Separation of powers in the South African Context: Is there space for the Political Question Doctrine?

By

Nkosinathi Riddick Ndlovu

Student number: 214549160

Submitted in partial fulfilment for the degree
Master of Laws (Constitutional Litigation)
in the College of Law and Management Studies
School of Law at the
University of KwaZulu-Natal

Supervisor: Professor D.W Freedman

Declaration

I certify that the whole research paper, unless specifically indicated to the contrary in the text, is my own work. It is submitted as part of research component in partial fulfilment for the degree of Master of Laws Constitutional Litigation (LCTLL) in the School of Law, University of KwaZulu-Natal, 2019.

Signature.....N. Mthembu..... Date.....2019.....

Acknowledgements

Firstly, I would like to thank the Almighty God for giving me the strength, will and wisdom to complete this dissertation. Nothing is possible without you Christ Jesus, for you are the beginning and the end of all things. Blessed be the name of the Lord.

Secondly, I would like to thank my mother for her continued prayers, support and words of encouragement and always pushing me to work hard. I thank the Lord for having blessed me with as lovely a mother as you. While I still have a long way to travel, I would not have been where I am today without you, you have indeed laid a strong foundation for my journey. As Abraham Lincoln once said, so I say; “all that I am, or hope to be in the future, I owe to my angel mother.”

I would like to dedicate this work to my brother, Tyhilande, may you grow up and cherish education for it is the only tool that can empower your mind, knowledge is a necessity. As Nelson Mandela once said, “education is the great engine of personal development. It is through education that the daughter of a peasant can become a doctor, that the son of a mine worker can become the head of the mine, that a child of farmworkers can become the president of a great nation. It is what we make out of what we have, not what we are given, that separates one person from another.” I would also like to dedicate this work to my late father, whom while I know would have not understood what it means, he would have been proud. May you rest in eternal peace Lalemini.

Saving the last for the best! I would like to thank my supervisor Prof Freedman for not only being a supervisor and mentor but for being a friend and for making my views and thoughts sound logical. Thank you for the opportunity you gave me and for the belief you showed in my topic. None of this would have been possible without your wisdom Prof. May the grace of our Lord Jesus Christ be with you and may you be blessed and supervise many more students and bring their ideas to life.

Abstract

In a constitutional democracy the courts are usually given the power of judicial review. This power allows the courts to review legislative and executive conduct and test it against the constitution. If the conduct in question is found to be unconstitutional, then the courts can declare that conduct to be invalid. However, this power gives rise to some difficult questions and one of these is how can the courts exercises their powers without overreaching and thereby infringe the separation of powers principle. The courts have tried not to overreach their powers by adopting different approaches to judicial review. In the United States the courts have adopted a political question doctrine approach or the non-justiciable approach. In South Africa the courts have adopted the judicial self-restraint approach. Each of these will be discussed in this dissertation. The dissertation will also consider the advantages and disadvantages of each of these reviews. Furthermore, it will consider some of the criticism that have been levelled against the judicial self-restraint approach. This dissertation aims to critically examine the political question doctrine and determine whether it could contribute to the development of the South African separation of powers. However, this dissertation does not call for the political question doctrine to replace the judicial self-restraint approach adopted by the Constitutional Court.

Table of Contents

CHAPTER ONE: INTRODUCTION

1.1 Background

On the 31st of March 2017 President Jacob Zuma exercised his powers in terms of section 91(2) of the Constitution[1] and dismissed the Minister of Finance, Mr Pravin Gordhan and the Deputy Minister of Finance Mr Mcebisi Jonas.[2] At the time he dismissed Mr Gordhan and Mr Jonas, the President issued a statement explaining that he had decided to reshuffle his cabinet in order to "improve efficiency and effectiveness" and to bring more youth and women into the Cabinet.[3]

Following the President's decision to dismiss Mr Gordhan and Mr Jonas, the Democratic Alliance applied to the North Gauteng High Court in Pretoria for an order reviewing and setting aside President Zuma's decision on the grounds that it was irrational. As a part of its application, the Democratic Alliance called on the President, in terms of Rule 53 of the Uniform Rules of Court,[4] to provide it with a written record of the reasons behind his decision to dismiss Mr Gordhan and Mr Jonas.

Despite being formally called upon to provide written reasons for his decision, the President refused to do so. The Democratic Alliance then applied to the High Court for an urgent order compelling the President to make the record of his decision available so that it could pursue its application to review that decision. In *Democratic Alliance v President of the RSA, t*he High Court found in favour of the Democratic Alliance and granted the order.[5]

---

[1] Constitution of the Republic of South Africa, 1996. Section 91(2) provides that "[t]he president appoints the Deputy President and Ministers, assigns their powers and functions, and may dismiss them."
[2] Mr Pravin Gordhan was replaced by Mr Malusi Gigaba as the Minister of Finance and Mr Mcebisi Jonas was replaced by Mr Sifiso Buthelezi as the Deputy Minister (see Anonymous "President Zuma appoints new Ministers and Deputy Minister" (31 March 2017). Available at *https://www.thepresidency.gov.za/press-statements/president-zuma-appoints-new-ministers-and-deputy-ministers*, accessed on 25 January 2019).
[3] *Democratic Alliance v President of the Republic of South Africa* Unreported Case No. 24396/2017, 9 May 2017 (GP) at para 4-5.
[4] Rule 53 of the Uniform Rules of Court permits an applicant to call "upon the magistrate, presiding officer, chairperson or officer, as the case may be, to dispatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he or she is by law required or desires to give or make, and to notify the applicant that he or she has done so."
[5] *Democratic Alliance v President of the Republic of South Africa* Unreported Case No. 24396/2017, 9 May 2017 (GP) at para 33.

In arriving at this decision, the High Court adopted a robust approach towards the power of judicial review. This is because it held, not only that the principle of legality and the requirement of rationality apply to every exercise of public power, but also that rationality encompasses the right to be given reasons. Rationality encompasses the right to reasons, the Court held further, because it is impossible to determine whether a decision is rational without knowing what the reasons for that decision were. It followed, therefore, that Rule 53 could be applied to the President's decision to reshuffle his Cabinet.[6]

As Davis has pointed out this, this judgment is controversial. This is because it allows the courts to reach right into the heart of executive power and to review one of the most politically sensitive functions of the executive branch of government, namely the power to make executive appointments. It thus appears to undermine the doctrine of the separation of powers.[7] It is not surprising, therefore, that the President has chosen to challenge this judgment in the Constitutional Court partly on the ground that it amounts to judicial overreach.[8]

Concerns about the separation of powers, judicial overreaching also appear to underlie the judgment of the Eastern Cape High Court in Grahamstown in *Bobo v Faku*,[9] which also dealt with the power to make executive appointments, although this time at the local government level and not the national level.

In this case the respondent was the executive Mayor of the Buffalo City Municipality and the applicants were members of the executive mayoral committee. On 25 January 2010, the Mayor Zukisa Faku exercised her power in terms of section 60 of the Local Government Municipal Structures Act[10] and dismissed the applicants from their positions. At the time she dismissed the applicants the Mayor issued a letter stating that she had decided to do so on the basis that the municipal departments they lead had failed to deliver accountable and good governance.

---

[6] *Democratic Alliance v President of the Republic of South Africa* Unreported Case No. 24396/2017, 9 May 2017 (GP) para 33.
[7] R Davis "ConCourt faces difficult decision on disclosure of reasons behind cabinet reshuffles" *Daily Maverick* (15 February 2019). Available at https://www.dailymaverick.co.za/article/2019-02-15-concourt-faces-difficult-decision-on-disclosure-of-reasons-behind-cabinet-reshuffles/amp/, accessed on 15 February 2019.
[8] Applicants Heads of Argument in *President of the RSA v Democratic Alliance*, Case No. CCT 159/2018 at 15. Available at https://collections.concourt.org.za/bitstream/handle/20.500.12144/36571/Applicant%27s%20Heads%20of%20Argument.pdf?sequence=18&isAllowed=y, accessed on 25 January 2018.
[9] *Bobo v Faku* [2013] ZAECGHC 87 (29 August 2013).
[10] Act 117 of 1998.

Following Mayor Faku's decision to dismiss them, the appellants applied to the High Court for an order reviewing and setting aside her decision. They based their application on the grounds that the Mayor's decision was irrational because she had failed to follow a fair procedure because she had not given them an opportunity to be heard before she dismissed them. The High Court dismissed this argument and found in favour of Mayor Faku.

Unlike in the *Democratic Alliance* case, the High Court adopted a much more deferential approach towards the power of judicial review in this case. Although it held that the principle of legality and the requirement of rationality apply to every exercise of public power, it also held that rationality does not encompass the right to a fair procedure. This is because it would violate the doctrine of the separation of powers if executive decisions are subjected to the onerous requirements of procedural fairness.[11]

The fact that these two judgments adopted different approaches highlights one of the most complex and difficult questions that a supreme constitution gives rise to, namely may the courts review decisions that lie at the very heart of executive or legislative power and, if they may, how robust or deferential such a system of review should be. When it comes to answering these questions, the courts in different jurisdictions have adopted different approaches. Among the most prominent of these are the "political question doctrine" in the United States and the "judicial self-restraint approach" in South Africa.

Very briefly, the political question doctrine provides that the courts, which are an apolitical branch of government, should refuse to hear disputes that are politically controversial or politically sensitive. This is because to do so would infringed the doctrine of the separation of powers. Instead, these sorts of disputes should be resolved by the political branches of government, namely the executive and the legislature. It is also referred to as the non-justiciable approach to judicial review.[12]

Unlike the political question doctrine, the judicial self-restraint approach provides that every exercise of public power is subject to judicial review and there are no disputes which are so

[11] *Bobo v Faku* [2013] ZAECGHC 87 (29 August 2013) at para 23.
[12] S Navot *Political questions in the court: Is "judicial self-restraint" a better alternative than a "non-justiciable approach"?* Paper presented at the VII World Congress of the International Association of Constitutional Law 24 July 2007. Available at https://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1367596, accessed 19 January 2019.

politically sensitive that they cannot be heard by the courts. At the same time, however, and in order to uphold the separation of powers, the courts should show substantial deference to the politically sensitive decisions of the political branches. Such a decision should be declared unconstitutional and invalid only when the Constitution has been clearly violated.[13]

Although the South African Constitutional Court has adopted the judicial self-restraint approach, some academic commentators have argued that this decision has undermined the doctrine of the separation of power and exacerbated the conflict between the Constitutional Court and the political branches of government. Among the most consistent and prominent of these commentators is Professor Mtendeweka Mhango who argues further that the Court should abandon the judicial self-restraint approach and adopt the political question doctrine instead.[14]

The purpose of this dissertation, therefore, is to set out, discuss and critically engage with the judicial self-restraint approach, with Mhango's criticisms of this approach and with Mhango's suggestion that it should be replaced with the political question doctrine. Instead of accepting that the judicial self-restraint approach should be replaced with the political question doctrine, however, this dissertation will argue that the political question doctrine can be used together with the judicial self-restraint approach in order to bring more certainty to this approach.

1.2 Research Questions

Although the Constitutional Court has adopted a judicial self-restraint approach towards politically sensitive disputes, the purpose of this dissertation is to consider whether the political question doctrine nevertheless can still play a role in South Africa's system of judicial review. More particularly, the purpose of this dissertation is to:

(a) Set out and discuss the political question doctrine;

(b) Set out and discuss the judicial self-restraint approach to judicial review;

---

[13] *Ibid.*

[14] M Mhango and N Dyani-Mhango "Deputy Chief Justice Moseneke's approach to the separation of powers in South Africa" (2017) *Acta Juridica* 75; M Mhango "Is it time for a coherent Political Question Doctrine in SA: Lessons from the United States" (2014) 7 *African Journal of Legal Studies* 457; and M Mhango "Separation of powers in Ghana: The evolution of the Political Question Doctrine" (2014) 17(6) *Potchefstroom Electronic Law Journal* 2703.

(c) Set out, discuss and critically engage with Mhango's criticisms of the judicial self-restraint approach;
(d) Set out, discuss and critically engage with Mhango's suggestion that the judicial self-restraint approach should be replaced with the political question doctrine; and
(e) Determine whether the political question doctrine has a role to play in South Africa's system of judicial review.

