiliate of Zuma.³³²

Hlophe JP visited the chambers of Jafta and Nkabinde within two separate occasions, and amongst his conversations with both parties he discussed the presiding case of the court against Zuma and Thint.³³³ The argument made by Jafta and Nkabinde was that Hlophe had premeditated to influence both of the judges in the favour of Zuma as the Hlophe was quoted as saying:

‘There was a list containing names of people who were also implicated in the arms deal. He had obtained the list from the National Intelligence Agency (NIA), and he said something to the effect that some of the people who appeared on the list were going to lose their jobs when Zuma becomes President.’³³⁴

Thus, the Chief Justice Langa at the time lodged a complaint claiming that Hlophe interfered with the independent functioning of the Constitutional Court in a manner not envisaged by section 165 of the 1996 Constitution and attempted to influence Justices to breach their oath of

³²⁹ *Justice of the Constitutional Court v Judge President M.J Hlophe*: JSC Minority Decision para 1.

³³⁰ *Justice of the Constitutional Court v Judge President M.J Hlophe*: JSC Minority Decision para 2.

³³¹ *Justice of the Constitutional Court v Judge President M.J Hlophe*: JSC Minority Decision para 6.

³³² *Nkabinde and Another v Judicial Service Commission and Others* (20857/2014) [2016] ZASCA 12 para 14.

³³³ *Nkabinde and Another v Judicial Service Commission and Others* (20857/2014) [2016] ZASCA 12 para 14.

³³⁴ *Justice of the Constitutional Court v Judge President M.J Hlophe*: JSC Minority Decision para 68.

office sworn to in terms of Item 6 of Schedule 2 of the Constitution and in addition threatened the proper administration of justice.³³⁵

The acts by Hlophe JP had been deemed to have a high impact not only on the individual decisions of the Judges concerned but on the capacity of the Constitutional Court as a whole to adjudicate in a manner that ensures its independence, impartiality, dignity, accessibility and effectiveness as required by section 165(5) of the 1996 Constitution.³³⁶

Uncertainty about the politics within the judicial system still lingers amongst the relationship between the judiciary and the executive. Concerns were expressed by the Constitutional Court itself in *De Lange v Smuts NO* 1998(3) SA 785 (CC) of the principle of separation of powers should consider the political relations amongst the branches of government and to fit in within the context of the society it operates in.³³⁷ The author argues that this concern should be considered within the context of the doctrine of the separation of powers within the 1996 Constitution.

A crucial component within the battle against corruption is the judiciary the credibility of the judiciary. Thus, even the perception of corruption is quite dangerous for the legitimacy of the democracy of the state. The three branches of government are required by the doctrine of separation of powers to share a balance and checks of power to prevent the abuse of authority. However, the judiciary is placed with a greater constitutional duty that intends to extend independence to the court system. Furthermore, the judicial branch is the only branch of government that is expressly instructed to adopt the principle of impartiality of justice. The principle of impartiality of justice is interpreted by the author to require the judiciary to exercise its authority without fear and improper influence.

³³⁵ *Justice of the Constitutional Court v Judge President M.J Hlophe*: JSC Minority Decision para 9.

³³⁶ *Nkabinde and Another v Judicial Service Commission and Others* (20857/2014) [2016] ZASCA 12 para 5.

³³⁷ *De Lange v Smuts NO* 1998(3) SA 785 (CC) para 43.

3.3.3 Auditor-General (AGSA)

Another constitutional authority established to prevent the abuse of administrative discretion is the South African Auditor General's institution. Its main purpose is to audit and report the accounts, financial statements, and financial management of all national and provincial government departments, as well as administrative personnel and municipal governments, in accordance with section 188 of the Constitution.³³⁸ The 1996 Constitution intended to place the Auditor General with authority that would contribute to strengthening constitutional democracy.³³⁹

Accordingly, the author wishes to assess the Auditor General's level of incumbency in carrying out the oversight function of promoting financial accountability in the sphere of government necessary to fulfil their constitutional mandate as well as the extent of relations between the Auditor General and political figures and high-ranking public officials. Promoting financial accountability strives to reduce corruption by means of openness along with confirming that public funds have been spent appropriately and effectively by the government.³⁴⁰

In 2015, South Africa was reported to have three stubborn root causes of poor audit performance, namely the general lack of the minimum level competence of public administrators within public institutions, the negligent or corrupt performance of the public sector leadership being inconsequential, and the ineffective and careless enforcement of internal monitors.³⁴¹

The manner in which state funds are managed have an impact on the realms of society, politics, and the economy. Correspondingly, the Auditor General annually audits public institutions,

³³⁸ Pereira PG, Lehmann S, Roth A and Attisso K 'South Africa Anti-Corruption Architecture' 2012 *Basel Institute on Governance* 29.

³³⁹ See section 181 of the Constitution of the Republic of South Africa, 1996.

³⁴⁰ Sisulu MV 'Financial Oversight' (2014) *A publication of the South African Legislative Sector* 73.

³⁴¹ Siddle A & Koelble TA 'Local government in South Africa' 2016 *Swedish International Centre of Local Democracy Research Report No.7* 16.

including municipalities, municipal entities, government departments and other public entities.³⁴² As such the Auditor General will provide an audit report to oversight bodies, including the legislature. The legislature is tasked with overseeing the financial statements in order to assess both the auditee's financial performance as well as any significant findings regarding the accuracy and effectiveness of the Auditor General's financial reporting performance in order to identify any significant findings regarding non-compliance with the requirements of the law.³⁴³ Thus, the legislature is to constitutionally and legislatively apply the principle of separation of powers as it relates to its decision-making process and determining the efficient revenue spending of the Auditor General.³⁴⁴

The problem comes it as it was reported that Members of Parliament often do not have the time and resources to investigate in depth, or because of party discipline do not have the political independence that is required to arrive at an impartial decision.³⁴⁵ The Auditor General's importance to legislature derives primarily from reports from the Auditor General on the government's use of the funds in the budget voted for each year.³⁴⁶ Constitutionally, all revenue the government collects, including taxes, has to be deposited in the National Revenue Fund. Government can only access this money for its activities when parliament has voted its approval.³⁴⁷

³⁴² Auditor General South Africa 'Guidance for auditing in the public sector' (2012) *Independent Regulatory Board for Auditors* 14.

³⁴³ Auditor General South Africa 'Guidance for auditing in the public sector' (2012) *Independent Regulatory Board for Auditors* 16.

³⁴⁴ Pereira PG, Lehmann S, Roth A and Attisso K 'South Africa Anti-Corruption Architecture' 2012 *Basel Institute on Governance* 29.

³⁴⁵ Nicol M, Kadalie B & Levy M 'Checks and Balances: The Auditor-General Project Report' (2020) *Institute for African Alternatives* 12.

³⁴⁶ Nicol M, Kadalie B & Levy M 'Checks and Balances: The Auditor-General Project Report' (2020) *Institute for African Alternatives* 31.

³⁴⁷ Nicol M, Kadalie B & Levy M 'Checks and Balances: The Auditor-General Project Report' (2020) *Institute for African Alternatives* 88.

3.3.4 Public Service Commission (PSC)

The encouragement for the establishment of this institution is different from the other institution mentioned above. It is found in chapter 10 of the 1996 Constitution and mainly affects the civil service in South Africa. Its main responsibility is to defend the constitutional principles of public administration.³⁴⁸ Additionally, as per section 9 of the Public Service Commission Act (PSC Act), its functions also include conducting inspections within departments and other sectors in relation to public services and is accompanied with investigative discretionary powers according to section 10 of the PSC Act.³⁴⁹ Leading it to play a fundamental role in the country's anti-corruption fight.³⁵⁰

The National Assembly constitutionally appoints the 14 Commissioners as required by section 196 (7) of the 1996 Constitution to lead the PSC, which is said to be of strategic importance for the connection of political administration and public service.³⁵¹ The effective delivery of public service is highly dependent on the relationship shared by the Commissioners and the executive as the state departments are politically headed.³⁵²

The foundation of the PSC is characterised to bear continuous lingering apartheid features, such as, fragmentation and duplication, underrepresentation, corruption, mismanagement, lack of duty and transparency, standardised old-fashioned practices, underqualified staff, and regulatory bureaucratic culture.³⁵³ Since its foundation has not developed a culture of respect

³⁴⁸ Pereira PG, Lehmann S Roth A & Attisso K 'South Africa Anti-Corruption Architecture' 2012 *Basel Institute on Governance* 34.

³⁴⁹ Pereira PG, Lehmann S Roth A & Attisso K 'South Africa Anti-Corruption Architecture' 2012 *Basel Institute on Governance* 34.

³⁵⁰ Pereira PG, Lehmann S, Roth A & Attisso K 'South Africa Anti-Corruption Architecture' 2012 *Basel Institute on Governance* 34.

³⁵¹ Pereira PG, Lehmann S Roth A & Attisso K 'South Africa Anti-Corruption Architecture' 2012 *Basel Institute on Governance* 34.

³⁵² Pereira PG, Lehmann S Roth A & Attisso K 'South Africa Anti-Corruption Architecture' 2012 *Basel Institute on Governance* 34.

³⁵³ Bardill JE 'Towards a culture of good governance: The presidential review commission and public service reform in South Africa' 2000 *Public administration and development* 103.

for variety and for democratic ideals of openness and tolerance, South Africa's anti-corruption regime is unable to fulfil its purpose, and the present administration is unable to uphold constitutional norms.³⁵⁴ This serves such a tragic outcome as South Africa has established so many innovative institutional, legislative, and judicial programs that aim to move away from its oppressive past.

3.4 The 1996 Constitution and anti-corruption legislative agencies

The anti-corruption regulatory system in South Africa is mostly under political authority. Hence, the regulatory framework is one of the main variables affecting how well anti-corruption laws are implemented.

Aimed to lead the force against political corruption in South Africa in order to facilitate for legislative transparency and accountability is the Executive Members Ethics Act No. 82 of 1998 (EMEA), which is described as one of the main legal frameworks that is dedicated in ensuring executive accountability. It is responsible for the formation of the Code of Ethics (Code). This Code derives from section 96 of the 1996 Constitution. Clause 2.1 of the Code orders that the President and his cabinet to act in good faith and to put the interests of the Republic first when executing their duties.³⁵⁵

Good faith and good governance require a subjective character observation from public officials to be honest, transparent, and obedient. Clause 2.2 provides for the responsibility of the President or Premier to safeguard the promotion of an open, democratic, and accountable government.³⁵⁶

³⁵⁴ De Vos P 'Compassion and Corruption: choosing the difficult path' (2014) 116 *Transition* 46.

³⁵⁵ Budhram T & Geldenhuis N 'Corruption in South Africa: The demise of a nation? New and improved strategies to combat corruption' (2018) 1 *South African Journal of Criminal Justice* 41.

³⁵⁶ Budhram T & Geldenhuis N 'Corruption in South Africa: The demise of a nation? New and improved strategies to combat corruption' (2018) 1 *South African Journal of Criminal Justice* 41.

