

Attacks on the Judiciary: Undercurrents of a Political versus Legal Constitutionalism Dilemma?

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Abstract

A number of landmark judicial review decisions and the resultant political backlash are arguably to supportive of the claim that political and legal constitutionalism are entrenched in South Africa. The common thread in the legislature and executive's reaction to judicial review decisions is that government supremacy is under threat from legal constitutionalism. More specifically, there is a perception that courts are meddling in the political space through judgments that are aimed at weakening the government's authority and power. Nonetheless, such decisions have had an effect of reinforcing the judiciary's legal constitutional role of reviewing the lawfulness of the other branches' activities. There is need for strategies to minimize this tension as the continued antagonism can have unintended consequences such as the delegitimisation of the judiciary.

Keywords

Judicialisation; political constitutionalism; legal constitutionalism; judiciary; executive; constitution; government; politicisation.

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1 Introduction

Judging by myriad reports quoting fractious utterances by members of the ruling African National Congress party (ANC), it is safe to say that the recent coverage of acerbic political statements aimed at the judiciary signify a growing tension between the South African judiciary on one hand and legislature and the executive on the other.¹ Several cases are illustrative of this assertion. Ultimately, the events surrounding these and many other cases discussed below had the effect of pitting those who argued that the issues were political and those who saw a need for judicial involvement. At the heart of this conflict is a debate between the starkly underlying politically motivated system of governance and of the constitutionally entrenched rights of the judiciary. For the purpose of this comment, it is the arguments proffered for and against the use of judicial review to resolve the contentious issues that are illuminating. The judgments handed down by the courts have brought into focus an arguably unsteady Executive-Legislative-Judicial relationship.

This scenario has presented an ample opportunity for re-examining the divergent theories surrounding constitutionalism in South Africa. Earlier scholarship has emphasized the need to broaden political debate on this subject with a view to reviving "serious interest in issues of deference and the separation of powers".² In fact, the issue of the conflict between the judiciary and the other arms of the State is one in which much ink has been spilt.³ To a cynic this is an exhausted issue and would not warrant any additional scholarly consideration. However, maintaining such an attitude arguably smacks of complacency and is counterproductive to constitutionalism and good governance. Continued attention on this issue is

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¹ Recent years have seen a number of important court decisions going against the ANC led government. Most of these had an effect of cementing freedoms enshrined in the *Constitution*, but surprisingly, such outcomes have not been accepted without vilification by the Executive. In other instances government simply ignored the court orders. See for example *Primedia Broadcasting, A Division of Primedia (Pty) Ltd v Speaker of the National Assembly* 2015 4 SA 525 (WCC); *Freedom under Law v Acting Chairperson: Judicial Service Commission* 2011 3 SA 549 (SCA); *Minister of Justice and Constitutional Development v The Southern African Litigation Centre* 2016 ZASCA 17 (15 March 2016).

² Democratic Governance and Rights Unit 2014 http://www.dgru.uct.ac.za/sites/default/files/image_tool/images/103/Separation%20of%20Powers%20Draft%20August%202014.pdf 5. See also a similar exhortation by Hoexter *Administrative Law* 519.

³ See among others Vinx 2010 *Political Theory* 809; Hirschl 2006 *Fordham L Rev* 721; Walen 2009 *ICON* 329; Hickman 2005 *U Toronto LJ* 981; Honohan "Republicans, Rights, and Constitutions"83.

crucial and as Malila contends, it is "fitting that with the emerging trends, the importance of the independence of the judiciary in the systems of checks and balances ... is repeatedly examined and re-examined".⁴ Furthermore, the crucial social,⁵ economic⁶ and political⁷ implications of constitutionalism make it imperative that discussion on this debate be kept alive. Unlike other submissions however, this discussion aims to contribute to the scholarship that has sought to situate that antagonism within the South African context. Through a panoramic interpretation of the political responses to judicial review judgments this comment seeks to make a modest attempt at exposing and revisiting the political and legal constitutionalism discourse that have spurred by such events.

