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The Relationship between Public Policy and Judicial Review in South Africa's Constitutional Democracy

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RESEARCH REPORT

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ACRONYMS

ANC – African National Congress
Constitution – the Constitution of South Africa Act 108 of 1996
DA – Democratic Alliance
EFF – Economic Freedom Fighters
FUL – Freedom Under Law
GIBS – Gordon Institute of Business Science
HSF – Helen Suzman Foundation
ICC – International Criminal Court
SABC – South African Broadcasting Corporation Limited
SCA – Supreme Court of Appeal
SACP – South African Communist Party
SCOPA – Standing Committee on Public Accounts

The purpose of this research was to establish whether the increasing referral in South African politics of policy matters to the judiciary for review was indicative of a strong or weakening constitutional democracy. The research sought answers through an investigation of three case studies, focussing specifically on the decisions made by the executive, the outcomes of the ensuing court processes, the extent of the powers of the judiciary, and the consequences of judicial review for policy, policy-makers and democracy. The research drew meanings from the manner in which public power was utilised by members of the executive; the manner in which the judiciary applied its constitutional duties of separation of powers and checks and balances to review public policy in these instances, and the outcomes thereof. In addition to the case studies, a literature review was carried out, and questionnaire-style interviews were conducted with constitutional law experts. The findings of the interviews were used to test, corroborate and triangulate the findings from the literature and case study reviews. Several themes emerged from the research, including the conflict between the constitutional requirement of rational decision-making and the political nature of executive power; the influence of politics, power dynamics and subjective interests on decision-making; the weakness of accountability institutions, such as the legislature, parliamentary committees and the Office of the Public Protector, to hold the executive to account; the consequent overreliance on the judiciary to fulfil the accountability function; the potential politicisation of the judiciary; and the impact of judicial ideology on public policy. An analysis of these themes revealed that the extent of judicial review practised in South Africa since 2009 is indicative of a weakening constitutional democracy with weak institutions of oversight and accountability.

CHAPTER 1

1.1 Introduction

The executive branch of government in South Africa has a constitutional obligation to develop and implement national policy (which encompasses public policy), and to implement legislation (Section 85 of the Constitution of South Africa Act 108 of 1996 (the Constitution)). In fulfilling these duties, the executive exercises public power by making decisions on a broad range of issues. These decisions are required to meet the constitutional requirements of rationality and legality. Whilst this constitutional duty exists, members of the executive are often faced with political considerations that have the potential to induce decision-making in one way as opposed to another. The legislature has the obligation to formulate legislation (Section 43 of the Constitution) and to hold the executive accountable to it (Section 55 (2) of the Constitution), and the judiciary has a constitutional duty to review the constitutionality of

any conduct or legislation referred to it. This often entails the judiciary getting involved in public policy matters, which is the functional area of the executive. These accountability measures mean that the legislature is required to challenge the executive in the event that the executive fails to implement its duties in accordance with its constitutional mandate, in order to ensure that the executive complies with the Constitution in carrying out its functions of policy or decision making and implementation of such policies. Similarly, the judiciary is required to ensure compliance by the executive and the legislature with the Constitution in exercising their functions. The legislature should be the first and most efficient check on the powers of the executive.

The Republic of South Africa is founded on constitutional values which include constitutional supremacy and the rule of law. The founding provisions of the Constitution inform all other provisions therein, thereby forming a foundation that echoes throughout. It is established law that any law or conduct from any branch of state or citizen which is inconsistent with the provisions of the Constitution is invalid. The Constitution imposes the doctrine of separation of powers on the different branches of state (the legislature, the executive and the judiciary) in order to protect South Africa's constitutional democracy from concentration of power in one branch of the state, and from the abuse of power. The Constitution, through the doctrine of checks and balances, permits each branch of state to intervene in the affairs of the other in the event that constitutional provisions are not being adhered to.

From the early days of South Africa's constitutional democracy, the judiciary has played a central role in ensuring that the legislature and executive adhere to the provisions of the Constitution. The cases Government of the Republic of South Africa and Others v Grootboom and Others (2000) CC (the Grootboom case), Minister of Health and Others v Treatment Action Campaign and Others (2002) CC (the TAC case), Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others (2000) CC (the Pharmaceutical case), and S v Dodo (2001) CC illustrate how the judiciary, seemingly fearlessly, applied the doctrines of separation of powers and of checks and balances to government policies in the earlier years of South Africa's democracy.

The doctrines of separation of powers and checks and balances in the context of the judiciary have been the subject of great contention during the course of South Africa's constitutional democracy. This is due to the intrusive nature of these constitutionally entrenched powers, which allow the judiciary to intervene in the functional areas of the executive and the legislature. This research will review three separate instances of the use of public power by the executive. The manner in which the judiciary has interpreted and implemented its powers

to intervene in the functional areas of the executive in matters of public policy will be considered generally, and then more specifically in the three case studies referred to below. Through an examination of these case studies, the research will identify some of the reasons for the increasing level of judicial review of public policy in contemporary South Africa, and consider whether this is indicative of a strong or weak constitutional democracy.

The research will follow three matters within South African politics in order to draw meanings from (1) the manner in which public power was utilised by members of the executive, the legislature, the African National Congress (ANC), and the SABC *inter alia*; (2) the manner in which the judiciary applied its constitutional duties of separation of powers and checks and balances to review public policy in these instances, and the outcomes thereof; and (3) the themes that emerged from these case studies. The case studies involve (1) non-compliance by the then Minister of Communications (Muthambi) and the SABC board with the remedial action prescribed by the Public Protector pertaining to the then acting chief operations officer of the SABC, Hlaudi Motsoeneng (Motsoeneng) (the SABC case); (2) public spending on president Jacob Zuma's (the President's) private residence in Nkandla, KwaZulu-Natal, and the subsequent non-compliance by certain members of the executive and the legislature with the Public Protector's remedial action pertaining thereto (the Nkandla case); and (3) the failure by government to arrest the president of Sudan, Omar Hassan al-Bashir (Bashir) during his attendance of a summit hosted in South Africa, notwithstanding the existence of a warrant for his arrest having been issued by the ICC. The government subsequently failed to abide by a court order preventing Bashir from leaving South Africa prior to a final judgment being delivered by the court regarding the government's obligation to arrest Bashir (the Bashir case).

These case studies are appropriate for this research because they all involve the exercise of public power by members of the executive. They provide rich insights into the power relations between members of the executive, interactions between the three branches of state, and the power dynamics between various institutions. Furthermore, the research investigated the political environment within which these decisions and interactions took place. These case studies were current at the time the research was conducted, and the report evolved as developments occurred.

The purpose of this research, which is also the focus of the primary research question, is to establish whether the details of the three cases, as part of an increasing rate of referral of policy matters to the judiciary for review, strengthens or weakens South Africa's constitutional democracy. The research sought answers through an investigation of the case studies, focussing specifically on the outcomes of the court processes, the extent of the powers of the

judiciary, and the consequences of judicial review for policy, policy-makers and democracy. The secondary research questions are structured in a manner that allows the writer to reach a response to the primary research question. The chosen case studies are well ventilated in court documents and the media. Information is therefore accessible, which allows for an accurate account of government action. As a necessity, reference will be made to a substantial volume of case law, scholarly articles and opinion pieces, as well as newspaper articles. The research topic is based on on-going matters and it was therefore required that the research methodology is flexible.

1.2 Problem statement

Despite the guiding provisions in the Constitution, a significant number of public policy decisions have been referred to the judiciary for review from 2009 to date, during President Jacob Zuma's regime, on the grounds of the unconstitutional exercise of power primarily by the executive. It appears as though recourse to the courts has become the norm for resolving political disputes which are better suited for resolution through other channels provided for in the Constitution, including voting and checks and balances between the executive and the legislature. There seems to be a disconnect between the constitutional democracy envisaged by the Constitution, and the constitutional democracy that currently exists. The disconnection is derived from government's style of governance, which appears to allow politics to overwhelmingly influence public policy. The judiciary, when called upon, has no choice but to adjudicate in the political environment within which public policy is made, which has its challenges and consequences.

The distinguishing feature of constitutions around the world is the limitation of government power through tools including separation of powers, democratic principles and judicial review (Ghai, 2005). The founding provisions of the Constitution must inform, shape and constitute the very foundation of public policy, and public policy inconsistent with the prescripts of the Constitution will be invalid (Bekink, 2012; Currie and De Waal, 2002; Barkhuizen v Napier (2007) (CC)). Judicial review is an integral feature of the rule of law, and most constitutions in the world include this oversight by the judiciary (Vanberg, 2005, p. 1). Judiciaries around the world are engaging more and more in reviewing public policy matters (Gibson, 2006; Gee, Hazell, Malleson & O'Brien, 2015, p. 2). In South Africa, a culture of referring public policy decisions to the judiciary for review has developed. Examples of this can be derived from the case studies, as well as various other cases that will be referred to in the research.

Through the case studies the research will draw inferences from the events that occurred and the context within which the cases occurred, to gain insights from these inferences of why judicial review, on the level currently experience, is required. Case law spanning the duration of South Africa's constitutional democracy is consulted to obtain a view of the policy adopted by the judiciary in instances where it has to preside over matters of public policy. An important aspect of this research is the inquiry into whether judicial review in public policy matters, especially where politics is involved, will create a stronger, more stable, constitutional democracy for South Africa, or whether it will have the opposite effect.

1.3 Research questions

The research questions aim to establish whether the rate at which public policy decisions are referred to the judiciary for review is a sign of a constitutional democracy that is strengthening or weakening. To do this, the research adopted three case studies to provide insights as to the reasons why judicial review has become a common channel for the resolution of disputes between government and some minority organisations/institutions in South Africa; the nature of public power in South Africa's political discourse; the interaction between the three branches of state in fulfilling their constitutional obligations to hold each other accountable; and the impact and consequences of judicial review of public policy.

The primary research question that this research project will address is: Is the degree of involvement by the judiciary, as experienced from 2009 to date (early 2017), in reviewing public policy in South Africa, a sign of a strong constitutional democracy or a weakening constitutional democracy?

Secondary research questions:

a. With reference to the Nkandla, SABC and Bashir cases, has the exercise of public power by the executive conformed with constitutional provisions and principles?

b. What is the judiciary's policy when dealing with public policy matters, and to what extent is the judiciary involved in policy-making? Specifically, with regard to the case studies, has it managed to respect boundaries and maintain deference in respect of the functional areas of the executive?

c. What are the consequences of judicial review of public policy, and what impact and consequences does this have for South Africa's constitutional democracy?

1.4 Research objectives

This research will explore the reasons for the increase in judicial review of public policy and the constitutional implications thereof. The objectives are to establish the reason for the increasing referral of public policy matters to the courts, to establish whether this practice is indicative of a strengthening or weakening constitutional democracy for South Africa, and to consider the implications it may have on public policy and policy-making.

1.5 Research paradigm

The purpose of research paradigms is to make research more accurate, objective, and therefore more reliable. Patton (2015, p. 89) defines paradigms as "*a world view – a way of thinking about and making sense of the complexities of the real world… Paradigms tell us what is important, legitimate, and reasonable*". They provide a coherent world view thereby providing certainty and stability to research (Patton, 2015). Patton (2015) suggests that the focus of the research should be on methodological appropriateness which will impact on the quality of the study. The quality of the study is determined by its "intended purpose, available resources, procedures followed, and results obtained, all within a particular context and for a specific audience" (Patton, 2015, p. 92). He further argues that "*the importance of understanding alternative research paradigms is to sensitise researchers and evaluators to the ways in which their methodological prejudices, derived from their disciplinary socialisation experiences, may reduce their methodological flexibility and adaptability*" (2015, p. 92). The writer had to ensure that prejudice and subjective beliefs did not interfere with the research process, and that objectivity was maintained throughout the research process.

The writer strived to conduct an objective inquiry to ensure that the findings derived from the data corresponded with reality. "*To test a claim of effectiveness by bringing data to bear on it, including qualitative data, is to be engaged in a form of reality testing that uses evidence to examine assertions and corroborate claims*" states Patton (2015, p. 105). Reliance was placed on the data itself to substantiate claims made and to generate theories.

Post-positivism informed and shaped the research in order to ground it in reality and truth. Post-positivism postulates that discretionary judgment cannot be avoided in scientific research, it is problematic to try to prove causality with certainty where human behaviour is concerned, knowledge is relative and not absolute, and "*it is possible, using empirical evidence, to distinguish between more and less plausible claims, to test and choose between rival hypotheses, and to distinguish between "belief and valid belief*" (Patton, 2015, p. 106).

This research did not aim to find absolute answers to the research questions, but in order to get as close as possible to the answers it sought, it was important to always interpret the data collected within the context of a particular time and the set of circumstances – in line with the conditions and requirements specified by Wisker (2008). The meanings generated from the findings were arrived at through linking concepts, interpreting contexts and perceptions (see Wisker, 2008). Therefore, the research design is guided and influenced by the post-positivism paradigm, which means that all stages of the research process, including data collection, data analysis and review of the quality of the findings, were guided by the paradigm's concepts of science (see Patton, 2015).

Value free inquiry is not possible, and therefore any biases that the writer had or identified had to be made explicit, and steps had to be taken to mitigate their influence, and their possible influence had to be discussed – further requirements highlighted by Patton (2015). The aim is to minimise bias and maximise the accuracy and reliability of the study. The findings must be empirical, reflecting solid description and analysis, but the writer must acknowledge the potential presence of subjectivity. The inclusion of triangulation of sources of data and methods of analysis was desirable in order to increase the credibility and accuracy of the findings (see Patton, 2015). The criteria for quality includes "truth value and plausibility of findings; credibility, impartiality, and independence of judgment; confirmability, consistency, and dependability of data; and explainable inconsistencies or instabilities" (Patton, 2015, p. 107).

