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Pushing the Boundaries: Judicial Review of Legislative Procedures in South Africa

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ABSTRACT: In recent years, the South African Constitutional Court has dramatically shed the general reluctance it had shared with most courts around the world to review legislative processes as distinct from outcomes. In a series of graduated steps culminating in two 2017 cases, the Court has engaged in increasingly robust oversight of various types of legislative procedures. These processes embrace not only the law-making process itself, but also internal National Assembly rules, especially those relating to the National Assembly's other central function in a parliamentary democracy of holding the executive politically accountable. The article begins with a brief discussion of the background norm of non-intervention in legislative procedures from which the Court has progressively and so notably departed. It then charts the three steps by which this departure has come about, showing how each of them marks a new stage in the degree of judicial supervision. The heart of the article explores whether the Court was justified in taking these steps or was guilty of overreaching. It argues that, although a certain general tension between the separation of powers and rule of law underlies the background norm of judicial non-intervention, in the specific contexts in which these cases were decided, these two values increasingly came together. Indeed, far from violating separation of powers, the Court promoted it when overly concentrated legislative-executive power threatened impunity. Systemic weaknesses of executive political accountability that arises not merely from the existence but the abuse of dominant party status called for novel remedies of the type employed by the Court.

KEYWORDS: legislative process, executive accountability, political process theory, parliamentary government

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Over the past dozen years or so, the South African Constitutional Court has dramatically shed the general reluctance it shared with most courts around the world to review legislative processes as distinct from outcomes. In a series of graduated steps, culminating in the two 2017 cases of *United Democratic Movement v Speaker of the National Assembly*[1] and *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* ('*Economic Freedom Fighters II*'),[2] the Court has engaged in increasingly robust oversight of various types of legislative procedures. These include not only the law-making process itself, but also internal National Assembly rules and mechanisms for the conduct of its business, especially those pertaining to its other key function in a parliamentary democracy of holding the executive politically accountable. Moreover, it has not only found existing promulgated National Assembly rules unconstitutional, as in violation of the constitutional rights of individual members of parliament, but also mandated the creation of others where they do not already exist. Although this series of judicial rulings is an intrinsic part of, and cannot be fully understood apart from, the Court's broader role alongside other institutions and actors in the 'politics of accountability' that ultimately resulted in Jacob Zuma's resignation and disgrace,[3] it is also sufficiently unusual within the narrower frame of separation-of-powers jurisprudence to merit more single-focused or isolated study.[4]

In this article, I first briefly discuss and illustrate the background norm of non-intervention in legislative procedures from which the Court has progressively and so notably departed in recent years. Then, in Part II, I chart the three steps by which this departure has come about, showing how each of them marks a new stage in the degree of judicial supervision. Finally, in Part III, I explore why the Court has been able to take these steps and what the normative justification for them might look like, in terms of such core values of constitutional democracy as the separation of powers and rule of law. Although there is a certain general tension between these two, which underlies and grounds the background norm of judicial non-intervention, I will suggest that in the specific contexts in which these cases were decided, they increasingly came together. Special separation of powers and rule of law problems, arising not merely from the existence but the systematic abuse of dominant party status by the leadership of the ANC, called for special remedies of the type employed by the Court. More broadly, the article contributes to the growing scholarly focus on the general theory and practice of judicial review of legislative processes by analysing its current comparative outer boundary, in South Africa, and proposing a defence of this practice that suggests the need for a friendly amendment to, or extension of, Ely-style political process theory.[5]

1 [2017] ZACC 21, 2017 (5) SA 300 (CC).

2 [2017] ZACC 47, 2017 (2) SA 571 (CC).

3 S Woolman 'A Politics of Accountability: How South Africa's Judicial Recognition of the Binding Legal Effect of Public Protector's Recommendations Had a Catalysing Effect that Brought Down a President' (2018) 8 *Constitutional Court Review* 155. See also H Klug 'State Capture or Institutional Resilience: Is There a Crisis of Constitutional Democracy in South Africa?' in M Graber, S Levinson & M Tushnet (eds) *Constitutional Democracy in Crisis?* (2018).

4 This view is, I think, supported by the fact that in his outstanding article for the same Rule of Law symposium in this volume, Firoz Cachalia also analyses and seeks to develop an explanatory and normative framework for these and other related judicial rulings. F Cachalia 'From Aspiration to Realism: Constitutionalism, Judicial Review and the Democratic Process in South Africa' (2019) 9 *Constitutional Court Review* – (forthcoming).

5 See text between footnotes 88 and 93 below.

I THE GENERAL NORM OF JUDICIAL NON-INTERVENTION

The starting point from which the recent jurisprudence has progressively departed is the long-standing principle of judicial non-intervention in the internal affairs and procedures of the legislature that is a general characteristic of courts in constitutional democracies. In the common law world, this principle was originally captured in the doctrine of parliamentary privilege, especially as instantiated in Article 9 of the US's 1689 Bill of Rights, which, inter alia, rendered 'proceedings of Parliament' immune from impeachment or questioning in any court of law.[6] Although, of course, this doctrine emerged within a constitutional system gradually evolving towards its central characteristic of the 'sovereignty of Parliament' and consequent absence of judicial review of legislation, the two are not necessarily connected. Even within the common law world, the core of parliamentary privilege survived the rejection of parliamentary sovereignty, as evidenced by the adaptation of the language of Article 9 in the United States Constitution exactly one hundred years later[7] and, more recently, in ss 58 and 71 of the South African Constitution.[8] Moreover, the distinction between judicial review of legislative outputs and procedures – of what a legislature has the legal power to do and how it goes about doing it – is reasonably clear in both theory and practice. The substance of parliamentary privilege and the principle of judicial non-intervention it embodies are not, of course, limited to the common law. Most modern democratic constitutions contain similar provisions, providing immunity from court proceedings to members of the legislature for votes cast or statements made in Parliament.[9]

The principle of judicial non-intervention in the internal affairs of the legislature is itself ultimately an implication of the broader, and similarly near-universal, constitutional principle of the separation of powers. This principle requires that 'each arm of the State has its own domain, in which it is (to varying degrees) a master of its own process.'[10] The autonomy of legislative proceedings from court oversight is the flip side of the independence of the judiciary from undue or inappropriate legislative interference. Just as it would presumptively violate separation of powers norms for legislatures to prescribe how courts conduct their judicial function, so it would also be for courts to intervene in how legislatures conduct their internal (non-constitutionally specified) proceedings. The separation of powers presumption of institutional autonomy applies equally to inter-branch relationships other than that between the legislature and the judiciary. Parliamentary privilege was also designed to protect legislatures from executive interference, in the form of instigating or threatening prosecutions; and life

[6] 'That the freedom of speech and debates or the proceedings of Parliament ought not to be impeached or questioned in any court or place out of Parliament.' Bill of Rights,1689, Article 9.

[7] US Constitution, Article I, §6 ('...and for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place.')

