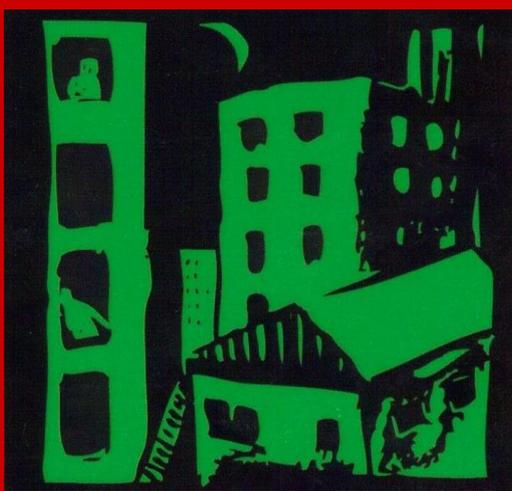


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**The implications of  
the Public  
Protector's  
remedial action  
directing the  
exercise of  
discretionary  
constitutional  
powers: separation  
of powers  
implications**

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**ABSTRACT**

*This article considers the judgments of the North Gauteng High Court in which the remedial action of the Public Protector was reviewed. In President of the RSA v Public Protector, delivered in 2018, the Court upheld the remedial*

*action directing the President to appoint a commission of inquiry without having regard to the separation of powers doctrine. The decision stands in contrast to an earlier decision (SARB v Public Protector) and a later decision (RSA v Public Protector) where the Court set aside the remedial action of the Public Protector that also purported to direct the exercise of discretionary constitutional powers. In these cases, the remedial action was set aside after proper regard was had to the separation of powers doctrine. This article therefore considers these diverging approaches where the court reviews the remedial action of the Public Protector directing the exercise of discretionary constitutional powers. It considers the effects of not consistently having regard to the separation of powers doctrine in reviewing the remedial action of the Public Protector. It is argued that the inconsistent invocation of this doctrine leads to legal uncertainty specifically in relation to the exercise of the President's discretionary constitutional power as head of state to appoint a commission of inquiry. Furthermore, the article considers the effect the failure to review the Public Protector's remedial action consistently from a separation of powers perspective may have on the Public Protector's ability to adequately fulfil the mandate of strengthening constitutional democracy.*

**Keywords:** Public Protector, remedial action, separation of powers, commissions of inquiry.

## 1. INTRODUCTION

In *President of the Republic of South Africa v Office of the Public Protector*<sup>1</sup> (President (2018)), the President sought to set aside some components of the remedial action ordered by the Public Protector in terms of her *State of Capture* report.<sup>2</sup> In particular, the President sought the review and setting aside of the remedial action that required him to appoint a commission of inquiry headed by an individual recommended by the Chief Justice. The purpose of the commission would be to uncover the full extent of corruption as identified in the *State of Capture* report. The President has the power to appoint a commission of inquiry in terms of section 84(2)(f) of The Constitution of the Republic of South Africa, 1996 (Constitution), and in *President of the RSA v South African Rugby Football Union (SARFU III (2000))*,<sup>3</sup> the Constitutional Court stated that the power to appoint a commission of inquiry is a discretionary power of the President.<sup>4</sup> In *President (2018)*, the High Court refrained from setting aside the remedial action as requested by the President. It did so without considering whether the remedial action directing the President to exercise a discretionary constitutional power potentially violates the separation of powers doctrine.

Where it concerns having regard to separation of powers considerations in reviewing the Public Protector's remedial action, *President (2018)* is

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<sup>1</sup> (2018) 2 SA 100 (GP).

<sup>2</sup> See Report 6 of 2016/2017.

<sup>3</sup> 2000 (1) SA 1 (CC).

<sup>4</sup> See *SARFU III (2000)* at para 146.

distinguishable from *SARB v Public Protector* (*SARB* (2017))<sup>5</sup> and *President of RSA v Public Protector* (*President* (2020))<sup>6</sup>. In both *SARB* (2017) and *President* (2020), the same High Court had regard to separation of powers concerns in reviewing the remedial action of the Public Protector. In *SARB* (2017), the Court set aside the remedial action requiring the amendment of a constitutional provision on the basis that it offends the separation of powers doctrine, which according to the Court is protected in terms of section 1(c) of the Constitution . Similarly, in *President* (2020), the High Court had regard to the separation of powers doctrine in setting aside the remedial action of the Public Protector directed at the Speaker of the National Assembly and the National Director of Public Prosecutions.

This article considers, from a separation of powers perspective, the ambit of the Public Protector's power to take appropriate remedial action directing other functionaries to exercise discretionary powers . It also considers the role of the courts in exercising their supervisory jurisdiction over the Public Protector so as to prevent the Public Protector from ordering remedial action that may be classified as overreach, and negatively impact the legitimacy of the office of the Public Protector. The specific focus is *President* (2018) where there was no engagement with the separation of powers doctrine, but the earlier *SARB* (2017) decision and the more recent decision in *President* (2020) are also considered, as in those cases the relevance of the separation of powers doctrine in settling highly contentious political issues is evident. The purpose of this article is to consider the possible implications when proper regard is not had to the separation of powers doctrine, which is a fundamental tenet of South Africa's constitutional democracy.

As *President* (2018) dealt with the remedial action of the Public Protector directing the President to appoint a commission of inquiry in terms of section 84(2)(f) of the Constitution, it is necessary , first, to discuss the understanding of the President's power exercised in terms of section 84(2), and, secondly, to set out the specific purpose of a commission of inquiry. Thereafter, the decision in *President* (2018) is considered in the light of the facts, and the Court's understanding of both section 84(2) of the Constitution and the power of the Public Protector to take remedial action. The implications of this judgment on the separation of powers doctrine and the reach of the Public Protector's power to take appropriate remedial action are then considered. In its conclusion the article finds that neglecting to consider the separation of powers doctrine weakens the doctrine as an underlying principle directing the manner in which disputes between different branches of government are resolved. Furthermore, the decision demonstrates that the Public Protector wields the power to direct the executive arm of the State to exercise its discretionary constitutional powers if that will address the harm that the investigation of the Public Protector uncovered. This, however, exposes the office of the Public Protector to several risks, which may undermine the institution's ability to adequately fulfil its mandate.

