**RESEARCH ARTICLE:**

# Judicial Review as an Accountability Mechanism in South Africa: A Discourse on the Nkandla Case

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## Abstract

*Separation of powers among the three branches of government, in most Constitutional democracies, is a design to avert the tyranny of a personalized rule. With specific roles, in relationships characterized by separated but shared powers, each branch of government is a watchdog against the other in case of any abuse. In the South African governing system, the Constitution guarantees functional power relationships among the legislature, the executive, and the judiciary branches of the government. Nevertheless, the dominant party system, in practice, has weakened the legislative oversight and accountability powers to tame the excesses of the executive, contrary to the intendments of the drafters of the Constitution. Judicial review of the various legislative and executive actions, however, has created precedents that seek to reassert legislative capacity to hold the executive accountable. At one time or the other, the judiciary had indicted the legislature and the executive of dereliction of duties. Using primary and secondary data from judicial pronouncements, constitutional provisions, and other public documents, with extant literature, respectively, this paper reviewed the environment that prompted the activist posture of the South African judiciary. An entrenched culture of party loyalty and the incapacity of the legislature to enforce accountability have bolstered the need for assertive judicial review in ensuring accountability. The failure of the legislature to exercise its oversight power has provided the platform for the judiciary to rise as a formidable accountability instrument. Judicial independence, guaranteed by The Constitution, would continue to sustain the tenets of South African representative democracy.*

***Keywords:*** *accountability; oversight; corruption; governance; judiciary*

## Introduction

The doctrine of separation of powers is an accountability measure. It is at the centre of the advocacy for responsible leadership in the exercise of state power. The principal focus of this classic thought is the need to limit the exercise of power, by the stakeholders in the institutions of government, within the confines of constitutional provisions (Hanani, 2020). Separation of powers, among the three branches of government in most constitutional democracies, is a design to avert the tyranny of a personalized rule (O'Donoghue, 2021). With specific roles, in a relationship characterized by separated but shared powers, each of the three branches of government is a watchdog against the other, intending to avert any abuse (Persson, Roland, and Tabellini, 1997). The principle of separation of powers characterizes the South African governing system, where each of the three branches of government, the legislature, the executive, and the judiciary, has constitutional powers and boundaries. This paper focuses on judicial review of legislative and executive actions and decisions on the report of the Public Protector on the Nkandla case. The idea of a system of separation of power presupposes that though the branches of government are interdependent, each has a measure of independence within the constitutional

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stipulated authority. Thus, the judiciary, as an independent arm of government, has its constitutional power to interpret the laws. In the exercise of their constitutional responsibilities, courts have the power to make declarations that could refine and redefine the laws passed by the legislature and the executive. In other words, the role of the judiciary is to restrict the exercise and avert the abuse of the powers of the government to promote the objective of the state.

Neil Duxbury describes a regime of judicial review thus:

> When a nation's constitution is the supreme law of the land, and that nation's higher courts are responsible for enforcing the constitution, we say that the nation has a legal system that permits judicial review of legislation, with judges having the power to invalidate unconstitutional laws (Duxbury, 2017: 649).

Alexander Hamilton, in his *Federalist Paper No 78*, affirmed that the courts were the medium for the preservation of the constitutional restrictions placed on government (Hamilton, 2008). Hamilton said:

> The courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It, therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body (Hamilton, 2008).

Judicial review, therefore, connotes the inherent power of the court to determine the validity of legislative acts and executive endorsements (Sapienza, 2018; Welch, Gruhl, Thomas, and Borrelli, 2013). This means that the courts, as the interpreters of the constitution, can nullify laws passed by the legislature and endorsed by the executive, to promote constitutionalism. Judicial review is a control mechanism of the court to evaluate the constitutional system of separated powers in a state (Fagbadebo 2010; *Salman, Sukardi, and Aris*, 2018). The concept of judicial review is rooted in the principles of the supremacy of the constitution and respect for the rule of law (Radian Salman, 2018). The concept of judicial review has its root in the principle of the supremacy of the constitution, as enunciated by Alexandra Hamilton and James Madison in their respective Federalist Papers. Jutta Limbach identifies three characteristics of constitutional supremacy.

> The possibility of distinguishing between constitutional and other laws; the legislator's being bound by the constitutional law, which presupposes special procedures for amending constitutional law; and an institution with the authority in the event of conflict to check the constitutionality of governmental legal acts (Limbach, 2001: 3).

