OF PRESIDENT ZUMA, NKANDLA AND THE CONSTITUTIONAL IMPERATIVES OF SOUTH AFRICA

By

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Declaration of originality

I Kgalalelo Abigail Segwagwa, declared that the work presented in this dissertation is original and that it has never been presented in any other University or Organization and that all the sources have been properly acknowledged.

KGALALELO ABIGAIL SEGWAGWA

SIGNED…….

DATE…….

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LIST OF ABBREVIATIONS

Chief Justice	CJ
Democratic Alliance	DA
Economic Freedom Fighters	EFF
African National Congress	ANC
Constitutional Court	CC
South Africa	S A
South African Broadcasting Corporation	SABC

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Chapter one

1.1 Background

South Africa is currently experiencing an unprecedented rise in corruption, maladministration and constitutional transgression executed by the ruling elite. This is despite the constitution having put controlling mechanisms in place to protect the society against governmental tyranny and abuse of power. In March 2014 the Public Protector released a report detailing how President Zuma's private residence was renovated and up-scaled at the tax payer's expense. The renovations that were disputed were non-security upgrades which were done solely to enrich and unduly benefit the President. These developments included the chicken coop, cattle kraal, visitors' center, amphitheater and a swimming pool.

As remedial action, the Public Protector directed that relevant state organs should work out a reasonable portion of the money to be paid and that the president should pay the said expenses. The report was submitted to the President and also to the National Assembly in order for the Assembly to assist with the facilitation of the remedial action as per Section 42(3) and 55(2) of the Constitution. The President opted to disregard the report and, in turn, a Special Investigations Unit was tasked with carrying out its own investigation, which unit then exonerated the President of any liability. The President also requested the Minister of Police to report to Cabinet on whether he was liable or not. This report also cleared him of any wrongdoing. Based on these reports the National Assembly absolved the President of any liability. This research intends to investigate the President's lack of respect for the role of the Public Protector and his refusal to abide by the recommendation made and whether such recommendations are binding.

Based on these events the Economic Freedom Fighters and the Democratic Alliance filed an application with the Constitutional Court (CC) seeking an order of the court to compel the President to pay a reasonable portion of the funds used on the non-security upgrades.

The CC in a unanimous ruling delivered by Chief Justice Mogoeng ruled that failure by the President to abide with the remedial action of the Public Protector was in contravention of the Constitution and that he thus violated his oath of office. The National Assembly was also held not to have exercised its imperative oversight role. This development was celebrated by the South African citizenry and faith in the judiciary further strengthened. The core

imperatives of constitutionalism as enunciated in this case are interrogated in order to establish whether the concerned spheres live up to these edicts.

1.2 Statement of the research problem

In this thesis I explore the case of President Jacob Zuma and the Nkandla saga in an attempt to bring to the fore the notion of the supremacy of the Constitution and its role in maintaining coherence and maintaining stability in the lives of all South African citizens. This is motivated by the simple fact that when it comes to matters of constitutional law, the topic of the supremacy of the constitution and the rule of law usually takes center stage. The constitutional roles of both the Executive and the National Assembly are examined and interrogated against how these branches acted in the Nkandla debacle. The powers and the mandate of the office of the Public Protector in protecting and advancing democracy is also examined.

1.3 Significance of the study

Supremacy of the Constitution and the rule of law are the core principles of the current South African legal order. These principles are the bedrock of any political democracy and whatever the three arms of government (Legislature, Judiciary and the Executive) do in pursuance of their mandate must be in line and in accordance with these principles. In my research I intend to consider to what extent the Constitution plays a role in ensuring that these spheres of government respect the rule of law, supremacy of the constitution and the principle of accountability.

1.4 Objectives of the study

This study assesses the mandate of the three spheres of government in upholding and advancing the concept of constitutionalism and observing their oversight roles particularly against the backdrop of the Nkandla case.

1.5 Assumptions

-The constitution plays a pertinent role of safeguarding abuse of power by the legislative and executive branches of government.

-The three arms of government observe their oversight Constitutional mandate.

-The Public Protector has the power to investigate, report and take appropriate remedial action concerning any prejudice or improper government administration and that this mandate is respected and is effective in curbing maladministration and corruption.

1.6 Methodology

This study is based on non-empirical method in which the primary and secondary materials are interrogated in order to get an insight into what other scholars have said and reflected on regarding the core imperatives of constitutionalism such as supremacy of the Constitution, separation of powers as well as the notion of checks and balances.

1.7 Overview of chapters

Apart from this introductory chapter, this mini-dissertation consists of a further seven chapters.

In chapter two I discuss the rule of law and constitutional supremacy as fundamentals of a constitutional state.

In chapter three I explore the anatomy of the separation of powers and its core elements from historical to the current times.

In chapter four I discuss the role and mandate of the National Assembly as provided for in the Constitution, especially its oversight role.

In chapter five I discuss the Executive especially the President and his constitutional mandate of upholding, defending and respecting the Constitution and how this requirement was transgressed in the Nkandla case.

Chapter six engages with role of the Office of the Public Protector in enhancing democracy and the legal effects of office's investigations and findings.

In chapter seven, the Judiciary's role of ensuring order and compliance is discussed.

Chapter eight ends with the conclusion.

Chapter Two

The rule of law and Constitutional supremacy as key components of Constitutionalism

The apartheid era came to an end in South Africa with the introduction of the 1994 interim Constitution. This symbolized the turning of a new leaf in the South African legal order and the end of the era of parliamentary supremacy and the injustices, which were based on apartheid policies. The introduction of the Constitution introduced a whole new imperative notion of constitutionalism, which seeks to ensure that any government power is exercised in a limited manner and that all the set defined procedures are followed when exercising such power. This concept also highlights that all rights should be sustained and exercised in conformity with the letter and spirit of the Constitution. Concisely, the current South African

constitution is an imperative source of government accountability, which stems from it being the source of legal authority. The Constitution does not only define the powers but also describes the relationship including the checks and balances between the branches of government as well as the relationship between government and the citizens.[1] An accountable government is the one that is open, transparent and responsive and can justify its acts and omissions and most importantly respects the concept of constitutionalism and the rule of law.[2] Accountability ensures that corruption is curtailed and the people are treated fairly and equally.

South Africa being a constitutional state means that the Constitution is now the supreme law with which all other legislation has to become consistent. This has been provided for in section 1 (c) of the Constitution, which provides:

The republic of South Africa is a sovereign, democratic state founded on the following values …supremacy of the constitution and the rule of law.[3]

Section 2 further provides that: "This constitution is the supreme law of the republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."[4]

The Nkandla debacle epitomizes and deals with some of the pertinent foundational values that are imperative in cementing and sustaining constitutional democracy. The supremacy of the Constitution particularly in relation to the current dissertation on President Zuma and Nkandla essentially denotes that all powers in various spheres of government must be exercised in virtue of and in accordance with the provisions of the Constitution in a manner that guarantees accountability, responsiveness and openness.[5]

In the years that President Zuma ascended to power, South Africa has seen an unprecedented rise of corruption and maladministration by senior government officials. This has resulted in South Africa being relegated to junk status and also being ranked at number 64 of the most corrupt nations by Transparency International. The South African Council of Churches has also

[1] M Chirwa & L Nijzink "Accountable government in Africa'' p 7-hhtps;//unu.edu/media/unu.edu/publication/4390/accountable-gov-sample-chapter-pdf.
[2] As above.
[3] Constitution of the Republic of South Africa, 1996 ('the Constitution').
[4] As above.
[5] G E Devenish, *The South African Constitution* (2005) p 19-20.

released a report in which it was observed that it is becoming apparent that there are discernable patterns of the systematic undermining of government that go beyond petty corruption.[6] A group of social scientists have also released a report titled "Betrayal of the Promise, how a nation is being stolen''.[7] The report, the authors say, documents how South Africa is grappling with corruption at the top of the state hierarchy that involves political leaders and their close associates and friends. This state of affairs has resulted in robustness of courts in adjudicating on cases dealing with grand corruption, usurpation and abuse of power. Nkandla case is one of the many cases that has been in the spotlight and has assisted in exposing the rot and maladministration carried out by those entrusted with managing and protecting state resources. In 2009 the Public Protector Tuli Mandonsela investigated and reported on the misuse of public funds utilized in upgrading the President's public residence in Nkandla.[8] The report detailed how the President was knowingly self-enriched when a chicken coop, cattle kraal, visitor's Centre, amphitheater and a swimming pool were constructed with public funds under the guise of them being security features. The reported highlighted that in deriving these undue benefits, the President acted in contrary to the Constitution. As a remedial action, the President was directed to pay back the misappropriated funds. The National Treasury was directed to determine a reasonable portion of the funds to be paid back. The report was submitted to the President and to the National Assembly to assist with implementation and compliance as per section 42 (3) and 55(2).[9] The President neglected this report and setup a special investigative unit to evaluate the Public Protector's report. The Minister of police also produced a report on the matter. Both these reports absolved the President from any wrong doing. Based on these events, the intention of this paper is to investigate the actions of both the Executive and the National Assembly and how they violated the basic principles of constitutionalism.