The condemnation faced by the Code is that it only serves to demonise political corruption and is not actually concerned with associating the breach of the Code with prosecution.³⁵⁷

In terms of the Members Act the authority of the Public Prosecutor is limited to drafting remedial actions for the violation of the Code. In terms of cabinet, section 3 of the Members Act provides that it is the President who has the authority take action for the breach of the Code by the cabinet.³⁵⁸ The Code does not seem to be composed of a structured procedure or an overall legislative method that aims to cover the types of political corruption that should be anticipated as section 3 of the Code but only serves authority to transfer investigative powers of any breach of the Code in section 3 of the Code to the Public Protector in terms of the Public Protector Act, 1994.³⁵⁹ Meaning that section 3 of the Code does not authorise the Public Protector to investigate a violation of the Act itself but limits her authority to investigating a breach of the code.³⁶⁰ Jafta J in *Public Protector v President of the Republic of South Africa Others* (CCT 62/20) [2021] ZACC 19 explained an additional limitation into the investigative powers of the Public Protector in terms of the Code and stated that:

‘Since the complaint was lodged for the breach of the Code after the President had assumed office, the Members Act does not cater for action to be taken against the President where he or she is responsible for violating the Code.’³⁶¹

Notably, there is a main legislation that focuses on combatting corruption is the Prevention and Combatting of Corrupt Activities Act (PACCA) and is ‘a legal effort aimed at reinforcing

³⁵⁷ Budhram T & Geldenhuys N ‘Corruption in South Africa: The demise of a nation? New and improved strategies to combat corruption’ (2018) 1 *South African Journal of Criminal Justice* 41.

³⁵⁸ See Section 3 of the Members of Executive Ethics Act.

³⁵⁹ *Public Protector and Others v President of the Republic of South Africa and Others* (CCT 62/20) [2021] ZACC 19 para 11.

³⁶⁰ *Public Protector and Others v President of the Republic of South Africa and Others* (CCT 62/20) [2021] ZACC 19 para 11.

³⁶¹ *Public Protector and Others v President of the Republic of South Africa and Others* (CCT 62/20) [2021] ZACC 19 para 135.

initiatives to prevent and combat corruption and corrupt practices.³⁶² More importantly, PACCA seeks to also subject those in high-ranking offices (foreign public officials, agents, members of the legislative authority, judicial officers, offices that deal with governmental contracts, procurement, and withdrawal of tenders), to the monitoring and sanctioning of corrupt activities.³⁶³

PACCA is championed by legislations such as:

3.4.1 The Competition Act

The relations between this piece of legislation and political corruption are relayed by the nature of the competition environment that seeks to grant opportunities to competitors from government depending on their weighed submissions for contracts.³⁶⁴ Therefore, allowing the collusive tendering process rules and regulations of the Competition Act to be subjected to criticism within this paper.³⁶⁵

Collusive tendering is described to be a process of competitors agreeing amongst each other not to bid in return for a favour, this may include side payments to other competitors³⁶⁶ and consists of ‘a series of restrictive commercial tactics in which competing firms attempt to eliminate any degree of price competition by agreeing on the tender price to be provided in advance.’³⁶⁷ Such conduct threatens the benefits of a good procurement system.³⁶⁸ Section

³⁶² Mohamed Z ‘Fundamentals of Anti-Bribery and Anti—Corruption Compliance in South Africa’ (2019) 3 *Journal of Anti-Corruption Law* 194.

³⁶³ Mohamed Z ‘Fundamentals of Anti-Bribery and Anti—Corruption Compliance in South Africa’ (2019) 3 *Journal of Anti-Corruption Law* 194.

³⁶⁴ Sewpersadh P & Mubangizi JC ‘Using the law to Combat Public Procurement Corruption in South Africa: Lessons from Hong Kong’ (2017) 8 *Potchefstroom Electronic Law Journal* 8.

³⁶⁵ Irvine H ‘Tender corruption: a job for the competition authorities?’ available at <https://www.linkedin.com/pulse/tender-corruption-job-competition-authorities-heather-irvine/> (accessed 07 August 2021).

³⁶⁶ Anderson R ‘Measures to prevent collusive tendering: an important adjunct to a liberalised government procurement regime’ 2010 *WTO OMC* 3.

³⁶⁷ Hunter A & Simons D ‘Collusive or Level Tendering and Public Authorities’ (1963) 35 *The Australian Quarterly* 17.

³⁶⁸ Anderson R ‘Measures to prevent collusive tendering: an important adjunct to a liberalised government procurement regime’ 2010 *WTO OMC* 5.

4(1)(iii) of the Competition Act provides that collusive tendering is strictly prohibited.³⁶⁹ It follows also that those who contravene this section are *inter alia* in contravention of section 12 and 13 of PACCA and stand for possible prosecution.³⁷⁰

In *Moseme Road Construction CC v King Civil Engineering Contractors* 2010 (4) SA 359 (SCA), the SCA provided that within the legal field, it is not taken seriously enough that the public procurement system tenders are at high risk to be tainted with corruption.³⁷¹ The Competition Act falls short of protecting the state against political corruption commonly within tender initiatives as tenders play a huge role in facilitating competitive markets within the public and private sectors and aiding delivering public services and functioning government.³⁷²

In general, rules and regulations pertaining to public procurement in South Africa offer limited safeguards in terms of protecting the state against corruption activities.³⁷³ The biggest problem in this regard is that public procurement rules and regulation run on the basis that the existing organs of state must have the resources and authority to detect and prevent any acts that seek to abuse the public procurement system.³⁷⁴ In *Dr JS Moroka Municipality v Bertram (Pty) Ltd* (2014) 1 All SA 545 (SCA), the SCA followed the aforesaid sentiment by providing that public procurement policies and procedures have resulted in a requirement for sets of new laws that unfortunately have a theme of creating grounds for litigation.³⁷⁵

³⁶⁹ See section 4(1) of the Competition Act 89 of 1998.

³⁷⁰ Mantzaris E & Pillay P 'Free enterprise and corruption: The South African construction Cartel Case Study' 2018 *Anti-Corruption Centre for education and Research of Stellenbosch University* 180.

³⁷¹ *Moseme Road Construction CC v King Civil Engineering Contractors* 2010 (4) SA 359 (SCA) para 1.

³⁷² Irvine H 'Tender corruption: a job for the competition authorities?' available at <https://www.linkedin.com/pulse/tender-corruption-job-competition-authorities-heather-irvine/> (accessed 07 August 2021).

³⁷³ Makube T 'The importance of using different methods of analysis in dealing with the challenges of collusive tendering and other forms of corruption in the south African public procurement system' (2019) 6 *African Public Procurement Journal* 45.

³⁷⁴ Makube T 'The importance of using different methods of analysis in dealing with the challenges of collusive tendering and other forms of corruption in the south African public procurement system' (2019) 6 *African Public Procurement Journal* 45.

³⁷⁵ *Dr JS Moroka Municipality v Bertram (Pty) Ltd* (2014) 1 All SA 545 (SCA) para 8.

Sewpersadh and JC Mubangizi within their research on how South Africa can using the Law to Combat Public Procurement Corruption listed the principles of fairness, equity, transparency, competitiveness, and cost-effectiveness as grounds that must be met for anti-corruption within public procurement.³⁷⁶

3.4.2 The Prevention of Organised Crime Act (POCA)

Organised crime and political stability and integrity tend to never co-exist. The relationship between organised crime and corruption disturbs the social-economic and political environment, legal domains, and criminal justice.³⁷⁷ POCA was specially designed to address organised crime and corruption and to furthermore recover the proceeds of the crime and assets used thereof.³⁷⁸ Cameron J in *National Director Public Prosecutions v Elran* 2013 (1) SACR 429 (CC) expressed that POCA serves the principles of democracy, the rule of law and constitutionalism.³⁷⁹ The role of constitutional law against organised crime and corruption is that it promotes POCA to reduce and guard criminal activity within the country, this inevitably is supported by constitutional law as section 8 of the Constitution obligates the state to protect, fulfil and promote the bill of rights. Therefore, POCA for the most part is considered one of the constitutional guardians of the state.

Part 2 of chapter 6 of POCA in section 38 provides for the permissibility of forfeiture to the state of the assets alleged to have been used for an unlawful activity.³⁸⁰ The section 38 procedure is accomplished through an *ex parte* application by the National Director of Public Prosecutions (NDPP).³⁸¹ The Court in *National Director of Public Prosecutions v Gallant*

³⁷⁶ Sewpersadh P & Mubangizi JC 'Using the law to Combat Public Procurement Corruption in South Africa: Lessons from Hong Kong' (2017) 8 *Potchefstroom Electronic Law Journal* 13.

³⁷⁷ Van Dijk & Buscaglia E 'Controlling Organised Crimes and Corruption in the Public Sector' (2003) 3 *Forum on Crime and Society* 16.

³⁷⁸ Du Plessis A & Louw A 'Crime and Crime prevention in South Africa: 10 Years After' (2005) 74 *Canadian Journal of Criminology and Criminal Justice* 432.

³⁷⁹ *National Director Public Prosecutions v Elran* 2013 (1) SACR 429 (CC) para 70.

³⁸⁰ See section 38 of the Prevention of Organised Crime Act 121 of 1998.

³⁸¹ See section 38 of the Prevention of Organised Crime Act 121 of 1998.

gave a warning about the possibility and risk of forfeiture of property that might result in an unrestrained application of chapter 6 of POCA which may in return breach the constitutional protection against arbitrary deprivation of property.³⁸²

POCA in relation to the section 38 procedure does not stand without its own criticism within the legal space. This paper maintains that the South African model of civil forfeiture law is not rigid enough to stand against the improper of the seizure of assets by the state. The breach of discretion is a consequence of the lack of sections addressing what the NDPP should do after the section 38 procedure is granted.³⁸³

3.4.3 The Special Investigating Unit and Special Tribunals Act 1996

Any reference made to the Special Investigating Unit (SIU) might as well include ‘member of the executive branch’. Every cornerstone of this institution should be interpreted to serve the executive government. The SIU’s mandate is to operate as one of South Africa’s anti-corruption mechanisms. The SIU is promoted as being independent from government. The SIU’s website describes its functions as ‘investigating serious allegations of corruption, malpractice and maladministration in the administration of state institutions, assets and funds’.³⁸⁴ In spite of its proclaimed independence, the SIU is directly accountable to the National Assembly and the President. The President bears more authority in terms of the SIU and Special Tribunals Act 1996.³⁸⁵ The President is responsible for the establishment of the SIU, its interrogations, and the results of investigative reports are to be submitted to the President.³⁸⁶ Adding to this issue is the fact that the Unit’s main task is to recover and prevent

³⁸² *National Director of Public Prosecutions v Gallant* (917/2018) [2021] ZAECPEHC 51 para 22.

³⁸³ Kessler SL ‘Asset Forfeiture: Home and abroad’ (1998) 4 *ILSA Journal of International and Comparative Law* 389.

³⁸⁴ Special Investigating Unit ‘About SIU’ available at <https://www.siu.org.za/about-us/> (accessed 01 August 2022).

³⁸⁵ Munzhedzi PH ‘Fostering public accountability in South Africa: A reflection challenges and successes’ (2016) 12 *The journal for Transdisciplinary Research in the Southern Africa* 5.

³⁸⁶ Munzhedzi PH ‘Fostering public accountability in South Africa: A reflection challenges and successes’ (2016) 12 *The journal for Transdisciplinary Research in the Southern Africa* 5.

national financial losses caused by corrupt practices by elected officials. Corrupt practices include the illegal spending of public funds and approving transactions, ignoring losses from public corruption, and committing crimes against state departments.³⁸⁷

Since the establishment of the SIU questions have followed the Unit with regards to its governing provisions.