The separation of judicial power, from the legislative and executive powers, is designed to avert jurisdictional error and ensure the sustenance of the core values of a democratic state. Each of the three arms of government has its jurisdictional domain, in terms of roles and responsibilities. Within each of these boundaries, there are limitations to the exercise of powers within the larger context of the state. Given this, each arm is bound to operate within these jurisdictional limitations for the fulfillment of the overall interest of the state. Institutional legitimacy and the control of these institutions are central to judicial review. The application of the power of the court, to determine errors in the exercise of power, is a process to either slow down or speed up change (Welch *et al.,* 2013). The instrument of judicial review became popular in the *Marbury v. Madison* case of 1803, where John Marshall, the Chief Justice of the United State of America, declared, in his controversial judgment, the validity of judicial authority over constitutional issues (Hoffmann-Riem 2004; *Salman, Sukardi, and Aris*, 2018). He declared, "The Constitution is the supreme law of the land. If other laws contradict it, they are unconstitutional" (Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). The determination of the status of the 'other laws' made

by the political branches of the government, is within the authority of the court. Otherwise known as a judicial oversight instrument (Hoffmann-Riem, 2004), the regime of judicial review is a cautionary mechanism for the political branches of the government to exercise the power of law-making with utmost consideration of the democratic tenets of accountability.

This discretionary power of the court, to interpret statutes, depends largely on the perceptual outlook of the court. A court could be either perceptively passive or active in its interpretation of statutes. Adherents of judicial passivism or what is popularly known as judicial self-restraint, posit that courts should be reluctant to overrule the policy decisions of the political branches of government (Welch *et al.,* 2013; *Salman, Sukardi, and Aris*, 2018). Justice Harlan Stone, in his dissenting opinion in the case of *United States v. Butler*, expressed the perception of judicial self-restraint in the consideration of legislative and executive policy decisions.

> The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that, while the unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the courts, but to the ballot and to the processes of democratic government (*United States v. Butler*. 297 U.S. 1, 1936, para 78-79).

Thus, any oversight in the abuse of power or violation of the constitution should be an exclusive reserve of the people, through their votes, to determine the status of the laws in question. Adherents of judicial restraint contended that the court lacked the expertise of the bureaucrats, required for the policymaking process. In other words, policy outputs emerged from the careful and expertise process; and as such, judicial officers should not invalidate laws passed by the legislature but build up political capital for the occasional time that such laws would pass through the process of revocation (Welch *et al.,* 2013). They often express their "concern over the legitimacy of judicial arrogation of the power to set aside the desired objectives of the democratically accountable political branches" (Issacharoff, 2019: 3). In other words, they query the "peculiar ability of the weakest branch of government to claim a privileged, if not monopolistic, power to invoke constitutional authority as the supreme law of the land" (Issacharoff, 2019: 3). The contention here is that the judiciary, a less democratic branch of the government, given the nature of its composition, has an overbearing authority to truncate the decisions of the majority. The argument here is that the judiciary often plays the role of "negative legislator" (Hanani, 2020).

Proponents of judicial activism appreciate the stabilizing role of the judiciary as an important instrument for the promotion of democratic governance (Issacharoff ,2019; Hasani, 2020). Hanani has noted that the judiciary, "out of necessity and political pragmatism" does exceed its "competence to act not only as 'positive legislators' but also as creative policymakers involved in the governance of society" (Hanani, 2020: 552-553). Thus, judicial review is a mechanism whereby judicial officers expand their constitutional responsibility to include "participation in governance and assist in democratic processes" (Hanani, 2020: 549). This is a subtle way of establishing the legitimacy of the judiciary as a critical stakeholder in the democratic process. Indeed, the negative legislative role, especially in developing countries, is an instrument for the promotion of the interest of society, in a system characterized by autocracy and personalized politics. Thus, given its power of judicial review, the judiciary has "assumed a merited role in governance, steering societies towards constitutional values and principles advocating equality for all, a thing most particularly notable in societies in transition, best illustrated by three features" (Hanani, 2020: 540). Since the administration of the state is governed by rules, the judicial institutions "become ultimately the decision-makers, especially when the rule they state

applies not only to the parties of the case but to all those for whom analogous conflicts arise" (Zeno-Zencovich, 2020).