This comment does not intend to dwell on the correctness or otherwise of the substantive reasoning behind the judgments but rather on their implications in this discussion. To that end, this article proceeds as follows. The second section gives a background to the legal and political constitutionalism theories and reviews the inherently non-complementary or incompatible central components of the two systems. Section three positions these concepts within the South African context. It accomplishes that by making reference to some of the cases whose outcomes illustrate the deep-seated legitimacy conflict in the trilateral relationship. It also briefly discusses the possible consequences emanating from that those hostilities. Section four concludes.

2 Political and legal constitutionalism revisited

Simply described, the main objective of constitutionalism is the prevention of arbitrary governance.⁸ This is achieved by way of elaborate structures that establish who can rule, the technique of ruling as well as the purpose.⁹ From this established theory two contrasting models – legal and political constitutionalism – have emerged. These two schools of thought differ in terms of their characterisation of what amounts to arbitrary conduct and the resultant strategies that are aimed at averting the perceived threats to basic tenets of constitutionalism.

⁴ Malila 2011 *Zambia LJ* 72.

⁵ See generally Goldoni 2012 *ICON* 926; Dani 2009 <http://www.lse.ac.uk/european-institute/Assets/Documents/LEQS-Discussion-Papers/LEQSPaper13b.pdf>; Sciulli *Theory of Societal Constitutionalism*.

⁶ See for instance Gerber 2001 *JITE* 14; Feiyue 2006 *Front Law China* 372; Dawson, Enderlein and Joerges *Beyond the Crisis*.

⁷ Shinar *Accidental Constitutionalism*; Bellamy *Political Constitutionalism*; Tushnet 2006 *Chi-Kent L Rev* 992.

⁸ Arato 2012 *ICON* 627-659; Cohen "Sovereignty in the Context of Globalization" 261.

⁹ See for instance Horowitz "Constitutional Design" 15-36.

The political constitution theory is premised on the notion that political processes should be mechanism through which those who exercise political power should be subjected to. In essence it provides that alleged violations of political codes or norms should be subjected to political processes¹⁰; that "political decisions should be taken by politicians",¹¹ that "no political matter may be decided other than by the people, lest that matter (no matter how obvious or true or right) becomes a source of domination over the people".¹² Adherents claim that accountability is facilitated not by the depoliticising efforts of the judiciary but by mechanisms such as elections and other motivation that compel politicians to make judgments that benefit the electorate.¹³ Since political matters require political remedies the judiciary has no room to adjudicate on such issues. The argument is that judicial involvement would result in the "juridification" of political issues which would culminate in taking "political decisions out of the hands of politicians and into the hands of judges".¹⁴

By contrast, proponents of legal constitutionalism submit that judicial review and not political mechanisms should be the tool for holding those exercising political power to account.¹⁵ They perceive "political life as potentially destructive of the rule of law and individual rights and which, therefore, must be constrained by judicially enforceable constitutional prescriptions".¹⁶ What seems to be the building block of legal constitutionalism is that the judicial process is more reliable and fairer than the democratic process. It is argued, among other things, that the judiciary is able isolate itself from public pressure.¹⁷ Furthermore, it is submitted that through judicial review, not only is the sanctity of the *Constitution* preserved but the fundamental rights of individuals are also secured.¹⁸ More recent legal constitutional scholars such as Tomkins advance the concept of "juristocracy" by which they argue that all constitutional problems can be resolved by the judiciary and in fact,

¹⁰ Gee and Webber 2010 *OJLS* 273; Griffith 1979 *MLR* 1-2; Waldron 2006 *Yale LJ* 1346.

¹¹ Griffith 1979 *MLR* 2. For additional attacks on the alternative scholarship see for instance Honohan "Republicans, Rights, and Constitutions" 83; Craig "Political Constitutionalism and Judicial Review" 19; Vinx 2010 *Political Theory* 809; Walen 2009 *ICON* 329; Hickman 2005 *U Toronto LJ* 981.

