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Precautionary Constitutionalism, Representative Democracy and Political Corruption

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ABSTRACT: The Constitutional Court has over the past several years intervened in a significant number of cases that set concrete rules for the manner in which the internal procedures of our representative branches should operate. Once one overcomes anodyne expressions of the separation of powers doctrine, the departure from 'well established' understandings of the proper relationship between the judiciary and other branches in constitutional democracies begins to make sense *in South Africa*. That said, our fundamental commitment to representative democracy and a 'separation of powers' should urge some caution when it comes to judicial intervention in the 'internal functioning' of the representative branches. This article has put forward a 'democratic process' theory, which includes a specific case for 'representation-reinforcing review' aimed at promoting 'principal/agent' accountability. Given the deep commitment of the basic law to self-government in multiple forms, this theory holds that where self-dealing representatives: (a) fail to fulfil their custodial responsibilities for public resources on behalf of 'the people'; (b) engage in self-dealing; (c) are 'captured' by private interests; or (d) create corrupt patronage systems that threaten the entire democratic project, then the judiciary is well within its rights to impose binding legal constraints on the political process in order to secure accountability. Of course, where accountability ends, and meddling starts, can sometimes be difficult to ascertain. On several occasions the Court has failed to offer a persuasive argument for intervention in the internal processes of the representative branches of government. But while the outcomes might appear jarring on a first read, this article shows that the Court's implicit recognition in recent cases of constitutional standards governing the relationship between representatives and voters (a 'principal/agent' relationship) in a representative democracy and the express principle of accountability in a constitutional state provides justification for the more troubling decisions reached and bright lines for future cases. The case for democracy-reinforcing review propounded here enables us to ascertain, as best as we can, when the rough and tumble of democratic politics – as a deep constitutional commitment – must be respected and when the democratic process has become so utterly dysfunctional and our representatives so remiss in the observance of their constitutional obligation of accountability to 'the people', that it renders our representative democracy 'representative' and 'democratic' in name only.

KEYWORDS: representative democracy, accountability, democracy-reinforcing process theory, corruption

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> The day might come when the leader says that to have a gold bed or diamond studded toilet paper holder is to support local industry, but I rather doubt it. Our corruption, should it come, would be of the more sophisticated kind, as befits a developed country. … Constitutions both express and tame power. They are built not on trust but on mistrust, and not just of the other side, but of ourselves.[1] — Albie Sachs
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> A dependence upon the people, is no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. — James Madison

I INTRODUCTION

A Precautionary Constitutionalism[2]

South Africa had its founding 'constitutional moment' just more than two decades ago, putting an end to the political and legal institutions of the apartheid system and inaugurating a new political and legal order based on democracy, human rights and the rule of law. This specific transition appeared to be part of a global and irreversible trend towards democratic systems and constitutionalism.[3] Political transition to a non-racial constitutional order through deliberative acts of bargaining and political choice, was a significant achievement in a society with a history of colonial conquest and despoliation. South Africa's judiciary supported and legitimated this transition[4] and over the next two decades developed an impressive body of 'aspirational jurisprudence' concerned both with the enforcement of individual rights and the rule of law. Many judges and constitutional scholars saw the Constitution of the Republic of South

[1] A Sachs 'Perfectibility and Corruptibility: Preparing Ourselves for Power' Inaugural Lecture, University of Cape Town (1992) 4 and 11; J Madison. Federalist No. 51: 'The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments' (1788) *New York Packet*, February 8, 1788.

[2] M Dorf 'The Aspirational Constitution' (2009) 77 *George Washington Law Review* 1631. Constitutions are aspirational in the sense that they identify and symbolise the shared ideals of a political community and the goals to be achieved over time. The idea, for instance, that the Constitution has transformative goals is widely accepted in the legal community and by judges. But constitutions are also precautionary devices that aim at managing the risks of 'backsliding' and even failure associated with democratic politics and the abusive or corrupt exercise of power. The South African Constitution is no different. See also J Tullis & S Macebo (eds) *The Limits of Constitutional Democracy* (2010); T Ginsburg & AZ Huq *How To Save Constitutional Democracy* (2019). Both books offer analysis of the kinds of factors that impair the functioning of constitutional democracies.

[3] F Fukuyama *The End of History and the Last Man* (1992). Francis Fukuyama suggested, after the collapse of the Soviet Union, that liberal democratic institutions would displace all alternatives. His *volte-face* in more recent work focuses on the causes of decay in liberal democracies – including 'elite capture'. See F Fukuyama *Political Order and Political Decay: From the Industrial Revolution to the Globalization of Democracy* (2014) 465, 486. He notes that the 'Madisonian' features of the US Constitution have not succeeded in preventing elite capture or institutional decay.

[4] *Certification of the Constitution of the Republic of South Africa* [1996] ZACC 26, 1996 (4) SA 744 (CC) ('*Certification of the Constitution*').

Africa, 1996 (Constitution) as a blueprint for 'transformation' and social change.[5] All that such a transformation required was a change in legal culture from formalism to a substantive commitment to social democracy, and a good-faith implementation of the Constitution's immanent normative postulates by the political branches.

Absent in this political-constitutional moment was a realistic conception of the risks inherent in democratic politics and of forms of *political dysfunction*[6] that can threaten the practice of democracy and the prospects of 'transformation'. Sam Issacharoff, in these pages, pointed to the need for the Court to 'articulate a theory of proper democratic politics in order to discharge a principled role in engaging political process failures'.[7] Such risks, leading potentially to forms of 'dysfunction' that need a judicial remedy, can take various forms; abuses of power, the undue influence of monied elites, majoritarian or minoritarian oppression, self-dealing by incumbents,[8] authoritarianism, a

[5] K Klare 'Legal Culture and Transformative Constitutionalism' 14 *South African Journal on Human Rights* (1998) 146. Several judges publicly embraced the concept of 'transformative constitutionalism'. S Ngcobo 'South Africa's Transformative Constitution: Towards an Appropriate Doctrine of Separation of Powers' (2011) 22 *Stellenbosch Law Review* 37; D Moseneke 'The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication' (2002) 18 *South African Journal on Human Rights* 309. But the concept was not without its critics. T Roux 'Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference' (2009) 2 *Stellenbosch Law Review* 258. See S Sibande 'Not Purpose Made! Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty' (2011) 3 *Stellenbosch Law Review* 482.

[6] Precautionary constitutionalism is concerned with 'risk mitigation' both *ex ante* and *ex post.* But in this article, my focus is on the latter, ie on forms of 'political dysfunction' that have become manifest in the functioning of democratic institutions in 'post-apartheid' South Africa.

[7] S Issacharoff 'The Democratic Risk to Democratic Transitions' (2016) 8 *Constitutional Court Review* 97. My case for the expansion of judicial review to consider questions concerning the 'internal functioning' of representative bodies generally considered to be non-reviewable on a traditional separation of powers grounds, is premised on a recognition that the scope of review in any particular jurisdiction is in part a contextual question, which depends on whether certain background conditions exist, in particular whether a country has good, working democratic institutions, and whether the implicit norms that support democratic practices are generally observed, especially by those who hold elective office.

[8] R Pildes 'The Constitutionalization of Democratic Politics – The Supreme Court, 2003 Term' (2004) 118 *Harvard Law Review* 29. Pildes engages the 'uniquely American practice of self-interested legislative districting'. The concept of 'self-dealing' is used here in a broader sense: for example, where party loyalty trumps public accountability.

lack of accountability,[9] executive dominance of legislatures,[10] party dominance,[11] various forms of oligarchic[12] and plutocratic capture,[13] unjust socio-economic inequalities,[14] and political corruption

[9] S Woolman 'A Politics of Accountability: How South Africa's Judicial Recognition of the Binding Legal Effect of the Public Protector's Recommendations had a Catalysing Effect that Brought down a President' (2018) 8 *Constitutional Court Review* 155.

[10] S Gardbaum 'Judicial Review of Legislative Procedures in South Africa' (2019) 9 *Constitutional Court Review* 1.

[11] 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* 2. Choudhry's assessment of 'political dysfunction' and the Constitutional Court's jurisprudence is based on a characterisation of South Africa as a 'dominant party democracy'. I have doubts about whether this concept can provide a principled basis for judicial intervention to remedy 'democratic process dysfunction' since it invites the judiciary to second guess the outcomes of electoral processes and to supervise the preferences of voters because the theory postulates 'electoral dominance per se' as constitutionally suspect. It arguably invites partisan adjudication. See also DA Strauss 'Corruption, Equality and Campaign Finance Reform' (1994) 94 *Columbia Law Review* 1369 (Strauss argues that 'political corruption' is inherent in the 'interest group' character of democratic politics, and so is not restricted to 'dominant party democracies' nor are the phenomena of state and plutocratic capture); M Lofgren *The Deep State: The Fall of the Constitution and The Rise of a Shadow Government* (2016). Secondly, the theory's framing of 'political dysfunction' is too narrow: it ignores the problem of 'dominant minorities' and the inequalities which arise from the economic structure of 'post-colonial South Africa'. A Mbembe *The Critique of Black Reason* (2017) 176 (Achille Mbembe notes the contradictions that arise from a 'demographic majority' that exercises political power while lacking economic power). However, this article shares with the dominant party theorists an attempt to understand the specific forms of 'political process dysfunction' in a jurisdiction such as our own. Our experience in South Africa, after the introduction of democratic institutions suggests that some constitutional and non-constitutional political practices and norms essential to a functioning democracy, like the norm of political accountability, are not yet well established. A 'politics of accountability', as Stu Woolman argues, has recently asserted itself in response to political corruption and 'state capture'. Woolman (note 9 above). But when political institutions throughout the state fail to hold the President to account for the abuse of public funds and the 'unconstitutional delegation' of public power to private agents, we must reckon with more widespread frailties in our polity.

[12] R Michels *The Iron Law of Oligarchy* (1911).

[13] M Ignatieff *The Ordinary Virtues: Moral Order in a Divided World* (2017) 219. Ignatieff writes: 'It is a comforting illusion to divide the world into secure liberal democracies that have mutually enabling relations between institutions and virtue and those that are still struggling to create this virtuous upward spiral. Even in the developed liberal democracies the ordinary virtues struggle whenever honest, non-collusive, responsive institutions are lacking.' See also D Runciman *How Democracy Ends* (2018); AC Grayling *Democracy and Its Crisis* (2017); and Y Mounk *The People v Democracy: Why Our Freedom is in Danger and How to Save It* (2018).

[14] T Scanlon *Why Does Inequality Matter?* (2018). For recent reflections on inequality in South Africa, see MN Smith *Confronting Inequality* (2018).

– the particular focus of this article.[15] Constitutions should therefore be understood, not only *aspirationally* as texts which articulate a conception of justice, but as precautionary devices for managing risks associated with the *exercise of power* in a representative democracy.[16] At the 'higher law' moment of its formulation and founding, the 'risk mitigation' question arises as a question primarily of institutional design.[17] Once vices inherent in 'ordinary politics'[18] and the 'rule of men' arise, the question that follows is how the extant constitution ought to be interpreted in the light of political 'dysfunction' that has become manifest.

Which political risks and forms of 'dysfunction' require a constitutional remedy is a question that depends on alternative theoretical accounts of the constitutional project and democratic ideals. But democratic constitutions always have a dual purpose: facilitating the exercise of 'good power' and constraining the exercise of 'bad power'.[19] Protecting the integrity of the

[15] 'Political corruption' as I use the concept, is not limited to 'quid pro quo' corruption involving an improper exchange of inducements and benefits between a private party and a public official exercising public functions. This kind of corruption is a criminal offence, and is dealt with through the criminal justice system. See the Prevention of Corrupt Activities Act 12 of 2004. But *political* corruption is a broader concept. It includes corrupt, 'self-dealing' *by elected public representatives* that threatens the functioning of the democratic institutions of 'republican self-government'. *Citizens United v FEC* 558 US 310 (2010). Justice Steven's wrote: 'When they bought our constitution into being, the Framers had their minds trained on a threat to republican self-government', in the form of political corruption. Ibid at 452. It is for this reason that constitutions provide for exceptional remedies through the political process, like impeachment, which are not dependent on proof of criminal conduct. Nor is political corruption limited to discreet acts. It includes institutional and systemic corruption. See Lawrence Lessig 'On the Legitimate Aim of Congressional of Regulation of Political Speech: An Originalist View' in LC Bollinger & GR Stone *The Free Speech Century* (2019) at p.99. That is how 'state capture' in South Africa should be understood. This conceptualisation explains why political corruption properly raises *constitutionally salient* questions and informs my analysis of recent cases of 'unorthodox' intervention by the judiciary in the political processes of the National Assembly. Theunis Roux has suggested that extant corruption is an 'epiphenomenon' with structural roots – while Stu Woolman has noted that it can also be traced to a host of 'wicked problems' beyond South African borders and local sovereign control. If so, then judicial review and constitutions can provide only limited remedies. They may be correct. However, the control of abuses of political power, including corrupt exercises of such power has always provided one of the more important justifications for constitutional constraints in a democracy.