> The paradox is that the more legislatures and government bodies engage in the production of norms, the more they are transferring ultimate powers to the judiciary which often does not – and cannot – have an overall view of the multiple interests that are at stake, and that might be external to the specific conflict brought in front of it (Zeno-Zencovich, 2020).

In essence, the gradual acquisition of legislative and executive power by the judiciary is a function of the mode of behaviour of the two political branches of the government. Scholars have argued, however, that the tripartite division of state powers "remains vulnerable to whims of power, and that aggressive pursuit of self-contained goals by the executive may quickly disrupt the delicate balance among the highest bodies in a constitutional democracy" (Baros, Dufek, and Kosar 2020). This is common in developing countries, where political leaders appropriate state powers to advance pecuniary interests. Thus, attempts to alter or reduce this power would lead to manipulative measures to either expand or undermine state power in serving the pecuniary interests of the political elites.

Nevertheless, judicial review does not make the judiciary an autocratic branch of the government. As the harbinger of justice, courts have the responsibility of impartial interpretation of statutes to protect the interests of the public and the sanctity of the constitution. In the face of the delinquency of the political branches, judicial review is an accountability mechanism to enforce the responsibility of the legislature and the executive for public service delivery. The thrust of judicial responsibility is to protect the sanctity of democratic practice, which is anchored on constitutionalism (Staton, Reenock, Holsinger, and Lindberg, 2018).

## The Judiciary in the South African Governing System

The South African governing system anchors on the principle of constitutional democracy and vital values for the promotion of the well-being of citizens. These values include "the supremacy of the Constitution protected by an independent judiciary", openness, accountability, and equality, and "a separation of powers between the legislature, executive, and judiciary with appropriate checks and balances to ensure accountability, responsiveness, and openness...."[3] The drafters of the Constitution of the Republic of South Africa in 1996 vested judicial authority in the courts (Section 165 (1). The Constitution also reaffirmed the independence of the judiciary in the administration of justice. Section 165 (2-3) stated:

> The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. (3) No person or organ of the state may interfere with the functioning of the courts (Constitution of the Republic of South Africa 1996).

Section 172 of the Constitution made provisions for judicial review of legislative actions:

> When deciding a constitutional matter within its power, a court— (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and (b) may make any order that is just and equitable, including— (i) an order limiting the retrospective effect of the declaration of invalidity; and (ii) an order suspending the declaration of invalidity

[3] Constitutional Principle VI in Schedule 4 to the interim Constitution of South Africa. See also Certification of the Constitution of Republic of South Africa [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (Certification case) at para 45.

> for any period and on any conditions, to allow the competent authority to correct the defect (Section 172 (1), Constitution of the Republic of South Africa 1996).

Nevertheless, the final determination of the validity or otherwise of any law or rule, rests with the Constitutional Court, as the superior court in the South African government system. Section 172 (2) of the Constitution stated that:

> The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a Provincial Act, or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court (Constitution of the Republic of South Africa 1996).

These provisions complement the ideals of constitutionalism, which exhibit the supremacy of the Constitution as well as the independence of the judiciary (Mcineka and Ntlama, 2019).

## Constitutionalism, Separation of Powers and Judicial Review in South Africa

Constitutionalism connotes the "legal enforcement of constitutional limits of state powers to ensure constitutional order in a democratic polity" (Barber, 2018: 1). This demands the creation of a competent and effective set of institutions of the state, capable of monitoring the exercise of powers. The consequence of this is the enhanced capacity of the institutions to exercise their oversight powers to ensure accountability. Empowered state institutions would be effective and competent to defend and protect the rights of the public. While constitutionalism restricts arbitrary exercise of the power of the state, it equally strengthens the institution of government to ensure the protection of the rights of the citizens; most importantly, the exercise of the power for the improvement of the wellbeing of the citizens (Elazar, 2017; Barber, 2018; Ginsburg, Huq and Versteeg, 2018). The principle of separation of powers presupposes that each of the three major arms of government, the legislature, the executive, and the judiciary, has its boundary in the exercise of state powers for the specific constitutional responsibilities (Elazar 2017; Mcineka and Ntlama, 2019). However, the exercise of these powers is not absolute; they are subject to checks, as a cautionary measure to prevent abuse. The essence of this separated but shared power, in a system of checks and balances, is a mechanism to ensure accountability.

