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Lawfare: How to approach it in South Africa's constitutional democracy

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Abstract

This article reviews the so-called lawfare that the courts, political parties and non-state actors have increasingly adopted since the presidency of Jacob Zuma as an approach to seeking legal remedies or corrective action for governance failures and in cases of perceived unfairness of judicial processes. The concept of lawfare is placed in the context of South Africa's constitutional democracy, which establishes the Constitution of the Republic of South Africa, 1996, as the supreme law and allows in principle for judicial review of legislation and executive action that contravene the basic principles and values of the Constitution. A positive constitutional understanding of lawfare is identified as the judicialisation of politics as a corrective to failures of appropriate oversight of governance as envisioned in the constitutional scheme. In such cases, judicial understanding is that judges should justify their decisions in terms of the transformative ideas, values and socioeconomic goals of the Constitution to correct such failures. This is argued to be a positive and understandable consequence of South Africa's constitutional order and the place of judicial review within it. The positive understanding of lawfare is distinguished from the negative conception of lawfare popular in South African discourse, where it means an unnecessary use of the courts to resolve issues that are constitutionally intended to be resolved by non-judicial (i.e. political) measures. In the popular understanding, the latter is most often understood to mean the so-called Stalingrad tactic, whereby public officials abuse their access to the courts and/or to public funding to engage in extensive litigation when charged with various forms of malfeasance or incompetence, which is perceived to be an effort to evade legal accountability. Negative lawfare can be destructive in a

constitutional democracy, and three remedies to abuses of the courts through the Stalingrad tactic are identified: rethinking South Africa's adversarial system to accommodate some of the advantages of the inquisitorial system; more effective measures within the legal profession to hold legal professionals accountable for abuses of the courts; and imposing more consequential costs orders on public officials and legal professionals who abuse court processes.

Key words: Accountability; constitution; constitutionalism; constitutional theory; democratic principles; democratic theory; judicial activism; judicial review; lawfare; litigation; procedural law; rule of law; South Africa; Stalingrad tactic; substantive law.

Introduction

"Lawfare" and "Stalingrad tactics" are concepts frequently used in modern South African political discourse. Yet, lawfare is often inaccurately given a one-dimensional meaning focusing on its destructive effect, which fails to grasp the constructive role lawfare can play in a constitutional democracy. Furthermore, while media reports often lament Stalingrad tactics, there is little in the way of providing solutions to this systemic legal problem. In this article I aim to deal with these gaps.

In this article, the concept of lawfare will be placed within the context of constitutional democracy. A democracy functioning under a supreme constitution places the power of upholding the rule of law largely in the hands of the courts. Judicial review by independent courts is a central tenet of the system – all legislation and government conduct inconsistent with the constitution can be declared invalid by the courts. This is the system that prevails in South Africa, which transitioned to a constitutional democracy after many years of parliamentary sovereignty under the colonial and apartheid systems of government.

Yet, there is an ongoing tension between the rule of law and democratic principles in constitutional democracies. This has been evident in South Africa in the form of the enduring debate around lawfare – the use of the law by state actors to achieve strategic political objectives. It can be argued that the system of judicial review allows public or private entities, or individuals with the resources to litigate, to influence constitutional principles or legal precedent, and that such access is anti-democratic because it might be conducted in the interests of and by unelected parties that are not accountable to democratic processes. I aim to demonstrate that lawfare can in fact play a central role in strengthening constitutional democracy, while also acknowledging that it can pose a grave threat to it.

In contemporary South African politics the question of the role of lawfare in public life arises because recent years have seen public officials engaging in extensive litigation when charged with various forms of malfeasance or incompetence, a tactic that is often perceived to abuse court processes in an effort to evade legal accountability, and which in some cases have been identified as such by the courts. This approach, which has come to be known as the Stalingrad tactic, is perceived to constitute a damaging form of destructive lawfare that undermines the rule of law and the effective functioning of South Africa's constitutional democracy.

This perceived prevalence of the use of Stalingrad tactics has become a central theme in reporting and debates in the South African political media, but other than detailed investigative reports about the background to such cases or opinion articles attacking the individual characters who rely on such tactics, there has been little conversation around *solutions* to the problem of continued use of these tactics. Some researchers and commentators argue that the legal system appears to tolerate the use of these tactics and that this highlights weaknesses within the system itself. This article outlines some possible legal solutions to this systemic abuse of legal process.

Constitutional democracy

Constitutionalism is a system of governance established under a written or unwritten constitutional scheme. This scheme delineates a series of rights, norms, values, rules and principles which structure and constrain state power. According to Rosenfeld, modern constitutionalism is based on three essential elements: limiting the powers of government, ensuring adherence by all, including government, to the rule of law, and protecting the fundamental rights established by the constitution (Rosenfeld, 2000).

In a constitutional democracy, political authority comes in the first place from the people. Constitutional democracies are representative democracies in that they rely on two related approaches to vesting political authority in a government: an aggregational element by which electorates vote for representatives in a multi-party system under conditions of free and fair elections, and a deliberative element whereby government and citizens are involved in an ongoing debate about the content and processes of political authority that includes active consultation with the public on matters of public policy. The latter includes media debate, party-political debate, expert views and, in particular, the process of judicial review, which is itself a form of ongoing discussion about the appropriateness of government policies and actions in the context of the fundamental rights established by the constitution (Worley, 2009). Importantly, the founding of a

constitution by democratic procedures underwrites constraints on the authority of the majority. This is achieved through separation of powers and government accountability mechanisms. The constitution is supreme, and all three branches of government – the legislature, the executive and the judiciary – are subject to its framework.

A constitutional system exists in contrast to a parliamentary sovereignty, whereby an elected legislature has exclusive and supreme power to make and enforce decisions through legislation. Parliament is not limited by a constitution. The legislative body has absolute sovereignty over the executive and judicial branches of government. Essentially, the two systems have different methods of seeking to uphold the rule of law, which is one of the key dimensions determining the quality and good governance of a country (Allan, 1985).

The rule of law and judicial review in a constitutional democracy

The modern meaning of the rule of law is usually traced back to the work of the English constitutional scholar, Albert Venn Dicey, who defined the rule of law as embodying three core principles (Dicey, 1961). Firstly, no person is lawfully punishable except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In other words, there must be no wide, arbitrary or discretionary powers. Secondly, all must be equal before the law. Finally, a society must possess certain individual rights if it is to conform to the rule of law. The Diceyan view of the rule of law was simplistic and ambiguous in several ways, and so a number of different interpretations have emerged in modern theory.

A more comprehensive and systematic interpretation of the rule of law has recently been developed for the World Justice Project's Rule of Law Index (The World Justice Project, 2021). It encompasses four principles: the government and its officials and agents are accountable under the law; the laws are clear, publicised, stable, applied evenly, and ensure human rights as well as property, contract and procedural rights; the processes by which laws are adopted, administered, adjudicated and enforced are accessible, efficient and fair; justice is delivered timely by competent, ethical, and independent representatives and neutrals, who are accessible, have adequate resources and reflect the makeup of the communities they serve. A constitutional democracy is fundamentally based on the premise that a sovereign constitution upholds some or other version of the rule of law similar in substance to the one just outlined. Under this system, any conduct or legislation found to be inconsistent with the provisions or values of the supreme constitution must be declared invalid by the courts. Thus, judicial review by independent courts is central to the successful functioning of a constitutional democracy.