1.6 Limitations of the study

This study followed three primary case studies, which provide an account of executive use of public power. Public policy in this research is understood as the actions and decisions of public officials. This research is concerned with aspects of public policy such as the actions, omissions, decisions and non-decisions, political influence, and political considerations that inform public policy. The study derived generalisations from an investigation of the facts of each case study, and created themes, patterns and theories from those facts. The limited number of cases utilised in the study means that the generalisations made must be met with circumspection. The writer, in mitigating this limitation, consulted a number of sources, and made reference to additional cases involving public policy and judicial review in an endeavour to provide further justification and plausibility to the findings of the research. The research also attempted to link aspects of the case studies to theory in international comparison, in order to keep the findings objective, with maximum possible application.

The tools utilised to ground the report in objective facts include (1) the use of questionnaire-style interviews, which triangulated the data and findings generated; (2) the use of theory; (3) the use of numerous sources of data; (4) reference to numerous incidents which generated the same theories or findings; and (5) the adoption of a scientific approach to the data.

A further challenge in analysing the exercise of power and the decision-making process was the limited exposure the writer had to what happened behind the scenes; the events that are not reported or not reflected on in interviews because they are unknown to the public, media, public interest groups and also specialist interviewees. The thoughts and true intentions behind public acts of power are not known, and this applies not only to politicians but to members of the judiciary as well. The research closely followed reported events as they unfold and endeavoured to make connections and generate themes and theories from the information that was available and the context in which these events unfolded. The writer also relied on observations to get a better understanding of events or phenomena.

1.7 Ethical considerations in conducting research

Ethical considerations were considered and adhered to at every stage in the research process. The research was conducted with accuracy and integrity, and the informed consent of interviewees was obtained (see Wagner *et al*., 2012, p. 64). Accuracy requires data to be reported factually. Fabrications, contrivances and omissions are unethical and non-scientific (Wagner *et al*., 2012, p. 64). In conducting this research, the writer ensured that events and statements were conveyed accurately in order to avoid distorted results.

1.8 Conclusion

This research report aims to establish the reasons for the increasing referral of policy matters, in the form of decisions taken by the executive, to the judiciary; whether this practice signifies a strengthening or weakening constitutional democracy; and the consequences of judicial review of executive action at these levels. In Chapter 2 the research methodology for this research project is discussed. This is followed in Chapter 3 by a review of the prevailing literature on key issues which include the doctrine of separation of powers, checks and balances, the rule of law, and theory pertaining to aspects of judicial review such as judicial deference, the counter-majoritarian dilemma, and judicial independence. The case studies will be considered in Chapter 4, and in Chapter 5, the responses to the questionnaire-style interviews will be considered. Chapter 6 will consider the findings from the analysis of the case

studies, questionnaire-style interviews, and literature review. These findings will be analysed further in chapter 7 in order to answer the research questions.

CHAPTER 2: RESEARCH METHODOLOGY AND DATA ANALYSIS

2.1 Research methodology

To acquire knowledge about social reality, it is important to ensure that the research strategy, the data collected and the manner of analysing the data are appropriately linked, and work effectively in answering the research questions. This involves finding the most appropriate tools and techniques (Gog, 2015, p. 34). To achieve this, a logical plan had to be followed in order to arrive at the findings of this report (see Mayer, 2015, p. 55).

The strategy for this research was to take a naturalistic approach to the inquiry, which means that the research studies, in the words of Patton (2015, p. 47), "*real world situations as they unfold naturally*" without any predetermined ideas. The writer had to keep apprised of developments as they unfolded. The writer did not interfere with the data collection process and was therefore in the position to uncover events in their natural state and context, for example, as documented in court judgments, scholarly analyses, reports produced by members of the executive and the Public Protector, and news reports. Due to the continuous unfolding of events concerned with the case studies, the research required flexibility as the study had to be guided by these events, to some extent, as they unfolded in 'real time'. The study was therefore open-ended and adopted emergent design flexibility (as specified by Patton, 2015).

2.1.1 Research design

The research design should present a logical plan that links the research questions to their answers. The design provides the framework for data collection and analysis. Yin quotes Nachmias and Nachmias' definition of research design as a plan that "*guides the investigator in the process of collecting, analysing, and interpreting observations. It is a logical model of proof that allows the researcher to draw inferences concerning causal relations among the variables under investigation"* (Yin, 2014, p. 28).

Essential components that should inform the research design are (Yin, 2014, pp. 29-36): (1) the research questions, which determine how the research is conducted, and the ultimate findings; and (2) the units of analysis, which define the scope of data to be collected and its relevance. This refers to defining the case to be studied and bounding it, which limits the scope

of the research. The unit of analysis for this study is whether the judiciary's involvement in the political aspects of public policy is appropriate for a healthy democracy.

The quality of a research design can be tested by considering four factors (Yin, 2014, p. 45). These are construct validity, internal validity, external validity and reliability. These tests (which look at the confirmability, credibility, data dependability and trustworthiness of the research) apply at different stages of the research process and will be discussed as part of the relevant steps (for example, data collection, data analysis). The test that is applicable to the design stage is external validity, which considers whether the findings of a study can be generalised beyond the current study (Yin, 2014, p. 48). In other words, have the findings produced analytic generalisations? These are the lessons learned from the research findings, which can be generalised, and "*shed empirical light about some theoretical concepts or principles*" (Yin, 2014, p. 40). They should be capable of application to other situations (Yin, 2014, p. 41). The generalisability of findings will be influenced by the construction of the research questions. This is because the form of the questions will determine the research methods utilised, and therefore the outcome of the study (Yin, 2014, p. 48). This study is both descriptive and explanatory, and therefore questions about how and why certain phenomena arise or exist will be raised. The research questions (together with the research methods) have been carefully structured to facilitate, as far as possible, analytic generalisability.

The research design involves three case studies (a multiple case design). Yin defines a case study as an "*empirical inquiry that investigates a contemporary phenomenon (the case) in depth and within its real-world context, especially when the boundaries between phenomenon and context may not be clearly evident*" (Yin, 2014, p. 16). Gog (2015, p. 36) quotes Gerring's noteworthy definition of case studies as the intense study of *"a single unit for the purpose of understanding a larger class of (similar) units"*. There are many ways of defining case studies, their common features are the close examination of a case or several cases, with the intention of understanding their peculiarities and generalising the findings.

It was important to select appropriate cases for this study to ensure rich content and variety (see Gog, 2015, p. 38). The case studies allowed for the collection of data to occur naturally and for the context in which events occurred to be taken into account. The case study design enables the writer to build on existing theory, create new theories, and to explore and describe phenomena that occurred (see Tumele, 2015, pp. 70-71).

Case studies must be understood within their context (Wisker, 2008), which is linked to a specific place and time. Multiple sources must be utilised ideally in order to accurately

investigate a phenomenon (Wisker, 2008). It is important to acknowledge and try to guard against subjectivity which may creep into the process of analysing data collected (Wisker, 2008). The research approaches that are compatible with case studies are the descriptive and explanatory approaches (Wisker, 2008). These approaches aimed to obtain detailed information about phenomena and why they occurred (Wisker, 2008; Yin 2014, p. 10), and are therefore well suited to the case study design (Yin 2014, p. 10).

The case studies utilised in this research were selected specifically because of their depiction of public power at the executive level. The nature of the decisions made by the executive, the executive's relationship with the legislature in this context, the judiciary's response to these decisions, and the executive's attitude or reaction to the judgments were observed in the research process. The case studies are similar in structure, having all began with executive decisions that were ultimately referred to the judiciary for resolution by political parties or non-governmental organisations. They demonstrate how decision-making can be influenced by subjective interests and power politics, and how poor leadership can allow the boundaries of constitutionalism and good governance to be stretched by ignoring the laws that safeguard South Africa's constitutional democracy. The case studies also show the poverty of the separation between the executive and the legislature, and highlight instances where the legislature has failed, or refused, to hold the executive to account. There are many other instances of public power that could have been chosen as case studies, however, these three are the most relevant for the reasons stated. However, due to there being so many choices, the writer has briefly touched on a select number of other cases that assist in creating context pertaining to the political environment in which the case studies unfolded. These additional incidents also assisted the writer in substantiating the patterns and theories developed through the research process.

2.1.2 Data sources

The data collected for the research was dynamic, relevant and current, following the case studies as they developed in the period October 2015 to March 2017. The data comprised documentation including court documents, reports, documented interviews, speeches, scholarly articles, newspaper articles, as well as observations from recorded interviews and news reports on events. According to Yin (2014, p. 107-108), documentation as a data source is useful and central for case study research, however the researcher must be aware of the potential biases that might exist within documentation, and should constantly seek out these biases by critically evaluating the information contained in documents, in order to avoid being

misled. Social and environmental conditions that are relevant to the study are taken into consideration, and may provide valuable context for purposes of data analysis. The questionnaire, attached as Annexure A, was distributed to a number of legal experts, and was utilised to triangulate the findings derived from the data collected by the writer.

2.1.3 Data collection

When collecting data, four principles must be adhered to: (1) the use of multiple sources of evidence, (2) the establishment of a case study database, (3) maintaining a chain of evidence, and (4) the exercise of care/ caution when using data from electronic sources like social media (Yin, 2014, p. 105). The use of multiple sources of evidence, also called data triangulation, is an important research tool as it exposes the researcher to a wide range of historical and behavioural issues and enables the convergence of data or findings to occur (Yin, 2014, p. 120). A study is more reliable and accurate if it uses a wide variety of sources of information which indicate converging ideas (Yin, 2014, p. 120).

Creating a case study database to organise and document the data collected increases the reliability of research, and preserves the data collected in a retrievable form (Yin, 2014, pp. 123-124). This can be stored electronically and generally includes information regarding the documents and other materials collected (Yin, 2014, p. 123). The third principle is the maintenance of a chain of evidence, which should enable a third party to follow the course of the research or collection of evidence from the research questions to the conclusion, thus showing the link between the research methods and the findings (Yin, 2014, pp. 127-128). The evidence presented should mirror the evidence collected in the research process, and no evidence should have been left out due to bias or carelessness (Yin, 2014, p. 127). The four principles prescribe that one must be careful when using data derived from electronic sources. Such data, if obtained from unreliable sources, must be cross-checked for validity, and caution must be exercised when using data derived from social media sites (Yin, 2014, p. 129).

These principles will assist in ensuring reliability of findings and construct validity. Construct validity is about avoiding subjectivity in the collection of data. This can be achieved by identifying specific concepts in the research questions and finding corresponding operational measures to investigate those concepts (Yin, 2014, p. 46). In this regard, the secondary research questions will be addressed as reflected in Table 2.1.

Table 2.1: Construct validity

Secondary research questions	**Application of construct validity test**
Secondary research question 1 With regard to the Nkandla, SABC and Bashir cases, has the exercise of public power by the executive conformed with constitutional provisions and principles?	Identify trends in the decision-making process in the three case studies
	Analyse what the courts have said in their judgments in each case study
Secondary research question 2 What is the judiciary's policy when dealing with public policy matters, and to what extent is the judiciary involved in policy-making? With regard to the case studies, has it managed to respect boundaries and maintain deference in respect of the functional areas of the executive?	Identify trends regarding the application of the separation of powers doctrine
	Look at the prominent Constitutional Court judgments on the subject
Secondary research question 3 What are the consequences of judicial review of public policy, and what impact and consequences does this have for South Africa's constitutional democracy?	Identify the challenges and opportunities of judicial review of public policy
	Look at literature, court judgments, and real life outcomes pertaining to judicial review of public policy (good and bad; controversial and accepted)

The use of multiple sources of evidence and establishing a chain of evidence will increase construct validity (Yin, 2014, p. 47). The aim of the reliability test is to minimise bias and errors in the study (Yin, 2014, p. 49). This is achieved by documenting the procedures followed in the research process, so that anyone could replicate that process and arrive at similar findings.

2.1.4 Data collection process

The search engines 'Ebsco Host' and 'JSTOR' were utilised to find scholarly articles on the research topic. Advanced searches were carried out using the key words: *policy, politics, public power, judicial review, judicial restraint, judicial activism, constitutionalism, rule of law, separation of powers, checks and balances*. These searches brought up thousands of documents which had to be scanned for relevance to the research topic. This entailed

narrowing search results by using more specific key word combinations and searching articles for specific key words. All articles that did not focus specifically on the research topic were discarded for lack of relevance. The articles that remained are listed under References at the end of this report, and range from articles published in the period from 1993 to 2016. The writer extracted the relevant information from them using the methods detailed below. A range of books and textbooks were also consulted, especially with regard to the doctrine of separation of powers, checks and balances, the rule of law, constitutionalism, research methodology, and data analysis. These books were found pursuant to searches on the Wits Library catalogue, and represent the views of leading authors in the respective fields.

The Google search engine was utilised to find reports, news reports, court judgments (found on Saflii and the Constitutional Court website) and other documentation (e.g. the Constitution). A number of news websites and media websites were utilised in order to avoid relying too heavily on the reports of a single news source – this assisted in facilitating accuracy and objectivity in reporting. In addition, news reports were corroborated by checking them against other news sources to ensure accuracy in the facts being reported. Due to the use of case studies, news reports were tracked closely to keep apprised with developments in the cases. The writer also followed televised news reports and interviews/speeches. Most of this information was collected from the eNCA news channel – although all news is influenced by the narrative and viewpoints of the particular organisation, the writer found this channel more reliable than the alternatives (SABC news channel and ANN7) at delivering relatively objective news. This is not to say that the channel is objective, but rather that in comparison, it offers more reliable news. This channel also offered complete broadcasts of speeches by public figures that were utilised in this research, for example retired Deputy Chief Justice Dikgang Moseneke's Helen Suzman lecture and the President's speech at the ANC Cadre Forum. Google was also utilised to search for the key words detailed above, as a mechanism to ensure that all relevant articles had been consulted.

The writer also attended dialogues hosted by GIBS wherein former Finance Minister, Nhlanhla Nene, delivered a speech and engaged in a discussion with the audience in late 2016; and in March 2017 the Deputy Finance Minister Mcebisi Jonas did the same. Attendance of these dialogues provided the writer with further context pertaining to South Africa's political environment. It was extremely valuable to engage with senior members of the ANC who understand the politics of the ruling party, and therefore government, and who were willing to provide us with a glance/ account, albeit quite narrow, of what may really be going on inside the South African government. The writer closely followed speeches and public statements

made by then Finance Minister, Pravin Gordhan, throughout the research process, specifically because he is relatively vocal about what is happening inside government.