1.3 The research methodology

This a desktop study. Data will be collected from appropriate primary and secondary sources including local and foreign statute law, case law, books, chapters in books and journal articles. Data will also be collected from online and other relevant sources. It is important to note, however, that this study is not simply based on a desktop approach. In addition, it is also based on the notion of "constitutionalism." As Cryer *et al* have argued, constitutionalism can be applied "to reveal new insights into the [separation of powers] as a legal construct." This is because it asks "what fresh insights and challenges will the 'trend towards thinking in a constitutional register bring'."[15]

1.4 The structure of the study

This dissertation is divided into five chapters.

The background to the study is set out in Chapter One. Apart from the background, the research question, the methodology of the study, the rationale for the study and the structure of the study are also set out in Chapter one.

The key characteristics of the political question doctrine are set out and discussed in Chapter Two. The manner in which this approach has been interpreted and applied by the United State Supreme Court is also set out and discussed in Chapter Two. The advantages and disadvantages of this approach will also be considered in this chapter.

[15] R Cryer, T Hervey and B Sokhi-Bulley *Research methodologies in EU and international law* (2011) at 51.

The key characteristics of the judicial self-restraint approach are set out and discussed in Chapter Three. The manner in which this approach has been interpreted and applied by the South African Constitutional Court is also set and discussed in Chapter Three. The advantages and disadvantages of this approach will also be considered in this chapter.

The criticisms that have been levelled against the manner in which the Constitutional Court has exercised its power of judicial review by Mhango as well as his suggestion that the judicial self-restraint approach should be replaced with the political question doctrine will be set out and discussed in Chapter Four.

The extent to which the political question doctrine can play a role in South Africa's system of judicial review will be analysed and discussed in Chapter Five. In this chapter it will be argued that the political question doctrine can be used to introduce an element of certainty into the system of judicial self-restraint.

1.5 Limitations of the study

Apart from the political question doctrine and the judicial self-restraint approach, there are a number of other methods that may be employed by the judicial branch of government to ensure that it does not violate the doctrine of the separation of powers when it exercises the power of judicial review. This dissertation, however, will focus exclusively on the political question doctrine and the judicial self-restraint approach. This is because these are the most common methods used by courts around the world to manage the threat of overreaching.

In addition, this dissertation will focus primarily on the manner in which the political question doctrine has been interpreted and applied by the United States Supreme Court and the manner in which the judicial self-restraint approach has been interpreted and applied by the South African Constitutional Court. This is partly because both of these courts have applied these methods on a number of occasions and, accordingly, have developed a rich and sophisticated jurisprudence.

CHAPTER TWO: THE "POLITICAL QUESTION" DOCTRINE APPROACH TO JUDICIAL REVIEW

2.1 Introduction

The purpose of this chapter is to set out and discuss the key characteristics of the political question doctrine. More particularly, the purpose of this chapter is to set out and discuss the manner in which this doctrine has been interpreted and applied by the United States Supreme Court. This is partly because the doctrine originated in the United States and partly because the Supreme Court has developed a rich and sophisticated political questions jurisprudence. Apart from the United States, the manner in which the political question doctrine has been interpreted and applied in other jurisdictions will also be briefly considered. Finally, the advantages and disadvantages of this doctrine will be examined.

2.2 The political question doctrine

As was pointed out in Chapter One, the political question doctrine provides that certain disputes should not be resolved by the courts because of their politically sensitive nature. Instead, they should be resolved by the political branches of government (i.e. the legislature and the executive).[16] Any attempt by the courts to resolve these sorts of disputes, it is argued, would violate the separation of powers, which provides that political decisions should be made by the political branches and not the judicial branch of government. A dispute that is political in nature, therefore, is classified as a non-justiciable one and judicial oversight has no place in such a matter.[17]

Navot describes this approach as follows

"According to the [non-justiciable approach], the resolution of disputes bearing a political character is the task of a political organ and not the judicial branch. Involving the judiciary in disputes of this nature violates the principle of separation of powers in a democratic regime, in which political decisions are adopted by the elected political authorities, and is also detrimental to the courts themselves. The judge's basic instinct should therefore be to

[16] M Mhango "Is it time for a coherent Political Question Doctrine in SA: Lessons from the United States" (2014) 7 *African Journal of Legal Studies* 457 at 463-464.
[17] R Barkow "More supreme than court? The fall of the Political Question Doctrine and the rise of judicial supremacy" (2002) 102 *Columbia Law Review* 237 at 248.

distance himself from decisions of a political nature. President Aharon Barak of the Israeli Supreme Court classified 'justiciability' as one of the legal tools utilised by the court to close its gates to actions which are not suited for judicial resolution. A 'non-justiciable matter' is a matter for which there are no legal criteria upon which a judicial resolution can be based, or a problem which is not suited or appropriate for the resolution of the judicial branch."[18]

2.3 The political question doctrine in the United States

(i) Introduction

The origins of the political question doctrine can be traced back to the United States in general, and the judgment of the United States Supreme Court in *Marbury v Madison,*[19] in particular. In this case, William Marbury was appointed by President John Adams as a judge in terms of the Judiciary Act of 1801. This Act provided, inter alia, that a person's appointment as a judge was not valid until his commission was formally delivered to him by the Secretary of State.

Unfortunately, Marbury never received his commission from the Secretary of State. This is because shortly after Marbury was appointed, President Adams's term of office came to an end and he was replaced as President by Thomas Jefferson. Jefferson appointed James Madison as his Secretary of State and Madison refused to deliver the commission to Marbury. Jefferson and Madison believed that Adams had appointed Marbury, together with a number of other new judges, with the goal of frustrating the new administration.

After Madison refused to deliver the commission to Marbury, he applied to the Supreme Court for a writ of mandamus compelling Madison to do so. The key issue the Court had to decide was whether Madison's decision was illegal and, if so, whether it could issue a mandamus against him. The Court held that Madison's decision was illegal, but that it could not issue a mandamus against him. This is because the Act allowing Marbury to bring his case directly to the Supreme Court was unconstitutional. Marbury had to approach a lower court first.

[18] S Navot *Political questions in the court: Is "judicial self-restraint" a better alternative than a "non-justiciable approach"?* Paper presented at the VII World Congress of the International Association of Constitutional Law 24 July 2007 at 6. Available at *https://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1367596,* accessed 19 January 2019.
[19] 5 US (1 Cranch) 137 (1803).

In arriving at this decision, the Supreme Court confirmed for the first time that it enjoyed the power of judicial review. In this respect, the Court held that "it is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule."[20]

Apart from confirming that it enjoyed the power of judicial review, the Supreme Court also recognised that such power had limitations when it held that certain political questions could not be decided by the courts:

"By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. The subjects are political. Being entrusted to the executive, the decision of the executive is conclusive. The province of the court is, solely, to decide on the right of individuals, not to inquire how the executive, or executive officers, perform duties in which they have discretion. Questions in their nature political, or which are by the constitution and laws, submitted to the executive, can never be made in this court."[21]

Although the Supreme Court appeared to limit the concept of political questions only to those powers in respect of which the President has a discretion, this passage has generally been interpreted as adopting a very broad approach to the political question doctrine.[22] This broad approach was largely followed by the Supreme Court until its leading judgment in *Baker v Carr* in 1962.[23] Before turning to discuss this judgment, however, it will be helpful to briefly discuss the broad approach the Supreme Court initially followed.

(ii) The application of the broad approach

As indicated above, the Supreme Court initially adopted a very broad approach to the political question doctrine and it used this broad approach to avoid dealing with a wide range of issues. For example, the Court used the broad approach to avoid deciding whether the internal procedures or decisions of Congress were valid or not.

[20] *Marbury v Madison* 5 US (1 Cranch) 137 (1803) at 177.
[21] *Ibid* at 170.
[22] JW Peltason and S Davis *Corwin and Peltason's Understanding the Constitution* 15ed (2000) at 184.
[23] 369 US 186 (1962).

In *Field v Clark*,[24] for example, Congress had passed the Tariff Act of 1890. Apart from setting new tariffs on a wide range of imported goods, this Act also delegated the power to the President to alter the tariffs set by the Act if another country altered its tariffs in a way that he felt was harmful to the United States.

After the Tariff Act came into operation, the applicants applied for an order declaring it to be unconstitutional. They based their application on several grounds. One of these was the Act had not been passed following the correct legislative procedure because there was evidence to show that the final version of the Act differed from the version that had been signed by the Presiding Officers of the two Houses of Congress and the President.

One of the issues the Supreme Court had to decide, therefore, was whether Congress had complied with its own internal legislative procedure when it passed the Tariffs Act. The Court, however, refused to do so on the grounds that disputes about the internal procedures of Congress give rise to political questions which have to be resolved by the political and not the judicial branches of government.

This meant, the Supreme Court held, that when an Act of Congress has been signed by the Presiding Officers of both Houses of Congress as well as the President, the courts have to accept that the Act in question has been passed following the correct legislative procedure. If the courts failed to do so they would not be showing due respect for the political branches of government.

Apart from the internal procedures of Congress, the Supreme Court also used the broad approach to refuse to determine whether the conduct of foreign affairs by the President was valid or not.

In *Williams v Suffolk Insurance Co*,[25] for example, the plaintiff lodged an insurance claim against the defendant after its ship was confiscated by the government of Buenos Ayres while

[24] 143 US 649 (1892).

[25] 38 US (13 Pot) 415 (1839). See also *Russian Socialist Federated Soviet Republic v Cibrario* 236 NY 591 (NY 1923), where the court held that the determination of a political branch on a sovereignty of a territory was binding on the court. The court further stated that "the sovereign of a territory is a political question. In any case where that question is in dispute the courts are bound by the decision reached by those departments." This case shows an important component of the political question doctrine, that even though the court will not decide on political questions, nor dismiss such matters in terms of the political question doctrine simply because they raise

fishing in the ocean around the Falkland Islands. The defendant, however, rejected the claim on the grounds that the ocean around the Falkland Islands formed part of the territory of Buenos Ayres, that the government of Buenos Ayres had not given the ship permission to fish and, consequently, that the ship was fishing illegally.

After the defendant rejected its claim, the plaintiff sued to enforce the insurance contract. In support of its claim, the plaintiff argued that its ship had not been finishing illegally. This is because the government of the United States had decided that the Falkland Islands did not form part of the territory of the Buenos Ayres and, consequently, that it did not recognise the authority of the government of Buenos Ayres over the Islands and the oceans around them. The plaintiff, therefore, did not need the permission of Buenos Ayres to fish.

One of the issues the Supreme Court was required to decide, therefore, was whether the decision of the United States government was valid. The Court, however, refused to do so on the grounds that the manner in which the government conducted foreign affairs was a political question and, consequently, that it was bound by the decision of the government.[26] In arriving at this decision, the Court held that it had to accept the decision of the United States government as a fact and maintain that position, regardless of whether the action taken by the government was right or wrong.[27]

Finally, the Supreme Court also used the broad approach to refuse to decide whether congressional voting districts were malapportioned.

In *Colgrave v Green*,[28] for example, the State of Illinois had undergone a process of rapid urbanisation towards the end of the nineteenth century. As a result of this process urban congressional districts were under-represented, while rural congressional districts were over-represented.

---

political questions, the courts will instead apply and enforce the determinations of the political branches in deciding the case. Another important component shown by the court was that the determination of the political branches was treated as conclusive only on the political question and then the remaining factual and legal issues will be resolved by the court.

[26] TL Grove "The lost history of the Political Question Doctrine" (2015) 90 *New York University Law Review* 1908 at 1919.

[27] *Ibid.*

[28] 328 US 549 (1946).

The applicants, who all lived in under-represented urban districts, applied to the Supreme Court for an order prohibiting the State of Illinois from holding congressional elections until the congressional districts were reapportioned on a more geographically compact and equitable basis.

The key issue the Supreme Court had to decide, therefore, was whether the congressional districts in Illinois were malapportioned. The Court, however, refused to do so on the grounds that disputes about the apportionment of congressional districts gave rise to political questions which had to be resolved by the political and not the judicial branches of government.

In arriving at this decision, the Supreme Court reasoned that, "the Constitution has conferred upon Congress exclusive authority to secure fair representation by the States in the popular House and left to that House determination whether States have fulfilled their responsibility. If Congress failed in exercising its powers, whereby standards of fairness are offended, the remedy ultimately lies with the people."[29]

An important consequence of the broad approach adopted by the Supreme Court was that the political question doctrine was applied in an *ad hoc* manner and on a case-by-case basis. This made it difficult to identify the circumstances in which the doctrine would be applied and the circumstances in which it would not. This broad, *ad hoc* and case-by-case approach to the political question doctrine, however, changed significantly in *Baker v Carr*.[30]

(iii) The narrow approach

Like *Colgrave v Green,* the judgment in *Baker v Carr* also dealt with the malapportionment of voting districts as a result of urbanisation, but in this case the voting districts were not congressional voting districts, but rather voting districts for the Tennessee state legislature. The applicant, who lived in an urban district, applied for an order declaring the apportionment of voting districts to be unconstitutional on the grounds that it violated his right to equal protection of the law under the Fourteenth Amendment.

