THE FOUNDATION FOR HUMAN RIGHTS

THE PROSPECTS OF SUCCESS OF AN APPLICATION TO COMPEL THE PRESIDENT TO ESTABLISH A COMMISSION OF INQUIRY INTO THE SUPPRESSION OF THE TRC CASES

OPINION

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INTRODUCTION

1 The Foundation for Human Rights seeks our advice on the prospects of success of an application to compel the President of the Republic of South Africa (**the President**) to establish a commission of inquiry (**COI**) into the suppression of the cases referred by the Truth and Reconciliation Commission (**TRC**) to the National Prosecuting Authority (**NPA**) (**the TRC cases**) (**the application**).

2 We conclude that there are reasonable prospects of success in compelling the President so to act. Various considerations outlined by our courts oblige the President to exercise his power to establish a commission of inquiry in the appropriate circumstances.

3 This opinion is confined to the following questions:

3.1 whether section 84(2)(f) of the Constitution may be interpreted to impose a duty on the President to establish a COI in appropriate circumstances,

3.2 whether his failure to exercise that duty may be reviewed under the principle of legality, and

3.3 whether his failure to exercise that duty violates the Bill of Rights.

IS THE PRESIDENT OBLIGED IN CERTAIN CIRCUMSTANCES TO APPOINT A COI?

The source of the President's power to appoint a COI

4 Section 84 of the Constitution of the Republic of South Africa, 108 of 1996 (**the Constitution**) sets out the powers and functions of the President. Subsection 84(2)(f)

states that the President "*is responsible*" for appointing COIs. It constitutes the sole source of the President's power to appoint a COI.

5 The Constitutional Court (**CC**) has repeatedly referred to the President's power to establish a COI as an 'original' power which vests in the President by reason of the Constitution in his capacity as head of state.[1] The CC in **SARFU**[2] also described the President's power in terms of section 84(2)(f) as discretionary.[3] However, it is not entirely clear whether all the President's powers under section 84(2) are truly discretionary or not. For example, the President cannot refuse to exercise his responsibilities regarding receiving and recognising foreign diplomatic representatives and appointing ambassadors, diplomatic and consular representatives.[4] These are also powers mentioned in section 84(2) for which the President is "*responsible*".

6 The CC in **Von Abo v President of the Republic of South Africa**[5] noted that "*ready examples of constitutional **obligations** specifically entrusted to the President may be found in section 84(2) of the Constitution*" (own emphasis).[6]

Exercise of discretionary power

7 A person or entity may be obliged to exercise a power in certain circumstances. In **Veriava and Others v President, SA Medical and Dental Council, and Others**

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1 *Magidiwana v President of the Republic of South Africa* [2013] ZACC 27 at para 15.
2 *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) ("*SARFU"*).
3 At paras 145 – 147.
4 *See* sections 84(2)(h) & (i) of the Constitution.
5 2009 (10) BCLR 1052 (CC).
6 At para 37. *See also Minister for Justice and Constitutional Development v Chonco* 2010 (4) SA 82 (CC) at para 30; *SARFU* at paras 144 &148; *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) at paras 6–8.

("**Veriava**"),[7] the applicants (a group of medical professionals) sought an order directing the SA Medical and Dental Council to hold an investigation into alleged improper and disgraceful conduct by two doctors who treated Steve Biko before he died in Security Branch detention.

8 In terms of section 41 of the Medical, Dental and Supplementary Health Service Professions Act 56 of 1974, the Council had the power to institute an inquiry into any complaint, charge or allegation of improper or disgraceful conduct against any person registered under the Act, and, on finding such a person guilty of such conduct, to impose any of the penalties prescribed in section 42(1).

9 The Court held that:

> "Section 41 of the Act merely provides that the Council shall have power to institute an inquiry. It does not provide expressly that the Council shall be obliged to institute an inquiry. The words "shall have the power" of themselves only mean that it would be possible and competent for the Council to institute an inquiry into a complaint, a power which it would otherwise not have. The natural meaning is enabling only. There may however be circumstances which may couple the power with a duty to exercise it. In the case of Julius v The Lord Bishop of Oxford 5 (187980) A.C. 214 (H.L) [("**Julius**")] at pp 222 to 223 Earl Cairns L.C. remarked:
>
> > "There may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom power is reposed to exercise that power when called upon to do so.""[8] (own emphasis)

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7 [1985] 2 All SA 1 (T).
8 At pp 17 – 18.

10 **Veriava** makes clear that where an entity is given what appears to be a discretionary power, it may still be obliged to exercise that power where the factors identified in the English case of **Julius** warrant as much.