As a result simultaneous applications were brought before the Constitutional Court and the High Court by both the EFF and DA seeking to compel the President to comply with the Public Protector's report and pay back the funds used in the non-security upgrades. This application was based on the all imperative notions of Constitutional Supremacy, the rule of law and the

[6] South African Council of Churches Secretary General Report of 19th May 2017.
[7] Betrayal of the Promise, how a nation is being stolen, released on 25th May 2017.
[8] As per Section 182 of the South African Constitution.
[9] As note 3.

principle of accountability. These imperatives have been highlighted in section 1(c) of the constitution which provides that the republic of South Africa is one sovereign democratic state founded on the values of supremacy of the constitution and the rule of law.[10] The significance of the notion of the supremacy of the Constitution was highlighted by Chaskalson CJ, when he stated in *Pharmaceutical Manufacture's Association and Another; In re Ex parte President of the Republic of South Africa*, that "[t]here is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law derives its force from the constitution and is subject to constitutional control."[11] This in effect means that any law or conduct can potentially be tested against the provisions of the constitution and must be declared invalid if found to be inconsistent with the provisions of the constitution.[12] This means that the president must and can only act in accordance with the powers vested in him as head of the national executive by the constitution. The Constitution also details in some sections how executive power is curtailed within un-arbitrary bounds. Hugh Corder in his book stated that the Constitution is near emphatic on the point that exercise of executive power must be subjected to constitutional checks and balances.[13] This is so because of a well-known Constitutional law mantra which provides, power corrupts and absolute power corrupts absolutely (this mantra has been attributed to Montesquieu himself a luminary in the field of separation of powers and the rule of law).

The dissertation explorers the evolution of the age-old doctrine known as separation of powers. This doctrine provides that one branch of government can be held accountable by other branches in the exercise of checks and balances.[14] This system ensures that there is no branch of government which considers itself dominant and above the law and it guards against tyranny. This check of power on the executive power is provided in section 55(2) of the constitution, which obliges the National Assembly to put measures in place to curb usurpation of power by the executive. This provision also compels members of the executive

[10] See note above.

[11] *Pharmaceutical Manufacturers Association v Chonco* 2008 (1) SA 566 (CC).

[12] D. Brand, C. Gevers, K. Govender, P. Lenanghan, D Mailula, N Ntlama, S. Sibanda, L. Stone *South African Constitutional Law in Context* (2014) 71.

[13] H Corder *Quest for Constitutionalism* (1994), Parliament and the Separation of Powers-A Critical Analysis in relation to Single Party Domination, p39-51, 43.

[14] See note 12, p 61.

to be accountable both individually and collectively to Parliament.[15] This point brings to light the issue of whether the National Assembly was acting within its constitutional rights by second-guessing the findings of the Public Protector. This pertinent question was answered in the court's ruling, which will be discussed in detail in the further chapters.

Another avenue of putting the executive in check is by the application of the rule of law through the principle of legality, which requires that when exercising his power, the President has to act rationally and in good faith. The principle of legality is enunciated in the South African Constitution as an aspect of the rule of law. This principle provides a crucial safeguard for review of all Public power. The Constitution codifies the most important rules about how a country has to be governed and it assigns powers and privileges, rights and responsibilities. If anyone so much as acts outside the said rules, then they are said to be acting illegally and their act stands to be scrutinized by the Courts and if found to be illegal, it would be set aside. The rule of law seeks to ensure certainty and guarantee legal protection. This principle was highlighted in *Fedsure Life Insurance V Greater Johannesburg Metropolitan Council* where Chaskalson P and Goldstone J stated in a famous dictum that "[i]t seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power or perform no function beyond that conferred by the law ".[16]

In keeping in tune with the checks and balance precaution, the Constitution establishes another branch of government called the Judiciary whose main mandate is to check whether the two political branches of government act within their powers. The judiciary has the powers to review and set aside any act of both branches which it deems to be unconstitutional and invalid. This paper will also attempt to decipher the conundrum of just how far the courts can go in keeping the other two branches in check and its limitations in doing so.

On the 31st March 2016, the highest court in the land, the Constitutional Court, in a unanimous ruling of 11 judges delivered by CJ Mogoeng Mogoeng, held that failure of the President to comply with the Public Protector's remedial action was inconsistent with section

[15] See note 3.

[16] Director of Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others 1999 (1) SA 374 National Prosecution V Zuma 2009 (2) SA 277 (SCA).

83(b) of the Constitution as read with sections 181(3) and 182(1) (c) of the Constitution and therefore invalid.[17] Mogoeng went further to highlight that the President is a constitutional being by design, a national pathfinder, the quintessential commander in chief of the state affairs and the personification of the nation's constitutional project.[18] In view of this damning conclusion, the court ordered President Zuma to pay back the state funds utilized on his non-security upgrades. The court further held that the National Assembly flouted its constitutional obligation to hold the President accountable by passing a resolution nullifying the findings of the Public Protector.

In this dissertation I intend to consider to what extent the Constitution plays a role in ensuring that the President as head of the state, the executive and legislature, respects the rule of law, supremacy of the constitution and the principle of accountability as its core valu

In the instant case, the court when making pronouncement in the rule of law stated in clear terms that the South African Constitutional order hinges on the rule of law and that no decision based on the Constitution may be disregarded without regard to a court of law and that to do otherwise would amount to self-help.[19]

[17] *Economic Freedom Fighters V Zuma and Another*, CCT 143/15 and CCT 171/15 [2016] (5) BCLR 618 (CC) 2016 (3) SA 580 (CC) (31 March 2016)
[18] As above, paragraph 20.
[19] As note 17, Par 74.

CHAPTER THREE

ANATOMY OF THE DOCTRINE OF SEPARATION OF POWERS

The Nkandla case is pertinent in accentuating and bringing to the fore the principle of the separation of powers and the system of checks and balances. Separation of powers has through time come to assume its rightful place of being universally regarded as the bedrock of the concept of political governance called democracy. The courts here in South Africa and indeed all over the world, including the developed world have had to grapple with this concept in its raw form. They have been confronted with the basic question concerning the (im)propriety of a situation where one arm of government is deemed to be encroaching onto the perceived sphere of another arm of government. It is a widely accepted norm the world over that a well-functioning democracy is made up of an amalgam of three distinct arms of governance being the legislature, the executive and the judiciary. The main objective of this doctrine is to disperse power in the three branches in order to avoid over concentration which may have the catastrophic effect of oppression of other branches. [20] This aspect also rings true so far as the South African scenario is concerned. This doctrine has not been provided for explicitly in the text of the Constitution but is deduced from Constitutional principle VI that was one of the principles informing the final drafting of the 1996 Constitution. This principle provided that:

''There shall be a separation of powers between the legislature, Executive and Judiciary, with appropriate checks and balances to ensure, responsiveness and openness"[21]

The South African Constitution creates the legislature, executive and the judiciary and proceeds to assign these branches of government various duties and functions. At the core of separation of powers is the need to diffuse power rather than concentrating power in the hands of the few which can result in arbitrariness. The Legislature is empowered to make,

[20] http://www.hsrc.ac.za/uploads/pageContent/7058/HSRC%20Public%20Lecture%20%28FINAL%29%20-%20Why%20The%20Constitution%20Matters%20%28v%2020%20July%202016%29.pdf, pg 15,Public speech given by Justice Sandile Ngcobo at the Human Sciences Research Council.

[21] Schedule 4 of the interim Constitution (Act 200 of 1993), these branches are distinctly provided for in chapter 4, 5 & 8 of the South African Constitution of 1996.

amend and repeal laws.[22] The executive executes the law,[23] whilst the judiciary is empowered to determine the law and how it should be applied in disputes.[24] The Constitutional Court has had occasion to make a pronouncement on separation of powers in several cases. The Constitution establishes the independence of the three branches of government and also makes provision for the principle of checks and balances and the desirability of ensuring the Constitutional order by preventing the government branches from usurping power from one another. In the case of *South African Association of personal Injury Lawyers v Heath*, Chaskalson stated as follows:

"In the first certification judgement this court held that the provisions of our Constitution are structured in a way that makes provision for separation of powers… There can be no doubt that our Constitution provides for such separation of powers and that laws that are inconsistent with what the Constitution requires in that regard are invalid"[25] The court went on further to hold that a judicial officer cannot be appointed to head a criminal investigations unit as such is the terrain of the executive and not a Judicial function.