[8] 'Cabinet members, Deputy Ministers and members of the National Assembly (a) have freedom of speech in the Assembly and its committees, subject to its rules and orders; and (b) are not liable to civil or criminal proceedings, arrest, imprisonment or damages for (i) anything they have said in, produced before or submitted to the Assembly or any of its committees, or (ii) anything revealed as a result of anything that they have said in, produced before or submitted to the Assembly or any of its committees.' Constitution of the Republic of South Africa, 1996 ('Constitution') s 58(1).

[9] See, for example, the German Basic Law Article 46; Spanish Constitution Article 71.

[10] A Deb *Privacy International*: A Matter of Constitutional Logic and Judicial Trust?, UK Constitutional Law Blog (8 January 2019), available at https://ukconstitutionallaw.org/.

tenure was created in order to protect the king's judges from the king's wrath.[11] In addition, many other doctrines, rules, and principles are aimed at constraining one branch of government from overreach into the affairs of another.

As an example of the general reluctance of constitutional courts to intervene in legislative processes and proceedings, even those that engage in robust review of legislative outputs, consider the United States Supreme Court. As is well-known, the Supreme Court and commentators are largely in agreement that judicial review of congressional procedures is more problematic than review of its substantive outcomes, so that almost never is the former undertaken.[12] Rather than direct review of legislative processes as an independent basis for unconstitutionality, the closest courts in the United States typically come is to make them a factor in substantive review.[13] Thus, in determining whether or not Congress is acting within its enumerated authority to regulate interstate commerce, the Supreme Court has held that the existence, nature and quality of congressional findings of a connection between the regulated activity and interstate commerce is a relevant, although not a conclusive, factor.[14] Similarly, where a congressional statute creates a novel legislative procedure for a given subject matter, courts may determine its substantive constitutionality by reference to its consistency with the procedure contained in Article I.[15] Even the few academics who have urged the courts to abandon their resistance to review of process have largely limited themselves specifically to review of law-making rules and procedures.[16] Other types of congressional proceedings are mostly off the table. For example, internal rules of the US Senate, which include such arcane parliamentary manoeuvres as the budget reconciliation procedure that permitted the 2017 Republican tax law[17] to be enacted without the possibility of a Democratic filibuster, as well of course as the filibuster itself, are generally deemed to be non-justiciable.[18] A relevant instance of this position relates to impeachment proceedings brought against two sitting lower federal court judges in the late 1980s. The judges filed suits challenging as unconstitutional the relevant Senate rules under which they had been tried.[19] Although in each case the presiding

[11] The Act of Settlement 1701 granted royal judges life tenure as distinct from serving at the king's pleasure, as most previously did.

[12] I Bar-Siman-Tov 'The Puzzling Resistance to Judicial Review of the Legislative Process' (2011) 91 *Boston University Law Review* 1915. Like Bar-Simon-Tov, I have also urged that this resistance to judicial review of legislative processes in the United States should be reconsidered. S Gardbaum 'Due Process of Lawmaking Reconsidered' (2018) 21 *University of Pennsylvania Journal of Constitutional Law* 1.

[13] Siman-Tov refers to this as 'semiprocedural judicial review. Bar-Siman-Tov (note 12 above) at 1924–1925.

[14] *United States v Lopez* 514 US 549 (1995); *United States v Morrison* 529 US 598 (2000).

[15] *INS v Chadha* 462 US 919 (1983). *Chadha* provides an example – the invalidation of the Immigration and Nationality Act's 'one-House veto' of executive branch decisions to suspend deportation of deportable aliens – of an infringement of the Constitution's bicameralism requirement.

[16] Bar-Siman-Tov (note 12 above). See also I Bar-Simon-Tov 'The Role of Courts in Improving the Legislative Process' (2015) 3 *The Theory and Practice of Legislation* 295 (2015); I Bar-Simon-Tov 'Lawmakers as Lawbreakers' 52 *William & Mary Law Review* 805 (2010).

[17] Originally entitled The Tax Cuts and Jobs Act, the final title was changed as a result of a Senate rule to an Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018.

[18] The filibuster is, of course, (selectively) employed in the Senate's 'advise and consent' function regarding presidential nominations for offices, and not only in law-making debates. On non-justiciability, see A Winkler 'Is the Filibuster Unconstitutional?' *The New Republic* (March 7, 2013); M Miller 'The Justiciability of Legislative Rules and the "Political" Political Question Doctrine' (1990) 78 *California Law Review* 9341.

[19] *Hastings v United States* 716 FSupp 38 (1989); *Nixon v United States* 744 FSupp. 9 (1990).

judge indicated some sympathy to the claims on the merits, both suits were dismissed as non-justiciable.[20] On appeal, the Supreme Court affirmed, holding that impeachment proceedings and procedures were exclusively a political question not entrusted to the courts.[21]

Even the twin pillars of 'political process' review in the United States, *Carolene Products* Footnote 4[22] and John Hart Ely's *Democracy and Distrust*,[23] still focus on judicial review of legislative outputs, as distinct from processes per se; on *what* legislatures have done rather than *how* they have done it. This now seemingly outlier theory[24] famously limits robust or heightened judicial scrutiny to a subset of enacted laws of specific content: those that restrict the democratic process (by, for example, denying some part of the electoral public a vote or voice/free speech) or harm certain racial, ethnic, or religious minorities out of hostility or prejudice, thereby denying equal protection and participation in a representative system.[25] Despite its label, the theory does not prescribe judicial review of legislation on procedural grounds alone, much less of non-legislative acts and procedures of the legislature.[26]

In South Africa, the common law doctrine of parliamentary privilege has, of course, been subsumed under the Constitution and its overarching principle of judicially enforced constitutional supremacy.[27] Nonetheless, the core of the doctrine has been constitutionalised in ss 58 and 71,[28] in provisions not dissimilar to those in many other modern constitutions. More importantly, the broader principle of judicial non-intervention in internal parliamentary affairs still has force as part of the more general constitutional principle of separation of powers. In *Doctors for Life International v Speaker of the National Assembly and Others* ('*Doctors for Life*'),[29] considered below, the Court was at pains to stress that judicial interference in parliamentary proceedings is inconsistent with the separation of powers doctrine unless mandated by the Constitution.[30]

In comparative terms, there are a few limited exceptions to the general reluctance of constitutional courts to intervene in legislative proceedings; though the number may be growing worldwide. For example, in 2002, the German Constitutional Court struck down a controversial immigration bill on the basis that the vote in the Bundesrat did not satisfy the Basic Law's procedural requirement that decisions of the chamber require the consent of a majority of the states, even though the President of the Bundesrat had certified there was a majority (by one state) for the bill. The Basic Law specifies that each state's votes must be cast as a block vote,[31]

[20] Ibid. See also Miller (note 18 above).

[21] *Nixon v United States* 506 US 224 (1993).

[22] *United States v Carolene Products, Co.* 304 US144 (1938).

[23] John Hart Ely *Democracy and Distrust: A Theory of Judicial Review* (1980).