¹² Gee and Webber 2010 *OJLS* 273.

¹³ See Bellamy *Political Constitutionalism*.

¹⁴ Griffith 1979 *MLR* 16.

¹⁵ Gee and Webber 2010 *OJLS* 273; Carbonell *Theory of New Constitutionalism*; Hirschl 2006 *Fordham L Rev* 721

¹⁶ Gee and Webber 2010 *OJLS* 279-280.

¹⁷ See generally Bellamy *Political Constitutionalism*.

¹⁸ Moseneke 2012 *SALJ* 17. See also Budlender 2011 <http://www.polity.org.za/article/sa-budlender-address-by-human-rights-lawyer-at-the-bram-fischer-memorial-lecture-johannesburg-11112011-2011-11-11>.

that it is inconceivable that a constitutional problem can be said to be surely straighten out until the courts have solved it.¹⁹

Nonetheless, political constitutionalists argue that

... when it comes to making decisions about our collective life, constitutional courts...lack the intrinsic fairness and impartiality of the democratic process – that of treating each person's views equally. They restrict access and unduly narrow the range of arguments and remedies that may be considered, and are neither accountable nor responsive to citizens in ways that ensure their opinions and interests receive equal concern and respect.²⁰

Furthermore, litigation

... is a time consuming business, with constitutional courts perforce having to be highly selective as to which cases they hear. When they do so, the case is presented as a dispute between two litigants and the only persons and arguments with standing have to relate to the points of law that have been raised by those concerned.²¹

Much as these schools of thought depict divergent foundational tenets which in turn make diverse requirements on the political and judicial actors, in the final analysis they all converge on their acceptance of the fact that the *Constitution* is higher law which invalidates all other laws that stand in conflict with it.²²

3 The South African setting

In South Africa recognition was given to the fact

... that untrammelled parliamentary authority was vulnerable to abuse, and that this should be guarded against by entrenching certain rights against legislative interference. Once this decision was made, institutional arrangements had to be made in order to police the boundaries for legislative and executive conduct which had been created by the constitution. This role was given to the courts.²³

¹⁹ Tomkins 2010 *U Toronto LJ* 1. See also Craig 2011 *ICON* 112-131.

²⁰ European Commission for Democracy through Law *Definition and Development of Human Rights* 81.

²¹ Bellamy 2007 <https://www.ucl.ac.uk/spp/research/publications/downloads/SPP-WP-26-Inaugural-Lecture.pdf>.

²² In South Africa s 2 of the *Constitution of the Republic of South Africa*, 1996 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." Related to this is s 8, providing that all law is subject to the Bill of Rights and that the same binds the Legislature, the Executive, the Judiciary and all state organs.

²³ Democratic Governance and Rights Unit 2014 http://www.dgru.uct.ac.za/sites/default/files/image_tool/images/103/Separation%20of%20Powers%20Draft%20August%202014.pdf. See also Klug 2010 *CCR* 1; Van Zyl 2009 *PELJ* 2.

More specifically, "Courts are required by the Constitution 'to ensure that all branches of government act within the law' and fulfil their constitutional obligations. This Court 'has been given the responsibility of being the ultimate guardian of the Constitution and its values'.²⁴As such judicial intrusion into the political realm is provided for under the constitution.

Ironically, it is that constitutional mandate itself that has driven the courts to the rough end of the political stick. This is mainly, as shown above, that role often times entails thwarting or declaring unconstitutional Legislative-Executive decisions courts. As such the judiciary is denounced for supposedly fashioning their judgments with the objective of advancing or collusion with other entrenched interests. What emerge below are undertones of an unfolding conflict between legal and political constitutionalism.