Over and above these constitutional precepts and edicts, this area of the law has, as stated elsewhere above been a subject of intense discussion by jurists as well as numerous Courts. It invariably vexes every student of constitutional review, whether the perceived encroachment by the courts is justified and is not an arrogation of the duties of other similarly placed arms of government. Kirsty Mclean posits that, although these three arms of government are separate and disparate, they are however both institutionally independent of one another but also interdependent on one another.[26] This is true and the author agrees entirely, for the simple reason that there was never an active intent on the birthers of democracy that there would exist an impregnable "Berlin wall" in between these arms of government. If such was the case, then governance would become rigid, unthinking and a menace to the very people it was supposed to serve. Judge Mojapelo has also observed in his article that complete separation of powers is not possible, neither in theory nor in practice

[22] As above (Chapter 4).
[23] As above (chapter 5).
[24] As above (Chapter 8).
[25] (CCT 23/96) [1996] ZACC 26: 1996 (10) BCLR 1253 (CC) (6 September) par 108-109.
[26] K Mclean 'Towards a framework of understanding constitutional deference' (2010) 25 SAPL 445.

and that some overlap is unavoidable given the fact that all the three spheres make up one government.[27]

The Constitutional Court has buttressed in the *Certification* case that, in a constitutional democracy, which imposes restrictions on the various branches of government as a way of checks and balances, there can never be absolute separation.[28] The court therefore stated that:

''The principle of separation of powers, on the one hand, recognizes the functional independence of the branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the Constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers; the scheme is always one of partial separation.''[29]

Just as it has been stated above that there exist inter dependence in this area, it has proven all too daunting to achieve absolute success in ensuring that the arms are manned by different persons and this is the case not only in South Africa but all around the world even in well-established democracies. In the United States of America, for instance, the President as head of the executive has the power to veto the legislation passed by Congress, their legislative arm and this acts as a check as it enables the President to review and reject the Acts he finds unconstitutional, unjust or unwise.[30] It is widely accepted to be true and trite, for instance that the function of making new law, is not the exclusive preserve of parliament in that the upper courts, on account of the system that governs the way they deal with cases and especially of the central aspect of *stare decisis* or precedent, also make law by setting up rules in such cases which rules are binding on the citizenry and even on other arms of government. This does not in any case however, derogate from the primary role of parliament as the main creator of law and legislation.[31] There is also an overlap in the judiciary swearing in the

[27] P.M. Mojapelo, The doctrine of separation of powers (a South Africa perspective) – www.sabar.co.za/law-journals/2013/april/vol026-no1-pp37-46.pdf.
[28] Certification of the Republic of SA, 1996, (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC) 1996 (10) para 109.
[29] As above.
[30] https://www.archives.gov/files/legislative/resources/education/veto/background.pdf.
[31] Section 44(1) of the Constitution main vest law making power in Parliament.

executive when they assume office and which does not in any way serve as a functional interference but entrench and strengthen democratic order.[32]

As a matter of necessity, these three arms of government have found ways of working interdependently with one another. Where there are commendable deviations from the norm of separation of powers these norms do not derive from the principle of checks and balances but get developed as a matter of constitutional expediency.[33]

The main objective of this doctrine as a constitutional imperative is to prevent abuse of power within all the three branches of government.

There are however certain minimum expectations and features which are crucial to having a working separation of powers and as a result a functioning democracy. It is an imperative that these three arms be manned by different people so as to curb the concentration of power in one individual. In this fashion then, the three arms operate as effective checks and balances on each other. It is a mantra in matters of constitutional law that power corrupts and absolute power corrupts absolutely (this mantra has been attributed to Charles Louis Secondat, Baron de la Brede et de Montesquieu himself a luminary in the field of separation of powers and the rule of law). Montesquieu's idea of separation of powers was eventually propounded by Vile into four basic norms:

a) The principle of trias politica, which requires a formal distinction between the legislature, executive and judiciary
b) The principle of separation of personnel which calls for the three distinct arms to be manned by different officials and employees
c) The principle of separation of functions which calls each of the arm to be assigned distinct functions in that legislature should make laws, the executive confine itself to administering affairs of the state and the judiciary to restrict itself to adjudication
d) The principle of checks and balances which requires each branch to be entrusted with special powers to keep a check on the exercise of functions by other branches in order to prevent the usurpation of powers.

[32] In swearing in the President, the Chief Justice Acts in terms of schedule 2 of the South African Constitution.
[33] J. D. Vander Vyver, Separation of Powers, South African Public Law, vol 8, Issue 2, Jan 1993, p171-191, p190.

For purposes of this paper, emphasis will mostly be paid to the last principle of checks and balances in the context of seeking to determine to what extent this imperative principle of checks and balances was not adhered to by the concerned spheres of government when dealing with the Nkandla matter.

It is posited that even though the constitution is clear on the distinct and separate roles of the three branches, there is nonetheless this overlap, which reinforces the principle of checks and balances. The executive checks the legislature by assenting to bills in terms of section 121 and also implementing policy. [34] The executive also keeps a check on the judiciary by taking part in the appointment of judges. The Judiciary checks the Legislature by invalidating any laws it considers inconsistent with the Constitution and further ensures that the executive fulfills its constitutional obligations.[35] The legislature checks the executive by the appointment or removal of the executive team and requiring full and regular reports and also takes part in the appointment and removal of Judges.[36] This principle serves to make the separation of powers effective by balancing the power of one arm against the other.[37]

Above and in addition to the provisions on distinct separation of powers the Constitution in chapter 9 also makes provision for other institutions which are tasked with safeguarding and preventing abuse of state power. The Public Protector is one such institution mandated and empowered to investigate any conduct or administration that is alleged or suspected to be improper or to culminate in prejudice or impropriety. This institution should be credited with the founding by the Constitutional Court that the President as head of executive failed to uphold and respect the Constitution in the Nkandla matter. [38]

Within this interdependence of separation of powers comes the necessity for the Courts, as the final arbiter of all disputes in the land, to carve out a niche for themselves in which they would ensure that the other two arms of government serve their constitutionally assigned duties.

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[34] As note 3(Constitution).
[35] As above, section 167.
[36] As above, see section 174 (4).
[37] Z. Motala & C. Ramaphosa, Constitutional Law- Analysis and cases (2002) p177.
[38] These institutions are established in terms of Section 181 of the Constitution and they include the Auditor General, Electoral Commission, Commission for Gender Equality, Human Rights Commission, Public Protector and the Commission for the Promotion and Protection of the rights of Cultural, Religious and Linguistic Communities.

But it does not necessarily follow that in all cases where one or even two of the precepts have been violated, the courts would then review such conduct and set it aside. Courts at times review the decisions brought before them, but then instead of setting them aside for this or that reason, choose not to. In such cases, the Courts are said to be deferring to whatever authority had taken such a decision.[39] In venturing into the all-important decision of whether to defer or not, the Courts are confronted with a myriad of issues, ranging from institutional capacity, integrity, respect to the doctrine of separation of powers and so on and so forth. CJ Mogoeng engaged with this notion in respect of the National Assembly and rightly pointed out that it falls outside the terrain of the Judiciary to prescribe to the National Assembly how it should carry out its mandate of implementing the checks on the Executive and holding it accountable.[40] Mogoeng CJ posited that the court's role is to determine on a broader scale whether the National Assembly did in substance and reality fulfill its constitutional obligations and that it is vital to the Constitutional design that certain matters be left to the other branches. The Chief Justice was quick to at the same time highlight that the court should not shy away from asserting its authority whenever it is constitutionally permissible irrespective of the parties involved, and at the same time guard against any impermissible intrusions.[41] The court held that by setting aside the Public Protector's findings the National Assembly usurped the powers of the court and infringed on the trite doctrine of separation of powers. The court further stated that in conducting its own investigations the National Assembly's actions amounted to self-help and stepped in the shoes of the Public Protector, something that is contrary to the rule of law.[42]

[39] C Hoxter, *Administrative Law in South Africa, (2007) p130.*
[40] As note 17 Par 93.
[41] As above.
[42] As note 17 Par 98.