South African Association of Personal Injury Lawyers v President of the RSA and Another 2001 (1) SA 883 dealt with the constitutional validity of the appointment of Judge Heath to head the SIU. Section 3(1) of the Act 74 of 1996 and proclamation R24 of 1997 decree was challenged.³⁸⁸ Chaskalson P made it clear that he was not in support of the appointment.³⁸⁹ The Constitutional Court gave a warning about the risk of letting the executive determine who heads the anti-corruption units as it places a peril for the detachment and independence between the relationship of the use of power permitted to the executive and the execution of justice.³⁹⁰ What needs to be fed more within the establishment of independent institutions that aim to uphold democracy is that the independence of an institution secures public confidence.

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³⁸⁷ Munzhedzi PH 'Fostering public accountability in South Africa: A reflection challenges and successes' (2016) 12 *The journal for Transdisciplinary Research in the Southern Africa* 5.

³⁸⁸ *South African Association of Personal Injury Lawyers v President of the RSA and Another* 2001 (1) SA 883 para 46.

³⁸⁹ *South African Association of Personal Injury Lawyers v President of the RSA and Another* 2001 (1) SA 883 para 39.

³⁹⁰ *South African Association of Personal Injury Lawyers v President of the RSA and Another* 2001 (1) SA 883 para 46.

3.4.4 National Prosecuting Authority Act

One of the fundamental components of the National Prosecuting Authority (NPA) that supports the anti-corruption regime is its investigation and prosecutive powers. Section 7(1A) of the NPA Act, as amended by the NPA Amendment Act 2008, allows for the President, through a proclamation, to establish one or more Investigating Directorates, in respect of offences or criminal or unlawful activities.³⁹¹

The Minister of Justice has the ultimate responsibility in relation to the prosecuting authority in accordance with section 33(1) of the NPA Act.³⁹² Hence, 'section 33(2) of the NPA Act makes it compulsory for the National Director of Public Prosecutions (NDPP) at the request of the Minister of Justice, furnish information with regards to any case, matter or subject or to provide the Minister with reasons for any decision taken by the NDPP in the exercise of his or her powers.'³⁹³

The NPA Act further authorises the President to call for the establishment of these entities on the grounds of a range of alleged corruption:

- a. 'Serious maladministration in the affairs of any state institution.'³⁹⁴
- b. 'Improper or unlawful conduct by state employees.'³⁹⁵
- c. 'Unlawful appropriation or expenditure of public money on property.'³⁹⁶
- d. 'Unlawful irregular or unapproved acquisitive act, transaction, measure, or practice having or bearing on state property.'³⁹⁷
- e. 'International or negligent loss of public money or damage of public property.'³⁹⁸

³⁹¹ Pereira PG, Lehmann S, Roth A & Attisso K 'South Africa Anti-Corruption Architecture' 2012 *Switzerland: Basel Institute on Governance* 36.

³⁹² See section 33(1) of the National Prosecuting Act 32 of 1998.

³⁹³ See section 33(2) of the National Prosecuting Act 32 of 1998.

³⁹⁴ Redpath J 'The Scorpions: Analysing the Directorate of Special Operations' 2004 *Institute for Security Studies Monographs* 103.

³⁹⁵ Redpath J 'The Scorpions: Analysing the Directorate of Special Operations' 2004 *Institute for Security Studies Monographs* 103.

³⁹⁶ Redpath J 'The Scorpions: Analysing the Directorate of Special Operations' 2004 *Institute for Security Studies Monographs* 103.

³⁹⁷ Redpath J 'The Scorpions: Analysing the Directorate of Special Operations' 2004 *Institute for Security Studies Monographs* 103.

³⁹⁸ Redpath J 'The Scorpions: Analysing the Directorate of Special Operations' 2004 *Institute for Security Studies Monographs* 103.

- f. 'Corruption in connection with the affairs of any state institution.'³⁹⁹
- g. 'Unlawful or improper conduct by any person which has caused or may cause serious harm to the interests of the public.'⁴⁰⁰

3.4.5 South African Police Service Act (SAPS)

The SAPS is subordinate to the state department of police as mandated by section 205 of the 1996 Constitution⁴⁰¹, where its function and authority are constantly undermined and serves as an armless force in relation to political corruption. Consequently, corruption has become an endemic within the SAPS and as a result, the SAPS is regarded as “the most corrupt institution in South Africa”.⁴⁰²

In 2009, former President Zuma irregularly appointed Richard Mdluli as the Head of Crime Intelligence. Disregarding the SAPS Act at the time that obligated the National Commissioner, Tim Williams, to be part of the appointing process of all deputy and divisional Commissioners, Zuma decided to solely conduct the selection process to include four Cabinet Members.⁴⁰³

Former Commissioner Jackie Selebi was commonly known for covering grand corruption investigations. In 2002, Agliotti was reportedly involved in a R105 million Mandrax shipment and suspects who were caught within action were arrested. However, due to his political affiliation with Selebi, the investigation was halted and the suspects were released.⁴⁰⁴

The SAPS does not have the power to prosecute crimes in South Africa, however, what can be said makes their authority distinctly dangerous lies within the SAPS' ability to abuse its

³⁹⁹ Redpath J 'The Scorpions: Analysing the Directorate of Special Operations' 2004 *Institute for Security Studies Monographs* 103.

⁴⁰⁰ Redpath J 'The Scorpions: Analysing the Directorate of Special Operations' 2004 *Institute for Security Studies Monographs* 103.

⁴⁰¹ Pereira PG, Lehmann S, Roth A & Attisso K 'South Africa Anti-Corruption Architecture' 2012 *Switzerland: Basel Institute on Governance* 36.

⁴⁰² Nortje W 'Professionalising the fight against Police Corruption in South Africa: Towards a proactive anti-corruption regime' (2023) 48 *Journal for Juridical Science* 73.

⁴⁰³ Kinnes I & Newham G 'Feeling the Hawks: Why an anti-corruption agency should not be in the SAPS' (2012) 39 *South African Crime Quarterly* 35.

⁴⁰⁴ Kinnes I & Newham G 'Feeling the Hawks: Why an anti-corruption agency should not be in the SAPS' (2012) 39 *South African Crime Quarterly* 35.

discretion for personal use and disguise the effects thereof under its authority to investigate illicit activities.⁴⁰⁵

The ineffective results of anti-corruption agencies and legislative pillars demonstrate that the fundamental principles and democratic pillars within the 1996 Constitution alone cannot be considered as the sole anti-corruption measurements. Anti-corruption measurements are strengthened by using constitutional principles as guidelines. Thus, in South Africa, the execution to combat corruption is required to come from bigger forces such as the ‘government of the day, civil society groups, unions, political parties, businesses, and individual citizens.’⁴⁰⁶ The author declares this mandate as an unrefined mechanism.

It is submitted that the general South African anti-corruption characteristic is not impressive nor effective. In that, the general anti-corruption thesis requires public officials not to put themselves within a position that may conflict with the compliance of their official duties and private interest. The author argues that there lies a strong assumption that since the 1996 Constitution is the supreme law and is appraised as an exceptional component of universal human rights that, therefore, any legislation composed in alignment with it is deemed to hold the same preservation.

3.5 The importance of administrative authority and public interests

In 2019, after 25 years of democracy in South Africa, the country remains the most economically unequal country in the world.⁴⁰⁷ As Time Magazine put it ‘the richest 10 per cent (%) of the population own more than 85% of household wealth, while over half of the

⁴⁰⁵ Nortje W ‘Professionalising the fight against Police Corruption in South Africa: Towards a proactive anti-corruption regime’ (2023) 48 *Journal for Juridical Science* 79.

⁴⁰⁶ Moyo S *Corruption in Zimbabwe: an examination of the roles of the state and civil society in combating corruption* (Doctor of Philosophy, University of Central Lancashire, 2014) 213.

⁴⁰⁷ Scott K ‘South Africa is the world’s most unequal country. 25 years of freedom have failed to bridge the divide’ available at <https://edition.cnn.com/2019/05/07/africa/south-africa-elections-inequality-intl/index.html> (accessed 15 November 2021).

population have more liabilities than assets'.⁴⁰⁸ "In many ways, the legacy of apartheid endures."⁴⁰⁹

The decision-making process of administrators needs to take into account the public's economic and social circumstance.⁴¹⁰ Thus, human dignity should be seen as a value that influences every area of law.⁴¹¹ Human dignity and administrative law relate on the basis of aiming to ensure no human being is ever subjected to life that is beneath a human's living standard.⁴¹²

The relationship between administrative law and government is a quotidian one.⁴¹³ Public authorities depend on administrative law to give direction on the discharge of the empowered provisions held upon them.⁴¹⁴ Therefore, an administrative action is constitutionally required to be executed lawfully, reasonably, and procedurally fairly.⁴¹⁵ This would thus mean that the administrator must not only act on an empowered provision but also act in alignment with the provision.

The case of *Ngomane and Others v City of Johannesburg Metropolitan Municipality and another* (734/2017) (2018) ZASCA 57 demonstrates the dangers of administrators acting on an empowered provision that ultimately goes against the interests of the empowering provision. The Supreme Court of Appeal declared that it was unconstitutional to destroy the possessions

⁴⁰⁸ Sguazzin A 'South Africa wealth gap unchanged since apartheid , says World inequality lab' available at <https://time.com/6087699/south-africa-wealth-gap-unchanged-since-apartheid/> (accessed 23 October 2021).

⁴⁰⁹ Scott K 'South Africa is the world's most unequal country. 25 years of freedom have failed to bridge the divide' available at <https://edition.cnn.com/2019/05/07/africa/south-africa-elections-inequality-intl/index.html> (accessed 15 November 2021).

⁴¹⁰ Bolton P 'Government procurement as a policy tool in South Africa' (2006) 6 *Journal of Public Procurement* 198.

⁴¹¹ Venter B 'A selection of constitutional perspectives on human kidney sales' (2013) 16 *Potchefstroom Electronic Law Journal* 367.

⁴¹² McCrudden C 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 *European Journal of International Law* 718.

⁴¹³ Kohn L 'Using Administrative law to secure informal livelihoods: Lessons from South Africa' 2017 *WIEGO Technical Brief (Law)* 6.

⁴¹⁴ Kohn L 'Using Administrative law to secure informal livelihoods: Lessons from South Africa' 2017 *WIEGO Technical Brief (Law)* 6.

⁴¹⁵ See section 33(1) of the Constitution of the Republic of South Africa 1996.

of the homeless applicants in a clean-up operation carried out by the City of Johannesburg from the traffic island in the business district where they lived, using their public health by-laws to administer this unlawful act.⁴¹⁶ The court ordered the municipal government to compensate the applicants.⁴¹⁷ The court held that the damage to the applicants' properties violated their dignity, and right to privacy.⁴¹⁸ The Constitutional Court in *Minister of Defence and Military Veterans v Motou and Others* 2014 (8) BCLR 930 (CC) solidified that administrative action functions as a proxy to legality and emphasised that administrator's conduct needs to be rightfully supplemented by law.⁴¹⁹

Reasonableness is one of the backbones of the 1996 Constitution. The reasonableness of a decision contains two components that must be completed which are, that the decision must be rational and proportional.⁴²⁰ Rationality stands as a monitor of the abuse of discretionary powers or arbitrary decision-making.⁴²¹ In *MEC, Department of welfare, Eastern Cape v Kate* 2006(4) SA 478 (SCA), a disabled applicant applied for social assistance to the Eastern Cape Social Assistance Department.⁴²² Although the processing and approval time should not exceed three months, the department took forty months, which was unreasonable.⁴²³ The delay was due to the widespread mismanagement in the Eastern Cape.⁴²⁴ The SCA held that depriving the applicant of her rights deprived her of the constitutional right to receive social assistance.⁴²⁵

⁴¹⁶ *Ngomane and Others v City of Johannesburg Metropolitan Municipality and another* (734/2017) (2018) ZASCA 57 para 22.