In contrast, parliamentary sovereignty limits the power of the courts. A court cannot declare invalid any laws made by a properly constituted parliament; the court's only basis to declare a law invalid is on the ground of incorrect legal procedure. This reduced role of judicial review does not necessarily threaten Dicey's notion of the rule of law. For example, the United Kingdom's system of parliamentary sovereignty is relatively successful in upholding the rule of law and citizens' (unwritten) constitutional rights. However, this system is potentially open to the possibility of abuse in terms of rule *by* law through a warped interpretation of the jurisprudential theory of legal positivism (Dugard, 1971). This is what occurred in pre-democratic South Africa. The positivist argument is that "in the absence of an expressed constitutional or legal provision, it could not follow from the mere fact that a rule violated standards of morality that it was not a rule of law; and, conversely, it could not follow from the mere fact that a rule was morally desirable that it was a rule of law". Positivists never denied that morality influences law, but posit that it does not influence the *validity* of a law. Morality does not determine validity. However, Dugard argued that the apartheid-era judiciary interpreted this to mean that morality has no influence on what the law *ought* to be. The separation of law from morality in South Africa's apartheid system of parliamentary sovereignty is not indicative of the system of parliamentary sovereignty or the theory of legal positivism, but rather of the judiciary's mechanical interpretation of the discriminatory laws as valid, while neglecting the role morality played on what the law *ought* to be.

Transition to constitutional democracy in South Africa: the changing meaning of the rule of law

The system of parliamentary sovereignty was abused in pre-democratic South Africa to entrench the violation of human rights and structural racial oppression.[1] From colonial rule to apartheid, parliament was never fully democratically representative. Large-scale disenfranchisement resulted in a parliament of elected representatives selected from and exclusively representative of the white minority. The vesting of sovereignty in a white minority parliament aided the perpetual and legally unassailable oppression of the disenfranchised black, coloured and Indian populations.

This was facilitated by the judiciary's often dogmatically positivist approach to adjudication in this era, which embedded the notion of a strict dichotomy between law, on the one hand, and justice and morality on the other (Sibanda,

[1] Parliamentary sovereignty was entrenched in the Constitution of 1910, as the Union of South Africa under British rule, and in 1961 and 1983 as the Republic of South Africa.

2011). The intention of the legislature was the only focus of judicial interpretation. Judges thus hid behind a dubious veil of rigid "political neutrality" while often validating overtly political racial oppression in their judgments. Ultimately, parliamentary sovereignty and the rule of law were distorted positivistically in order to espouse a system of rule by law.

Post-apartheid South Africa's system of democratic constitutionalism was intended to replace the system of parliamentary sovereignty with constitutional sovereignty. This system embraces conceptions deriving from natural law, a school of thought on the nature of law that fundamentally opposes positivism. Natural law is based on the idea that laws must contain a basic level of justice, or "inner morality" (Fuller, 1969) if they are to be valid, and hence, able to sustain any rule of law. This can be seen in the normative framework of South Africa's 1996 Constitution.[2]

Tension between judicial review and democracy

Constitutional theory and democratic theory both centre on long-standing tension between judicial review and certain democratic institutions. This tension boils down to the "counter-majoritarian difficulty" – unelected judges' power to invalidate the legislative decisions of popularly elected representatives in parliament, or invalidate the conduct of popularly elected government representatives. Some researchers argue, then, that judicial review is inherently undemocratic, since judges are not similarly electorally accountable to the majority (Waldron, 2006).

However, as Samuel Freeman argues, this view may be based on a misguided conception of constitutional democracy, its foundations, and the role of judicial review (Freeman, 1990). In a constitutional democracy, judicial review is one of several procedural devices that free and equal sovereign persons might rationally agree upon and impose as a constraint upon legislative processes and elected representatives' exercises of power. The purpose is, firstly, to protect the basic rights of all, secondly, to protect society as a whole against the possibility of mistaken majority decisions, and thirdly to protect minorities from majority decisions that breach their basic rights. By granting the power to review democratically enacted legislation and the conduct of democratically elected representatives to a body that is not electorally accountable, citizens have a mechanism to protect their sovereignty and independence from the unreasonable exercise of the political rights that they vest in their representatives (Freeman,

[2] The founding values of the Constitution are set out in section 1. They include dignity, equality, freedom, non-racialism and non-sexism.

1990). Thus, judicial review "is a kind of rational and shared precommitment among free and equal sovereign citizens at the level of constitutional choice" (Freeman, 1990). Given that in a constitutional democracy the constitution is adopted by democratic procedures of majority voting, if this constitution includes judicial review mechanisms, then free and equal sovereign citizens have, in fact, pre-committed to this mechanism by choice.

What is clear is that South Africa's adoption of constitutional democracy formed part of a wave of such adoptions across the world, particularly in Africa and Eastern Europe following the end of the Cold War, and that this distinctive trend was, in general, intended to counter the excesses of various forms of parliamentarianism. And while it is certainly true that judicial review can be subject to abuse in the same way that legislative procedures and executive power can be abused, it does not follow that judicial review is inherently ineffective in upholding democratic principles. Nevertheless, in the context of constitutional democracy, the rule of law can still sometimes come into tension with central democratic principles (Rosenfeld, 2001, p. 3). This has been evident in South Africa, in the form of lawfare.

What is lawfare?

Lawfare in South African discourse

The above theoretical explanation gives context to the existing tension between judicial review and politics (democratic institutions) in a constitutional democracy. Lawfare has many meanings in political-legal discourse, but I will discuss the term in the context in which it is applied in South Africa. Recently, lawfare has taken centre stage in South African politics. Given this, it is important to be clear that several kinds and conceptions of lawfare can be observed to exist. In a general sense, it denotes the use of the law by state actors to achieve strategic political objectives. This can range from legal (as opposed to military) strategies used by states in foreign policy and international relations, to class actions by non-governmental organisations against the government as a kind of law-based advocacy.

However, lawfare is often understood to imply an abuse of the courts for political or personal ends.[3] This predominantly negative connotation is the

[3] It must be stressed that the term "lawfare" is not comparable to the use of the term "Stalingrad tactics". While lawfare has taken on a predominantly negative connotation in South Africa, as noted, it does not exclusively refer to constitutionally damaging behaviour, as is the case with Stalingrad tactics. Stalingrad tactics can be considered as an approach falling under the larger umbrella of "bad" lawfare. This will be elaborated upon later.

one most common in South Africa, where it is often taken to mean a form of behaviour by individuals in government who are charged with various abuses of power and who use their access to resources to abuse court processes to prevent or at least stall eventual prosecution and/or conviction. However, lawfare need not be democratically harmful. As we see from the different conceptions outlined above, it can be both a constructive and destructive tactic, depending on how the law is utilised and what political objectives it seeks to achieve. It is therefore important to determine what constitutes "good" and "bad" lawfare in a constitutional democracy.