[16] A Vermeule 'Precautionary Principles in Constitutional Law' *Harvard Public Law Working Paper 11–20* (2012), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1930427. The precautionary principle in constitutional law covers prophylactic measures taken in 'designing constitutions' [the drafting stage] and once they are operational, [the implementation stage] measures, including ones enforced by the judiciary, to manage actual risks as well as speculative ones, which if actualised, have devastating consequences. This perspective informs my suggestion that the Constitution should be read as instantiating an 'anti-corruption' principle, and can plausibly be so read.

[17] J Elster *Ulysses and the Sirens: Studies in Rationality and Irrationality* (1979); J Elster *Securities Against Misrule: Juries, Assemblies, Elections* (2013). Elster argues that the primary task of constitutional design is a negative one of weeding out self-interest, passion, prejudice and bias, rather than a positive one of producing good outcomes. He makes the argument that written constitutions are needed to constrain legislatures '*in order to prevent those in power from using their power to keep their power'.* Ibid at 191–192. We have learnt from experience that 'self-dealing' elected representatives can misuse otherwise legitimate power, to evade accountability and entrench themselves in power. In such circumstances, judicially enforced constitutional constraints can prove to be important in securing at least some of the conditions for the preservation of a project of democratic constitutionalism.

[18] B Ackerman *We the People, Volume 1: Foundations* (1991)(Ackerman draws a distinction between 'constitutional politics' and 'ordinary politics'.)

[19] G Mulgan *Good Power and Bad Power: The Ideals and Betrayals of Government* (2006).

institutions of self-government and the democratic process from the negative consequences of improper influence and the corrupt exercise of power provides one of the basic premises of *precautionary constitutionalism*.

B State capture and the Constitution

'State capture', a form of political corruption, entered our public lexicon after the publication of two reports by the Public Protector. The first report found that public funds had been spent on the President's private homestead for non-security purposes.[20] The second, that he had effectively handed over his constitutional authority to appoint Cabinet Ministers to private individuals who are in business with his son.[21] A subsequent report by a group of academics came to the conclusion that under the Zuma administration, public power was effectively being exercised by a 'shadow state' – a well-organised clientelistic and patronage network.[22] Despite the overwhelming evidence of systemic corruption, the National Assembly – the body 'elected to represent the people and to ensure government by the people under the constitution'[23] – failed to discharge its constitutional obligation to hold the President to account.[24]

'State capture' raises fundamental questions both of constitutional integrity and democratic legitimacy since the normative democratic theory underpinning the Constitution envisages a political process that is sufficiently under the control of both the electorate and their representatives.[25] When a 'faction' of the state, acting in concert with a network of unauthorised private actors, usurps the rights and powers of the popular sovereign, the representative mechanism is no longer functioning as envisaged by the Constitution.

How should constitutional theory and law respond to problems of 'political dysfunction' in the form of political corruption and state capture? What is the role of judicial review in

[20] Office of the Public Protector *Secure in Comfort: Report on an Investigation into Allegations of Impropriety Relating to the Implementation of Security Measures by the Department of Public Works at and in Respect of the Private Residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal Province* (Report 25 of 2013/2014)('*Secure in Comfort*').

[21] Office of the Public Protector *State of Capture: Report on an Investigation into Alleged Improper and Unethical Conduct by the President & Other State Functionaries Relating to the 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 Business* (Report 6 of 2016/2017) ('*State of Capture*').

[22] HB Bhorat, M Buthelezi, I Chipkin, S Duma, L Mondi, C Peter, M Qobo, M Swilling & H Friedenstein *Betrayal of the Promise: How South Africa is Being Stolen* (2017). The analysis in this report bears a striking resemblance to Mike Lofgren's analysis of elite capture and institutional decay in the United States. M Lofgren *The Deep State: The Fall of the Constitution and the Rise of a Shadow Government* (2016). See also C Olver *How to Steal a City: The Battle for Nelson Mandela Bay: an Inside Account* (2017).

[23] Constitution s 42(3).

[24] Ibid s 55(2). Accountability is also one of our founding constitutional values. See Constitution s 1.

[25] Vermeule (note 16 above). Adrian Vermeule characterises this kind of 'dysfunction', where representatives are insufficiently constrained by voters, as a kind of 'agency slack', ie, the defect is in the presumed relationship between voters and their representatives. The identification of a principal/agent problem in a representative government can also be found in John Stuart Mill's essay 'On Liberty': 'In time … elective government … became subject to the observations and criticisms which wait upon a great existing fact. It is now perceived that such phrases as "self government", and the "power of the people over themselves", do not express the true state of the case. The "people" who exercise the power are not always the same people with those over whom it is exercised.' *JS Mill: On Liberty and Other Writings* in S Collini (ed) (1989).

our jurisdiction in setting standards for 'democratic politics' and remedying 'political process dysfunction'?

My aim in this article is to adumbrate a theory, grounded in the idea of democratic self-government,[26] that will help us better understand the Court's 'political process jurisprudence'. When 'self-dealing' representatives are corrupt or fail to act against corruption, what is really at stake, I argue, is the health of democracy as a system of self-government and democratic representation. In such circumstances, 'democracy-reinforcing review' overriding the usual 'separation of powers'[27] constraints imposed on the judiciary when it comes to 'interference in the internal functioning' of constitutionally autonomous representative bodies, may be justified by precautionary considerations, in order to vindicate the constitutional promise of self-government.

In part II, I show why the constitutional principle of 'self-government'[28] and the democratic process of collective decision-making and representation it envisages, requires 'rule of law' constraints which are protective of the integrity of the democratic process. This is the familiar paradox of democratic constitutionalism that Jon Elster and others have drawn attention to.[29] The constitutional principle of the 'rule of law' is a broader notion than its administrative law derivation which is concerned with arbitrary, unfair and unauthorised exercises of discretionary powers by officials. It includes for instance a requirement that the same rules are applied to *governors and the governed* and that *representatives act on behalf of the people and not in their own interests*. In the way that I will use the concept of the rule of law, it includes *all legal constraints* that a self-governing community imposes over time and through experience to safeguard the integrity of the institutions and processes of political contestation, collective decision-making and representation in a self-governing political community.

In part III, I consider the question: under what legal constraints is it appropriate for the judiciary, having regard to its institutional competencies and constitutional role, to impose on the political process, designed to give expression to the constitutional principle of self-government? Answers to this question will depend on how the process of 'will formation'

[26] F Cachalia 'Separation of Powers, Active Liberty and the Allocation of Public Resources: The E-Tolling Case' (2005) 132 *South African Law Journal* 285 (Contends that the idea of self-government should be considered to be the core component of a Constitution – even one with a justiciable Bill of Rights). But see DM Davis 'Separation of Powers: Democracy or Juristocracy' (2016) 133 *South African Law Journal* 258 (Davis J responded that such recognition would encourage 'undue deference' in cases of rights adjudication – an odd claim since I considered it uncontentious that the principle of self-government is the primary basis for political ordering in a constitutional democracy. 'Rights' should not be counter-posed to the principle of 'self-government'. Both are instantiated in the constitutions of modern democracies and are interdependent.)

[27] A Vermeule *Law's Abnegation: From Law's Empire to the Administrative State* (2016) 56. Vermeule shows how the constitutional doctrine of the separation of powers has come to be understood by judges in the context of the administrative state not as a sacred constraint that must always be strictly obeyed, but rather as a principle that must be optimised. See also E Carolan *The New Separation of Powers: A Theory for the Modern State* (2009); William B Gwyn 'The Indeterminacy of the Separation of Powers in the Age of the Framers' (1989) 30 *William and Mary Law Review* 263. The version of the principle adopted in South African Constitutional Law is 'flexible', whose application case by case depends on a variety of considerations. *In re: Certification of the Constitution* (note 4 above) at 111. But I argue here that there must some 'bright lines'. The normative and institutional considerations that explain each decision, where this principle is implicated, must be *consistently* articulated, case-by-case. The principle cannot reflect an endlessly malleable, entirely fact driven approach.

[28] L Tribe *The Invisible Constitution* (2008) 83–91 (Offers an argument, that even if not textually explicit, both the rule of law and the principle of 'democratic accountability' are a part of the US Constitution).

[29] Elster (note 17 above).

is understood under our Constitution, and when the political process can be considered to be constitutionally defective. While 'process theory' proved inadequate as a supposedly neutral account of judicial view, this article contends that it can guide judicial intervention (or where appropriate, non-intervention) in the democratic political process to remedy 'political process dysfunction' when it is given sufficient substantive content, grounded in the idea of representative government.

In part IV, I discuss the Court's jurisprudence concerning the relationship between courts and representative bodies in terms of the separation of powers doctrine and respect for democratic processes. A trilogy of the most recent cases[30] will demonstrate that the principle of the separation of powers should be invoked to preclude judicial intervention in the internal functioning of representative bodies, unless a clear violation of a specific textual provision, a constitutional obligation or a constitutional principle can be shown.

In part V, I consider what difference 'principal/agent dysfunction' arising from political corruption makes to the prior analysis. This kind of systemic dysfunction means that the political system is not functioning properly *as a system of representative government*. Judicial intervention, which displaces or qualifies the usual separation of powers considerations, may then be justified in order to vindicate the constitutional commitment to democratic self-government. The Court's recent jurisprudence can be understood as an attempt by the judiciary to respond to the harms represented by political corruption and state capture to the constitutional project of democratic self-government. The Court has increasingly incorporated a constitutional requirement of principal/agent probity (ie, in the relationship between representatives and citizens) in its analysis of the standards the Constitution sets for the proper functioning of and judicial intervention in the democratic political process.

Although anti-corruption concerns are pervasive in these recent cases, the Court did not explicitly invoke 'anti-corruption' as an enforceable constitutional norm. In part VI, I conclude that an implicit anti-corruption constitutional norm should become a 'free floating' precautionary principle that works together with the Court's 'political process jurisprudence' by clarifying when intervention is justified to remedy dysfunction in the democratic political process.

The aim of the precautionary principles in constitutional law is to protect democracy. The anti-corruption principle thus 'has an insistently democratic foundation. Its goal is to assert popular control over the risks that concern the public'.[31] Its adoption would justify intervention in the internal processes of the legislature in only the direst of situations – where the default assumption that the legislature is functioning as required by the Constitution cannot be made.

[30] *Economic Freedom Fighters v Speaker of the National Assembly & Others; Democratic Alliance v Speaker of the National Assembly & Others* [2016] ZACC 11, 2016 (5) BCLR 618 (CC), 2016(3) SA580 (CC) (31 March 2016) ('*EFF 1*'); *United Democratic Movement v Speaker of the National Assembly & Others* [2017] ZACC 21, 2017 (8) BCLR 1061(CC), 2017 (5) SA 300 (22 June 2017)('*UDM*'); *Economic Freedom Fighters & Others v Speaker of the National Assembly & Another* [2017] ZACC 47, 2018 (3) BCLR, 259 (CC) 29 December 2017 ('*EFF 2*').

[31] CR Sunstein *The Cost-Benefit Revolution* (2018) 144–155. Sunstein discusses the relationship between precautions and democracy. The subject of his book however is the regulatory state, not constitutional and democratic theory. But the precautionary principle is also important in constitutional law. It is designed to mitigate actual harms and also harms that cannot always be predicted, but if actualised, have devastating consequences for a constitutional democracy.

II SELF-GOVERNMENT, POLITICS AND THE RULE OF LAW

In her essay, 'The Great Tradition',[32] Hannah Arendt says definitions of types of government always rest on two conceptual pillars: *law and power*. The first pillar is Platonic: It recognises that law both constitutes and constrains the exercise of power. It is recognisable in contemporary constitutionalism as the idea of the 'rule of law, not men': 'lawful government was good and lawless bad'.[33] She then contends that:

> The criterion of law … as a yardstick of good or bad government, was very early replaced ... by the altogether different notion … with the result that bad government became the exercise of power in the interests of the rulers, and good government the use of power in the interests of the ruled *on whose behalf power is exercised*. [I]t is necessary that all share equally in ruling and being ruled.[34]

In Arendt's description of Aristotelian politics we have an early expression of the idea of 'rulership' *in a democracy*. In contemporary times, this conception of democratic rule has come to mean 'free and equal participation in political will formation',[35] or government by and on behalf of the people.[36] Modern conceptions of democratic constitutionalism combine these two ideas: (a) self-government, or 'government by the people' if not directly, then least by their consent and on their behalf; and (b) the 'rule of law, not men' – which appears at first blush to contradict the first requirement, but is actually a *sine qua non* for its existence.[37]

The democratic value of self-government requires that the people are self-governing and sovereign. As Frank Michelman has observed:

> Constitutionally speaking, democracy in our times … names a standard by which a country is not free, its inhabitants not free men and women, unless political arrangements are such as to place the people under their own joint rule. 'Self-government' it is often called.[38]

For the people to be 'self-governing', they must, in some sense, be the authors of the laws to which they are subject. It guarantees rights of representation and participation in the institutions that are set up for collective decision-making.