[24] The revival of 'substantive due process' and the judicial establishment of new substantive rights, such as abortion and the possession of firearms (2008) do not appear to protect 'discrete and insular minorities'. See also M Klarman 'The Puzzling Resistance to Political Process Theory' (1991) 77 *Virginia Law Review* 747.

[25] See *Carolene Products* (note 22 above) at fn 4, sections (2) and (3); Ely (note 23 above) at 103.

[26] For more on how my account relates to political process theory, see the Conclusion below.

[27] See C Okpaluba 'Can a Court Review the Internal Affairs and Processes of the Legislature? Contemporary Developments in South Africa' (2015) 48 *Comparative and International Law Journal of Southern Africa* 183 (2015).

[28] See note 8 above: Section 71 reproduces, for delegates to the National Council of Provinces, the same rights and immunities that members of the National Assemebly enjoy under s 58.

[29] [2006] ZACC 11, 2006 (6) SA 416 (CC).

[30] Ibid at para 37.

[31] German Basic Law Article 51(3).

and the Court found that the dissenting vote by one member of the deciding state's delegation nullified the vote of that state.[32] In 2010, the same court invalidated the Federal Parliament's recent amendment of the country's welfare legislation because it deemed that the flawed procedure used to determine the subsistence minimum violated the constitution.[33] In 2017, the Israeli Supreme Court struck down a tax law on procedural grounds alone for violating the right of all legislators to meaningfully participate in the law-making process, when they received the final version of an omnibus tax bill at the last minute.[34] As a final example, the Colombian Constitution expressly grants the Constitutional Court the power to review legislation for errors of procedure as well as substance.[35] In addition to the fairly frequent exercise of this power for legislative infringement of detailed textual procedural rules,[36] the Colombian Court has also invalidated a tax law for violating the unwritten principle of 'minimum public deliberation.' This latter invalidation occurred when the government, in an attempt to reduce the budget deficit, added increased VAT rates on certain necessities at the last minute with no notice to legislators just before the final vote.[37] The Colombian Court's interventions have been premised on an attempt to bolster the quality of deliberation within a largely dysfunctional legislature, in the light of the clear intent of the framers of the 1991 Constitution to try and overcome a long history of overly powerful presidents and rubber stamp legislatures.[38]

II THE THREE-STAGE DEPARTURE FROM THE NORM

In South Africa, the Constitutional Court's departure from this norm of non-intervention has taken place in three distinct, increasingly robust stages between 2002 and 2017. Starting out with judicial review of legislative Acts for potential violations of constitutionally required procedures at stage one, the Court then moved into the more unorthodox terrain of reviewing internal parliamentary rules for infringements of the constitutional rights of individual Members of Parliament at stage two, and finally, at stage three, began reviewing whether and how (ie, the procedures by which) the legislature performs its critical non-legislative function in a parliamentary democracy of holding the executive politically accountable. This third, most recent, stage is highly unorthodox by comparative standards. As a quintessentially political function, judicial oversight and review would typically be viewed as illegitimate overreach.

Stage one consisted of two major cases reviewing the constitutionality of legislative Acts, the first for what was done and the second for what was not, decided in 2002 and 2006 respectively. In *United Democratic Movement v President of the Republic*,[39] the Constitutional

[32] Immigration Case (2002) 106 BVerfGE 310.

[33] The 'Hartz IV' Decision, BVerfGE, Judgment of the First Senate of 9 February 2010 – 1BvL 1/09 – at paras 1–220.

[34] *Kwantiski v The Knesset*, HCJ 10042/16 (20017). The decision is discussed in I Bar-Siman-Tov 'In Wake of Controversial Enactment Process of Trump's Tax Bill, Israeli SC Offers a Novel Approach to Regulating Omnibus Legislation' *I·CONnect* (December 13, 2017).

[35] Constitution of Colombia Article 241.

[36] M José Cepeda Espinosa & D Landau *Colombian Constitutional Law: Leading Cases* (2017) 323–324.

[37] Decision C-776 of 2003 (per Justice Manuel José Cepeda Espinosa). For further discussion of the decision, see Espinosa & Landau (note 36 above) at 318–323.

[38] Espinosa & Landau (note 36 above) at 324. See also D Landau 'Political Institutions and Judicial Role in Comparative Constitutional Law' (2010) 51 *Harvard International Law Journal* 319.

[39] *United Democratic Movement v President of the Republic of South Africa* [2002] ZACC 21, 2003 (1) SA 495 (CC) (*UDM*).

Court reviewed four Acts of Parliament, including two constitutional amendments, permitting limited floor crossing by members of national, provincial, and municipal legislatures that were challenged by the opposition UDM as being in violation of various procedural requirements under the Constitution. With respect to the two constitutional amendments, the claim was that their passage required meeting, but did not satisfy, the higher thresholds of ss 74(1) or (2),[40] as amendments of the founding values of the Constitution in s 1 or the bill of rights in chapter 2, rather than the general or default threshold of a two-thirds vote of the National Assembly under section 74(3). With respect to one of the statutes, the Membership Act, the claim was that the Constitution's temporary licence to change the initial ban on floor crossing by ordinary statute had expired, so that another constitutional amendment was now required. Indicating that it has 'little if any' role in reviewing the substance of constitutional amendments (including ones that amend the so-called basic structure), as distinct from whether amendments are 'passed in accordance with the prescribed procedures and majorities',[41] the Court unanimously rejected the claim that the floor-crossing amendments triggered the higher threshold as inconsistent with either s 1's founding values of multiparty democracy or the rule of law, or the political rights contained in Chapter 2. Rather, these values and rights do not require or mandate an anti-defection provision, as both the temporary licence and many other democratic constitutions testify. The Court unanimously accepted UDM's temporal argument regarding the Membership Act. Although the product of the Constitution's unusual, but by no means unique, special entrenchment provisions or 'tiered constitutionalism',[42] as a species of procedural review of constitutional amendments, the Court's role was well within the comparative mainstream. Similarly, its apparent rejection of both *substantive* review of constitutional amendments and inquiring into the motives or consequences of ANC support for floor-crossing,[43] are also evidence of judicial modesty.

Four years later, in *Doctors for Life*, the Court took the bolder step of invalidating four health statutes because the National Council of the Provinces had failed to fulfil its constitutional obligation to 'facilitate public involvement' as a requirement of the law-making process under ss 72(1)(a) and 118(1)(a).[44] Acknowledging that separation of powers and the autonomy of Parliament mean the judiciary should not interfere in its processes unless mandated to do so by the Constitution, the Court drew the outer boundaries of judicial power at determining *whether* there has been the degree of public involvement in the law-making process required by the Constitution, but leaving to parliamentary discretion *how* the duty is fulfilled.[45] Moreover, the tension between legislative autonomy and the judicial duty to enforce this constitutional

[40] This higher threshold is 75 per cent.

[41] *UDM* (note 39 above) at para 12. The Constitutional Court's jurisdiction to review the validity of constitutional amendments is granted by s 167(4).