In South African history, as we have noted, during the apartheid era the law was used as an instrument of political oppression by those in power; however, it was also used as an instrument of resistance by those oppressed by apartheid – a "sword" and a "shield" (Meierhenrich, 2008). As explained above, law was used as the framework to construct the racist apartheid state,[4] but it was then put to more virtuous use by the apartheid resistance in an attempt to assuage these racially oppressive measures. Litigation became a "weapon of the weak", and legal activism occasionally resulted in a softening of some of the stifling apartheid laws (Comaroff, 2001) (Davis & Michelle, 2009). Some judges during the apartheid era used their position to find loopholes in the discriminatory laws which favoured liberty, in order to lessen the strictures on the oppressed groups. This may be one of the reasons why, even after the system of rule by law under colonialism and apartheid, South Africans have developed a positive attitude towards judicial power as a means of protecting the citizenry, rather than regarding it as an enemy of the people.[5]

In the era of constitutional democracy, lawfare has taken a different form, i.e. the judicialisation of politics. The courts have been used as the forum to resolve contentious political disputes. On the one hand, this is a positive and understandable consequence of South Africa's constitutional order and the place of judicial review within it. Section 1(c) and section 2 of the Constitution

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[4] The apartheid state was a form of "rule by law". See https://www.sahistory.org.za/article/apartheid-legislation-1850s-1970s for the legislation that constructed apartheid.

[5] See for example Rosenfeld, 2001: Rosenfeld compared France's commitment to the *État légal* (the "legicentric" state which places primacy of the law over constitutional rights), and British attitudes to judicial power. He argued that France's reinforced commitment to the *État légal* stemmed from a manifest distrust of judges ever since the Revolution, due to the negative role they played during the *Ancien Régime*. So, its concept of the rule of law depends exclusively on the state. By contrast, despite a long tradition of parliamentary sovereignty, the British developed a positive attitude towards judicial power, as protectors of the citizenry.

establish that constitutional supremacy and the rule of law are founding values of the democracy, and section 172(a) explicitly states that all law or conduct inconsistent with the Constitution must be declared invalid by the courts. The courts have clarified that this judicial power extends to all exercises of public power, even those that are distinctively political.[6]

The legal academic, Etienne Mureinik, famously said that after apartheid South Africa transitioned from a culture of authority to a culture of justification, where every exercise of power has to be justified by the power holder (Mureinik, 1994). He reasoned that the duty of judges in the new constitutional dispensation is to justify their decisions in terms of the transformative ideas, values and socio-economic goals enshrined in the post-liberal "transformative" Constitution. For him this process of justification, then, involved a necessary politicisation of the rule of law; the provisions and values of the Constitution are broad, and their interpretation would certainly be influenced by the judges' political values and ideological preconceptions in light of their particular social and economic context. Mureinik concluded that this politicisation needed to be accepted His argument, then, was effectively that the "bright-line" distinction between law and politics must be softened, where bright-line denotes a rigid rule, leaving little room for varying interpretation. The democratic and responsive social transformation envisioned by the Constitution required this "updated, politicised account of the rule of law" to be successful (Klare, 1998).

Building on the sense sketched earlier, we can consider negative lawfare to be an unnecessary use of the courts to resolve issues that are constitutionally intended to be resolved by non-judicial (i.e. political) measures. The constitutional framework outlines intricate separation of powers mechanisms to hold the various branches of government accountable. This responsibility falls on the shoulders of the executive and legislative branches, as well as the independent Chapter 9 institutions, and is not solely the work of the judiciary. This is why it has been argued that having political issues consistently decided by the courts can become a dangerous form of judicial overreach into functions intended for other branches of government, and thus a bad form of lawfare that in fact undermines the constitution's democratic scheme (Davis & Le Roux, 2008).

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[6] See *President of the Republic of South Africa* v *Hugo* 1997 (4) SA 1 (CC), concerning a judicial review of the president's section 82(1) prerogative power to grant a pardon. Although the court will exercise varying levels of deference depending on how "political" the nature of the decision is, all such decisions are nevertheless justiciable in court. Also see *Bato Star Fishing (Pty) Ltd* v *Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) para 48 on judicial deference towards certain decisions of the executive.

This conundrum forms the heart of the debate on what constitutes good and bad lawfare in South Africa's constitutional democracy. Tensions have visibly arisen among Constitutional Court judges on this issue – in the case concerning the impeachment of former president Jacob Zuma, then chief justice Moegoeng Moegoeng insisted on reading out his minority judgment, in which he described the majority judgment of Judge Chris Jafta as "a textbook case of judicial overreach" (*Economic Freedom Fighters [EFF] v Speaker of the National Assembly* 2018 (2) SA 571 (CC)).[7] Moegoeng himself acknowledged the "extraordinary nature and gravity of this assertion" and its "controversial" nature, indicating deep divisions within the judiciary concerning what counts as good or bad lawfare.

Good lawfare: why lawfare is beneficial in South Africa's constitutional democracy

Judicial lawfare has a valuable role to play as a last-resort device to fill an accountability vacuum (Corder & Hoexter, 2017). The increasing trend towards this form of lawfare adopted by the courts, political parties and non-state actors in the Zuma years, was largely a result of the failures of appropriate oversight as envisioned in the constitutional scheme. The legislature and executive have repeatedly failed to prevent the growth of nepotism, corruption and ultimately state capture (Corder & Hoexter, 2017). Thus, the courts provide an opportunity to give a voice to those who are morally outraged at the dearth of government answerability. This is in line with South African legal tradition, which has produced a steadfast faith in the law that facilitated the country's transition to democracy after apartheid (Meierhenrich, 2008).

This was highlighted in the "Nkandla" case in the Constitutional Court (*EFF v Speaker of the National Assembly*; *Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 580 (CC)). It was held that Zuma's substantial disregard for the remedial action taken against him by the then public protector was inconsistent with the president's section 83 constitutional duty to uphold, defend and respect the constitution, as well as the duty of all organs of state to assist and protect the Office of the Public Protector as per section 181. Furthermore, the National Assembly, which set aside the public protector's report, was found to have acted contrary to the rule of law by usurping the authority of the judiciary. It was also found to have failed to uphold its constitutional obligations to oversee executive action (section 42), oversee the president and hold him accountable (section 55), and protect the Office of the Public Protector (section 181).

[7] See paragraph 223; see also Jafta's response to Moegoeng's assertion from paragraph 218.

In this instance, lawfare was a necessary tool to ensure that the president was held accountable for his actions, and that the rule of law was upheld, since both the executive and the legislature failed to fulfil their constitutional oversight duties. Effectively, the legislative and executive branches of the South African government have frequently been charged with and convicted of failing in their constitutional responsibilities, and the judiciary has had to intervene. For as long as the government remains corrupt and unaccountable, there will be disproportionate recourse to the courts for political disputes that could otherwise have been dealt with extrajudicially.

Advocating good lawfare is not to say that courts should intervene in political disputes in any way they wish. The judicial activism of lawfare must be distinguished from judicial overreach. Judicial activism denotes the role played by the courts in upholding the constitution, while judicial overreach occurs when the courts violate the separation of powers principle by usurping the functions of the legislative or executive branches of government.

This is when the courts' discretion in the exercise of judicial deference is vital in order to keep their conduct within the domain of good lawfare and outside the domain of judicial overreach. According to the principle of judicial deference, courts can ensure that government decisions align with the principle of legality (lawful and rational) or administrative justice (lawful, reasonable and procedurally fair), but they cannot rule on the merits of these decisions. As unelected officials, judges cannot make substantive political decisions. The more political and polycentric the issue, the more the courts should exercise deference (*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC)). The judiciary has been effective in recognising legal applications and appeals as involving political issues and not necessarily last-resort attempts to fill a political accountability vacuum. This is vital for the maintenance of judicial legitimacy, the courts' only means of implementing their power.