Constitutionalism and compartmentalization of the powers of the government are features of South African constitutional democracy. Each of the legislative, executive and judicial arms of the State has specific roles to play, and they interrelate[4]. The legislative and executive branches exercise political discretion in determining public decisions, considering the political preferences of the electorate, while the judiciary considers the contextual provisions of the Constitution to ensure adherence to the rule of law[5]. This is the expected role of the South African Constitutional Court. The interdependence of, and the interrelationship between, the two political benches and the judiciary is the cornerstone of constitutionalism in South Africa. The core value of constitutionalism is 'the protection and development of rights, not their extinction'.[6] The test of rationality, determined within the context of the South African constitutional democracy, empowers the judiciary to prevent the abuse of state power by the political branches of government. Section 167 (5 & 7) of the Constitution empowers the Constitutional Court to interpret and make a final decision on the validity of any decision of the legislature and the executive:

[4] United Democratic Movement v Speaker of the National Assembly and Others [2017] ZACC 21, para 2.; Certification of the Constitution of Republic of South Africa [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (Certification case) at para 45.
[5] S v Makwanyane 1995 (6) BCLR 665
[6] ibid at 357

> The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force… A constitutional matter includes any issue involving the interpretation, protection, or enforcement of the Constitution (Section 167 (5&7), Constitution of the Republic of South Africa 1996).

This provision makes the Constitutional Court the final appellate court, whose decision is binding and devoid of further adjudication. This places a huge political responsibility upon the Court in terms of the nature of cases that the Constitution has stipulated for its consideration.

## Judicial Review as an Accountability Mechanism in South Africa

Central to this independent judicial power is the promotion of accountability. Accountability connotes the justification of the powers delegated to the representatives of the people in the government (Fagbadebo, 2019). Citizens expect effective service delivery, used to measure performance (Olsen, 2015). Accountability, according to Olsen (2015: 425), is the establishment of "facts and assigning causality and responsibility, formulating and applying normative standards for assessing conduct and reasons given, and building and applying capabilities for sanctioning inappropriate conduct". In other words, government officials should discharge their responsibilities and exercise their powers according to the precepts set by the constitution. Accountability establishes a nexus between the people and the state. This has its root in the social contract theory of the state, characterized by principal-agent relationships (Pelizzo and Stapenhurst, 2014; Brandsma and Adriaensen, 2017). The state as the agent must promote the interests of the citizens who have surrendered their natural rights and freedom of self-government to the state. Evident in this is the answerability (give accounts) and enforceability (hold accountable) components of accountability. Thus, there are two major components of accountability drawn from this. The ability of the principal to impose sanctions when the agent fails to act according to the terms of performance constitutes the core of governance.

The South African Constitution provides a series of accountability mechanisms to safeguard the interests of the public. Section 1(d) provides that members of the executive, including the President, and Cabinet members, and Deputy Ministers, have the constitutional mandate to be accountable to the Parliament (Section 92 (2 &3); Section 93 (2), Constitution of the Republic of South Africa 1996). A vote of no confidence and or impeachment, described as "crucial accountability-enhancing instruments"[7], are the punishments for the failure of accountability (Sections 89 and 102, Constitution of the Republic of South Africa 1996). In some decided cases, the South African judiciary has demonstrated its capacity to provide the enabling environment for upholding the tenets of answerability and enforceability in governance. Subsequent sections discuss some of the issues brought to the fore through judicial review of legislative and executive actions, on the Nkandla case.

## Abuse of Executive Authority and Privileges

Chapter nine of the Constitution of the Republic of South Africa provides for the establishment of six independent State Institutions Supporting Constitutional Democracy (SISCD) as instruments of accountability. These are the Public Protector, the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious, and Linguistic Communities, the Commission for Gender Equality, the Auditor-General, and the Electoral Commission (Section 181(1), Constitution of the Republic of South Africa 1996). The Public Protector (PP) has the constitutional mandate to carry out investigations on any improper

[7] United Democratic Movement v Speaker of the National Assembly and Others [2017] ZACC 21, at 10

conduct of officials in respect of any institution of government. The Constitution empowers the PP:

> to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice; to report on that conduct; and (c) to take appropriate remedial action (Section 182(1a-c).