CHAPTER FOUR

NATIONAL ASSEMBLY AND ITS OVERSIGHT ROLE

It is of paramount importance when dealing with the National Assembly to note that it is part of Parliament, which is based on the principle of representivity. Members of the National Assembly are elected in a national election from various political parties. This notion is provided for in section 42(3), which provides that Parliament is elected to represent the people and to ensure government by the people under the Constitution and it does this by choosing the President, providing a national forum for consideration of issues by passing legislation and scrutinizing and overseeing executive action.[43] This renders the National Assembly more prominent and powerful to hold the executive accountable since it is directly elected to represent the aspirations of the people.[44] This representivity principle has been highlighted in the case of *Malema v Chairman of the National Provinces*,[45] where the court stated that freedom of speech was crucial to the representivity principle, which in turn is paramount to the notion of Constitutionalism. This in essence highlights that the National Assembly's core mandate is to represent and be a voice for the electorate. This imperative is also discernable from the oath that the National Assembly members take and swear and confirm faithfulness and obedience to the Republic and the Constitution. The National Assembly performs various functions in a constitutional state and one of its important roles is to keep a check on the Executive. This oversight authority is provided for in section 55(2) of the Constitution, which provides that:[46]

The National Assembly must provide for mechanisms-

(a) To ensure that all executive organs of the state in the national sphere of government are accountable to it and that; and
(b) To maintain an oversight of-
    (i) The exercise of national executive authority, including the implementation of legislation; and

[43] As note 3.
[44] As note 12, p 145.
[45] [2015] ZAWCHC 39.
[46] As note 3 (Constitution).

(ii) Any state organ

This provision brings to the fore one of the fundamental principles that the President and his cabinet must be accountable to the democratically elected National Assembly as envisaged by the Constitution.[47] Accountability is one of the core elements of good governance and one writer has posited that the absence of accountability in talks of good democracy is like running a motor vehicle on a flat tire.[48] The constitution has been very clear on how both the National Assembly and the Executive should be accountable to the electorate. As regards the Nkandla case and all the constitutional imperatives involved, accountability refers to the need to provide full explanation, full disclosure of facts and information that lead to certain decisions being taken, the processes followed or omitted and any remedial steps taken.[49] Accountability has been said to encompass the following by Rautenbach and Malherbe:[50]

- A duty to explain to parliament how one's duties and powers have been exercised and controlled
- A duty to acknowledge that a mistake has been made and promise to rectify such
- A duty to resign if personal responsibility has been accepted.

The discussion to follow examines how the members of the National Assembly failed to uphold their constitutional duties. The National Assembly was furnished with a report by the Public Protector detailing findings on how the non-security upgrades were done at the private residence of the President at the tax payer's expense. The report called for remedial actions to be taken against the President. The Public Protector acted in terms of section 182(1)(b) of the constitution, and Section 8(2)(b)(i), (ii) and (iii) of the Public Protector's Act, which mandates her to investigate any conduct in state affairs and make a report and take remedial action against such conduct. Further Section 8 (2) of the Public Protector's act provides that:

(b) the Public Protector shall at any time, submit a report to the national assembly on the finding of a particular investigations if -

(i) he or she deems it necessary;

[47] As note 12, p 145.

[48] M L Koename & F Mangena ''Ethics, accountability and democracy as pillars of good governance'' African Journal of Public affairs, vol 9 no 5, Jan 2017, p61-73, p 63.

[49] As note above, p 63.

[50] I M Rautenbach & E F J Malherbe, 'National Executive Authority' Constitutional law, 2004,4th edition, 175, p178.

(ii) he or she deems it in the public interest;

(iii)it requires the urgent attention of, or an intervention by, the national assembly.

Instead of acting on the report, the National Assembly choose to perform its own investigations, which exonerated the President of any liability and entirely disregarded the Public Protector's report. Mogoeng CJ intimated that the report was a high priority matter that required urgent attention and intervention by the National Assembly. This the Chief Justice states, ought to have triggered the National Assembly's Constitutional mandate and obligation to scrutinize, oversee executive action and hold the President accountable. The court also ruled that the National Assembly had failed to uphold its obligation of giving urgent attention to the report, its findings and remedial action contained therein and to also intervene appropriately.[51] The court buttressed that the National Assembly was duty bound to hold the president accountable by facilitating and ensuring compliance with the findings and recommendations. By second-guessing and ignoring the Public Protector's report as if it were of no force and effect, the court holds, the National Assembly contravened the constitution and acted unlawfully.[52] The author completely agrees with the court for having found the National Assembly to have acted in contravention of the constitutions as it is quite clear that from the discussed legal authorities that the National assembly has been bestowed with distinct and special powers which it does not share with any other institution to ensure democratic control over the Executive.[53] In highlighting the pertinence of the National Assembly to the South African citizens, Chief justice Mogoeng has stated that as the National Assembly is the embodiment of the centuries old dreams and aspirations of the people, the mouthpiece, eyes and service delivery-ensuring machinery of the people.[54] The Chief Justice termed the National Assembly the watchdog of state resources and the enforcer of fiscal discipline and cost–effectiveness for the common good of all the people, especially the poor, the voiceless and the last remembered.[55] Mogoeng CJ highlighted the oversight role of Parliament over the Executive in holding it accountable for service delivery and ensuring fulfillment of promises made to the populace. The pronouncement of the Chief Justice was

[51]As note 17, Par 95.
[52] As above.
[53] As note 12.
[54] As note 17, par 22.
[55] As above.

imperative in reminding the National Assembly of their constitutional mandate and what they were elected for in the first place.

The issue of accountability can further be argued from the point of view of social contract theory, which dictates that both the state and the citizens have the moral obligations to ensure governmental accountability.[56] This theory calls for public officials to act towards the common good and for the citizens to know their rights and obligations of voting and participating in modern constitutionalism.[57] This accountability can only be only be exercised where branches of government act independently and pay respect to the constitution as the supreme law of the republic of South Africa. It can rightly be argued that one of the contributors to lack of accountability and political decay as witnessed in South Africa is the separation of politics and ethics.

Further to the above provisions, section 181(3) of the constitution provides that other organs of the state, through legislative and other measures, must assist and protect the Public Protector's office in order to ensure its independence, impartiality and effectiveness. Roxen Venter posits that in face of the serious and damning findings of the Public Protector, the legislature acted as impassive as a ''wardrobe''.[58] The writer applauds the court for having risen to the occasion to criticize the legislature for its unacceptable and impassive attitude towards the Public Protector, one of the most important guardians of democracy.[59] The writer further states that the unacceptability to both the National Assembly and the Executive trampling over the powers of the Public Protector is highlighted by the *EFF* case having been brought on grounds of exclusive jurisdiction of the Constitutional Court, based on section 167(4)(e).[60] This section provides that only the Constitutional Court has jurisdiction in cases requiring determination as to whether parliament and the president had failed to fulfill a constitutional mandate. She states that direct access can only succeed if the specific duty is required of Parliament and the President. She further points out that the court emphasized this by referring to the office of the President as a constitutional being by design; a national

[56] As note 48, p 63.
[57] As above.
[58] R Venter ''the executive, the public protector and the legislature; the lion the witch and the wardrobe'', South African Law Journal, volume 2017, issue 1, April 2017, 176- 189.
[59] As above p 185.
[60] As note 58, p 185.

pathfinder; the quintessential commander in chief of state affairs; and the personification of the nation's constitutional project.[61] In the same vein, the court referred to the National Assembly as watchdog of state resources and the enforcer of fiscal discipline and cost effectiveness for the common good of all our people.[62]

The observation by Venter that the National Assembly acted impassively as a 'wardrobe' is shared as it failed to take a principled stand in accordance with the Constitution.[63] In order for the National Assembly to be taken serious as a constitutional branch of government, it needs to focus on its pertinent mandate of scrutinizing and overseeing executive action and less on members' dress code and throwing opposing voices out of the chamber.[64]A representative mandate of National Assembly obliges it to function efficiently and effectively in the interest of the people and this renders the assembly directly accountable to the people.[65]H Klug has posited that historically, Parliament has never managed to serve effectively as a watchdog and that this is attributable to government appointed Commissions of enquiries and also the dominance of ANC members within the institution.[66] The author completely concurs with this statement as members are usually obligated to tow the line in accordance with the party caucus even in cases where one does not agree with some unprincipled party decisions. From point of view of this reality, it perhaps time to consider some amendment to the current electoral system.

[61] As above.
[62] As note 17,(Nkandla case) para 22.
[63] As above.
[64] https://www.businesslive.co.za/rdm/politics/2016-04-04-key-constitutional-principles-the-concourt-clarified-in-its-nkandla-ruling/.
[65] http://www.hsrc.ac.za/uploads/pageContent/7058/HSRC%20Public%20Lecture%20%28FINAL%29%20-%20Why%20The%20Constitution%20Matters%20%28v%2020%20July%202016%29.pdf, pg 15,Public speech given by Justice Sandile Ngcobo at the Human Sciences Research Council.
[66] H Klug, The Constitution of South Africa, Parliamentary Democracy pg 152-185, pg 173.