[42] R Dixon & D Landau 'Tiered Constitutional Design' (2018) 86 *George Washington Law Review* 438.

[43] For an argument that the Court ought to have taken into account the impact of floor crossing on strengthening the ANC's dominant party status, see S Choudhry '"He Had a Mandate": The South African Constitutional Court and the African National Congress in a Dominant Party Democracy' (2009) 2 *Constitutional Court Review* 1.

[44] Constitution s 118(1)(a) reads, in relevant part: The National Council of Provinces must – (a) facilitate public involvement in the legislative and other processes of the Council and its committees. Constitution s 72(1)(a) reads, in relevant part; 'A provincial legislature must – (a) facilitate public involvement in the legislative and other process of the legislature and its committees.'

[45] *Doctors for Life* (note 29 above) at para 67. A similar decision, involving a provincial legislature's approval of a constitutional amendment, was reached in *Matatiele Municipality v President of the Republic* [2006] ZACC 12

obligation against the legislature also calls for a second-order reasonableness standard on the 'whether' question: has Parliament acted reasonably in discharging its duty to provide a reasonable opportunity for public participation.[46] Despite this relatively permissive approach, the majority concluded that holding no public hearings at all had been unreasonable under the circumstances.

The next stage in the progression occurred in 2012–2013, in two cases reviewing and invalidating internal National Assembly rules (rather than legislative Acts) for violating the constitutional rights of opposition party members. In *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* ('*Oriani-Ambrosini*'),[47] the Court held that National Assembly rules requiring MPs to secure the permission of the Assembly, through one of is prescribed committees, before they may prepare and introduce legislation, violates their individual right to do so under ss 55(1) (b) and 73(2).[48] Although s 57 empowers the National Assembly to create rules covering its legislative business, this authority is textually conditioned on respecting the participation of minority parties 'in a manner consistent with democracy'.[49] It does not permit such rules to negate what the Court interpreted as the constitutional right of individual MPs to initiate and to introduce legislation by imposing what are effectively substantive (rather than simply procedural) limitations on its exercise. The following year, in *Mazibuko v Sisulu and Another* ('*Mazibuko*'),[50] the Court applied essentially the same reasoning to what it interpreted as the individual right of an MP to schedule a motion of no-confidence in the President of the Republic under s 102(2).[51] National Assembly rules delegating to a committee the power to decide whether to schedule such a motion for debate in the Assembly effectively impose substantive limitations on the right and are inconsistent with the Constitution. Once again, although National Assembly rules may prescribe the process for vindicating a right, they may not thwart or frustrate it: 'We may not hold that an entitlement that our Constitution grants is available only at the whim or discretion of the majority or minority of members on a committee.'[52] By seven votes to four, the Court ordered a suspended declaration of invalidity for six months to remedy the defect. In these two cases, the Court reviewed the constitutionality of internal National Assembly Rules and found the procedures that they establish impermissible fetters on the individual (rather than collective or institutional) rights of MPs – it perhaps generously read the relevant sections to contain.

[46] Ibid.

[47] [2012] ZACC 27, 2012 (6) SA 588.

[48] Constitution s 73(2) reads, in relevant part: 'In exercising its legislative power, the National Assembly may – (a) consider, pass, amend or reject any legislation before the Assembly; and (b) initiate or prepare legislation, except money Bills.' Constitution s 55(1) reads, in relevant part: 'Only a Cabinet member or a Deputy Minister, or a member or committee of the National Assembly, may introduce a Bill in the Assembly…'

[49] Constitution s 57: reads, in relevant part: (1) The National Assembly may – (a) determine and control its internal arrangements, proceedings and procedures; and (b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement. (2) The rules and orders of the National Assembly must provide for – ...(b) the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy.

[50] [2013] ZACC 28, 2013 (6) SA 249

[51] Constitution s 102(2) reads: 'If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the President, the President and the other members of the Cabinet and any Deputy Ministers must resign.'

[52] *Mazibuko* (note 50 above) at para 58.

The third and most recent stage (2016–2017) involves a trio of cases in which judicial review of parliamentary processes went beyond both legislative Acts and internal procedural rules for consistency with constitutional rights. Here, the Court intervened in the distinctive legislative function in a parliamentary democracy of holding the executive politically accountable. Ordinarily, political accountability stands in contrast with legal accountability, and so more-or-less by definition excludes judicial oversight and review.

In *Economic Freedom Fighters v Speaker of the National Assembly* ('*Economic Freedom Fighters I*'),[53] the Court unanimously held that the National Assembly has not only the political power and function, but also a constitutional obligation, to hold the President accountable. Further, it had violated this duty by not facilitating and ensuring compliance with the legally binding recommendations of the Public Protector involving Jacob Zuma's private home – Nkandla.[54] Instead, the National Assembly ('NA') had passed a resolution absolving the President based on a report by the Minister of Police, a member of the President's cabinet. It thereby effectively flouted its constitutional obligation, as well as the rule of law.[55] The Court derived this obligation from s 55(2), which directs the NA to create mechanisms 'to ensure that all executive organs of the state are accountable to it.' As in *Doctors for Life*, the Court drew the boundary of judicial power at the 'whether', rather than the 'how', question:

> It falls outside the parameters of judicial authority to prescribe to the National Assembly how to scrutinize executive action, what mechanisms to establish...for the purpose of holding the executive accountable and fulfilling its oversight role...Ours is a much broader and less intrusive role. And that is to determine whether what the National Assembly did does in substance and in reality amount to fulfilment of its constitutional obligations. That is the sum-total of the constitutionally permissible judicial enquiry to be embarked upon. And these are some of the 'vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government.[56]

The Court concluded unanimously that the NA's constitutional obligation had been violated.

In *United Democratic Movement v Speaker of the National Assembly* ('*UDM*'),[57] decided in June 2017, the Court set aside the Speaker's ruling that she had no power to call for a secret ballot on a motion of no-confidence in the President. In response to the Speaker's view that neither the Constitution nor the rules of the NA provide for secret ballot, the *UDM* Court held that as the Constitution is silent on the voting procedures, a secret ballot is permissible and the NA has, through its Rules, effectively delegated to the Speaker the decision as to what procedure to use, including a secret ballot. In addition, the Court held that the Speaker's decision must be supported by a proper and rational basis and made to facilitate the effectiveness of parliamentary accountability mechanisms.[58] Recall that in *Doctors for Life,* the Court stated that it could only intervene in parliamentary proceedings when the Constitution mandated it

[53] [2016] ZACC 11, 2016 (3) SA 580.

[54] The report containing the recommendations was entitled *Secure in Comfort: Public Protector's Report on Nkandla*: *Report by the Public Protector on an Investigation into Allegations of Impropriety relating to the Installation and Implementation of Security Measures by the Department of Public Works at and in respect of the Private Residence of President Jacob Zuma at Nkandla in the Kwa-Zulu Province* Report No: 25 of 2013/4 (19 March 2014).