[29] *Ibid.*
[30] 396 US 186 (1962).

In light of its earlier jurisprudence, the first question the Supreme Court had to decide was whether the apportionment of voting districts should still be classified as a political question. Insofar as this question was concerned, a majority of the Court overturned its previous jurisprudence and held that the apportionment of voting districts was in fact not a political question and, consequently, that these disputes were justiciable.

In arriving at this decision, the majority identified a set of criteria that should be taken into account when deciding whether a particular dispute may be classified as a political question or not. The majority stated in this respect that:

"Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standard for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non – judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an usual need for unquestioning adherence to a political decision already made; or the[31] potentiality of embarrassment from multifarious pronouncements by various departments on one question."[32]

As Barron and Dienes have pointed out, these criteria encompass a combination of classical, functional and prudential concerns. Classical concerns relate to the text of the Constitution itself, functional concerns to the practical difficulties a politically sensitive dispute may give rise to and prudential concerns to the separation of powers difficulties such a dispute may also give rise to.[33]

While the first criterion ("a textually demonstrable constitutional commitment of the issue to a coordinate political department") may be classified as a classical concern, they point out further, the second and third criteria ("a lack of judicially discoverable and manageable standard for resolving [a case]" and "the impossibility of deciding without an initial policy determination") may be classified as functional concerns.[34]

[31] JA Barron and CT Dienes *Constitutional law in a nutshell* (1999) at 60.
[32] *Baker v Carr* 396 US 186 (1962) at 217.
[33] JA Barron and CT Dienes *Constitutional law in a nutshell* (1999) at 60.
[34] JA Barron and CT Dienes *Constitutional law in a nutshell* (1999) at 61.

This leaves the fourth, fifth and sixth criteria ("expressing lack of the respect due coordinate branches of government," "an usual need for unquestioning adherence to a political decision already made" and "the potentiality of embarrassment from multifarious pronouncements by various departments") which may be classified as prudential concerns.[35]

Finally, it is important to note that in order to invoke the political question doctrine, not all six criteria must be present; the existence of one out of the six will suffice.[36]

(iv) The application of the narrow approach

Following the Supreme Court's decision to adopt a more formal and narrow approach in *Baker v Carr*, the number of cases in which the political question doctrine has been successfully applied has declined significantly. In particular, the Court no longer always considers the conduct of foreign affairs by the President, the internal procedures and decisions of Congress and the apportionment of legislative seats to be political questions. Despite the more narrow approach, the Supreme Court has continued to find that certain types of disputes give rise to political questions, especially those involving the republican form of government, the internal affairs of political parties and the impeachment of officials.

The application of the political question doctrine to the republican form of government is illustrated in *Luther v Borden*.[37] In this case the defendant broke into the plaintiff's home searching for evidence that he had participated in an illegal election in the state of Rhode Island. The plaintiff then sued the defendant for trespass. In his defence, the defendant argued that he was not trespassing when he broke into the plaintiff's home because he had been authorised to do so by the state government in order to search for evidence.

In response to this defence, the plaintiff argued that the authorisation granted by the state government was unconstitutional because the state government itself was unconstitutional. The state government was unconstitutional, the plaintiff argued further, because it was based on a royal charter granted to it by King Charles II in 1663 and this charter violated Article IV(4) of

[35] JA Barron and CT Dienes *Constitutional law in a nutshell* (1999) at 62.
[36] M Mhango "Is it time for a coherent Political Question Doctrine in SA: Lessons from the United States" (2014) 7 *African Journal of Legal Studies* 457 at 465.
[37] 48 US 1 (1849).

the United States Constitution which provides that "[t]he United States shall guarantee every State in this Union a Republican form of government."

One of the issues the Supreme Court was required to decide, therefore, was whether government of Rhode Island violated Article IV(4) and, therefore, was unconstitutional. The Court, however, refused to do so on the ground that this was a political question and, consequently, that it was bound by the decision of the Congress and the President on this issue.[38] In arriving at this decision, the Supreme Court stated that "undoubtedly the courts of the United States have certain powers under the Constitution and laws of the United States which do not belong to the State courts. But the power of determining that a State government has been lawfully established, which the court of the State disown and repudiate, is not one of them."[39]

Like the republican form of government, the application of the political question approach to the internal affairs of political parties is illustrated in *O'Brian v Brown*.[40] In this case, the Democratic Party's Credentials Committee recommended the unseating of delegates from California and Illinois in the Democratic National Convention of 1972, the said delegates challenged their unseating in the District Court which the court dismissed. On the Appeal Court the California delegates were granted relief and the Illinois delegates were denied relief. However, the Supreme Court held that "in view of the probability that the Court of Appeals erred in deciding the cases on the merits and in view of the traditional right of a political convention to review and act upon the recommendations of a Credentials Committee, the judgments of the Court of Appeals must be stayed. The important constitutional issues cannot be resolved within the limited time available, and no action is now taken on the petitions for certiorari."[41]

In arriving at this conclusion, the Supreme Court reasoned that it had to consider that there was no law authorising the Court of Appeals to intervene in internal matters of a national political party regarding the seating of delegates while it was on the eve of its convention. The court went further and stated that there was no case which was cited before it where a federal court

[38] *Ibid.*
[39] *Ibid*.
[40] 409 US 1 (1972).
[41] *Ibid* at 1.

undertook to interrupt a "deliberative processes of a national convention" and that there was no case law which supported intervention by the court on this matter which involved delicate relationships that were of a political nature. The court concluded by that the intervention of the courts on such matters have traditionally been "approached with great caution and restraint."[42]

Finally, the application of the political question doctrine to the impeachment of officials is illustrated in *Nixon v United States*.[43] In this case, Walter Nixon, who was a federal district judge, was convicted of making false statements to a grand jury. Following his conviction, however, Nixon refused to resign as a federal judge. The House of Representatives then adopted three articles of impeachment against him and these articles were referred to the Senate for a decision. After conducting a hearing, the Senate voted to uphold them and Nixon was removed from office.[44]

After Nixon was removed from office he applied to the Supreme Court for an order setting the Senate's decision aside. He based his application on the grounds that Senate had not followed the correct procedure when it impeached him. The Senate had not followed the correct procedure he argued because the trial had been conducted by a committee of the Senate rather than the whole Senate itself. This infringed the Constitution, he argued further, because it provided that the Senate and not a committee of the Senate had the power to try all impeachments.

The key issue the Supreme Court had to decide, therefore, was whether the internal procedure followed by the Senate was constitutionally valid or not. The Court, however, refused to consider this issue on the grounds that this was a political issue. In arriving at this conclusion, the Court relied on the classical criterion identified in *Baker v Carr,* namely that there was a "textually demonstrable constitutional commitment of the issue to a coordinate political department." In other words, the Court relied on the fact that the text of the Constitution itself allocated the power to deal with these sorts of disputes to the legislative and not the judicial branch of government.[45]

---

[42] *Ibid* at 4.
[43] 506 US 224 (1993).
[44] This rule allowed a committee of Senators to hear evidence against an impeached individual and to report that evidence to the full Senate.
[45] *Nixon v United States* 506 US 224 (1993).

2.4 The political question doctrine in Africa

(i) Introduction

Apart from the United States, the political question doctrine has also been adopted in a number of other countries and, in particular, in a number of other African countries, including Ghana, Nigeria and Uganda. This section will briefly discusses the application of the doctrine in Ghana and Uganda.

(ii) Ghana

Like the United States, the political question doctrine has been adopted in Ghana as mechanism to uphold the separation of powers in politically sensitive cases.[46] The origins of the doctrine in Ghana are usually traced back to the judgment of the Supreme Court of Ghana in *New Patriotic Party v Attorney-General*.[47] Apart from this case, the Supreme Court has considered the political questions doctrine in at least three other cases, namely *Mensah v Attorney-General*; [48] *Amidhu v President Kufour;* [49] and *Ghana Bar Association v Attorney-General*.[50] The leading case, however, is *Ghana Bar Association v Attorney-General*.

In this case, the issue before the Supreme Court was whether the appointment of the Chief Justice by the President on advice from the Council of State and Parliaments approval of that nomination, violated the Constitution.[51]

The Supreme Court found that the political question doctrine applied in Ghana, reasoning that the doctrine was implied in the principle of separation of powers, therefore in a constitutional design based on the separation of powers as the one Ghana has, a political question cannot turn to a judicial issue.[52]

---

[46] M Mhango "Separation of powers in Ghana: The evolution of the Political Question Doctrine" (2014) 17 *Potchefstroom Electronic Law Journal* 2705 at 2710.
[47] *New Patriotic Party v Attorney-General* (31st December Case)
[48] 1996-1997 SCGLR 320.
[49] 2001-2002 SCGLR 138.
[50] 2003-2004 SCGLR 250.
[51] M Mhango "Separation of powers in Ghana: The evolution of the Political Question Doctrine" (2014) 17 *Potchefstroom Electronic Law Journal* 2705 at 2715.
[52] *Ibid.*

The Supreme Court further stated that the appointment of the Chief Justice in terms of the Constitution of Ghana was for the political branches, being the executive and the legislature, therefore, an "attempt by the Supreme Court to claim a power to be able to declare null and void the appointment of the Chief Justice would justly be described as a usurpation of the constitutional functions of both the executive and legislative branches."[53]

The Supreme Court further outlined three characteristics in order to ascertain whether an issue before the Court raises a political question, these are: "(1) does the issue involve the resolution of questions committed by the text of the Constitution to a co – ordinate branch of government; (2) would a resolution of the question demand that a court move beyond areas of judicial expertise; and (3) do prudential considerations counsel against judicial intervention."[54]

(iii) Uganda

The origins of the political question doctrine in Uganda are usually traced back to the judgment of the Supreme Court of Uganda in *Uganda v Commissioner of Prisons, Ex parte Matovu*.[55] Apart from this case, the Supreme Court has considered the political questions doctrine in at least three other cases, namely *Attorney General v David Tinyefuza*;[56] *Severino Twinobusingye v Attorney-General;* [57] *and Centre for Health, Human Rights and Development v Attorney-General*.[58] The leading case, however, is *CEHURD v Attorney-General*.

In this case, the adequacy of maternal health services in Uganda was challenged by *CEHURD*, arguing that the "levels of funding and maternal health care in Uganda amount to a denial of a constitutionally mandated right to health."[59] The Supreme Court held that "matters of government health policy are non-justiciable political questions," and dismissed the petition.

The Supreme Court relied on the political question doctrine and reasoned that in terms of the doctrine, "certain issues should not be decided by courts because their resolution is committed

[53] *Ibid* at 2717.
[54] *Ibid* at 2718.
[55] [1966] EA 514.
[56] Supreme Court (Uganda) Constitutional Appeal No. 1 of 1997.
[57] Supreme Court (Uganda) Constitutional Appeal No. 27 of 2011.
[58] Supreme Court (Uganda) Constitutional Appeal No. 1 of 2013.
[59] DB Dennison "The political question doctrine in Uganda: a reassessment in the wake of *CEHURD*" (2014) 18 *Law, Democracy & Development* 1 at 2.

to another branch of government and/or because those issues are not capable, for one reason or another, of judicial resolution. Its purpose is to distinguish the role of the judiciary from those of the Legislature and the Executive, preventing the former from encroaching on either of the latter. Under this rule, courts may choose to dismiss the cases even if they have jurisdiction over them."[60]

2.5 The advantages and disadvantages of the political question doctrine

Academic commentators have identified a number of advantages and disadvantages of the political question doctrine.