Actualisation of the political good of 'self-rule' also requires a system *of rules, standards, and procedures,*[39] – the legal standards encapsulated in the notion of the 'rule of law'. The rule

[32] H Arendt *Thinking Without a Banister: Essays in Understanding, 1953–1975* in J Kohn (ed) (2018) 43.

[33] Ibid.

[34] Ibid at 58.

[35] A Honneth *The Idea of Socialism: Towards a Renewal* (2017) 92.

[36] Constitution Preamble and s 43(2). Section 42(3) makes it clear that *self-government* in South Africa is to take the form of a *representative* democracy. It reads: 'The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.'

[37] On the conditions required for collective self-rule and the rule of law, see S Woolman 'On the Reciprocal Relationship between the Rule of Law and Civil Society' (2015) *Acta Juridica* 374.

[38] F Michelman 'Democracy and Positive Liberty' (1996) *Boston Review* 5, 21. The concept of 'the people' as the ultimate source of sovereign power, as Slavoj Zizek writes, functions 'merely to designate a certain limit: it prohibits any determinate agent from ruling with full sovereignty'. S Zizek *Like a Thief in Broad Daylight: Power in The Era of Post-Humanity* (2018) 75.

[39] J Tulley 'The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy' (2002) 65 *Modern Law Review* 204, 205 (James Tully argues that a constitutional democracy is legitimate if it meets the test of two inextricably connected principles of legitimacy: the principle of democracy or popular sovereignty and constitutionalism or of the rule of law).

of law thus makes representative democracy possible. Self-rule or 'active liberty'[40] requires a system of legally binding constraints on the political process of collective decision-making. As Montesquieu noted, a constitution (among other documents) provides a legal 'framework within which people move and act'.[41] This realm – the democratic political process – encompasses the representative institutions which structure collective action and party competition. The ongoing influence of this idea locally is evinced in Woolman's recent suggestion that the Constitution is best read as a framework or scaffolding for collective action.[42]

Hans Lindahl also sees law as a species of collective action. His 'first person plural' perspective on constitutions takes its departure point from the opening words, 'We The People', which provides:

> [the] master rule that structures how a legal collective goes about responding authoritatively to the practical question: 'What is joint action for?' thereby determining what counts as legal behaviour for the collective.[43]

Lindahl captures this relationship more precisely when he says:

> There is a form of joint action in which the monitoring and enforcement of collective action is entrusted to certain officials and authorities. By the monitoring of joint action, I mean that in the course of joint action, certain authorities establish in a binding fashion what is its point, and how it can be best achieved, whether in the light of the changing context in which the joint action unfolds or because conflict about these issues may arise between participant agents. In such circumstances, it is up to the authorities to articulate the point of joint action by establishing what will count in the default setting of collective action, and to establish whether an act counts as a participant act.[44]

Lindahl's Authoritative Collective Action Model (ACA) makes it clear that harms to democratic processes of collective decision-making through which joint action and its point is decided upon are distinct from harms to individual interests. But such harms are also constitutionally cognisable. In South Africa's constitutional democracy, ultimate responsibility for deciding on the legal criteria by which all public actions are judged falls to the Court and other independent bodies – the independent institutions created in Chapter 9 of the Constitution.

The line drawn between political accountability through the electoral process and legal accountability enforceable at a matter of law, or between 'politics and law', is a contextual matter. Different jurisdictions offer different answers.[45] And the same jurisdiction might provide different answers at different times, since risk assessments to the project of democratic self-government can change over time.

Rule of law constraints are required to enable and to protect a project of democratic self-government which envisages a democratic process of representation, political contestation

[40] S Breyer *Active Liberty: Interpreting our Democratic Constitution* (2005).

[41] Arendt (note 32 above) at 53.

[42] S Woolman 'Understanding South Africa's Aspirational Constitution as Scaffolding' (2016) 60/61 *New York Law School Law Review* 401; S Woolman 'South Africa's Aspirational Constitution and Our Problems of Collective Action' (2016) 32 *South African Journal on Human Rights* 1.

[43] H Lindahl 'Constituent Power and the Constitution.' D Dyzenhaus and M Thorburn (eds) *Philosophical Foundations of Constitutional Law* 145

[44] Ibid at 144 (my emphasis).

[45] How a constitutional system actually functions depends both on the conceptions of political justice instantiated in a constitutional text and on the traditions and practices of a particular political community. The cultural preconditions for democracy and the rule of law have to be consciously constructed and then entrenched, and re-entrenched as social mores and practices over time: they cannot simply presupposed. See J Habermas *Between Facts and Norms* (1998); J Rawls *Justice as Fairness: A Restatement* (2001) 145, 146.

and collective decision-making. The C, and lower courts and independent institutions, must intervene in the democratic political process when defects such as widespread and deeply systemic political corruption undermines the processes of genuine collective decision-making and representative government. It does so by employing the basic and founding commitment to rule of law found in s 1(c) of the Constitution. In so doing, it imposes constraints on self-dealing representatives and their private benefactors on behalf of the people and their right to democracy, as enshrined in s 1(d) of the Constitution.

However, in imposing constraints on the political process for constitutionally cognisable reasons, the judiciary is itself constrained by the constitutional principles of self-government and the separation of powers. The judiciary, as much as the legislature, is subject to the principle of constitutional supremacy set out in s 1(c) of the Constitution. The scope for judicial intervention in the democratic process to correct 'democratic process dysfunction' is, therefore, *not unlimited*.[46]

III JUDICIAL REVIEW AND THE DEMOCRATIC PROCESS

Judicial intervention in the internal functioning of representative bodies usually falls within some conception of the 'separation of powers' principle. How should the line between constitutionally prescribed intervention and usurpation be drawn? If we can identify when the political process is 'dysfunctional', then we can justify appropriate judicial intervention and judicial overreach. Here then is one way of articulating a norm that enacts such a distinction: the judiciary should ensure that the control exercised over other powers legitimated by the people, especially the legislature, can itself be regarded as emanating from the people and their sovereign right to self-rule.

Judicial intervention is not always, as I have pointed out elsewhere, 'a legitimate or efficacious response to perceptions of political dysfunction'.[47] In a democracy, judicial restraint in order to facilitate self-government and to show proper respect for the people's elected representatives, will often be the right posture where no genuine issue of rights protection or rule of law observance has arisen. That said, the judiciary must intervene whenever the Constitution *clearly* sets out specific obligations and duties that the legislature or the executive has failed to exercise properly.

Answers to this question of line-drawing between justifiable intervention and unjustifiable overreach can also turn on how we determine when the democratic process is 'dysfunctional'. Below, I assess the relative merits of two possible answers: (a) John Ely's 'representation-reinforcement' theory; and (b) Samuel Issacharoff and Richard Pildes' 'structural process theory'. This assessment is not an either/or. Both theories aid our understanding of 'democratic process dysfunction' and justifiable judicial intervention.

A Ely's theory of representation-reinforcing review

Ely proposed that courts should be cast in the role of guardians of the democratic process itself instead of being placed in the invidious position of second-guessing the decisions of the

[46] *EFF 1* (note 30 above) at para 92.

[47] F Cachalia 'Judicial Review of Parliamentary Rulemaking: A Provisional Case for Restraint' (2016) 60 *New York Law School Law Review* 379.

people's elected representatives on important moral questions they should be trusted to make.[48] His concern with finding a 'democracy-reinforcing' justification for the judicial enforcement of rights is not of much interest in South Africa. In our Constitution, the principles of constitutional supremacy and judicial enforcement of rights are clearly established in the text.

However, Ely did demonstrate that the proper functioning of the democratic process might require judicial intervention. Herein lies the contemporary relevance of Ely's theory of 'democratic process dysfunction' for non-rights cases in South Africa. His insights enable us to draw a connection between the idea of popular self-rule and the case for 'representation-reinforcing review'[49] to remedy 'democratic process dysfunction'.

Ely built his theory on the back of *Carolene Products*,[50] which identified ways in which the ordinary democratic process in a system of representative government can malfunction. Ely assumed that the representative political process envisaged by the US Constitution was ordinarily majoritarian and based on efficient pluralist bargaining. But where these assumptions break down and the process can therefore be said to be defective, the judiciary can justifiably intervene in order to protect those effectively unable to protect themselves through pluralist bargaining in a representative, democratic process.

His theory of representation-reinforcement also emphasises principal/agent accountability between the people and their representatives.[51] This second theme recognises that the relationship between representatives and citizens/voters can also break down in practice when representatives act in ways which are self-serving and constitute an abuse of democratically legitimate incumbency. So, in addition to the judiciary's role in protecting the rights of 'discreet and insular minorities', it has the responsibility of protecting the democratic character of representational institutions so as to ensure their accountability to the people.[52]

Ely's process theory of judicial review, so read, can provide a theoretical starting point for identifying a class of constitutionally cognisable process harms. They encompass harms that representatives (often in concert with private actors) pose to legitimate democratic decision-making. 'Democracy-reinforcing judicial review' applies to both harm to the democratic process and the harmful consequences for individuals and minorities that might result from a 'dysfunctional process'. The kind of systemic political corruption – so-called capture of the democratic political process – that South Africans have experienced for the last score of years impairs the system of accountability and representation explicitly envisaged by the Constitution.[53] In response to such conditions, the judiciary must craft constitutional remedies designed to restore, in so far as possible, the proper workings of our democracy.

[48] JH Ely *Democracy and Distrust: A Theory of Judicial Review* (2002).

[49] M Dorf 'Putting the Democracy in Democracy and Distrust: The Coherentist Case for Representation Reinforcement' (2004) 73 *Cornell Law Faculty Working Papers,* available at https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1076&context=clsops_papers

[50] *United States v Carolene Products Company* 304 US 144, 152–153, fn 4 (1938).

[51] Ely (note 49 above) at 77.

[52] Ibid at 78.

[53] See notes 25 and 37 above.

B Structural process theory and 'self-dealing'

In the US, judicial supervision of the political process stretches back at least to the early 1960s and electoral rights. *Baker v Carr*[54] served as precedent for applying the principle of one person, one vote to the abuse of incumbency via gerrymandering as well as the fairness of campaign finance restrictions. Gerrymandering and campaign finance invariably raise concerns about political corruption of the democratic process.[55] Pildes has described this 'largely unappreciated transformation in constitutional law' as the 'constitutionalization of democratic politics'.[56] He contends that the dominant mode of constitutional theorising – which places individual rights at the centre – does not provide an adequate analytical framework for understanding the constitutional questions that are implicated when it is the functioning of the democratic process itself which requires consideration.

Pildes and Issacharoff have tried to solve that inadequacy with a theory that relies on a compelling analogy between competition in political markets and competition in corporate markets (governed by antitrust law).[57] The theory targets abuses of dominance – not dominance per se – by 'insiders'. It concentrates its focus on the protection of electoral processes in a manner that ensures accountability by eliminating problems of self-dealing by political incumbents designed to entrench themselves in power through illicit means.

However, my concerns regarding 'political process dysfunction' naturally differ from those that animate Pildes and Issacharoff's project. They are concerned with 'partisan lockups' and other forms of electoral engineering by incumbents that undermine fair electoral competition. My principal/agent driven theory concerns itself predominantly with the twin ideals of 'democratic self-government' and 'accountability of representatives to the people'. My approach converges with that of both Ely and Pildes and Issacharoff by emphasising that judicial review can play a 'democracy-reinforcing role' that cabins 'self-dealing' by incumbent representatives. Process theory as a distinct genre of constitutional theorising provides valuable insights into the question when the democratic political process can be considered to be functioning in accordance with constitutional dictates, and when they fall afoul of the basic law's provisions.