2.1.5 Research approach

The research approach that was appropriate for finding answers to the primary and secondary research questions was qualitative research. A qualitative study permitted the writer to collect information with the purpose of exploring, describing and identifying social phenomena (see Wagner *et al*., 2012). Qualitative research is generally characterised by a flexible inductive study that is concerned with the context of a phenomenon (Mayer, 2015, p. 57). Wagner *et al*. (2012) define qualitative research as being concerned with "*understanding the processes and the social and cultural contexts which shape various behavioural patterns*" (Wagner *et al*., 2012, p. 126). Mayer (2015, p. 57), quotes Denzin and Lincoln's definition of qualitative research as:

> *"a situated activity that locates the observer in the world. It consists of a set of interpretive, material practices that make the world visible ... They turn the world into a series of representations, including field notes, interviews, conversations, photographs, recordings, and memos to the self. … This means that qualitative researchers study things in their natural settings, attempting to make sense of or to interpret, phenomena in terms of the meanings people bring to them".*

Qualitative research "*seeks insights through structured, in-depth data analysis that is mainly interpretive, subjective, impressionistic and diagnostic*" (Wagner *et al*., 2012, p. 126). The strengths associated with a qualitative study are the opportunity for the researcher to reveal the complexity inherent in a phenomenon, to engage with context in order to reveal truths that are not so obvious, and the possibilities it opens to reveal rich and holistic truths (Miles, Huberman & Saldana, 2014, p. 11). The depth of the research may be attributable to the research being carried out over a lengthy period of time (such as this research) to properly study a process, and engage with questions about how or why, as well as causation (Miles *et al*., 2014, p. 11). The study can be conducted as events unfold, and this type of research allows flexibility in research methods (Miles *et al*., 2014, p. 11). It also offers the best strategy for discovery and hypothesis development (Miles *et al*., 2014, p. 12). A potential weakness of qualitative research lies in the analysis process. If analysis is conducted competently and logically, the research findings will be objective and reliable; if not the results will not be credible, and will fail to yield results that can be generalised.

2.1.6 Methods

The research is primarily based on information gathered from documentary analysis of a range of sources, both primary and secondary, which were then thematically assessed and interpreted in terms of the themes of the study. Altheide defines documentary analysis as "*an integrated and conceptually informed method, procedure and technique for locating, identifying, retrieving and analysing documents for their relevance, significance and meaning*" (1996, p. 2). The documentation comprised public and private documents, both primary (such as the Constitution, speeches, court judgments, reports, and media coverage of pertinent developments) and secondary (which include reports, textbooks and scholarly articles, commentary and opinion pieces).

Silverman warns that care must be taken when obtaining information from documents, which must be considered in relation to who produced them and for what audience, and attention must be paid to the implied claims that an author might make (2011, pp. 77-90). In analysing the documentation, the writer identified the main themes in each document as well as the silences, omissions and gaps in the documents, which are also of importance (see Wagner *et al*., 2012). Themes and patterns were extracted from the data. The writer observed the manner in which institutions and individuals related and interacted with each other, in order to make the findings of the research richer and more accurate.

This research uses three different types of triangulation: methodological triangulation (the use of multiple research methods – documentary analysis and interviews that used questionnaires); data triangulation (the use of various sources of data in the study such as reports, news, speeches, articles, books); and theory triangulation (using multiple perspectives to interpret data) (as in Patton, 2015, p. 316). Methodological triangulation results in improved reliability of research (Patton, 2015, pp. 316-317). The aim of such triangulation is to test for consistency in the research, and where inconsistencies are found, these present opportunities to better understand "*the relationship between the inquiry approach and the phenomenon under study*" (Patton, 2015, p. 317).

2.1.7 Themes guiding the analysis

As alluded to in section 2.1.6 above, a number of themes initially emerged from the data during the documentary analysis stage of the research (Table 2.2).

Table 2.2: Themes guiding the analysis

Themes	Explanations
Exercise of public power	The exercise of power by government officials emerged as a strong theme in the research. The research considered how decisions are reached and why certain decisions were made instead of others.
Power dynamics between institutions	The investigation of the relationships between institutions was a vital element of the research report. The report considered how various institutions interacted with each other, and the power dynamics involved in their interactions from the available data.
The influences that shape public policy	The report considered the impact that considerations of politics, social and economic factors had on decision-making.
Accountability of public officers	The research considered whether public officials were held accountable, and whose responsibility it is to hold the executive, legislature and public officials generally accountable.
Suitability of judicial involvement in policy and politics	Although the judiciary is involved in the policy-making process through judicial review, the judiciary's involvement in policy and politics should be infrequent, as political matters should be engaged with in parliament or through other effective democratic avenues.

2.1.8 Questionnaire and targeting of the interviews

A questionnaire was compiled and distributed to 15 constitutional law experts by e-mail, on the expectation that only a small set would respond positively and offer to cooperate. The questionnaire is annexed to this report as Annexure A. The questionnaire included an introductory paragraph that explains the purpose of the research and provides a definition of public policy, to provide context and a better understanding of the research. Careful attention was paid to the content and the structure of the questions to avoid ambiguity (in Wagner *et al*., 2012 p. 104). The questions were as neutral as possible, and logically organised (as directed by Wagner *et al*., p. 112).

The intention was to extract knowledge relating to on-the-ground realities about various aspects of judicial review. Initially, the writer requested responses by e-mail, and when responses were not forthcoming, the writer asked the experts whether an interview or telephonic interview would be more suitable. It became clear over time that the problem was the unwillingness of the experts to engage with the subject matter of the questionnaire, with some candidates (specifically two members of the judiciary) advising the writer that they were unable to engage on the topic given its sensitive nature. Ultimately, over a period of five months, the writer was able to obtain three written responses. Although the writer would have preferred to include more responses from experts in this research, the researcher is satisfied

with the responses received, and is of the view that the respondents are sufficiently diverse in their fields to offer a balanced aggregated view.

A fourth interview was conducted telephonically with Advocate Marcus, given his preference to discuss the questions. The interview lasted for 40 minutes. Advocate Marcus requested clarity on the definition of public policy adopted in the research report, which was explained. The interview was semi-structured, and evolved into a shared conversation (as outlined by Merriam, 2002, pp. 13 & 69). The questions were answered as they arose in conversation, and not in numerical order. Advocate Marcus shared as much of his experiences in engaging in court cases pertaining to judicial review as was possible, thus providing greater insights for the writer (a possibility flagged in Yin, 2014, p. 113). In contrast, the written responses received from some participants were less comprehensive and in some areas, unclear.

Table 2.3 offers details of the names and credentials of the legal experts who provided responses to the questionnaire (either orally or in written form).

Table 2.3: Respondents to the questionnaire

Constitutional law expert	**Experience**
Justice Catherine O'Regan	Retired Justice O'Regan sat on the bench of the Constitutional Court from 1994 to 2009. She presided over many of the cases discussed in this research, for example the TAC case.
Justice Albie Sachs	Retired Justice Sachs sat on the bench of the Constitutional Court from 1994 to 2009. He played a leading role in the architecture of the Constitution, and has presided over many of the cases discussed in this research, for example the TAC case.
Professor Cora Hoexter	Professor Hoexter is a senior constitutional law and public law lecturer at the University of the Witwatersrand, where she has worked since 1994. She has written an impressive number of articles and books on constitutionalism, judicial review and the rule of law.
Advocate Gilbert Marcus	Advocate Marcus is a senior advocate of the Johannesburg Bar, having been admitted in 1983. His main areas of practice are constitutional law and public law. He often

	appears in the Constitutional Court, and was involved in both the Nkandla and Bashir/ ICC court cases.

The purpose of the questionnaire was to test and triangulate the findings of the research, thereby making the findings more objective, reliable and accurate (see Wagner *et al*., 2012, p. 133). The questionnaires tested the findings, and in many instances assisted in providing corroboration to the findings of the documentary analysis component of the research report (a possibility envisaged by Wagner *et al*., 2012, p. 134). They provided the writer with deeper insight into the themes and patterns that emerge from the research (as noted by Patton, 2015, p. 317), and revealed further aspects or elements that were relevant to the study.

2.2 Data analysis

The research process culminated in the analysis of the data collected and identification of themes. Data analysis is a process that involves examining, categorising and testing information to derive patterns and explanations, and to generate new theory (Tumele, 2015, p. 73). Data analysis, says Mayer (2015, p. 58), is extremely important when applied to qualitative research because the manner in which analysis is conducted will influence the research findings. The case study design facilitates the collection and analysis of data. Through the case studies the researcher intended to systematically find reliable answers to the research questions. According to Yin, there are no well-established analysis strategies for case studies (2014, p. 133). The writer's empirical thinking, the provision of sufficient evidence, and the consideration of alternative interpretations are therefore important in the analysis stage (Yin, 2014, p. 133).

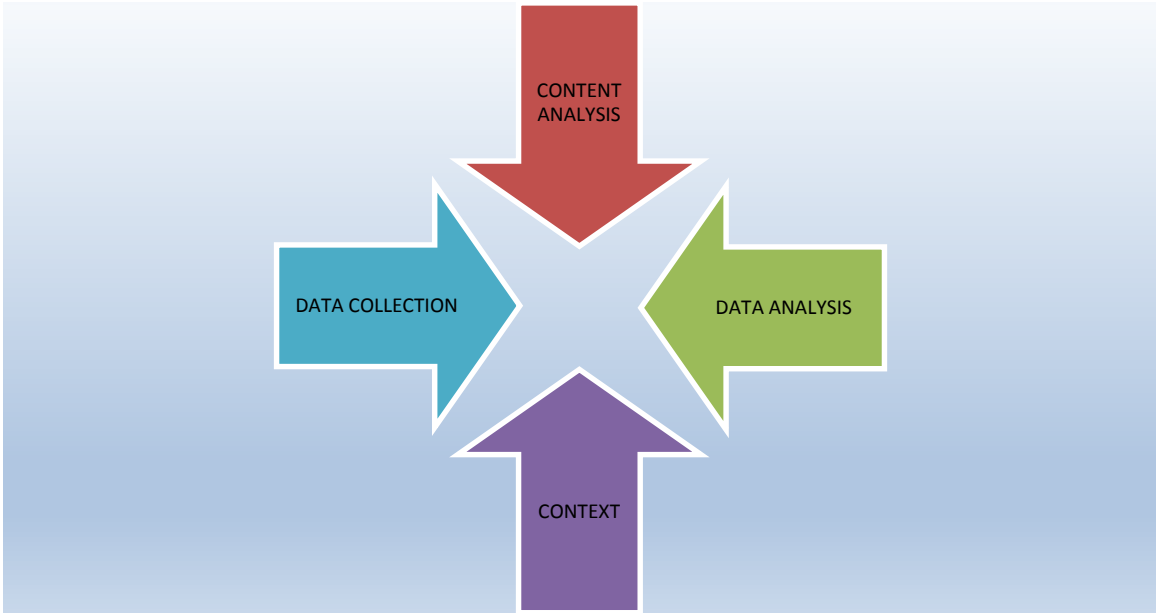
Context was extremely important in analysing data, as events considered in isolation would present completely different and contradictory results to events that were considered within the greater picture – taking relationships, related incidents, personal interests, and power relations into account. This is why Gordhan said the public had to consider why charges had been brought against him, whose interest the agencies that brought charges against him were serving and the timing of those charges (Ministry of Finance, 2016). Jonas echoed this when he stated that it was important that society learned to connect the dots, to consider how events relate to each other, and to decipher the emerging picture/ the 'political moment'. What these political figures are telling us is that there is a greater picture, and that events are not happening in isolation, and it would be unintelligible to consider them as isolated and insignificant, because we would then miss the political moment. Hence this research

consistently considers the relevance of particular events, their greater meaning, the relationship between political actors, the nature of public power and its influences, and the interconnectedness of seemingly isolated events.

2.2.1 Induction

Induction was utilised to analyse data collected in order to summarise and generate conclusions. Induction is the process of taking specific incidents and generalising them (Wagner, Kawulich & Garner, 2012). The induction process involved reducing large and diverse amounts of data to particular themes. The data that was available for this analytical process took the form of court judgements, scholarly articles, newspaper articles, reports and news reports, and questionnaire-style interview information. During this process, the writer continuously moved in a backwards and forwards cycle of data collection, data analysis and data collection, which process included content analysis, until the primary research question had been sufficiently answered. The writer searched for patterns in the research to arrive at plausible explanations (see MacMillan & Schumacher, 1997) for important issues as identified by the research. The analysis sought to identify patterns and themes in the data. In analysing the data, the writer remained cognisant of the context within which events occurred and continued to unfold. Schematic Depiction 2.1 reflects the backwards and forwards process between data collection and data analysis, and the application of content analysis as an analysis tool in this process. Context has been included in this model on the basis that it should inform the analysis process.

Schematic Depiction 2.1: Research process



2.2.2 Content analysis

The writer interpreted the text by considering what was said, and what was intended implicitly and explicitly, within the context that the text was delivered. Content analysis is an analysis method that involves sifting through documentation to extract data that is relevant to a study; this is also called selective reduction (Mayer, 2015, p. 61). Content and form are important when applying this analytical method, as is paying particular attention to omissions in texts (Merriam, 2002, p. 355). Content analysis involves inspecting data for recurring themes, and the identification of these themes across various documents (Silverman, 2011, pp. 170-171): "*Content analysis involves replicable and valid methods for making inferences from observed communications to their context*", as noted by Krippendorf (1980, p. 69). Generally, content analysis refers to the analysis of text in order to reduce it and make sense of it, for the purposes of identifying core meanings and consistencies (Patton, 2015, p. 540).