One of the advantages identified by commentators is that it strengthens the separation of powers principle in that it ensures that courts do not decide matters that are constitutionally committed to other branches of government and which the political branches are better placed to resolve and deal with. Another is that if courts do not usurp the powers of the political branches, then this will help avoid disputes between the courts and political branches. Furthermore, the doctrine allows the political branches of government to make decisions on matter that they are better placed to decide and have more expertise on them.[61]

One of the disadvantages is that the doctrine can be confusing and even in the United States, where it was formulated, it is still not clear as to how the doctrine is applied and the doctrine is misleading as the courts decide politically sensitive cases all the time.[62] Furthermore, what makes the doctrine to be more confusing is the criteria set out in *Baker v Carr*, these criterion are written in very broad terms and it is hard to determine clearly what constitutes a political question, it is difficult to use the Baker criteria to determine whether an issue is a political question or not.[63]

---

[60] *Centre for Health Human Rights & Development & 3 Others v Attorney General (CONSTITUTIONAL PETITION NO. 16 OF 2011)* [2012] UGCC 4 (5 June 2012). Available at https://www.ulii.org/ug/judgment/supreme-court-uganda/2012/4-0, accessed on 04 February 2019.
[61] E Chemerinsky *Constitutional Law: Principles and Policies* 4ed (2011) at 134.
[62] *Ibid* at 131.
[63] *Ibid* at 132.

2.6 Conclusion

In summary, the political question doctrine was formulated and extensively developed in the United States and was developed as a separation of powers mechanism in order to ensure that the judiciary does not unlawfully intrude on the powers of the political branches of government. In the United States, the case that has been the go to case when it comes to the doctrine is *Baker v Carr*, which modified the doctrine and provided a six criteria in order to determine what constitutes a political question. However, the doctrine is no longer clear in the United States and it is confusing and there is even doubt among scholars whether the doctrine still exists. The political question doctrine has also been adopted in other African countries, including but not limited to Ghana and Uganda. These African countries also adopted the doctrine from the United States and also acknowledge, like in the United States also recognise that the doctrine is the function of the separation of powers and it is there in order to ensure that the courts do not exercise powers which are not constitutionally given to them.

CHAPTER THREE: THE "JUDICIAL SELF–RESTRAINT" APPROACH TO JUDICIAL REVIEW

3.1 Introduction

The purpose of this chapter is to set out and discuss the key characteristics of the judicial self-restraint approach to judicial review. More particularly, the purpose of this chapter is to set out and discuss the manner in which this approach has been interpreted and applied by the South African Constitutional Court. This is partly because, the Constitutional Court has adopted a very broad approach to the judicial self-restraint approach and partly because the Court has implemented this approach more successfully than most other Constitutional Courts in new democracies. In addition, the purpose of this chapter is to identify the different strategies the Court has adopted to manage its relation with the political branches of government. Finally, the advantages and disadvantages of this approach will be examined.

3.2 The judicial self-restraint approach

Unlike the political questions doctrine, the judicial self-restraint approach provides that every dispute can be resolved by the courts through the application of legal rules and principles, irrespective of whether it is politically sensitive or not.[64] The politically sensitive nature of a dispute, therefore, does not determine whether it is justiciable or not. Instead, every dispute is governed by the law and can be adjudicated upon by the courts.[65]

Although the judicial self-restraint approach provides that every dispute, including politically sensitive disputes are justiciable, it also accepts that a distinction must drawn between the political and legal aspects of the dispute. An important consequence of this distinction is that while a court is entitled to review the legality of a decision according to legal standards, it is not entitled to review the political wisdom of that decision.[66]

---

[64] S Navot *Political questions in the court: Is "judicial self-restraint" a better alternative than a "non-justiciable approach"?* Paper presented at the VII World Congress of the International Association of Constitutional Law 24 July 2007 at 8. Available at *https://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1367596*, accessed 19 January 2019.
[65] *Ibid.*
[66] *Ibid.*

The mere fact that the courts are prepared to review the legality of every decision irrespective of its politically sensitive nature, however, does not mean that they are immune to the separation of powers concerns that underlie the political question doctrine. Instead of classifying certain decision as political ones, however, the courts seek to uphold the separations of powers doctrine by exercising self-restraint.

In other words, courts that adopt the judicial self-restraint approach to judicial review seek to uphold the separation of powers by showing appropriate deference or respect to the powers and functions of the political branches of government. There are a number of different ways in which the courts can show deference or respect to the political branches of government. In practice, however, this usually takes the form of converting concepts into discretionary tests; different standards of review and different types of remedies.

Navot describes the judicial self-restraint approach as follows:

"As mentioned, Israeli law did not adopt the American approach of the non-justiciability of political questions. The foremost spokesman for the Israeli 'self-restraint' approach was Supreme Court former President Aharon Barak. According to Barak, any act is liable to be 'caught' by the legal norm, and there is no act for which there is no applicable legal norm. There is no 'legal vacuum', in which acts are performed without the law taking a position on them. The law spans all actions. Barak's view is that the nature of the act – political or other – is irrelevant. Every act, whether political or a matter of determining policy, is contained within the world of law, and is subject to a legal norm.

According to the Israeli approach, the political nature of an act does not negate its legal nature, but the legal character of the executing body will affect the nature of the rules applied by the court. In the words of Justice Barak: 'The judiciary assesses the 'legal aspects of politics, not its wisdom. Accordingly, when a judge assesses the legality of a political determination, he is not concerned, neither positively nor negatively – with the merits of the determination. He does not make himself part of it. He does not assess its internal logic, but only examines its legality according to legal standards. In doing so he fulfils his classic role'."[67]

Under the judicial self-restraint approach, therefore, a distinction must be made between "(a) the legal question of the jurisdiction of the political authority and whether the jurisdiction was lawfully exercised, and (b) the question of whether the political authority chose the appropriate solution from among a number of lawful solutions."[68] The court has a duty, in terms of the

[67] *Ibid.*
[68] *Ibid.*

judicial self-restraint approach, and in terms of its powers and scope to determine the first question and the nature of the legislation, where legislation gives power to an organ of state, it also gives the court authority to interpret it, outline the scope for such power and whether the organ concerned exercised its powers lawfully.[69]

3.3 The judicial self-restraint approach in South Africa

(i) Introduction

Although the judicial self-restraint approach did not originate in South Africa, the South African Constitutional Court has adopted a very strong version of it. In South Africa, the origins of the judicial self-restraint approach may be traced back to the judgment in *Pharmaceutical Manufacturers Association of South Africa and Another: In re the Ex Parte Application of the President of the RSA*,[70] where the Constitutional Court held that every exercise of public power must at a minimum comply with the principle of legality and in particular the requirement of rationality.

In this case Parliament passed the Medicines and Medical Devices Regulatory Authority Act[71] in 1998 ("the Medicines Act"). Section 55 of the Act provided that it would come into operation on a date to be determined by the President. In 1999 the President issued a proclamation declaring that the Medicines Act had come into operation. The President, however, issued the proclamation on the basis of incorrect advice. Regulations which were essential to the operation of the Medicines Act (dividing different types of medicines into categories subject to varying degrees of control) had not yet been published. The result was a legal vacuum: it was not known which medicines were subject to which form of legal control.

After this error was brought to the President's attention he applied to the High Court to have the proclamation declared invalid. The High Court, however, rejected the President's application on the grounds that he had acted within his powers and in good faith. The fact that he had acted on the basis of incorrect advice was not enough, the High Court held, to review the President's decision. After the President lost his application, he appealed to the full bench

[69] *Ibid.*
[70] 2000 (2) SA 674 (CC).
[71] Act 132 of 1998.

of the same High Court. The full bench overruled the decision of the High Court and found that the President's proclamation was invalid on the grounds that, first, his decision could be classified as an administrative act; second, that as such it was subject to the principles of administrative law; and, third, that it was *ultra vires*.

The President's decision was *ultra vires*, the full bench held, because section 59 authorised him to bring the Medicines Act into operation only after the regulations were ready and not before. Unfortunately, he had brought the Act into operation before the regulations were ready and, therefore, had exceeded his authority and acted unlawfully. After the full bench handed down its decision, it was referred to the Constitutional Court for confirmation in terms of s 172(2)(a) of the Constitution. In its judgment, the Constitutional Court confirmed that the President's decision to bring the Medicines Act into operation was invalid. The Court, however, arrived at this decision on different grounds.

In this respect the Constitutional Court began by explaining that the full bench had incorrectly classified the President's decision. Instead of classifying his decision as an administrative act, it should have classified his decision as a legislative act. This is because it formed part of the process of making the Medicines Act, rather than implementing it. Although the President's decision could not be classified as an administrative act, the Constitutional Court went on to explain, this did not mean that his decision was not subject to any legal constraints at all. This is because, even though it was not subject to the principles and rules of administrative law, it was subject to the principle of legality, which forms a part of the rule of law.

Having found that the President's decision was a legislative act and that it was subject to the principle of legality, the Constitutional Court then turned to examine what is required by the principle of legality. In this respect, the Court held that in terms of the principle of legality every exercise of public power must be rationally related to the purpose for which the power was given. In this respect it stated that:

"It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass

constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action."[72]

After setting out these principles, the Constitutional Court then applied them to the facts and came to the conclusion that the President's decision to bring the Medicines Act into operation was irrational. The fact that the President acted in good faith when he brought the Act into operation made no difference. Through no fault of his own, the President had made an irrational decision.

The principles laid down in this judgment have been applied by the Constitutional Court in a number of subsequent judgments and they are so widely accepted today that they are often regarded as trite.

In *President of the RSA v SARFU*,[73] for example, the Constitutional Court made the following remarks:

"It does not follow, of course, that because the President's conduct in exercising the power conferred upon him by section 84(2)(f) does not constitute administrative action, there are no constraints upon it. The constraints upon the President when exercising powers under section 84(2) are clear: the President is required to exercise the powers personally and any such exercise must be recorded in writing and signed; until 30 April 1999, the President was required to consult with the Deputy President; the exercise of the powers must not infringe any provision of the Bill of Rights; the exercise of the powers is also clearly constrained by the principle of legality and, as is implicit in the Constitution, the President must act in good faith and must not misconstrue the powers. These are significant constraints upon the exercise of the President's power. They arise from provisions of the Constitution other than the administrative justice clause. In the past, under the doctrine of parliamentary supremacy, the major source of constraint upon the exercise of public power lay in administrative law, which was developed to embrace the exercise of public power in fields which, strictly speaking, might not have constituted administration. Now, under our new constitutional order, the constraints are to be found throughout the Constitution, including the right, and corresponding obligation, that there be just administrative action."[74]

And in *SA Predator Breeders' Association v Minister of Environmental Affairs and Tourism*[75] the Supreme Court of Appeal remarked that:

[72] 2000 (2) SA 674 (CC) at para 85.
[73] 2000 (1) SA 1 (CC).
[74] 2000 (1) SA 1 (CC) at para 148.
[75] [2011] 2 All SA 529 (SCA).

"Rationality, as a necessary element of unlawful conduct by a functionary, serves two purposes: to avoid capricious or arbitrary action by ensuring that there is a rational relationship between the scheme which is adopted and the achievement of a legitimate government purpose or that a decision is rationally related to the purpose for which the power was given, and to ensure the action of the functionary bears a rational connection to the facts and information available to him and which he purports to base such action. As noted in the *Pharmaceutical* case at para 90 'a decision that is objectively irrational is likely to be made only rarely but, if this does occur a court has the power to intervene and set aside an irrational decision'."[76]

(ii) Judicial self-restraint strategies

(a) Introduction

As was pointed out above, the mere fact that the Constitutional Court has held that every exercise of public power is subject to judicial review does not mean that it is willing to usurp the functions of the political branches of government. In order to ensure that it does not overreach its powers and thus infringe the doctrine of the separation of powers, the Court has adopted a number of different strategies. Among these are the conversion of concepts into discretionary tests; using different standards of review; and the use of different types of remedies. Each of these will be briefly discussed in turn.

(b) The conversion of concepts into discretionary tests

In terms of this strategy, the Constitutional Court does not define key concepts such as "unfair discrimination," "arbitrary deprivation" and "adequate access to housing," which "would perforce have excluded certain kinds of laws from constitutional scrutiny."[77] Instead, the Court converts key concepts into different and discretionary standard of review. The benefit of this strategy is that the Court is able to consider every possible challenge to that particular issue under the Constitution and to do so without having to commit to a "particular position on the range of controversial questions that could potentially come before it."[78]

[76] *Ibid* at para 28.
[77] T Roux "Assessing the social transformation performance of the South African Constitutional Court" in C Jenkins and M du Plessis (eds) *Law, Nation-Building and Transformation* (2014) at 223
[78] *Ibid.*

The strategy was used by the Constitutional Court in its judgment in *Harksen v Lane NO.*[79] In this case, the Court had to determine whether section 21 of the Insolvency Act[80] infringed the right not to be unfairly discriminated against guaranteed in section 9 of the Constitution. This section provided that:

"The additional effect of the sequestration of the separate estate of one of two spouses who are not living apart under a judicial order of separation shall be to vest in the Master, until a trustee has been appointed, and, upon the appointment of a trustee, to vest in him all the property (including property or the proceeds thereof which are in the hands of a sheriff or a messenger under a writ of attachment) of the spouse whose estate has not been sequestrated (hereinafter referred to as the solvent spouse) as if it were property of the sequestrated estate, and to empower the Master or trustee to deal with such property accordingly, but subject to the following provisions of this section."