11 The Appellate Division in **Schwartz v Schwartz**,[9] in dealing with the court's powers under the Divorce Act, extrapolated upon the factors identified in **Julius**:

> "In the first place, I am not convinced that s 4 (1) [of the Divorce Act 70 of 1979] does confer upon the Court the kind of discretion contemplated by counsel's submission. It is true that s 4 (1) is couched in permissive terms. It provides that a Court "may grant a decree of divorce" (Afrikaans text: "kan 'n egskeidingsbevel... verleen"). It does not necessarily follow, however, that the Legislature intended to confer a discretion on the Court. Section 4 (1) is clearly an empowering section: it confers legislatively a power which the Court did not previously enjoy. A statutory enactment conferring a power in permissive language may nevertheless have to be construed as making it the duty of the person or authority in whom the power is reposed to exercise that power when the conditions prescribed as justifying its exercise have been satisfied. Whether an enactment should be so construed depends on, inter alia, the language in which it is couched, the context in which it appears, the general scope and object of the legislation, the nature of the thing empowered to be done and the person or persons for whose benefit the power is to be exercised.…As was pointed out in the Noble & Barbour case supra, this does not involve reading the word "may" as meaning "must". As long as the English language retains its meaning "may" can never be equivalent to "must". It is a question whether the grant of the permissive power also imports an obligation in certain circumstances to use the power."[10] (own emphasis)

12 The CC in **Saidi**[11] confirmed that a discretionary power may be coupled with a duty in appropriate circumstances. In this case the CC had to consider whether a Refugee Reception Officer has the power to extend a temporary asylum permit pending the outcome of a judicial review of a decision of a Refugee Status Determination Officer rejecting an application for asylum. The CC held that *"[a] permissive power which imposes an obligation to act does not negate the existence of a discretion. Instead, it*

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9 [1984] 4 All SA 645 (AD).
10 At p 650.
11 *Saidi v Minister of Home Affairs* 2018 (7) BCLR 856 (CC).

eliminates the option of deciding not to use the power. This means that if conditions for exercising the power are met, the repository is obliged to use it".[12]

13 Therefore, the principle that a decision-maker may be obliged to exercise a discretionary power in certain circumstances[13] has been confirmed by the CC and the factors which may require its exercise have been settled.[14] Based on **Julius** and **Schwartz**, these factors may be summarised as follows:

13.1 the legislative context and the language of the text giving rise to the power,

13.2 the nature of the power,

13.3 the purpose of the power,

13.4 the conditions under which the power must be exercised, and

13.5 those for whose benefit the power is exercised.

14 The question that arises is whether the power for which the President is "responsible" in terms of section 84(2)(f) of the Constitution is one which he may be compelled to exercise in appropriate circumstances.

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12 At para 72.

13 The circumstances and relevant context of this matter are set out below under "Legality Review".

14 In *South African Railways Appellant v New Silverton Estate Ltd* 1946 AD 830 at 842 it was held that permissive terms in a statute are more readily construed as creating an obligation when the statute authorises the course of action in question for the public good.

Compelling the President to appoint a COI

15 At the outset, it must be stated that there is no decided case in South African law where the President has been compelled by a non-state entity to establish a COI in terms of the Constitution. The President has previously been directed to establish a commission of inquiry by a state entity, namely the Public Protector,[15] but that was pursuant to the Public Protector's remedial powers.

16 In addition, the President has been compelled to establish an investigation by a non-state entity in terms of statute, but not in terms of the Constitution. In **FUL**,[16] the applicant sought an order directing the President to act in terms of section 12(6)(a) of the NPA Act to suspend advocates Nomgcobo Jiba and Lawrence Mrwebi of the NPA and to institute an enquiry into their fitness to hold office. The applicant contended that in the light of scathing comments in four judgments and two reports on their impropriety, the President ought to have exercised his powers in terms of section 12(6)(a) of the NPA Act to suspend the two officials and institute enquiries into their fitness to hold office. The Court reviewed and set aside the President's failure and directed the President to institute the inquiries.[17]

17 In **Crawford-Browne**,[18] the applicant attempted to compel the President to establish a COI, but the matter was settled out of court and the President later established the Arms Commission as prayed for.[19]

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15 *See* "State of Capture" report by the Public Protector, para 8.4 p 353, accessible at https://www.corruptionwatch.org.za/wp-content/uploads/2016/11/State-of-Capture-October2016.pdf

16 *Freedom Under Law (RF) NPC v National Director of Public Prosecutions* 2018 (1) SACR 436 (GP).

17 At paras 87 & 100.

18 *Crawford-Browne v The President of South Africa* Case No CCT 103/2010.