Ethnographic content analysis was used in this research. This method involved drawing themes while being mindful of culture and context in interpreting themes (Grbich, 2013, p. 189). This allows for a deeper thematic analysis in searching for explanations for why certain words were utilised in particular contexts (Grbich, 2013, p.189). Documents that may be analysed in this manner include written texts, audio and visual media (Grbich, 2013, p. 189). This form of analysis was used to sift through large amounts of documentation to establish patterns and themes, and their contexts, through a process of interpretation and theorising (see Grbich, 2013, p. 198). The initial process of data collection required the application of enumeration to distinguish relevant documentation from irrelevant documentation (in Grbich, 2013, p. 190).

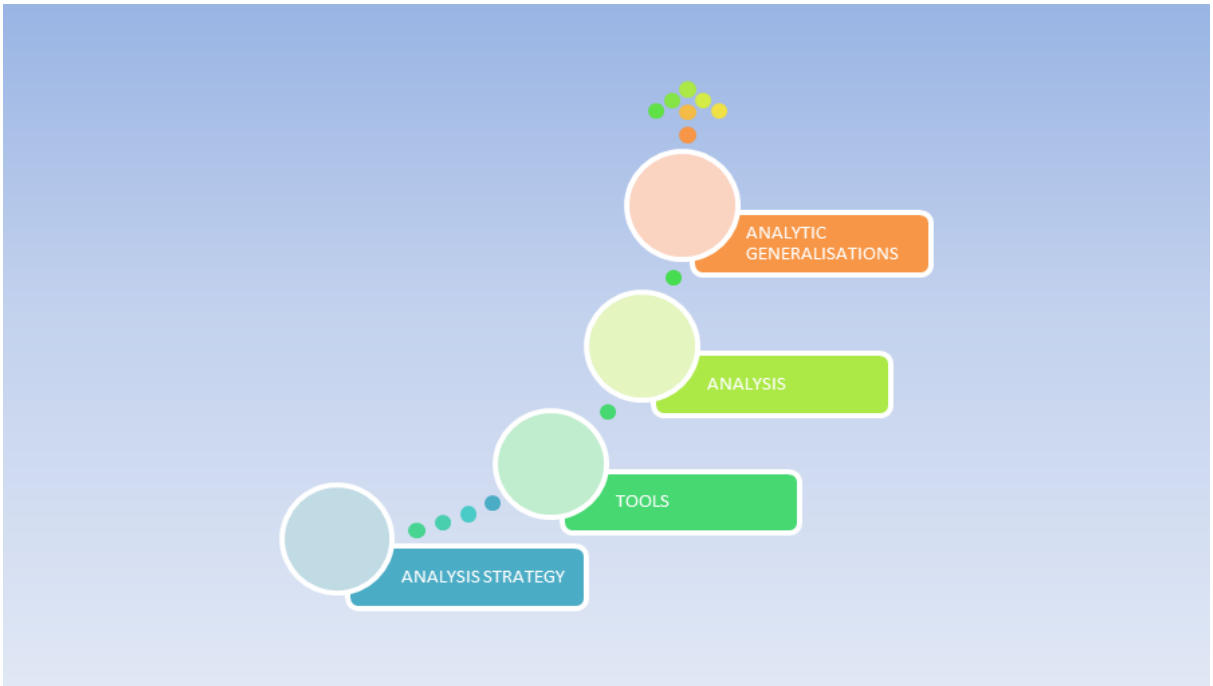
This involved a process of searching for the presence and reoccurrence of particular words or phrases in documents in order to assess their relevance to the research (in Grbich, 2013, pp. 190-191). The writer had to remain mindful of the context of the documents to ensure that viable information and documentation was not discarded. This was an incredibly useful tool in the early stages of research, but had its limitations after the initial stage given its superficial overview capacity (as noted in Grbich, 2013, pp. 190-191). Ethnographic content analysis was used thereafter to analyse the documents for their significance and meaning within their context. Grbich writes that the "*emphasis is description, the search for contexts, explanatory meanings, patterns, and processes*" (2013, p. 195). Actions and behaviour can be contextualised through thematic analysis (Grbich, 2013, p. 195). This form of analysis was critical for the research as it facilitated the identification of attitudes, intentions, emotions and power (see Grbich, 2013, p. 197).

In considering context, the writer also considered who was delivering the text, their position and authority, the connotations and implications resulting from the text, and the power relations involved, for example who stood to benefit or lose. To limit the influence of bias, the answers provided by respondents to the questionnaire were compared with the writer's findings.

2.2.3 Data analysis tools

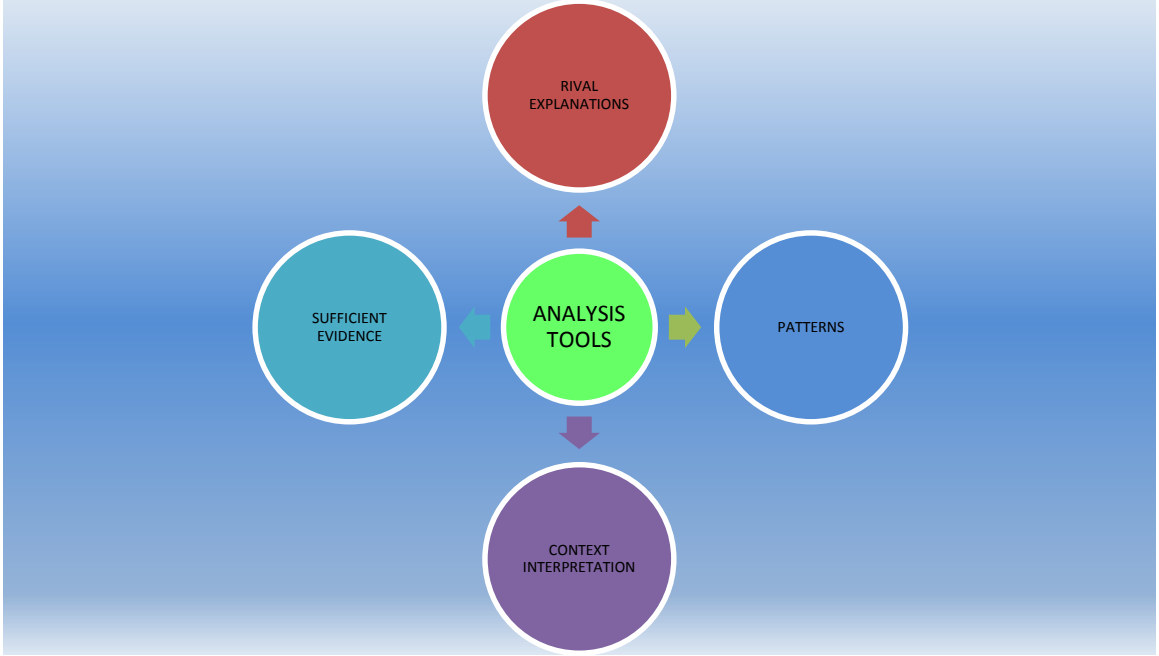
Yin (2014) outlines tools that assist in analysing data derived from case studies. These include working your data from the bottom up, developing a case description, and examining plausible rival explanations (Yin 2014, p. 136). One must be careful to ensure, when dealing with causation, that there is no other plausible cause attributable to that relationship which might threaten the internal validity of the research findings (Yin, 2014, p. 47). Therefore, all material rival explanations and possibilities must be considered and negated to make the causal link airtight (see Yin, 2014, p. 47). The internal validity test is concerned with explanatory research, and the accuracy in establishing causal relationships (Yin, 2014, p. 47). Tactics that may be employed to achieve internal validity include addressing rival explanations, explanation building, and using logic models (Yin, 2014, p. 48). Other analysis tools include identifying patterns/trends, core issue, causes, effects and priorities (Gog, 2015, p. 40). Schematic Depiction 2.2 below is a simple depiction of the analysis process.

Schematic Depiction 2.2: Data analysis process



Schematic Depiction 2.2 shows that an analysis strategy must identify effective tools in order to analyse data in a manner that produces analytic generalisations. Appropriate tools must be identified for purposes of analysing the data and themes generated. The writer had to devise an analysis strategy by identifying the appropriate analysis tools, using those tools to analyse the data, and derive analytic generalisations from this process. Schematic Depiction 2.3 presents the various tools available for analysis.

Schematic Depiction 2.3: Analysis tools



As discussed above, Schematic Depiction 2.3 shows the tools that may be utilised to analyse data. The writer relied on drawing patterns, rival explanations, the use of sufficient evidence, and context interpretation in analysing the data.

2.3 Conclusion

The research methodology and analysis that have been detailed in this Chapter will assist in producing objective findings and theoretical generalisations. The writer used a naturalistic approach to data analysis. A logical plan was mapped out that linked the research questions to answers. Appropriate case studies were identified to assist in generating theory from the findings of this research. A descriptive and explanatory approach was used in order to obtain information about phenomena, and various data sources were utilised in order to produce rich and objective findings, through documentary analysis. A qualitative study allowed the writer to understand the social contexts that inform behaviour, and therefore to derive better understandings from phenomena. The next chapter deals with the theoretical framework and literature review, and thereafter the case studies will be considered.

CHAPTER 3: LITERATURE REVIEW AND THEORETICAL FRAMEWORK

In this chapter, the theoretical framework provides the foundation for the manner in which executive action should be executed, and offers a detailed explanation of the doctrine of separation of powers and checks and balances. The literature review draws knowledge from numerous scholars on issues such as judicial independence and ideology, judicial legitimacy, the counter majoritarian dilemma (amongst others) in order to obtain knowledge on these issues. A vast amount of case law is relied on to establish how the judiciary has adhered to the separation of powers doctrine while fulfilling its duties of judicial review. Findings from the literature review are discussed in Chapter 6, and through an analysis of these findings, together with the findings from the case studies and the interviews, answers to the research questions are found.

The chapter begins by offering clarifications for the manner in which certain concepts will be understood in this report, followed by the theoretical framework, and then the literature review. The case studies are reviewed and findings are made in Chapter 4, and in Chapter 5 the results of the interviews are discussed. A cumulative assessment of the findings from the literature review, the case studies and the interviews is undertaken in Chapter 6. Chapter 7 refines the findings of the report through further analysis in order to answer the primary research question.

3.1 Conceptual clarifications

This section sets out how concepts that are used extensively in this report should be understood. Public policy, in particular, is understood in this research as the exercise of public power, as further detailed below. The definitions of governance, politics and institutions are also addressed below. These concepts are linked to each other in this report. For example, politics is an inherent feature in policy, governance and the running of institutions that are associated with the case studies, and policy or decision-making is a vital component of governance. This section is important as it ensures that these concepts are not interpreted in a manner that is different to that which is intended in this work.

The political nature of public policy makes judicial review contentious. Politics, which is about a struggle for resources, interests and power (Gee *et al*., 2015), is inextricably linked to the policy-making process (Anderson, 1997, p. 59). Public policy cannot be understood without taking the political environment within which it is made and operates into account (Anderson, 1997, pp. 55-59). The Constitution requires government to be accountable and transparent,

and to act in a legitimate and responsive manner in governing the country. However, in attempting to fulfil these constitutional obligations the executive is affected by politics, external and internal influences and environmental factors (Anderson, 1997, pp. 55-59). Some of these influences are prominent while others are subtle. These factors impact on policy decisions taken and those not taken. This research will identify these influences, where possible, in order to better understand the reasons why certain decisions are taken instead of others. The courts therefore engage in politicised matters when they review public policy.

The formulation of public policy is characterised by conflicts of interests and desires between different groups, private and official (Anderson, 1997, p. 55). Political, social and economic factors influence public policy, and determine why some decisions are made rather than others (Anderson, 1997, p. 59). Public policy is a broad term that has been defined in various ways. For the purposes of the current research project it will be defined as it is understood by Klein and Marmor, as "*what governments do and neglect to do. It is about politics, resolving (or at least attenuating) conflicts about resources, rights, and morals*" (2006, p. 892). This definition is practical, it does not simply look at what is written and assented to by the president, or agreed to in Parliament; it takes into account what governments and public figures do in practice, and what motivates them and the decisions they make, which does not always correlate with policy documents. It acknowledges that public policy also encompasses what governments choose not to do. This is a conception of public policy as decision-making.

This research is concerned with aspects of public policy such as the actions, omissions, decisions and non-decisions, political influence and political considerations that inform public policy. In this regard, Lukes' (1993) theory of political power and non-decision making holds that government can influence what we think is important through decisions and non-decision making (Lukes, 1993). Lukes (1993) identifies three dimensions of power: the first is concerned with who the policy actors are, the second with the decisions taken and those that are not taken, and the third with the impact of hidden agendas, subjective interests and thought control by policy-makers, in order to avoid overt and covert conflicts in the policy process (Lukes, 1993). The third dimension demonstrates an exercise of power in which policymakers act against the interests of a group, and such group accepts that exercise of power (Lukes, 1993). This does not necessarily imply that consensus was reached, but that power is being exercised (Lukes, 1993; Ham & Hill, 1993). These aspects and dynamics are important in understanding the political environment in which public policy operates. The second theory is Ham and Hill's (1993) theory that non-decisions are in fact decisions, that government decisions are affected by what leaders anticipate will be the reaction of the public, and power can be used to shape people's preferences.

The legal framework of constitutionality is in direct conflict with the Lukes conception of decision-making. The Constitution requires that decision-making be rational, objective and transparent. However, decision-making by members of the executive and legislature is often influenced by politics, subjective interests and power dynamics. This tension reveals itself in the case studies and the resultant strained relationship between the executive and the judiciary. The judiciary enforces constitutional principles of the rule of law and rational decision-making, which at times conflict with executive decisions which are often characterised by politics.

Policy-making constitutes the exercise of public power (Booysen, 2006; Lukes, 1993; Ham & Hill, 1993). The sources and the nature of power exercised must be investigated, which involves asking questions about the actors involved in the policy process and their interactions with each other (Booysen, 2006). Elite theory holds a position that society is divided into the elites and the poor masses, in which the 'powerful' elite set the policy agenda while the 'powerless' masses are excluded from the policy process (Booysen, 2006). Power is defined by Max Weber (in Dean, 2013, p. 4) as "*the probability that one actor within a social relationship will be in a position to carry out his own will despite resistance, regardless of the basis on which that probability rests*" (Dean, 2013, p. 4).