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<sup>5</sup> 2017 (6) SA 198 (GP).

<sup>6</sup> (2020) 5 BCLR 513 (GP).

## 2. THE PRESIDENT'S POWER TO APPOINT A COMMISSION OF INQUIRY

The South African President acts as both head of State and head of the national executive authority.<sup>7</sup> Section 84(2) of the Constitution sets out the powers the President exercises as head of State,<sup>8</sup> while section 85 of the Constitution sets out the powers the President exercises as head of the national executive authority.<sup>9</sup> Although the President is part of the executive authority and therefore the exercise of his power is always regarded as the exercise of executive powers,<sup>10</sup> there are significant differences between the manner in which the President exercises his constitutional powers as head of State in section 84(2) and the manner in which he exercises his constitutional powers as head of the executive in section 85. It may therefore be important to locate the exercise of presidential power either under section 84(2) or section 85.

When exercising section 84(2) powers, the President usually acts alone.<sup>11</sup> Section 84(2) therefore does not require “collective action”<sup>12</sup> on the part of the President. However, in exercising section 85 powers, the President exercises those powers “together with the other members of the Cabinet”.<sup>13</sup> Therefore, in *Minister for Justice and Constitutional Development v Chonco*<sup>14</sup> (Chonco (2010)) the Constitutional Court remarked that “[w]hat separates the exercise of powers and functions under section 84 from those under section 85 is that the former are performed exclusively by the President, while the latter are performed collectively by the President and members of the Cabinet”.

In *SARFU III* (2000) the Constitutional Court gave further content to the understanding of the President's powers in section 84(2), particularly where it concerns the appointment of commissions of inquiry. In *SARFU III* (2000), the Constitutional Court, in deciding whether the President's decision to appoint a commission of inquiry is administrative action reviewable under administrative justice and section 33 of the Constitution, distinguished between three categories of head of State powers in section 84(2). The first are those found in sections 84(2)(a)-(c), which relate to the President's “controlled constitutional responsibilities directly related to the legislative process”.<sup>15</sup> These relate to the signing of bills or referring them back to the legislature or

<sup>7</sup> See *SARFU III* (2000) at para 144. See also Murray C & Stacey R “The President and the National Executive” in Woolman S & Bishop M (eds) *Constitutional law of South Africa* 2ed Cape Town: Juta (2013) at 18-1.

<sup>8</sup> See *SARFU III* (2000) at para 144. Section 84(2) of the Constitution includes the former prerogative powers usually exercised by the head of State, see *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) (*Hugo* (1997)) at para 5.

<sup>9</sup> See Murray & Stacey (2013) at 18-4.

<sup>10</sup> See *Hugo* (1997) at para 11.

<sup>11</sup> Murray & Stacey (2013) at 18-5 state that the “President need consult no one when exercising a power or performing a function” when exercising his powers as head of State.

<sup>12</sup> Murray & Stacey R (2013) at 18-4.

<sup>13</sup> Section 85(2) of the Constitution. See also Murray & Stacey (2013) at 18-1, 2, 4.

<sup>14</sup> 2010 (4) SA 82 (CC) at para 37.

<sup>15</sup> See *SARFU III* (2000) at para 146.

alternatively to the Constitutional Court in appropriate circumstances. The second category includes those powers in section 84(2)(d)-(e), which are “narrow constitutional responsibilities ... [related] to the execution of provisions of the Constitution”.<sup>16</sup> For instance, section 84(2)(e) grants the President the power to make appointments as required by the Constitution. In this capacity, the President appoints the members of the various Chapter 9 institutions in terms of section 193 of the Constitution. In these cases the President merely formalises the appointment “on the recommendation of the National Assembly”. The third category includes those powers in sections 84(2)(f)-(k). The Constitution does not expressly place any constraint upon the exercise of these powers. Instead, the powers are considered to be “discretionary powers of the President”.<sup>17</sup> They include, in section 84(2)(f), the power to appoint commissions of inquiry.<sup>18</sup>

Although the Court’s ultimate finding was that none of these powers are administrative in nature and therefore not reviewable under administrative justice, the discussion above does indicate that section 84(2) creates constitutional powers that are vested in the President. The Court held that when the President appointed a commission of inquiry “he was exercising an original constitutional power vested in him alone”<sup>19</sup>. Although the President has the power to appoint a commission of inquiry in terms of section 84(2)(f), there are nevertheless several constraints on the exercise of that power as identified by the Court.<sup>20</sup> First, the President must exercise the power personally; he cannot delegate the power of appointment to someone else. Secondly, the decision to appoint a commission of inquiry must be recorded in writing and signed by the President. Thirdly, the decision may not infringe on any right in the Bill of Rights. Fourthly the President must act in good faith. Lastly, the principle of legality (and rationality) applies to the exercise of the power.

From *SARFU III* (2000) it is clear that the President alone has the power to appoint a commission of inquiry. Unlike the injunction to make the relevant appointments or complete the legislative process by signing a bill, the President cannot appoint a commission on the instruction of another person such as a minister or a constitutional body such as the National Assembly.

The purpose of a commission of inquiry has also been considered by the judiciary. In *Madigiwana v President of the Republic of South Africa* (*Madigiwana* (2013)), the Constitutional Court stated that “[i]t is open to the President to search for the truth through a commission”<sup>21</sup>. The purpose of a commission of inquiry is therefore to

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<sup>16</sup> See *SARFU III* (2000) at para 146.

<sup>17</sup> See *SARFU III* (2000) para 145.

<sup>18</sup> It also includes in s 84(2)(j), the power to pardon offenders, of which the Court in *Chonco* (2010) at para 35 said the following: “The final decision on a pardon application, and the constitutional responsibility for that decision, rests with the President as Head of State. On that there is no contest.”

<sup>19</sup> See *SARFU III* (2000) at para 147.

<sup>20</sup> See *SARFU III* (2000) at para 148.

<sup>21</sup> (2013) 11 BCLR 1251 (CC) at para 15.