19 The Notice of Motion sought *inter alia* "an order directing the President to appoint an independent commission of inquiry to complete the work left undone by the Arms Procurement Commission on the

18 In **Daniel**,[20] the applicant sought to compel the President to appoint a COI into corruption in Mpumalanga and applied for direct access to the CC on the ground that such an issue fell exclusively within the jurisdiction of the CC. The Court declined to grant direct access holding that it was not in the interests of justice to make the CC a court of first and last instance in those circumstances. When the applicant sought to rescind the order, the CC confirmed its earlier order, notably holding that section 84(2)(f) does not impose a duty on the President but grants a power which may be exercised at his discretion.[21] Accordingly, the CC held that the President's failure to appoint a COI did not amount to a failure to fulfil a constitutional obligation and was therefore not a matter within the exclusive jurisdiction of the CC, and should have been first heard in the High Court.[22]

19 We are of the view that the CC's pronouncements in **Daniel** are not an absolute bar to the envisaged application. In **Daniel** the Court was seized primarily with the issue of jurisdiction. It was not specifically seized with the question of whether there may be circumstances which would oblige the President to exercise his discretion to appoint a COI. We must nevertheless reckon with what the CC said about the nature of the President's power to appoint a COI.

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same terms of reference as were given to the Arms Procurement Commission, plus a mandate to investigate misfeasance and malfeasance in the sub-contracts that relate to the said procurements".

20 *Daniel v President of the Republic of South Africa* 2013 (11) BCLR 1241 (CC).

21 However, in *Minister for Justice and Constitutional Development v Chonco* 2010 (4) SA 82 (CC) the CC in considering an application for a presidential pardon in terms of s 84(2)(j) of the Constitution found that the powers, functions and obligations contained in the section vest solely in the President and concluded that the matter should have come directly before the CC in terms of s 167(4)(e) as it concerned presidential obligations, namely functions exclusively belonging to the head of state (at para 43).This subsection states that only the CC may decide whether the President has failed to fulfil a constitutional obligation.

22 At paras 10 – 14.

20 In 2018 the Full Bench of the Gauteng Division, in an application brought by the President to review the Public Protector's direction that he establish a COI, rejected the President's reliance on **Daniel** to the effect that section 84(2)(f) does not impose a duty but merely a discretionary power.[23]

21 The Full Bench concluded that the President's power in section 84(2)(f) of the Constitution was indeed a power coupled with a duty:

> "That the President does not enjoy untrammelled powers is to be inferred from the wording of section 84 of the Constitution. The section is cast in obligatory language. Section 84(1) provides that the President has the powers "entrusted by the Constitution" and, in subsection (2), it is provided that the President is "responsible for . . ." appointing commissions of enquiry. According to the Oxford Dictionary one of the meanings of "entrust" is "to give responsibility to". The ordinary meaning of the word "responsible" is "answerable; accountable; liable to account". The use of these words implies that the power to appoint a commission of inquiry is a power coupled with a duty.
>
> To sum up, even though the Constitution vests in the President the power to appoint a commission of inquiry, this power is not an untrammelled one; it must be exercised within the constraints that the Constitution imposes. The President's power to appoint a commission of inquiry will necessarily be curtailed where his ability to conduct himself without constraint brings him into conflict with his obligations under the Constitution." [24] (own emphasis)

22 The constraints upon the President's power were set out by the CC in **SARFU**:

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23 *President of the Republic of South Africa v Office of the Public Protector* 2018 (2) SA 100 (GP) para 70: "Daniels was concerned with the question whether the Constitutional Court - as opposed to the Supreme Court of Appeal and the High Court - had jurisdiction in terms of s 167(4)(e) of the Constitution to decide whether the President had failed to fulfil a constitutional obligation. Section 167(4)(e) provides that only the Constitutional Court can decide whether the President has failed to fulfil a constitutional obligation. The enquiry in Daniels was whether the President's power in terms of section 84(2) (f) of the Constitution in an obligation within the meaning of section 167(4)(e). As appears from the aforesaid dictum, it was held in Daniels that, that the "obligation" in s 167(4)(e) means a duty that is specifically imposed on the President to perform specified conduct. The President's power to appoint a commission of inquiry in terms of s 84(2)(f) is not a duty specifically imposed upon him by the Constitution and is therefore not justiciable under s 167(4)(e). But such power is justiciable under s 172(2)(a) of the Constitution, which empowers the High Court and the Supreme Court of Appeal to make orders concerning the constitutional validity of any conduct of the President. See *Von Abo v President of the Republic of South Africa* and President of the *Republic of South Africa v South African Rugby Football Union.* Daniels is thus not supportive of the President's contention."

24 At paras 68 & 71.

> "It does not follow, of course, that because the President's conduct in exercising the power conferred upon him by section 84(2)(f) does not constitute administrative action, there are no constraints upon it. The constraints upon the President when exercising powers under section 84(2) are clear: … the exercise of the powers must not infringe any provision of the Bill of Rights; the exercise of the powers is also clearly constrained by the principle of legality and, as is implicit in the Constitution, the President must act in good faith and must not misconstrue the powers. These are significant constraints upon the exercise of the President's power. They arise from provisions of the Constitution other than the administrative justice clause. In the past, under the doctrine of parliamentary supremacy, the major source of constraint upon the exercise of public power lay in administrative law, which was developed to embrace the exercise of public power in fields which, strictly speaking, might not have constituted administration. Now, under our new constitutional order, the constraints are to be found throughout the Constitution, including the right, and corresponding obligation, that there be just administrative action."[25] (own emphasis)