Moe argues that political institutions are structures of power that often, through political processes, favour those with power (Moe, 2005). Therefore, it is important to understand the power relations within institutions. These range from political parties, government departments, state owned entities, government as a whole, to individuals. The three branches of the state constitute institutions. Institutions play an integral role in policy formulation, implementation and outcomes. Institutions are the means through which politicians pursue and drive their interests (Moe, 1994). They are political creatures created by political actors for political purposes; one cannot consider them as separate from, and independent of, each other (Moe, 1994). Political actors who are in control are focused on building effective agencies for themselves, which impacts negatively on the institutions (Moe, 1994). This conception of institutions and how they function is important for understanding the relations within and between the different institutions involved in the case studies. Moe further argues that political influence on institutions undermines good governance (1994).

Grindle (2007) defines governance as the state's function as an administrator. The state is an institution that makes rules and enforces them, that manages the affairs of a country and all of its spheres, it looks after the economy, and is responsible for the institutions, mechanisms and processes involved in the achievement of governance (Grindle, 2007). Governance

involves the formulation, implementation, monitoring and reviewing of public policy, which is often, if not always, informed or influenced by politics (Fukuyama, 2013). The effect, as discussed above, is that policy decisions are not made in a vacuum, and factors such as political influence, power relations, availability of resources, an active civil society, the effectiveness and efficiency of the public officials amongst others, impact on the decisions that are ultimately reached, as well as the manner in which public policy is implemented. Governance is therefore also about accountability of public officials, access to information, transparency of government, as well as politics (Leftwich, 1994).

3.2 Theoretical framework

The Constitution encompasses the most essential laws pertaining to a country's constitutional system. These include rules concerning the state and its institutions, the nature of their powers, and the manner in which their powers may be exercised, therefore providing norms against which public actions may be measured, and ensuring public stability and security (Rautenbach & Malherbe, 2004, pp. 22-23). This section will consider the rule of law and constitutional supremacy, as founding provisions of the Constitution; the Constitutional Court's interpretation of the doctrine of separation of powers; and the role of the Office of the Public Protector as an additional constitutional safe guard against improper public administration. The theoretical framework is based on South African conceptions and literature. This is because the issues canvassed in this section are specific to South Africa's constitutional democracy.

3.2.1 Constitutional supremacy and the rule of law

Constitutional supremacy and the rule of law are among the founding provisions of the Constitution. Section 2 of the Constitution provides that it is the highest law in the land, and laws and actions in contradiction therewith are invalid (the Constitution 1996; Currie & De Waal, 2002; Bekink, 2012). It also means that all obligations imposed by the Constitution must be fulfilled (the Constitution 1996, Section 2; Currie & De Waal, 2002). Constitutional law governs the relationship between "*the state and its people, and between the various government bodies functioning within the state*" (Bekink, 2012, p. 23). The Constitution is binding on all branches of state and takes priority over all other rules made by the executive, the legislature and the courts (Currie & De Waal, 2002).

The rule of law is based on the premise that the exercise of public power is legitimate only when it is lawful (Currie & De Waal, 2002). This requires branches of state to act or make decisions based on pre-announced, established, clear and general rules, and to adhere to the provisions of the law in exercising their power (Bekink, 2012). The rule of law encompasses the principle of legality, which requires all branches of the state to comply with legal principles and rules that apply to them (Currie & De Waal, 2002; Bekink, 2012). When any organ of state (including the public servants within it) exercises power, such power must be authorised by either the Constitution or a valid law (Currie & De Waal, 2002). Donald views the role of the rule of law as a mechanism to limit and channel public power (2009, p. 11). This is achieved through creating a system in which the rules are known to everyone and apply to everyone, and as a result it creates a basis for accountability (Donald, 2009, p. 12). The rule of law effectively constrains the use of public power; it informs officials of the boundaries of their power and the consequences of overstepping those limitations (Donald, 2009, p. 12).

Dicey first codified the meaning of the rule of law in 1885 as follows; "*nobody may be deprived of rights and freedoms through the arbitrary exercise of wide discretionary powers by the executive*", and "*nobody is above the law and everybody is subject to the jurisdiction of ordinary courts*" (In the Study of the law of the Constitution, as cited in Rautenbach & Malherbe, 2004, p. 8). Dicey outlined the crucial role that courts would assume, being, as the late Pius Langa, Chief Justice of South Africa from 2005 to 2009, understood it, the primary defenders of the rule of law and the supremacy of the Constitution (Klaaren, 2006). Chaskalson also wrote, in a judgment of the Constitutional Court in the Pharmaceutical case (Currie & De Waal, 2002, pp. 79-80):

> "*It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement*".

Establishing whether a decision is rational is an objective enquiry (Pharmaceutical case). The court in the Pharmaceutical case held further that rationality is a minimum threshold requirement that applies to the exercise of all public power by the executive and other functionaries: *"State action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional State presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order"* (State v Makwanyane, 1995). In Prinsloo v van der Linde and another (1997) the court held that the constitutional state "*should*

not regulate in an arbitrary manner or manifest naked preferences that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state".

In determining rationality, the courts consider whether the purpose and the decision taken, or the conduct carried out to achieve that desired purpose, are rationally connected (Kohn, 2013, p. 825). Yacoob held, in the Democratic Alliance v The President of the Republic of South Africa (2013), that a failure to take relevant information into account in decision-making may render a decision irrational due to the irrationality in the decision-making process.

Fukuyama observes that the consequence of the rule of law is the limitation of state power, which inhibits rulers from exercising their authority for their own personal gain, and for their communities (2011, p. 246). This creates conflict between public power and the rule of law (Fukuyama, 2011, p. 246). The tension between the rule of law requirement and the political nature of public power is a theme that emerges throughout the research. This conflict between the constitutional law framework and political practices is evident in the case studies, and forms the basis for the referral of the cases to the judiciary for review. It reveals an inherent misalignment between the political nature of power and the constraining effect of the Constitution. As Fukuyama reflects, these constraints may be both positive and negative for democracy. What is clear is that they are presenting themselves to be increasingly incompatible.

3.2.2 Separation of powers

The doctrine of separation of powers is a crucial aspect of this report. This is because it is on the basis of this doctrine that the three branches of state must respect each other's functional areas. This doctrine will be referred to numerous times herein, mostly in the context of the doctrine being respected when the judiciary fulfils its duty to act as a check on executive power – the judiciary in these circumstances is required by the Constitution to intervene as little as possible in the functional area of the executive.

The concept of limiting government power as a means of preventing tyranny has been in existence for centuries. Some of the most influential eighteenth century theorists include Aristotle, Montesquieu, Madison and Locke. Aristotle famously theorised that "*well ordered constitutions have three elements, one to deliberate about public affairs, another, the officers of the state, and the third, the judicial department*" (Hendel, 1974, p. 575). Locke argued that the legislature and the executive should be separate, otherwise the legislature and the

executive would make laws to their private advantage (Hendel, 1974, p. 575), and those who make laws must be subject to those laws (Cooper, 1994, p. 363). Montesquieu, the primary influencer of the doctrine of separation of powers, warned that it would be the end of everything if the same body were tasked with making laws, executing them and adjudicating over them (Cooper, 1994, pp. 362-363; Hendel, 1974, pp. 575–576; Wilson, 1934, p. 15). He argued that separation of powers guaranteed liberty, and the life and liberty of citizens would be exposed to arbitrary control if the judiciary was not separate from the executive and the legislature (Hendel, 1974, p. 576; Wilson, 1934, p. 15). Madison added to the doctrine that the three branches should operate independently of each other (Wilson, 1934, p. 24), and Paul Janet advocated that there should be checks on power in order to prevent its abuse (Wilson, 1934, p. 15).

These eighteenth-century ideas, although more refined, have become integral parts of most constitutions around the world, including that of South Africa. The doctrine of separation of powers was explicitly referenced in South Africa's interim constitution of 1993, Act 200. However, in the 'final' Constitution (of 1996) there is no overt mention of it. It is not clear why the drafters of the Constitution removed the explicit mention of the doctrine. Notwithstanding such exclusion, it is widely accepted by scholars and the judiciary that it was the intention of the writers of the Constitution that the doctrine is enforceable, as well as the doctrine of checks and balances, on the basis that the Constitution allocates different functions to the three branches of the state (Currie & De Waal, 2002; Bekink, 2012; Klaaren, 2006). In solidification of this argument, the Constitutional Court in South African Association of Personal Injury Lawyers v Heath (2000) CC held that the doctrine is implied in the Constitution and that there can be no doubt that the Constitution provides for it (Currie & De Waal, 2002; Klaaren, 2006).

The doctrine of separation of powers ensures that the different branches of the state are accountable to each other (Currie & De Waal, 2002). Separation of powers entails dividing and allocating government functions amongst the different branches of state in order to limit individual power. Checks and balances require the different branches to monitor each other's actions and performance (Currie & De Waal, 2002). The purpose of checks and balances is to enable the different branches of the state to control each other in order to counter the power possessed by each branch, thereby ensuring accountability, openness and responsiveness on the part of government (Currie & De Waal, 2002; Bekink, 2012). Judicial review constitutes a check on the power of the executive. The judiciary plays a vital role as a safeguard against transgressions of the Constitution and the misuse or abuse of power by the executive (Kohn, 2013, p. 816).

The Constitutional Court said the following about separation of powers and checks and balances during its certification of the Constitution:

> *"The principle of separation of powers, on the one hand, recognises the functional independence of 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 over the terrain of another" (*Mnyongani, 2011, p. 5 from *Ex Parte Chairperson of the Constitutional Assembly: In Re: Certification of the Constitution of the Republic of South Africa, 1996(4) SA 744(CC) at par 109).*

The difficulty with the doctrine of separation of powers is that it is not absolute (O'Regan, 2005), and while the Constitution provides guidance, the complexity of applying the doctrine makes it difficult to succinctly codify it. Hence retired Constitutional Court Justice, O'Regan, wrote (2005, p. 121):

> *"There is no universally accepted system for achieving the separation of powers ...over time our courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances, and on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest".*

In Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs (2004) O'Regan said the following regarding judicial deference, which refers to the judiciary's obligation to ensure that in reviewing executive action it does not overstep its constitutional authority and effectively usurp the functions of the executive:

> ''*Judicial deference does not imply judicial timidity or an unreadiness to perform the judicial function… the need for Courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental principle of separation of powers itself".*

O'Regan stated that a court should not consider itself to have knowledge superior to that of other branches of government on matters entrusted to those branches. It was noted that the

judiciary should respect the decisions of other branches if they are democratically legitimate. These principles, according to O'Regan, should guide judicial deference (Bato Star, 2004).

Of particular relevance to this research is the power bestowed on the judiciary to declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency (Section 172 (1), Constitution). The judiciary has a constitutional mandate and obligation to decide on the constitutionality, rationality, legality and validity of actions and decisions of the executive and other public institutions when these matters are referred to it. The Constitutional Court is the highest court in the land and makes the final decision on the constitutional validity of any law or conduct by any person or institution (Section 172, Constitution). In reviewing public policy, the judiciary engages in policy-making (as observed more generally in Anderson, 1997, pp. 59 & 69), and often adjudicates over matters that are political in nature.

Judicial review in South Africa provides the judiciary, and more specifically the Constitutional Court, with significant power over *inter alia* public policy. Courts all over the world are becoming more powerful, and more controversial due to the significant number of political cases being referred to them for adjudication (Gibson, 2006, p. 514). For example, a court in the Ukraine declared that country's 2004 election unconstitutional because a number of constitutional procedures governing the electoral process were violated, which led to a different candidate winning the re-election. Other examples include the US Supreme Court's decision to grant G. W. Bush the presidency over A. Gore in 2001 (Gibson, 2006, pp. 514-515), and controversial judgments of US courts that suspended President Trump's travel ban policy, which effectively barred people from Sudan, Libya, Syria, Iraq, Iran, Yemen, and Somalia from entering the USA - the decision of the initial court was appealed twice, with both appeal courts upholding the order handed down by the court of first instance (Zapotosky, Rucker & Weiner, 2017).

To improve compliance with constitutional principles, the South Korean legal system created a constitutional court that often presides over impeachments and matters concerning disputes between government entities. The constitutional court in this case is also empowered to dissolve political parties (Galanti & Levkowitz, 2015, p. 322). This legal system allows direct application to the constitutional court for review proceedings (Galanti & Levkowitz, 2015, p. 322). In contrast, and illustrating intolerance for judicial interference, the Japanese legal system is structured in a manner that gives the constitutional court limited power (Galanti & Levkowitz, 2015, p. 321). The executive is the dominant branch of government, and judicial review is a constrained function (Galanti & Levkowitz, 2015, p. 321). The review process has to start from the lowest court, and can take years to reach the highest court. Additionally,

judges are elected by the government and serve additional terms at government's discretion (Galanti & Levkowitz, 2015, p. 321).

3.2.3 Chapter Nine institutions

Chapter Nine institutions are constitutionally mandated institutions that assist in protecting South Africa's democracy in various ways. In this regard, they perform the function of an additional safe guard. The Office of the Public Protector is discussed in this context as it played a significant role in the case studies, and has an important role in holding public officials accountable.

Chapter Nine state institutions are responsible for monitoring the actions of government institutions and state owned companies in order to strengthen constitutional democracy. They are specialised institutions with an important role in preventing the abuse of power (Currie & De Waal, 2002). The Office of the Public Protector is established by this chapter. Section 182 (1) of the Constitution gives the Public Protector the power to:

(a) "*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;*
(b) *report on that conduct; and*
(c) *take appropriate remedial action*."

The Public Protector is independent and subject to the Constitution and the law alone (Bekink, 2012). Bekink argues that the Public Protector, along with the other institutions established in terms of Chapter 9 of the Constitution, "form an integral part of the requirement for different checks and balances over the powers of the state" (2012, p. 458). The Public Protector acts like an independent control over the public administration of the state, and is tasked with investigating maladministration within the state in instances where the judiciary is not mandated to get involved (Bekink, 2012). The Public Protector's role is therefore extremely important as her function involves ensuring the openness and transparency of government as a whole (Bekink, 2012).