In furtherance of its mandate, the PP launched an investigation into the alleged breach of the Executive ethic Code, in respect of the security upgrade of the private residence of the former president, Jacob Zuma, in 2013 (Public Protector, 2014). The Executive Members' Act 82 of 1998, prescribes the code of ethics and conduct for members of the executive arm at all levels of the government of the Republic of South Africa. A weekly tabloid, *Mail and Guardian*, opened the lid on the malfeasances associated with the project (Rossouw, 2009). It alleged that 'President Jacob Zuma is expanding his remote family homestead at Nkandla in rural KwaZulu-Natal for a whopping price of R65-million — and the taxpayer is footing the largest chunk of the bill' (Rossouw, 2009). The government denied the allegations but later claimed that the "Zuma family planned before the elections to extend the Nkandla residence, and this is being done at their own cost. No government funding will be utilized for the construction work" (Rossouw, 2009).

Given this denial, while the construction works had already commenced, a complainant petitioned the PP requesting an investigation into the allegations. The complainant alleged:

> the President's private residence was being improved and upgraded at enormous expense to the state, estimated at about R65 million. The impugned improvements allegedly included a network of air-conditioned living quarters, a clinic, gymnasium, numerous houses for security guards, underground parking, a helicopter pad, a playground, and a Visitors' Centre (Public protector, 2014:5).

Subsequently, the amount was alleged to have increased to R246 million, after some additions to the original prescriptions for the security upgrade of the president's private residence:

> More items were added to the project after the concerns were raised in 2009, bringing the cost from the initial R65 million, which was the subject of complaint in 2009, to R215 million, which has since been spent, while outstanding work is currently estimated at R36 million bringing the envisaged total cost to R246 million (Public Protector, 2014:6).

The concern of the complainant was the justification for the expenses on the private residence of the president, who had two other official residences, while most citizens were fighting for their survival because of the consequences of the parlous state of the economy:

> While the majority of people in this country still struggle and fight for survival it is deeply disturbing to discover that the President and some of his close senior supporters feel that it is all right to abuse their positions to benefit themselves and each other at the expense of the nation and all her citizens (Public Protector, 2014: 7).

The PP submitted its report in 2014 with a series of discoveries bordering on maladministration, violation of the constitution and other statutes and misappropriation of state resources. The report upbraided President Zuma as well as other top government officials who participated in the subversion of the laws and rules that governed the administration of the state (Public Protector, 2014):

> President Zuma improperly benefited from the measures implemented in the name of security, which include non-security comforts such as the Visitors' Centre, such as the swimming pool, amphitheatre, cattle kraal with culvert and

> chicken run. The private medical clinic at the family's doorstep will also benefit the family forever. The acts and omissions that allowed this to happen constitute unlawful and improper conduct and maladministration (Public Protector, 2014: 431).

The PP further chided the president, as the custodian and the guardian of the resources of the state, for his failure to preserve public resources and prevent wastage:

> His failure to act in the protection of state resources constitutes a violation of paragraph 2 of the Executive Ethics Code and accordingly, amounts to conduct that is inconsistent with his office as a member of Cabinet, as contemplated by section 96 of the Constitution (Public Protector, 2014: 439).

The president violated the provisions of sections 96 and 237 of the Constitution as well as section 2(v) of the executive members' Ethics Act of 1998. Section 96(1) (b-c) precludes any member of the executive from acting…

> …in any way that is inconsistent with their office or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or (c) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person (Constitution of the Republic of South Africa 1996).

Similarly, section 237 of the Constitution prescribes, "All constitutional obligations must be performed diligently and without delay". In addition, section 2(v), of the Executive Members' Ethics Act of 1998 prevents the president from "acting in a way that may compromise the credibility or integrity of their office or the government". Pieces of evidence presented by the PP indicated that the former president violated the provisions of the Constitution and extant rules that guided his conduct in office. Given these infractions by the President, the PP, acting on the provisions of section 182(1)(c) of the Constitution, directed the president to take some remedial actions.

> The president is to: Take steps, with the assistance of the National Treasury and the SAPS, to determine the reasonable cost of the measures implemented by the DPW [Department of Public Works] at his private residence that do not relate to security, and which include Visitors' Centre, the amphitheatre, the cattle kraal and chicken run, the swimming pool. Pay a reasonable percentage of the cost of the measures as determined with the assistance of the National Treasury, also considering the DPW apportionment document. Reprimand the Ministers involved for the appalling manner in which the Nkandla Project was handled, and state funds were abused. Report to the National Assembly on his comments and actions on this report within 14 days (Public Protector, 2014: 442).

The PP submitted the report to the National Assembly, as envisaged by the drafters of the Constitution, to assist in the exercise of its oversight power.