Instead of defining the concepts of "discrimination" and "unfair discrimination" in a substantive manner, however, the Court converted them into a multi-stage discretionary test.

In this respect, the Constitutional Court began its analysis by distinguishing between those cases in which the state differentiates between persons on grounds that are not listed in section 9(3) and those cases in which it differentiates on grounds that are listed in section 9(3) or on grounds that are analogous to those listed in section 9(3).

When the state differentiates between persons on grounds that are not listed in section 9(3), the Constitutional Court held, that differentiation may be classified as a "mere differentiation" Insofar as mere differentiation is concerned, the state is simply expected to act in a rational manner. "It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State."[81]

However, when the state differentiates between persons on a ground that is listed in section 9(3), or on an analogous ground, the Constitutional Court held further, that differentiation may be classified as "discrimination". If the discrimination is based on a ground listed in section 9(3) then it is presumed to be "unfair" and the onus is on the state to prove otherwise. On the

[79] 1997 (11) BCLR 1489 (CC).
[80] Act 24 of 1936.
[81] *Harksen v Lane NO* 1997 (11) BCLR 1489 (CC) at para 26.

other hand, if the discrimination is based on an analogous ground that it is not presumed to be unfair and the onus is on the complainant to prove that it is.[82]

When it comes to determining whether discrimination is unfair, the Constitutional Court went on to conclude, a variety of factors have to be taken into account and then applied to the facts of the case in question. These factors include:

(a) the position of the complainants in society;

(b) whether they have suffered in the past from patterns of disadvantage; and;

(c) the nature of the provision or power and the purpose sought to be achieved by it.[83]

As Roux has pointed out, the test for mere differentiation is a lenient one and in most cases the state should be able to satisfy it fairly easily. The test to establish unfair discrimination, however, is much more rigorous and, accordingly, is much harder to satisfy. By adopting a multi-stage test, encompassing different standards of review, therefore, the Constitutional Court has "devise[d] a review standard that allowed it greater flexibility to manage its relationship with the political branches."[84]

(c) The use of different standards of review

In terms of this strategy, the Constitutional Court has used the principle of legality in exercising its power of judicial review. However, in order to ensure that the court exercises restraint, it has developed standards that it can use, these are the test for rationality and the test for reasonableness. Rationality is a means/ends test, the "decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement."[85] Rationality is a low level test and does not take into account the infringements that will be caused but only whether the means achieve the ends. On the other hand the test for reasonableness is a much stricter test which requires the actions of the government to be reasonable and not only meet the means ends test.

[82] *Ibid* at para 45.
[83] *Ibid* at para 47.
[84] T Roux "Assessing the social transformation performance of the South African Constitutional Court" in C Jenkins and M du Plessis (eds) *Law, Nation-Building and Transformation* (2014) at 223.
[85] 2000 (2) SA 674 (CC) at para 85.

The judgment in *New National Party v Government of the RSA,*[86] is a good example. The majority used rationality and the minority used reasonableness and as a result they came to different conclusions. In this case the New National Party challenged the requirement set by Parliament that in order to vote, the person must have a green barcoded ID book. In a majority judgement, Yacoob J found that Parliament has the power to decide on an electorate scheme and decide the requirements, in this case it decided on a barcode ID. However, Acts passed by Parliament must be rational, they must satisfy the means ends test and every exercise of public power can be tested against the principle of legality, on this case the test for rationality. In order to satisfy the means ends test, the question that must be asked is whether, the actions taken by Parliament will achieve a legitimate government goal, and in this case Yacoob J looked at the purpose of the Act.

The Act was going to ensure that there will administrative efficiency as it would be easier to administer elections with the Barcoded ID. Secondly, the barcoded ID was going to prevent fraud as in order to get it, you had to produce your fingerprints. Lastly, it was a post-apartheid ID and had no racial classification. Therefore, for Yacoob J, and the majority, the Act was rational as it satisfied the means ends test. Yacoob J disagreed with O'Regan J and explained why he used rationality in this case. In this regard he stated that:

"O'Regan J in her dissenting judgment measures the importance of the purpose of the statutory provision in relation to its effect, and asks the question whether the electoral scheme is reasonable. She goes on to conclude that the scheme is not reasonable, and for that reason, to hold that the relevant provisions of the Electoral Act are inconsistent with the Constitution. In my view this is not the correct approach to the problem. Decisions as to the reasonableness of statutory provisions are ordinarily matters within the exclusive competence of Parliament. This is fundamental to the doctrine of separation of powers and to the role of courts in a democratic society. Courts do not review provisions of Acts of Parliament on the grounds that they are unreasonable. They will do so only if they are satisfied that the legislation is not rationally connected to a legitimate government purpose. In such circumstances, review is competent because the legislation is arbitrary. Arbitrariness is inconsistent with the rule of law which is a core value of the Constitution. It was within the power of Parliament to determine what scheme should be adopted for the election. If the legislation defining the scheme is rational, the Act of Parliament cannot be challenged on the grounds of unreasonableness. Reasonableness will only become relevant if it is established that the scheme, though rational, has the effect of infringing the right of citizens to vote. The question would then arise whether the limitation is justifiable under the provisions of section 36 of the Constitution, and it is only as part of this section 36 enquiry that reasonableness becomes relevant. It follows that it is only at that stage of

[86] 1999 (5) BCLR 489 (CC).

enquiry that the question of reasonableness has to be considered. The first question to be decided, therefore, is whether the scheme prescribed by the Electoral Act is rational."[87]

Writing for the minority, O'Regan J used the test for reasonableness, she reasoned that, the case dealt with the right to vote, which was a significant right, important for a young democracy like South Africa and it was important to encourage all citizens to vote and determine who has political power. Therefore, the court should be much stricter to the government and not worry about over stepping its authority. In applying the test for reasonableness, O'Regan J reasoned that, what good was Parliament trying to achieve, however you must start by looking at the harm, does the good outweigh the harm or does the harm outweigh the good. Furthermore, is there a better way in which the goal can be achieved? On administrative efficiency, O'Regan J was of the opinion that yes the barcoded ID would be efficient, but asked how long would it take to type a ID number and was of the view that typing out the ID number would not cause much harm. On election fraud, she was of the opinion that, yes it would reduce fraud, but if you lost your ID you could get a temporary ID which was barcoded. Finally, on the post-apartheid era, she reasoned that this was never decide in Parliament but was just arguments of the lawyers.

Furthermore, she looked at the harm that was going to be caused and for her denying 2.5 million a chance to vote was very harmful and outweighed the good.

(d) The use of different types of remedies

The Constitutional Court also uses different types of remedies in order to ensure that it does not usurp the functions of the political branches of government. The judgment in *Fourie v Minister of Home Affairs*[88] is a good example. The majority sent the matter back to Parliament, while the minority disagreed. In this case the court held that section 30(1) of the Marriage Act and the common law were inconsistent with the constitution based on the rights to equality and dignity, to the extent that they make no provision for same sex couples to enjoy the status, entitlements and responsibilities they accord to heterosexual couples.

[87] *Ibid* at para 24.
[88] 2006 (3) BCLR 355 (CC).

Writing for the majority, Sachs J, stated that the remedy, was to send the matter back to Parliament for a legislative remedy that must cater for same sex couples and be generous and accepting towards them. The court then decided to give Parliament 12 months to cure the defect as it reasoned that Parliament would be not starting a legislation from stretch but it would be a result of a work that had been long done. The court then set a condition that if Parliament failed to remedy the defect in 12 months, then the words "or spouse" will be automatically read into section 30(1) of the Marriage Act in order to enable same sex couples the same benefits afforded to heterosexual couples. Furthermore, the court stated that if Parliament wished to refine or replace the remedy with another legal arrangement, that met constitutional standards, it could still have the last word.

However, in a minority judgement, O'Regan J disagreed with the remedy and was of the opinion that the court should develop the common law and also read in to Section 30(1) that will immediately allow same sex couples to be married by civil marriage officers. She reasoned that simply because Parliament had a choice, did not mean that it was sufficient for the court to refuse to develop the common law and remedy a statutory provision which is unconstitutional.

The majority in this case tried not to take over the role of Parliament of law making by sending the matter to the Legislature to fix.

3.4 A principled or pragmatic approach

(i) Introduction

As the discussion set out above indicates, the Constitutional Court has not only adopted a number of different strategies to avoid overreaching its authority, but also that the Court often takes pragmatic considerations into account when it exercises the power of judicial review. The pragmatic approach that the Court has adopted towards judicial review, however, has changed over time. Initially, the Court adopted a deferential approach towards the political branches of government. Over the last ten years, however, it has adopted a much less deferential approach. Before turning to discuss this change in approach, it will be helpful to briefly distinguish between a principled approach to judicial review and a pragmatic approach

(ii) A principled versus a pragmatic approach

As Roux has pointed out, the primary task facing a constitutional court in a new democracy is to ensure its own survival. This is because it cannot achieve any other goals if its existence is short-lived. In order to achieve this goal, he points out further, a constitutional court in a new democracy must build and maintain its own legitimacy. There are two ways in which a constitutional courts in a democracy can do this. The one is by adopting a principled approach to judicial review and the other is by adopting a pragmatic approach to judicial review.[89]

A principled approach, Roux argues, is one in which a constitutional court in a new democracy seeks to build and maintain its legitimacy by acting as a "forum of principle" and deciding every case on the basis of legal principles rather than political considerations. If a constitutional court in a new democracy adopts such an approach, it will inevitably develop a reputation as an institution which is governed by law, which is immune to political influence and which can be trusted to make the "correct" decision.[90]

Unlike a principled approach, Roux argues further, a pragmatic approach is one in which a constitutional court in a new democracy should not ignore the political consequences of the cases it is called on to adjudicate. Instead, a constitutional court in a new democracy which seeks to build and maintain its legitimacy should take the political consequences of each case into account and then adjust its decisions so as to promote its own legitimacy and therefore its own survival.[91]

It is important to note, however, Roux goes on to argue, that the pragmatic approach is subject to two important consideration.

First, that a constitutional court in a new democracy must work within the constraints of legal doctrine. "Whatever the outcomes it was trying to achieve, a pragmatic constitutional court in a new democracy would have to pursue those outcomes as a court of law, and should therefore frame its judgments, even if only for rhetorical purposes, as legal judgments."[92]

---

[89] T Roux "Principle and pragmatism on the Constitutional Court of South Africa" (2009) *International Journal of Constitutional Law* 106 at 106.
[90] *Ibid.*
[91] *Ibid.*
[92] *Ibid.*

Second, that the purpose behind the pragmatic approach is not to give a constitutional court in a new democracy the freedom to simply promote its policy preferences. Instead, the purpose is to enhance the court's capacity to decide cases in the interests of the community as a whole, so that, "with time, it can achieve the best practical outcome in even the most difficult cases, whilst maintaining its legitimacy."[93]

(iii) A deferential versus non-deferential approach

The argument that the Constitutional Court initially adopted a deferential approach (during the Mandela and Mbeki periods), but more recently has adopted a more robust approach (during the Zuma period), has largely been made by Roux. The former spanned from 1995-2007, where the Constitutional Court "enlisted the ANC as its major ally in the implementation of the constitutional project", while the latter spanned since 2007, where the Court has lost faith on the ruling Party as a credible partner and has looked for a number of partners.[94]

In the early cases, the Court showed respect to the ruling Party and saw it as "the driving force behind the establishment of democracy and as integral to the success of the constitutional project". In the *Grootboom* case, for example, the Court opted for a deferential review standard which allowed the ANC to take charge of the constitutional project by resisting "the invitation to adopt a minimum-core approach and instead opted reasonableness review – an approach that explicitly opened up a co-operative dialogue with the ANC about how to implement the Constitution's vision for social and economic transformation."[95] Furthermore, the Court relied consistently on "suspended declarations of invalidity as a tool for enlisting the support of the National Assembly, and thus the ANC, in implementing the constitutional project" … "Remedies of this kind not only delay the legal effect of a finding of constitutional invalidity. They require legislators to take active steps to redress constitutional violations, thereby effectively enlisting them as partners in the constitutional project."[96]

---

[93] *Ibid.*
[94] R Dixon and T Roux *Marking Constitutional Transitions: The Law and Politics of Constitutional Implementation in South Africa* (01 January 2018) at 5. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3251131, accessed 23 January 2019.
[95] *Ibid* at 5-6.
[96] *Ibid* at 6.