23 Accordingly, the President in exercising his powers under s 84(2)(f) must comply with the principle of legality, in that he: (i) must act in good faith, (ii) must not misconstrue his powers, and (iii) he must not act arbitrarily and his decision must be rationally-related to the purpose for which the power was given.[26]

24 Conversely, therefore, an exercise of the President's power under section 84(2)(f) (including a failure to appoint a commission) may be reviewed under the principle of legality which is an incident of the rule of law. The principle of legality acts as a residual source of review jurisdiction for the exercise of public power of a non-administrative nature.[27] The exercise of the President's power in terms of section 84(2)(f) may also be impugned to the extent that it infringes a provision of the Bill of Rights. We deal with these in turn.

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25 At para 148.

26 *Ibid*, *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at para 85.

27 Hoexter C, "Administrative Law in South Africa" 2 ed *Juta* pp 121 – 125.

LEGALITY REVIEW

25 The question we address in this section is whether the refusal to appoint a COI into the TRC cases, or the failure to take and communicate a decision (process or means), constitutes a breach of the principle of legality.

26 We do not have evidence that the President has acted *mala fide* or for an ulterior purpose. On the information currently before us, the legality review is most likely to succeed on the basis that the President has improperly exercised his power under the Constitution or misconceived the nature of his powers and acted irrationally. The threshold of rationality is a low one. The President enjoys wide discretion in deciding whether and when to appoint a COI. He will however have to show that his decision and the process or means adopted are rationally connected to the purpose for which the power was granted.

Matters of public concern

27 The CC has described the purpose behind the power to appoint a COI as including:

27.1 investigating matters of public concern to restore public confidence in the institution in which the matter that caused concern arose;[28]

27.2 serving a deeper public purpose, particularly at times of widespread disquiet and discontent;[29]

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28 *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Jacob Gedleyihlekisa Zuma* [2021] ZACC 2 (CC) at paras 2 and 5.

29 *Magidiwana and Others v President of the Republic of South Africa and Others (Black Lawyers Association as Amicus Curiae*) at para 15.

27.3 serving indispensable accountability and transparency purposes;[30] and

27.4 serving the need, not only of the victims of the events investigated and those closely affected to know the truth but also the country at large.[31]

28 Section 84(2)(f) of the Constitution does not constrain the subject matter of any COI that the President may appoint. By contrast, the Commissions Act 8 of 1947 limits COIs to matters of "*public concern*".

29 The rulings of the CC read with section 1(1) of the Commissions Act require a closer examination of the term "*a matter of public concern*".[32] In conceptualising 'public concern' the CC in **Minister of Police v Premier, Western Cape**[33] noted:

> "In addition to advising the executive, a commission of inquiry serves a deeper public purpose, particularly at *times* of widespread disquiet and discontent. In the words of Cory J of the Canadian Supreme Court in *Phillips v Nova Scotia:*[34]
>
> > "One of the primary functions of public inquiries is fact-finding. They are often convened, in the wake of public shock, horror, disillusionment, or scepticism, in order to uncover 'the truth'. . .. In *times* of public questioning, stress and concern they provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem. Both the status and high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence not only in the institution or situation investigated but also in the process of government as a whole. They are an excellent means of informing and educating concerned members of the public."[35]

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30 *Ibid*.
31 At para 15.
32 Section 1(1).
33 2014 (1) SA 1 (CC).
34 [1995] 2 SCR 97.
35 *Ibid* at pp 137 – 138.

30 In determining what is a matter of public concern the CC in **Secretary of the Judicial Commission** held that the term is subject to an objectively ascertainable standard:

> "The phrase "a matter of public concern" is subject to an objectively ascertainable standard. It does not *mean* what the President in his or her mind views as public interest. Instead, it refers to the concern that the general public had in respect of the matter to be investigated by the Commission vested with coercive powers in the Commissions Act. [36]
>
> With regard to *the* objective test and the proper approach to the interpretation of the phrase, this Court said in *SARFU III*:[37]
>
> > "In determining whether the subject-matter of the commission's investigation is indeed a 'matter of public concern', the test to be applied is an objective one. The legally relevant question is not whether the President thought that the subject-matter of the inquiry was a matter of public concern, but whether it was objectively so at the time the decision was taken. Whether or not the matter is one of public concern is a question for the courts to determine and not a matter to be decided by the President within his own discretion. In this context, the Constitution requires that the notion of 'public concern' be *interpreted* so as to promote the spirit, purport and objects of the Bill of Rights and to underscore the democratic values of human dignity, equality and freedom. The purpose of the requirement that a matter be one of public concern is, on the one hand, to protect the interests of individuals by limiting the range of matters in respect of which the President may confer powers of compulsion upon a commission and, on the other, to protect the interests of the public by enabling effective investigation of matters that are of public concern."[38]

31 The CC in **SARFU** stressed that in the context of the Commissions Act, a matter is of public concern if it evokes public anxiety or worry and interest:

> "The Oxford English Dictionary defines the term 'concern' as 'anxiety or worry; or matter of interest or importance to one'. The first meaning given is the meaning of 'worry or anxiety'. The second *meaning* is a matter of interest or importance. In our view, 'public concern', as it is used in the Commissions Act, should be interpreted in a way which involves both the notion of 'anxiety' and 'interest'. A matter of public concern is, therefore, not a matter in which the public merely has an interest, it is a matter about which the public is also concerned. 'Public concern' in this context is therefore a more restricted notion than that of public interest."