“determine facts and to advise the president through the making of recommendations”<sup>22</sup>. These recommendations may inform the President as to certain corrective measures that can be taken, it may influence a change in policy or lead to legislative reform.<sup>23</sup> The President is, however, not bound to follow the recommendations made by a commission of inquiry.<sup>24</sup> A commission of inquiry is therefore within the remit of the President. It is for the President to decide when it would be appropriate to appoint a commission for purposes of investigating certain matters in order to receive recommendations.<sup>25</sup>

An important aspect of a commission of inquiry is also the “deeper public purpose”<sup>26</sup> it serves. Although a commission of inquiry seeks to establish or uncover certain facts, it is also an important mechanism to realise the constitutional values of accountability and transparency.<sup>27</sup> The rationale for a commission of inquiry as an appropriate mechanism to further uncover the allegations of State capture is not disputed. The Court in *President* (2018) was probably correct in its finding that the appointment of a commission of inquiry, as ordered through the remedial action, is rationally related to the purpose of uncovering the allegation made in the State of Capture Report.<sup>28</sup> However, the question that is left unanswered is whether it is within the remit of the Public Protector to direct the President to exercise a discretionary constitutional power in a manner that does not have regard to the principle of separation of powers.

### **3. PRESIDENT OF THE RSA V PUBLIC PROTECTOR (2018)**

#### **3.1. Introduction**

Against this background, the decision of *President* (2018) should be understood. In this decision, the President sought to set aside some components of the remedial action ordered by the Public Protector in terms of her State of Capture Report. The President in particular wanted to have the remedial action requiring him to appoint a commission of inquiry, that was to be headed by a judge recommended by the Chief Justice, set aside. One of the main objections of the President was that he alone can appoint a commission of inquiry as the Constitution vests that power in the President. He therefore argued that it is unconstitutional for the Public Protector to instruct him to appoint a commission of inquiry. The President also argued that if he were to comply with the

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<sup>22</sup> See *SARFU III* (2000) at para 146.

<sup>23</sup> See *Madigiwana* (2013) at para 15.

<sup>24</sup> See *SARFU III* (2000) at para 146. Also confirmed more recently by the Constitutional Court in *Minister of Police v Premier of the Western Cape* 2014 (1) SA 1 (CC) at para 44. It is, however, accepted that ignoring recommendations may in certain cases lead to political repercussions.

<sup>25</sup> See *Madigiwana v President of the Republic of South Africa* [2014] 1 All SA 76 (GNP) at para 27.

<sup>26</sup> *Minister of Police v Premier of the Western Cape* 2014 (1) SA 1 (CC) at para 45.

<sup>27</sup> See *Madigiwana* (2013) at para 15.

<sup>28</sup> See *President* (2018) at para 140.

remedial action, his decision to appoint a commission of inquiry would be reviewable as he would have abdicated his decision-making powers granted to him by section 84.<sup>29</sup>

Therefore, the main question was “whether the President’s constitutional power to appoint a commission of inquiry can permissibly be limited by remedial action taken by the Public Protector”.<sup>30</sup> The limitations, or constraints, upon the President’s power to appoint a commission of inquiry had already been set out in *SARFU III (2000)*, which was discussed above. The question that was not considered in this decision is, however, whether the remedial action of the Public Protector can take away a discretionary constitutional power of the President within a constitutional democracy that incorporates a separation of powers. In answering the main question, the Court had regard, first, to section 84(2) of the Constitution, and secondly, to the Public Protector’s power to take appropriate remedial action. In the following parts, these two aspects are considered in more detail, as these are the justifications relevant to this article on which the Court relied in upholding the remedial action.

### **3.2. The Court’s understanding of section 84(2) of the Constitution**

In relation to the discussion of the President’s power under section 84(2) of the Constitution, the Court accepted that the power to appoint a commission of inquiry vests in the President alone. The Court also accepted that the power of appointment is an “original constitutional power”<sup>31</sup> of the President. The Court then correctly indicated that the power to appoint a commission of inquiry is not free of any constraints. The Court had regard to the fact that in exercising his constitutional powers, the President may not infringe any right in the Bill of Rights, and that the exercise of the power is subject to the principle of legality. Therefore, the Court was initially relatively clear on the power of the President regarding the appointment of commissions of inquiry. The Court’s reasoning is also in accordance with the Constitutional Court’s remarks in *SARFU III (2000)* regarding the appointment of commissions of inquiry.

However, the Court proceeded to consider the specific words used in sections 84(1) & (2), to find that the power of the President to appoint a commission of inquiry “is a power coupled with a duty”<sup>32</sup>. It is not immediately clear what the duty is to which the Court is referring. The High Court accepted that there are certain constraints on the exercise of the President’s power to appoint a commission of inquiry. However, the Court did not elaborate on what the duty it referred to may be. Instead it proceeded to refute the argument of the President based on the Constitutional Court’s decision in

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<sup>29</sup> See *President (2018)* at para 59.1 with reference to *SARFU III (2000)* at paras 39-40.

<sup>30</sup> See *President (2018)* at 60. The inelegantly phrased question is regrettable. As made clear in *SARFU III (2000)*, there are many limitations that apply to the exercise of the powers of the President. The question should arguably not have been whether the remedial action may limit the President’s powers, but rather whether the President can be forced by the remedial action ordered by the Public Protector to exercise a discretionary constitutional power.

<sup>31</sup> See *President (2018)* at para 61.

<sup>32</sup> See *President (2018)* at para 68.

*Daniel v President of the Republic of South Africa (Daniel (2013))*.<sup>33</sup> The President relied on a dictum in that case, where the Court held that “section 84(2)(f) does not impose a duty on the President but a power which may be exercised at his discretion”<sup>34</sup>.

The High Court reasoned that reliance on *Daniel (2013)* was misplaced as it dealt with the “question whether the Constitutional Court – as opposed to the Supreme Court of Appeal and the High Court – had jurisdiction in terms of s167(4)(e) of the Constitution”<sup>35</sup>. The Court in *Daniel (2013)* held that the refusal or failure to appoint a commission of inquiry is not a failure to fulfil a constitutional obligation and is therefore not justiciable under section 167(4)(e) of the Constitution. It is not easy to understand why reliance on *Daniel (2013)* was misplaced. Although the decision dealt with when a constitutional obligation on the part of the President would arise that would trigger the Constitutional Court’s exclusive jurisdiction, the Court did make it clear that the power to appoint a commission of inquiry is a discretionary power of the President. In refuting the argument of the President, the Court therefore did not explain what it meant when it stated that the President’s power to appoint a commission of inquiry is also coupled with a duty.