IV THE CONSTITUTIONAL COURT AND THE SEPARATION OF POWERS IN MATTERS PERTAINING TO THE PROCESSES OF REPRESENTATIVE BODIES

The South African judiciary has intervened increasingly in the internal processes and functioning of legislatures. These 'internal matters' take many forms, including: the exercise of disciplinary powers by Parliament over its members,[58] its compliance with a constitutional obligation to facilitate public participation in its legislative processes,[59] the treatment of 'private

[54] *Baker v Carr* 369 US 186 (1962) (In this landmark decision, the US Supreme Court held that the political question doctrine does not prevent courts from assessing the fairness of redistricting, especially when gerrymandering vitiates the basic democratic and constitutional commitment to one person, one vote).

[55] *Buckley v Valeo* 424 US 1 (1976).

[56] R Pildes 'The Constitutionalization of Democratic Politics – The Supreme Court, 2003 Term' (2004) 118 *Harvard Law Review* 29, 31.

[57] S Isscharoff & R Pildes 'Politics as Markets: Partisan Lockups of the Democratic Process' (1998) 50 *Stanford Law Review* 643.

[58] *Speaker of the National Assembly v De Lille* 1994 (4) SA 863 (SCA).

[59] *Doctors for Life International v Speaker of the National Assembly & Others* [2006] ZACC 11, 2006 (6) SA 416 (CC).

members bills',[60] the scheduling of motions of confidence,[61] the powers of the Speaker to require a secret ballot,[62] and, finally, the need to promulgate rules regulating impeachment of a President as well as the composition of a parliamentary committee convened to consider the impeachment of a President.[63]

Cumulatively, these decisions have significant implications for the relationship between the judiciary and Parliament. They depart from widely accepted understandings of the constitutional norms and principles governing the relationship between courts and legislatures in more established constitutional democracies. Indeed, the differences are profound – whether the legislature takes a 'Westminster'[64] form, reflects the 'constrained parliamentarism' of Canada[65] and Namibia, or looks like a US style system with its broad array of 'checks and balances'. In these different jurisdictions, the internal proceedings are generally, though not always, considered to be generally unreviewable.[66] The South African decisions by contrast constitute – as Michael Walzer might describe them – 'deep penetration raids into the area of legislative decision'[67] and are 'radically intrusive on what might be called democratic space'.[68] Put differently, they curtail majoritarian decision-making on questions usually reserved for the legislature.[69]

The question arises as to how these incursions can be justified.[70] As Aziz Huq notes in this volume, the Court interventions may simply be tactical attempts to safeguard the democratic process – and thus not readily susceptible to explanation by a single, overarching theory.[71]

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60 *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* [2012] ZACC 27, 2012 (6) SA 588 (CC) ('*Ambrosini*').

61 *Mazibuko v Sisulu & Another* [2013] ZACC 28, 2013 (6) SA 249 (CC)('*Mazibuko*').

62 *UDM* (note 30 above).

63 *EFF 2* (note 30 above).

64 Under the 'Westminster Constitution' all matters concerning the internal functioning of the House of Commons are non-justiciable on separation of powers grounds. See C Turpin *British Government on the Constitution: Text Cases and Materials* (5th Ed, 2002) 43.

65 In Canada the legislature remained internally autonomous even after the introduction of the Charter of Rights. The willingness of the South African Constitutional Court to intervene in the internal functioning of Parliament may well be consistent with trends in jurisdictions which have more recently adopted the principle of constitutional supremacy. Mali introduced a centralised system of judicial review in 1992. The Malian Constitutional Court has intervened in the country's legislative processes in order to strengthen minority rights and the independence of individual members from party control. See L Heeman 'Judicial Review and the Democratization in Francophone Africa: The Case of Mali' (2018) 51 *Verfassung und Recht in Ubersee* 166. Judicial review, as a technique for ensuring the fairness of 'democratic politics', does not have a fixed content and is clearly jurisdiction dependant.

66 Compare R Colker & J Brudney 'Dissing Congress' (2001) 100 *Michigan Law Review* 80 (Critiques the US Supreme Court for its insistence that Congress develop a record in support of proposed legislation: such insistence amounts to undue interference in the internal functioning of a co-equal branch).

67 M Walzer *Thinking Politically: Essays in Political Theory* (2007) 13.

68 Ibid.

69 But see Elster (footnote 17 above), who remarks: 'Legislatures are to a large extent, although far from completely, masters of their own rules of order' (at 21). What is remarkable in the evolution of South African constitutionalism is the extent to which the Legislatures are not 'masters of their own rules of order'.

70 Judicial intervention may be required to contain the effects of executive dominance in parliamentary systems, see Gardbaum (note 10 above). See also U Beck *Risk Society: Towards a New Modernity (*1992) 188 (Ulrich Beck identifies 'a shift of former Parliamentary powers to factions and parties' and the 'automization of the state apparatus against the will of citizens').

71 A Huq 'A Tactical Separation of Powers Doctrine' (2019) 9 *Constitutional Court Review* –(forthcoming).

My democracy-reinforcing theory proffers only one possible form of justification and critique. In this part of the article, I examine the Court's reasoning from what might be characterised as a 'traditional' separation of powers perspective. In part V, I consider whether the democratic process can be considered to have 'malfunctioned' in a trilogy of cases that came before the Court over the last two years, and what difference that might make to the analysis. I suggest how 'democracy-reinforcing judicial review' might justify overriding 'traditional' separation of powers considerations when the political process can be said not to have functioned in accordance with constitutionally prescribed standards.

A The Separation of powers

In *EFF 1*, the Court addressed two novel issues: (a) whether the Public Protector's remedial orders have binding legal effect; and (b) whether the National Assembly had an obligation to hold the President accountable in light of the Public Protector's adverse findings. Given that the Court held that the Public Protector's remedial orders have binding legal effect, it had some work to do with respect to the National Assembly's resolution absolving the President of any adverse findings in the Public Protector's *Secure in Comfort* report.[72] However, given that the Public Protector's remedies and the National Assembly's resolution were not technically incompatible with one another, the Court found itself able to give full effect to the separation of powers principle. It held that it fell 'outside of the parameters of judicial authority to prescribe to the National Assembly how to scrutinise executive action, what mechanisms to establish, and which mandate to give them, for the purpose of holding the executive accountable.[73]

The Court soon found itself confronted with a similar separation of powers issue in *EFF 2*. In this matter, however, the Court did 'prescribe to the National Assembly how to scrutinize executive action' in order to fulfil its institutional function 'of holding the executive accountable'. It delineated the requirements with which impeachment rules must comply: (a) the establishment of a 'specific mechanism' in the form of a standing committee; (b) the creation of a permanent committee as opposed to ad hoc committee; and (c) the composition and the mode of decision-making of this 'mechanism', so as to ensure that the committee was not controlled by the parliamentary majority.[74]

[72] *Secure in Comfort* (note 20 above).

[73] *EFF 1* (note 30 above) at para 93.

[74] A Vermeule 'Submajority Rules: Forcing Accountability upon Majorities' (2005) 13 *Journal of Political Philosophy* 74. Adrian Vermeule contends that sub-majority rules on procedural questions can, and should, be employed in order to enable minorities to hold majorities accountable and to ensure that their decision-making is transparent. This argument provides support for the Court's reasoning in *EFF 2*, as well as other decisions such as *Ambrosini* and *Mazibuko.* Justice Froneman offers an alternative account of what the Court had done. In his concurrence, Justice Froneman argues that the Court had done no more than provide 'guidance' to the National Assembly as to how it should discharge its constitutional obligations. *EFF 2* (note 30 above) at para 284. He writes: 'It attempts to provide the National Assembly with the tools necessary to enable it to fulfil its constitutional duty, to hold the President accountable in the direst of situations. *It does not tell the National Assembly how to use those tools*.' *EFF 2* (note 30 above) at 285 (my emphasis).

As a textual matter, s 89 of the Constitution prescribes no specific rules, procedures or mechanisms for impeachment.[75] It grants the National Assembly the authority to impeach the President and sets out three grounds for discharging the President from office. But it nowhere determines the procedures demanded to carry out this exceptional exercise of political power.

The Chief Justice, in dissent, complained that the majority's holding had strayed into the 'exclusive domain of Parliament' and that its order constituted 'a textbook case of judicial overreach'.[76] As for textbook cases, in *Ambrosini*[77] the Chief Justice held not only that Parliament was constitutionally obliged to adopt rules regulating the treatment of 'private members bills' but that individual members had a constitutional right to have such legislation drafted at Parliament's expense, and to compel consideration of such legislation, even if there were no prospects of gaining the support of the majority. In *Mazibuko*,[78] the Court held that Parliament was obliged to adopt rules regulating the scheduling of motions of confidence, and preventing the majority from delaying consideration of such motions – and the Chief Justice concurred. In neither *Ambrosini* nor *Mazibuko* did the Court rely on any specific direction in the text of the Constitution (or even a well established constitutional norm). In all three cases, the Court's actions reflected clear 'intrusions' into the internal rule-making authority of the National Assembly. Section 57(1) of the Constitution states:

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

Ambrosini, *Mazibuko* and *EFF 2* are all arguably 'textbook cases of judicial overreach' on 'traditional' separation of power grounds.[79]

The *EFF 2* Court's order requiring the Assembly to draft rules for impeachment did not, ostensibly, dictate 'content'. However, the Court held that a standing committee – as distinct from an ad hoc committee – on impeachment was to be established. In addition, the reasoning in the main judgment made it clear that such a committee would have to be controlled by the minority in order to be constitutionally compliant.[80] Again, there is little textual basis for an outcome that clearly encroaches upon the autonomy of the representative branch. In conclusion, *EFF 1*, *EFF 2, Ambrosini* and *Mazibuko* demonstrate that although the Court remains concerned with separation of powers considerations, it has yet to develop a normative framework that accounts coherently for those decisions that respect, and those that override,

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

[76] *EFF 2* (note 30 above) at para 223.

[77] *Ambrosini* (note 60 above).

[78] *Mazibuko* (note 61 above).

[79] Cachalia (note 47 above).

[80] *EFF 2* (note 30 above) at paras 191 and 192.

the 'rule-making' powers exercised by the National Assembly and when it regulates its own 'internal-functioning'.[81]

B The political process and the value of political equality

Democratic electoral processes are, uncontroversially, based on the egalitarian principle of 'one person, one vote'. But what principle of equality should govern collective decision-making in representative bodies where all law and all state conduct draws its force from the Constitution and no law nor state conduct is immune from judicial review?[82]

Let's step back for one moment. Equality in a democracy takes three forms.

The first, political equality, has four facets. Each adult citizen exercises the franchise. Every adult citizen – unless she has run afoul of the law in particular ways – may run for office. Each person possesses one vote, and no more.[83] Governments in a parliamentary democracy are elected in a two-stage process: by a majority of votes cast in an election[84] and subsequently by those elected representatives who constitute the legislative branch,[85] ie, by a 'bare majority'.

Political equality however also has two egalitarian background conditions. Legal equality, as s 9 of the Constitution tells us, requires that all persons are equal before the law. In short, no one may face discrimination on ascriptive characteristics such as race, ethnicity, sex, religion, age, birth, or disability. Moral equality requires that each person in a polity must be treated (a) by the state with equal concern and respect; and (b) with dignity by his or her compatriots.[86]

Most representative bodies take legislative and non-legislative decisions, by majority vote.[87] In most constitutional democracies – and South Africa is no different – minority parties,

[81] The problem of 'inadequate procedures' has plagued impeachment trials in the US. R Posner *An Affair of State: The Investigation, Impeachment, and Trial of President Clinton* (1999) 120. The rules, procedures and practices related to impeachment in the US remain unsettled despite the existence of a 230-year Constitution. Perhaps their absence can be attributed to only two successful attempts to impeach a President in the House, both of which failed in the Senate. L Tribe & J Matz *To End A Presidency: The Power of Impeachment* (2018). Laurence Tribe and Joshua Matz's work offers a cautionary tale regarding impeachment proceedings against an elected President: '[E]nding the Presidency … is a very big deal … [W]e have no historical experience with the full consequences of pushing the red button'. Despite Tribe's initial reluctance to pursue this potentially explosive path, after the publication of the Mueller Report, he revised this position in an op-ed piece published in *USA Today* (21 April 2019). See also L Greenhouse 'The Impeachment Question' LXVI *New York Review of Books* (June 27 2019) 22.

[82] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) at paras 58–99 ('It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.') *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* (2000) (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at para 33 ('The control of public power by the courts through judicial review is and always has been a constitutional matter. Prior to the adoption of the Interim Constitution this control was exercised by the courts through the application of common law constitutional principles.')

[83] The proportional 'closed list' electoral system adopted in South Africa respects this principle and is not susceptible to the 'vote dilution' that can occur through the manipulation of electoral boundaries in some constituency-based systems. Nor is any vote 'wasted'.