CHAPTER FIVE

THE FUNCTION AND ROLE OF THE EXECUTIVE IN RELATION TO THE NKANDLA MATTER

The Nkandla case involved President Jacob Zuma as the head of State and national executive. Mogoeng CJ has correctly highlighted that the President is the first citizen who occupies the highest office, indispensable for the effective governance of the Republic of South Africa and that the constitutional obligation to uphold, defend and respect the Constitution is, significantly, imposed upon him.[67] Mogoeng CJ, in a poetic statement, posited, as already referred to above, that the President is a constitutional being by design, a national pathfinder, the quintessential commander in chief of state affairs and the personification of the nation's constitutional project.[68] He further stated that the nation's hopes are pinned on the President to steer the country in the right direction and to accelerate its journey towards a peaceful, just and prosperous destination towards which all other progress-driven nations strive.[69] Section 85 provides that the executive authority is vested in the President and that the President exercises this authority together with other members of the cabinet by-

(a) Implementing national legislation except where the constitution or an Act of Parliament provides otherwise;
(b) Develop and implementing national policy;
(c) Coordinating the functions of state departments and administrations;
(d) Preparing and initiating legislation; and
(e) Performing any other executive function provided for in the constitution or in national legislation.[70]

In terms of section 91(2), the President has the exclusive authority to appoint and dismiss the Deputy President, Cabinet Ministers and Deputy Ministers. These sections grant the President wide powers which he exercises at times without any consultations. It is paramount to note that the national executive is usually made up of the members of the majority party in the National Assembly and this is usually why it is easy for corrupt leaders to appoint executives who are pliable and can toe the line in assisting them to implement their corrupt practices. In

[67] As note 17, Para 20.
[68] As note 17, (Nkandla case), para 20.
[69] As above.
[70] Constitution.

exercising his duties, section 83 of the Constitution requires the President to observe and exercise certain obligations as it provides;

The President-

(a) Is the head of state of the national executive;
(b) Must uphold, defend and respect the Constitution as the supreme law of the republic; and
(c) promotes the unity of the nation and that which will advance the Republic.

This section obligates the president as the pinnacle of constitutionalism to respect the supremacy of the constitution. This position has previously been buttressed in the case of *President of the Republic of South Africa and Another v Hugo* where it was stated that the President is the supreme upholder and protector of the constitution and that just like all state organs he is obliged to obey each and every one of the constitutional commands.[71]

Based upon the investigations carried out by the Public Protector of the non-security upgrades done at the President's private residence, the president was requested in terms of the recommendations of the Public Protector to determine the amount of money utilized on the non-security upgrades and pay it back. Instead of complying with the recommendations, the President carried out his own investigations, which exonerated him of any liability. The non-security upgrades were clearly in breach of Section 96(2) (b), as it exposed the president to a conflicted stance between his official responsibilities and private interest. Mogoeng CJ held that the President clearly infringed the Constitution by electing to close his eyes to this conflict of interest. The court has held this conduct to be unbefitting of a president. By the same token the President was held to have transgressed Section 96(1), which calls for the executive to observe a code of ethics prescribed by national legislation in the discharge of their duties. This national legislation is the Executives Members' Ethics Act,[72] which requires that members of the Executive desist from exposing themselves to situations involving the risk of conflict between their official responsibility and private interests. In failing to abide

[71] [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) para 65.
[72] Section 2 (2) (b) (iii).

these provisions, the President violated his oath of office as well as section 83, which calls on him to uphold, defend and respect the Constitution.[73]

Further, in second-guessing and undermining the remedial recommendations of the Public Protector, the President further failed to uphold his constitutional obligation as canvassed in section 181(3),[74] of assisting and protecting other organs of state to ensure their independence, impartiality, dignity and effectiveness. Conduct of the Executive in the Nkandla matter exhibit a distinct lack of respect towards the Public Protector despite the offices' imperative status and purpose as provided for in the Constitution.[75] The author shares Venter's observance that the executive seems to view itself as a ''lion'' whose decisions cannot be second guessed by an unelected body which falls outside the spheres of government and the Public Protector as a "witch" who wants to inhibit its functions and encroach on its terrain.[76]

[73] As note 3 (Constitution).
[74] As above.
[75] As note 58.
[76] As above.

CHAPTER SIX

THE ROLE OF THE OFFICE OF THE PUBLIC PROTECTOR IN ADVANCING DEMOCRACY

The Constitution creates independent state organs, to ensure that the government complies with its mandate. These organs are referred to as Chapter 9 institutions. These institutions enforce the rule of law and help to promote the notion of accountability in how government exercise its mandate.[77] The office of the Public Protector also enhances and promotes ethical leadership. The Constitution strictly calls for any mal-administration, abuse of power, improper conduct, undue delay, and acts resulting from improper prejudice to a person to be investigated.[78] The Nkandla case has epitomized the role of the office of the Public Protector and has helped clear any confusion as to what this office does or is supposed to do in the promotion of the constitutional imperatives of South Africa. Section 182 of the Constitution provides for the powers of the Public Protector and states that the Public Protector is empowered to investigate conduct in state affairs or public administration that is alleged or suspected to be improper and report on that conduct and come up with any remedial action.[79] Further to the Constitution section 6(4) of the Public Protector Act highlights that the Public Protector is competent to endeavor to solve any dispute or rectify any act or omission by mediation, conciliation, or negotiation advising complainants about appropriate remedies or any other means that may be expedient in the circumstances. It is on the basis of this authority that the Public Protector acted in the Nkandla matter. In this matter, the Public Protector investigated allegations of misappropriation of public funds which took place in upgrading the President's private residence. The expenditures are said to have gone way beyond the security upgrades to include some of the luxurious upgrades at the tax payer's expense. The Public Protector's report concluded that the President failed to act in line with certain of his constitutional and ethical obligations by knowingly deriving undue benefit from the irregular deployment of state resources.[80] In light of the findings, the Public Protector directed the President together with other relevant Cabinet Ministers to determine a

[77] As note 48.

[78] J. O Kuye and M. J Mafunisa 'Responsibility, Accountability and Ethics: The case for public service leadership Journal of Public Administration, vol 38 no 4, December 2003.

[79] As note 3 (Constitution).

[80] Public Protector Report of March 2014, par 2, 6-9.

reasonable portion of the money used on the lavish upgrade to be paid back by the President. The Public Protector further called on the President to reprimand all the relevant ministers involved and further for National Assembly to assist with the implementations of the recommendations. The President instead dismissed the report together with its recommendations and conducted counter investigations on the Public Protector's report. This counter investigation was produced by the parliamentary adhoc committee and it exonerated the President from any wrong doing. Both the executive and National Assembly therefore blatantly ignored the findings of the Public Protectors report together with the recommendations encapsulated therein. This resultant effect of these state of affairs was EFF and the DA approaching the CC for an order declaring and affirming the legally binding effect of the Public Protector's findings and recommendations.

The main point of contention in the case was whether the recommendations of the Public Protector are binding. In 2015, at a colloquium held at the University of Pretoria by the Law Society of South Africa, both Justice Yacoob and Mr Naidoo concurred that the findings and recommendations of the Public Protector are not binding but enforceable and that to make the findings binding would render the Public Protector the investigator, prosecutor and judge, which is something unheard of in the modern democracies.[81] Professor Mhango further stressed that recommendations are never binding.[82] In defense of the mandate bestowed on her office by the Constitution, the former Public Protector stated that she has always thought it beyond doubt that the office of the Public Protector is a special office whose findings were binding unless set aside by the court.[83] It can be said that the Nkandla matter came at an opportune time when clarification was needed as to how the recommendations and the findings are intended to achieve strengthening and safeguarding the Constitution's core imperatives. This role was previously buttressed 2012 by the Public Protector at an annual human rights lecture when she stated that the role of her office is to strengthen and support democracy through complementary oversight by exerting accountability in the exercise of public power.[84] Madonsela asserts that task of ensuring adherence to the Constitution and

[81] N Nyathi-Jele, 'Public Proctor's findings not legally binding' De Rebus, volume 2015, issue 550, March 2015, p6-7.
[82] As above.
[83] As above.
[84] T.N Madonsela 'The role of the Public Protector in protecting Human rights and strengthening democracy' Stellenbosch law review, vol 23, Issue 1, Jan 2012.