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36 At para 16.
37 At para 17.
38 *SARFU* at para 171.

32 In ascertaining whether a matter rises to a 'matter of public concern' the test is an objective one. In addition, the notion of 'public concern must' be interpreted to promote the spirit, purport and objects of the Bill of Rights and to underscore the democratic values of human dignity, equality and freedom.

33 While the President's power in section 84(2)(f) is not limited to matters of public concern, in our view, the starting point would be an examination of the nature of the concern that might be triggered to compel the President to appoint a COI. Being the exercise of a public power, we assume that implicit in section 84(2)(b) is a requirement that it be only exercised in the public interest.

34 The concern in the present case relates to the failure to prosecute cases arising out of the TRC process. In this regard evidence of possible, potential, or actual impact will be particularly instructive. The source of the concern may also play an important role in that concern expressed by those most directly affected may be weighted higher than evidence of concern from others.

35 While matters of public concern do not lend themselves to quantification it may be possible to consider how widespread the concern is. The spectrum ranges from a concern amongst some individuals, to a concern to a community to widespread concern in the entire nation. It is likely that a concern amongst a few persons would not constitute a significant public concern, but we would suggest that nationwide anxiety need not be present before a matter becomes a matter of public concern. In this regard the observation of the CC in **SARFU** is helpful:

> "The use of "public" to qualify concern makes it clear therefore that the concern must not be a private or undisclosed concern of the President. It must be a concern of members of the public and which is widely shared. The word "public" needs to be construed in its context and with common sense. It would be quite inappropriate to require the concern

> to be one shared by every single member of the South African public, for that would be to create a condition that could, arguably, never be met. However, the concern must be one shared by a significant segment or portion of the public."[39]

36 Concern that is present across different groups, organisations or regions tends to be indicative of a significant public concern. It may also be possible to consider the amount, effort, and frequency the concerns have been expressed in the media and at the public level.

Irrational or arbitrary decision

37 Various letters have been sent to the President urging him to appoint a COI into the failure to prosecute persons who were either refused amnesty or did not apply for amnesty under the TRC processes. Nothing has come of those letters.

38 As discussed above, a matter of public concern is a matter of gravity, warranting a pressing need to uncover the truth to alleviate victim and public discontent, formulate corrective measures, and restore confidence in the implicated institutions. We do not yet know why the President has declined the requests for the appointment of a COI. At this stage we cannot conclude that his decision is irrational. It can be said, however, that the absence of reasons – at this stage – renders his decision *prima facie* arbitrary.[40]

39 In the letters addressed to the President on 5 February 2019 (**letter 1**) and 24 March 2021 (**letter 2**) the former TRC Commissioners pointed out that the approximately 400

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39 At paras 171 & 174 – 175. *See also Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Jacob Gedleyihlekisa Zuma* at paras 16 – 18.

40 *Minister of Justice and Another v SA Restructuring and Insolvency Practitioners Association and Others* 2018 (5) SA 389 (CC) at paras 49 – 54.

cases suppressed by political interference comprised some of the most serious crimes in South Africa's history, including murder, kidnapping, torture and various crimes against humanity. In relation to impact they stated in letter 2:

> "Perhaps more than any other class of cases, the suppression of the TRC cases has been almost total in its impact. Virtually all the 400 cases were blocked. The impact visited on the families of those murdered, their communities and on the fabric of society is incalculable. The harm done to the families and our society demands an expeditious, thorough, and credible inquiry into the machinations that resulted in such a massive denial of justice".

40 In this regard, an aggravating factor is that most of the TRC cases, given their age, will not be able to be revived as suspects and witnesses have died. This means that the damage to the associated families and their communities is permanent and they are accordingly entitled to answers. We are advised that an additional aggravating factor is that, to date, negligible progress has been made in the few cases that can be taken forward in recent years, which suggests that the institutional problems of the past still persist.[41] The little progress made is attributable directly to the considerable efforts of the families and their investigators and legal representatives.

41 The letters dated 23 June 2019 and 23 June 2020 addressed to the President by the families of Chief Albert Luthuli, Steve Biko, the Cradock Four, Nokuthula Simelane, Ahmed Timol, Dr Neil Aggett, Imam Haron and 14 other families expressed their deep pain and anguish at having been denied truth and justice in the new South Africa. They demanded answers and an enquiry into the massive denial of justice they have endured.