[55] The legally binding nature of the Public Protector's recommendations was the first, and perhaps even more important, part of the Court's ruling in *EFF I*. Woolman (note 3 above).

[56] Ibid at para 93 (quoting *Doctors for Life* (note 29 above) at para 37).

[57] [2017] ZACC 21, 2017 (5) SA 300 (CC).

[58] *EFF I* (note 53 above) at paras 86–88.

to do so. Here such a mandate is not as easy to find. By acknowledging constitutional *silence* on the issue of voting procedures and effectively intervening to interpret NA rules to the Speaker, the Court seems to be extending its role. Moreover, reviewing internal procedural decisions of the chief parliamentary officer under the general principle of legality[59] is arguably in significant tension with parliamentary autonomy. It is true that the Court refuses UDM's request to affirmatively order the Speaker to hold a secret ballot, as 'no legal power exists for such a radical and separation of powers-insensitive move':[60] but under the circumstances, such an order was probably unnecessary. As the Court concluded: '[N]ow that it has been explained that she [the Speaker] has the power to do that which she is not averse to, she has the properly-guided latitude to prescribe what she considers to be the appropriate voting procedure under the circumstances.'[61] The circumstances, of course, included this unanimous judicial 'guidance'.

Finally, in *Economic Freedom Fighters II*,[62] the Court took its intervention into the procedures surrounding Parliament's task of holding the executive accountable to a new and higher level. Although the opposition parties had moved to impeach the President under section 89(1),[63] and the motion was debated and defeated on a secret ballot ordered by the Speaker in the light of UDM, the Court held that the NA had nonetheless failed to fulfil its implicit constitutional obligation under the section to make rules creating a specially tailored process for impeachment. The more general ad hoc committee procedure used by the NA for the motion was, according to the majority, constitutionally insufficient. The procedure was also found inadequate in a second way: rather than the required antecedent judgment that one of the grounds for impeachment exists, such as a 'serious violation of the Constitution or the law', the NA impermissibly held a one-step debate on the motion to impeach.[64]

The vigorous dissent by the Chief Justice and three colleagues helpfully highlights how the *Economic Freedom Fighters II* majority went beyond the judgments in the previous two cases, which he had written for a unanimous court. According to the dissent, whereas in *Economic Freedom Fighters* and *UDM*, no specific rule or procedure was prescribed by the Court, here there is. But the Court should only be asking whether a satisfactory procedure for impeachment was in place, and not the best one. As the Chief Justice wrote:

> This time around, we are even specific about size, representations, procedure, provision for the entirety of the process, avoiding abuse of majority representation, institutional predetermination of grounds before debating and voting on impeachment. That, in my view, is an unprecedented and unconstitutional encroachment into the operational space of Parliament by judges. . . . There exists no jurisdiction in the whole world, that I am aware of, where a court has decided for Parliament how to conduct its impeachment process. Respect for separation of powers explains why this is so.[65]

[59] The principle, as developed by the Constitutional Court, requires that exercises of public power comply with minimum standards of lawfulness, reasonableness and fairness. See, for example, C Hoexter 'The Principle of Legality in South African Administrative Law' (2004) *Macquarie Law Journal* 8.

[60] *EFF I* (note 53 above) at para 92.

[61] Ibid.

[62] *EFF II* (note 2 above).

[63] Constitution s 89(1) reads, in relevant part: 'The National Assembly, by a resolution adopted with a supporting vote of at least two-thirds of its members, may remove the President only on the grounds of (a) a serious violation of the Constitution or the law; (b) serious misconduct, or (c) inability to perform the functions of office.'

[64] *EFF II* (note 2 above) at para 180.

[65] Ibid at para 254.

In prescribing 'what mechanisms to establish', the majority also went beyond, or perhaps showed the impossibility of maintaining, the Chief Justice's distinction in *Economic Freedom Fighters I* (going back to *Doctors for Life*) between impermissible judicial review of how Parliament holds the executive accountable and obligatory judicial review of whether it fulfils its constitutional obligation to do so.

In sum, by the end of 2017, judicial review of parliamentary procedures included not only the various components of the law-making process, National Assembly rules for violations of constitutional rights, decisions of the Speaker made under or applying these Rules, and whether Parliament has fulfilled its constitutional obligations as interpreted by the Court, but also what mechanisms and processes these obligations require. In terms of institutional independence and the separation of powers-inspired limits on judicial power, one would be hard pressed to state precisely what remains of the autonomy of Parliament vis-à-vis the courts apart, somewhat ironically, from the outcomes of judicially-approved procedures.

III ACCOUNTING FOR THE DEPARTURE

In this section, I first want to address the explanatory question of why the Court has been able to intervene in parliamentary processes in this increasingly robust way. Then, the remainder of the section will focus on the normative issue: what might a justification for the Court's intervention look like in terms of separation of powers and rule of law values? Are these two necessarily in tension, so that advancing the latter has come at the expense of the former? Is there a way to understand the Court's intervention as promoting, rather than (perhaps justifiably) trenching on, separation of powers?

Both sides of the 'constraint' identified by Theunis Roux as characteristic of the Court – South Africa's general legal culture and the political environment in which it operates[66] – have created the space for, or facilitated, the recent jurisprudence of legislative process. Working within a relatively formalistic or legalistic culture that tends to treat as illegitimate judicial recourse to broader moral and substantive norms, the text of the Constitution provides unusually rich resources in the relevant sections to support the Court's work, in that it contains a comparatively large amount of detail and specificity on legislative functions, powers and, especially, duties. This, of course, is not to say that the judicial rulings were compelled by the text, or are even the best among competing reasonable interpretations, but rather that the text can plausibly be read to support them. In almost every case, the leading opinion was able to cite (and interpret) a relevant section of the text rather than rely exclusively on more general structural norms of democracy, parliamentary government, minority rights, separation of powers, etc.[67] In this

[66] T Roux *The Politics of Principle: The First South African Constitutional Court*, 1995–2005 (2013) Chapter 2; T Roux, 'The South African Constitutional Court's Democratic Rights Jurisprudence' (2015) 5 *Constitutional Court Review* 33, 53–61.

[67] In *Doctors for Life*, the Court relied on s 72(1)(a) and public participation. In *Oriani-Ambrosini*, its decision hinged upon ss 55(1)(b) and 73(2) regarding the rights of MPs. In *Mazibuko*, it found support in s 102(2) on motions of no confidence. In *EFF I*, it banked on s 55(2)'s requirement that the legislature must hold the executive accountable. In *EFF II*, it found succour in s 89's provisions on removing the President. Indeed, the Court has held that the values contained in Section 1 of the Constitution, which include democracy and the rule of law, although fundamental and giving substance to all the provisions of the Constitution, do not give rise to discrete and enforceable rights in themselves. *Minister of Home Affairs v NICRO* [2004] ZACC 10 at para 21.

way, the Court could reasonably claim – and be seen – to be doing 'lawyers' work',[68] despite the increasingly obvious political consequences.