[84] Constitution ss 9 [equality] and 19 [political rights].

[85] Ibid ss 42, 46, 47 and 86.

[86] Woolman (note 37 above) at 374.

[87] Where this is not the case, as for example for constitutional amendments and impeachment, the Constitution is specific.

minority coalitions or transient minorities still participate in the process of decision-making as of right.[88] Consistent with the above account, Jeremy Waldron argues that majoritarian decision-making in legislatures is not merely a technical device, but rather a fundamental egalitarian principle of political morality which treats each participant as an equal.[89] The Constitution also provides emphatically that all questions before the National Assembly are to be decided by a majority of votes cast.[90]

We now have a working definition of political equality which has a constitutional basis. With it we can take accurate measure of the most recent and troubling case law.

In *EFF 1* the Court decided unanimously that a resolution passed by the National Assembly absolving the President of compliance with the remedial action taken by the Public Protector in the 'Nkandla' matter was inconsistent with the Constitution. As far as this author is aware, the judgment constitutes the first occasion that a procedurally correct motion passed by a majority of votes cast in the National Assembly has been found to be unconstitutional. It is a curious conclusion given that s 53(1)(c) read with s 57(1)(a) of the Constitution suggests that all questions before the National Assembly can be decided by a majority of the votes cast, except where the Constitution specifically provides otherwise. This article revisits this question in part V.

In *EFF 2*, the Court held that the National Assembly was in breach of its constitutional obligations to initiate impeachment proceedings and to draft rules for the impeachment process in terms of s 89 against the President. Again, the Court so held despite the fact that the President enjoyed support of a political majority and that the Constitution leaves such decision-making to the National Assembly by majority vote. Impeachment is the most serious and exceptional instrument of parliamentary censure and is fraught with risk to the integrity of a representative democracy since it potentially results in the displacement of an elected President through an invariably partisan, party political process. Not surprisingly, the nature of the risk generated strong disagreements within the Court about whether it was appropriate for the judiciary to insert itself in the process and to countermand the decisions of the parliamentary majority.

Parliament had done nothing to delay or to impede the tabling or consideration of several no confidence motions and a motion to impeach. As a result, no need arose to create rules that specifically regulates impeachment. When such a question arose in the past, an ad hoc

[88] Section 57(2)(b) allows minority parties to participate in the proceedings of the National Assembly 'in a manner consistent with democracy'. *Democratic Alliance v Masondo* CCT 29/02 [2002], ZACC 287 (2003)(2) BCLR 128, 2003(2) SA 413(CC)(Court held that minority parties in a Municipal Council were not entitled to representation on the Mayoral Committee under the provisions of the Municipal Structures Act 117 of 1998.)

[89] J Waldron *Democracy and Disagreement* 107. Compare K Arrow *Social Choice and Individual Values* (1963). Arrow's 'impossibility theorem' shows why no decisional apparatus, especially one based upon majority rule over non-binary policy choices, reflects accurately the aggregation of all individual preferences. However, some systems diminish this problem through a combination of proportional representation and party discipline. K May 'A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision' (1952) 20 *Econometrica* 680. Of course, the problem of *choice* is replicated within political parties: members will disagree over an array of policies. See also CR Beitz *Political Equality* (1989). Beitz argues that majority rule 'is wrongly conceived as expressing a foundational requirement of political equality. Its significance is far more modest' (at xii). But he does not apply his conception of political equality and 'complex proceduralism' to decision-making in legislative institutions.

[90] Constitution s 53(1)(c).

committee was established on the initiative of the parliamentary opposition.[91] The absence of specific parliamentary rules on impeachment and provision for the establishment of a standing committee to handle impeachment proceedings could hardly constitute an impediment to an impeachment inquiry when no majority felt the need to proceed with such a momentous interrogation of the President. Parliaments across most jurisdictions do not allocate their scarce resources – time, staff and money – on speculative endeavours. That is one obvious reason that ostensible 'gaps' in the rules of Parliament always exist. Political adversaries will also defer decisions on contentious issues. For that reason, parliamentary rules are always 'incompletely theorized'.[92]

Prior to *EFF 2*, the Rules Committee had in fact set up a subcommittee to draft impeachment rules but were never adopted. Opposition parties failed to make submissions. Why? The committee was controlled by the majority party, as are all parliamentary committees. They therefore considered litigation to provide better prospects of success. However, the principle of majoritarian decision-making on 'internal matters' has been constitutionalised in the Constitution. Thus, the fact of majoritarian control of a parliamentary committee cannot *alone* be a source of constitutional concern.[93] In *EFF 2,* a majority of the members of the President's party did not agree with the opposition – *politically* – that the President should be impeached. That is representative democracy. Absent a two-thirds majority, the motion to impeach the President, tabled by the opposition, failed. Not surprisingly, Deputy Chief Justice Zondo's dissent repeatedly asked for a constitutional basis to compel the National Assembly to initiate impeachment proceedings against a President who retained the political support necessary to remain in office. Likewise, the Chief Justice's opinion turned on a separation of powers argument and understandings of what political equality in a representative democracy requires.

The majority's justifications for its circumvention of majority-rule with respect to decision-making procedures appear somewhat opaque. Justice Froneman writes cryptically that all the Court had done was to require the National Assembly to 'hold the President to account in the direst of situations'.[94] He left unexplained those considerations that had led him to reach this assessment. Instead, the Court would 'leav[e] it to history to determine whether the order in the second judgement … achieve[d] its aims'.[95] The *EFF 2* Court does no more than contend that the National Assembly was in breach of its obligations to hold the President accountable in terms of s 89 of the Constitution given the findings in *EFF 1* that the President had violated the Constitution by disregarding the Public Protector's legally binding remedies.

[91] The committee was created in response to the government's decision to allow President Omar al Bashir, President of Sudan to leave South Africa. Under the Rome Statute, al Bashir, who had been indicted by the International Criminal Court, should have been handed over to the Tribunal.

[92] C Sunstein *Legal Reasoning and Political Conflict* (1996).

[93] Justice Jafta's argument against the sufficiency of an ad hoc committee is that such committees are controlled by the majority. Actually, all committees, whether ad hoc or standing, are generally controlled by the majority. The Constitution itself confers powers on the National Assembly, in terms of s 57 to make rules and orders regulating the *duration and composition of committees*, and requiring only that provision be made for participation in such committees by minority parties 'in a manner consistent with democracy'. This begs the question. Had the National Assembly adopted rules to regulate the impeachment process which provided for the establishment of a standing committee controlled by the majority, and making provision for minority participation consistent with electoral outcomes, would such rules in the view of Justice Jafta have been constitutionally deficient? It is difficult to reconcile such a conclusion with the *with specific textual provisions.*

[94] *EFF 2* (note 30 above) at para 285.

[95] Ibid at para 286.

However, it does not follow – logically, textually or politically – that the outcome in *EFF 1* automatically triggered a constitutional obligation to create all the procedural trapping required for impeachment proceedings against the President in the Assembly, and to initiate such proceedings. Nor can the Court claim that *EFF 2* simply reiterates the reasoning or the holding in *EFF 1*. The *EFF 1* Court offers no prescription and no signal that its decision contemplates such a trajectory. Indeed, that the unanimous decision in *EFF 1* is followed by a 5–4 split in *EFF 2* strongly suggests that *EFF 2* does not follow the core logic and concerns of *EFF 1*.

EFF 2 reflects, at least implicitly, different conceptions of the separation of powers doctrine and of representative democracy. Justice Zondo writes:

> It's not a bad thing for different members of the National Assembly to hold different views on any issue. Our constitution expects there to be different views on issues in the National Assembly. This is why it provides in section 53(1)(c) that all questions before the Assembly are decided by a majority of the votes cast.[96]

Whilst maintaining that the National Assembly had, to some degree, held the President accountable,[97] his opinion is primarily animated by a concern that the Court's order 'bypasses the democratic process' envisaged by the Constitution. By allowing minority parties to use the courts to achieve ends that they could not achieve in the National Assembly, the Court ignores unambiguous textual requirements that all decisions by the National Assembly related to the establishment and composition of committees must be initiated in the Assembly by majority vote.[98] To be fair, a reading exists that makes some sense of the majority judgment. As in *Modderklip*,[99] and *EFF 1*, the majority of the Court appear concerned that such a fundamental abrogation of the rule of law had occurred that it raised questions as to whether the 'basic structures' of the country's democratic institutions remained intact.[100] If so concerned, the majority had an obligation to state this basis for their counter-majoritarian intrusion crystalline clear.

Part of the answer to the question as to whether and when counter-majoritarian constraints on 'non-legislative' parliamentary decision-making can be justified, is that the Constitution also

[96] Ibid at para 62.

[97] Ibid at para 89.

[98] Constitution s 53(1)(c)(note 90 above).

[99] *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5, 2005 (5) SA3 (CC) ('*Modderklip*').

[100] *United Democratic Movement v President of the Republic of South Africa* [2002] ZACC 21, 2003 (1) SA495 (CC).

contains competing normative commitments: to minority rights[101] and freedom of speech.[102] This trilogy of cases raised neither such concern. Again the majority only hints at another constitutional rationale that arises in the 'direst of situations'.

In part V, this article looks at this trilogy of cases – *EFF 1, UDM,* and *EFF 2* – through the lens of the principal/agent relationship envisaged by the Constitution between representatives and voters, the principle of accountability implicit in any conception of representative democracy, and expressly set out in the Constitution.[103] In this light, the article explores the implications of the failure of parliamentary processes over a protracted period, to hold the President to account for the misuse of public funds and for his orchestration of 'state capture'. This kind of systemic 'democratic process dysfunction' provides occasion for 'democracy-reinforcing review' in order to reinforce the accountability of representatives to the people who elected them. However, the case made in part V is highly qualified. Parliamentary or legislative autonomy, in a constitutional system committed to the separation of powers, should generally assume that majoritarian parliamentary processes are 'functioning well'.[104]

[101] Constitution s 57(2) states: 'The rules orders of the National Assembly must provide for (a) the establishment, composition, powers functions, procedures and duration of its committees; and (b) the participation in the proceedings of the Assembly and its committees on the minority parties represented in the Assembly, in a manner consistent with democracy.'

[102] Constitution s 58. Free speech in Parliament poses some interesting conundrums in our jurisdiction. What should happen if a Speaker, who has not been properly briefed on the requirements of s 58(1)(a) and (b), seeks to regulate the constitutionally protected content of speech by the government's parliamentary opponents? On my democracy-reinforcing process theory, it would reflect a 'clear case of dysfunction'. Freedom of speech in Parliament is a fundamental constitutional value, which must be observed in the practices of the National Assembly, when it is functioning as envisaged by the Constitution. Where this clear constitutional commitment is not observed, the National Assembly cannot be said to be functioning in a way that is constitutionally compliant. When the Court intervenes in such circumstances, it relies on a specific provision of the Constitution – parliamentary freedom of speech. However, absent such a clear constitutional basis for intrusion, it should be recognised that judicial supervision of parliamentary proceedings can have 'disabling effects' on the functioning of representative bodies. *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly)* [1993] 11 SCR 319 (Canada). In *New Brunswick,* Justice McLachlin explains that the exercise of powers to review decisions of the Speaker would impair the 'dignity and efficiency' of the legislature: 'Quite apart from the constitutional question of what right the courts have to interfere in the internal process of another branch of government. ... The ruling of the Assembly would not be final. The Assembly would find itself caught up in legal proceedings and appeals about what is disruptive and not disruptive. This in itself might impair the proper functioning of the Chamber.' Ibid at 383.

[103] Section 1(d) read together with the provisions regulating the structures of representation: ss 42(3), 46, 47 and 55.

[104] The question whether a representative body is 'functioning well' will often be in the eyes of the judicial beholder. In assessing the functioning of the political process, judges should recognise that parliamentarians, whether in the majority or minority, act, or fail to act, for many different reasons which are beyond judicial consideration or scrutiny, especially on questions of motions of confidence or impeachment. Their 'political judgments' should therefore be accorded a wide 'margin of appreciation'. The often messy business of politics, characterised by conflict and disagreement, must be allowed the space to 'work'. At the same time, judicially cognisable instances of systemic dysfunction in the structures of democratic representation most certainly exist. The Constitution, I ague below, sets at least some judicially enforceable standards on the conduct of representatives in order to reinforce what I have called principal/agent accountability between elections.

V PRINCIPAL/AGENT ACCOUNTABILITY AND DEMOCRATIC PROCESS DYSFUNCTION

A Principal/agent accountability

On 19 March 2014, the Public Protector issued her report into allegations of impropriety and unethical conduct as they related to the significant expenditure of public funds on the President's private homestead at Nkandla. The report's rigorous analysis of the evidence buttressed its damning findings of non-compliance by the President with Cabinet policy, ethics requirements, and public procurement legislation.[105] It held that a broad array of senior officials and Cabinet Ministers had engaged in related and similar illegal and irregular behaviour.