⁴¹⁷ *Ngomane and Others v City of Johannesburg Metropolitan Municipality and another* (734/2017) (2018) ZASCA 57 para 22.

⁴¹⁸ *Ngomane and Others v City of Johannesburg Metropolitan Municipality and another* (734/2017) (2018) ZASCA 57 para 21.

⁴¹⁹ *Minister of Defence and Military Veterans v Motou and Others* 2014 (8) BCLR 930 (CC) para 27.

⁴²⁰ De Lange S & Van Wyk, D 'The right to just administrative action in the context of suspending the payment of disputed tax' (2017) 20 *Potchefstroom Electronic Law Journal* 20.

⁴²¹ De Lange S & Van Wyk, D 'The right to just administrative action in the context of suspending the payment of disputed tax' (2017) 20 *Potchefstroom Electronic Law Journal* 15.

⁴²² *MEC, Department of welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA) para 7.

⁴²³ *MEC, Department of welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA) para 10.

⁴²⁴ *MEC, Department of welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA) para 31.

⁴²⁵ *MEC, Department of welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA) para 86.

Procedural fairness provides a ground for review of the exercise of public power. In *Bel Parto School Governing Body and Others v Premier Western Cape and Another* 2002 (9) BCLR 891 (CC), the Constitutional Court held that the unfairness of a decision has never been a ground for review.⁴²⁶ Something more is required. The injustice must be of such magnitude that it can be inferred that the person had erred in a respect which would provide grounds for review.⁴²⁷ The criteria for administrative review are legality, procedural fairness, and rationality. In *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* (2011) ZASCA 246, the SCA ruled that in order to prevail, the appellant must show that the decision served no valid governmental objective.⁴²⁸ This was meant to lay down the grounds to detect malicious exercise of public power. Another way that the judiciary is involved in holding administrative officials accountable is through the constitutional mandate that requires the judiciary to ensure that citizens are heard when it comes to issues relating the citizens and the state. Thus, the Constitutional Court warned in *South African Informal Traders Forum v City of Johannesburg* 2014 4 SA 371 (CC) that within the fulfilment of vulnerable rights, the characters of officials would come into play.⁴²⁹ The Constitutional Court went further to say that ‘there is a serious danger of influential officials mistreating vulnerable impoverished people.’⁴³⁰ The court in *Fose v Minister of Safety and Security* 1997 (7) BCLR 851 states that, if there is a way to exercise one’s rights through a court, if it turns out that the legal process has infringed the established right, it will be of effect that the court reinstate that infringement to be in a position that erases such an occurrence.⁴³¹ ‘For without effective remedies for breach,

⁴²⁶ *Bel Parto School Governing Body and Others v Premier Western Cape and Another* 2002 (9) BCLR 891 para 86.

⁴²⁷ *Bel Parto School Governing Body and Others v Premier Western Cape and Another* 2002 (9) BCLR 891 para 63.

⁴²⁸ *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* 2011 ZASCA 246 para 10.

⁴²⁹ *South African Informal Traders Forum v City of Johannesburg* 2014 4 SA 371 (CC) para 3.

⁴³⁰ *South African Informal Traders Forum v City of Johannesburg* 2014 4 SA 371 (CC) para 33.

⁴³¹ *Fose v Minister of Safety and Security* 1997 (7) BCLR 851 para 69.

the values underlying and the right entrenched in the 1996 Constitution cannot properly be upheld or entrenched.’⁴³²



⁴³² Kika M *Fashioning judicial remedies that work in a constitutional society: Establishing a framework for a functional approach to the awarding of constitutional damages in South African law and comparative jurisdictions* (unpublished PHD thesis, University of Cape Town, 2019) 7.

Chapter 4

CONSTITUTIONALITY AND POLITICAL CORRUPTION IN ZIMBABWE, NIGERIA, AND BOTSWANA: LESSONS FOR SOUTH AFRICA

The accomplishment of constitutional stability is interdependent with the discharge of authority. African countries share similar state characteristics due to the historical state of apprehension by the British, which facilitated centralised governmental structures that continue to inform how the state authority is exerted today.

This chapter will pursue an analysis of the relationship between constitutional law and political corruption, within the South African neighbouring countries such as Zimbabwe, Botswana. Furthermore, this chapter assess the federal constitutionalism within Nigeria and its influence on legal instruments because much like in South Africa, Zimbabwe, Botswana, and Nigeria aimed at protecting the new democratic wave within Africa when they accepted the legal doctrine of constitutional supremacy.

This chapter will also provide an analysis on the concentrated power within the executive of each country and the facilitation of corruption. What is more important about this chapter is the lessons to be gained from those countries that have controlled the executive authority and the impact of corruption.

4.1 Colonialism and western corruption

Post-colonialism in Africa has continued the embodiment of centralised power within legal systems by the western elites.⁴³³ 'In most African countries, the state is no more than a décor, a pseudo-Western façade masking the realities of deeply personalised political relations.'⁴³⁴

⁴³³ Koechlin L *Corruption as an empty signifier: politics and political order in Africa* (2013) 71.

⁴³⁴ Koechlin L *Corruption as an empty signifier: politics and political order in Africa* (2013) 33.

Essentially, the western elites within post-colonialism have discovered a legal gateway to maximise their power of control without precisely enforcing it.⁴³⁵ This includes the monitoring of constitutional development within African states.⁴³⁶ Hence, there is a need for continuous evaluation to guard how countries receive democratic constitutionalism in Africa. This will involve the process of an identification of the true acceptance of constitutionalism and good governance. The focus will range from observing civil and political rights, freedom of the press, corruption, and the rule of law.⁴³⁷

4.2 State of constitutionalism in Africa

The introduction of constitutionalism in Africa was meant for the supremacy of the Constitution and the rule of law.⁴³⁸ This would allow for a measurement to the dedication of the revolutionary wave of democracy.⁴³⁹ The measurement of democracy facilitates an evaluation to the legitimacy of the government. Consequently, the rife of governmental corruption contaminates the progress of constitutionalism, democracy, the respect for the rule of law and good governance.⁴⁴⁰ Subsequently, the African continent carries a constitutional standard which prescribes political authority and the location of power, conferment, distribution, exercise and limitation of authority and the power between the delegates of government.⁴⁴¹

⁴³⁵ Mulinge MM & Lesetedi GN 'Interrogating Our past: Colonialism and Corruption in Sub-Saharan Africa' (1998) 3 *Journal of Political Science* 20.

⁴³⁶ Mulinge MM & Lesetedi GN 'Interrogating Our past: Colonialism and Corruption in Sub-Saharan Africa' (1998) 3 *Journal of Political Science* 20.

⁴³⁷ Fombad CM 'Strengthening constitutional order and upholding the rule of law in central Africa: Reversing the descent towards symbolic constitutionalism' (2014) 14 *Africa Human Rights Law Journal* 440.

⁴³⁸ Burger J 'Political interference weakening the rule of law in SA' available at <https://issafrica.org/iss-today/political-interference-weakening-the-rule-of-law-in-sa> (accessed 29 August 2021).

⁴³⁹ Burger J 'Political interference weakening the rule of law in SA' available at <https://issafrica.org/iss-today/political-interference-weakening-the-rule-of-law-in-sa> (accessed 29 August 2021).

⁴⁴⁰ Fombad C 'Constitution-building in Africa: Corruption and constitutionalism in Africa- Revisiting control measures and strategies' available at <https://stias.ac.za/fellows/projects/constitution-building-in-africa-corruption-and-constitutionalism-in-africa-revisiting-control-measures-and-strategies/> (accessed 29 August 2021).

⁴⁴¹ Olasunkanmi A 'Constitution without constitutionalism: interrogating the Africa experience' (2018) 2 *Art Human Open Acc Journal* 5.

Constitutionalism is not a state of governance in the continent but has indoctrinated elements of tyranny and authoritarianism that are expressed using the constitutional discretionary powers for personal interest.⁴⁴² This is why numerous African governments are considered to be collapsing as their legal measurements are not based on true form of constitutionalism. This African constitutional moment should not be recognised as it has a legacy of operating on the premise of constitutional law without constitutionalism.⁴⁴³ Therefore, due to the African history of having founded Constitutions within colonialism, modern African constitutionalism needs and demands interrogation.⁴⁴⁴ This includes the modern constitutional governing powers.

African governments often collapse due to maladministration of state resources as corruption in Africa has a major impact on the reduction in domestic investment, discouraging foreign direct investment, inflating government expenditures, and distorting public spending by taking away funds from government initiatives such as education, health, and infrastructural investment into sectors more vulnerable to corruption.⁴⁴⁵

Mainly the issue around corruption within the African constitutional state is the weakening of the principle of the rule of law. African countries have undermined the weight of the rule of law.⁴⁴⁶ Originally, the foundation of the rule of law within the context of the new age African continent was to maintain the values of constraints on government powers, absence of

⁴⁴² Olasunkanmi A 'Constitution without constitutionalism: interrogating the Africa experience' (2018) 2 *Art Human Open Acc Journal* 5.

⁴⁴³ Prempeh HK 'Africa's constitutionalism revival: False start or new dawn' (2007) 5 *International Journal of Constitutional Law* 469.

⁴⁴⁴ Heydenrych PW 'Constitutionalism and coloniality: A case of colonialism continued or the best of both world' 2016 *North West University* 2.

⁴⁴⁵ Willett S 'Defence Expenditures, Arms Procurement and Corruption in Sub Saharan Africa' (2009) 26 *Review of African Political Economy* 335.

⁴⁴⁶ Fombad CM 'An overview of the crisis of the rule of law in Africa' (2018) 18 *African Human Rights Law Journal* 220.

corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice.⁴⁴⁷

4.3 How the rule of law is understood

The rule of law cannot be simply transplanted to Africa.⁴⁴⁸ In simple terms, this means that no person can ever be above the law. In legal terms, it is the concept that can only verify the powers of state and government only if in accordance with applicable laws and procedures.⁴⁴⁹

The rule of law and where it stands in Africa:

‘Like political democracy and human rights, has endured a checkered history and has been subject to profound critiques about its normative incompleteness, cultural blindness, Anglo-Saxon imperial complicity and historical context. Thus, the rule of law and related concepts offer hope and caution in an environment replete with extreme complexity and historical trauma.’⁴⁵⁰

The symptoms of the deficit of the rule of law:

- a. When the state does not have the capacity or the will to protect people or their property or their human rights.⁴⁵¹
- b. When institutions are not strong enough to resolve social and political conflicts.⁴⁵²
- c. When institutions are not strong enough to resolve political or social conflict or organised crime.⁴⁵³

The 1990s for Africa saw a strong phase to be fully committed to the principle of the rule of law.⁴⁵⁴ However, modern democracy has seen the threats that stand against the principle such as political instability, economic decline, poverty, unemployment, and endemic corruption.⁴⁵⁵

⁴⁴⁷ Fombad CM ‘An overview of the crisis of the rule of law in Africa’ (2018) 18 *African Human Rights Law Journal* 220.

⁴⁴⁸ Mutua M ‘Africa and the rule of law’ (2016) 13 *International Journal of Human Rights* 159.

⁴⁴⁹ Shivute P ‘The rule of law in sub-Saharan Africa—An overview’ 2008 *Human rights and the rule of law in Namibia* 213.

⁴⁵⁰ Mutua M ‘Africa and the rule of law’ (2016) 13 *International Journal of Human Rights* 160.