Govender states that the office of the Public Protector has a vital role to play in "*ensuring the proper exercise of public power*" (2013, p. 82). The SCA in The Public Protector v Mail and Guardian Ltd (2011) described the Public Protector as the "*last defence against bureaucratic oppression, and against corruption and malfeasance*" (Govender, 2013, p. 99). The SCA

affirmed the position of the Public Protector as independent and impartial, and requiring courage at times, and held further that "*if that institution falters, or finds itself undermined, the nation loses an indispensable constitutional guarantee*" (Govender, 2013, p. 99).

3.2.4 Conclusion

This section considered the meaning of the rule of law and the doctrine of separation of powers, amongst others. The rule of law, which is a founding provision of the Constitution, requires the exercise of public power to be lawful and rational in order for it to be legitimate. The purpose of the separation of powers doctrine is to guard against abuse of power, while checks and balances allow the separate branches to monitor each other, therefore achieving a balance. As discussed in this section, this balance is difficult to achieve, given the constant tension between the rule of law on the one hand, and the political nature of policy and governance on the other. Judicial review is the check assigned to the judiciary by the Constitution. It is the central theme of this research. The Public Protector also assumes a vital role of acting as a check on public power. The Office of the Public Protector is more accessible than the judiciary, from a procedural and resources perspective, and could therefore serve as a vital and robust institution in holding public servants to account.

3.3 Literature review

The literature review reflects a broad range of views on various aspects of judicial review. As discussed in section 3.2, judicial review is a check on public power. This section focusses specifically on aspects of judicial review such as the independence of the judiciary, judicial ideology, the relationship between the executive and the judiciary in the context of the doctrine of separation of powers, and the consequences of judicial review of public policy. The literature reveals that judicial review is not without its challenges, and it also shows the tension between the rule of law and the exercise of public power, as expressed by Fukuyama (2011, p. 246) in section 3.2.1, which results in a tense relationship between the different branches of state.

3.3.1 Judicial review of public policy and separation of powers

Section 165 (2) of the Constitution of South Africa provides that the judiciary is independent and subject only to the Constitution and the law. Section 165 (5) further provides that an order of a court is binding on all persons and organs of state. As set out in section 3.2.2 above, the judiciary is enabled by Section 172 of the Constitution to decide constitutional matters, and

may declare conduct or law which is inconsistent with the Constitution to be invalid. The Constitution provides members of the judiciary with independence and security of tenure in order to enable them to fearlessly defend South Africa's constitutional democracy whenever they are presented with acts, decisions or legislation inconsistent therewith, regardless of its nature. The Constitution therefore envisages that it will be necessary for the judiciary to adjudicate on matters of public policy, legislation and governance. As a consequence, the judiciary would ultimately get involved in matters of a political nature.

There is however disagreement regarding the role that the judiciary should fulfil in a constitutional democracy. Some view them as being on the same level as other policy-makers, thus being heavily involved in the policy process, while others view their role as more modest, involving following existing laws faithfully in resolving disputes (McGuire, 2006, p. 535). Another prominent issue is whether judges should be involved in policy-making. There is significant support for this view, with the Constitution also making provision for this. McGuire, however, argues that judges have an extremely limited policy role because they are asked to deliberate on narrow or specific issues, and therefore they do not have the ability to give expansive rulings (2006, p. 540). Judges, McGuire argues, must also wait for matters to be referred to them and cannot actively seek to challenge the decisions of other branches without the matter being brought to them for adjudication, therefore the role of courts as policy-makers is significantly limited (2006, p. 540). Another perceived limitation, which will be discussed in more detail in this chapter, is the argument that courts have little to no enforcement power, which forces them to rely on the goodwill of other institutions to carry out their orders or policies (McGuire, 2006, p. 537; Vanberg, 2005, p. 6).

While some, like Judge Jody Kollapen (a judge sitting in the High Court), believe that the Constitution sets out the balance in relation to the separation of powers (Klaaren, 2006), the Constitution does not determine how far this intervention may extend. There are many perspectives on this subject. Some argue that the Constitutional Court does not go far enough (Coggin & Swart, 2015). The narrative of the executive and the legislature is that the judiciary often goes too far into their functional areas. The judiciary has been criticised by the secretary general of the ANC, and at the alliance meeting of the tripartite alliance and the South African National Civic Organisation held in June 2015, where concerns over judicial overreaching, negative bias towards government, and perceived political speech from Deputy Chief Justice Moseneke (at the time) were raised (John, 2015; SACP, 2015). Judges, on the other hand, often express in their judgments that the judiciary tries its best under the circumstances to maintain deference in executing its duties (Grootboom, TAC, and Opposition to Urban Tolling

Alliance and others v South African National Roads Agency Limited and others 2013 (the OUTA case)).

Considerations about the judiciary's application of the doctrine of separation of powers are based on case law, which provides an understanding of the manner in which the doctrine has been applied by judges in court cases. Therefore, case law is drawn on significantly in this section. Case law is important because it develops South Africa's common law, and sets precedents that must be followed by other courts in future cases. From the prevailing case law on this subject, it is clear that the judiciary sets its own parameters within the framework of the Constitution, making reference to this balancing act in a number of cases which include Grootboom, TAC and OUTA. Judge Kollapen describes it as the delicate balance that the judiciary must strike to ensure that it does not encroach into the functional areas of the executive and legislature while fulfilling its constitutional duty to ensure that those branches of government adhere to the provisions of the Constitution (Klaaren, 2006, p. 99). In its discussion document the Department of Justice and Constitutional Development (DOJ&CD) also acknowledged that "*striking a balance between policy and law becomes necessary in the current times where courts are increasingly placed in a situation where they have to pronounce on matters of public policy*" (2012, p. 29).

The courts have over the years developed a broad body of work pertaining to separation of powers, some being conservative as in the OUTA case while others were bold such as the Grootboom and TAC cases. There are, however, some broadly accepted principles which have found expression in many judgments over the years (Grootboom, TAC, SARFU, for example). These include respect by the judiciary of the terrain of the branches of government with specialist knowledge and experience in policy-making; the judiciary must therefore be slow to intrude into the functional areas of the other branches, and must refrain from making orders that make it difficult for the executive and the legislature to do their jobs; however, the judiciary has a duty to intrude into their terrain (as far as the Constitution allows them) in order to uphold constitutional provisions and individual rights (O'Regan, 2005).

The nature of South Africa's democracy is such that political disputes are often fought in courts (Swart & Coggin, 2015). In De Lange v Smuts (1998) and President of the RSA v SARFU (1999) the courts both held that the judiciary had the power to preside over political matters, and that they would do so if the matter had important political consequences. In Ferreira v Levin (1996) the court held that its role was to ensure that political decisions were constitutional, and not to approve or disapprove of those decisions.

From the judgments embedded in the case studies in Chapter 4, other cases considered in this research, and a study of some of the prominent cases that have been presided over by South African courts over the years, it is evident that courts have generally upheld the doctrine of separation of powers and checks and balances. The courts have at times appeared reluctant to intervene in policy matters as is evident from the judgment of OUTA, where the Constitutional Court refused to get involved in policy established by the executive pertaining to the funding model for road infrastructure (OUTA argued that the funding model was unreasonable and that there are better funding models), saying that the remedy lay in a political process. Swart and Coggin (2015) argue that the court's policy on interfering in public policy matters is unclear and inconsistent, and it appears as though the court is prepared to intervene in policy matters on some occasions, and avoids doing so on others.

3.3.2 Judicial deference

The judiciary is mindful of encroaching into the territory of the other branches of state, and guards against this in varying degrees from case to case. The executive has increasingly over the years engaged in decision-making in a manner that makes its decisions susceptible to judicial review, the outcome of which often is the setting aside of the decisions. As the judiciary engages more with the exercise of public power, it assumes the role of holding the executive to account and ensuring its responsiveness (for instance where the structural interdict is utilised). This, together with the haste exercised by some political parties, the DA in particular, in referring disputes, best suited for political deliberation and resolution, to the judiciary for adjudication reduces the need for citizen agency and overburdens the courts. The courts run the risk of politicising themselves and losing legitimacy, an exceptionally important component of their survival.

Klaasen (2015, p. 1901) argues that the judiciary's policy on deference equates to judicial restraint, and that courts cannot afford to take a position of judicial restraint in the politico-legal environment that characterises South Africa, in which courts are required to ensure that the executive and the legislature adhere to the Constitution in policy-making, and to protect citizens as well. The executive dominates the legislature, and consequently the function of the judiciary is under more strain as it is the only branch that performs the function of checks and balances, argues Klaasen (2015, p. 1902). Many scholars hold the view that the executive is much more powerful in comparison to the legislature and cannot as a result be controlled or effectively checked by the legislature (Swart & Coggin, 2015; Kohn, 2013, p. 816). The case studies that are reviewed in Chapter 4 will reveal that checks and balances between the

executive and the legislature are not effective due to the overlap of individuals and functions between the two branches, which make their independence from each other difficult, if not non-existent.

Judge Jody Kollapen discusses the delicate balance that must be achieved by the judiciary, in fulfilling its constitutional duty, to ensure that it does not intrude in the functions of the other branches of government (Klaaren, 2006; p. 99). He states that in an ideal world in which all parties played their role, the balance would be achieved and enhanced (Klaaren, 2006, p. 99). However, 'slippages' occur where organs or institutions fail to play their role, which threatens the balance (Klaaren, 2006, p. 99). Judge Kollapen states, instead of the judiciary getting involved, ordinary democratic processes should be engaged to resolve these imbalances (Klaaren, 2006, p. 99). Advocate Kollapen further states:

> *"But those imbalances happen and I think in our society we are beginning to see more and more pressure is brought to bear on the Court to play a role, the extent of which was not quite envisaged. I just caution, especially in light of some remarks from judges here today, that there are cases that come before them that really should not, and on which they are perhaps not best placed to make decisions, but must do so. I think there is a lesson in this for civil society and for other institutions in society to use this space to mediate some of those issues and some of those problems but failing that ultimately the Court will have to do it with the consequences that go with that"* (Klaaren, 2006, p. 99).

On 24 November 2016, the urgent application brought by FUL and the HSF for an order directing the President to suspend Shaun Abrahams from his position as the National Director of Public Prosecutions, and to establish an inquiry into his fitness to hold office was heard. The application was the result of Abraham's handling of the fraud and theft charges brought against the then Minister of Finance (Gordhan), which he subsequently withdrew. Justice Dunstan Mlambo, in handing down the judgment of the North Gauteng High Court, stated that the relief sought by FUL and the HSF:

> "*has the potential for this court to stray into the executive terrain which could if not properly considered, violate the separation of arms doctrine, and which would have the implication of the judiciary straying into the terrain of the executive. We should also guard, as a court, against creating precedents where, based on insufficient grounds, and inadequate foundation, to encourage ordinary citizens to use the courts as a platform to dictate to the executive how it should do its work*" (Justice Mlambo, eNCA, 24 November 2016 (16:30)).

The Court held that the relief sought was premature as it failed to provide the President with time to consider whether Abrahams should be suspended, and for the relevant processes to take place (Justice Mlambo, eNCA, 24 November 2016). Echoing similar views was former Deputy Chief Justice Moseneke when he delivered the Helen Suzman lecture a week earlier. He stated that "*lawfare has assumed the form of political contestation*" (Moseneke, eNCA News Channel, Helen Suzman Lecture, 17 November 2016). Public interest groups are focused on mis-governance, instead of matters of social justice, he argued: "*Plainly, courts have become sites of resolving disputes on political par and rivalry, absent other credible sites of mediating political strife in our land*" (Moseneke, eNCA News Channel, Helen Suzman Lecture, 17 November 2016). He warned that *"(a) properly functioning democracy should ordinarily eschew lumbering its courts with so much that properly belong to other democratic sites or even to the streets in the form of peaceful protests … we will over time politicise the courts and thereby tarnish their standing and effectiveness in the long term*" (Moseneke, eNCA News Channel, Helen Suzman Lecture, 17 November 2016). Echoing the views of Judge Kollapen, Moseneke advised that South Africans needed more agency, individually and collectively, in order to hold political leaders accountable, because "*the highest form of public accountability is not and will not be the courts, or the work of the Public Protector*" (Moseneke, eNCA News Channel, Helen Suzman Lecture, 17 November 2016).

3.3.3 The meeting between the Chief Justice and the executive

The overreliance placed on courts to review the exercise of public power has put strain on the relationship between the judiciary and the executive, and other public servants. During 2015, top members of the ANC made statements questioning the integrity of the judiciary following various rulings made by the courts pertaining to government actions. The details of this meeting contributed substantially to the body of literature that informs the current research project.

On 27 August 2015 a meeting was held between members of the executive and members of the judiciary. The meeting was at the request of Chief Justice Mogoeng Mogoeng following public statements made by both branches of state questioning the other's integrity (*Eye Witness News*, 2015). Subsequent to the North Gauteng High Court handing down a scathing judgment pertaining to the defiance by the South African government of the interim court order ordering that President Bashir be prohibited from leaving South Africa until a final order had been made by the said court, Secretary General of the ANC, Gwede Mantashe, and the South African Communist Party's General Secretary and Minister of Higher Education, Blade Nzimande, and Minister of Police, Nathi Nhleko, strongly criticised the judiciary (*Eye Witness*

News, 2015). As discussed in section 3.3.1 above, Mantashe had accused the judiciary of 'overreaching' and 'contradicting the interests of the state versus the judiciary' (John, 2015), while Nhleko and Nzimande had accused the judiciary of being biased (John, 2015).