At the same time, the political constraints on the Court have loosened over the course of this time period, coinciding with the playing out of the Nkandla and other recent corruption scandals,[69] as the dominance of the ANC has seemingly declined. This is evidenced by the sweeping losses in the 2016 municipal elections, the forced resignation of Jacob Zuma, and at least talk that the ANC could conceivably have faced defeat at the national elections in 2019. This larger story, of the 'politics of accountability' and the 'catalysing effect' of the roles of media, civil society groups, opposition parties, Public Protector and judicial decisions in defending the rule of law and 'resetting' democracy, has been masterfully told by Stu Woolman in his contribution to these pages last year.[70] For current purposes, it seems reasonably clear that the trajectory of the Court decisions discussed in the previous section were both in part cause and effect of the erosion of ANC dominance. In 2002, or even 2012, the Court did not have the political space to act as it did in 2017.

If these two factors help to explain the Court's increasingly robust interventions in parliamentary processes, why it was able to play this role, what if anything might justify it? In acknowledging the tension between separation of powers and the rule of law in this context, is the Court best seen as perhaps justifiably jettisoning the former in order to protect the latter in the face of increasing brazen displays of impunity? Although this is not of course how the Court did or could present its case for intervention, I believe that separation of powers and the rule of law in fact come together, rather than diverge, to provide a justification for the Court's role.

To make this case, it is necessary to be reminded that there are two relevant sides of the institutional separation of powers, and not only one. As briefly discussed in part I above, the first side, and the one most obviously at stake in judicial consideration of legislative processes, is the mutual independence and autonomy of these two branches of government from each other. Just as the legislature is presumptively prohibited from intervening in judicial processes and functions as potentially undermining that part of the separation of powers usually referred to as the independence of the judiciary, so too the courts are constrained to respect the autonomy of Parliament, as an independent – and, in a parliamentary system, the only directly elected – branch of government. The role of constitutional courts in enforcing the supreme law limits on (and, where they exist, the constitutional obligations of) the legislature is expected to take this principle into account, hence the general tension between these aspects of the separation of powers and rule of law.

[68] 'Lawyer's work' is a reference to US Justice Scalia's critique of the popular legitimacy of the Supreme Court's work product when its decisions make little or no reference to the constitutional text. A Scalia 'Originalism: The Lesser Evil' (1989) 57 *University of Cincinnatti Law Review* 849, 854.

[69] For more on the 'state capture' scandal involving the Gupta family's influence over Jacob Zuma to steer procurement decisions and political appointments for their benefit, as well as the practices of other major private firms designed to advance their interests and their profits, see the Public Protector's second major report on Zuma-era corruption: Office of the Public Protector, South Africa *State of Capture: Report on an Investigation into Alleged Improper and Unethical Conduct by the President and Other State Functionaries relating to Alleged Improper Relationships and Involvement of the Gupta Family in the Removal and Appointment of Ministers and Directors of State Owned Enterprises resulting in Improper and Possibly Corrupt Award of State Contracts and Benefits to the Gupta Family Businesses*, Report No. 6 of 2016/17 (October 14, 2016), available at saflii.org/images/329756472-State of Capture.pdf.

[70] Woolman (note 3 above).

But the second side of the separation of powers involves legislative-executive, rather than legislative-judicial, relationships. In presidential democracies, this aspect of separation of powers is institutionalised in separated powers, with politically independent legislative and executive branches typically each having a role or veto in certain shared functions, such as law-making. Although the original Madisonian, friction-based model of 'ambition being made to counteract ambition'[71] may have had its rough edges both smoothed down and further sharpened in regular cycles by the modern cross-branch partisanship of political party and party discipline,[72] the relative independence of each resulting from the logic of separate popular elections survives. Thus, whether the re-election prospects of legislators are enhanced or diminished by actively supporting a president of their own party (or opposing one of the other) is generally determined by the contingencies of politics at any given time, not structure. By contrast, in parliamentary democracies the system of partially 'fused' rather than separated powers resulting in large part from holding a single election for both branches, means that, on the one hand, the executive governs significantly through the legislature[73] but, on the other, the separation of powers is served by means of the executive's political dependence on and responsibility to parliament. Stated crudely, what the parliamentary executive 'gains' in terms of political power compared to the presidential through its typically majoritarian control of the legislature, it also 'loses' by being dependent on the legislature for continuance in office. Although, therefore, parliamentary executives and legislatures are not designed or structured to be fully independent of each other, nonetheless the legislature must be sufficiently independent of the executive to be able to play its key separation of powers role of holding the executive politically accountable to it. If it were not, partially fused power would become fully fused, or concentrated, power, the very opposite of separation of powers.

In the modern context, many parliamentary democracies around the world have come to the conclusion that, sometimes, judicial intervention may be required to supplement or bolster the capacity of legislatures to play their allotted role in making the parliamentary version of separation of powers work. The nature, scope and limits of such judicial intervention have varied, depending on a range of factors. In terms of the requisite independence of Parliament and possible judicial supplementation, there are basically four different scenarios.

The first may be called the classical, and is best represented by the British parliamentary system of the nineteenth century, before the development of the modern political party system. Here, political accountability of the executive to a legislature consisting of relatively independent Members of Parliament – elected to office at least as much for their personal abilities, connections and records as their party labels and able to deliberate collectively about the public interest – was a robust feature of parliamentary government.[74] As long as it continued to enjoy the confidence of a majority of such members, the government exercised significant legislative powers in addition to executive ones (reflected in the concept and prioritising of 'government bills'), meaning that there was a partial fusion of the two functions and not only personnel. But the possibility of losing

[71] J Madison 'No. 51' *The Federalist Papers* C Rossiter (ed)(1961).

[72] D Levinson & R Pildes 'Separation of Parties, Not Powers' (2006) 119 *Harvard Law Review* 2311.

[73] As a result, parliament tends to be a 'policy-influencing', rather than a 'policy-making' legislature (as in a system of presidential government). R Craig 'Could the Government Advise the Queen to Refuse Royal Assent to a Backbench Bill?' *UK Constitutional Law Blog* (22 January 2019).