3.1 The trend

After a long period of dormancy, South Africa is witnessing a resurgence of the legal and political constitutionalism controversy.²⁵ Recent years have been associated with increased negative reports, complaints and stirring emotional statements by the ANC government against the judiciary. It is worth noting that much of the contestation follows a rise in cases that were capable of and indeed should have been resolved politically.²⁶ That the courts got embroiled in such cases should not be surprising. Judicial involvement was a mere confirmation of the natural order of things; people fall back on the judiciary when disputes are not resolved, just as they rely on the electoral system to get rid of politicians.²⁷

As will be shown below, a common thread in these attacks is what is perceived as judicial invasion into the political domain. The contention is that, using judicial review as a tool; courts are meddling in the political space through judgments that are designed at chipping off the government's

²⁴ *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) para 38.

²⁵ It is recorded that this trend was last seen in the 1950s. See Van Zyl 2009 *PELJ* 3 and the authorities cited thereat. See also Siyo *et al* 2015 *PELJ* 816. This is further supported by Klaaren who notes that "Since at least around 2003, the judiciary and the government had been engaged in seriously negotiating a set of rules and principles regarding the institution of the judiciary ... This was the case at least until late 2005 and 2006, when the issue spilled into public debate". See Klaaren 2009 <http://wiredspace.wits.ac.za/jspui/bitstream/10539/8749/1/Hlophe%20and%20the%20Politics%20of%20the%20Judiciary.pdf>. See also Albertyn 2006 *SAJHR* 126.

²⁶ See Business Day 12 July, Mail & Guardian 19 August, The Times 2 November, City Press 18 December 2011, Business Day, The Times 16 March, The New Age 27 March 2012.

²⁷ See Vibert *New Regulatory Space*.

authority and powers. It is feared that the continued intrusion might blur the lines that separate the judiciary from the legislature and Executive. Political constitutionalism, especially the alleged supremacy of the political system over the courts is best manifested through a number of statements by government ministers and the ANC's spokespeople.

Several acerbic statements stand out in this regard. For instance in a show of displeasure after losing two major cases in the Constitutional Court²⁸ - the then secretary general of the ANC, Gwede Mantashe lashed at the courts for "acting as if they were the political opposition' and in so doing seeking to arrest the functioning of Government".²⁹ In another explicit display of discontentment with the judiciary, the secretary general of the South African Communist Party (SACP), an alliance of the ruling party, Blade Nzimande ranted that South Africa was slowly gravitating towards a "judicial dictatorship" manifested through "a co-ordinated liberal offensive" aimed at attacking "almost any decision by the president and the executive".³⁰

Probably the clearest indicator of the government's aversion of judicial review is best summarised by the President of the Republic of South Africa Mr Zuma who, in March 2012 is alleged have said: "We are a Government ... and the Judiciary is not a government and it cannot simply review all government policies. They cannot be elevated to do something they are not supposed to do".³¹

Of the many incidences³² that embody the hostilities towards the judiciary, several land mark cases are illustrative. In a criminal case³³ before the

²⁸ These essentially centred on the challenge by Hugh Glenister to the scrapping of the Scorpions as well as actions instituted to prevent Mr Zuma from reappointing Judge Sandile Ngcobo as chief justice. See *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC).

²⁹ Gumede *Restless Nation*; Hartley 2011 <https://www.pressreader.com/south-africa/business-day/20111102/282480000577522>. See also Legalbrief Today 2011 <http://legalbrief.co.za/diary/legalbrief-today/story/zuma-lays-down-law-on-separation-of-powers/print/>.

³⁰ News24 2011 <http://m.news24.com/news24/SouthAfrica/Politics/Nzimande-slams-judicial-dictatorship-20111217-2>.

³¹ News24 2011 <http://m.news24.com/news24/SouthAfrica/Politics/Nzimande-slams-judicial-dictatorship-20111217-2>.

³² This article does not seek to revisit all the cases that have exposed this conflict. Other cases include *S v Makwanyane* 1995 3 SA 391 (CC); *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC).

³³ *Freedom under Law v Acting Chairperson: Judicial Service Commission* 2011 3 SA 549 (SCA).