In *Chonco (2010)* the Constitutional Court had regard to a duty of the President in relation to the power in section 84(2)(j), which concerns the pardoning of offenders. In *Chonco, (2010)* the Court held that when a request for pardon is submitted to the President, he would have a duty to consider that request “in good faith, in accordance with the principle of legality and without delay”<sup>36</sup>. Based on the above, it would seem clear that the duty of the President in relation to the exercise of the power to appoint a commission of inquiry relates to the duty to exercise the power in compliance with the principle of legality and rationality, in good faith, and in a manner that does not violate any right in the Bill of Rights.

However, it is unlikely that this is the duty to which the Court referred to in *President (2018)*, as the Court had already discussed these factors (or constraints) earlier in the judgment with reference to established jurisprudence. A possible explanation of the understanding of the duty to which the Court referred is the President’s duty to appoint a commission of inquiry because he has been instructed to do so by the Public Protector in terms of remedial action that the Court considered to be appropriate and rational, and therefore, binding. As the President is the only person with the constitutional power to appoint a commission of inquiry, he would therefore

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<sup>33</sup> (2013) 11 BCLR 1241 (CC).

<sup>34</sup> At para 12.

<sup>35</sup> *President (2018)* at para 70. Section 167(4) of the Constitution sets out the issues over which the Constitutional Court has exclusive jurisdiction. Section 167(4)(e) specifically states that “[o]nly the Constitutional Court may decide that Parliament or the President has failed to fulfil a constitutional obligation”.

<sup>36</sup> See *Chonco (2010)* at para 30.

have a duty to appoint a commission if directed to do so by another institution that has the power to make binding orders.<sup>37</sup>

Regrettably, the Court did not consider whether the exercise of a discretionary constitutional power may be usurped by another branch of government<sup>38</sup> and whether there are any objections from a separation of powers perspective. The Court stated at the end of its discussion on the power of the President in terms of section 84(2) that “[t]he President’s power to appoint a commission of inquiry will necessarily be *curtailed* where his ability to conduct himself without constraints brings him into conflict with his obligations under the Constitution”<sup>39</sup> . However, the Court’s explanation of the President’s power to appoint a commission of inquiry in terms of section 84(2) of the Constitution as one coupled with a duty does not justify the usurpation of the President’s discretionary constitutional powers.

### 3.2. The Court’s understanding of the Public Protector’s remedial action

With regard to the lawfulness of the Public Protector’s remedial action, the President argued that it is unconstitutional for the Public Protector to instruct the President to appoint a commission of inquiry. Furthermore, the President argued that it was beyond the Public Protector’s power to “direct the manner in which the commission of inquiry is to be implemented”<sup>40</sup> .

The Court had regard to the Public Protector’s constitutional powers in section 182 of the Constitution, and its legislative powers as set out in the Public Protector’s Act.<sup>41</sup> In order to fulfil the mandate to protect the public from governmental action that may be harmful or prejudicial, the Public Protector can take appropriate remedial action. This remedial action must be situational;<sup>42</sup> it must therefore be effective in “remedying the wrong in the particular circumstances ”<sup>43</sup>. Therefore, the remedial action must be

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<sup>37</sup> This would be similar to the duty the President has to sign a bill in terms of s 84(2)(a) in cases where the President does not refer the bill back to Parliament (s 84(2)(b)) or to the Constitutional Court (s 84(2)(c)).

<sup>38</sup> The Public Protector, together with certain other Chapter 9 institutions, has been described as a “fourth branch of government”, Seedorf S & Sibanda S “Separation of Powers” in Woolman & Bishop (eds) (2013) at 12-30 to 12-32; Klug H “Transformative constitutionalism and the role of integrity institutions in tempering power: the case of resistance to state capture in post-apartheid South Africa” (2019) 67 *Buffalo Law Review* 701 at 709; Hodgson TF “The mysteriously appearing and disappearing doctrine of separation of powers: toward a distinctly South Africa doctrine for a more radically transformative Constitution” (2018) 34 *SAJHR* 57 at 75-76.

<sup>39</sup> See *President* (2018) at para 71 (own emphasis).

<sup>40</sup> *President* (2018) at para 59.3.

<sup>41</sup> As contained in the Public Protector Act 23 of 1994.

<sup>42</sup> *Economic Freedom Fighters v Speaker, National Assembly & others* 2016 (3) SA 580 (CC) (*Economic Freedom Fighters* (2016)) at para 71.

<sup>43</sup> *President* (2018) at para 82.

effective in the circumstances, and, unless set aside by a court, is binding on the parties.<sup>44</sup>

In the present circumstances, the Court held that it is appropriate for the Public Protector to order the President to appoint a commission of inquiry.<sup>45</sup> The Court found that the remedial action is appropriate in the circumstances, as the *prima facie* case of large-scale malfeasance and corruption requires a large-scale investigation, for which the Public Protector does not have sufficient resources. In this regard, the Court held that the remedial action directing the President to appoint a commission of inquiry is rationally related to the purpose of uncovering the scale of corruption in State affairs.<sup>46</sup>

The findings of the Court in relation to the power of the Public Protector to take remedial action cannot easily be disputed on an individual level. There was sufficient *prima facie* evidence of corruption that had to be uncovered. It was also established that the Public Protector did not have the necessary resources to conduct and complete such an investigation. The remedial action was also rationally related to the purpose of uncovering the scale of corruption. Therefore, the remedial action is binding as there is, according to the Court, no basis on which to set it aside. As such, the Court must have deemed the remedial action to be lawful.