The use of a more robust approach began after Jacob Zuma replaced Thabo Mbeki as president of the both the ANC and the Republic, the Constitutional Court began to lose confidence in the ruling Party as its main partner in the constitutional project and thereby "sought to enlist a wider range of partners in an apparent effort to contribute to the building of a more diffuse, pluralist democracy."[97] Roux outlines this as follows:

"The main shifts in its jurisprudence that signal this underlying change in posture are: (1) the emergence of 'meaningful engagement' as the preferred approach to the resolution of social and economic rights claims (thus changing the Court's partners from national-level policy makers to local-level municipalities responsible for implementation; (2) a growing concern for the equality of the ANC's internal democratic processes as a way of stimulating pluralism within South Africa's dominant political party; and (3) the more direct targeting of pathologies of nepotism and corruption (for example, by insisting on proper qualifications for senior appointees and challenging the ANC's policy of cadre deployment to that extent)".[98]

The case that best exemplifies this approach is the *Nkandla* case (which will be discussed in more detail later in the dissertation). It's significance is that it "(a) signalled a clear shift towards enlisting the 'Chapter 9 institutions' (institutions supporting Constitutional democracy) as partners in the enforcement of the Constitution; and (b) showed that the Court was prepared to directly criticize a senior national leader and identify his behaviour as a threat to constitutional democracy."[99]

3.5 Advantages and disadvantages of the judicial self-restraint approach

Some of the advantages of judicial self-restraint are that it confirms the important role that the courts play in a constitutional democracy. These roles are the protection of the constitution and ensuring that the political branches of government respect the constitution. Furthermore, under this approach, all disputes can be adjudicated by the courts, which in the case of South Africa is also in line with section 34 of the constitution (the right to access to courts).[100] Judicial self-restraint also confirms that we are a law governed society, as law never runs out under this approach and all exercises of power are subject to judicial review. Furthermore, this approach

[97] *Ibid* at 7.
[98] *Ibid* at 8.
[99] *Ibid* at 8.
[100] Constitution of the Republic of South Africa, 1996 – Section 34 provides that "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

avoids the difficult problem of having to decide what is a political question and what is not. This approach further ensures that the interests of minorities are protected and avoid a situation where the majority will always get its way even when it is wrong.

Some of the disadvantages of this approach is that it results to the judicialization of politics and the involvement of courts in political disputes. This approach further increases the chance of conflict between the courts and the political branches. This approach further takes decision making out of the hands of the people (Parliament and the executive) and into the hands of lawyers and judges. Furthermore, the approach results in uncertainty. This is because when the courts are taking programmatic considerations into account, they don't explain what those considerations are in their judgements. Instead, we have to try and guess.

3.6 Conclusion

In summary, judicial self-restraint provides that every dispute can be resolved through the application of legal principles. The Constitutional Court in South Africa has adopted a very strong approach to judicial self-restraint, holding that every exercise of public power is subject to judicial review under the principle of legality and held that exercise of public power must be at least rational, as was held in *Pharmaceutical Manufacturers supra.*

However, even though the Constitutional Court has held that every exercise of public power is subject to judicial review, it has adopted a number of strategies in order to ensure that it does not overstep its authority and violate the separation of powers principle. The court does this by using different tests, like the conversion of concepts into discretionary tests as discussed above. Furthermore, the Court uses different standards of review (rationality v reasonableness) and different types of remedies.

In exercising its powers of judicial review, in order to exercise restraint, the Court has also taken pragmatic considerations. This approach has changed over time since the inception of the Constitutional Court. The Court began by a deferential approach, which allowed it to share the constitutional project with the political branches. Then over the last ten years adopted a much more robust approach as it lost faith in the ruling Party and the political branches.

CHAPTER FOUR: ARGUMENTS IN FAVOUR OF ADOPTING THE NON-JUSTICIABLE APPROACH TO JUDICIAL REVIEW

4.1 Introduction

As we have already seen, the South African Constitutional Court has not only adopted a judicial self-restraint approach towards judicial review, but also a pragmatic one. This combination has conferred a wide discretion on the Court to manage its relation with the political branches of government almost on a case-by-case basis taking into account both legal and political considerations.

When compared to constitutional courts in new democracies such as Hungary, Poland and Russia, this approach has been a successful one. Not only has the Constitutional Court survived for nearly thirty years, it also enjoys a high degree of legitimacy among South Africa's people. In fact, it has been so successful, that over the last ten years the Court has been able to adopt a much more robust approach to the political branches of government.

Although the approach adopted by the Constitutional Court has secured its survival and its legitimacy, it has also brought the Court into conflict with the political branches of government. This conflict reached new heights during President Zuma's term of office when President Zuma himself and other prominent members of the ruling party, including former Minister of Correctional Services, Ngoako Ramatlhodi and the former Secretary-General of the ANC, Gwede Mantashe, severely criticised the Constitutional Court for overreaching its authority.

The purpose of this chapter is to set out and discuss the criticisms that have been levelled against the manner in which the Constitutional Court has exercised its power of judicial review by prominent individuals. In addition, and more importantly, the purpose of this chapter is to set out, discuss and critically engage with Mhango's criticisms of the manner in which the Court has exercised its power of judicial review and his suggestion that it should be replaced with the political question doctrine.

4.2 Criticisms from the executive against judicial self-restraint

(i) Introduction

As pointed out above former President Jacob Zuma, former Minister of Correctional Services Ngoako Ramatlhodi and former Secretary General of the ANC Gwede Mantashe have levelled intense criticism against the manner in which the Constitutional Court has exercised its power of judicial review. The criticisms made by each of these individuals will be discussed in turn.

(ii) Zuma's arguments

Former President Jacob Zuma has called for the political branches of government to be given space by the courts to resolve their disputes and particularly for the political matters to be resolved politically. Zuma has argued that without any doubt, the separation of powers principle must "reign supreme" in order to allow all the branches of government to conduct their business freely, and without any biasness, other branches should frown upon the encroachment from other branches on the terrain of others, therefore, while the executive has respect for the constitutional powers of the courts and Parliament, these branches are also expected to do the same.[101]

The former president further argued that: "political disputes resulting from the exercise of powers that have been constitutionally conferred on the ruling party through a popular vote must not be subverted, simply because those who disagree with the ruling party politically, and who cannot win the popular vote during elections, feel other arms of the state are avenues to help them co-govern the country. This interferes with the independence of the judiciary. Political battles must be fought on political platforms."[102]

In his address in Parliament the former President stated that, "this challenge is perhaps articulated clearly by Justice VR Krishna Lyer of India who observed that '[l]egality is within the courts' province to pronounce upon, but cannon of political propriety and democratic

[101] President Zuma *Keynote Address to Access to Justice Conference* (08 July 2011). Available at https://www.constitutionallyspeaking.co.za/president-zumas-keynote-address-to-access-to-justice-conference/, accessed on 17 December 2018.
[102] *Ibid.*

dharma are polemic issues on which judicial silence is a golden rule.' In our view, the principle of separation of powers means that we should discourage the encroachment of one arm of the state on the terrain of another, and there must be no bias in this regard."[103]

Furthermore, in support of his view, President Zuma argued that the resolution of political disputes should be reserved for the political branches as they have a mandate from the electorate, in this regard President Zuma had the following to say:

"In paying tribute to our former chief justice, we reiterate our firm belief in the principles of the rule of law, the separation of powers, and judicial independence. We also reiterate our view that there is a need to distinguish the areas of responsibility between the judiciary and the elected branches of the state, especially with regards to policy formulation. The executive has the sole discretion to decide policies for government. We respect the powers and role conferred by our Constitution on the legislature and the judiciary. At the same time, we expect the same from these very important institutions. The executive should be allowed to conduct its administration and policy-making work as freely as it could. The powers conferred on the courts could not be regarded as superior to the powers resulting from a mandate given by the people in a popular vote. To provide support to the judiciary and free the courts to do their work, it would help if political disputes were resolved politically".[104]

In summing up his arguments, President Zuma said, "we must not get a sense that there are those who wish to co-govern the country through the courts, when they have not won the popular vote during elections."[105]

(iii) Ramatlhodi's arguments

The former minister of Correctional Services and member of the National Executive Committee of the ANC has argued that, after the Apartheid regime was overthrown,[106] South Africa chose to adopt a Constitution that was the supreme law and entrenched the rule of law as one of its founding values. This resulted in what Ramatlhodi has described as the "emptying

[103] Jacob Zuma *Address by President Jacob Zuma on the occasion of bidding farewell to Former Chief Justice Sandile Ngcobo, and welcoming Chief Justice Mogoeng Mogoeng, National Assembly* 1 November 2011. Available at *https://www.gov.za/address-president-jacob-zuma-occasion-bidding-farewell-former-chief-justice-sandile-ngcobo-and*, accessed on 28 January 2019.
[104] *Ibid.*
[105] *Ibid.*
[106] The Apartheid regime was introduced by the National Party government after it won the general election in 1948. "Apartheid made laws forced the different racial groups to live separately and develop separately, and grossly unequally too." Under Apartheid there was a system of Parliamentary supremacy where the courts did not have the power to enforce human rights nor strike down legislation that was passed by Parliament. For more information on the Apartheid regime see *https://www.sahistory.org.za/article/history-apartheid-south-africa*.

of the state" and further argued that, by so doing, the "Apartheid forces sought to and succeeded in retaining white domination under a black government. This they achieved by emptying the legislature and executive of real political power."[107]

Furthermore, Ramatlhodi argues and criticises the Constitution by reasoning that "the objective of protecting white economic interest, having been achieved with the adoption of the new Constitution, a grand and total strategy to adopt it for all times, was rolled out. In this regard, power was systematically taken out of the legislature and the executive to curtail efforts and initiatives aimed at inducing fundamental changes. In this way, elections would be regular rituals handing empty victories to the ruling party."[108] He goes further and argues that the effect of not limiting the courts power, is that a number of policy positions taken by the elected branches are challenged in the courts, whenever such an opportunity arises. Furthermore, "the legislature itself has not escaped the encroaching tendency of the judiciary, with debatable decisions taken by majority views, in some instances. Decisions of the Judicial Services Commission have equally been systematically subjected to judicial reviews. The process of delegitimising the Commission and its decision has been initiated through the instrument of 'public policy'."[109]

Ramatlhodi goes on to state that "given what seems to be unequal power, it is incumbent upon the courts to be not only guardians of the Constitution, but also guardians of the limits of their own power and authority. Only when they act in that manner can they ensure the survival of our Constitution by adhering to the constitutional separation of powers. Courts must not only respect the Constitution, but they must be seen to do so."[110] Courts must therefore respect the principle of separation of powers and not usurp the powers of the elected branches of government and while the courts have a constitutional duty to uphold and interpret the Constitution, they "should not act in a manner suggesting [they are] supreme to the Constitution. It would be incorrect for the judiciary to invoke the Constitution in order to ultimately undermine the very same Constitution."[111] Therefore, judges must understand that

[107] N Ramatlhodi "The Big Read: The ANC's Fatal Concession" *Times Live* (1 September 2011). Available at https://www.timeslive.co.za/opinion/commentary/2011/09/01/the-big-read-anc-s-fatal-concessions, accessed on 16 October 2018.
[108] *Ibid.*
[109] *Ibid.*
[110] V Pikoli "Ramatlhodi, you are dead wrong" *Sunday Independent* (23 April 2012). Available at www.iol.co.za/sundayindependant/ramatlhodi-you-are-dead-wrong-1281654, accessed on 08 December 2018.
[111] *Ibid.*

just like any other public office bearers, like members of Parliament, Ministers and the President, they are also not above the law and must respect the separation of powers principle.[112]

(iv) Mantashe's arguments

Former Secretary-General (now the Chairperson) of the ANC, Gwede Mantashe, has also criticised the judiciary. In his criticism, Mantashe contends that the judiciary is hostile towards the political branches of government and that the courts are "consolidating opposition to the government."[113] Mantashe went further and said that the Constitutional Court was counter-revolutionary and that it was "thwarting the will of the people" by declaring laws duly enacted by the legislature to be unconstitutional.[114] Mantashe has criticised the courts on a number of occasions, he has also criticised the courts as being problematic and biased against the ANC.[115] Mantashe has further argued that "there is a drive in sections of the judiciary to create chaos for governance … if it doesn't happen in the Western Cape High Court, it will happen in the Northern [sic] Gauteng – those are the two Benches where you always see that the narrative is totally negative and create[s] a contradiction."[116]

4.3 The political questions doctrine

Academic commentators have responded to the criticisms levelled against the judiciary. One of the most prominent is Mhango. The purpose of this section is to set out the response of Mhango.