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[41] Only 2 indictments have been issued in the last 5 years in the cases of Nokuthula Simelane and Ahmed Timol, but neither case has commenced.

42 Letter 2 from the former TRC Commissioners pointed out:

42.1 that there was considerable evidence of the suppression of the TRC cases in court papers,

42.2 that senior NPA officials had admitted under oath in the **Rodrigues**[42] matter that the NPA had succumbed to political pressure,

42.3 that the full bench in **Rodrigues** had called for the NPA and the Executive to take steps to enquire into the suppression,[43] which to date has not happened,

42.4 that appropriate action to prevent recurrence can only be based on a full and thorough inquiry,

42.5 that an inquiry was needed to uncover:

42.5.1 the reasons behind the suppression of the cases,

42.5.2 the sources of the interference,

42.5.3 the arrangements and agreements struck between individuals and entities within and outside government.

42.5.4 how the will of outsiders was imposed on the NPA and the SAPS.

42.6 that the available evidence pointed to the involvement of:

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42 3 All SA 962 (GJ) 2019; (2) SACR 251 (GJ) 2019.
43 At para 65. *See also* paras 21 – 24 and 57 – 64.

42.6.1 multiple entities and individuals across the public sector, including the Department of Justice and Correctional Services, the National Intelligence Agency, the NPA, the SAPS, the Department of Defence, and the Office of the Presidency, and

42.6.2 persons possibly implicated included politicians, cabinet ministers, senior civil servants, senior police officers and prosecutors.

42.7 that potentially serious common law and statutory crimes were committed,

42.8 that families of victims of apartheid-era crimes and their communities have lost all trust and confidence in the SAPS and NPA,

42.9 that the suppression has provoked much anxiety and worry amongst many South Africans who regard the suppression of these cases as a matter of great public interest and importance,

42.10 that the suppression of the TRC cases deeply offends the human dignity of the families and their communities, and

42.11 that the rights of the families to equality before the law has been grossly disrespected in that their cases were treated differently from other serious criminal cases for purposes of serving undisclosed political and/ or ulterior ends.

43 Letter 1 also pointed out the historical significance of pursuing the TRC cases as well as the legal and moral obligations arising from South Africa's transition from apartheid to democracy.

44 In our considered view the subject matter in question clearly constitutes a matter of deep public concern in the light of the following factors:

44.1 The suppression of hundreds of serious criminal cases, mostly murders, constitutes a massive subversion of the rule of law,

44.2 Families have been impacted from across the country in all provinces,

44.3 The anguish they have experienced is evident from their letters to the President and from multiple media statements over several years,[44]

44.4 Several organisations have expressed their public concern at the failure to investigate and prosecute the TRC cases, and in this regard,

44.4.1 Family members have established the Apartheid-Era Victims' Families Group to fight for justice.[45]

44.4.2 11 organisations have formed the South African Coalition for Transitional Justice to pursue the unfinished business of the TRC. [46]

45 The subject matter is without question an important one, and one that has provoked considerable anxiety amongst many people across the country, qualifying it as a matter of significant public concern.

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44 *See for example* https://www.ahmedtimol.co.za/news/ and https://unfinishedtrc.co.za/
45 *See* https://www.ahmedtimol.co.za/apartheid-era-victims-family-group-avfg/
46 *See* https://unfinishedtrc.co.za/the-south-african-coalition-for-transitional-justice/

46 In our view a refusal or failure to appoint a commission of inquiry into the suppression of the TRC cases:

46.1 Shuts down or prevents the search for the truth behind the massive denial of justice to hundreds of families. (This is particularly the case since the implicated institutions can hardly be expected to carry out credible investigations against themselves),

46.2 Further undermines confidence in the implicated institutions, most notably the NPA and SAPS, but also the Ministry of Justice, National Intelligence Agency, Department of Defence, and the Presidency,

46.3 Raises deep suspicions that these institutions have something to hide,

46.4 Gives rise to the impression that they are being shielded from scrutiny and protected from possible embarrassment,

46.5 Serves to heighten and exacerbate the already existing widespread disquiet and discontent on this issue.

47 We are accordingly of the view that the decision to refuse to appoint a commission of inquiry is subject to judicial review. Much will depend on the President's response to any such application and the reasons he provides for not appointing a COI.

The President's failure to respond

48 The failure of the President to: (i) respond substantively to letters 1 and 2 from the TRC Commissioners in February 2019 and March 2021 and the victims' families' letters of June 2019 and June 2020; and (ii) to make and communicate a decision, delays and

jeopardises the outcome of an inquiry into the suppression of the TRC cases. Such failure has the same deleterious impact set out in the preceding paragraphs.