However, taken as a whole, the Court's refusal to set aside the remedial action of the Public Protector meant that a Chapter 9 institution directed (or forced) the President, in his capacity as head of State, to exercise a discretionary constitutional power that is not related to the legislative process or the execution of constitutional provisions. Up until this decision it was understood that the President must make the decision to appoint a commission of inquiry alone, and that he cannot act on the dictate of another person in exercising this discretionary power. The Court did not consider whether – within the separation of powers doctrine – any other branch can force the President to exercise this discretionary constitutional power for purposes of checks and balances. As such, the discussion of the power of the Public Protector to take appropriate remedial action, although in accordance with earlier case law, appears unconvincing from a broader separation of powers perspective.

<sup>44</sup> See *Economic Freedom Fighters* (2016). This was also recently confirmed in *Economic Freedom Fighters v Gordhan; Public Protector v Gordhan* [2020] ZACC 10 at para 100. However, Tsele M “Coercing virtue’ in the Constitutional Court: neutral principles, rationality and the *Nkandla* problem” (2018) *CCR* at 193-220 questions the Court’s finding, where it was held that the remedial action of the Public Protector is binding unless set aside by a court. See Woolman S “A politics of accountability : how South Africa’s judicial recognition of the binding legal effect of the Public Protector’s recommendations had a catalysing effect that brought down a president” (2018) *CCR* 155 , especially fn 135, for engagement with Tsele’s proposition.

<sup>45</sup> *President* (2018) at para 85. According to the Court : “ Any contrary interpretation would be inconsistent with the Constitution as aptly pronounced by the Constitutional Court in *EFF*, and would render the Public Protector’s power to take remedial action largely meaningless and ineffectual.” In *Economic Freedom Fighters* (2016) the Court stated that the remedial action will be meaningless if it is not binding on the parties. It did not make this point in relation to whether the remedial action is suitable in the circumstances, as that was not the case before the Constitutional Court.

<sup>46</sup> *President* (2018) at paras 130-140.

#### 4. ANALYSIS FROM A SEPARATION OF POWERS PERSPECTIVE

It has been argued that the separation of powers doctrine, as applied in South African law, is something of an enigma, that there is no conceptual clarity on what it means and how it is applied, and that it “seems to appear, disappear, reappear, and evolve at the Court’s convenience and whim”<sup>47</sup>. Although this argument is made in relation to the jurisprudence of the Constitutional Court, it may equally apply to the line of decisions of the particular High Court involving the remedial action of the Public Protector. In *SARB (2017)*, an earlier decision of the same High Court, the remedial action of the Public Protector directing the National Assembly to amend section 224 of the Constitution in a manner dictated by her was set aside.<sup>48</sup> In addition to the finding that the remedial action should be set aside because the Public Protector was not empowered by section 182(1) of the Constitution to order such remedial action,<sup>49</sup> the Court also considered the ground of review relating to separation of powers. The Court considered this point even though the Public Protector agreed that it was unlawful for her to order the amendment of section 224 of the Constitution. With regard to the remedial action relating to the amendment of section 224, the Court reasoned as follow:

“The Public Protector’s orders trenches unconstitutionally and irrationally on Parliament’s exclusive authority. The enactment of national legislation is within the exclusive constitutional domain of Parliament. Sections 43 and 44 of the Constitution vest legislative authority in Parliament, including the power to amend the Constitution ... The Public Protector does not have the power to prescribe to Parliament how to exercise its discretionary legislative powers.”<sup>50</sup>

In this regard, the Court held that the remedial action ordered by the Public Protector violates the separation of powers principle, which “requires constitutionally established institutions to respect the confines of their own powers and not to intrude into the domain of others”<sup>51</sup>. The remedial action directing the amendment of a constitutional provision in the manner dictated, therefore violates the separation of powers principle, in that it encroaches upon Parliament’s discretionary legislative powers.

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<sup>47</sup> See Hodgson (2018) at 59. See also Swart M & Coggin T “The road not taken: separation of powers, interim interdicts, rationality review and e-tolling in *National Treasury v Opposition to Urban Tolling*” (2015) *CCR* 346 at 346.

<sup>48</sup> Section 224(1) of the Constitution sets out the primary purpose of the South African Reserve Bank, which is “to protect the value of the currency in the interest of balanced and sustainable economic growth in the Republic”. The Public Protector proposed the insertion of words so that the economic growth referred to is explicitly linked to protecting the socio-economic wellbeing of South African citizens.

<sup>49</sup> The Court specifically relied on s 6(2)(1) of the Promotion of Administrative Justice Act 3 of 2002, which states that an administrative action can be reviewed if the administrator “was not authorised to do so by the empowering provision”, the empowering provision in this case being s 182(1) of the Constitution.

<sup>50</sup> At para 43.

<sup>51</sup> At para 44.

Similarly, in *President* (2020) the same High Court had regard to separation of powers concerns when reviewing the Public Protector's remedial action. In this decision, the Court was requested to review and set aside the remedial action of the Public Protector, which directed the Speaker of the National Assembly to cause the exercise of the National Assembly's power to hold the executive authority accountable. The High Court accepted that it is the "Speaker's constitutional role to determine what measures are most appropriate to deal with conduct that is alleged to breach the Rules or Codes applicable to the National Assembly"<sup>52</sup>. This finding rests on separation of powers considerations. Furthermore, the Court held that the Public Protector does not have the power to direct the National Director of Public Prosecutions to conduct further investigations and oversee the manner of implementation of that investigation. That interference will undermine prosecutorial independence,<sup>53</sup> which is guaranteed in section 179(2) of the Constitution.

However, in *President* (2018) the High Court did not consider the separation of powers doctrine in upholding the Public Protector's remedial action against the President. Although the President argued that the remedial action ordering him to appoint a commission of inquiry offends the separation of powers doctrine, the Court did not consider the implications of the remedial action, and its upholding, on this doctrine. This line of case law therefore shows how the separation of powers doctrine appears, disappears, and reappears. The implications of such an approach is considered below.

The purpose of the separation of powers is to avoid the concentration of public power in one institution so as to avoid the "abuse of power for personal gain"<sup>54</sup>. The separation of powers doctrine therefore recognises the division of governmental power and functions, as well as appropriate checks and balances to ensure that branches can be held accountable for the manner in which public power is exercised. Although not explicitly protected in the Constitution, the Constitutional Court accepts that the separation of powers doctrine is protected just as the other principles expressly mentioned in the Constitution are protected, and that any violation of the principle is in conflict with the Constitution and therefore invalid.<sup>55</sup>

With regard to the separation of powers and the general principles of this doctrine as applied in South African law, Seedorf and Sibanda explain that although it is accepted that the powers and functions of the different branches of the State are interrelated, the Constitutional Court recognises the importance of "understanding the nature of each

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<sup>52</sup> *President* (2020) at para 169.