Constitutional Court involving the then deputy president Mr Jacob Zuma and another accused, it later alleged that before judgment was handed down Hlophe JP, separately approached some of the judges of the Constitutional Court with a view to influencing the pending judgment. Subsequently, this was reported to the other judges of the Constitutional Court and a complaint was against lodged to the Judicial Service Commission (JSC).³⁴ Not content with the JSC's adverse findings, Mantshe made a scathing criticism of the judgment which he characterised as a conspiracy by "counter-revolutionary forces" bent on destroying the ruling party.³⁵

To clearly put these averments in perspective and understand the hostilities, a quick review of a few landmark cases is necessary. Perhaps the case that serves as an apt demonstration of resistance against constitutional court decisions and the fact that the judiciary sometimes fails to rely on the allegiance of political partners to be in order to have their decisions enforced³⁶ is *Minister of Justice and Constitutional Development v The Southern African Litigation Centre*.³⁷

Following public outcry after the government defied the Rome Statute ordering the arrest and detention of President Al Bashir of Sudan for extensive human rights violations in his country, the government chose to cover up its inaction by portraying itself as a victim in the whole saga. The spin to the "who" debacle was that there was "a drive in sections of the judiciary to create chaos for governance; that's our view ... you always see that the narrative is totally negative and create a contradiction".³⁸ Similarly, the Minister of Higher Education Nzimande seethed that "sections of the judiciary tend to somehow overreach into areas that one would expect even in a constitutional state to tread very, very carefully".³⁹

³⁴ For a background to this case and the subsequent academic discussion arising therefrom see *S v Zuma* 2006 2 SACR 191 (W); *Hlophe v Constitutional Court of South Africa* 2008 ZAGPHC 289 (25 September 2008); Dodek 2009 JPPL 121.

³⁵ Letsoalo, Rossouw and Alcock 2008 <https://mg.co.za/article/2008-07-04-anc-boss-accuses-judges-of-conspiracy-against-zuma>.

³⁶ See also Mendes 2010 CCR 33.

³⁷ *Minister of Justice and Constitutional Development v The Southern African Litigation Centre* 2016 ZASCA 17 (15 March 2016).

³⁸ Comrie 2015 <https://www.news24.com/SouthAfrica/News/Gwede-Mantashe-singles-out-problematic-courts-20150622>; Britton 2015 <http://702.co.za/articles/3355/gwede-mantashe-the-judiciary-has-anti-government-tendencies>; eNCA 2015 <https://www.enca.com/south-africa/gwede-mantashe-criticises-judiciary-being-problematic>.

³⁹ Comrie 2015 <https://www.news24.com/SouthAfrica/News/Gwede-Mantashe-singles-out-problematic-courts-20150622>; Britton 2015 <http://702.co.za/articles/3355/gwede-mantashe-the-judiciary-has-anti-government-tendencies>; eNCA 2015

3.2 *Remarks on the tension*

The empirical accounts of hostilities towards the judiciary echo the view that legal constitutionalism is a threat to the political hegemony. With a view to countering that phenomenon, the political response has been a nuanced attempt towards the politicisation of the judiciary. This takes the form of "subtle threats and intimidation of judicial officers to force them into making findings favourable to certain political players".⁴⁰ In other words, it is manifested by a "growing perception of the court as a partisan and possibly a coopted decision making body instead of an impartial and independent arbiter of conflicts".⁴¹

The foregoing also validates the commonly held hypothesis that "constitutional adjudication has traditionally been regarded as 'political'; identifying how judicial decisions, especially those originating in the context of constitutional review, are referred to as 'political' as opposed to 'legal' or the like".⁴² As such, judicial review is deemed to be an intrusion into the political space and a negation of the assumption that other than political constitutionalism there is no space for any other superior norms or legal constitutions.