good governance cannot be guaranteed by the traditional institutions alone and that the Constitution created other institutions such as the ones provided for in chapter 9 to assist in enforcing this mandate.[85] Mandosela further highlighted that ethics and integrity are core elements of good governance and that the Public Protector has both a reactive and pro-active role in ensuring that state affairs are conducted with integrity and general good governance.[86] Further to the above, the Public Protector argues that the kind of accountability expected from state organs in terms of discharging and upholding fundamental Constitutional principles requires the body to be fair and also take responsibility for the consequences of improper performance of its administration functions.[87]

Turning to the court's judgment in the Nkandla saga, Chief Justice Mogoeng, in confirming the binding nature of the Public Protector's findings highlighted that the office of the Public Protector was created to strengthen constitutional democracy. He continued that, to achieve this, the office is required to be independent, impartial and to exercise its functions without fear, favour or prejudice and subject only to the Constitution and the law.[88] The Chief Justice pointed out that these requirements would not ordinarily be incumbent upon an institution whose powers and decisions are supposed to be ineffectual.[89] The court also remarked that taking into consideration the massive budget, offices and staff all over the country, energy and time expended on investigations, findings and recommendations, it is doubtful and senseless to think that the Public Protector's powers and decisions were meant to be inconsequential.[90] The court acknowledges that the office of the Public Protector is the most valuable constitutional gift to the South African nation in the fight against corruption, unlawful enrichment, prejudice and impropriety in state affairs and for the betterment of good governance. The court further acknowledged the exorbitant nature of litigation and poverty in the South African nation and stated that the Public Protector is the embodiment of biblical David who fights the most powerful and very well resourced Goliath who happens to be corrupt government officials.[91] The court further highlights that wide powers of the

[85] As above.
[86] As above, page 9.
[87] As above p 15.
[88] As note 17 (Nkandla case) par 52.
[89] As note 17, p 49.
[90] As above.
[91] As above per 52.

Public Protector leave no lever of government power above scrutiny, coincidental embarrassment and censure. The court states that the Public Protector's investigative powers are not supposed to bow down to anybody, not even to the highest chambers of raw State power. The court rightly cautions that those officials implicated in corrupt practices would rarely react favorably to findings and recommendations of the Public Protector.[92] The chief justice buttressed that if compliance with remedial action was optional, then very few culprits, if any at all would allow it to have any effect and that it would be incomprehensible how the Public Protector would strengthen constitutional democracy if its decisions were not binding.[93] Chief Justice Mogoeng further rejected the proposition that the Public Protector's powers as provided for in the Constitution had been narrowed or watered down by the provisions in the Public Protector's Act and clearly and correctly stated that the position that holds that such powers have somehow been mortified or subsumed under the enabling act lacks merit.[94] The court essentially cleared confusion and stated that the powers of the Public Protector as provided for in the Public Protector's Act should be understood to be in harmony with the Constitution.

The Supreme Court of Appeal was also presented with an opportunity to engage and make a deliberation in the case of *South African Broadcasting Corporation Society Ltd v Democratic Alliance*.[95] In this case, the Public Protector released a report detailing some corporate governance deficiency and maladministration at the SABC. The report further disclosed that the salary of the Chief Operations Officer, being Mr Motswoaneng, was irregularly increased. The report directed that disciplinary proceedings be instituted against Mr Motswoaneng and urgent steps taken to fill his position. Instead of the remedial action being implemented as recommended in the report, the SABC board chose to second-guess the findings and recommendations of the Public Protector and instead appointed a law firm to investigate and scrutinize the findings contained in the report. This report exonerated Mr Motswaneng of any wrongdoing and he was appointed the permanent Chief Operations Officer. The DA approached the court for an order declaring Mr Motswaneng's appointment invalid and to compel the board to implement the recommendations in the report. In delivering its

[92] As above, par 55.
[93] As above par 56.
[94] As above par 64.
[95] 2016 (2) SA 522.

judgment the supreme court of appeal stated that the Constitution does not permit the government organs to ignore the Public Protector's findings willy-nilly and that the mandate of the Public Protector would be defeated if organs of the state are allowed to second guess and ignore her recommendations.[96] The court further stated that the Public Protector's findings may only be challenged and set aside by a court of law.

[96] As above par 52.

CHAPTER SEVEN

ROLE AND FUNCTION OF THE JUDICIARY

The regulation of government authority is very pertinent in any state and the Judiciary is key to ensuring that the different functions function properly and at the same time respecting independence of such branches.[97]Judiciary acts as a cornerstone of good governance in that it enhances its quality by ensuring that there is legality and fairness and further advance the culture of transparency and accountability.[98]The courts are entrusted with safeguarding the equilibrium of the power play within government in their bid to promote Constitutionalism and the rule of law.[99] The courts do this by way of judicial review. Judicial review is immensely rooted in the rule of law and the doctrine of the supremacy of the Constitution and these principles permits the courts to set aside executive and legislation actions which are in contrary to the Constitution.[100]Without the Judiciary it will be impossible to restrain the arbitrary use of power by the other branches. Most important in the adjudication of cases of constitutional nature is the Constitutional court which is established in terms of section 166 and 167 of the constitution. This court deals with cases which seek to determine the boundaries of power between different branches and also determination of rights in the Constitution against any infringement.[101]The Constitutional court is mandated as in the Nkandla case to determine whether the presidential powers were exercised accordingly and confirm whether the exercise of such powers does not contravene the bill of rights or breach the principle of legality.[102]

Section 165 of the constitution vest the judicial authority in the courts.[103] The independence of the judiciary has been provided for in section 165(5) which provides that the courts are independent and subject to only the Constitution and the law, which they must apply the law impartially and without fear, favor or prejudice.[104] Judicial impartiality can be said to be

[97] P N Langa Symposium "A delicate balance" place of the judiciary in a constitutional democracy, p 9.
[98] As note 67, Justice Ngcobo's public lecture on why the Constitution matters delivered at the Human Sciences Research Council, p 17.
[99] As above.
[100] As note 64.
[101] Y Cilliers, finding a balance between judicial activism and Judicial Deference, dissertation submitted in partial fulfillment of Masters in Law degree.
[102] As note 12.
[103] South African constitution of 1995.
[104] As above.

concerned with notion that the judiciary is free to make sound legal judgements which are uncontaminated by any outside influence which is not legally relevant. Judicial independence also includes legal legitimacy, institutional legitimacy, security of tenure, degree of financial security and institutional independence of the court. Theunis Roux in his eye opening article has posited that legal legitimacy is plausibility of judicial decisions according to applicable standards of legal reasoning and institutional legitimacy as public support for the judiciary regardless of the outcome of its decisions.[105] He also stated that institutional security means the ability of the judiciary to withstand and survive political attack of its independence.[106] This trite doctrine of judicial independence implies that in order to discharge its Constitutional duties the judiciary must have its own independent existence free of any influence from both the legislature and the executive.

Section 167 further provides for the Constitutional court as the apex court in matters pertaining to constitutional and other matters that needs determination of the powers, status as well as the constitutionality of bills and proposed amendments. The role of the Courts to wade in by the review instrument and act as they often do, is well guaranteed by the constitution.[107] To this end, there is clarity. The citizenry is also aware that when they contend that they have been a victim of unfair treatment at the hands of the technocrats, they can approach the Courts for redress. It is trite that in such instances, the Courts are then faced with a stark choice concerning the respect of the doctrine of the separation of powers and whether they should intervene in the decisions taken by the president and his cabinet. The courts usually have to perform a balancing act to enforce the provisions of the Constitution and the rule of law and on the other hand and show some respect and acknowledge that the executive decisions usually contain political elements with which the courts should avoid.[108] The judiciary is the only branch which can set aside a decision grounded in the Constitution and the President in this instant case should have approached the court to challenge the findings and recommendations of the Public Protector.[109]As posited by Narshi, the only proviso to the requirement of the Public Protector effective remedial actions is that she does

[105] R Theunis "Principle and pragmatism on the South African Constitutional court" International journal Constitutional law 2007 (7)
[106] As above.
[107] Section 33 of South African Constitution.
[108] As note 12.
[109] As note 17, Para 81.

not have unfetted discretion as remedial action will always remain open to judicial scrutiny.[110]This position is based on the trite principle of the rule of law which seeks to provide a crucial safe guard for review of all Public power. This principle requires that all exercise of public power should be exercised in accordance with the legally sanctioned provisions of the law and further requires law abiding citizens to obey decisions made by those granted the legal authority to make such decisions.[111] The principle of legality is enunciated in South African Constitution as an aspect of the rule of Law .This principle provides a crucial safe guard for review of all Public power which cannot be categorized as Administrative Action as per Section 33(1) of the Constitution. This Section provides that only administrative actions are reviewable and Section 1 of the PAJA lists all those actions that can be said to be administrative. This has in turn narrowed the scope of Administrative Law .This position was highlighted in the case *of Fedsure Life Assurance V Greater Johannesburg Metropolitan Council*,[112] in which the court was called to make a determination on the nature of the budgetary resolutions which were made by the respondent. Chaskalson P and Goldstone J held in a joint judgement that the resolutions in question did not amount to administrative action as provided for in section 24 of the interim Constitution. This the court stated that in making the resolution the council was acting as a deliberative legislation body and exercising original law-making power.[113]The court went further to provide that in accordance with the principle of the rule of law, the local government had to still act within the powers conferred on it.[114]in its famous dicta the court went to provide that "it seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power or perform no function beyond that conferred by the law".[115]

The Constitutional Court in the case of *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council* the learned Court had to grapple with the issue of legality and it pronounced as follows;

[110] J Narshi "President Zuma and the Constitution of the Republic of South Africa: compliance not optional" without prejudice, vol 16 issue 3, April 2016, p7.
[111] As note 17,para 75.
[112] 1999(1) SA 374 (CC) (14 October 1998).
[113] As note above (paragragh 41, 45).
[114] As above (paragraph 56).
[115] As above (pagragh 58).