<sup>53</sup> *President* (2020) at para 182.

<sup>54</sup> Seedorf & Sibanda (2013) at 12-1. See also Kohn L "The test for 'exceptional circumstances' where an order of substitution is sought: an analysis of *Trencon* against the backdrop of the separation of powers" (2018) *CCR* 91 at 93.

<sup>55</sup> *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC) (*Heath* (2001)) at paras 18-22.

branch's separate (or pre-eminent) domain"<sup>56</sup>. Just as it is important to recognise the principle of checks and balances within the separation of powers doctrine, it is important to recognise that the separation of powers doctrine also protects "the unobstructed exercise of powers and functions"<sup>57</sup> of the legislature, executive and judiciary, respectively. In this regard, Seedorf and Sibanda note that "the principle of pre-eminent domain protects the core functions and powers of each branch of government against intrusions from outside"<sup>58</sup>.

Certain powers or functions may therefore fall within the exclusive domain of a particular branch of government, and any interference with those exclusive powers or functions must be regarded as unconstitutional intrusions, and cannot be justified as necessary for effective checks and balances.<sup>59</sup> Therefore, when it is alleged that there has been a breach of the separation of powers doctrine in that one branch exercises (or contemplates exercising) a power or function of a different branch, it must first be determined whether the particular power or function falls within the pre-eminent domain of one of the branches. Only if it does not can it be questioned whether the "particular power may be subject to limitations aimed at tempering its exercise and constraining its abuse"<sup>60</sup>. Accordingly, the principle of pre-eminent domain "emphasises the separation of functions and limits the attribution of certain powers to the 'wrong' institution"<sup>61</sup>.

This theory may explain the outcome in *SARB (2017)*. It is within Parliament's pre-eminent domain to consider amendments to the Constitution and to follow the requisite procedures to effect such an amendment. Any other branch, even the fourth branch of the government, is not competent to intrude into the pre-eminent domain of a different branch.<sup>62</sup> It can also explain the outcome in *President (2020)* where the High Court set aside the remedial action directed at the Speaker and the National Director of Public Prosecutions as the remedial action encroached upon power entrusted to these functionaries.

However, in *President (2018)*, the High Court did not consider the separation of powers and the principle of pre-eminent domain in upholding the Public Protector's remedial action against the President. The Court did not consider whether the appointment of a commission of inquiry falls within the exclusive competency (or pre-

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<sup>56</sup> Seedorf & Sibanda (2013) at 12-39. See *Minister of Health v Treatment Action Campaign 2002 (5) SA 721 (CC)* at para 98 and cases cited there. See also *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development 2009 (4) SA 222 (CC)* (*Director of the Public Prosecutions, Transvaal (2009)*) at para 181.

<sup>57</sup> Seedorf & Sibanda (2013) at 12-39.

<sup>58</sup> Seedorf & Sibanda (2013) at 12-39.

<sup>59</sup> Seedorf & Sibanda (2013) at 12-39.

<sup>60</sup> Seedorf & Sibanda (2013) at 12-39.

<sup>61</sup> Seedorf & Sibanda (2013) at 12-40.

<sup>62</sup> It is also for this reason that the Public Protector may not investigate court decisions (s 183(2) of the Constitution), as the judicial authority is vested in the courts per s 165(1) of the Constitution.

eminent domain) of the President as head of State, and consequently under which circumstances, *if at all*, it may be justifiable to encroach upon that power for purposes of checks and balances. The decision therefore lacks an explanation of how, within the specific context, the separation of powers impacts the specific dispute before the Court or, conversely, how the outcome impacts the evolving understanding of the separation of powers doctrine.

Intrusion into the domain of another branch (once decided that it does not fall in the pre-eminent domain of the branch) may be necessary in appropriate circumstances to ensure checks and balances.<sup>63</sup> However, such an intrusion must be explained and justified.<sup>64</sup> The omission of any such explanation is contrary to the manner in which the same Court and the Constitutional Court have dealt with disputes that touch upon sensitive separation of powers concerns. For instance, in *S v Dodo (Dodo)*,<sup>65</sup> the Constitutional Court had to decide whether the finding of the High Court to the effect that legislation that obliges courts to impose a particular minimum sentence in defined cases unless there are “substantial and compelling circumstances”<sup>66</sup> to find otherwise is unconstitutional in that it violates the separation of powers doctrine, should be confirmed. The argument of the High Court was that the imposition of minimum sentences occasions an intrusion by the legislature on the powers and functions of the judiciary and violates the separation of powers doctrine.<sup>67</sup> The Constitutional Court gave a detailed exposition of the separation of powers doctrine, its origins and purpose, and how it is specifically to be understood in the South African context. The Court considered the specific context in setting out how the separation of powers doctrine, as defined, impacted on its ultimate decision.

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<sup>63</sup> In *Heath* (2001) at para 4 the Court stated that corruption and maladministration go against the constitutional aspirations, but rooting it out must take place in a manner that is reconcilable with the dictates of the Constitution. Similarly, the alleged corruption laid bare in the State of Capture Report has to be addressed. However, the method that is to be employed must be reconciled with the dictates of the Constitution, which includes the separation of powers doctrine.

<sup>64</sup> For instance, while having regard to the autonomy of Parliament’s law-making process and the separation of powers doctrine, which prevents (in general) the court from interfering in parliamentary proceedings, the Constitutional Court acknowledged in *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) (*Doctors for Life* (2006)) at paras 37-38, that interference in the domain of another branch may be justifiable if mandated by the supreme Constitution. However, in *President* (2018), the Court did not offer any explanation of why the supreme Constitution mandates an intrusion, apart from accepting that the remedial action is binding and appropriate in the circumstances.

<sup>65</sup> *S v Dodo* 2001 (3) SA 382 (CC).

<sup>66</sup> Section 51(3)(a) of the Criminal Law Amendment Act 105 of 1997.