49 There is therefore room to argue that the President has at least failed to perform the following constitutional obligations imposed on him:

49.1 in section 7(2) of the Constitution, to respect, protect, promote and fulfil his rights in the Bill of Rights

49.2 in section 195 of the Constitution, to act in accordance with various basic values governing public administration, including the need to respond to people's needs and the requirements of transparency.

50 The President may also be guilty of violating the rule of law. Section 1 of the Constitution, aside from being the source of the legality principle, more generally upholds the rule of law as a constitutional value. The fact that serious crimes from the past have been suppressed deeply implicates the rule of law. This violation of the rule of law is exacerbated by the refusal or failure to get to the bottom of the suppression of the cases. The relationship between crime and the rule of law has been recognised by Ngcobo J as follows:

> "Crime strikes at the very core of the fabric of our society. It undermines some of the fundamental human rights enshrined in our Bill of Rights. It violates the right to life, the right to freedom and security, the right to property and the right to dignity to mention a few. It undermines the rule of law, a foundational value of our constitutional democracy. What is more, those who commit crimes violate their constitutional duties and responsibilities as citizens of this country. The State has a constitutional duty to eliminate crime. This obligation flows generally from its obligation to 'respect, protect, promote and fulfil the rights in the Bill of Rights'."[47]

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47 *Minister of Home Affairs v NICRO* 2005 (3) SA 280 (CC) per Ngcobo J, minority judgment at para 44.

INFRINGEMENTS OF THE BILL OF RIGHTS

51 The exercise of the President's power under section 84(2)(f) may also be impugned to the extent that it infringes any provision of the Bill of Rights.[48] In this section we consider possible violations of the rights to dignity, life and freedom and security of the person.

Violation of the right to dignity

52 Human dignity has been described as a foundational value of the constitutional order.[49] The CC has held that the protection of dignity "*requires us to acknowledge the value and worth of all individuals as members of society*".[50] The respect and importance of human dignity requires that the exercise of power, particularly the power of the state, must be premised on the inherent worth of human beings. The legality of any official action must be assessed in terms of whether human dignity is undermined in any way.[51] The right to dignity under section 10 has a wide sweep and underpins many of the other rights in the Bill of Rights. The CC has stressed the way in which dignity is intricately linked with other human rights.

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48 *SARFU* at para 148: "It does not follow, of course, that because the President's conduct in exercising the power conferred upon him by section 84(2)(f) does not constitute administrative action, there are no constraints upon it. The constraints upon the President when exercising powers *under* section 84(2) are clear: the President is required to exercise the powers personally …. **the exercise of the powers must not infringe any provision of the Bill of Rights** …" (emphasis added). Separate, and in addition to this requirement, once a commission is appointed and the Commission's Act invoked it must be done "subject to an opportunity to be heard" (*SARFU* at para 220). Moreover, subsequent conduct by a commission is constrained by the duty to act fairly (as per *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) at paras 233B-C).

49 A Chaskalson "Human Dignity as a Foundational Value of our Constitutional Order" 2000 SAJHR 193.

50 *Nyathi v Member of the Executive Council for the Department of Health Gauteng and Another* 2008 (5) SA 94 (CC) at para 45.

51 *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC); GE Devenish, *Constitutional Law*, Law of South Africa at paras 41 – 42.

53 In **S v Makwanyane**[52] O'Regan J stated

> "Recognising a right to dignity is an acknowledgement of the intrinsic worth or human beings: human beings are entitled to be *treated* as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in ... [the Bill of Rights.]"[53]

54 Chaskalson J went further in that case to say

> "The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in the Bill of Rights. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others."[54]

55 In **AZAPO v President of the Republic of South Africa** ("**AZAPO**")[55] the CC recognised that ongoing impunity constitutes an infringement of the right to dignity:

> "Every decent human being must feel grave discomfort in living with a consequence which might allow the perpetrators of evil acts to walk the streets of this land with impunity, protected in their freedom by an amnesty immune from constitutional attack…"[56]

56 It is in the light of this reasoning that we submit that the decision and/ or the failure to take a decision is an affront to the human dignity of the members of the families of victims of apartheid era crimes. In affording those behind the suppression of the TRC cases further opportunities to escape scrutiny, the intrinsic worth of the victims is degraded.[57]

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52 1995 (3) SA 391 (CC).
53 *S v Makwanyane* at para 44.
54 *S v Makwanyane* at para 144.
55 1996 (4) SA 562 (CC).
56 *Azapo* at para 17.
57 *S v Makwanyane* per O'Regan J at para 44.

57 The refusal to appoint a commission of inquiry into the suppression of the TRC cases, alternatively the failure to make and communicate a decision, offends the dignity of the families associated with the suppressed cases since it:

57.1 protects the perpetrators of gross human rights and those behind the suppression of the cases at the expense of the families,

57.2 causes suffering to the families by denying them knowledge and truth as to what happened to the cases of their loved ones,

57.3 prevents the families from reaching closure or resolution of past injustices,

57.4 dishonours the respect, dignity, value, and acceptance of the families in the wider community.