Does this type of lawfare result in an undue politicisation of the judiciary?

This seemingly noble form of lawfare has, however, been questioned. As we have noted, it can be said to allow the possibility of an objectionable politicisation of the judiciary.

In their book *Lawfare: Judging Politics in South Africa*, Michelle le Roux and Judge Dennis Davis seem to think that even good forms of lawfare can be democratically detrimental. They argue that the Constitutional Court's Nkandla decision demonstrates the "danger inherent in far-reaching court decisions on political questions in a system of precedent: what is desirable in one set of

circumstances involving certain individuals can be wholly disastrous when circumstances change or other people are appointed" (Davis & Le Roux, 2008, p. 286). In that case, the court expanded the latitude and authority of the Public Protector to include binding remedial action. However, this was made in the political context where Advocate Thuli Madonsela was public protector, and her remedial actions against corruption were being unconstitutionally ignored by the president and the National Assembly. The extension of the public protector's power has since been abused by Madonsela's successor, Advocate Busisiswe Mkhwebane. Thus, Davis and Le Roux suggested that the legal decision extending the public protector's powers in the Nkandla case was made on the basis of a certain political context which ultimately backfired. They argued that this was evidence of dangerous judicial overreach.

I do not agree that Davis and Le Roux supply enough clear evidence that this would constitute destructive "judicialisation" of politics in South Africa's constitutional democracy. As elucidated above, it is an inevitable consequence of South Africa's constitutional framework that political issues will sometimes appear before the courts, since all exercises of public power are, in theory even if not in practice, judicially reviewable.[8] As Theunis Roux aptly states, "politicisation is not an inevitable result of the adoption of a system of judicial review but a possible consequence that has to be separately investigated in each case" (Roux, 2020). When constitutionally required, the courts must make legal decisions on politically contentious issues. Their decisions are therefore not automatically political, since they must be founded on legal and constitutional principles. This was the case in the Nkandla judgment. The binding nature of the Public Protector's remedial powers was established based on sections 181 and 182(1)(c) of the constitution, not on the specific individual in power.[9] So, while political context might have influenced the decision – in terms of facts, timing, or the nature of the reasoning – I maintain that it was soundly and irrefutably justified on the basis of constitutional provisions.

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[8] Theunis Roux wrote that "Constitutional systems that provide for judicial review require courts to decide politically controversial matters…That this has been the consequence of the adoption of the constitution is so unremarkable as to be almost not worth saying" (Roux, 2020).

[9] Section 181(3) obliges other organs of state to assist and protect the public protector to ensure her dignity and effectiveness. It was reasoned that she would lack dignity and be ineffective if her directives could be ignored. Section 182(1)(c) states that the public protector must take appropriate remedial action. "Appropriate" action was held to mean action suitable to redress or undo the unlawful enrichment or corruption in question. While sometimes it might be appropriate to merely give a recommendation, it would often have to be binding action if it is to effectively address the complaint.

Yet, to prevent any *undue* politicisation of the judiciary, judges should openly acknowledge the influence of political context, or any personal political convictions that could possibly shape their legal decision on politically contentious disputes. This aligns with John Dugard's famous argument about the "inarticulate premise" – or subconscious prejudice – that all judges inevitably have. His view was that this premise should not be denied or ignored but openly acknowledged in the making of decisions (Dugard, 1978, p. 303). Judges must then hold these potential influences in check while making a decision that aims to uphold the constitution. This maintains judicial integrity without disempowering the courts from fulfilling their constitutional mandate.

The issue of undue politicisation of the judiciary is more of a problem when issues concerning *political* accountability are improperly brought to the courts and confused with *legal* accountability. For example, Minister of Mineral Resources and Energy Gwede Mantashe's proposed legal challenge to the Zondo Commission's[10] findings against him confuses political accountability with legal accountability.[11] The minister seems to be trying to make his *political* accountability in terms of his party's step-aside requirements dependent on the National Prosecuting Authority's capacity and inclination to hold him *legally* accountable, which would unduly judicialise a political question within his own party, the African National Congress (ANC). In recent years the ANC has introduced a step-aside requirement for members who have been charged with malfeasance and are likely to face legal proceedings or trial. While this is clearly in the public interest, in that the measure is apparently intended to introduce an element of internal accountability for all members of the party, and particularly those who hold public office, the measure is properly speaking an internal political issue. In such a case, legal technicalities should not be relied upon to avoid political accountability. Courts should not entertain, and thus far have not entertained, such attempts to judicialise political issues.

Bad lawfare: why lawfare can be dangerous in a constitutional democracy

Evasion of accountability using Stalingrad tactics

The legal tactic of the so-called Stalingrad legal defence is clearly a bad form of lawfare in our constitutional democracy. The average politically aware South

[10] Full name: Commission of Inquiry into Allegations of State Capture.

[11] See my policy briefing on this issue: https://gga.org/legal-and-political-implications-zondo-commission/

African citizen is all too familiar with this term. This is a legal strategy often employed by public officials in an effort to evade legal accountability when charged with various forms of misconduct or incompetence. The term was coined by former president Jacob Zuma's senior counsel to describe his counterattack to serious criminal charges against him. The name stems from the style of warfare adopted by the Soviet Union during World War II, which involved wearing down the German forces in a five-month war of attrition.

In South African political discourse, the term indicates an illegitimate use of substantive and procedural law to defend a person's right to a fair trial.[12] This legal tactic involves "constantly raising unwarranted interlocutory points, mounting spurious defences, launching baseless counterclaims, and appealing against every adverse ruling, irrespective of the merits" in order to avoid accountability (Corder & Hoexter, 2017, p. 115). The term, then, is always used in contexts in which abuses of the law have a destructive effect on constitutional democracy; it does not refer to the noble wars of legal attrition fought by apartheid legal activists, such as George Bizos[13], nor indeed to the restricted sense of the term as it might apply to judicial activism. Using this tactic, the former president delayed for 15 years a criminal trial in which he was charged with corruption, racketeering, fraud and money laundering, spending more than R18 million worth of taxpayer money on legal fees while he was president. Fortunately, the High Court later ruled that he owed this money back to the state (*Zuma v Democratic Alliance* 2021 (5) SA 189 (SCA)).

The Stalingrad tactic has been masterfully adopted by other public officials too – notably the Western Cape Judge President John Hlophe, found guilty of gross misconduct by the Judicial Service Commission (JSC). To this day he has not

[12] Rights enshrined in sections 34 and 35(3) of the Constitution.

[13] See https://gcbsa.co.za/law-journals/2020/december/Advocate%20December%202020%20WEB%20p22.pdf. Although this article describes Bizos's method as "true Stalingrad legal tactics", I believe its use of this term is misleading. Indeed, it could be considered strange that the term Stalingrad tactics has taken on a meaning associated with a purely negative and abusive approach to lawfare in South African discourse, when the Stalingrad battle itself was painstakingly fought, street by street and house by house, in a war of attrition. While lawyers like those of Bizos's approach could certainly be considered a form of "war of attrition" falling under the positive lawfare described above, it is inaccurate to use the term Stalingrad tactics to describe apartheid resistance litigation, as this is not how the term is used in politics today. Today, it refers to the evasion of accountability in such a way that undermines the democratic constitution and its entrenched rule of law. In the apartheid era, lawfare was used to find legal loopholes that favoured liberty in an unjust and oppressive positivist legal system of rule "by" law and attempted to establish a rule "of" law in its place.

been disciplined for the gross misconduct for which he was convicted in 2008. The JSC has only recently, in July this year, recommended to the president that he be suspended, though by the time of writing this had not occurred. Hlophe received about R10 million in state funding for his legal defence in the matter arising from the complaints of gross misconduct. He has not been requested to pay this back to the state.