⁴⁵¹ Khan I ‘Africa and the rule of law’ available at <https://www.idlo.int/news/policy-statements/africa-and-rule-law> (accessed 13 November 2021).

⁴⁵² Khan I ‘Africa and the rule of law’ available at <https://www.idlo.int/news/policy-statements/africa-and-rule-law> (accessed 13 November 2021).

⁴⁵³ Khan I ‘Africa and the rule of law’ available at <https://www.idlo.int/news/policy-statements/africa-and-rule-law> (accessed 13 November 2021).

⁴⁵⁴ Fombad CM ‘An overview of the crisis of the rule of law in Africa’ (2018) 18 *African Human Rights Law Journal* 232.

⁴⁵⁵ Fombad CM ‘An overview of the crisis of the rule of law in Africa’ (2018) 18 *African Human Rights Law Journal* 232.

4.4 Political corruption and the constitutionality of Africa

The main anti-corruption instrument in Africa is the African Union Convention on Preventing and Combatting Corruption. This Convention applies to the Member of States of the African Union, which include, Botswana, Nigeria, South Africa and Zimbabwe who are all subject to analysis under this chapter. Article 5(3) of the Convention drives the anti-corruption campaign in Africa and requests that State Parties to establish, maintain, and strengthen the national anti-corruption frameworks or mandates.⁴⁵⁶

However, according to a report released by Corruption Watch in 2022 titled “Corruption Across Africa”, reported that the laws and standards place within the African Union Convention on Preventing and Combatting Corruption have not taken root in national institutions implementation has not been adequately monitored or enforced by Member of States, and that corruption continues to be controlled within the continent despite law, standards and international and regional instruments.⁴⁵⁷ As a result, corruption continues to be widespread and destructive to the stability of the countries within the continent and in 2022, High Level Panel on Illicit Financial Flows from Africa discovered that “Africa as entire continent loses more than R 917 billion annually through illicit financial outflows.”⁴⁵⁸

As majority of African states have attained independence and there has been an acceptance of constitutionalism, the correct assumption would be that the Constitution is the main source of the anti-corruption authority.

However, discretionary powers within African Constitutions tend to operate as an obstacle for the stability of a constitutional nation. The purpose of this study is to prove that constitutionality and its mandates towards the government can indeed be at war with its anti-

⁴⁵⁶ Article 5(3) of African Union Convention on Preventing and Combatting Corruption.

⁴⁵⁷ Corruption Watch in 2022 titled “Corruption Across Africa”13.

⁴⁵⁸ Tafirenyika M ‘Africa loses \$50 billion every year’ available at <https://www.un.org/africarenewal/magazine/december-2013/africa-loses-50-billion-every-year> (accessed 13 October 2023).

corruption fundamental values and sustain corruption facilitating factors within a state. For that purpose, in this paper Zimbabwe, Nigeria, and Botswana will be used as the countries that will be subjected to constitutional law examination and the impact of the executive's discretionary powers within the rife of corruption in each country.

4.4.1 Constitution of Zimbabwe Amendment (No.20) Act, 2013

The relationship between constitutional law and political corruption in Zimbabwe is the constitutional blunder that South Africa should avoid but finds itself on the verge of making. Much like in South Africa, Zimbabwe is subject to constitutional law supremacy.⁴⁵⁹

Section 88 of the 2013 Zimbabwean Constitution expresses that the executive authority of the country is constitutionally ordained as the people vest authority within the President and the Cabinet and this authority subsequently implants a general duty on the President along with his Cabinet to uphold the constitutional values which include the rule of law.⁴⁶⁰ There is no question that in section 110 of the 2013 Zimbabwean Constitution, the constitutional drafters had a goal to institute provisions that would promote a limited government by confining the Head of State powers, however, such as in South Africa, these constitutional law provisions which also permit other legislation to be made in support of section 110, hand over absolute discretion to the executive instead.⁴⁶¹

Nevertheless, the Constitutional Court in its role as the guardian of the 2013 Zimbabwean Constitution, through section 162, bears the burden of ensuring that the governing of the state reflects the constitutional values of a governance system that supports democratic governance, openness, accountability, the rule of law and entrenches fundamental rights and freedoms,

⁴⁵⁹ See section 2 of the Zimbabwe Constitution of 2013.

⁴⁶⁰ See section 88 of the Zimbabwe Constitution of 2013.

⁴⁶¹ See section 110 of the Zimbabwe Constitution of 2013.

while facilitating democracy, promoting constitutionalism, protecting the sovereignty and interests of the people, and securing the remedy of all injustices.⁴⁶²

In accordance with the role of constitutional guardianship, the 2013 Zimbabwean Constitution in section 233, provides that all the independent agencies and institutions must also always be directed by good governance, accountability, openness, moral dignity, human rights principles, and financial credibility.⁴⁶³

The 2013 Zimbabwean Constitution as an effort to protect the socio-economic rights held by the citizens, encourage accountability, and openness in the use of public power, and the redress of citizens' injustices.⁴⁶⁴ As much the 2013 Zimbabwean Constitution established within the ambit of constitutional empowerment independent commissions under chapter 13 in section 255, the Zimbabwe Anti-Corruption Commission and the National Prosecuting Authority.⁴⁶⁵

For the purpose of this study, the examination will focus only on the Zimbabwe Anti-Corruption Commission power that forms part of the daily practice for the state.

The Zimbabwean government, as instructed by the 2013 Zimbabwean Constitution, initiated the Zimbabwe Anti-Corruption Commission (ZACC) in an effort to combat any corrupt act that threatened to plague the country and has a constitutional mandate of investigating and reporting instances of corruption, combating corruption, and eliminating theft, abuse of power, as well as other irregularities in both the public and commercial sectors.⁴⁶⁶ This leads to an inquiry into the difficulties that the ZACC encounters in ensuring transparency and accountability in Zimbabwe.

⁴⁶² See section 162 of the Zimbabwe Constitution of 2013.

⁴⁶³ Chitsove E 'Legal Aspects of Combatting Corruption in Zimbabwe' (2018) 26 *University of Botswana Law Journal* 47.

⁴⁶⁴ Mugadza TP 'The Role of Constitutional Commissions in Zimbabwe's New Constitution' (2017) *Assessing Progress in the Implementation of Zimbabwe's New Constitution*. Nomos Verlagsgesellschaft mbH & Co. KG 129.

⁴⁶⁵ Mugadza TP 'The Role of Constitutional Commissions in Zimbabwe's New Constitution' (2017) *Assessing Progress in the Implementation of Zimbabwe's New Constitution*. Nomos Verlagsgesellschaft mbH & Co. KG 129.

⁴⁶⁶ Chilunjika A 'Revamping the Zimbabwe Anti-Corruption Commission (ZACC)' (2021) 16 *African Journal of Business & Economic Research* 315.

In 2021, Transparency International (TI) reported that Zimbabwe is ranked 160 out of 180 in terms of the perceived levels of public sector corruption.⁴⁶⁷ The Zimbabwean legislation, the Criminal Law Codification and Reform Act, lists what is identified as amounting to corrupt acts rather than defining what actually constitutes corruption.⁴⁶⁸ The corrupt acts legislatively identified include:

- a. Bribery.⁴⁶⁹
- b. Giving or receiving a bribe as an inducement or reward.⁴⁷⁰
- c. Corruptly using a false document.⁴⁷¹
- d. The intentional non-disclosure of, or the concealment of, a transaction from one's principal in order to deceive.⁴⁷²
- e. The deceitful non-disclosure or concealment from one's principal of a personal interest in a transaction.⁴⁷³

In Zimbabwe 'corruption can now be said to qualify as a highest ranked threat to socio-economic development and progress'.⁴⁷⁴ While constitutions aim to strengthen and place boundaries on the institutions that govern society which subsequently transmits to the delivery of public goods⁴⁷⁵, unfortunately, the reality of the country is that the abuse of public

The answer for the current state of the country and all its initiatives to reduce corruption in Zimbabwe have been hampered by the obstruction of justice, and the interference with the operations that aim to identify, investigate, and prosecute by political officials and the police, who were initially imparted the role of leadership within the fight against corruption, are now

⁴⁶⁷ Chilunjika A 'Revamping the Zimbabwe Anti-Corruption Commission (ZACC)' (2021) 16 *African Journal of Business & Economic Research* 312.

⁴⁶⁸ Chitsove E 'Legal Aspects of Combatting Corruption in Zimbabwe' (2018) 26 *University of Botswana Law Journal* 58.

⁴⁶⁹ Mugadza T *Effectiveness of Anti-Corruption Agencies in Southern Africa Angola, Botswana, DRC, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe* (2017) 330.

⁴⁷⁰ Mugadza T *Effectiveness of Anti-Corruption Agencies in Southern Africa Angola, Botswana, DRC, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe* (2017) 330.

⁴⁷¹ Mugadza T *Effectiveness of Anti-Corruption Agencies in Southern Africa Angola, Botswana, DRC, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe* (2017) 330.

⁴⁷² Mugadza T *Effectiveness of Anti-Corruption Agencies in Southern Africa Angola, Botswana, DRC, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe* (2017) 330.

⁴⁷³ Mugadza T *Effectiveness of Anti-Corruption Agencies in Southern Africa Angola, Botswana, DRC, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe* 2017 330.

⁴⁷⁴ Choruma A 'Corruption stalls Zimbabwe's economic agenda' 2017 *Financial Gazette* 1.

⁴⁷⁵ Rahman K. 'Anti-corruption measures in constitutions' 2021 *Transparency International* 2.

named the worst offenders.⁴⁷⁶ Additionally, poor financing, lack of technical capacity and discord within the institution as contributing factors to the corruption flood across public offices'.⁴⁷⁷ The worst reality is that, according to section 254 of the 2013 Zimbabwean Constitution, the Commission is constitutional governed by the President and his Cabinet, while the Police in section 255 of the 2013 Zimbabwean are instructed to investigate any suspicions that are reported by the Commission.⁴⁷⁸

The Transparency International ranks the Zimbabwean police force as one of the main contributors to the impunity that is mostly caused by the police force's inaction when it comes to taking decisive action against individuals who violate their oath of service.⁴⁷⁹ The Furthermore, the Transparency International reported that the Zimbabwean Police are recognised as the nation's most corrupt organisation.⁴⁸⁰

Thus, the ability of the commission to give directives to the Commissioner-General of Police was a controversial clause throughout the constitution drafting and negotiating process as some constitutional drafters were concerned that this would endanger the independence of the institution.⁴⁸¹

⁴⁷⁶ Zinyama T 'Systemic Corruption in Zimbabwe: Is the Human Factor the Missing Link? (2021) 12 *African Journal of Public Affairs* 138.

⁴⁷⁷ Munhende L 'Zimbabwe: Zacc, Anti-Graft Bodies Trashed At "Dem Loot" Indaba' available at <https://allafrica.com/stories/202106240504.html> (accessed on 19 September 2022).

⁴⁷⁸ See section 254 & 255 of the 2013 Zimbabwean Constitution.

⁴⁷⁹ Transparency International 'How to put an end to police corruption in Africa' available at <https://www.transparency.org/en/news/corruption-of-police-in-africa-must-end-now> (accessed 27 October 2023).

⁴⁸⁰ Mugadza T *Effectiveness of Anti-Corruption Agencies in Southern Africa Angola, Botswana, DRC, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe* (2017) 362.

⁴⁸¹ Tanyaradzwa M *A critical evaluation of the Zimbabwe anti-corruption commission* (unpublished LLM dissertation, University of the Western Cape, 2019) 6.