The Chief Justice said, at a media briefing on 8 July 2015, that such repeated criticism was unfounded, and had the potential to delegitimise the courts, and that the law should not be undermined (John, 2015). The Chief Justice further stated that criticism of the judiciary should not be gratuitous, but rather specific and clear, and the correct channels for reporting behaviour should be followed (John, 2015). He further stated that he was not too concerned with the non-compliance with court orders as these incidents were very few, and he was confident that meeting with the Executive would deter further incidents of this nature (John, 2015). The outcome of the seven-hour meeting was a reaffirmation by both institutions to respect the doctrine of separation of powers and the integrity of each of these institutions; to be cautious about making critical statements in the public arena; to promote the ethos and values of the Constitution; their duty to promote and protect the Constitution as the supreme law; their responsibility to uphold the Constitution; and to respect and comply with court orders (De Rebus, 2015). This meeting was followed by a subsequent meeting between the President, the Chief Justice and the speakers of the National Assembly and the National Council of Provinces, in which they discussed and reaffirmed their commitment to constitutional principles, including the separation of powers, and working together as the three branches of state (The Presidency, 3 November 2015).

3.3.4 Consequences of judicial review

This section considers the consequences of the judiciary's seemingly constant involvement in decision-making. Literature concerning judicial ideology, the counter-majoritarian dilemma, and the judiciary's role in policy-making (and politics), amongst other issues, is considered. The purpose of this section is to consider the positive and negative aspects of judicial review as argued by scholars, in order to provide a balanced perspective of the impact of judicial review on policy.

3.3.4.1 Courts and politics

In Davis and Le Roux's book, wherein the authors consider how the law can be used for good and bad, Cyril Ramaphosa (who was a businessman and a senior member of the ANC in 2009, and is now the Deputy President of the ANC and South Africa) states "*the courts remain*

sites of intense contestation in which the moral and political conflicts of our society continue to be fought"; however, judges and lawyers cannot protect the Constitution on their own (2009, p. v). Ramaphosa further states that "*leadership in a constitutional order must rest on persuasion and justified action and not upon the bald compulsion of state and party power*" (Davis & Le Roux, 2009, p. v-vi). Davis & Le Roux define 'lawfare' as the use and abuse of the law, and argue that it is possible to use litigation as a tool to undermine the law (2009, p. 2). A growing pattern has been observed of the use of the law as a means of gaining control, conflicts are more often settled in courts rather than in more traditional democratic ways (Davis& Le Roux, 2009, p. 185).

Quoting the Comaroffs, Davis and Le Roux state "*politics in many societies is played out more in the courts than in the streets, more by the use of law and its disguised violence than by unfettered brutal force*" (Davis & Le Roux, 2009, p. 185). Courts may be used or abused by political rivals as a means to gain control or power. The President has accused civil society organisations and others who lack political power of using their economic power to gain political power through the use of the courts (Wiener, 2016; eNCA News Channel, 18 November 2016).

The President, in his answering affidavit to the application brought by the HSF and FUL pertaining to the suspension of Abrahams, accused civil society organisations of trying to govern through the courts, stating further that when courts are invited to govern through their rulings, this violates the separation of powers doctrine (Wiener, 2016). In his speech at the ANC Cadre Forum on 18 November 2016, the President stated that those with money have access to the courts, and rule through the courts; opposition parties run to court to settle political scores; there is no longer political debate in South African Parliament as opposition parties constantly run to court to settle disputes, and that this is a sickness that has gripped South Africa's democracy (eNCA News Channel, 18 November 2016).

Comaroff argues that lawfare, which he defines as the use of the law and legal instruments to rule and impose control, was used by colonisers as a means to coercively control indigenous people in their countries (2001, p. 306). The law was used as a tool to cultivate and enforce power as a means to colonise and govern in an illegitimate manner. The President's argument is that those who do not have political power, but have economic power, use their economic means to try to force government to choose policies or make decisions other than those that government would have elected to make, or to change the decisions made by government via the courts. This is effectively governing by means of using the judiciary as a conduit.

The judiciary is frequently called upon to resolve matters that are political in nature. In addition to the matters related to the case studies, other matters include the controversial spy tapes case, the application by the HSF for the review of the appointment of Berning Ntlemeza as the permanent head of the Hawks, the challenge to the SABC's policy not to broadcast violent protests, the Finance Minister's application for an order declaring he cannot interfere with a private relationship between a bank and its customer, the President's review of the State of Capture report, and the SASSA application, as discussed in Chapter 4. This is not an exhaustive list; it reflects prominent cases that have occurred in South Africa between 2009 and 2017.

3.3.4.2 Judicial independence

Judicial independence refers to the independence that must be provided to judiciaries in order to enable them to act impartially, without fear or favour. It also refers to the requirement that judges make rulings that are independent or removed from their personal ideologies. This section of the research considers whether judges are independent in both senses, and considers aspects that have an impact on judicial independence.

Moustafa says *"(s)cholars and policy makers have placed a great deal of faith in judicial reform as a cure-all for the political and economic turmoil plaguing developing countries*" (2007, p. 219). The phenomenon of placing reliance on the judiciary to hold branches of government and public officials accountable is shared by numerous countries, many of which are developing, and the judiciary is seen as the solution to problems plaguing society, many of which are the result of poor decision-making. The judiciary is an essential tool to curb the use of power arbitrarily (Moustafa, 2007, p. 219), however, you cannot have the rule of law without the independence of the judiciary (Moustafa, 2007, p. 223).

Hamburger (2010) argues that judicial duty existed in the USA long before the Marbury v. Madison 1969 case, which is credited for entrenching the legal principle of judicial review, and that judges had been handing down judgments on the constitutionality of legislation and decisions of government before the entrenchment of judicial review. He states that when we understand the function of judges to be based on judicial duty, we then understand that judges base their judgments on their duty as officers of the court. This in turn allows them to base their decisions on law alone, independent of external influences as well as the judge's own internal will and passion, thus acting as a limitation on the power of judges (Hamburger, 2010, p. 1177). Judicial review is therefore an ordinary function of judicial office (Hamburger, 2010, p. 1176). Gibson argued that while judges are influenced by their duty, their ideology will

influence their decisions (Gibson, 2006, pp. 516 & 519). Judges are able, due to the discretionary power they possess, to make decisions based on their ideologies because they are not accountable to anyone, and therefore are able to allow their personal policy preferences to influence their decisions (Gibson, 2006, p. 516). This theory is more appropriate for the highest courts, where rulings are not susceptible to further review.

Kramer argues that both the judiciary and the legislature are susceptible to political/ ideological influences (2012), and Abramowicz and Colby (2009) express concern about whether the judiciary is adequately constrained from the influences of their ideologies. According to Cross and Lindquist there is "*considerable empirical support for claims that the Supreme Court has engaged in result-oriented judging*" (2007, p. 1766). They refer to a study conducted by Jeffrey Segal and Harold Spaeth in which they found a high correlation between the values of Justice's and the manner in which they voted in several cases spanning a number of years (2007, p. 1766). Further studies have corroborated these findings and support the view that decisions are reached systematically in a manner that favours the Justices' ideology (2007, p. 1767). Cross and Lindquist however, state that there may be an unfair presumption of intention to circumvent the law to reach favoured decisions by Justices (2007, p. 1767). They state that motivated reasoning occurs when subconscious biases affect decisions made by judges, and judges may reason or rationalise in a certain way so as to reach a desired outcome or decision (Cross & Lindquist, 2007, p. 1767). According to Cross and Lindquist (2007), and Gibson (2006), judges do not intentionally impose their will or ideologies on the masses, this occurs inadvertently.

According to Gibson, there is no consensus from judges on whether it is legitimate to make decisions first and then find precedents to support those decisions (2006, p. 521). How a decision is reached is an important aspect of legal decision-making, and precedents are there to guide the decision-making process on pre-existing foundations. This issue was raised following certain prejudicial statements made by High Court Judge Mabel Jansen that were made public in May 2016. The judge made the statements that the raping of babies, daughters and mothers is a pleasurable past-time for black men, insinuated that rape is a part of black culture, and stated that black men are now in a position where they can include white women in this practice (Bendile & Lindeque, 2016). The judge also stated that murder was a minor issue for black people (Bendile & Lindeque, 2016). The judge's previous rulings were brought into question by the Ahmed Kathrada Foundation and the Black Lawyers' Association with concerns that her views may have influenced her judgments (Bendile & Lindeque, 2016). The Black Lawyers' Association hence called for the judge's previous cases related to rape and murder to be reviewed (Bendile & Lindeque, 2016).

3.3.4.3 Enforcement of court judgments

Judges do not have the power to enforce their judgments. This often leaves them at risk of the executive, or other public officials, not abiding by their orders. Vanberg and McGuire question the practical ability of judges to constrain the power of elected governing majorities (2005, p. 2; 2006, p. 537). While courts enjoy broad powers of review, they do not have the ability to ensure that their judgments or rulings are implemented or enforced, and as a result, they are generally at the mercy of institutions, whose actions or policies are the subject of their review, to cooperate with them and to implement their judgments (Vanberg, 2005, p. 6; McGuire, 2006, p. 537). These non-judicial actors may therefore implement judgments faithfully, evade the implementation thereof, or circumvent judgments by legislating around them (Vanberg, 2005, p. 7). Vanberg lists Italy, Germany and Russia as countries where the legislatures often evade the implementation of judgments that they oppose, sometimes simply by ignoring the judgments completely (Vanberg, 2005, p. 7).

The Bashir case study (Chapter 4) will be seen to be representative of this phenomenon in South Africa. This also occurred in Minister of Home Affairs v Somali Association of South Africa Eastern Cape (2015) where the Minister of Home Affairs failed to implement a court order ordering the reopening of a refugee reception office (Klaasen, 2015, p. 1920). In the latter case, the court stated that democracy could not survive if court orders were trampled and shunned (Klaasen, 2015, p. 1920), stating further that:

> "*The cornerstone of democracy and the rule of law is the uncompromising duty and obligation upon all persons, more especially State departments, to obey and comply with court orders. There are processes in place for those who disagree with court orders. But they are not free to simply turn a blind eye to the order nor do they have any discretion to not obey the order*" (Klaasen, 2015, p. 1920).

Justice Yvonne Mokgoro, referring to government's evasion of the Bashir judgment, stated that it is mandatory for the executive to implement judicial decisions, and quoted the late Chief Justice Ismail Mahomed, who had said that courts could be reduced to paper tigers with no teeth if court orders were disregarded (Du Plessis, 2015). Retired Deputy Chief Justice Moseneke expressed less concern, stating that South Africa's democracy is still functioning well, as government implements court judgments most of the time (Du Plessis, 2015).

According to McGuire, institutions in the USA may try to undo or override rulings of the Supreme Court in the event that they conflict with their preferences (2006, p. 549). As a result,

the Supreme Court takes these practices into consideration when making rulings, alternatively "*when the Court concludes that it is constrained by existing law to make decisions that will provoke public displeasure, it will openly invite lawmakers to overturn their policies*" (2006, p. 549). On this basis, McGuire argues that courts are aware of their need for systemic support from other institutions (2006, p. 549): "*Knowing that their policies demand acceptance and support, judges will strive to produce policy that will, in the long run, help to guarantee their effectiveness by sacrificing short-term gains. Stated differently, courts trade what they expect will be largely symbolic policies for a sustained level of efficacy*" (McGuire, 2006, p. 549).

According to Vanberg, judicial decision-making and the response thereto by the legislature are influenced by the environment in which the judiciary and the legislature operate (2005, p. 56). The judiciary is reliant on public support and transparency in the political environment in order for the legislature to implement its judgments, on the premise that in the event that public officials choose to evade the implementation of a judgment, and such evasion comes to the attention of the public, the public will retract their support for the ruling party or the government of the day (Vanberg, 2005, p. 56). It is for this reason that public officials, in the event that the said conditions are present, will implement the judgment – to avoid losing public support (Vanberg, 2005, p. 56). It is often the political parties, media and civil interest groups that bring such issues to the attention of the public (Vanberg, 2005, p. 56). According to Vanberg, the reliance that the judiciary has on the public influences the decisions the judiciary ultimately makes, because the judiciary is concerned with maintaining this support (2005, p. 56). Constitutional courts will therefore find it difficult to consistently take a stand against the prevailing public opinion (Vanberg, 2005, p. 57).

Evasion on matters where the public has no interest will be much easier than in circumstances where the public interest is significant (Vanberg, 2005, p. 22). The successful evasion of a judgment by a party against whom an order has been made is costly for the judiciary as it undermines the court's authority as a policy-maker and shows it to be weak (Vanberg, 2005, p. 27), therefore judges in their decision-making process are influenced by considerations of maintaining the legitimacy of their institution, and would prefer to avoid making certain judgments if they are of the view that the judgments could be successfully evaded (Vanberg, 2005, p. 27). Vanberg argues that "*an environment that leaves the court in a weak position creates conditions for 'legislative supremacy'*" (2005, p. 32), as the courts will uphold policies that they would overturn if the circumstances were different, in order to protect their institutional standing (2005, p. 32). He further states that courts will generally be more deferential on matters that constitute the central interests of the governing majority, on the

basis that these are the issues that the governing majority will be more willing to evade regardless of the consequences (Vanberg, 2005, p. 137).

As we shall see in the detailed assessment of the case studies, the courts did not defer to the government in the Bashir case even though they anticipated that the ramifications would be significant. This indicates that while South African courts are reliant on the public for legitimacy and protection, and while their relationship with the executive is strained, they are not willing to compromise themselves to that extent in order to secure the public's favour. In fact, the courts have found other avenues for ensuring compliance with their judgment, one of them being the structural interdict. The structural interdict is a supervisory order that allows the court to have control over the implementation of its orders (Tabata, 2016).

This type of order was utilised in the Nkandla case where the court gave specific instructions and timelines in its judgment for the implementation of its orders, and prescribed that the parties return to the court for its approval of the amount determined by the Finance Minister for payment by the President, effectively preventing any political meddling in the implementation of its orders. The Constitutional Court, in Pretoria City Council v Walker, stated that it was appropriate for courts to give orders that included structural interdicts if it was necessary in order to secure compliance with a court order (Roach & Budlender, 2005, p. 330). In Sibiya v Director of Public Prosecutions (2004) the Constitutional Court held that these orders are appropriate where the court anticipates that its order will not be complied with, and where the facts indicate that the order will not be carried out promptly.