It appears that the current public protector has adopted this strategy too. This year, Mkhwebane turned to litigation in an attempt to stall impeachment enquiry proceedings against her in parliament.[14] It must be said that some of her constitutional challenges to the impeachment rules have proved constitutionally beneficial. The Constitutional Court found, for example, that the rules' limitation of her right to full legal representation during the impeachment process was irrational, procedurally unfair, and thus unconstitutional (*Public Protector v Speaker of the National Assembly* 2020 (12) BCLR 1491 (WCC)). However, the litigation efforts that followed clearly constitute an abuse of court process in a last-ditch attempt to delay being held accountable on charges of incompetence and misconduct.[15]

The credibility of the court largely depends on public perception of the legitimacy of its rulings. Public confidence is a crucial element in the judiciary's ability to enforce its power, in addition to other elements of law and order, including effective and consistent policing and the effective management of legal sanctions such as imprisonment. The use of Stalingrad tactics can significantly undermine perceptions of the legitimacy of court proceedings, and, as a result, of the legitimacy of court rulings. Such tactics bring court processes, the administration of justice and the decisions and authority of the courts into question on purely technical grounds that do not recognise the substantive elements of the rule of law and the functioning of the justice system in general.

Bad forms of lawfare also detract from the functioning of legitimate democratic processes envisioned by the constitution. In other words, it circumvents the functioning of democracy as it is supposed to function. For example, Public Protector Mkhwebane, through her lawfare tactics, has tried to stall the constitutionally envisioned processes of accountability. She has tried to prevent

[14] See my explainer piece on the Public Protector's impeachment: https://gga.org/why-the-public-protector-is-being-impeached-and-why-the-process-is-slow-and-controversial/

[15] See: https://gga.org/why-the-public-protector-is-being-impeached-and-why-the-process-is-slow-and-controversial/

parliament from exercising its section 194(1) constitutional power to conduct the impeachment process, and to prevent the president from exercising his section 194(3)(a) constitutional power to suspend her once the impeachment process has begun. The same can be said for Mantashe, who has threatened to take a finding against him by the Zondo Commission on judicial review. This detracts from and hinders the smooth functioning of a Commission of Inquiry as a fact-finding and accountability mechanism.

Fortunately, parliament and the president have remained steadfast in response to the current public protector's attempts to undermine their constitutional powers. However, if persistent challenges to valid democratic processes of accountability in the courts become an accepted norm, it would undermine and delay these legitimate political practices. The courts should not have the final say on every single political matter in every case. Lawfare is only a constructive approach when legitimate democratic processes have not taken place as they should have. This was the case in the Nkandla case. The former president failed to implement the then-public protector's remedial action and parliament failed to hold him accountable as it was constitutionally required to do. In this case, the use of lawfare did not debilitate legitimate democratic processes; on the contrary, it ensured that they actually occurred. The value of lawfare must be judged by its function, rather than its form.

Possible ways to prevent the use of bad lawfare

Possible ways to prevent the use of bad lawfare – Stalingrad tactics – range from big-picture systemic issues, to more focused problem areas. This article proposes several approaches. The first proposal addresses a systemic issue, while the following two proposals are more focused and immediate solutions.

Rethinking the adversarial system

Constitutional law expert Pierre de Vos argues that the abuse of court processes through Stalingrad tactics is partly a consequence of South Africa's adversarial legal system. In theory, this system contrasts strongly with the inquisitorial legal system, the primary system used in the civil legal systems of countries such as France and Italy. However, in practice, most jurisdictions adopt some hybrid form of the two systems – they are not mutually exclusive.

The two systems have the same goal: to establish the truth in a way that is regarded as fair. The fundamental difference between an adversarial and inquisitorial system is their assumption about the best means to achieve this goal. The adversarial system is more party-driven while the inquisitorial system

is more judge-driven. An adversarial system relies mainly on the assumption that the opposing parties are able and willing to present their arguments properly and honestly within evidential and procedural boundaries; it is assumed that this factual "battle" enables the truth to emerge. On the other hand, an inquisitorial system places a far higher value on truth-finding by doing away with these evidential restrictions. The search for the truth is in the hands of an investigating judge or magistrate whose role is to consider all relevant evidence with no restrictions on what information is admissible. Legal counsel plays a more minor role. On this view, the aim is to arrive at "material" truth is the aim, rather than "party-centred" truth (Steytler, 2001).

The concept of party-centred truth may ultimately place the outcome of any case in the hands of the stronger, smarter and higher-paid lawyers. An element of legal "gamesmanship", then, becomes an influential factor in the conduct of the case. The objectives of truth-finding and substantive fairness can be undermined if either side fails to perform its role as a competent or ethical adversary. Placing the conduct of a trial so substantially in the hands of the litigants can also allow trials to be prolonged through delaying tactics. This has been evident in the utilisation of Stalingrad strategies, which detract from the substance of a case in favour of procedural and formalistic legal arguments.

In South Africa the courts of law use an adversarial system while other forms of legal inquiry, particularly commissions, use a partly inquisitorial system, as demonstrated in the execution of the Zondo Commission. Commission hearings are not structured in an adversarial battlefield style that opposes sides under the guidance of technical rules, and the legal representatives of parties involved in commission hearings play a less prominent role in the process than would be the case in a purely adversarial legal proceeding such as a criminal trial. However, the adversarial method is endemic in South African legal culture. This has allowed attempts to import Stalingrad strategies in such contexts. A commission generally has wider powers to run its process than would be allowed by normal court procedural rules, which gives commission chairs stronger powers to curtail Stalingrad tactics. However, it may be noted that the current rules for commissions also give commission chairs scope to rush inquiries in unacceptable ways, as in the case of the Seriti Commission into alleged corruption in relation to arms acquisitions.

De Vos suggests that a hybrid adversarial-inquisitorial legal system in South Africa might prevent lawyers from using technical loophole arguments to distract the court's attention from the substantive fairness of hearings and so protect their clients. South Africa's adversarial system does include some inquisitorial elements,

such as in bail proceedings and sentencing processes in criminal trials. De Vos's argument is essentially that the inclusion of inquisitorial elements in other parts of a trial's proceedings, particularly the pre-trial and investigatory stages, could help to prevent the use of Stalingrad tactics and improve trial efficiency.

Such a hybrid system would entail that the judges play a more active role in the management of a trial, and are not expected to subordinate the enforcement of legal norms to the wishes of counsel (Goldstein, 1974). A hybrid system would retain a basic adversarial structure but infuse it with corrective inquisitorial elements in trial procedures. Judges would play a more managerial role in preventing Stalingrad tactics where these were evidently being used to delay accountability and undermine the rule of law. An emphasis on substantive justice and truth-finding would ensure that judges' discretion in such instances need not undermine fair process. As the Stalingrad cases show, judges need to have more discretion in refusing to entertain delaying tactics through the use of technical or formalistic legal arguments. If judges were permitted a more inquisitorial role in trials, judicial intervention of this type would not be irregular and it could not be seen as an intrusion into the political sphere. When court processes are abused, judges should not be expected to play a passive role. Ultimately, justice is as much a matter of substance as it is form. While there is a constant tension between perceptions of bias and truth-finding, this tension should not preclude the court from performing its primary function and expertise of seeking substantive justice (Steytler, 2001).