[74] A Beattie (ed) *English Party Politics: 1600–1906* (1970) 83: 'In [an] age [1832–1867] in which neither national party labels nor an electorate voting almost solely with reference to those labels had emerged, "control" over the actions of backbenchers was slight.'

that confidence was a real one, so that executive dependence on – and political accountability to – Parliament reflected the practice and not merely the theory of governance. As evidence, between 1832 and 1945 there were seventeen successful votes of no confidence in the British Parliament resulting in the resignation of the prime minister. Since 1945, there has only been one.[75] Indeed, not since 1895 has a majority-party government been voted out of office by Parliament. In this classical period, the traditional separation of power between King and Parliament[76] was reconstituted by the new separation between the King's government in Parliament and the other, non-ministerial members of the legislature, a separation which, although it involved some overlapping office holding, was still institutional in nature and designed to structure executive-legislative relationships in a way that maintained some significant independence of Parliament. Moreover, this second side of the separation of powers not only did not require, but would have condemned, any intervention on the part of the courts. Political accountability was not only sufficient to ensure this aspect of the separation of powers, but, in contrast to legal accountability, it also reflected and expressed the distinctive role of Parliament as the historic protector of liberty. This was the heyday of 'the political constitution'.[77]

The second scenario is the contemporary competitive party parliamentary democracy, which displaced the classical following the rise and triumph of the modern political party system. Compared to the first, it is characterised by more limited separation of powers and political accountability to parliament. In versions with two-party (and so, usually, first-past-the post voting[78]) systems, the typical electoral outcome of a single majority party in Parliament without majority electoral support has reversed the dependency of the executive on the legislature. As party political affiliation, rather than individual record and qualities, became all-important for voting purposes, the re-election prospects of government and individual Members of Parliament were increasingly intertwined at the one and only, dual-function election. Thereafter, the primary task of 'backbench' majority party legislators was no longer to check and hold the government politically accountable but to maintain it in office, increasingly at all costs. This new electoral interdependence of government and Parliament resulting from the modern party system has really become the *dependence* of the latter on the former. The executive dominates Parliament through the whip system in order to maintain necessary party unity in the face of continuous partisan attack by the minority second, or opposition, party: the alternative government-in-waiting. Accordingly, without any significant alteration of formal institutional powers or relations, the entire working of the parliamentary system in Britain changed – from a more divided or pluralistic to (usually) a strongly unified governance structure – as a result of the rise of the modern party political system in the first half of the twentieth century. And this arrangement was duplicated in other Westminster-style systems. In his classic work on political parties, Maurice Duverger described the result of this change as follows:

> Officially Great Britain has a parliamentary system…In practice the existence of a majority governing party transforms this constitutional pattern from top to bottom. The party holds in its hands the essential prerogatives of the legislature and the executive…Parliament and Government

[75] Prime Minister James Callaghan resigned in 1979.

[76] A Tomkins *Public Law* (2003).

[77] J Griffith 'The Political Constitution' (1979) 42 *Modern Law Review* 1.

[78] Following Duverger's rule (or law): (1) one-seat districts with plurality/majoritarian electoral rule tend to reduce the number of parties to two; and (2) multi-seat districts with proportional representation tend to be associated with more than two parties. M Duverger *Les Partis Politiques* (1951); M Duverger *Political Parties: Their Organization and Activity in the Modern State* (1954).

> are like two machines driven by the same motor – the party. The regime is not so very different in this respect from the single party system. Executive and legislature, Government and Parliament are constitutional facades: in reality the party alone exercises power.[79]

Within multiparty versions, usually resulting from some form of proportional representation electoral system,[80] there is typically somewhat more 'divided' government, not because of institutional separation but because of the balance of party politics. Two or more parties share executive power in a coalition government, and the executive as a whole is somewhat more dependent on the legislature as it often cannot take continued support more or less for granted as is usual in two-party systems. Smaller parties in multiparty systems tend not to be 'all-purpose' entities whose main political interests lie in supporting or opposing the government whatever its position, but are more issue driven and so more selective in their voting – whether inside or outside the coalition. The religious parties in Israel are a classic example of this phenomenon. Accordingly, overall there is less concentration of power and a less comprehensive fusion of executive and legislative functions.

Nonetheless, in both two-party and multiparty competitive democracies, the relative loss of parliamentary independence in the face of party government and growing 'executive supremacy' has meant that the capacity of legislatures to subject the executive to meaningful political accountability has been in secular decline everywhere. Political accountability is no longer sufficient for the oversight and checking function that the second side of the separation of powers originally assigned to the legislature. As a result, in this new context, political accountability of the executive for its actions has been supplemented by legal accountability. This, I believe, is a large part of the reason for the rise of judicial review, not only of administrative acts, but also of executive-driven legislation that the parliamentary world has seen since 1945 and again after 1989.[81] But note than such judicial review, like the political review it supplements, is focused on outputs rather than processes. It serves as a partial substitute for the continuous political accountability of the executive for its legislative and administrative actions in between the longer electoral cycles of direct accountability to voters.

The third scenario is the dominant party parliamentary democracy. The major difference from the ordinary competitive party system of the second scenario is that it is not merely *Parliament's* capacity to hold the executive accountable that is at risk, but the existence of *any* meaningful form of political accountability where the possibility of electoral turnover in power is small or effectively zero. In a competitive party system, in addition to grounding periodic accountability to the electorate, such rotation in office means that while executive dominance may be a constant, it is exercised by alternating actors and parties over time, so that there is at least temporal separation or diffusion of power – even if with a lag – and no complete and indefinite concentration or capture of state power by one group (or subgroup).[82] By contrast, in a dominant party democracy, such temporal concentration significantly exacerbates the separation of power problem by posing a threat to the independence not only of Parliament

[79] Ibid at 124.

[80] Ibid.

[81] S Gardbaum 'Separation of Powers and the Growth of Judicial Review in Established Democracies (Or Why has the Model of Legislative Supremacy Mostly Been Withdrawn From Sale)' (2014) 62 *American Journal of Comparative Law* 613.

[82] In some unstable competitive party democracies, the same political actors often remain in office despite frequent changes of government. Nonetheless, these are coalition governments, lacking the concentrated power of a dominant party government.

but of all institutions, including the courts, and thereby beyond political to any form of accountability and the rule of law. Where a court has the political space to do so, this threat may justify additional scope for judicial intervention, including attempts to bolster the effectiveness of the legislature's accountability mechanisms, as compared with the second scenario.[83]

And yet, despite the risks that inhere in the type, they may not be realised. Moreover, in a constitutional democracy, if one party earns the long-term trust and support of the majority of voters through free and fair elections, this legitimises its dominance despite the risks and, other things being equal, should constrain the types of judicial interventions in the name of the separation of powers that are deemed proper. Accordingly, where a dominant party essentially or mostly plays by the rules (even ones it largely wrote) and does not succumb to the pathologies posed by the form,[84] at least generally, then the scope for judicial intervention in an attempt to defend, boost or maintain the independence of Parliament in particular (although other institutions as well), while perhaps greater than in a competitive system, should be circumscribed.

The final scenario may be termed systematic abuse of dominant position. Here, the risks posed by the form are in fact realised generally. Not only is the potential for concentration of power over time achieved, but its typical pathologies appear more regularly and systematically: corruption, impunity, lack of accountability. Once abuse takes the form of illegal acts and the ruling group's dominance is employed to evade responsibility for them, then separation of powers and the rule of law join forces to justify greater judicial intervention in an attempt to open up the blockages to both political and legal accountability. In this scenario, the autonomy of a perennially captive Parliament becomes a weapon used by the party leadership to resist, not to promote, its being held to account, and judicial intervention in legislative processes is geared towards loosening party control and boosting the independence of opposition voices to help secure its key separation of powers function. In other words, in this extreme dysfunctional scenario, the larger separation of powers goal of resisting the fact and consequences of concentrated power over time may justify incursions of the principle's more normal institutionalisation in a democracy. Judicial intervention to bolster Parliament's ability to play its central role in holding the executive accountable, especially for violating the law, may be called for. This judicial oversight of legislative procedures as an attempt to remedy the problem of institutional dysfunction is similar to what has transpired in Colombia, as mentioned in Part I above, even though the relevant function and context – though not the underlying concern with separation of powers – differ. In Colombia's presidential system, the problem is weakly institutionalised political parties, rather than a dominant one,[85] and the dysfunction relates to the deliberativeness of the law-making process rather than holding the executive accountable.