However, that hypothesis only serves to expose lack of appreciation of the reality that law and politics are intertwined.⁴³ It is also a failure to acknowledge that judicial detachment to avoid conflict is "impossible of achievement therefore it ought not to be strived for".⁴⁴ Such ignorance arguably explains why, instead of simply complying with or appealing against unfavourable rulings, the government has sought to portray itself as a victim and as such, seek a realignment of the judiciary.⁴⁵

However in spite of such political denunciation it must be borne in mind - to the chagrin of political constitutionalists; that the judiciary will be expected to continue undeterred, to invalidate negative government policies or actions on constitutional grounds.⁴⁶ The reality therefore is that "[w]here the courts are granted jurisdiction under the Constitution, they cannot decline

<https://www.enca.com/south-africa/gwede-mantashe-criticises-judiciary-being-problematic>.

⁴⁰ Malila 2011 *Zambia LJ* 126.

⁴¹ Ciencia "From Judicialization to Politicization of the Judiciary" 118.

⁴² Mendes 2010 *CCR* 34.

⁴³ Kurland 1959 *Utah L Rev* 457.

⁴⁴ Kurland 1959 *Utah L Rev* 464.

⁴⁵ See generally Hoexter 2000 *SALJ* 470; Van Zyl 2009 *PELJ* 2.

⁴⁶ See generally Van Zyl 2009 *PELJ* 2.

to intervene simply because there may be political consequences to the decision".⁴⁷

It is not as if the court itself is not aware of the dangers of intruding in the legislative and executive territories. The recent case of the *Economic Freedom Fighters v Speaker of the National Assembly*⁴⁸ exhibits a classic scenario of self-examination and a self-criticism that demonstrates that members of the judiciary are mindful of unwarranted judicial activism that seeks tramples on the separation of powers. In the dissenting judgment the Chief Justice of South Africa, Mogoeng Mogoeng expressed disquiet with the majority's directive that the Speaker of the House of Assembly implement necessary processes and mechanisms aimed holding the President Zuma accountable for his conduct (and failures) highlighted in the report of the Public Protector.

In his admonishment to his fellow judges, he charged that the second judgment in particular had crossed the line, that it was "a textbook case of judicial overreach – a constitutionally impermissible intrusion by the Judiciary into the exclusive domain of Parliament".⁴⁹

As such, instead of condemning the dissenting judgment as other quarters of the society clearly did, the Chief Justice's response should be commended for its concern for the separation of powers. It should be celebrated for providing insights into the fact that the judiciary – by criticizing itself – is sensitive to the need avoid descending into the legislature's policy formulation and political arena. Likewise, wanton intrusion into the role of the legislature would have negative externalities of it undermining the "public faith in the objectivity and detachment of the Court, without which the Court will be reduced to an impotent body, unable to perform those important, indeed vital functions which properly fall within its scope".⁵⁰ Reiterating Kurland's warning Mogoeng Mogoeng counselled that the court's

... impartiality must therefore never be open to reasonable doubt. For, its moral authority without which it would cease to enjoy legitimate public confidence and ready compliance with its decisions by all, owes its existence to its predictable and self-evident execution of its mandate without any apparent fear, favour or prejudice.⁵¹

⁴⁷ Okpaluba 2003 *SAPR/PL* 342.

⁴⁸ *Economic Freedom Fighters v Speaker of the National Assembly* 2018 2 SA 571 (CC).

⁴⁹ *Economic Freedom Fighters v Speaker of the National Assembly* 2018 2 SA 571 (CC) para 223.

⁵⁰ Kurland 1959 *Utah L Rev* 457.

⁵¹ *Economic Freedom Fighters v Speaker of the National Assembly* 2018 2 SA 571 (CC) para 235

In essence therefore, Mogoeng Mogoeng's reasoning serves to arrest the potential risk of judicialisation of politics. Unlike its opposite - the politicisation of the judiciary, judicialisation of politics said to occur when "the Court [assumes jurisdiction over] a wide variety of policy processes that would otherwise be the responsibility of the executive and legislature, that is, the majoritarian institutions".⁵² It is also characterized by a rising reliance "on judicial bodies and processes ... the reliance on courts and judicial processes to address 'core moral predicaments, public policy questions, and political controversies' and 'matters of outright and utmost political significance that often define and divide whole polities'.⁵³