Subsequent legislative and executive actions on the report sought to discredit its findings. For instance, the Minister of Police, Nkosinathi Nhleko, who led a team to investigate the veracity of the report absolved the president of any wrongdoing, and, as such should not comply with the remedial action (ENCA 29/05/2015). Nevertheless, members of the National Assembly who undertook an oversight trip to Nkandla, to verify the contents of the report, found out that "President Zuma unduly benefited as the Public Protector found" (*cf.* Nicolson, 2015). Upon the receipt of the report, the National Assembly set up an Ad-Hoc Committee to consider the report and the response of the President (Makinana 2014). The Committee tacitly agreed that there were losses of state resources on the Nkandla project but short of making the President culpable (Committee Report on Report by President on Nkandla Security upgrades). Given this position,

the African National Congress (ANC) insisted that the president did not violate any law, and as such, compliance with the remedial action was unnecessary (Makinana, 2014). On November 14, 2014, with a vote of 201 against 103, the National Assembly exonerated President Zuma of any infraction in the handling of the Nkandla project.

## Judicial Review of the Legislative Action on Nkandla

On the strength of the legislative action, members of the opposition party in the parliament approached the Constitutional Court (CC), in two different cases, for adjudication[8]. They sought the determination of the constitutionality of the action of the legislature. One of the responsibilities of the CC, as stated in section 167 (4)(e) of the Constitution, is to "decide that Parliament or the President has failed to fulfill a constitutional obligation". Section 55(2) of the Constitution mandates the National Assembly to provide for mechanisms — (a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and (b) to maintain oversight of—the exercise of national executive authority, including the implementation of legislation; and (ii) any organ of state (Constitution of the Republic of South Africa 1996).

Aside from the reports of the SISCD, such as that of the PP, section 56 of the Constitution empowers the National Assembly to procure necessary information in advancing its oversight responsibilities. Similarly, sections 89, 92, 93, 96, and 102, exhibit the primacy of accountability as a watchword in the conduct of members as well as the consequences of actions tantamount to constitutional breach or failure to adhere to ethical conduct and behaviour.

The CC, in its judgment, declared, among others that:

> The resolution passed by the National Assembly absolving the President from compliance with the remedial action taken by the Public Protector in terms of section 182(1)(c) of the Constitution is inconsistent with sections 42(3), 55(2)(a) and (b) and 181(3) of the Constitution, is invalid and is set aside[9].

The Court also affirmed the constitutionality and the binding authority of the PP to recommend remedial action and that the failure of the president to comply was tantamount to a violation of the Constitution…

> …The remedial action taken by the Public Protector against President Jacob Gedleyihlekisa Zuma in terms of section 182(1)(c) of the Constitution is binding. The failure by the President to comply with the remedial action taken against him, by the Public Protector in her report of 19 March 2014, is inconsistent with section 83(b) of the Constitution read with sections 181(3) and 182(1)(c) of the Constitution and is invalid[10].

The Court ordered the president to pay, personally, the costs of measures and items implemented in the project that did not relate to security, as determined by the National Treasury. The Court affirmed the culpability of the president in abuse of power and violation of the constitution. It also vindicated the PP and affirmed the constitutionality of the actions and recommendations, directed toward the promotion of accountability because of the failure of the National Assembly to hold the president accountable. Section 89 (1) (a-c) of the Constitution listed three offenses that could warrant the parliament to remove the president from office: "a serious violation of the Constitution or the law; serious misconduct; or inability to perform the functions of office".

[8] Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11; Economic Freedom Fighters and Others v Speaker of the National Assembly and Another [2017] ZACC 47.
[9] ibid at Order 10
[10] ibid at Order 3-4

## The Primacy of Legislative Oversight as an Accountability Mechanism

Section 42 (3) of the Constitution established the oversight power of the National Assembly.

> The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action[11].

Similarly, section 55 (2) empowers the National Assembly to put in place every measure to ensure the operation of an accountable leadership through oversight of executive authority as well as any organ of the state. One of the tools available to the National Assembly is the reports of findings of the PP, as envisaged in section 8(2)(b) of the Public Protector Act.[12] The CC affirmed that one of the principal responsibilities of the legislature is "to oversee the performance of the President and the rest of Cabinet and hold them accountable for the use of State power and the resources entrusted to them"[13]. The National Assembly has "the obligation to hold Members of the Executive accountable [and] put effective mechanisms in place to achieve that objective and maintain oversight of their exercise of executive authority"[14]. But the National Assembly failed to harness these constitutional provisions to hold the president accountable. And the CC upbraided the National Assembly for its failure[15].