<sup>67</sup> In *S v Dodo* 2001 (1) SACR 301 (E) at 322 the High Court, with reference to *De Lange v Smuts* 1998 (3) SA 785 (CC) at para 61, stated that “whatever the boundaries of separation of powers are eventually determined to be, the imposition of the most severe penalty open to the High Court must fall within the exclusive prerogative and discretion of that Court. It falls within the heartland of the judicial power, and is not to be usurped by the Legislature.”

The Court, for instance, discussed the interest that the legislature and executive have in the imposition of sentences, to find that the separation of powers does not afford the judiciary the “sole authority to determine the nature and severity of sentences”<sup>68</sup>. The Court therefore had regard to the relationship between the branches with regard to the specific issue before it to justify why in this particular case there was no violation of the separation of powers doctrine. Such an explanation arguably provides for a richer understanding of the separation of powers doctrine and its application, also in future cases.<sup>69</sup>

The separation of powers doctrine was effectively overlooked by the Court in *President* (2018). The Public Protector directed the President to appoint a commission of inquiry in the manner and form as prescribed by her. The Court affirmed the remedial action without justifying why it is permissible for the Public Protector to interfere with the exclusive power conferred on another branch by the Constitution itself. The fact that the remedial action is binding, rational, and appropriate in the circumstances was unfortunately not sufficient to dismiss the President’s arguments, which rested on separation of powers considerations. At the very least, the Court should have explained clearly why in this particular case, the concept that each branch is assigned separate powers and that interference with that separation may be unconstitutional, was not applicable in this case. There may be justifications for the intrusion,<sup>70</sup> and those justifications – if presented – could have been debated. But, unfortunately, no justification other than finding the remedial action is rational or appropriate, was offered by the Court.

It is accepted that the purpose of the separation of powers doctrine, together with the rule of law and the principle of democracy, is to ensure a society based on human rights,<sup>71</sup> and that the allegation of corruption as noted in the State of Capture Report

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<sup>68</sup> *S v Dodo* 2001 (3) SA 382 (CC) at para 33.1.

<sup>69</sup> In other cases, the Constitutional Court also considered the separation of powers doctrine, specifically the boundaries created by the doctrine that prevent branches from intruding into the domain of other branches. In *Doctors for Life* (2006), the Court considered whether it is appropriate to intervene in the parliamentary law-making process. The Court, at para 37, recognised that the legislature has autonomy over the law-making process, and that in determining whether and when it would be justifiable to intervene in that process, the Court “must observe the constitutional limits of ... [its] authority”. Similarly, in *Director of Public Prosecutions, Transvaal* (2009) at paras 178-185, the Court emphasised the importance of the separation of powers doctrine. It noted that although the judiciary has the power to review the exercise of powers of the legislature and the executive, it cannot usurp those powers and exercise them themselves. The Court therefore, at para 183, stated that the judiciary has “a duty to patrol the constitutional borders defined by the Constitution. ... [It] cannot, therefore, cross those borders”.

<sup>70</sup> See *Doctors for Life* (2006) at para 37, where the Constitutional Court accepted that intrusion in the domain of another branch is possible if the Constitution, as supreme law, makes provision for such intrusion. See also Hodgson (2018) at 76-77, who argues that in the broader constitutional mandate to address inequality and poverty, the courts may at times find that a particular intrusion into another branch’s territory is unconstitutional, while at a different time find that such an intrusion is acceptable.

<sup>71</sup> Seedorf & Sibanda (2013) at 12-1.

weakens the State's ability to effectively realise the advancement of human rights. Corruption and maladministration must be eradicated, and those found guilty must be held accountable. However, there are various ways in which that can be done, and it is prudent to navigate between the available means in a manner that does not strain the delicate balance between the various constitutional values and principles at play. Ensuring that those who exercise public power are held accountable, must be done in a manner respectful of all constitutional values and principles and not in a manner where certain principles, like the separation of powers, are not regarded appropriately.<sup>72</sup> The fact that the separation of powers was not considered in any detail, led to certain unforeseen and undesirable consequences, which are considered below.

### **5. THE BROADER IMPLICATIONS OF *PRESIDENT OF THE RSA V PUBLIC PROTECTOR (2018)***

As the Court did not concern itself with separation of powers considerations, particularly whether it is justifiable for the Public Protector to direct the President to exercise his discretionary constitutional power, there is now uncertainty as to the understanding of the President's head of State powers, and the distinctions between the different powers as previously set out in *SARFU III (2000)*. In *SARFU III (2000)*, as explained above, the Court distinguished between three categories of powers under section 84(2) of the Constitution. The second category is the responsibility of the President to make certain appointments in terms of the Constitution, which the Court regarded as part of the President's "narrow constitutional responsibilities"<sup>73</sup>. When these appointments are made, the President merely formalises the decision of the National Assembly. In *SARFU III (2000)* the appointment of commissions of inquiry was regarded as part of the third category of powers the President exercises as head of State, which includes discretionary powers that are not constrained by any other constitutional provision.<sup>74</sup>

The implication of *President (2018)* is that the discretionary power of the President to appoint a commission of inquiry – as was explained in *SARFU III (2000)* - is allegedly now constrained by the remedial action that a Public Protector may order in terms of section 182 of the Constitution. Because the remedial action is binding, the President is duty-bound to exercise his once discretionary constitutional power when required to do so by the Public Protector. It is also now appropriate for the appointment of the particular person to head the commission to be selected by a different person. The court will seemingly not interfere with the Public Protector's decision to make such a

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<sup>72</sup> Such an approach is also out of sync with the sentiment expressed by Ngcobo J in *Director of Public Prosecutions, Transvaal (2009)* at para 181, where he stated : "The importance of the principle of the separation of powers in our constitutional democracy cannot be gainsaid. It is required by the very structure of our Constitution." If the available accountability mechanisms in terms of the Constitution are not suitable, or appear to be inconsequential, then questions must be asked about the mechanisms and whether amendments to those mechanisms are necessary.

<sup>73</sup> *Director of Public Prosecutions, Transvaal (2009)* at para 145.

<sup>74</sup> See *SARFU III (2000)* at para 146.