"…the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law."[116]

This addresses itself to the constitutional imperative of legality. The Constitution codifies the most important rules about how a country has to be governed and it assigns powers and privileges, rights and responsibilities. If anyone so much as acts outside the said rules, then they are said to be acting illegally and their act stands to be scrutinized by the Courts and if it is illegal, it would be set aside. There is no room for illegality in Administrative and Constitutional law.

This then therefore raises another one of the widely accepted constitutional imperatives which holds that a repository of power should at all times be aware and knowledgeable about his/her power so that he/she doesn't overstep them. In the event the authority oversteps its powers, even in cases where such powers have been, in good faith misconstrued, then the action would be reviewed and set aside. In the case of *Masetlha v President of the Republic of South Africa* the Constitutional Court cemented this point.[117] It is widely accepted that the Constitution, to the extent that it sets out such imperatives in specific terms is laudable and Cora Hoxter agrees[118].

Further to the issue of legality, the Constitution also provides another *condition sine qua non* namely reasonableness which is often times expressed as rationality of the decision. This aspect was discussed at length in the case of *Pharmaceutical Manufacturers Association v Chonco*[119] which culminates in the now widely cited mantra that public power should never be exercised arbitrarily, whimsically and petulantly. According to the case law, this area is well settled and it is a minimum requirement that public power should at all times be exercised on the basis of true facts. Again, the specificity that is contained in the Constitution shines through and takes away all the ambiguity as to what is reviewable and what is not reviewable.

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[116] As note 112.
[117] 2008(1) SA 566 (CC).
[118] C Hoxster, The Rule of Law and the Principle of Legality in South African administrative Law Today in M Carnelley & S Hoctor (Eds) Law Order and Liberty : Essays in Honour of Tony Matthews (2011) 55.
[119] 2010 (4) SA 82 (CC).

This principle demands general justification for the view of exercises of public power and operates as a residual source of review.[120] This principle is provided for in Section 33 of the constitution which provides that administrators should act lawfully, reasonably and procedurally and to give reasons in certain circumstances. This principle has quite an influence as a source of South African Administrative Law.[121]

The principle of legality encompasses lawfulness and rationality which are both elements of reasonableness.

This principle of rationality was developed by the Constitutional court in the Pharmaceutical Manufacturers Association.[122] In this case the President acting on mistaken advice from the Department of Health proclaimed a statute in to force before various schedules were ready. This rendered the statute unworkable and the constitutional court held that in order for the decision to be acceptable, it must be rationally related to the purpose for which the power was given otherwise the decision would be arbitrary and inconsistent with the requirement of rationality.0n this basis the President's decision was held to be irrational and set aside. This requirement was developed as a minimum requirement applicable to the exercise of all public power. It was further stated in the Pharmaceutical case that as long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary and as long as the functionary's decision, viewed objectively is rational, a court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made only rarely but if it does occur, a court has the power to intervene and set aside the irrational decision. In the case of *Albutt v Centre for The Study Of Violence And Reconciliation And Others*,[123]the court had to make a determination as to whether the president's exercise of the power to grant pardons to applicant's before hearing the victims' families was reviewable. The court stated that the principle of legality requires lawfulness, honesty and rationality and that in order for this principle to be satisfied and for the decision to be said to be fair, the president had to consult family members of the victims involved and the decision was held to be irrational for

[120]C Hoexter Administrative Law in South Africa (2nd edition) page121.
[121] C Hoexter 'The rule of law and the principle of legality in South African administrative law today' in M Carnelley and S Hoctor (eds) *Law, Order and Liberty: Essays in Honour of Tony Matthews* (2011) 55.

[122] As note 119.
[123] 2010 (3) SA 293.

lack of consultation. This then meant that the principle of legality includes an aspect of consultation.[124]

This principle was further developed in the case of *Minister of Justice & Constitutional Development v Chonco* where it was held that the President's power to confer pardons entails a corresponding right to have the application for pardons considered and decided upon rationally, in good faith and in accordance with the principle of legality.[125]

It needs to be noted that it does not necessarily follow that in all the courts will be quick to set aside decisions of the other two branches where there is conclusion that indeed the Constitution has been transgressed, after review, the courts can sometimes elect not to set aside the decision for a myriad of reasons ranging from institutional capacity, integrity, respect to the doctrine of separation of powers and so on a so forth on. In exercising such restraint, the Courts are said to be deferring to whatever authority had taken such a decision. The common thread of separation of powers stills runs through the mind of the Courts even under the transformed era of such a liberal Constitution. This is even validated by S J Jowell by stating the relevant fact that Constitutional competence which denotes the lawful role of institutions in the whole scheme of things as well as institutional competence which denotes a practical evaluation of the capacity of decision making bodies to make certain decisions have an influence in courts deferring certain cases.[126] The latter becomes even more relevant in that the Courts need to accept that their place in the Constitution is not to dominate other branches and in reviewing administrative decisions, they should at all times be aware that "*it is not the province of the Courts… to make their own evaluation of the public good, or to substitute their personal assessment of the social and economic advantage of a decision…*"[127]

On the international sphere, the courts are known to, in fitting cases, defer to other spheres of government. It is on this basis therefore that jurisprudentially, there are two schools of thought which have academically been expressed as belonging to Ronald Dworkin on the one hand and Jeremy Waldron on the other. The two schools of thought are best captured by

[124] As note above, para 49.
[125] 2010 (4) SA 82 (CC).

[126] S J Jowell (Of Vires and Vacuums: The Constitutional Context of Judicial Review" 1999 Public Law 448.
[127] Jowell (as above) 6.

Kirtsy Maclean when she states that,[128] "*Dworkin relies primarily… on an expanded notion of democracy, but also puts forward arguments regarding the value of judicial review which could be used to support pragmatic arguments in favour of judicial review. Waldron, on the other hand, asserts the primacy of democracy and attempts to refute Dworkin's democratic argument for judicial review.*"

This jurisprudential tension aside, the matter and attitude of the South African scenario was best captured by *Dennis M Davis when* he indicates that,[129] *"… the overarching purpose of South African administrative law is the promotion of a deliberative, accountable democracy, the foundational principles of which have their source in the Constitution."*

This is the very basis of the law in South Africa and these are the value objectives of constitutional democracy. It therefore leads to a thematic question of when is it proper for the Courts to defer and when is it for them to go ahead and intervene with their powers. Murray Hunt puts it better and bluntly when he states that the question is "what are the proper boundaries to the respective powers of different branches of government, and who decides on where those boundaries are drawn?"[130] This question is thematic and it vexes the courts on a routine basis. The courts occupy an assured and special place which is even constitutionally derived and it is to step in and curtail the excesses of other arms of government. The Constitutional Court early on, set the general parameters on the concept of deference in the case of S v Makwanyane[131] where the Chaskalson P noted, relying on the Canadian Case of Tetreault-Gadoury v Canada[132] that where choices have been made between differing reasonable policy options, the courts must give the legislature a measure of deference in that choice. The Court however went ahead ruled that the death penalty which was at the centre of the said case, was unconstitutional and proceeded to outlaw it.

A closer reading of the cases cited above makes it clear that the South African courts are intent on developing democracy and that they do not shy away from policy laden matters as

[128] K Mclean 'Towards a framework of understanding constitutional deference'(2010) 25 SAPL 445.
[129] D Davis (To defer and when? Administrative law and Constitutional Democracy) in M Taggart ed The Province of Administrative Law (1997) 279 (UNISA).
[130] Murray Hunt Sovereignty's Blight: Why contemporary public law needs the concept of "due deference" in Nicholas Banforth and Peter Leyland (eds) *Public Law in a multi-layered constitution* (2003) 337-370 at 338.