58 In the circumstances, it is submitted that it can be contended that the decision or the failure to take a decision infringes the rights of the families to the protection of their dignity under section 8 of the Constitution.

Violation of the right to life and the right to freedom and security of the person

59 The President's decision violates the rights of victims and their families to life by: (i) declining or failing to authorise an inquiry into the suppression of the investigations and prosecutions of perpetrators who infringed this right by committing acts of murder and enforced disappearances; and (ii) failing to give value to the lives of victims of apartheid-era crimes.

60 The President's decision violates the rights of victims to freedom and security of the person by declining or failing to authorise an inquiry into the suppression of the

investigations and prosecutions of perpetrators who infringed this right by committing acts of torture, assault and other cruel and inhuman treatment.

61 The right to life is protected by section 11 of the Constitution, which states that "*everyone has the right to life*", and section 12(1) recognises that:

> "Everyone has the right to freedom and security of the person, which includes the right-
> …
> (c) to be free from all forms of violence from either public or private sources,
> (d) not to be tortured in any way; and
> (e) not to be treated or punished in a cruel, inhuman or degrading way."

62 A challenge based on the rights to life and to freedom and security of the person are typically based on the obligations of the State to take reasonable measures to address violent crime. As the CC stated:

> "Crimes … resulting in loss of life … touch every one of us because they offend our deepest principles of human rights - the right to life and the right to freedom and security of the person …"[58]

63 In ***S v Basson***,[59] the CC held:

> "… In a constitutional State the criminal law plays an important role in protecting constitutional rights and values. So, for example, the prosecution of murder is an essential means of protecting the right to life, and the prosecution of assault and rape a means of protecting the right to bodily integrity. The State must protect these rights through, amongst other things, the policing and prosecution of crime.
>
> The constitutional obligation upon the State to prosecute those offences which threaten or infringe the rights of citizens is of central importance in our constitutional framework. … By providing for an independent prosecuting authority with the power to institute criminal proceedings, the Constitution makes it plain that the effective prosecution of crime is an important constitutional objective. Where, therefore, a court quashes charges on the ground that they do not disclose an offence with the result that the State cannot prosecute that accused for that offence, the constitutional obligation of the prosecuting authority and the State, in turn, is obstructed. The constitutional import of such a

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58 *S v Molimi* 2008 (3) SA 608 (CC) at para 52; *see also Minister of Home Affairs v NICRO* 2005 (3) SA 280 (CC) per Ngcobo J at para 144.

59 2005 (1) SA 171 (CC).

> consequence is particularly severe where the State is in effect prevented from prosecuting an offence aimed at protecting the right to life and security of the person."[60]

64 The CC has also recognised the clear connection between crime and the right to freedom and security of the person, thus:

> "Section 12 of the Constitution guarantees everyone the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources. In a society marred by violent crime, the importance of protecting this right cannot be overstated."[61]

65 In considering the obligations imposed by the rights to life, dignity and freedom and security of the person, the CC held that:

> "It follows that there is a duty imposed on the State and all of its organs not to perform any act that infringes these rights. In some circumstances there would also be a positive component which obliges the State and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection."[62]

66 According to the Supreme Court of Appeal:

> "Section 12(1)(c) requires the State to protect individuals, both by refraining from such invasions itself and by taking active steps to prevent violation of the right. The subsection places a positive duty on the State to protect everyone from violent crime."[63]

67 In the circumstances, it can be argued that a decision not to inquire into the suppression of the TRC cases, or a failure to make such a decision, infringes the rights to life and to freedom and security of the person. Of course, this would be true of the

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60 At paras 31 – 32.

61 *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* 2007 (4) SA 395 (CC) at para 37; *see also NM v Smith (Freedom of Expression Institute as Amicus Curiae)* 2007 (5) SA 250 (CC) at para 134.

62 *Carmichele v Minister of Safety & Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) at para 44, approved *in Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) at para 71.

63 *Van Eeden v Minister of Safety & Security (Women's Legal Centre Trust, as Amicus Curiae)* 2003 (1) SA 389 (SCA) at para 13, citing *S v Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425 (CC) at para 11.

victims of apartheid era crimes but it is likely that the courts would recognise these rights as extending to the families of the victims as well.

CONCLUSION

68 In conclusion we are of the view that:

68.1 The power of the President under section 84(2)(f) of the Constitution to appoint a COI is coupled with a duty, which he is required to exercise in appropriate circumstances.

68.2 In the circumstances and context described in the instant matter, a duty or obligation to appoint a COI does arise.

68.3 In the circumstances and context of this matter, a refusal or failure to appoint a COI constitutes a violation of the families' rights to dignity. It would also likely result in a violation of the right to life and the right to bodily integrity.

68.4 The refusal or failure of the President to appoint a COI in these circumstances is accordingly susceptible to a review under the legality principle as well as a Bill of Rights challenge.

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31 May 2021