It is this final scenario that has been playing out in South Africa over these past few years, as clear and incontrovertible evidence of a shift from (1) the mere existence of a dominant

[83] Of course, despite such potentially greater justification, typically courts have less political space to intervene under this scenario, so that the risks of doing so, in terms of threats to judicial independence, are also likely to be greater. See Roux (note 66 above). For Asian examples, see P Yap *Courts and Democracies in Asia* (2017). See also S Gardbaum 'Are Strong Constitutional Courts Always a Good Thing for New Democracies?' (2015) 53 *Columbia Journal of Transnational Law* 285.

[84] For a concise summary of these pathologies, as well as early evidence of occasional or partial realisation, see Choudhry (note 43 above).

[85] Espinosa & Landau (note 36 above).

political position, to (2) occasional or partial abuse of that position, and finally (3) to systematic and widespread abuse by the party leadership has emerged.[86] The argument is not intended to provide a specific justification for, say, the majority versus the dissenting judgment in *Economic Freedom Fighters II*, but rather a more general or functional justification of the entire trend of the Court's jurisprudence as a whole as it has increased the scope and intensity of its review of legislative processes of all types. Both sides of the separation of powers are aimed at preventing a common problem, the undue concentration of political power and its consequences, and when there is a major risk of systemic failure, available resources can be diverted in a crisis to the immediate source of danger. This is how judicial intervention in parliamentary processes to bolster the legislature's ability to hold an abusive executive accountable, especially for violations of the law, should be seen. Special separation of powers problems call for special remedies.

IV CONCLUSION

Within a system of constitutional supremacy, there is a tendency for the rule of law to become equated with judicial supremacy or the rule of judges. No person is above the law, but the Constitution is above the ordinary law, and its meaning and application are commonly perceived to be the 'peculiar province of the courts'.[87] The principle of the separation of powers, which guards against the consolidation of power by any one person or institution, protects against this tendency by imposing limits on judicial power that typically take a number of forms. One of these boundaries is the institutional autonomy of the legislative branch of government from judicial oversight of its internal proceedings, if not necessarily (or any longer) its external outputs. Accordingly, a certain tension between the rule of law and the separation of powers is a normal feature of modern constitutional democracies, especially where (as in South Africa) the supreme law not only grants powers to, but imposes affirmative obligations on, the legislature. Should these obligations be understood, interpreted and enforced more through the lens of the rule of law or the separation of legislative and judicial power?

This normal tension, however, may largely disappear in circumstances where the threat of consolidated power and its consequences comes from a dominant political party in long-term control of the executive and legislative branches, as well as other state institutions designed to disperse and check power, and hold it accountable. Within parliamentary systems, separation of powers is importantly manifested and operationalised through the political accountability and responsibility of the executive to the legislature. Where abuse of dominant position results instead in the weaponisation of the legislature to help create impunity and resist accountability – especially for criminal violations by party leaders – the rule of law and separation of powers come together to justify judicial intervention to bolster the ability of a parliamentary legislature to fulfil its distinctive function. The same would be true in reverse. Where abuse takes the form of systematically stripping the courts of their independence and packing them with party loyalists to the point of constitutional or criminal impunity, both rule of law and separation of powers may render certain unorthodox legislative intervention to resist and counter such moves legitimate. In both cases, the real issue will often be less the legitimacy than the practical likelihood of such measures in a context of abusive dominance. But where

[86] For more evidence on this subject, see the two Public Protector reports on Nkandla and state capture (notes 54 and 69 above).

[87] A Hamilton 'No. 78' in *The Federalist Papers* C Rossiter (ed)(1961) 467.

sufficient institutional independence has survived to make them possible, they are justified and proportionate as a means to the goal of saving constitutional democracy.

In the final sentence of *Democracy and Distrust*, John Hart Ely wrote that 'constitutional law appropriately exists for those situations where representative government cannot be trusted, not those where we know it can'.[88] Systematic abuse of dominant position is one of these 'situations'.[89] More generally in this article, I have offered an 'elaboration'[90] and extension of the political process or representation-reinforcement theory of judicial review that Ely constructed on the foundation of Footnote 4. This is so in three ways. First, despite its 'political process' label, the existing theory still essentially addresses judicial review of legislative outcomes, *what* was done rather than *how*, albeit focusing on different types of laws (those denying a vote or voice, or harming 'discrete and insular minorities'[91] out of prejudice or hostility) than those of the rival 'substantive values' approach. By contrast, the account presented in this article seeks to provide a justification of judicial review of legislative processes per se, both statutory and non-legislative acts and procedures of the legislature. In other words, political process review and legislative process review are not identical. Second, to the extent it does focus on actual procedures, Ely's theory looks primarily to the 'external' processes and modes of democratic participation by the people, especially in terms of voting and voice in free and fair elections; whereas my account looks to the 'internal' processes of, and modes of participation in, the elected legislature. Finally, the article identifies some of the distinctive problems and potential 'malfunctioning [of] the political market'[92] within a parliamentary constitutional democracy as compared with the presidential one that Footnote 4 and Ely presumed.

Nonetheless, although falling within none of the Footnote 4 categories or Ely's articulation and extended defence of them, and so neither a restatement nor a necessary implication of this theory, the account provided here undoubtedly falls within its general spirit. For, like Ely, it is centrally concerned with providing means of resistance to prevent 'the ins . . . choking off the channels of political change to ensure that they will stay in and the outs will stay out.'[93]

[88] Ely (note 23 above) at 183.

[89] I am not arguing that systematic abuse of dominant position is the *only* scenario that potentially justifies judicial intervention in legislative procedures of the type undertaken by the South African Court. Even without establishing political dominance, a governing party may engage in forms of 'abusive constitutionalism' that similarly threaten separation of powers, rule of law, and constitutional democracy: as arguably has occurred in Poland since 2015. That said, the persistence of competitive party democracy – and thereby political accountability – will likely mean that the judicial role ought to be more circumscribed (as generally under the second scenario) and this type of intervention retained as a last resort.

[90] Ely (note 23 above) at 181: 'The elaboration of a representation-reinforcing theory of judicial review could go many ways, and Chapters 5 and 6 are obviously just one version.'

[91] *Carolene Products* (note 22 above) at 152, fn 4.

[92] Ely (note 23 above) at 103.

[93] Ibid.