[131] S v Makwanyane 1995 (3) SA 391 (CC).
[132] Tetreault-Gadoury v Canada (Employment and Immigration Commission) (1991) 4 CRR (2d).

they deem it as their rightful role and what the Constitution wills for them to review decisions taken at the high offices of raw state power. That said it is also true that the law has evolved in this era (deference) from the pre-democracy era where the courts adopted a minimalistic attitude in that they were operating under a system of rules which was unresponsive to the people's needs due to the apartheid era and the current expansionist system which has a value driven agenda of bettering people's lives as mandated in specific terms by the Constitution itself.

I share the same sentiments posited by O' Regan in the case of Bato Star Fishing[133] where it was provided that while recognizing the proper constitutional role of the executive and treating the executive decisions with respect, the complexity of the policy should nonetheless not be a barrier to judicial scrutiny, and that where necessary the courts should proceed and set aside executive decisions which contravene the fundamental principles of the Constitution. This assertion is based on the supremacy of the Constitution and the rule of law as founding values of the Constitution. This means that when exercising his Presidential powers in the Nkandla sagga, the president should have acted in good faith and in accordance with the rule of law. This case performed a pertinent role of strengthening the rule of law and affirming the role and independence of the Judiciary in exercising its constitutional mandate.

[133] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490.

CHAPTER EIGHT

CONCLUSION

Corruption and maladministration has the detrimental effect of weakening government's efforts of rendering effective service delivery and unwillingness to deal with this pandemic is a direct attack on democracy and good governance.[134] The catastrophic consequences of corruption were captured by the majority judgement in the Glenister case as follows;

'there is no gainsaying that corruption threatens to fell at the knees of virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the state to fulfill its obligations to respect, promote, and fulfill all the rights enshrined in the bill of rights. When corruption and organized crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk.'[135]

The Nkandla case has helped to expose the grand corruption committed by the powers that be and their unwillingness to be held accountable.[136] The Nkandla judgement has raised the bar and is a reminder that within a constitutional democracy, the principle of the supremacy of the constitution, the rule of law and the principle of good governance and accountability should be respected as foundational elements of constitutionalism. The judgement is also a legal block to strengthening and cementing the significant role of the office of the Public Protector in curbing corruption and maladministration in South Africa, and in general sensitizing and bringing awareness on the mandate of the chapter 9 institutions and their role in strengthening democracy. Having considered all Constitutional provisions discussed in the case with regards to the fundamental elements of Constitutionalism, it is quite clear as Chief Justice Mogoeng rightly pointed out that both the executive and the legislature compromised democracy by their arbitrary misuse of power and total disregard for ethical norms and standards. The manner in which the report and the recommendations of the Public Protector

[134] As note 48, p 70.
[135] Glenister v President of the Republic of South Africa and others CCT 48/10[2011] ZACC 6 para 166.
[136] As note 117 above.

were handled by the echelons of power in South Africa evidences a ferocious attack on the office of the Public Protector and total lack of respect for constitutional institutions. The court is to be commended for having been bold enough and taken a principled decision in rebuking the Executive's conduct in a politically charged environment. The Nkandla judgement further restored faith in the judiciary as the ultimate guardians of the Constitution.

The current state of affairs in South Africa leaves very little to be desired as the country is in an endless tail spin of grand corruption and looting carried out from the very highest office. The country has seen the emergence of a phenomenon termed "state capture" that many of us never knew existed. August Rohss in his book titled "Political Corruption'' has termed this corruption "grand" and says that it occurs at the top of state hierarchy and involves political leaders and their close associates who award contracts, concessions and privatization of state business amongst themselves.[137] Rohss posits that this results in bureaucrats and politicians organizing their offices and rewriting the rules to induce massive payoffs which gives way to non-state actors such as organized gangs and benevolent associations to dislodge a Constitutional state and replace it with a shadow state.[138] The allegation of this state of affairs are rife and have brought fear and confusion to the South African citizens. This state capture phenomenon also contradicts Section 96(c), which prohibits executives to use their positions or information entrusted to them to enrich themselves or improperly benefit one another.[139] By the same token, this provision also applies to the President as head of the Cabinet and executive authority of the state. This state of affairs also affects the role and notion of checks and balances. This oversight role is diminished by appointments which are a made along allegiance lines. Appointments made on this basis essentially means that the public is denied capable and qualified personnel who are well and better suited for their jobs. This then contravenes provisions calling for appointments of fit and proper persons. This seriously undermines a system of constitutional democracy, because it in a way brings about some constitutional change not sanctioned in the Constitution. Major cabinet appointments are said to be made based on the allegiance to this network and those who resisted the agenda removed or redeployed to other lucrative posts to silence them. This selected group of

[137] A Rothstein, *Political Corruption (2015) 132.*
[138] As above.
[139] As note 23 (Constitution).

individuals is said to operate on the as-need arises basis and has thus resulted in replacement of the executive decision making with kitchen cabinets of informally constituted elites.[140]

Judging from the current state of affairs and the everyday reports from the media, it is very clear that something needs to be done for South Africa to maintain the status of a shining beacon of democracy which other African states aspire to simulate. There is need for a vigilant civil society which is capable and willing to engage on Constitutional issues and wide spread corruption threatening the South African economy. Civil society comprises of individuals, media, legal scholars, legal professionals and others. The civil society should jealously guard against any form of infringement of the rule of law and resist any actions which threaten any progress already made. This activism of the civil society is commonly exhibited in South Africa in the form of court cases, demonstration against corrupt government officials, demonstration regarding poor service delivery and meticulous examination and studying of the courts' judgments by the citizens as a whole.

There is therefore need for electoral reform to allow for direct appointment of the President, cabinet as well as the National Assembly. This would ensure that the leaders remain committed to the voters rather than their parties. This would ensure principled decision making and reduce corruption. This would also bring the notion of the politics of the stomach to an end as the leaders would be inclined to represent the electorate without any fears of being side-lined or being out spoken. It is quite clear in the Nkandla matter that the National Assembly opted to knowingly enrich the President with the sole aim of pleasing the President with the knowledge that they serve because the leadership of the party agreed for their names to appear at the top of the election list.[141] The learned Chief Justice Mogoeng has rightly observed that when people know that they are dealing with the president or other individuals in high offices of power, they have a high inclination to want please the powers that be by doing more than is reasonably required and legally permissible.[142] Reform in electoral law would also enforce the laws that prohibit the buying of individual votes as well

[140] State capture report, 14 October 2016.
[141] https://www.dailymaverick.co.za/opinionista/2016-03-30-con-court-nkandla-judgment-preview-forget-about-impeachment.
[142] As note 17, Para 8.

as improvements in the regulation of campaign finance, the role of lobbyists and the private financial interests of politicians to curb conflict of interests.[143]

The independent judiciary is one of the core elements of Constitutionalism that is fundamental in achieving good governance. This means that courts must apply the law impartially without fear, favor or prejudice and that they should be subject to the Constitution only. The principle of independent, impartial judiciary makes judges immune from the influence of outside political forces. This principle also calls for Judges as the custodians of the Constitution to play an active role in guarding the Constitution against power hungry leaders who want to usurp the Constitution at will. This also requires the judiciary not shy away from policy issues of other spheres of government and that they should where necessary be willing to scrutinize even administrative action of the other arms in order to promote transformative adjudication and guard against any abuse. Having said that, however, the judiciary is to be applauded for having taken a principled position in the Nkandla matter and holding that both the executive and the National Assembly usurped the powers of the Public Protector and violated the principle of separation of powers.

In conclusion, it is important to note that Africa as a whole still has a long way to go in terms of entrenching a culture of Constitutionalism. This is not helped by authoritarian, corrupt and arrogant leaders who continue to trample on the Constitution and people's rights without any care in the world. Going forward in order to avoid the unfortunate debacle such as the one in the Nkandla matter, it is imperative for all the branches of government to have a mutual understanding and cooperation in order to ensure independence, dignity and effectiveness as the drafters of the Constitution clearly intended.[144] Currently, there seem to be no end in sight for South Africa as there is scandal after scandal of corruption and maladministration committed by the ruling elites. The retired Justice Ngcobo has likened this endemic corruption to a cancer that is slowly away the fabric of the South African society.[145]It seems the only other way out for South Africa to rid itself of the strangle hold, is through the ballot box, where the masses should demonstrate their displeasure with the current leadership for the prevailing state of affairs.

[143] As note 119.
[144] As note 58, p 189.
[145] As note 65, Justice Ngcobo' speech delivered at the Human Sciences Research Council.

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