4.4.2 The abuse of the Office of Presidency in Nigeria

There is no denying that Nigeria's federal constitutionalism places a strong emphasis on democratic principles, rule of law, and good governance.⁴⁸² The author, however, has already mentioned in chapter three of this study that the worth and calibre of democracy, the rule of law, and good governance are defined by how effective these principles are. Nigeria is the ideal state that has documented the disparity of effective relationships between constitutional principles and an unstable government over the course of their four constitutional eras, indicating that without the cooperation of government and constitutional principles they will cease to be a functioning democratic leadership.

The stages of post-independence constitutional development within the country have left a legacy of executive pre-eminence and rampant corruption alongside extensive patronage networks that views the government primarily through the lens of their own personal enrichment.⁴⁸³ Since the colonialised times of Nigeria, pre-independence, there was a fair degree of public officials' involvement in bribery, theft, nepotism, and money laundering in the way that state ran its business and thus allowed for governance of the state to be considered an office for personal wealth.⁴⁸⁴ Thus, throughout the last 60 years, post-independence, several administrations have developed policies and actions to fight corruption, including:

- a. The campaign to seize property that Nigerians had obtained unlawfully that began in 1975 under General Murtala Mohammed.⁴⁸⁵
- b. Shehu Shagari's 1979 ethical revolution, which included the adoption of a code of conduct for public employees aimed to fight corruption.⁴⁸⁶

⁴⁸² Kolawole A 'Good Governance, Constitutionalism, and the Rule of Law: Imperatives for Sustainable Development in Nigeria' (2013) 6 *OIDA International Journal of Sustainable Development* 129.

⁴⁸³ Azeez A 'Endangering good governance for sustainable democracy: The continuing struggle against corruption in Nigeria' (2011) 11 *Journal in Research, Peace, Gender and Development* 307.

⁴⁸⁴ Tignor RL 'Political Corruption in Nigeria before Independence' (1993) 31 *The Journal of Modern African Studies* 176.

⁴⁸⁵ Obuah E 'Combatting Corruption in Nigeria: The Nigerian Economic and Financial Crimes (EFCC)' (2010) 12 *African Studies Quarterly* 19.

⁴⁸⁶ Obuah E 'Combatting Corruption in Nigeria: The Nigerian Economic and Financial Crimes (EFCC)' (2010) 12 *African Studies Quarterly* 19.

- c. The fight on discipline that General Muhammadu Buhari waged at the beginning of 1983.⁴⁸⁷
- d. Campaign for social and moral uplift led by General Ibrahim Babaginda in 1985.⁴⁸⁸
- e. 2002 that saw the establishment of the Economic and Financial Crimes Commission (EFCC) under the Obasanjo government, which began in 1999. The EFCC is tasked with a broad range of duties related to preventing, detecting, investigating, and prosecuting instances of economic and financial crimes in Nigeria.⁴⁸⁹

All four constitutional eras in Nigeria have been modelled after the American presidentialism system, but this has had a similar effect to the hybrid system in South Africa, where a state finds it difficult to balance and enforce constitutional principles, which leads to the abuse of executive discretionary powers meant to protect the state's federation.⁴⁹⁰

The state is required to combat corruption and the abuse of power under section 15(5) of the 1999 Federal Constitution, which outlines the essential goals and guiding principles of state policy.⁴⁹¹ The problem that still stands is that the state has inherited government officials that have managed to manoeuvre procedures to camouflage their plunders through state-owned resources.⁴⁹² It is now unfortunate that the characteristics of a failing state are almost entirely present in Nigeria, those include:

- a. Succession of failed administrations.⁴⁹³
- b. Political instability.⁴⁹⁴
- c. Structural adjustment programme.⁴⁹⁵

⁴⁸⁷ Obuah E 'Combating Corruption in Nigeria: The Nigerian Economic and Financial Crimes (EFCC)' (2010) 12 *African Studies Quarterly* 19.

⁴⁸⁸ Obuah E 'Combating Corruption in Nigeria: The Nigerian Economic and Financial Crimes (EFCC)' (2010) 12 *African Studies Quarterly* 19.

⁴⁸⁹ Obuah E 'Combating Corruption in Nigeria: The Nigerian Economic and Financial Crimes (EFCC)' (2010) 12 *African Studies Quarterly* 19.

⁴⁹⁰ Baba YT *Executive dominance and hyper-presidentialism in Nigeria* (2018) 194.

⁴⁹¹ See section 15(5) of the 1999 Federal Constitution of Nigeria.

⁴⁹² Tade O 'Why Buhari's government is losing the anti-corruption war by O Tade' available at <https://theconversation.com/why-buharis-government-is-losing-the-anti-corruption-war-155488> (accessed 17 March 2022).

⁴⁹³ Folarin S 'Nigeria is still struggling at 60. But hope is still alive' available at <https://theconversation.com/nigeria-is-still-struggling-at-60-but-hope-is-still-alive-146943> (accessed 17 March 2022).

⁴⁹⁴ Folarin S 'Nigeria is still struggling at 60. But hope is still alive' available at <https://theconversation.com/nigeria-is-still-struggling-at-60-but-hope-is-still-alive-146943> (accessed 17 March 2022).

⁴⁹⁵ Folarin S 'Nigeria is still struggling at 60. But hope is still alive' available at <https://theconversation.com/nigeria-is-still-struggling-at-60-but-hope-is-still-alive-146943> (accessed 17 March 2022).

- d. Moral bankruptcy in public institutions.⁴⁹⁶
- e. Military misadventure.⁴⁹⁷

Nigeria placed 154th out of 180 nations in the 2021 TI corruption perception index.⁴⁹⁸ Which is not a surprise since the 1999 Federal Constitution places the role of the executive branch in a particular all-encompassing and extremely vital position. Although, the courts as well as the legislature are therefore required if any progress is to be achieved in reducing corruption to be a constant guardian of the executive.⁴⁹⁹ In accordance with section 88 of the 1999 Federal Constitution, the legislature has the authority to look into, among other things, the actions of any person, authority, ministry, or government agency tasked with carrying out or managing legislation passed by the National Assembly or disbursing or managing funds that have been or will be appropriated by the National Assembly.⁵⁰⁰

Nigeria is still not at a point in its development where politicians can be expected or trusted to regulate themselves even after over 60 years of independence. Nor is the separation of power sufficient to limit the abuse of power. Therefore, the constitutional values offered in part 1 of Fifth Schedule to the 1999 Federal Constitution of morality, transparency, and accountability in the conduct of government business will continue to struggle to be effective for as long as the 1999 Federal Constitution allows for public officers who are put on a hierarchy over other governmental organs.⁵⁰¹

⁴⁹⁶ Folarin S 'Nigeria is still struggling at 60. But hope is still alive' available at <https://theconversation.com/nigeria-is-still-struggling-at-60-but-hope-is-still-alive-146943> (accessed 17 March 2022).

⁴⁹⁷ Folarin S 'Nigeria is still struggling at 60. But hope is still alive' available at <https://theconversation.com/nigeria-is-still-struggling-at-60-but-hope-is-still-alive-146943> (accessed 17 March 2022).

⁴⁹⁸ Obadare E 'Nigeria's all too familiar corruption ranking begs broader questions around normative collapse' available at <https://www.cfr.org/article/nigerias-all-too-familiar-corruption-ranking-begs-broader-questions-around-normative> (01 December 2022).

⁴⁹⁹ Olujimi AMA & Fashagba YJ 'The legislature and anti-corruption crusade under the fourth republic of Nigeria: Constitutional imperatives and practical realities' (2010) 1 *International Journal of Politics and Good Governance* 4.

⁵⁰⁰ See section 88 of the 1999 Federal Constitution of Nigeria.

⁵⁰¹ Chitimira DH & Animastiaun O 'The reliance on the lifestyle Audits for Public Officials to Curb Corruption and Tax Evasion in Nigeria' (2021) 24 *Potchefstroom Electronic Law Journal* 11.

It is submitted that the 1999 Federal Constitution has overshadowed the function of integrity within government over a model of self-determination. The constitutional latitude granted to the president has created a framework for an unstable system of government from the outset, which has eventually prevented Nigeria from moving forward. These include:

- a. The President's ability to make unilateral economic opportunities through discretionary allocation of crude oil, lifting contracts outside competitive bidding rounds, the granting of presidential import duty waivers to businesses and control of opaque extrabudgetary votes.⁵⁰²
- b. The discretion to appoint and oversight anti-corruption institutions such as:
 - i. The Independent National Electoral Commission (INEC).⁵⁰³
 - ii. The Police Service Commission.⁵⁰⁴
 - iii. The National Security Council.⁵⁰⁵
 - iv. The Revenue Mobilization Allocation and Fiscal Commission (a body that determines the salaries of all major public functionaries, including judges).⁵⁰⁶
 - v. The Economic and Financial Crimes Commission (EFCC).⁵⁰⁷
 - vi. The Independent Corrupt Practices Commission, and the National Boundaries Commission (NBC).⁵⁰⁸

In light of this, the author notes that Nigeria's constitutional history has taught us that it is crucial to understand how the exercise of power is related to freedom, democracy, and stability, and that these understandings must go hand in hand with a willingness to uphold the core principles of good governance. Because of this, no matter how eager the constitution or other legislative measures are to ensure accountability and reduce the abuse of presidential power, all will be lost until there is political will to follow them. The ability of the executive branch to transfer discretion into political will must then be thoroughly assessed.

⁵⁰² Seburu RT 'Strategies for Advancing Anticorruption Reform in Nigeria' (2018) 47 *Anticorruption: How to Beta Back Political and Corporate Graft* 194.

⁵⁰³ Nicholas A & Kincaid J *Courts in federal countries: Federalists or unitarists?* (2017) 295.

⁵⁰⁴ Nicholas A & Kincaid J *Courts in federal countries: Federalists or unitarists?* (2017) 295.

⁵⁰⁵ Nicholas A & Kincaid J *Courts in federal countries: Federalists or unitarists?* (2017) 295.

⁵⁰⁶ Nicholas A & Kincaid J *Courts in federal countries: Federalists or unitarists?* (2017) 295.

⁵⁰⁷ Nicholas A & Kincaid J *Courts in federal countries: Federalists or unitarists?* (2017) 295.

⁵⁰⁸ Nicholas A & Kincaid J *Courts in federal countries: Federalists or unitarists?* (2017) 295.

4.4.3 The Botswanan achievement of political stability within executive dominance

Botswana has embodied democracy since 1966, which means that Botswana has held democracy longer than South Africa.⁵⁰⁹ Much like South Africa, Nigeria and Zimbabwe, constitutional supremacy is a staple in Botswana, with similar executive features that are highlighted through parliamentary and presidential political systems. Similarities between the Botswanan Constitution and the 1996 Constitution of the Republic of South Africa include:

- a. The Botswanan Constitution includes an institutional framework that is made up of the parliament as a representative, law making, and oversight organ intended to ensure that the executive delivers on its mandate.⁵¹⁰
- b. Establishes three principal organs of the state, the executive, parliament, and the judiciary.⁵¹¹
- c. Specifies the appointment and powers of principal public service offices and fundamental issues concerning public finance and its management.⁵¹²
- d. Provides for internal checks and balances and requires the government to be open, accountable, and transparent.⁵¹³
- e. To ensure accountability and transparency which instructs the Constitution to establish the Office of the Auditor General to conduct annual audit of all public accounts.⁵¹⁴
- f. The Constitution states that the President shall act in his own deliberate judgment and shall not be obliged to follow advice of any other person or authority.⁵¹⁵
- g. Once the President makes a decision, the Cabinet is legally bound to support it, due to the principle of collective responsibility which stipulates that the members of the executive cannot question executive decision.⁵¹⁶
- h. Section 92 of the Constitution enables Parliament to declare that it has no confidence in the executive.⁵¹⁷

⁵⁰⁹ Alexander K & Kaboyakgosi G 'A fine balance: Assessing the quality of governance in Botswana' 2012 *Idasa* 3.