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direction when the remedial action is rationally linked to the stated purpose. This places the power to appoint a commission of inquiry into the second category as discussed above, as it would be similar to the President making the various appointments on the recommendation of the National Assembly, but in this case, on the (binding) recommendation of the Public Protector. This essentially strips the President of any discretion in deciding whether to appoint a commission of inquiry, and is not reconcilable with the Constitutional Court's decision in *SARFU III* (2000).

If the court accepts that the power of the President to appoint a commission of inquiry can be so constrained, will it be possible in future to direct the President to pardon offenders in terms of section 84(2)(j), a power of the President as head of State that also falls within the third category as identified by *SARFU III* (2000)? These are further question that arises due to the fact that the Court did not consider whether in fact the Public Protector has the power, from a separation of powers perspective, to direct the President to exercise a discretionary constitutional power.

More broadly, it appears that the particular High Court has now accepted that it is within the Public Protector's power to direct the other branches to exercise a discretionary constitutional power. The idea that the Public Protector can direct the President to exercise a discretionary constitutional power in appropriate circumstances was again noted in *President* (2020) . In that decision, the Court – with reference to *President* (2018) – stated that “[t]he Public Protector has the power to direct or instruct members of the Executive, to exercise powers entrusted to them under the Constitution where it is required to remedy the harm in question”<sup>75</sup>. The Court mentioned that the Public Protector, as an organ of State, must abide by the separation of powers doctrine in ordering the remedial action, but this statement seems to be aimed at showing appropriate “deference to the expertise within the other organs of state”<sup>76</sup>. It does not refer to having regard to the principle that the Constitution vests different powers in different branches and that generally, those powers cannot be exercised by another branch. This has grave implications for the devolution of power generally, and the potential reach of the Public Protector's power more broadly.

It has been argued that the potentials for overreach on the part of the Public Protector “can be, *and already have been*, cabined by effective judicial oversight”<sup>77</sup>. However, *President* (2018) shows that sometimes judicial oversight is not effective in cabining the reach of the Public Protector's power. Since the Public Protector's remedial action may be binding, a finding that the remedial action is appropriate and rational in the circumstances is not alone sufficient to uphold the remedial action in cases where the remedial action purportedly directs other branches to exercise a discretionary constitutional power. In those circumstances, courts must also seriously consider

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<sup>75</sup> *President* (2020) at para 164. The statement of the Court is wide enough to include both mandatory (like those powers of the President relating to the completion of the legislative process) and discretionary powers.

<sup>76</sup> *President* (2020) at para 164.

<sup>77</sup> See Woolman (2018) at 159.

whether, within the separation of powers doctrine and the principle of pre-eminent domain, the remedial action is constitutionally acceptable. Such a contextual exposition would also assist in determining with greater clarity the outer limits of the Public Protector's power.

In the light of *Economic Freedom Fighters* (2016), where the Constitutional Court held that remedial action ordered by the Public Protector is binding and must be given effect to unless set aside by a court, and *President* (2018), where the intrusive remedial action was upheld, the Public Protector may have been emboldened to take the remedial action that has now been the subject of great controversy. This includes the remedial action ordering the amendment of the Constitution (*SARB* (2017)), and the overbroad (and unlawful) remedial action relating to the investigation of the CR17 campaign (*President* (2020), which was set aside by the relevant court. On the strength of several adverse findings against the Public Protector, including the decision in *SARB* (2017) and the subsequent decision of the Constitutional Court in *Public Protector v South African Reserve Bank*<sup>78</sup>, where the Court upheld the personal cost order in favour of the Reserve Bank against the Public Protector, the fitness of Advocate Mkhwebane to hold the office of Public Protector was challenged in *Institute for Accountability in Southern Africa v Public Protector*<sup>79</sup>. Although the challenge was unsuccessful, it does impact negatively on the integrity of the office of the Public Protector.<sup>80</sup> Not cabining the remedial action of the Public Protector, which may have led to the over-zealous issuing of remedial action, may therefore negatively impact the integrity of the office of the Public Protector, which has proven to be a vital institution in strengthening South Africa's constitutional democracy.

## 6. CONCLUDING REMARKS

In *President* (2018), the Court upheld the remedial action of the Public Protector directing the President to appoint a commission of inquiry headed by a judge selected by the Chief Justice. In upholding the decision the Court argued that the President has a duty to appoint a commission of inquiry as there was no basis upon which to set the binding remedial action of the Public Protector aside. The Court upheld the remedial action without having regard to the President's argument that the remedial action in fact violates the separation of powers doctrine. The Court, in not having regard to the separation of powers doctrine, departed from its own decision in *SARB* (2017) and decisions of the Constitutional Court, where the separation of powers doctrine was considered in a contextual manner whenever arguments were made regarding the intrusion of one branch into the domain of another. The decision of the High Court in *President* (2018) shows that the separation of powers doctrine is invoked as an *ad hoc*

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<sup>78</sup> (2019) 6 SA 253 (CC).

<sup>79</sup> [2020] ZAGPPHC 64 (24 March 2020).

<sup>80</sup> This may have necessitated the Court in *Economic Freedom Fighters v Gordhan; Public Protector v Gordhan* [2020] ZACC 10 (29 May 2020) at para 99 to emphasise that although the Public Protector may rightly be criticised, the Office of the Public Protector must at all times be respected.

principle, even though the Constitutional Court has accepted the central role of this doctrine in South African law.

The implication of the judgment in *President* (2018) is that the Public Protector can seemingly now direct the President to exercise his discretionary powers through taking remedial action, even in cases where the Constitutional Court has regarded the particular power as set out in the constitutional text to be in the sole discretion of the President.<sup>81</sup> The judgment also shows that a court will in certain cases not interfere with remedial action if that remedial action is rational, lawful and addresses the harm in question, irrespective of separation of powers concerns. The effect of this judgment is that it places the office of the Public Protector in a powerful position, a position that was not necessarily contemplated, and one which may, as shown in *President* (2020), negatively affect the integrity and legitimacy of the office of the Public Protector, and consequently, weaken the Public Protector's ability to strengthen constitutional democracy.

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<sup>81</sup> See the discussion of *SARFU III* (2000).

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