The lack of sufficient majority votes, because of the numerical strength of the governing ANC in the National Assembly, led to the defeat of all the motions of no confidence in the President, moved by the opposition parties, for undermining the report of the PP on Nkandla project[16] (Eyewitness News 29/07/2017). When this failed, the opposition leader in the parliament sought a judicial order to compel the National Assembly to commence an impeachment process[17]. Part of the relief[18] was for the court to direct the Speaker of the National Assembly to set up a committee to investigate the conduct of the president, in preparation for impeachment, as envisaged by section 89(1) of the Constitution[19]. The CC had listed impeachment as one of the accountability-enforcing mechanisms at the disposal of the National Assembly[20]. One of the reasons why the National Assembly failed in its constitutional obligation was the consequence of the indictment of the president[21] because, as the CC noted, "It is unlikely that unpleasant findings and a biting remedial action would be readily welcomed by those investigated"[22]. The President was a member of the ANC, which had a majority of members in the National Assembly. The legislature failed to protect the interest of the state because it was interested in safeguarding the political party, contrary to the intendment of the Constitution[23].

## The Office of the Public Protector as an Independent Organ with Binding Constitutional Power

The PP plays a vital role to promote and protect the interests of the public, as contained in section 182 of the Constitution. Its report on Nkandla was just one of the manifestations of the exercise

[11] Constitution of the Republic of South Africa, 1996.
[12] Public Protector Act 23 of 1994
[13] United Democratic Movement v Speaker of the National Assembly and Others [2017] ZACC 21, paragraph 10.
[14] ibid, at 40
[15] Economic Freedom Fighters and Others v Speaker of the National Assembly and Another [2017] ZACC 47.
[16] ibid.
[17] ibid
[18] ibid
[19] ibid at 18.
[20] United Democratic Movement v Speaker of the National Assembly and Others [2017] ZACC 21, paragraph 10
[21] Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11, paragraph 42.
[22] ibid at 55.
[23] ibid at 43.

of this power. The Court had ruled that the effectiveness of this constitutional obligation resides in the independence of the PP.

> Whether it is impartial or not would be irrelevant if the implementation of the decisions it takes is at the mercy of those against whom they are made. It is also doubtful whether the fairly handsome budget, offices and staff all over the country and the time and energy expended on investigations, findings and remedial actions taken, would ever make any sense if the Public Protector's powers or decisions were meant to be inconsequential.[24]

The PP is a vital instrument to make its constitutional obligation effective as a facilitator of good governance. As such, its constitutionally guaranteed "independence, impartiality, dignity and effectiveness", which are "indispensable requirements for the proper execution of its mandate" as one of the SISCD, imposed an obligation on the agents of the state to accord it such recognition to strengthen constitutional democracy in South Africa[25]. The Court defined the core mandate of the PP as the protection of "the public from any conduct in state affairs or in any sphere of government that could result in any impropriety or prejudice".[26] The CC ruled that the "purpose of the office of Public Protector is to ensure that there is an effective public service which maintains a high standard of professional ethics"[27]. This reinforced one of the principles of public administration, effective service delivery, stipulated in section 195(1)(a) of the Constitution.[28]

> The Public Protector is thus one of the most invaluable constitutional gifts to our nation in the fight against corruption, unlawful enrichment, prejudice and impropriety in State affairs and for the betterment of good governance. The tentacles of poverty run far, wide and deep in our nation[29].

The CC also affirmed the binding authority of the PP stating that it "must have the resources and capacities necessary to effectively execute" its mandates of strengthening constitutional democracy.[30] Since the PP derives its power from the Constitution, the remedial actions, therefore, are to give effect to the principles of accountability, transparency, prudent management of public resources for the intended purpose, and effective service delivery.

> Public Protector would arguably have no dignity and be ineffective if her directives could be ignored willy-nilly. The power to take remedial action that is so inconsequential that anybody, against whom it is taken, is free to ignore or second-guess, is irreconcilable with the need for an independent, impartial and dignified Public Protector and the possibility to effectively strengthen our constitutional democracy.[31]

This judgment was a reversal of an earlier position of the High Court of South Africa, sitting in Cape Town, which held that the power of the PP was not adjudicative and that the remedial actions were not binding.