⁵¹⁰ Mudeme K & Holtzhausen N 'Contextualising Bureaucratic Corruption in the Botswana Public Service' (2018) 26 *Administratio Publica* 190.

⁵¹¹ Mudeme K & Holtzhausen N 'Contextualising Bureaucratic Corruption in the Botswana Public Service' (2018) 26 *Administratio Publica* 190.

⁵¹² Mudeme K & Holtzhausen N 'Contextualising Bureaucratic Corruption in the Botswana Public Service' (2018) 26 *Administratio Publica* 190.

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⁵¹⁴ Mudeme K & Holtzhausen N 'Contextualising Bureaucratic Corruption in the Botswana Public Service' (2018) 26 *Administratio Publica* 190.

⁵¹⁵ Mudeme K & Holtzhausen N 'Contextualising Bureaucratic Corruption in the Botswana Public Service' (2018) 26 *Administratio Publica* 190.

⁵¹⁶ Mudeme K & Holtzhausen N 'Contextualising Bureaucratic Corruption in the Botswana Public Service' (2018) 26 *Administratio Publica* 190.

⁵¹⁷ Mudeme K & Holtzhausen N 'Contextualising Bureaucratic Corruption in the Botswana Public Service' (2018) 26 *Administratio Publica* 190.

Much like in South Africa, legal frameworks in Botswana that are constitutionally empowered to assist to establish constitutional safeguards against corruption that promote the development of standards and procedures designed to safeguard the democracy, integrity, and stability of the state. Accordingly, Botswana shares the same extension as discussed in chapter three of this paper regarding politisation of anti-corruption legal frameworks that extends implementation and reporting authority to the executive branch of government. Botswana's anti-corruption legal framework consists of the following:

4.4.3.1 The Penal Code of Botswana, 1964 (Act 2 of 1964)

Part II Division II of the Code (offences against public order) draws attention to acts against the authorised discretion amongst administrators to prevent the abuse of power for personal endeavours.⁵¹⁸ Listed corrupt acts include official corruption, offering a bribe or extortion of a bribe by public officers, false claims by public officers and abuse of office.⁵¹⁹ Division VIII (offences relating to corrupt practices) is specifically tailored for addressing what is meant by sanctionable corrupt acts within the code, assisted by section 384, 385 and 386 within the same division.⁵²⁰ The consequence of the violation of the above mentioned divisions include a imprisonment term not exceeding three years.⁵²¹

4.4.3.2 The Corruption and Economic Crime Act, 1994 (13 of 1994)

This Act has a well-established reputation of directly urging senior officials within government against corruption. The main initiatives of the Act remain to be:

- a. Promoting ethical behaviour in government and public organisations.⁵²²

⁵¹⁸ Quansah EK 'The Corruption and economic Crime Act, 1994 of Botswana by EK Quansah' (1994) 38 *Journal of African Law* 191.

⁵¹⁹ Desai R 'Anti-Bribery and Corruption Guide' 2019 *Quick Guide* 3.

⁵²⁰ Quansah EK 'The Corruption and economic Crime Act, 1994 of Botswana' (1994) 38 *Journal of African Law* 191.

⁵²¹ Desai R 'Anti-Bribery and Corruption Guide' 2019 *Quick Guide* 4.

⁵²² Centre for public impact 'Fighting Corruption in Botswana by Centre for Public Impact' available at <https://www.centreforpublicimpact.org/case-study/fighting-corruption-botswana> (accessed 21 December 2021).

- b. Establishing codes of conduct.⁵²³
- c. Maintaining good governance, transparency, and the rule of law.⁵²⁴
- d. Taking part in corruption preventive interventions.⁵²⁵

Section 3 of the Act grants a mandate for the formation of a directorate meant to investigate any alleged violation of specific corrupt acts.⁵²⁶

4.4.3.3 The Finance and Audit Act, 1997

The importance of this legislation lies in tangible accountability and transparency. It provides for mechanisms that protect state funds.⁵²⁷ Section 6 of the Act names every public officer on duty with the handling of the state funds and safeguards the procedures therein.⁵²⁸ The Auditor General within this Act, section 29, is positioned as an oversight agent, this duty is together supported by section 124 (2)-(3) of the Constitution of Botswana.⁵²⁹

The Transparency International's Corruption Perceptions Index, unlike within South Africa, submitted that Botswana is placed among the best corruption free countries.⁵³⁰ The intrigue derives from the numerous critics against the relationship between the Botswanan Constitution and the executive with the lack of accountability that has been demonstrated through this study on the adoption of the hybrid system of governance that facilitates a conflicted relationship between the executive and legislature, as discussed in chapter three of this study which Botswana also implements.

⁵²³ Centre for public impact 'Fighting Corruption in Botswana by Centre for Public Impact' available at <https://www.centreforpublicimpact.org/case-study/fighting-corruption-botswana> (accessed 21 December 2021).

⁵²⁴ Centre for public impact 'Fighting Corruption in Botswana by Centre for Public Impact' available at <https://www.centreforpublicimpact.org/case-study/fighting-corruption-botswana> (accessed 21 December 2021).

⁵²⁵ Centre for public impact 'Fighting Corruption in Botswana by Centre for Public Impact' available at <https://www.centreforpublicimpact.org/case-study/fighting-corruption-botswana> (accessed 21 December 2021).

⁵²⁶ Mogomotsi PK, Mogomotsi GEJ & Hambira WL 'Illicit Capital Flows and Money Laundering in Botswana: An institutional Economic Analysis' (2021) 45 *Africa Development* 124.

⁵²⁷ Mudeme K & Holtzhausen N 'Contextualising Bureaucratic Corruption in the Botswana Public Service' (2018) 26 *Administratio Publica* 191.

⁵²⁸ Mudeme K & Holtzhausen N 'Contextualising Bureaucratic Corruption in the Botswana Public Service' (2018) 26 *Administratio Publica* 191.

⁵²⁹ Mudeme K & Holtzhausen N 'Contextualising Bureaucratic Corruption in the Botswana Public Service' (2018) 26 *Administratio Publica* 191.

⁵³⁰ Alexander K & Kaboyakgosi G 'A fine balance: Assessing the quality of governance in Botswana' 2012 *Idasa* 28.

Botswana's leaders have been hailed as having exceptional leadership as they have played a central role in the political and economic success of the country. However, compared to the negative democratic experiences across the continent, Botswana's economic prosperity and political stability have led to its celebration as the African Miracle.⁵³¹ Botswana's success is simply credited to the commitment towards political will.⁵³² The narrative is that a dedicated anti-corruption agency embodies democratic accountability and controlled levels of corruption.⁵³³

It can be submitted that the executive authority within the Botswanan Constitution has more impact than the achievement of democracy obtained since 1966 and other constitutional mandates. Thus, Botswana presents as a society that can successfully function with a constitutionally politicised government and is still able to exacerbate legislative good governance. This whole concept virtually causes questions about what truly causes political corruption. The continuous query within Botswana's political space is the constitutional mandate that facilitates executive authority over the National Assembly that grants a limitation on the parliamentary oversight mandate over the executive. Constitutional obligations such as parliament's operation being subjected within the President and grants the executive authority the power to dissolve the national assembly puts the executive within an authoritative state.⁵³⁴

⁵³¹ Mphendu U & Holtzhausen U 'Successful Anti-Corruption Initiatives in Botswana, Singapore and Georgia: Lessons for South Africa' (2016) 24 *Administratio* 237.

⁵³² Mphendu U & Holtzhausen U 'Successful Anti-Corruption Initiatives in Botswana, Singapore and Georgia: Lessons for South Africa' (2016) 24 *Administratio* 237.

⁵³³ Mphendu U & Holtzhausen U 'Successful Anti-Corruption Initiatives in Botswana, Singapore and Georgia: Lessons for South Africa' (2016) 24 *Administratio Publica* 237.

⁵³⁴ Section 91 of the Constitution of the Republic of Botswana, 1966.

4.4 Lessons for South Africa

The author submits that through the analysis of Zimbabwe and Nigeria, both countries have proven that the purpose and the legitimacy of the content of constitutional principles that support anti-corruption independent agencies and institutions is sufficient. Nevertheless, the authority for government to be involved within the realisation of anti-corruption contents has been proven to be the downfall of the constitutional mandates against corruption.

The role of the President, in principle, to be considered to have been established within a well drafted constitution should hold the highest authority in order to effect the constitutional values of good governance, accountability, openness, equality and ensure that discretionary powers under the constitution are not arbitrary affected and that the nature and purpose of democracy within the state and that public order and effective governance is maintained. The ideology of having the highest office monitor independent institutions that seek to protect the state would, in normal circumstances, be applauded. However, given the reality proven by South Africa, Zimbabwe, and Nigeria, that ideology only makes sense in principle.

In addition, Zimbabwe and Nigeria are proof for South Africa that the absence of an explicit constitutional provision that supports the anti-corruption framework should not be accounted for as a contributor to the rife of political corruption and that two things can be correct at the same time in that constitutional law can value to guard against corruption while aiding the abuse of power. On the other hand, Botswana stands to broadcast that there can be an imbalance of governmental structures within constitutional law but if the people that occupy public office have the correct motives, political stability, and economic prosperity can be the new rife.

There is no doubt that different societies need different systems based on their ethnic, culture, religion, historical, and geographical circumstances. The author submits that if you look at the historical root of the need for anti-corruption agencies, blame would be attributed to the

relationship that politics has with how state power is managed. Therefore, this adds to the questioning of why constitutional drafters would aid an authority disrupted by complex politics that have been proven for decades. The author submits that if only constitutional drafters understood that corruption is a consequence of how governing powers are informed and maintained, then there would be a straightforward cut between the executive authority and independent institutions against guarding the stability of a state. The constitutional provision that establishes these commissions poses the question to the author of how seriously the responsibility to combat corruption is taken, given the overwhelming evidence that anti-corruption commissions fail to handle corruption-related matters where there is lack of political will and reinforcing of the anti-corruption campaign. Although, what is notable with each and every country and the subsequent independent anti-corruption commissions and legislative agencies is that political corrupt acts are highlighted, however, the line is obviously drawn when it comes time to actually holding contravening individuals accountable, regardless of whether there is a constitutional provision that permits prosecution.

The purpose of chapter four was to examine each of the constitutions' from Zimbabwe, Nigeria and Botswana which were found to be comparable to the 1996 of Constitution of South Africa. The examination wanted to focus particularly on the outcomes of the government's constitutional discretionary powers. There has been a recognition of a shared characteristic from all four states which is overcoming colonialism which facilitated the establishment of democracy through constitutionality. Following this assessment, there are a variety of concepts that South Africa can understand to strike a balance between political corruption and arbitrary authority. The end goal is to have an appropriate constitutional framework that allows for an interaction between the executive and discretionary powers that are stringent and compliant. The need arises from the idea that a state's behaviour is imprinted through its governing structure following a set of laws. Thus, constitutions should also be understood to reflect the

feared consequences of constitutional violation in addition to their objective to enshrine governance measures.