The findings against the President constituted a serious indictment of his conduct: (1) he and his family were found to have 'unduly benefited from the enormous capital investment from non-security installations at his private residence';[106] (2) he had 'failed to discharge his responsibilities' as the 'guardian of the resources of the people';[107] (3) he was in breach of his ethical obligations under the Executive Members Act and Code;[108] and (4) his conduct, especially with regard to protecting public resources, was 'inconsistent with his office as a member of Cabinet, as contemplated by s 96 of the Constitution'.[109] The constitutional basis for the final finding, s 96, provides that members should not 'act in any way that is inconsistent with their office', expose themselves to any situation involving the risk 'of a conflict between their official responsibilities and private interests' or use their position 'to enrich themselves or improperly benefit any other person'. The President was ordered to repay a reasonable percentage of the cost, to be determined by the National Treasury, to reprimand the Ministers involved, and to report to the National Assembly within 14 days with regard to his illegal and irregular 'actions [found in] this report'.[110]

The President should have implemented the remedial action or sought to review the Public Protector's remedial action in court if he disagreed with the findings. Instead he directed the Minister of Defence, in a report to the Speaker, to review various policies relating to presidential security and to determine '*whether* the President is liable for any contribution in respect of security upgrades'.[111] This investigation and the reports of two parliamentary committees controlled by the President's party predictably absolved the President from all wrongdoing and responsibility. The National Assembly then passed a resolution by majority vote 'effectively nullifying the findings made and remedial action taken by the Public Protector'.[112] By passing that resolution the National Assembly had 'flouted its obligations'.[113]

This factual matrix plays at critical role in understanding the context in which the *EFF I* Court came to the conclusion – almost two years after publication of the report and thus two years of non-compliance – that the Public Protector's remedial orders had binding *legal* effect. While Woolman notes that this result can be justified with reference to the 'constitution's

[105] The Public Finance Management Act 1 of 1999 and the National Key Points Act 47 of 1985.
[106] *Secure in Comfort* (note 20 above) at para 10.9.1.4.
[107] Ibid at para 10.10.1.4.
[108] Executive Members' Ethics Act 82 of 1998.
[109] *Secure in Comfort* (note 20 above) at para 10.10.5.
[110] Ibid at para 11.
[111] Ibid at para 63.2 (my emphasis).
[112] Ibid at para 98.
[113] Ibid at para 99.

cleverly structured design'[114] he makes a far more incisive set of observations about how the law and the factual substratum interact. He writes:

> As the mercenary behaviour of our state officials became increasingly visible, the ongoing absence of any efficient, anti-corruption institution up to the task of fighting such widespread corruption became evermore evident. It is therefore not surprising that our appellate courts *read the basic law in a manner that recognized a binding legal effect of the Public Protectors recommendations.*[115]

The *EFF 1* Court further explained why the Public Protector's remedial action *must* be binding:

> [The Public Protector] is the embodiment of the Biblical David … who fights the most powerful and very well resourced Goliath – the very incarnation of impropriety and corruption by government officials. The Public Protector is one of the true crusaders and champions of anti-corruption and clean governance.[116]

For David to defeat Goliath, the Public Protectors powers must 'be very wide' – and such breadth is further justified, because in terms of the rule of law, 'no lever of governmental power is above scrutiny and censure'.[117] When it came to the plundering of the public purse and the pillaging of the public's source of basic goods, the Court and other independent state actors (for example, Chapter 9 institutions) had constitutional obligations to put a halt to such widespread, venal behaviour because:

> [the] repositories of these resources and power are to use them for the benefit of the public. When this is suspected or known not to be so, then the public deserves protection and that protection has been constitutionally entrusted to the Public Protector.[118]

The *EFF 1* Court's powerful statements restate how this basic relationship between citizens and their representatives in a constitutional democracy is undermined by 'self-dealing', the abuse of power and political corruption.[119]

In addition, the *EFF 1* Court also held that the resolution passed by Parliament – while proper in form and by a majority vote – that absolved the President of liability had been unconstitutional. By failing to hold the President to account in circumstances where there had been compelling evidence before the Court of abuse of power and misappropriation of public resources, the National Assembly violated its constitutional obligations in terms of s 42(3) of the Constitution.[120] This section reads as follows: '[The] National Assembly is elected to represent the People and to ensure government by the people under the Constitution'. The Court rightly reasoned that the National Assembly carries out this function 'by choosing the President … and by scrutinizing and overseeing executive action'.[121] In reaching this conclusion, the Court

[114] S Woolman 'A Politics of Accountability: How South Africa's Judicial Recognition of the Binding Legal Effect of the Public Protector's Recommendations had a Catalysing Effect that Brought Down a President' (2018) 8 *Constitutional Court Review* 155, 173.

[115] Ibid at 166 (My emphasis – 'appellate courts' refer to the Supreme Court of Appeal (in *SABC v DA*) and the C).

[116] *EFF 1* (note 30 above) at para 52.

[117] Ibid at para 53.

[118] Ibid at para 53.

[119] The Court grounded its holding in the text of the basic law by finding that the President's failure to comply with the remedial orders was inconsistent with s 83(b) read with ss 181(3) and 182(1)(c) of the Constitution. It ordered him to repay a reasonable percentage of the non-security costs incurred on his private home, to be determined by the National Treasury. The *EFF 1* the Court explained that the President is the 'personification of the nation's constitutional project' and that he is to 'serve the people well and with integrity'. Ibid at 20 and 21.

[120] Ibid at paras 94 and 98; and para 10 of the Court's order.

[121] Ibid at paras 97 and 104.

demonstrated that – based on the rule of law, its co-foundational value of constitutional supremacy and the separation of powers doctrine – it (a) had the responsibility to set criteria by which all public actions are judged; and (b) would enforce a constitutional standard of accountability for the misappropriation of public resources against both the executive and the parliamentary majority responsible for oversight where and when it was so required.[122]

This constitutional standard requires the National Assembly to act in 'good faith' as the representative of the people and the custodian of their resources. In this matter, it had not functioned as envisaged by the Constitution. The *EFF 1* Court anticipated a separation of powers objection, given that it had countermanded a decision of the parliamentary majority and thereby 'intruded' upon the National Assembly's space. The *EFF 1* Court explained that all it had done was to determine if the National Assembly had acted, in 'substance and reality',[123] in a manner consistent with the Constitution. Importantly, for this line of reasoning, the *EFF 1* Court did not prescribe how and 'by what structures or measures'[124] the National Assembly should carry out its legal obligations.

In two subsequent cases, the Court continued to invoke a requirement of principal/agent accountability. In *UDM* , the Court had to determine whether the Speaker had the constitutional power to prescribe that voting in a motion of no confidence in the President be conducted by secret ballot.[125] The motion arose out of the continuing controversy following the Public Protector's *Secure in Comfort* report,[126] the finding in *EFF 1* that the remedial action had binding legal effect, and the ongoing failure of the National Assembly to hold the President to account. The Speaker, probably acting on the misguided advice of the table staff, had taken the view, in response to a request from the applicant, that she did not have this power either in terms of the Constitution or under the National Assembly's rules, to order a secret ballot.

The purpose of the secret ballot would be to test whether the President still had the support of the majority of members able to vote 'in accordance with the conscience of each'[127] when implicit threats of punishment for breaches of 'party discipline' were removed.[128] In coming to the conclusion that the Speaker did possess this power, the *UDM* Court began as follows:

> South Africa is a constitutional democracy – a government of the people, by the people and for the people though the instrumentality of the Constitution. *It is a system of governance that 'we the people' consciously and purposefully opted for*, to create a truly free, just and united nation. …. [The Constitution reflects the understanding] that it is not practical for all 50 million of us to assume governance responsibilities … and that '*we the people' designated messengers or servants to run our constitutional errands for the common good of us all.* … [Judges too are] servants of the people.[129]

The *UDM* Court continued as follows:

> [Parliamentarians are] another set of servants. … These servants are supposed to exercise the power and control these enormous resources at the beck and call of the people. *Since state resources*

[122] *EFF 1* (note 30 above, see the Court's order),
[123] Ibid at para 93.
[124] Ibid at para 93.
[125] *UDM* (note 30 above).
[126] *Secure in Comfort* (note 20 above).
[127] Ibid at para 73.
[128] Ibid at paras 74 and 75.
[129] *UDM* (note 30 above) at paras 1, 3 and 4 (my emphasis).

> *are for our common good, checks and balances to ensure accountability* enjoy pre-eminence in our governance system.[130]

The servant metaphor is not simply a superfluous embellishment in the Court's reasoning: by distinguishing good from bad power, it functions as a criterion of law,[131] or in other words, the rule of law.

In *UDM,* the Court held that although the Constitution did not expressly authorise the Speaker to order a secret ballot in these circumstances, she retained the power to do so. In exercising this discretion, however, she was required to pay due regard to 'real possibilities of corruption'.[132] By pressing the Speaker so, the *UDM* Court reinforced principal/agent accountability as a criterion of constitutionally authorised 'rulership'.

EFF 2 was handed down some 14 months after the Public Protector's second major report: *The State of Capture.*[133] The document revealed the extent of systemic corruption and how it threatened the basic structures of representative democracy and constitutional government. At the time of the hearing, the National Assembly had *still* not taken the remedial action required by the Public Protector's *Secure in Comfort* report. This raised the question whether both the National Assembly and the President were in compliance with their constitutional obligations. The Court held that the failure of the National Assembly to make specific rules regulating presidential impeachment and to initiate impeachment proceedings against him, was inconsistent with the principal/agent relationship envisaged by the Constitution, since the National Assembly is elected to represent the people, and must ensure:

> [government] by the people by scrutinising and overseeing executive action. It also achieves this purpose by choosing the President and providing a national forum for public consideration of issues. This underscores the role played by the Assembly as the people's representative.[134]

It might be added: it carries out its representative mandate by impeaching an elected President who threatens the foundations of the constitutional order by setting up a corrupt system, and immunising himself from accountability by manipulating the political process and by undermining the constitutional checks on his power.

In both *UDM* and *EFF 2*; the Court invoked this 'populist' conception of constitutional accountability to explain why it is appropriate to impose constitutional constraints on the functioning of political parties in the National Assembly where party discipline appears to function as an obstacle to constitutional accountability. In *UDM*, Chief Justice Mogoeng remarked:

> If the will of political parties were always to prevail [mechanisms to ensure executive accountability will often not function]. Conceptually, those majorities could only be possible if members of the ruling party are also at liberty to vote in a way that does not always have to be predetermined by their parties. And this of course assumes that the ruling party will generally be opposed to the removal of their own.[135]

This theme reverberates throughout *EFF 2*. Jafta Joffered this observation:

[130] Ibid at paras 6 and 7 (my emphasis).
[131] Arendt (note 32 above) at 50.
[132] *UDM* (note 30 above) at para 88.
[133] *State of Capture* (note 21 above) was published on 16 October 2017.
[134] Ibid at para 142.
[135] *UDM* (note 30 above) at para 61.

> The fact that members of the Assembly assume office through nomination by political parties ought to have limited influence on how they exercise the institutional power of the Assembly. Where the interests of political parties are inconsistent with the Assembly's objectives, members must exercise the Assembly's power for the achievement of the Assembly's objectives. For example, members may not frustrate the realization of ensuring government by the people if its attainment would harm the political party. If they were to do so, they would be using the institutional power of the Assembly for a purpose other than the one for which the power was conferred. This would be inconsistent with the Constitution.[136]

This reasoning provides constitutional support for individual members to act independently of their parties by setting constitutional limits to the enforcement of party discipline by the familiar parliamentary practice of 'whipping' in service of a fundamental constitutional norm of representative government, as set out in s 1(d) of the Constitution. I have described this norm as a constitutional requirement of principal/agent accountability.

This far-reaching decision constrains not only how parliamentary majorities and the party whips function in the National Assembly, but also the powers of a party's leadership elected by its members 'outside' the Assembly. As a matter of constitutional law, individual members of the National Assembly who act to vindicate a constitutional value against the wishes of their party will now have a constitutional defence to any attempt at removal or 'punishment' by their party leaders. This extraordinary outcome was constitutionally justified, I will now suggest, having hedged my bets earlier, by the evidence that 'party discipline' was being invoked to protect a corrupt President. He had refused to be held accountable for the misuse of public funds, and a 'majority party' absolved him of responsibility for engaging in behaviour that served no legitimate purpose in our constitutional democracy.