Guidelines for this form of judicial intervention should be formulated in an effort to curb the Stalingrad tactics that have plagued politically contentious South African trials in recent years. Unfettered judicial intervention could result in legitimate complaints about partisan behaviour, so it is important that comprehensive guiding principles are spelled out. Such guidelines could include various contextual considerations of the issue at hand. These might include considerations involving such factors as the number of years the case has dragged on due to the use of procedural or technical legal arguments, a litigant's track record of using Stalingrad tactics, and the urgency of the need for accountability given the term of public service. The court's duty to be open-minded, impartial and fair in the exercise of this discretion must form the framework of these guidelines.

Stricter accountability in the legal profession

Another means of preventing Stalingrad tactics would be to implement stricter accountability within the legal profession. The use of these tactics is also a

problem of legal culture, which means that there is a need for change in legal professional culture. The utilisation of Stalingrad tactics by legal representatives is not in itself unlawful, but it could be said to contravene certain codes of conduct. Section 3 of the Bar Council's Code of Professional Conduct, for example, prohibits conduct which is dishonest or otherwise discreditable to an advocate; prejudicial to the administration of justice; or likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute. Furthermore, Part VI of the Legal Practice Council's Code of Conduct for all Legal Practitioners, Candidate Legal Practitioners and Juristic Entities prohibits a legal practitioner from abusing or permitting abuse of court process or deliberately protracting the duration of a case before the court.[16]

The objective of Stalingrad tactics is to contravene the rule of law and inhibit the fair and genuine functioning of the justice system. For a profession that is meant to be held to the highest ethical standard, it is concerning that legal representatives are often allowed to use tactics that obstruct the efficacy of the legal process. Legal representatives have a duty to their clients, but they also have duties to the courts and the justice system in general. Stalingrad tactics undoubtedly erode public confidence in the legal profession and justice system, which is contrary to the profession's codes of conduct.

Although there is often a thin line between boldly defending one's client's interests in an adversarial system and using a thin veil of legality to obstruct the administration of justice, regulatory bodies ought not to be so circumspect in recognising and calling out audacious abuses of court process using Stalingrad methods. The rules in the codes of conduct need to be more unreservedly and actively enforced by the relevant bodies if they are to have any meaning, and enforcement should include the possibility of firm penalties in cases of infringement. Where hefty fines or a suspension do not result in changed behaviour, advocates should be swiftly struck from the roll. Consequences for unethical and unprofessional behaviour of this kind are essential to ensuring that legal professionals meet their ethical duty to the courts, as well as the administration of justice.

However, the Legal Practice Council is not known for its firm or fast disciplining of divergent members. The Western Cape High Court has recently noted its dissatisfaction with the council's "lackadaisical and haphazard

[16] See paragraph 60 of this Code of Conduct at https://lpc.org.za/legal-practitioners/code-of-conduct/.

fashion" in imposing sanctions for repeated and gross transgressions, and described the body as "woefully inadequate" in the discharge of its regulatory duties (*The Legal Practice Council v Van Wyk* 2021 JDR 3262 (WCC)). Clearly, the Legal Practice Council's conduct requires significant improvements in the efficiency and adequacy of its disciplinary measures as these relate to the use of Stalingrad tactics by legal representatives. Its approach to discipline needs to be clear, structured, fast-acting and firm in order to effectively uphold its code of conduct.

Costs orders

Costs orders in constitutional litigation can be crucial to the healthy functioning of a constitutional democracy. How the burden of costs is distributed among litigants after trial in constitutional litigation can determine whether future constitutional violations go unremedied, whether important constitutional questions are left undecided, and ultimately whether justice and the rule of law are upheld.

The way in which litigants conduct litigation can be an important factor in a court's decision to award costs. If they have litigated vexatiously or abused the court's process, the court may punish them by denying them costs orders they would ordinarily have been entitled to, or by ordering costs against them they ordinarily would have been able to avoid, or in severe cases, making a punitive costs order. Punitive costs orders can include costs on an attorney and client scale[17] or costs *de bonis propriis* (Bishop, 2012). In the case of Stalingrad tactics employed by public officials, costs *de bonis propriis*, whether on a punitive scale or not, can act as a mechanism to prevent the abuse of court process and evasion of accountability.

Costs de bonis propriis against public officials

Costs *de bonis propriis* literally means costs "of his own goods". When public officials act in bad faith, with gross negligence, or unlawfully in the execution of their duties or during the course of litigation, they, and not the state, can and should be held accountable for any adverse costs orders (*Black Sash Trust v Minister of Social Development* 2018 (12) BCLR 1472 (CC)). Costs of this kind are usually ordered on a punitive scale and are an expression of the court's displeasure at the conduct of the litigant. Such costs orders can and should also

[17] This means that the party subject to this order must pay the ordinary court costs (party and party costs – costs of attendances of both parties' attorneys) as well as the fees and expenses the other party is liable to pay their attorney for services rendered in respect of the legal matter.

be used against public officials who employ Stalingrad tactics, in the interests of avoiding pointless litigation at the expense of taxpayers.

Costs de bonis propriis against public officials in constitutional litigation

However, things get more complicated when a public official is litigating in order to assert a constitutional right. This has been the case with the current public protector's series of legal challenges to her impeachment. In general (non-constitutional) litigation, a party who loses a case is obliged to cover their own costs as well as those of the party who wins the case. These are ordinarily costs on a "party and party" scale – the costs of the attendances of the parties' attorneys. However, a losing party may also be ordered to pay costs on a punitive "attorney and client" scale, and if a public official, costs *de bonis propriis*, as explained above.

Yet, the general costs requirements in constitutional litigation are different. In *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3 2006 (3) SA 247 (CC) the Constitutional Court established the general principle that in litigation between the state and private parties seeking to assert a fundamental right or raise a constitutional issue, the state should bear the costs of the other side if it loses, while if it wins, each party should bear its own costs. This is in an effort to avoid depleting the resources of private parties through costs orders, to encourage constitutional assertiveness and to promote the advancement of constitutional rights in the public interest. This is a general principle of constitutional litigation.

Yet, this principle is not unqualified. In *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC), the Constitutional Court determined that deviations from general principle may apply in exceptional cases when special grounds are present. A private party litigating a constitutional matter against the state is not necessarily immunised from covering the costs if there has been an abuse of process, or if litigation is frivolous, vexatious or manifestly inappropriate, such that the litigant deserves the court's condemnation (Du Plessis, Penfold, & Brickhill, 2013). In such cases, it would not violate the *Affordable Medicines* principle to order personal costs from a party claiming to assert a constitutional right against the state, as in the case of the Public Protector's litigation in her defence against possible impeachment.