---

[112] M Rossouw "Judges must know their place" *Mail & Guardian* (30 May 2009). Available at www.mg.co.za/article/2009-03-30-judges-must-know-their-place, accessed on 08 December 2018.
[113] O Ampofo-Anti "Mantashe's warped logic" *Sunday Independent* (31 August 2011). Available at https://www.iol.co.za/sundayindependent/mantashes-warped-logic-1128708, accessed on 09 December 2018.
[114] *Ibid.*
[115] Anonymous "Gwede Mantashe criticises judiciary as being problematic" *eNCA* (23 June 2015). Available at https://www.enca.com/south-africa/gwede-mantashe-criticises-judiciary-being-problematic, accessed on 09 December 2018.
[116] K Maughan "Judiciary is last line of defence against government" *Mail & Guardian* (12 February 2016). Available at https://www.mg.co.za/article/2016-02-10-the-judiciary-last-line-of-defence-against-government, accessed on 09 December 2018.

The main argument made by Mhango is that the political question doctrine is applicable in South Africa and that there have been instances where the court has applied the doctrine even though it did not specifically refer to it by name. Mhango sets out his arguments as follows:

In his contention that the political question doctrine is applicable in South Africa, Mhango relies on two decisions of the Constitutional Court. The first case he relies on is *Ferreira v Levin NO*.[117] In this case the court reasoned as follows:

"Implicit in the social welfare state is the acceptance of regulation and redistribution in the public interest. Whether or not there should be regulation and redistribution is essentially a political question which falls within the domain of the legislature and not the court. It is not for the courts to approve or disapprove of such policies. What the courts must ensure is that the implementation of any political decision to undertake such policies conforms with the Constitution. It should not, however, require the legislature to show that they are necessary if the Constitution does not specifically require this be done."[118]

Mhango argues that in this passage Chief Justice Chaskalson explained the type of a relationship the courts and the political branches should have as envisaged by the constitution when it comes to determining what are political questions under the new democracy.

Mhango then relies further on the *First Certification Judgement*,[119] which was the first case where the court interpreted the constitution before it became applicable. In describing its powers and functions in the certification process, which Mhango argues is not different than the ordinary powers and function of the court. The court remarked as follows:

"First and foremost it must be emphasised that the Court has a judicial and not a political mandate. Its function is to certify whether all provisions of the new text comply with the constitutional principles. That is a judicial function, a legal exercise. Admittedly the constitution by its very nature, deals with the extent, limitations and exercise of public power as also with the relationship between political entities and with the relationship between the state and persons. But this Court has no power, no mandate and no right to express any view on the political choice made by the constitutional assembly in drafting the new test, save to the extent that such choices may be relevant either to compliance or non-compliance with the constitutional principles. Subject to that qualification, the wisdom or otherwise of any provision of the new text is not this Court's business."

[117] 1996 (1) SA 984 (CC)
[118] *Ibid* at para 180.
[119] 1996 (4) SA 744 (CC).

Relying on these two cases, Mhango then submits that the political question doctrine is applicable in South Africa and that the authority for that view is these two cases. Mhango further argues that "clearly, even before the *First Certification Judgment,* Chaskalson P, motivated by separation of powers concerns, was apprehensive about the judiciary not overreaching to determine political questions that were the preserve of the political branches in the new South Africa."[120] Mhango further argues that the remarks by Chaslkason P in these two cases show that certain questions which are political in nature are not for the courts to determine, and that these remarks can only be explained in the context of the political question doctrine.[121]

Furthermore, Mhango argues that the political question doctrine is reflected in the cases decided by the South African courts. However, he contends that this doctrine is immature and that it needs to be developed into a clear doctrine which will be stated clearly and be an "acceptable principle to guide the courts when similar questions arise in the future."[122] Mhango has therefore argued that "there is a need for the development of a separation of powers principle, which incorporates a lucid political question doctrine that will assist the country to dispose of political questions that come to the courts for adjudication."[123]

He has also argued that the courts need to articulate the doctrine clearly and clarify when and how it will apply.[124] Therefore, he suggests that just as the Constitutional Court developed the principle of legality as an incident of the rule of law, it must now develop and clearly articulate the political question doctrine as an incident of the separation of powers, this is because, he argues, the drafters of the Constitution never intended to "anoint and ordain the judiciary with unlimited power".[125] He went further and criticised the courts for not developing a clear political question doctrine for South Africa.[126]

---

[120] M Mhango "Is it time for a coherent Political Question Doctrine in SA: Lessons from the United States" (2014) 7 *African Journal of Legal Studies* 457 at 472.
[121] *Ibid*.
[122] *Ibid* at 480.
[123] M Mhango and N Dyani-Mhango "Deputy Chief Justice Moseneke's approach to the separation of powers in South Africa" (2017) *Acta Juridica* 75 at 75.
[124] M Mhango "Is it time for a coherent Political Question Doctrine in SA: Lessons from the United States" (2014) 7 *African Journal of Legal Studies* 457 at 484.
[125] *Ibid* at 593.
[126] *Ibid* at 593.

4.4 Conclusion

In summary, while the Constitutional Court has been largely successful with judicial self-restraint, in that it has survived, established its legitimacy and more recently has become more robust and willing to take on the executive; it has not avoided conflict entirely with the executive with high ranking politicians in government and the ruling party being very critical of the courts. As discussed in this chapter, the most prominent of these being former President Jacob Zuma, former minister of Correctional Services Ngoako Ramatlhodi and former secretary general of the ANC Gwede Mantashe. These criticisms culminated into an investigation into the courts by the executive, however the investigation exonerated the courts and found that they had not overreached their powers.

The judges also responded to the criticisms in their extra curia activities with the most prominent being former Deputy Chief Justice Moseneke. Furthermore, academic commentators have also responded with Mhango in particular arguing in support of the political question doctrine. The following chapter is going to engage and respond to the criticisms by Mhango and make recommendations.

CHAPTER FIVE: FINDINGS, RECOMMENDATIONS AND CONCLUSION

5.1 Introduction

As discussed in chapter four, this chapter engages with and responds to the criticisms made by Mhango. It will discuss and sum up the findings of this study, specifically focusing on the President's power to appoint and dismiss ministers as a political question. Furthermore, the chapter will argue that the political question doctrine could be used to introduce more certainty into the South African separation of powers by identifying those "political questions" which should always be subject to a very limited form of review, specifically focusing on the President's power to appoint and dismiss his own ministers.

5.2 Response to the criticisms by Mhango

As discussed in Chapter Four, Mhango has argued that the political question doctrine is applicable in South Africa and that the courts have applied the doctrine without specifically referring to it. He, therefore, argues that the doctrine in South Africa is immature and the courts need to develop a clear political question doctrine that they will be able to apply when faced with political questions.

Looking at the decisions of the Constitutional Court, especially the decision in *Pharmaceutical Manufacturers*, the Court has often held that every exercise of public power is subject to judicial review at least under the principle of legality. As discussed in Chapter Three, the Court applies different tests in order to deal with disputes that involve the political branches and the Court usually applies the test for rationality, which is basically a means/ends test and has held that at the minimum, the actions of the executive must be rational. This point was discussed in Chapter Three.

Furthermore, one commentator has argued that in South Africa's constitutional democracy, the courts have a duty to enforce the Constitution and there can be no considerations which are political that will allow the court to avoid its obligation of enforcing and upholding the

Constitution.[127] Therefore, in any matter before it, the conclusion reached by the Court must be one dictated by the Constitution. There can be no political question doctrine and "no member of the executive or the legislature can leap over the constitutional text in favour of some abstract principles that he or she might like to see embodied in our regime of separated powers, but that might not in fact have found their way into our Constitution's structure."[128] This approach that has been adopted by the Constitutional Court is therefore in line with the Constitution and can be justified in terms of the Constitution, as it dictates that one of the founding values of our constitutional democracy is the rule of law and that any conduct or law that is inconsistent with the Constitution must be declared invalid, and to declare such laws or conduct invalid is the duty of the courts.[129]

Considering that every exercise of public power is subject to judicial review and at the minimum must be rational, it seems that Mhango is wrong and naive when he argues that the political question doctrine is part of South African jurisprudence. It is submitted, therefore, that the decisions cited by Mhango are nothing more than the courts showing respect for the separation of powers and exercising restraint in order to show respect to the political branches. It is submitted further that the use of that language by the courts is nothing more than what Roux identifies as "manipulating the text to lower the political temperature in controversial cases."

It further seems Mhango is wrong when he calls for the development of a political question doctrine in South Africa as that would mean that the Constitutional Court would have to overturn its decisions that have spanned two decades. It seems that there is no chance of the Court going back and overturning legality for the political question doctrine. However, even though the Court has turned its face away from the political question doctrine and is unlikely to ever change that position, the political question doctrine can still play a role in the development of the separation of powers for South Africa. It can do this by addressing some weaknesses in the judicial self-restraint approach. One weakness the doctrine can address is

[127] LWH Ackermann "Opening Remarks on the Conference Theme" in J Klaaren (ed) *A Delicate Balance: The place of the judiciary in a constitutional democracy* (2006) at 10.
[128] *Ibid.*
[129] Constitution of the Republic of South Africa, 1996 – Section 1 provides that "The Republic of South Africa is one, sovereign, democratic state founded on … (c) Supremacy of the constitution and the rule of law." Section 2 is the supremacy clause and it provides that, "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

that judicial self-restraint is very uncertain. Secondly, it can ensure that the Court does not overly intervene in the most political sensitive cases.

In order to achieve that, the doctrine can be useful in identifying the most political sensitive questions, and in those political sensitive cases, while they are going to be subjected to judicial review, they must be reviewed at the most minimal level of judicial review. The factors to be taken into account when reviewing these decisions must be that, firstly, there is a law authorising it and, secondly, that it is rational. However, it is submitted further that the rationality test that should be applied when reviewing politically sensitive cases is the test that was applied in *Pharmaceutical Manufacturers* case and *New National Party* case which only requires a means/ends test, probably with no procedural fairness nor reasons for the decision taken by the executive.

5.3 Findings

This dissertation has explored the power of judicial review and concluded that this power is an essential part of a constitutional democracy, just like the Republic of South Africa is also a constitutional democracy. Furthermore, unlike the courts in the United States, the courts in South Africa did not claim the power of judicial review for themselves. Instead, but this power is expressly provided for in section 1 and section 2 of the Constitution which entrenches the supremacy of the Constitution and the rule of law as the foundational values of the Republic of South Africa. The courts, therefore, do not only have this power of judicial review but also a duty to ensure that all laws and exercise of power are in line with the Constitution as the supreme law of the land. This dissertation found that this power and duty upon the courts is at the core of the counter-majoritarian difficulty and that courts adopts different approaches in order to deal with this difficulty, namely the non-justiciable political question approach and the judicial self-restraint approach.

This dissertation found in Chapter Two that the political question doctrine was firstly formulated in the United States Supreme Court and it is a function of the separation of powers, which aims to promote this principle and not usurp the powers which are constitutionally committed to the political branches of government. It does so by holding that certain matters in terms of the separation of powers principle are non-justiciable and should find resolution in the political branches because deciding them would violate the separation of powers principle

and intrude on the terrain of the legislative and executive. The political question doctrine is widely applied in the United States of America and the prominent cases relating to the political question doctrine is the case of *Marbury v Madison supra* which established the political question doctrine by holding that political questions can never be decided in court as discussed in Chapter Two. Another prominent case regarding the political question doctrine is the case of *Baker v Carr supra* which has been described as the "clearest articulation" of the political question doctrine by outlining six factors in order to determine whether the political question doctrine applies to an issue before the court.[130] This dissertation further found that the political question doctrine is also applicable in Ghana and Uganda and that it is also based on its formulation in the United States Supreme Court.