Nonetheless, it is worth pointing out that in most cases the public has generally defended the judiciary and endeavours to demean the judiciary have not gone without censure and adverse publicity.⁵⁴ Sympathy for the courts seems to be premised on the recognition that

... the jurisdiction of the courts must be jealously guarded if only for the reason that the beginning of dictatorships in many parts of the world had often commences with usurpations of authority of Courts and many dictators were often known to become restive under the procedural and structural safeguards employed by the Courts for the purpose of enhancing the rule of law and preserving the personal and propriety rights of individuals.⁵⁵

Much as that might be so, expecting that tension to be eliminated would be idealistic.⁵⁶ The consolation however, is that such antagonism can be reduced especially if the Executive and the judiciary both appreciate "that each has a role to perform and that each is better equipped to carry it out than the other ... that they are there to serve the people, not their own ends, and to adapt their conduct accordingly".⁵⁷

Besides the risk of delegitimizing the judiciary, the government's anti-judicial review approach could have far-reaching consequences that undermine not just the authority of the courts but the economy as well.⁵⁸ This is already a

⁵² Tate 1994 *Int'l Pol Sci Rev* 190.

⁵³ Ciencia "From Judicialization to Politicization of the Judiciary" 118.

⁵⁴ See Van Zyl 2009 *PELJ* 2. See also Mattes *et al* 2003 <http://www.afrobarometer.org/publications/wp24-democratic-governance-south-africa-peoples-view-2>.

⁵⁵ Aniagolu JSC in *Oba Lamidi Adeyemi (Alafin of Oyo) & Ors v Attorney General of Oyo State & Ors* 1984 1 SCNLR 525 602. See also Malila 2011 *Zambia LJ* 70.

⁵⁶ *McHugh* 2002 http://www.hcourt.gov.au/assets/publications/speeches/former-justices/mchughj/mchughj_paris.htm.

⁵⁷ Pearce 1991 *PLR* 193.

⁵⁸ It has been shown that there is a link between judicial independence and economic freedom or growth. See generally Epstein *Economics of Judicial Behaviour*, World Bank date unknown <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/JudicialIndependence.pdf>. In the South African context, it is reported that one of the considerations taken into account in averting a sovereign rating downgrade was the strength and independence of institutions such as the judiciary.

problem, especially in light of the fact that the highest, the Constitutional Court enjoys "relatively low legitimacy, at least as compared to other high courts; its legitimacy varies across racial groups; and most important, that the Constitutional Court is able to convert its legitimacy into acquiescence only in some circumstances and only with some groups".⁵⁹ Furthermore, the government's public statements might champion a perception that the judiciary is counter-majoritarian and partial. This might *inter alia* give ammunition to the government to interference in the appointment of judges. Emphasis would end up being put for instance, on ideological considerations when appointing judges which would result in a partisan bench.

It is probably in recognition of this sticky situation as well as the conundrums that come with the vilification of the courts that it was deemed necessary for the judiciary and the Executive to meet "to discuss matters of concern to the Judiciary. These included public utterances attributed to, among others, some members of the National Executive".⁶⁰ This culminated in a with a "10-point" agreement from which the executive and the judiciary agreed to cultivate mutual respect between each other.⁶¹ This is change of tone undoubtedly borrows from the understanding that "[w]hat we require if we are to move forward is an account that presents the legal and political constitutions not as competitors but as partners".⁶² However, judging by experience in other jurisdictions, such a resolution is imbued with skepticism. "The idea of a partnership may well provide a basis for the future relationship, but it would be unrealistic to expect it to be a partnership without tension."⁶³ Added to that option, there should be a "model of

See for instance Fin24 2016 <https://www.fin24.com/Economy/sa-not-out-of-the-woods-on-ratings-downgrade-20160509>; Joffe 2016 <https://www.businesslive.co.za/bd/opinion/2016-12-07-institutional-strength-staved-off-junk-status-downgrade-by-ratings-agencies/>.