How broadly this newly announced constitutional constraint on the functioning of political parties in the National Assembly should be construed remains unclear. Some party discipline is essential to the coherent functioning of political parties as instruments of collective action, electoral representation and the proper functioning of elected National Assemblies. Indeed, the *First Certification Judgment* Court rejected the argument that the system of party discipline and closed electoral lists was inconsistent with the constitutional requirement of accountability:

> We do not agree. Under a list system of proportional representation, it is parties that the electorate votes for, and parties that must be accountable to the electorate. A party which abandons its manifesto in a way not accepted by the electorate would probably lose at the next election.[137]

That said, in both *UDM* and *EFF 2,* the Court recognised that in some circumstances, party discipline can also weaken accountability – and the principal/agent relationship between representatives and the electorate.[138] In these two cases it can hardly plausibly be contended

[136] Ibid at para 144.

[137] *Certification of the Constitution* (note 4 above) at paras 106 and 186.

[138] F Rosenbluth & I Shapiro *Responsible Parties: Saving Democracy from Itself* (2018) 23 (The authors make a persuasive argument that strong disciplined, *programmatic* parties promote 'democratic accountability' (my emphasis). See also J Carey & A Reynolds 'Parties and Accountable Government in New Democracies' (2007) 13 *Party Politics* 255. (The authors distinguish two aspects of the strong party ideal: legislative discipline and programmatic platforms. Consistent with South Africa's experience, they suggest that legislative discipline can undermine both programmatic platforms and representative accountability to the electorate to see through the programmes for which they were elected). In these cases, 'party discipline' was being invoked not to support the governing party's programmatic objectives but to protect a corrupt President. In these circumstances, the enforcement of judicial limits on 'party discipline' was a justified 'intrusion' into the ordinary internal functioning of the *caucus* of a 'parliamentary party' and the National Assembly.

that party discipline was invoked to vindicate an electoral mandate. Rather, the cases reflect what Vermeule calls 'agency slack'.[139] As *EFF 1, UDM* and *EFF 2* make clear, the interests of the electorate in the proper custodianship of public funds was being egregiously ignored by its 'representatives', *without apparently any prospect of a remedy for a constitutional wrong through the ordinary operation of the representative political process.* The majority in the National Assembly acted in their own short-term interests as incumbents and in order to protect a corrupt President. Neither the President nor the majority party could be said in these circumstances to be vindicating electoral promises.

C Principal/agent accountability and the separation of powers

'Democratic process dysfunction' in the form of 'agency slack' – egregious failures of accountability by representatives to voters – can on occasion then, provide a rationale for judicial intervention. However, it remains the exception, not the rule, and cannot displace standard separation of powers considerations concerning the proper constitutional relationship between the courts and the National Assembly.

In *UDM,* the Court carefully crafted a decision in which the Speaker had the power to decide whether the vote on a motion of no confidence in the President should or should not be by secret ballot. Her exercise of this discretion, however, had to be appropriately seasoned with considerations of rationality.[140]

A danger lurks. This ubiquitous 'means/ends' standard, incorporated into a constitutional law context from the judiciary's experience in exercising its review powers over the exercise of administrative discretion, does not do the intended work. A secret ballot could just as easily support as undermine the Constitution's anti-corruption goal. A secret ballot aimed at reducing coercive pressures exercised by party leaders over 'backbenchers' could also foster corruption, by insulating individual members from any public accountability.[141]

The Court's rationality standard will provide little 'guidance' on how this conundrum should be resolved by the Speaker in the future without the Court itself hinting at the 'best' decision, while allowing for some 'margin of appreciation'.

Since that might not be the 'best' exercise of the Court's own constitutional authority, two other doctrines might serve as a preferred guide. Principal/agent accountability is one. In just a moment, we explore another.

The separation of power's question raised by *EFF 2* were discussed in part IV. As we saw, the 'doctrine' when applied in a very traditional sense raised two concerns. First, the judicial

[139] Vermeule (note 16 above).

[140] *UDM* (note 30 above) at para 94.

[141] Ibid at para 80. Similar issues arise with respect to voting in elections, which is provided for in s 90 of the Electoral Act 73 of 1998. See S Holmes 'The Secret Ballot and the Lives of Others', available at http://www.college-de-france.fr/media/jon-elster/UPL31835_holmes_scrutin.pdf (Concerns the merits of the secret ballot in voting). One side in the argument asserts that the secret ballot protects the voter from 'bullying pressure' and the other that the secret ballot permits the voter to 'indulge his insalubrious motives at public expense'.) The scandal in the UK Parliament some years ago, arising out of the exposé of a parliamentarian who was paid by a wealthy businessman to ask a parliamentary question, should serve as a reminder that secrecy can also corrupt parliamentary proceedings.

intrusion could potentially be 'disabling'.[142] Justice Zondo's dissent noted that that respect should be shown for parliamentary processes by discouraging 'litigants from approaching this court or any court for that matter in regard to an issue which is capable of being resolved without going to court'.[143] Of course, the Justice meant 'in the legislature' itself – or through other political mechanisms, say elections or branch meetings or political assemblies (all of which are exercises in popular sovereignty). Regular judicial intervention opens the door for minority parties to alter the balance of power in legislatures by using the courts as an extra-legislative forum. Such usage could open the courts to charges of 'partisan adjudication'.

A second institutional consequence of judicial intervention might be described as the '*Lochner* effect'. *EFF 2* decided more than the immediate issues in dispute between the litigants on the facts that were before the C. It could have long-term consequences. The impeachment procedure has substantially been constitutionalised by *EFF 2.* According to the majority judgment, the initiation, determination of 'jurisdictional facts', the rules of decision-making, the party-political composition of the Impeachment Committee, and the final outcome are now subject to judicial supervision.[144]

The *EFF 2* Court came to these conclusions without considering the *sui generis* and highly 'political character' of the constitutional power to remove an elected President. Indeed, it assumed erroneously that 'impeachment' is really no different from 'confidence' proceedings. Impeachment proceedings, unlike a confidence question, is the ultimate form of constitutional censure that is only likely to arise as a material question in extreme situations of political crises, fraught with risk to the body politic and the judiciary itself.[145] The Court has now inserted itself in this process, apparently without considering such adverse, long-term consequences.

Precautionary constitutionalism and democratic process reinforcement considerations would have counselled a more limited intervention. It could have simply required the initiation of impeachment proceedings, since the National Assembly was clearly incapable of holding the President to account in the 'direst of situations' because of significant democratic process dysfunctionality. It need not have prescribed 'constitutional impeachment rules'. When a court intervenes, especially in novel situations, it does not have to decide every question that might arise in the future.[146]

[142] JB Thayer 'The Origin and Scope of the American Doctrine of Constitutional Law' (1893) 7 *Harvard Law Review* 1, 29. Thayer was concerned that judicial review could sap the democratic process of its vitality and erode its capacity. However, Thayer was writing at a time of greater confidence in the functioning democratic institutions and before judicial review was exercised on a regular basis. Judicial review in contemporary constitutional democracies, should be considered in the light of our experience, including our experience with 'democratic process dysfunction'. Still, the potentially 'disabling' impacts of intrusive judicial review on parliamentary proceedings identified by Thayer, remains important when courts decide on the scope of review.

[143] *EFF 2* (note 30 above) at para 60.

[144] Ibid (note 30 above).

[145] Tribe & Matz (note 81 above).

[146] C Sunstein *One Case at a Time* (1996); C Sunstein 'The Supreme Court, 1995 Term – Forward: Leaving Things Undecided' (1996) 119 *Harvard Law Review* 4.

D Towards a principle of accountability

1 *Accountability, broadly speaking*

Everyone agrees that corruption is evil. But the concept is notoriously difficult to define.[147] This article construes corruption broadly and certainly draws 'political corruption' within its ambit. When political corruption occurs, the courts have a duty to protect the Constitution *as a project of democratic self-government*.

The concept of *political* corruption therefore refers to constitutionally suspect conduct by *elected occupants of a public office* who have won political power through the electoral process, and who use that power to benefit themselves and their 'friends' rather than the people who elected them. So understood, corrupt 'self-dealing' representatives violate both their 'contract with the people' and their oath of public office: in so doing, they undermine a foundational relationship between representatives and voters upon which our democratic project rests. Such self-serving behaviour by our elected representatives amounts to an 'abuse of power', is inconsistent with the 'rule of law' and can undermine the constitutional duty to respect, protect and promote the rights enshrined in the Constitution.[148] Of course, corrupt politicians usually have partners in crime. As Dennis Thompson notes: 'If private interests undermine the democratic process to enlist public authority in furthering their purposes, they become agents of corruption'.[149]

The Court has increasingly incorporated a principle of accountability into its reasoning. In *EFF 1* it acted as the constitutional ally of the Public Protector. The Public Protector had determined that President Zuma had violated s 96 of the Constitution. It cast s 96 in the role of an express 'anti-corruption provision'. While the *EFF 1* Court did make this particular finding, it regularly evoked accountability as a constitutional leitmotif designed to chop off the 'stiffened neck' of corrupt officials. In *EFF 2,* neither accountability nor anti-corruption play an express role in the Court's express reasoning. Still, the *State of Capture* report loomed large in the background.

Why is accountability so central to the workings of a principal/agent based account of representative democracy and the more expansive notion of self-governance. As Woolman has written:

> [Ongoing] polycentric exchanges between political institutions and social actors that build mutual trust, concern, care and loyalty in discrete relationships and within informal networks and formal institutions can, cumulatively, create a society and a state identified with a deep commitment to the rule of law [which turns inevitably on the ability to hold others accountable, and ultimately to internalise accountability as a social more]. If these vertical, horizontal and polycentric relationships, networks and institutions are constantly reaffirmed, then we might witness two developments. First, state actors … should enjoy greater legitimacy [as our representative]. Second, the various associations, communities, networks, and sub-publics that constitute civil society – … should be strengthened. On this account, it is clearly false to say that the more formal, purely vertical,

[147] Fukuyama (note 3 above) at 83, 84 (Corruption as the 'appropriation of public resources for private gain' is a 'useful starting point', but it also embraces clientelism, patronage and rent seeking behaviour).

[148] Constitution s 7(2).

[149] DF Thompson 'Two Concepts of Corruption: Making Campaigns Safe for Democracy' (2005) 73 *George Washington Law Review* 1036.

> conception of the rule of law [and the principle of accountability come] first. The relationship is one of reciprocal effect.[150]

South Africa, on this account, has witnessed some recent success with the reciprocal effect between the judicial enforcement of (and a broader societal commitment to) the principle of accountability and the foundational commitment to representative democracy:

> With that foundation still in place, the fourth estate could break a story in 2009 about malfeasance at the highest level of government: the President's use of public funds to build a private estate … the Public Protector, could then initiate an investigation. At roughly the same time, the rampant … dysfunctional governance of the South African Broadcasting Corporation became a matter … [for] review … by the Supreme Court of Appeal. … [It] held that the Public Protector's recommendations and remedies *may* have legally binding effect. The Supreme Court of Appeal's holding in *SABC v DA* lit the path for the Constitutional Court's assessment and reinforcement of the Public Protector's powers in *Economic Freedom Fighters I* … The two rulings confirmed for many citizens what they had already heard. … The severity of the damage [to the ANC] can be measured by the results of the 2016 municipal elections – just months after *EFF I.* The ANC, for the first time, lost control of virtually all of South Africa's major metropoles. … The electorate's judgment had a reciprocal effect on an array of actors. The Constitutional Court felt increasingly confident in wielding its limited powers in matters that turned on accountability . . . The Public Protector broadened her investigations into the depravity of the President, his patronage system and the non-political actors who benefitted immensely from a blurring of the lines between the public domain and the private realm. Finally, in December 2017, ANC members chose Cyril Ramaphosa as its new party President, and subsequently, President of the nation.[151]

However, prior to clear evidence of such reciprocal effect, the Court in *EFF 1* had already established a judicial doctrine connecting accountability and representative democracy. As the Chief Justice wrote in *EFF 1*:

> One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalized during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason, public office-bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck.[152]

The Court found – in its well established s 1(c)-driven rule of law jurisprudence, along with the principle of accountability in s 1(d) and s 96's expressly clear warnings regarding 'self-dealing' behaviour – sufficient support to hold the President accountable for the systemic damage

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[150] Woolman (note 37 above) at 374

[151] Woolman (note 9 above) at 160–161. See also M Krygier 'The Quality of Civility: Post-Anti-Communist Thoughts on Civil Society and the Rule of Law' (at 251) in A Sajó (ed) *Out of and into Authoritarian Law* (2002) 221. Martin Krygier writes that this commitment to the rule of law and accountability provides: '[the] … scaffolding for the building of 'civil' relations between state and citizens and among citizens themselves. They can begin to rely upon, rather than merely fear, the state and law. Apart from causal relationships, there is … a real affinity between the rule of law [qua principle of accountability] and civil society. Causal links are sometimes hard to trace, but a polity in which both the rule of law [the principle of accountability] has a deep hold is one in which restraint [and respect are] … cultural norm[s] … [They marry well] with pylons firmly planted on both sides of the divide and input moving in both directions.'