A costs *de bonis propriis* can be awarded as a punitive order against public officials in constitutional litigation. As per *Biowatch*, the courts need not hesitate to exercise discretion in holding public representatives personally liable for costs in order to reinforce the constitutional values of accountability, responsiveness

and openness (Okpaluba, 2018). The inherent power of the courts to implement the *Biowatch* principle is enshrined in the Vexatious Proceedings Act 3 of 1956, the purpose of which is to prevent the persistent and ungrounded institution of legal proceedings, by allowing a court to screen (though not completely block) a litigant who has persistently and without any reasonable ground instituted legal proceedings in any higher or lower court (*Beinash v Ernst & Young* 1999 2 SA 116 (CC)).

"Frivolous" litigation refers to litigation with no serious purpose or value. It also usually refers to a contemptuous attitude adopted by a litigant, generally demonstrating disrespect towards the judges and the court (*Marib Holdings (Pty) Ltd v Parring* NO 2020 JDR 1576 (WCC)). "Vexatious" litigation refers to litigation instituted without proper cause or in good faith, designed to frustrate and harass a defendant, or to delay the administration of justice (*Lawyers for Human Rights v Minister in the Presidency* 2017 (1) SA 645 (CC)). A court may consider litigation as frivolous or vexatious in cases where litigation lacks merit as a matter of certainty (*L F Boshoff Investments Pty Ltd v Cape Town Municipality* 1969 (2) SA 256 (C)). The burden of proof is thus higher than a balance of probabilities – the court's inherent power to strike out these claims must be exercised with caution, and applies only to exceptional circumstances (*Bisset v Boland Bank Ltd* 1991 4 SA 603 (D)).

The increasing use of Stalingrad tactics in constitutional litigation and the risk of this burdening the taxpayer and distracting from legitimate constitutional questions have occasioned the courts to be proactive in using the Biowatch principle's exception to hold public officials personally liable for costs, even if this person was litigating in his or her official capacity to assert a constitutional right against the state.

However, the courts have noted their caution in taking this approach. Moegoeng CJ, in his minority judgment in *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC), warned against making personal costs orders against public officials fashionable. In his view, this is an exceptional remedy. Moegoeng CJ noted that punitive costs *de bonis propriis* are to be awarded when there is fraudulent, dishonest or vexatious conduct and conduct that amounts to an abuse of court process. He argued that the imposition of personal liability on public officials must be done with extreme vigilance because such decisions are likely to have a chilling effect on the public officials' willingness to confront perceived or alleged wrongdoing, especially by the rich, powerful or well-connected.

Yet the majority decision nevertheless recognised that the need to prevent egregious abuse of state power, gross negligence and bad faith necessitated

personal costs orders, even on a highly punitive scale, in certain circumstances. This vindicates the Constitution: personal costs orders are an essential constitutionally-infused mechanism that ensures that public officials act in good faith, fulfil their constitutional duties and uphold the rule of law. There is no merit in the argument that separation of powers considerations – the independence of one's office and proper performance of one's public functions – demand exemption from adverse personal costs orders, as the Public Protector tried to argue in the Constitutional Court in this case.

The courts have made good use of punitive costs orders to prevent the use of Stalingrad tactics by public officials in constitutional litigation. However, it is important that courts do not make such decisions in the abstract. The facts at hand must support each such order, and clear reasoning must be provided for the appropriateness of this course of action. It might be argued, for instance, that the High Court erred in *Gordhan v Public Protector* 2019 JDR 1328 by ordering costs against the Public Protector *de bonis propriis* without providing any reasons to justify this exceptional and punitive order. The Constitutional Court subsequently overturned the decision (*Economic Freedom Fighters v Gordhan*; *Public Protector v Gordhan* 2020 (6) SA 325 (CC)), and in this case the Public Protector managed to escape this extra censure for bad faith and negligence.

However, this method of preventing Stalingrad tactics has its limits when applied to the wealthy and powerful, since such litigants can draw out proceedings until their funds run out. While costs orders can drain the litigant's stamina and eventually stop Stalingrad methods, they are not a quick-fix.

Costs de bonis propriis against legal representatives

Stricter accountability in the legal profession can also be implemented by the courts through costs orders, instead of or in addition to disciplinary action by regulatory bodies. In cases of egregious abuse of court process, a court can order punitive costs *de bonis propriis* against a legal representative, who is then obliged to personally cover the costs of litigation. This is ordered as a mark of the court's displeasure with the legal representative's conduct (*SA Liquor Traders' Association and others v Chairperson, Gauteng Liquor Board and others* 2009 (1) SA 565 (CC)). The court's exercise of discretion must be guided by the dictates of fairness and justice in the particular circumstances.

However, such a punitive costs order against a legal representative is only applied in exceptional circumstances (*Thunder Cats Investments 49 (Pty) Ltd v Fenton* 2009 (4) SA 138 (C); *Webb and Others v Botha* 1980 (3) SA 666 (N)). Reasons are dishonesty, obstruction of the interest of justice, irresponsible and grossly

negligent conduct, litigating in a reckless manner, misleading the court, and gross incompetence and a lack of care.[18] Legal representatives are ethically obliged to pursue their client's rights and interests fearlessly and vigorously, without undue regard for their personal convenience (*Thunder Cats Investment*). However, this duty may only occur within a certain set of ethical parameters, which include a duty not to mislead the court or attempt to "weaponise" legal procedure in order to obstruct the interests of justice. Stalingrad tactics can cross this ethical line.

In fact, our courts have a history of applying the exceptional remedy of costs *de bonis propriis* against legal representatives who employed Stalingrad-type tactics, dating back to the 1980s. For example, the High Court has ordered an attorney to pay the costs of all the parties to an appeal on a punitive scale in a case in which it was a "foregone conclusion" that the client's appeal would not succeed, yet the attorney continued to brief the client and put forward highly technical arguments with no substance and which were designed to delay the inevitable (*Webb v Botha* 1980 (3) SA 666 (N)). Essentially, the court punished the attorney for failing to advise the client to abandon the appeal. The High Court has also ordered costs against an attorney in a case in which he lengthened proceedings not to clarify issues, but in order to put undue pressure on the opponents (*Khunou and Others v Fihrer and Son* 1982 (3) SA 353 (W)). More recently, the Labour Court ordered punitive personal costs against an attorney for persisting with a "meritless application" in a manner that did not indicate bona fides (*Xaba v IG Tooling & Light Engineering (Pty) Ltd* (2019) 40 ILJ 638 (LC)). In *KT v AT* 2020 (2) SA 516 (WCC) the High Court confirmed that a costs order can be made against a legal representative on the highest scale (attorney-client scale) in cases of vexatious and arduous litigation or egregious abuse of court process.

This reasoning would apply to the use of Stalingrad tactics when a client lacks a meritorious case. Legal representatives should know better and advise their clients against this. This is the professional ethical standard required of those within the law profession. Depending on the particular context, then, judges can use their discretion to order personal punitive costs against legal representatives who employ Stalingrad defence strategies. This is an exceptional remedy, but these are exceptional times. The weaponisation of legal procedure to delay government accountability is a considerable threat to the Constitution's

[18] See *Machumela v Santam Insurance Company Ltd* 1977 (1) SA 660 (A) at 663 and 664; *Silinga v Nelson Mandela Bay Metropolitan Municipality* 2018 JDR 0907 (ECG) para 8; *Indwe Risk Services (Pty) Ltd v Van Zyl* (2010) 31 ILJ 956 (LC) at 957; *Multi-Links Telecommunications v Africa Prepaid Services Nigeria Ltd* 2014 (3) SA 265 (GP) para 35.

fundamental values of accountability, responsiveness and openness. It also undermines the rule of law, justice and equity, as well as public confidence in the legal profession and justice system as a whole. The courts ought to make better use of this kind of costs order in support of the Constitution.