⁵⁹ Gibson and Caldeira 2003 *Journal of Politics* 3. See also Hoexter 2000 *SALJ* 470; Daniels date unknown <http://law.bepress.com/cgi/viewcontent.cgi?article=6279&context=expresso>; Hoexter Administrative Law; Corder, Jagwanth and Soltau 1999 <http://www.casac.org.za/wp-content/uploads/2015/07/Report-on-Parliamentary-Oversight-and-Accountability.pdf>; Pieterse 2004 *SAJHR* 388.

⁶⁰ South African Judiciary 2015 <http://www.judiciary.org.za/index.php/news/press-statements/statements-2015?start=20>.

⁶¹ After the meeting, President Zuma read out the following press statement: "The meeting agreed on the following: 1) our respect for the separation of powers and the integrity of the two institutions [executive and judiciary] 2) to exercise care and caution with regards to public statements and pronouncements criticising one another. Failure to do so will undermine the global status of the republic as a bastion of democracy, tolerance, human rights and the rule of law". South African Judiciary 2015 <http://www.judiciary.org.za/index.php/news/press-statements/statements-2015?start=20>.

⁶² Hickman 2005 *U Toronto LJ* 1016.

⁶³ House of Lords 2007 <https://publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/151.pdf> 68.

separated powers that acknowledges the significance of both elements and identifies their proper place in a legitimate government structure".⁶⁴

4 Conclusion

The foregoing examination of context-specific political attitudes toward judicial review is quite revealing. The reality is that for as long as judicial review is inherently or rendered political by virtue its intrinsic function - a function that extends their role beyond resolving particular legal disputes to one that shapes the boundaries of the political⁶⁵ - fractious relationship between the judiciary and the other branches of government will endure. It is from this reality that the friction that has characterised the relationship between the South African judiciary and the other arms of the State should be understood.

That conflict is indicative or supports the supposition of entrenched political and legal constitutionalism. The common thread in the legislature and executive's reaction to judicial review decisions is that government supremacy is under threat from legal constitutionalism. That conflict however, arises more from the political effects of judicial review and not from legal reasoning upon which the judgments are based.

Furthermore, it should be noted that much as those two conflicting constitutionalism models have sought to elevate themselves above each other, the reality is that "purely legal and purely political constitutionalism both miss the very point of a constitution – to mutually reinforce the legal and political systems and to protect their differences".⁶⁶ Fortunately, with the increased interactions between the executive and judiciary, it is hoped that accounts of hostilities culminating from the perceived judicialisation of the political arm can be minimised. That is a worthy start.

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⁶⁴ Mollers *Three Branches* 10.

⁶⁵ Mendes 2010 *CCR* 33.

⁶⁶ Mollers *Three Branches* 10. See also Rawls *Theory of Justice*

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List of Abbreviations

ANC	African National Congress
CCR	Constitutional Court Review
Chi-Kent L Rev	Chicago-Kent Law Review
Fordham L Rev	Fordham Law Review
Front Law China	Frontiers of Law in China
ICON	International Journal of Constitutional Law
Int'l Pol Sci Rev	International Political Science Review
JITE	Journal of Institutional and Theoretical Economics
JPPL	Journal of Parliamentary and Political Law
JSC	Judicial Service Commission
MLR	Modern Law Review
NC L Rev	North Carolina Law Review
NW U L Rev	Northwest University Law Review
NYU L Rev	New York University Law Review
OJLS	Oxford Journal of Legal Studies
PELJ	Potchefstroom Electronic Law Journal
PLR	Public Law Review
SACP	South African Communist Party
SAJHR	South African Journal of Human Rights
SALJ	South African Law Journal
SAPR/PL	South Afrikaanse Publiekreg / Public Law

St Louis U Pub L Rev
U Toronto LJ
Utah L Rev
Yale LJ
Zambia LJ

Saint Louis University Public Law Review
University of Toronto Law Journal
Utah Law Review
Yale Law Journal
Zambia Law Journal