> The powers and functions of the Public Protector are not adjudicative. Unlike courts, the Public Protector does not hear and determine causes. …the Public Protector relies primarily on official documents such as memoranda and minutes, and less on oral evidence…. Further, unlike an order or decision of a court, a

[24] ibid at 49.
[25] ibid at 50.
[26] ibid at 51.
[27] Certification of the Constitution of the Republic of South Africa, 1996 [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at para 161 (Certification case).
[28] Section 195(1), Constitution of the Republic of South Africa 1996
[29] Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11, paragraph 42 at paragraph 52.
[30]ibid at 54
[31] ibid at 67

> finding by the Public Protector is not binding on persons and organs of state. If it was intended that the findings of the Public Protector should be binding and enforceable, the Constitution would have said so[32].

The supporters of the president as well as the Ad Hoc Committee in the Parliament had relied on this judgment to insist that the remedial actions prescribed by the PP should be ignored because it was ineffective. The Committee agreed with the findings of the various investigations that the handlers of the project "inflated the project costs in an irregular manner to an amount in excess of R216 million"[33], but absolved the president of any wrongdoing. The CC reinforced the importance of the functions and responsibilities of the PP as a countervailing accountability measure. Section 195 of the Constitution enumerated the core values of public service in the Republic of South Africa. These include accountability, transparency, and prudent management of public resources to ensure effective service delivery to the public. Thus, these judicial pronouncements have redefined the PP as an important organ of the state for the realization of the objective principles guiding its core mandate: effective service delivery. With the definition of the roles, importance and boundaries of the PP, the Court had revealed the intendment of the drafters of the Constitution to provide a safety verve against the predatory tendencies of the political branches of the government as exhibited in the Nkandla project.

## Conclusion

Legislative oversight, as envisaged by the drafters of the Constitution is pivotal to the realization of the core objective of the state. Indeed, the proponent of the principle of separation of powers and the doctrine of checks and balances had contemplated the feasibility of abuse of concentrated powers. In this paper, it is evident that the legislature failed in the discharge of its core responsibility: oversight of executive action to promote accountability and effective service delivery. The nature of the party system in South Africa and the domination of the legislature by members of the ruling ANC have weakened the capacity of the legislature to harness its constitutional powers for the intended purpose (Fagbadebo, 2019).

Judicial review of legislative and executive actions in recent times has revealed a series of malfeasances of members of the executive and the legislature at the expense of service delivery. For instance, the PP discovered that the monumental breaches of the Constitution and extant rules impact service delivery negatively. According to the PP report, the Department of Public Works (DPW) reallocated funds earmarked for the Inner-City Regeneration and the Dolomite Risk Management Programmes (Public Protector 2014: 436). Thus, this negatively affected the service delivery programs of the department. This is an indication that for every mismanagement of public resources, service delivery suffered. When funds originally allocated to some programs to improve the wellbeing of the members of the public are no longer available but misappropriated the public would witness ineffective service delivery. This is against the tenets of the Batho Pele principle. The core purpose of the principle is "effectiveness in delivering services which meet the basic needs of all South African citizens" (Batho Pele White Paper, 1997). The principle sought to ensure that the goal of the South African public service is improving service delivery.

This is the purpose of the empowerment of the legislature as an accountability institution, and more importantly, the establishment of the PP, as an agent for effectual monitoring and enforcement of the principles and objectives of the state. Thus, judicial review of the primacy of these two institutions in the Nkandla case and other subsidiary cases reinforces the need for adherence to the rule of law as a pivotal step towards the realization of the core values of Batho

[32] Democratic Alliance v South African Broadcasting Corporation Limited and Others (12497/2014) [2014] ZAWCHC 161; 2015 (1) SA 551 (WCC) (24 October 2014), paras 50-51).
[33] Committee Report on Report by President on Nkandla security upgrades: adoption. Ad Hoc Committee - President's Submission in response to Public Protector's Report on Nkandla

Pele principles. In the face of legislative failure to hold the executive accountable, the PP and the judiciary have come to the rescue of the South African public. Accountability as the core principle of the South African governing system demands that members of the legislature should be loyal to the Constitution, which they have sworn to uphold rather than their respective political organisation. Thus, adherence to the Constitution, irrespective of party affiliation and sentiment, is the bedrock of effective legislative oversight.

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