Lawfare: a blessing and a curse

Lawfare encapsulates the ongoing tensions between judicial review and democratic institutions in constitutional democracies. It is, then, both a blessing and a curse for South Africa's constitutional democracy. My argument is that the value of judicial review should centre more on its substance than its form. Judicial review can play a valuable role to fill an accountability vacuum, but it is a last-resort device. This should not be seen as an argument in favour of judicial overreach. In highly political matters, the separation of powers principle must be upheld through the cautious exercise of judicial deference. Yet there is little doubt that lawfare can be destructive in a constitutional democracy. This has been evident in the persistent use of Stalingrad legal tactics in South Africa in recent years, which undermine the rule of law and the justice system, and circumvent the democratic accountability framework established by the Constitution.

There are no easy or simple solutions to the problem of Stalingrad tactics in South Africa's constitutional democracy. However, I have highlighted key areas worth considering as the sites for possible change. To conclude: legal professionals need to consider the infusion of more inquisitorial elements into South Africa's primarily adversarial system; this could strengthen its legal system in the face of legalistic stalling tactics of the Stalingrad type. They need to critically evaluate why legal regulatory bodies are slow and inefficient in disciplining legal professionals who abuse court process and implement disciplinary policies that are clear, structured, fast-acting and firm in upholding their codes of conduct. Courts should order punitive costs *de bonis propriis* against public officials who employ Stalingrad tactics in constitutional litigation, in line with the *Biowatch* principle. And finally, the courts should also use punitive costs *de bonis propriis* against legal representatives who fail to meet their ethical professional standards by using these tactics. Costs *de bonis propriis* against public officials in constitutional litigation and against legal representatives are an exceptional remedy. But it is clearly within the scope of good judicial lawfare as outlined here to prevent the use of Stalingrad tactics by public representatives who seek to evade accountability. This phenomenon is an exceptional circumstance that gravely threatens South Africa's constitutional democracy.

Biographical details

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References

Comaroff, J. L. (2001). Colonialism, culture and the law: a foreword. *Law and Social Inquiry*, 26(2), 305–314.

Corder, H., & Hoexter, C. (2017). Lawfare in South Africa and its Effects on the Judiciary. *African Journal of Legal Studies*, 10, 105–126.

Davis, D., & Le Roux, M. (2008). *Lawfare: Judging politics in South Africa*. Cape Town: Jonathan Ball Publishers.

Davis, D., & Le Roux, M. (2009). *Precedent and Possibility: The (Ab)use of Law in South Africa*. Cape Town: Juta & Co Ltd.

Dicey, A. (1961). *Introduction to the Study of the Law of the Constitution* (10th Ed.). London: Macmillan.

Dugard, J. (1978). *Human Rights and the South African Legal Order*. Princeton: Princeton University Press.

Du Plessis, M., Penfold, G., & Brickhill, J. (2013). *Constitutional Litigation*. Cape Town: Juta.

Freeman, S. (1990). Constitutional Democracy and the Legitimacy of Judicial Review. *Law and Philosophy*, 9(4), 327–370.

Fuller, L. (1969). *The Morality of Law*. Yale: Yale University Press.

Goldstein, A. (1974). Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure. *Stanford Law Review*, 26(5), 1009–1025.

Klare, K. (1998). Legal Culture and Transformative Constitutionalism. *South African Journal on Human Rights*, 14(1), 146–188.

Meierhenrich, J. (2008). *The Legacies of Law: Long-Run Consequences of Legal Development in South Africa, 1652-2000*. New York: Cambridge University Press.

Mureinik, E. (1994). A Bridge to Where? Introducing the Interim Bill of Rights. *South African Journal on Human Rights*, 10(1), 31–48.

Rosenfeld, M. (2000). The Rule of Law and the Legitimacy of Constitutional Democracy. *California Law Review*, 1307–1377.

Rosenfeld, M. (2001). The Rule of Law and the Legitimacy of Constitutional Democracy. *Working Paper Series No. 36*.

Roux, T. (2020). The Constitutional Court's 2018 Term: Lawfare or Window on the Struggle for Democratic Social Transformation? *Constitutional Court Review*, 10, 1–42.

Sibanda, S. (2011). Not purpose-made! Transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty. *Stellenbosch Law Review*, 482–500.

Steytler, N. (2001). Making South African criminal procedure more inquisitorial. *Law, Democracy and Development*, 5, 1–30.

The World Justice Project (2021). *Rule of Law Index*. Washington, DC.

Waldron, J. (2006). The Core of the Case Against Judicial Review. *The Yale Law Journal*, 1346–1406.

Cases

Affordable Medicines Trust and Others v Minister of Health and Another [2005] ZACC 3 2006 (3) SA 247 (CC).

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC).

Biowatch Trust v Registrar, Genetic Resources 2009 (6) SA 232 (CC).

Bisset v Boland Bank Ltd 1991 4 SA 603 (D).

Black Sash Trust v Minister of Social Development 2018 (12) BCLR 1472 (CC).

Economic Freedom Fighters [EFF] v Speaker of the National Assembly 2018 (2) SA 571 (CC).

Economic Freedom Fighters v Gordhan; *Public Protector v Gordhan* 2020 (6) SA 325 (CC).

EFF v Speaker of the National Assembly; *Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 580 (CC).

Gordhan v Public Protector 2019 JDR 1328.

Indwe Risk Services (Pty) Ltd v Van Zyl (2010) 31 ILJ 956 (LC).

Khunou and Others v Fihrer and Son 1982 (3) SA 353 (W).

KT v AT 2020 (2) SA 516 (WCC).

L F Boshoff Investments Pty Ltd v Cape Town Municipality 1969 (2) SA 256 (C).

Lawyers for Human Rights v Minister in the Presidency 2017 (1) SA 645 (CC).

Machumela v Santam Insurance Company Ltd 1977 (1) SA 660 (A).

Marib Holdings (Pty) Ltd v Parring NO 2020 JDR 1576 (WCC).

Multi-Links Telecommunications v Africa Prepaid Services Nigeria Ltd 2014 (3) SA 265 (GP).

President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC).

Public Protector v South African Reserve Bank 2019 (6) SA 253 (CC).

Public Protector v Speaker of the National Assembly 2020 (12) BCLR 1491 (WCC).

SA Liquor Traders' Association and others v Chairperson, Gauteng Liquor Board and others 2009 (1) SA 565 (CC).

Silinga v Nelson Mandela Bay Metropolitan Municipality 2018 JDR 0907 (ECG).

The Legal Practice Council v Van Wyk 2021 JDR 3262 (WCC).

Thunder Cats Investments 49 (Pty) Ltd v Fenton 2009 (4) SA 138 (C).

Webb and Others v Botha 1980 (3) SA 666 (N).

Webb v Botha 1980 (3) SA 666 (N).

Xaba v IG Tooling & Light Engineering (Pty) Ltd (2019) 40 ILJ 638 (LC).

Zuma v Democratic Alliance 2021 (5) SA 189 (SCA).