[152] *EFF 1* (note 30 above) at para 1.

his abuse of the public purse had done to our nascent democracy and the people who rely so heavily on the state to provide desperately needed public goods.[153]

But the *EFF 1* Court's use of the principle of accountability to buttress representative democracy is hardly new. James Fowkes offers a detailed account of a jurisprudence replete with cases that bind these two linchpins of our basic law together. He begins by noting that 'The natural reading of FC s 1(d) envisages the maintenance of "accountability, responsiveness and openness" via the electoral mechanisms of vigorous representative democracy'.[154] His three-part analysis first identifies those cases in which accountability makes representative democracy possible through electoral mechanisms. Consistent with the primary thrust of this article, he notes:

> [*UDM*] (2) therefore articulates a structural understanding in which representative democracy should mostly be allowed to enforce itself, with the judicial role under FC s 1(d) being to enforce the basic ground rules to ensure that the choice of representatives is real and fair.[155]

However, since representative democracy does not, as we have seen, always enforce itself, the *Mazibuko v Sisulu* Court found that FC s 1(d) plays:

> [an] important role in identifying *the accountability-enhancing purpose* of FC s 102(2), and ultimately in invalidating parliamentary rules that made it virtually impossible for minority parties to have a motion of no confidence debated before the National Assembly.[156]

In a second line of cases, the connection between the broad principle of accountability and principal/agent accountability is somewhat more attenuated. For example, he argues that the Court in *Khumalo v Holomisa* makes the plausible assertion that 'the media are important agents in ensuring that government is open, responsive and accountable to the people as

[153] Constitution s 96 reads, in pertinent part, as follows: (2) Members of the Cabinet and Deputy Ministers may not — (a) undertake any other paid work; (b) act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or (c) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.

[154] J Fowkes 'Founding Provisions' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Ed, 2014) ch 13, 13–59.

[155] Ibid at 13–60, discussing *United Democratic Movement v President of the Republic of South Africa (No 2)* [2002] ZACC 21, 2003 (1) SA 495 (CC)('*UDM 2*').

[156] Ibid at 13–60, discussing *Mazibuko* (note 61 above). However my different reading of this case concludes that this may be a case of 'judicial overreach' on separation of powers grounds (Fn 47 above). What was at issue was whether the majority could *delay* the scheduling of a motion of confidence. The Court came to the conclusion that rules should be adopted (since there was a 'lacunae' in the rules), which treated the scheduling of such motions as a constitutional right. The result is that the timing and scheduling of such motions is now under the control of the government's parliamentary adversaries. It might be that the Court was of the view that this result would always enhance accountability. But is this so? Suppose the electoral map changes, resulting in unstable coalition governments, vulnerable to displacement between elections through marginal parliamentary votes. Does a rule which enables a small 'opportunistic' party to precipitate a change in government at will enhance accountability? In these circumstances, rules might be required that give such coalitions more time to negotiate. Stable government is also an important political value. Yet that possibility is now foreclosed by the Court's decision to constitutionalise aspects of the 'confidence procedure'. The Court itself did not rely on the textual principle of accountability in its reading of s 102(2). Rather, it invoked the concept of 'deliberative democracy' to justify its decision to intervene in the 'internal' functioning of the National Assembly. However, the importance of James Fowkes' reading lies in his grounding of the interpretation of s 102(2) in the text of the Constitution and the Court's accountability jurisprudence. After all, we are in search of ' bright lines'.

the founding values of our Constitution require'.[157] According to Fowkes, 'the implication of *Khumalo* is that FC s 1(d) protects not only the basic mechanisms of representative democracy, in order to achieve accountability, but anything that promotes accountability in a representative democracy, such as a free press.'[158] However, Fowkes also contends that s 1(d) of the Constitution does not support a free-standing principle of accountability – despite an array of judgments that stand for the opposing proposition.[159] To find that s 1(d) does so would sever its clear textual connection to representative democracy.[160]

2 *A narrower conception of accountability: a principle of anti-corruption*

Should a principle of accountability appear too broad to provide a bright line for judicial intervention in the legislative process, then another narrower option exists: an anti-corruption, precautionary principle. Whilst not as easily rooted in specific textual provisions, there is evidence in the jurisprudence of the Court that can be read in this way.

The earliest is the *Heath* case.[161] The *Heath* Court held that:

> [Corruption] in administration is *inconsistent with the rule of law* and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. And they are the antithesis of the open, *accountable*, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic state.[162]

On the *Heath* Court's account, political corruption is (a) by definition, a breach of the rule of law; (b) inconsistent with commitment to the Constitution's human rights provisions; and (c) amounts to a failure of an office-bearer to hold herself accountable to the people she serves, which is a constitutional requirement in a representative democracy. For this C, it functions as an erasure of the foundational values found in ss 1(a) through 1(d) of the Constitution, a panoply of specific textual violations – be they in Chapter 2 (the Bill of Rights) and Chapters 4 to 7 (the structures of representative democracy) – that underpin the judgment.

Similarly, years later, the *Glenister*[163] Court found itself confronted with a government that had gone out of its way to destroy an independent institution designed to keep state actors and private actors from engaging in the kind of corruption that violated the rule of law and threatened to degrade democratic institutions. In so doing the President and his cronies freed themselves from oversight and gave themselves a green light to pillage and plunder the public purse. The *Glenister* Court held that legislation establishing the Directorate for Priority Crime Investigation (DPCI) and disestablishing the Directorate of Special Operations (DSO) because it was constitutionally deficient on the grounds that the DPCI 'lacks the necessary

[157] *Khumalo v Holomisa* [2002] ZACC 12, 2002 (5) SA 401 (CC) at paras 21–28. See also *President of the Republic of South Africa v M & G Media Ltd* [2011] ZACC 32, 2012 (2) SA 50 (CC); *Minister of Health v New Clicks South Africa (Pty) Ltd* [2005] ZACC 14, 2006 (2) SA 311 (CC) at paras 110–113.

[158] Fowkes (note 154 above) 13–61.

[159] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20, 2005 (2) SA 359 (CC), 2005 (4) BCLR 301 (CC) at paras 74–75; *S v Mamabolo* [2001] ZACC 17, 2001 (3) SA 409 (CC) at paras 37 and 45; *K v Minister of Safety and Security* [2005] ZACC 8, 2005 (6) SA 419 (CC) at para 23.

[160] Fowkes (note 154 above) at 13–65.

[161] *South African Association of Personal Injury Lawyers v Heath & Others* [2000] ZACC 22, 2001 (1) SA 883('*Heath*').

[162] Ibid at para 4.

[163] *Glenister v President of the Republic of South Africa & Others* [2011] ZACC 6, 2011 (3) SA 347 (CC), 2011 (7) BCLR 651 (CC)('*Glenister*').

structural and operational independence to be an effective corruption fighting mechanism'.[164] The Court's reasoning relies heavily on South Africa's ratification of various international law instruments designed to support transnational efforts to combat systemic dishonesty by state actors.[165] But the *Glenister* Court made it unambiguously clear that this constitutional commitment arose from the text of the Constitution as a whole.

> The conclusion that the Constitution requires the state to create an anti-corruption entity with adequate independence is therefore intrinsic to the Constitution itself.[166]
>
> [*Leaving*] *to one side for a moment the Republic's international law obligations*, we consider that the scheme of our Constitution points to the cardinal need for an independent entity to combat corruption. … *The Constitution is the primal source of the duty to fight corruption*.[167]

Since the Court did not cite a specific textual source for 'the duty to fight corruption' it have relied on an implicit constitutional principle derived from a reading of the Constitution as a whole, which includes its 'structural provisions' and implicit normative underpinnings. This narrower anti-corruption constitutional principle explains both the Court's strict review of executive action and parliamentary legislation and its conclusion that both were constitutionally defective. In a number of subsequent cases, anti-corruption considerations played a central role in the Court's reasoning concerning: the decisions of the Director of Public Prosecutions;[168] the procurement and the payment of social grants;[169] and the funding of political parties.[170] However, in the trilogy of cases discussed here it is the systemic corruption and utter failure of the democratic process to secure accountability that explains *EFF 1* and *UDM*, or operates as the unmistakable background to *EFF 2.* In each of the former cases, Corruption Watch, an anti-corruption, non-governmental organisation, joined as an amicus.[171] In all three decisions, the Court invoked a requirement of principal/agent probity as the *essentialia* of democratic self-government – anchored in the Preamble and s 43(2) of the Constitution – in coming to decisions that are not justifiable from a 'traditional' separation of powers perspective.

These three cases introduced, for the first time, a 'democracy protective rationale' as distinct from a 'rights protection rationale' upon which the Court relied in *Glenister*.[172] These two rationales are not mutually exclusive. Moreover, the anti-corruption principle is not limited to cases of 'political process dysfunction'. As we know from our rule of law and Bill of Rights jurisprudence, any constitutionally authorised exercise of power – as Michelman and Woolman have shown – would be subject to the scrutiny under the Court's anti-corruption principle.[173]

[164] Ibid at para 178.

[165] Ibid at para 195.

[166] Ibid at para 200.

[167] Ibid at para 175 (my emphasis).

[168] *Corruption Watch v President of the Republic of South Africa* [2018] ZACC 23, 2018 (10) BCLR 1179 (CC).

[169] *Black Sash Trust v Minister of Social Development* [2017] ZACC 8, 2017 (3) SA 335 (CC).

[170] *My Vote Counts NPC v Minister of Justice and Correctional Services* [2018] ZACC 17, 2018 (5) SA 380 (CC). See also G Orr 'My Vote Counts: The Basis and Limits of a Constitutional Requirement of Political Disclosure' 8 *Constitutional Court Review* (2016) 52, 54 ('[Disclosure] of political finances serves anti-corruption and integrity purposes').

[171] J Klaaren 'Mobilizing against State Capture: Evidence of Counterpower in South Africa' PARI Conference: 'State Capture and its Aftermath: Building Responsiveness through State Reform' (2018)(on file with author).

[172] *Glenister* (note 163 above) at para 177.

[173] F Michelman 'The Rule of Law, the Legality Principle and Constitutional Supremacy' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Ed, 2008) ch 11; S Woolman 'Application' in S Woolman & M Bishop *Constitutional Law of South Africa* (2nd Ed, 2008) Chapter 31.

VI CONCLUSION: DEMOCRACY AND INTEGRITY

The Court has now intervened in a significant number of cases that set rules for the political process. Once one overcomes anodyne expressions of the separation of powers doctrine, the departure from 'well established' understandings of the proper relationship between the judiciary and other branches in constitutional democracies begins to make sense *in South Africa*. That said, our fundamental commitment to representative democracy should urge some caution when it comes to the judicial intervention in the 'internal functioning' of representative branches, especially with regard to rule-making.

This article has put forward a theory of 'democratic process-reinforcing review'. Given the deep commitment of the basic law to self-government in multiple forms, this theory holds that where self-dealing representatives: (a) fail to fulfil their custodial responsibilities for public resources on behalf of 'the people'; (b) engage in self-dealing; (c) are 'captured' by private interests; and (d) create corrupt patronage systems that threaten the entire democratic project, then the Court is well within its rights to impose binding legal constraints on the political process in order to secure accountability.

Of course, where accountability ends, and meddling starts, can sometimes be difficult to ascertain. On several occasions the Court has failed to offer a persuasive argument for intervention in the internal processes of representative branches of government. But while the outcomes might appear jarring on a first read, this article has shown that the Court's implicit recognition of a constitutional requirement of 'principal/agent probity' in a representative democracy, which bears a reciprocal relationship with the express principle of accountability in a constitutional state, provides both justification for the more troubling decisions reached, and bright lines for future cases. The theory of 'democratic process-reinforcing' review propounded here enables us to ascertain, as best as we can, when the rough and tumble of democratic politics – as a deep constitutional commitment – must be respected and when the democratic process has become so utterly dysfunctional and our representatives so remiss in their duties as 'representatives of the people' that our representative democracy is rendered 'representative' and 'democratic' in name only. Then, when the Court imposes legal constraints on the democratic process in order to ensure accountability, and fidelity to the electorate, it acts on behalf of the people, even though it is not itself elected.