This dissertation found that the Constitutional Court of South Africa has not adopted the political question doctrine but has instead chosen the judicial self-restraint approach. As discussed in Chapter Three, in terms of this approach there is no action or exercise of power which is not subject to judicial review regardless of the political nature of the act in question. This approach has been justified on the basis that it is a dictate of the Constitution, as it requires law or conduct inconsistent with the Constitution to be declared invalid and to be of no force to the extent of their invalidity.[131] Furthermore, the arguments in favour of the judicial self-restraint approach are that this approach serves to protect the process of democracy and fundamental human rights by ensuring that there are no abuses of power. Therefore, this approach strengthens a democracy rather than undermining it and ensures that the rule of law and constitutional supremacy are upheld as the core values of the Constitution and not that it aims to undermine the separation of powers principle and the political branches of government.

This dissertation found in Chapter Four, that the political branches, especially the executive is not entirely happy with the power of judicial review and how the courts have exercised this power on some issues before it. It found that representatives or rather office bearers in the executive including the former President of the Republic, Mr Jacob Zuma and the former Minister of Correctional Services, Mr Ngoako Ramatlhodi have criticised the courts and called for political disputes to be resolved politically. Furthermore, members of the ruling party, the African National Congress, notably former secretary general, now national chairperson, Mr

[130] See Chapter Two.
[131] Constitution of the Republic of South Africa, 1996 – Section 178.

Gwede Mantashe have also criticised the courts and accused them of judicial overreach and that they have no respect for the separation of powers principle. Furthermore, the judges as well as academic commentators have responded to the criticisms from the executive, with Mhango arguing in favour of the political question doctrine.

5.4 Analysis and Recommendation

(i) Introduction

Based on the findings of this dissertation outlined above, this dissertation will explore and analyse the presidents' power to appoint and dismiss ministers as a political question and make recommendations on how the courts should deal with this issue.

(ii) Analysis

This dissertation concluded in chapter two that the Presidents power to appoint and dismiss ministers is a political question. This is because the Constitution has expressly assigned this power to the President,[132] and does so without providing any criteria or procedure that the President must follow in exercising his power. Therefore, as discussed in chapter two, where the Constitution assigns a power to a political branch of government without proving certain procedures or limits on exercising that particular power, then that particular political branch is deemed to have the power and discretion to decide on the best way to exercise its powers afforded by the Constitution. Such powers are therefore political questions which are non-justiciable as the political body has discretion on how to best exercise its powers. The Presidents' powers to appoint and dismiss ministers is therefore a political question and the President has the discretion on how to exercise this power without any procedural and substantive processes that he is bound to follow or to consider in exercising his powers.

(iii) Recommendations

This dissertation recommends that the President's power to appoint and dismiss ministers be classified as a political question and that the Constitutional Court should make this

[132] Constitution of the Republic of South Africa, 1996 – Section 91(2).

determination as it will be binding on the lower courts and being the apex court in all matters. The dissertation further recommends that all matters which the Constitution has committed to the political branches, without providing limits or procedures on exercising such powers, be classified as political questions which should always be subject to a very minimal level of judicial review.

Furthermore, while this dissertation argues that the political question doctrine can be used in order to introduce more certainty into the South African separation of powers by identifying those political question like the president's power to appoint and dismiss ministers which should also be subject to a very minimal form of judicial review. It does not call for the abolishing of the judicial self-restraint approach as this would be at odds with the rule of law and the decisions of the Constitutional Court.

5.5 Conclusion

Identifying political questions, such as the President's power to appoint and dismiss ministers could bring more certainty into the South African separation of powers and the political question doctrine could be used in order to introduce certainty regarding those political questions which should always be subject to a very limited form of judicial review and can actually strengthen the judicial self-restraint adopted by the South African Courts, by identifying circumstances where the courts should always exercise restraint.

BIBLIOGRAPHY

SECONDARY SOURCES

Books

Barron, JA and Dienes, CT *Constitutional Law in a nutshell* (1999)
Chemerinsky, E *Constitutional Law: Principles and Policies* 4ed (2011)
Cryer, R, Hervey, T and Sokhi-Bulley, B *Research methodologies in EU and international law* (2011).

Chapters in books

Ackermann, LWH "Opening Remarks on the Conference Theme" in Klaaren, J *A Delicate Balance: The place of the judiciary in a Constitutional democracy* (2006).
Roux, T "Assessing the social transformation performance of the South African Constitutional Court" in Jenkins, C and Du Plessis, M (eds) *Law, Nation-Building and Transformation* (2014).

Journal Articles

Barkow, R "More supreme than court? The fall of the Political Question Doctrine and the rise of judicial supremacy" (2002) 102(2) *Columbia Law Review* 237-336.
Barnett, VM "Constitutional interpretation and judicial self-restraint" 39(2) *Michigan Law Review* 213-237.
Dennison, DB "The political question doctrine in Uganda: a reassessment in the wake of *CEHURD*" (2014) 18(1) *Law, Democracy & Development* 264-288.
Epstein, L and Landes, WM "Was there ever such a thing as judicial self-restraint?" (2012) 100(3) *California Law Review* 557-578.
Grove, TL "The lost history of the Political Question Doctrine" (2015) 90(6) *New York University Law Review* 1908-1974.
Mhango, M and Dyani-Mhango, N "Deputy Chief Justice Moseneke's approach to the separation of powers in South Africa" (2017) *Acta Juridica* 75-98.

Mhango, M "Is it time for a coherent Political Question Doctrine in SA: Lessons from the United States" (2014) 7 *African Journal of Legal Studies* 457-493.
Mhango, M "Separation of powers in Ghana: The evolution of the Political Question Doctrine" (2014) 17(6) *Potchefstroom Electronic Law Journal* 2703-2744.
Posner, RA "The meaning of judicial self-restraint" (1983) 59(1) *Indiania Law Journal* 1-21.
Posner, RA "The rise and fall of judicial self-restraint" (2012) 100(3) *California Law Review* 519-556.
Roux, T "Principle and pragmatism on the Constitutional Court of South Africa" (2009) *International Journal of Constitutional Law* 106-138.
Seidman, LM "The secret life of the Political Question Doctrine" (2004) 90(6) *New York University Law Review* 1908-1974.

Other sources

Ampofo-Anti, O "Gwede Mantashe's warped logic" *Sunday Independent* (31 August 2011). Available at *https://www.iol.co.za/sundayindependent/mantashes-warped-logic-1128708*, accessed on 09 December 2018.
Davis, R "ConCourt faces difficult decision on disclosure of reasons behind cabinet reshuffles" *Daily Maverick* (15 February 2019). Available at *https://www.dailymaverick.co.za/article/2019-02-15-concourt-faces-difficult-decision-on-disclosure-of-reasons-behind-cabinet-reshuffles/amp/*, accessed on 15 February 2019.
Democratic Governance and Rights Unit *Has the South Africa Constitutional Court Over-Reached? A study of the Court's application of the Separation of Powers Doctrine Between 2009 and 2013* (28 August 2014).
Dixon, R and Roux, T *Marking Constitutional Transitions: The Law and Politics of Constitutional Implementation in South Africa* (01 January 2018) at 5. Available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3251131*, accessed 23 January 2019.
Anonymous "Gwede Mantashe criticises judiciary as being problematic" *eNCA* (23 June 2015). Available at *https://www.enca.com/south-africa/gwede-mantashe-criticises-judiciary-being-problematic*, accessed on 09 December 2018.
Maughan, K "Judiciary is last line of defence against government" *Mail & Guardian* (12 February 2016). Available at *https://www.mg.co.za/article/2016-02-10-the-judiciary-last-line-of-defence-against-government*, accessed on 09 December 2018.

Moseneke, D *Address to mark the 30th anniversary of the assassination of Ruth First* (17 August 2012). Available at *https://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71654?oid=320118&sn=Detail*, accessed 23 December 2018.

Moseneke, D *Striking a balance between the will of the people and the supremacy of the Constitution* Paper Presented at the Claude Leon Public Lecture (29 September 2011).

Navot, S *Political questions in the court: Is "judicial self-restraint" a better alternative than a "non-justiciable approach"?* Paper presented at the VII World Congress of the International Association of Constitutional Law 24 July 2007. Available at *https://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1367596*, accessed 19 January 2019..

Pikoli, V "Ramatlhodi, you are dead wrong" *Sunday Independent* (23 April 2012). Available at *https://www.iol.co.za/sundayindependant/ramatlhodi-you-are-dead-wrong-1281654*, accessed on 08 December 2018.

Anonymous "President Zuma appoints new Ministers and Deputy Ministers" (31 March 2017). Available at *https://www.thepresidency.gov.za/press-statements/president-zuma-appoints-new-ministers-and-deputy-ministers*, accessed on 25 January 2019.

Ramatlhodi, N "The Big Read: The ANC's Fatal Concession" *Times Live* (01 September 2011).

Rossouw, M "Judges must know their place" *Mail & Guardian.* Available at *https://www.mg.co.za/article/2009-03-30-judges-must-know-their-place*, accessed on 08 December 2018.

Zuma, J *Address on the occasion of bidding farewell to former Chief Justice Sandile Ngcobo and welcoming Chief Justice Mogoeng Mogoeng, National Assembly* (01 November 2011).

Zuma, J *Keynote Address to Access to Justice Conference* (08 July 2011). Available at *https://constitutionallyspeaking.co.za/president-zumas-keynote-address-to-access-to-justice-conference/*, accessed on 17 December 2018.

PRIMARY SOURCES

South African Case Law

Bobo v Faku [2013] ZAECGHC 87 (29 August 2013).

Democratic Alliance v President of the Republic of South Africa Unreported Case No. 24396/2017, 9 May 2017 (GP).

Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC).
Ferreira v Levin NO 1996 (1) SA 984 (CC).
Fourie v Minister of Home Affairs 2006 (3) BCLR 355 (CC).
Harksen v Lane NO 1997 (11) BCLR 1489 (CC).
New National Party v Government of the RSA 1999 (5) BCLR 489 (CC).
Pharmaceutical Manufacturers Association of South Africa and Another: In re the Ex Parte Application of the President of the RSA 2000 (2) SA 674 (CC).
President of the Republic of South Africa v SARFU 2000 (1) SA 1 (CC).
SA Predator Breeders' Association v Minister of Environmental Affairs and Tourism [2011] 2 All SA 529 (SCA).

Foreign Case Law

Amidu v President Kufuor 2001-2002 SCGLR 138.
Attorney General v David Tinyefuza Supreme Court (Uganda) Constitutional Appeal No. 1 of 1997.
Baker v Carr 369 US 189 (1962).
Ghana Bar Association v Attorney-General (J1/26/2015) [2016] GHASC 43 (20 July 2016).
Gilligan v Morgan 413 US 1 (1973).
Luther v Borden, 48 US 1 (1849).
Marbury v Madison 5 US (1 Cranch) 137 (1803).
New Patriotic Party v Attorney-General available at *https://www.coursehero.com/file/p4+1107/in-the-first-case-new-patriotic-party-v-attorney-general-31st-december-case-the/,* accessed on 15 November 2018.
New Patriotic Party v Attorney-General (31st December Case).
Nixon v United States 506 US 224 (1993).
Russian Socialist Federated Soviet Republic v Cibrario 235 NY 255 (1923).
Tuffour v Attorney-General 1980 GLR 637.
Uganda v Commissioner of Prisons, Ex-parte Matovu [1966] EA 514.
Williams v Suffolk Insurance Co. 38 US (13 Pot) 415 (1839).

Statute Law

Local Government: Municipal Structures Act 117 of 1998.

s 60

Medicines and Medical Devices Regulatory Authority Act 132 of 1998.

s 55

The Constitution of the Republic of South Africa, 1996.

s 1

s 2

s 91

s 178

UNIVERSITY OF KWAZULU-NATAL
INYUVESI YAKWAZULU-NATALI

3 September 2018

Mr Nkosinathi Riddick Ndlovu 214549160
School of Law
Howard College Campus

Dear Mr Ndlovu

Protocol reference number: HSS/1417/018M
Project title: Separation of Powers in the South African context: Is there space for the Political Question Doctrine

FULL APPROVAL – No Risk/Exemption Application

In response to your application received 2 August 2018, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted **FULL APPROVAL.**

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment /modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully

.....

Professor Shenuka Singh (Chair)
Humanities & Social Sciences Research Ethics Committee

/pm

cc Supervisor: Professor Freedman
cc. Academic Leader Research: Dr Shannon Bosch
cc. School Administrator: Ms Robynne Louw/ Mr P Ramsewak