The ideology that a constitution is the most foundational text that can support an all-encompassing anti-corruption initiative in a state that affirms all mechanisms and institutions is thoroughly discredited by South Africa, Nigeria, and Zimbabwe. The political idea that democracy and constitutional supremacy bring stability has permitted states to exist in an unbalanced democratic state where the executive dominates the legislature and the judiciary, which are the two most powerful governmental institutions which are essential to the balancing of governmental states. This is a result of a failure to recognise that a government's political commitment to upholding the principles of constitutional supremacy and democracy is what ensures a state's stability within those frameworks. Living in a state with an uninformed and poorly organised government has the disadvantage that leads to the three branches of government (executive, legislative, and judicial) to be vulnerable to ambiguity, uncertainty, and potential conflict.

The abuse of government power and constitutional values within a state with rampant corruption caused by those entrusted with power surely should impose a question of the legitimacy of democracy in the state that was supposed to have an outcome which provides for a level-headed state. However, the Washington Consensus and political scientists advocated democratization as one of the avenues to combat corruption.⁵³⁵

After what was deemed as a democratic achievement in South Africa, Nigeria and Zimbabwe, an analysis is submitted that the rule on the acceptance of democratisation within states should

⁵³⁵ Ampratwum EF 'The fight against corruption and its implications for development in developing and transition economies' (2008) 11 *Journal of Money Laundering Control* 82.

include a review measure. Therefore, Beetham is of the view that democracy should be comprehended as a procedure rather than a set of ideas or values to operate on.⁵³⁶

The Transparency International has already confirmed that there are no new extra ordinary initiatives that are needed to be facilitated to add to the anti-corruption campaign, only the strengthening of the core elements of the existing anti-corruption campaigns that are needed. This has been living proof in Botswana as these initiatives have been met with political will which has been led by good governance, accountability, transparency, the rule of law, and public participation.⁵³⁷

The African Union (AU) confirmed that the elements of a continent seeking to thrive politically and economically lies within good governance, democracy, respect for human rights, justice, and the rule of law.⁵³⁸ What is interesting is that the current constitutional state of Botswana encourages the politisation of governmental leadership. Consequently, providing a nature of laws that benefit politics while maintaining a stable state. The state has acknowledged that politisation of the discretionary powers of the executive within the Constitution facilitates governmental monopolism, however, this is balanced by the conduct of government with whom the monopoly is held by.⁵³⁹ Thus, this calls for a fundamental understanding that each state is aware of its strengths and weaknesses to present a functional and stable democratic and accountable state.

Heilbrunn made the bold claim that less developed countries have no plans to change and that the true root of political corruption may be as simple as greed and malice, that government officials are robbing the economy, and that giving the appearance of reform allows them to

⁵³⁶ Beetham D 'Conditions for democratic consolidation' (2007) 21 *Review of African Political Economy* 159.

⁵³⁷ Corrigan T 'Measuring governance: The African peer review mechanism: Building freedom' 2016 *South African Institute of International Affairs* 13.

⁵³⁸ Mbaku JM 'Good and inclusive governance is imperative for Africa's future' 2020 *Foresight Africa* 23.

⁵³⁹ Suttner R 'Democratic Transition and Consolidation in South Africa: The Advice of the Experts' (2004) 52 *Current Sociology* 746.

postpone enacting effective solutions.⁵⁴⁰ This would explain why the authorities would intentionally allow for politics or personal interests to interfere with this mandate and seriously damage a country's economy.



⁵⁴⁰ Yates DA 'Oil, Democracy and Development in Africa' (2015) 53 *The Journal of Modern African Studies* 125.

CHAPTER 5

RECOMMENDATIONS AND CONCLUSION

5.1 Recommendations

Since the establishment of an official government in South Africa more than 350 years ago, the concept of a valid government has lost a lot of credibility. This research presented that the government authority that is established within the ambits of constitutional law in South Africa, if close attention is paid, contains a central theme of strategic centralisation of power from the government. Furthermore, politics seem to have a major influence on most governmental structures. Thus, the existence of political corruption.

A review was conducted and it provided that in fact the relations between the constitutional executive discretions and politics threaten good governance, accountability, transparency, the rule of law, public participation, and the doctrine of separation of powers. Consequently, it was established that corrupt authorities that carried out their illicit acts on the backdrop of various legislation indirectly and unintentionally justify the delay, and violations that result in the minimisation of any prospect for an accomplished and valid government.

After the thorough research analysis provided for by this study, it is within hopes of the author that the following recommendations are to grant an apposite counsel as a means to promote and strengthen the legislated ambit of anti-corruption that have been identified by this study and to align constitutional law and effective government authority.

5.1.1 Develop the role of the executive within the 1996 Constitution

Thus, the author argues that governance relations with the current constitutional structure in South Africa, unfortunately, is not measured against the reality of how it is used throughout society, which makes it impossible to accurately determine whether it still has the capacity to

drive an executive branch that is based on the preamble of a democratically open and free society that is for by the state of South Africa.

The basic role of the national executive is to ensure that legislation is implemented. It is undeniable that the function of legislation was to set the standards in which a state shall operate and function with its people. Developing a constitutional discretionary provision that supports the proper function of a constitutionally promoted government whilst extending a leg to the executive authority to implement other crucial constitutional mandates without undermining crucial civil liberties or human rights that form the cornerstone of a free society presents as a challenge in South Africa.

What then can the state do? Instead of limiting the executive authority's discretionary powers within the 1996 Constitution, it is suggested that the foundation of the authority must be completely reconstructed. This would include revisiting what informs executive authority and striking a balance between the actual authority and the historical and the cultural nature of South Africa today. This would require that there be an examination of the legitimate governmental purpose that the 1996 Constitution sought to have achieved within the exercise of executive authority against the scope of power provided for.

A formula for a newly developed executive governance tool is explained by Kiltgaard who created an equation ($\text{Corruption} = \text{Monopoly} + \text{Discretion} - \text{Accountability}$) that explains what causes political corruption within the executive branch and could assist constitutional drafters.⁵⁴¹ The equation contends that the excessive availability of governmental funds mixed with unlimited administrative discretion leads to far reaching corrupt behaviour.⁵⁴² Thus, the solution is accountability.⁵⁴³

⁵⁴¹ Myint U 'Corruption: Causes, Consequences and Cures' (2000) 7 *Asia-Pacific Development Journal* 2.

⁵⁴² Myint U 'Corruption: Causes, Consequences and Cures' (2000) 7 *Asia-Pacific Development Journal* 2.

⁵⁴³ Myint U 'Corruption: Causes, Consequences and Cures' (2000) 7 *Asia-Pacific Development Journal* 2.

It is submitted that within the backdrop of this paper, accountability would mean subjecting the government officials to a procedure that would require each decision taken by the national executive authority to be substantiated within the context of the best interests of society, however, this has been provided for within sections of the 1996 Constitution and has proven to be a failure in South Africa. Thus, this translates to constitutional law being able to determine whether the national executive's authority is positioned to result in the core principles and values of democratic constitutionalism being realised.

Subsequently, this means that South Africa within its legal frameworks must also look at the scope of executive authority, while examining the nature and purpose of the anti-corruption initiatives in order to derive the needed adjustment to accomplish what was intended. It is submitted that amendments must always have an open door towards the anti-corruption campaign.

5.1.2 Investigate the relevance of the current anti-corruption campaign within society

One cannot overlook how the anti-corruption regime has become more westernised. The legitimacy of this regime must be questioned since, as was previously mentioned in chapter four of this paper, it lacks the frame of reference yet is nonetheless expected to succeed. In reality, the examination of corruption within states lacks the consideration of the anti-corruption regime's western origins that have been avoided within the African setting, while the inefficiency of the anti-corruption campaign has been emphasised without going far enough to find the cause. Thus, the author highlights the importance of knowing that anything drafted in accordance but is lacking in context of where it can be used cannot be sustained, unfortunately that also includes law.

The first wise move is to recognise that there is no one solution that applies to all cases of political corruption in every state due to the fact that various countries have distinctive features

that manage to influence their way of function, that includes having separate governmental and non-governmental foundational principles that the states base their roots on.

Law is to be understood as a form of social control, which is why when making change, the way a legal instrument will probably play out or function as the primary source is the determining factor of that law's successful effectiveness. Thus, the use of the law as the primary source requires acknowledging that the effectiveness of legality is dependent on other various factors. When law is at odds with the status of socio-economy of that state and the conduct of government, it inevitably loses its effectiveness.

5.1.3 Cooperation of constitutional principles

A Constitution should aim to ensure that there is an existence of cooperation between its principles because what has been intended to exist within society will enable alignment with constitutional provisions and the achievement of its expectations. Thus, this would require all the participating elements within the governmental structure to have a legitimate concern for upholding the constitution's rules.

5.1.4 Objective character analysis

In addition, the author notes that throughout the study, the paper has leaned on constitutionality, legality, and institutionalism within the analysis of political corruption, however, could it be that the lack of character analysis is a valuable objective within the roles of government and should have been considered as a contributing factor?

When truly deconstructing the definition of political corruption, it provides that it occurs when an official abuses the discretion put in place for that official role, therefore, it takes a dishonest decision from a person to commit corruption, which involves a character deficiency on the official's side. Would it have not been important to add that upon legislative review that impacts corruption, the author finds it necessary to speak on the types of characters that South

Africa chooses for leadership purposes? The understanding of this moral standard would be value-based and be a pre-emptive measure that supports the implementation of governmental procedure and regulations.

5.2 Conclusion

This study aimed to critique the interrelations between constitutional law and the misuse of governmental authority and its consequence of political corruption whilst inherently highlighting the importance of the 1996 Constitution and evaluated it in light of the core principles that were meant to promote South Africa's democratic stability.

This examination, therefore, necessitated the comprehension of government power within South Africa and assessment of the background of South Africa's constitutional law practices and its correspondence with the present-day functioning of the country alongside the ideology that corruption in itself emanates from different elements that are facilitated through public authority.

This paper discovered that the real issue is with the normative study of corruption and its corresponding cure for South Africa. Yes, this paper did diagnose that indeed constitutional law does facilitate political corruption and the powerful take away is that as seen before within the constitutionalism era in South Africa, the executive office (the governmental structures) bears the infection lineage. In addition, is the failure of the anti-corruption regime that has been tried and tested in the country and has managed to fail is due to the inability to rationalise the proper tools that are needed to combat and prevent corruption in South Africa. Therefore, the question to be asked is what would rationalising political corruption even mean in South Africa? South Africa has to define what is truly meant by political corruption within the context of the country. This requires analysing the nature that the abuse of discretion, the cause of the

abuse of discretion, the scope that the abuse of discretion extends to, then develop the cure within context of the needs of the country.

Additionally, another major challenge with the reality of implementing this new strategic anti-corruption framework is the literature levels of our governmental leaders and the enforcing officials within the institutional pillars that are against corruption. The author articulates that being politically inclined in South Africa, especially on a governmental level, means that being a part of the accomplishment of the overthrow of the apartheid regime. The contextualised anti-corruption framework would require our governmental officials and enforcing agents to acquire legislative interpretative tools that would enable them to:

- a. Understand the commitment and ethical expectations of the official role in which they have been placed.
- b. Understand constitutional principles and objectives.
- c. Understand the structural procedures put in place.
- d. Understand international and national laws that are relevant to the role.

With all the research and recommendations that are provided for by this study, it is hoped that South Africa can balance the state of its economy and the feasibility of an effective government and anti-corruption framework.

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