The evasion of court orders is an international concern. The courts in the US also did not defer to the executive regarding the travel bans issued by recently elected USA president Donald Trump. Trump was frustrated by US courts due to their suspension of his policy which intended to ban citizens from seven Arab nations from entering the USA in February 2017. Trump was quoted as suggesting that he might find a way to legislate around the suspension (Zapotosky *et al*., 2017), which is exactly what he did in March 2017 by issuing a revised travel ban which was similar to the previous ban (abc News, 2017). The revised ban was once again suspended by US courts, and was undergoing an appeal process at the time of concluding this report (abc News, 2017). This case shows the tension between the executive and the judiciary in the US, which resulted in the USA president attempting to circumvent the review process, which in his view was frustrating his policy objectives.

Roach and Budlender warn that "*court orders that are not effective undermine respect for the courts, for the rule of law, and for the constitution itself*" (2005). Chief Justice Mogoeng has

said that the judiciary must be protected, and civil society and the legal fraternity must be vocal about the need to protect it (Bateman, 2016b). He stated that the judiciary must be strong enough to uphold the rule of law in circumstances where everything else fails (Bateman, 2016b). Vanberg conducted a number of interviews with American judges and members of the legislature in order to corroborate his theory. His findings were that judges were aware of their vulnerability, and their reliance on the public and the media for the enforcement of their judgments (Vanberg, 2005, p. 121). One judge said that "*there has to be a commitment to the constitutional order among the public without which the court cannot function*" (Vanberg, 2005, p. 121). While all the judges interviewed held the view that judges must be impartial and principled in their decision-making, some also believed that it was important to be sensitive to public opinion and that public attitudes also influenced their decision-making process (Vanberg, 2005, p. 126). The strength of the constitutional court depends on its political environment, and therefore "*under the right circumstances… high courts can be powerful forces in moving policy in directions not favoured by governing majorities*" (Vanberg, 2005, pp. 171-172).

The problem that judiciaries face is "*that they place themselves in direct opposition to powerful actors who do wield the purse and the sword*" (Law, 2009, p. 726). Law asks: "*Why would people with money and guns ever submit to people armed only with gavels?*" (2009, p. 727). Law argues that judicial review supports the people's will by mitigating the risk of abuse of power by those elected by the majority to govern (2009, p. 723). Through judicial review, courts perform monitoring and coordinating functions, meaning that courts provide citizens with reliable information regarding whether their governments have overstepped the bounds of their power, and they can coordinate popular action against governments by making public rulings which create certain beliefs and views among the public at large about government (2009, p. 724). The courts are therefore capable of mobilising the public against government, which means that there would potentially be severe consequences in the event that governments chose not to comply with court decisions, as argued by Law (2009, p. 724).

3.3.4.4 Legitimacy of courts

Law challenges the argument that courts are at risk of losing their legitimacy when they make unpopular decisions (2009, p. 724). His argument is premised on his understanding of constitutional courts being watch dogs for the public and, as a result, he argues that the public will support the constitutional courts regardless of whether they are in agreement with all of their decision or not (Law, 2009, p. 724). He argues that when an unpopular decision is

adhered to by government, the judiciary's powers are reinforced and this improves the chances of compliance with unpopular decisions in the future (Law, 2009, p. 724).

The counter majoritarian dilemma is a theory that claims that it is undemocratic to allow an unelected judiciary to have the power to overrule policies formulated by elected representatives (Rautenbach & Malherbe, 2004, p. 170). Judicial review allows an unelected minority judiciary the power to review and strike down as invalid or unconstitutional any policy or law that fails to conform with the Constitution (Du Plessis, 2000). The policies or laws that may be struck down are formulated and implemented by democratically elected representatives, which causes tension between the branches of state and has the potential to threaten the legitimacy of the judiciary in the eyes of citizens (Du Plessis, 2000). Waldron, a supporter of the counter majoritarian dilemma, identifies a risk to judicial legitimacy, stating *"in politics, support for judicial review is sometimes intensely embroiled in support for particular decisions*" (2006, p. 1351).

Justice Mokgoro argues that the fact that judges are not elected should be viewed as an important strength and not a weakness in our judicial system as it "*reinforces the impartially interventionist and protective role of the courts*" (Du Plessis, 2015, p. 1). Justice Mokgoro juxtaposes the role of politicians against that of the judiciary, stating that the judiciary is not populist, and argues that personal views and positions are irrelevant to members of the judiciary (Du Plessis, 2015).

Rautenbach and Malherbe (2004) counter the theory by arguing that the judiciary is also subject to the law and may not act arbitrarily, the courts have a duty to apply the law as prescribed by the elected government (and the legislature is able to amend laws where it disagrees with the interpretation of the courts), and the judiciary has a duty to promote and uphold democratic norms and values (Rautenbach & Malherbe, 2004, p. 170).

Law also challenges the legitimacy of the counter majoritarian dilemma on the basis that it is based on two principles, first that the majority has no control over the courts, and second that the courts in their decisions fail to side with the majority (2009, p. 728). On the first point, he argues that American politicians have control over which judges are appointed (which is influenced by the substantive views held by judicial candidates) and recalled from the bench. He argues that it is a well held view that the judicial appointment system facilitates a system in which the views held by policy-makers will be mirrored by the candidates appointed to the bench (2009, pp. 28-29). Law states that many scholars hold the view that American officials often have selfish and strategic reasons for encouraging the resolution of important policy

issues by the courts (2009, p. 729). He further states that research has shown that the rulings of the Supreme Court are often in sync with public opinion, and therefore do not go against the will of the majority (Law, 2009, p. 729).

Although the Judicial Service Commission (JSC) in South Africa was created to ensure judicial independence by regulating who appoints judges, the South African system of appointing judges, and specifically the heads of the Constitutional Court and the SCA is still susceptible to abuse. This is largely due to the ANC's majority in the National Assembly, which has an influence on the composition of the JSC. The composition of the JSC is provided for in Section 178 of the Constitution and does not completely safeguard against the tyranny of a majority party, whose representatives on the Committee have substantial influence over the list of nominees recommended for appointment to the bench. In terms of Section 178 (3) the President is empowered to appoint and remove two advocates and two attorneys who sit on the Committee. In March 2017, the President advised three members of the JSC that he no longer required their services, without providing reasons (The Presidency, 2017). Furthermore, the President need only consult with the JSC and leaders of the opposition parties in the National Assembly before appointing the Chief Justice and the Deputy Chief Justice, and need only consult with the JSC in order to appoint the President and Deputy President of the Supreme Court of Appeal. Hence former Deputy Chief Justice Moseneke was overlooked for the top position on more than one occasion.

Constitutional courts, through judicial review, perform the functions of disseminating information, signalling to the public whether government is overstepping its bounds, and coordinating the views of the public, which assist the public in controlling government, and therefore judicial review reinforces the power of citizens over their governments (Law, 2009, p. 730). The public therefore support the judiciary, and the fear of public censure and action motivates governments to adhere to court rulings (Law, 2009, p. 729). Therefore, the relationship between the public and the judiciary is symbiotic, the judiciary enables the public to control government, and the public support the judiciary, thereby mitigating the chance of government non-compliance with rulings, argues Law (2009, p. 730).

Nene expressed frustration at society's failure to hold government accountable, saying that this created an environment conducive for 'wolves' to thrive (Nene, speech at GIBS, 2017) Thus indicating that South African voters tend to fail to hold government accountable in crucial ways. In this regard, Advocate Jody Kollapen warns:

"*I think we must be careful that we do not allow the courts to be substituted for what is in a sense the best guarantor for democracy: the ability of ordinary citizens to hold their government accountable and to engage their government. While the court has an important role to play, its primary objective is not to hold government accountable but to ensure that the provisions of the Constitution are adhered to. Clearly, in doing so it would from time to time have to hold government accountable, but I do not believe that its primary responsibility is to hold government accountable*" (Klaaren, 2006, pp. 98-99).

Similarly, De Vos states that the change (in attitude, behaviour, accountability, and responsiveness) happens on the ground and not in courts; voters have the power to change policies of government, the Constitution cannot do this (Melber, 2014). The public must be cautious of placing too much reliance on the courts and having the judiciary play a significant role in policy.

3.3.4.5 Judiciary as policy-maker

Tushnet questions why it is thought that courts possess better skills to "*identify the requirements of substantive justice, equality and the like than legislatures will*" (Tushnet, 2003, p. 169). He refers to Michelman who argued that courts are better structured to seriously deliberate, taking all substantive positions into consideration, if they properly understand their function (Tushnet, 2003, p. 169). Kramer, who refers to the judiciary as "*life-tenured judges, whose chief qualification is technical legal training*" (2012, p. 634), argues that the legislature spends far more time in committees deliberating on constitutional matters than does the judiciary, and that the former has a better understanding of policy matters than the judiciary (Kramer, 2012, p. 629).

Some scholars are concerned that judges are not adequately constrained from being influenced by their ideologies in decision-making (Abramowicz & Colby, 2009, p. 982; Kramer, 2012, p. 629). The composition of the judiciary poses a further concern on the basis of questions of elitism and demographics (Tushnet, 2003, p. 172). Tushnet poses the pertinent question of whether "*judges have the practical wisdom required to preside over everyone and to make public policy*" and whether "*judges consider themselves as lawyers, instead of "participants in a complex policy making process*" (Tushnet, 2003, p. 172). Courts are policy-making institutions, in the process of dissecting the law and policies, de facto or established, they create and substantiate public policy. It is in this sense that courts are understood in this research to be policy-makers. The Constitution, in classifying courts as a branch of government, foresaw that it is impossible to completely compartmentalise the functions of

each branch and that the branches would spill over into each other, within limits (see Section 172 of the Constitution). In performing its function as a check on executive power, the judiciary often makes, clarifies and shapes laws and public policy.

Gee *et al.* state that it is a challenge in established democracies to support judicial independence when judges are using their substantial power over matters of public policy (2015, p. 14). Furthermore, they ask how much institutional independence is enough. If it is too little, then the impartiality of judges may be at risk, however, too much and their accountability becomes an issue, especially in relation to public policy matters (Gee *et al.*, p. 15). Judges are accountable only to the Judicial Service Commission and the National Assembly. These are the only bodies that may remove a sitting judge in accordance with the provisions of Section 177 of the Constitution. Judges therefore have a significant amount of freedom and independence to carry out their duties without interference. There is tension between the amount of independence afforded to the judiciary and the limited accountability which they are subject to. If courts are to be recognised as policy-makers, then they should be held accountable like other policy-makers, argues Gibson (2006, p. 529). However, due to their independence, judges are seldom held accountable for their rulings, which may weaken their legitimacy, especially when their rulings go against the majority (Gibson, 2006, p. 529).

3.4 Conclusion

This chapter considered aspects of judicial review, which include the independence of judges, the influence of judges' ideologies on their decisions, the suitability of the judiciary to make policy, whether the judiciary is sufficiently accountable, the involvement of judges in political matters, the judiciary's inability to enforce its judgments and the manner in which it handles this challenge, and the legitimacy of the judiciary. These aspects showed that there are challenges to judicial review, the most significant one being ideology, and that it is important that judges are prudent in exercising their powers in order to avoid their ideologies and the politics that impact the judiciary as an institution (for example, the legitimacy of the institution, public perception of the judiciary, and the attitudes of the executive) from influencing their decisions.

CHAPTER 4: RESEARCH FINDINGS I: CASE STUDY REVIEW

This chapter will review the pertinent facts of each of the three case studies on which this report centres. The case studies involve (1) non-compliance by the then Minister of Communications (Muthambi) and the SABC board with the remedial action prescribed by the Public Protector pertaining to Motsoeneng; (2) public spending on President's private residence in Nkandla, and the subsequent non-compliance by certain members of the executive and the legislature with the Public Protector's remedial action pertaining thereto; and (3) the failure by the South African government to arrest Bashir during his attendance of a summit hosted in South Africa, notwithstanding the existence of a warrant for his arrest having been issued by the ICC, and the government's subsequent failure to abide by a court order preventing Bashir from leaving South Africa prior to a final judgment being delivered by the court regarding the government's obligation to arrest Bashir.

Thereafter the chapter considers briefly a number of additional cases in order to provide better context and understanding of the political environment, and to substantiate further the arguments made in this research. The case studies offer illustrations of the executive of South Africa exercising public power. This chapter's systematic consideration of the three cases – in line with the theoretical considerations elaborated in Chapter 3 – is expected to demonstrate that the executive is not uncompromising in its adherence to constitutional principles, checks and balances exist minimally between the executive and the legislature, policy is influenced by politics and subjective interests, and matters that are capable of resolution elsewhere are referred to the judiciary for adjudication. This occurs for various reasons, for example desperation on the part of opposition parties (who often struggle to convince the legislature to hold the executive to account), political points scoring, and inefficacy of traditional mechanisms of accountability.

While the case studies are similar in the apparent irrationality of the decision-making by members of the executive, the involvement of the judiciary, and the failure of the legislature to hold the executive to account, the cases differ fundamentally. The SABC case is about poor corporate governance and censorship; the Nkandla case highlights the President's defiance of the remedial action of the Public Protector, with the support of the legislature and some members of the executive; and the ICC case illustrates the executive's evasion of a court order in order to avoid arresting a state leader, thus putting politics before constitutional duties.

The case studies show how the legislature continuously sides with the executive to the frustration of opposition parties, who as a result see the judiciary as the only credible accountability institution. These examples also reflect the lack of consequences for poor decision-making. In the current environment, poor governance does not appear to be admonished. Governance is characterised by tolerance for incompetence and corrupt behaviour.

4.1 The exercise of public power by the executive

The three case studies are discussed in detail in this section. The particular focus will be on setting out the details of the unfolding cases. The findings derived from the case studies will then be analysed thematically, in conjunction with the findings from the literature review and interviews, in Chapter 6. The details that are recorded in this section resulted from the content analysis of the cited sources, which include court judgments, speeches, events covered in the media, and reports compiled by some members of the executive and the Public Protector. Preliminary findings are made in this chapter, which are refined in Chapter 6.

4.1.1 The SABC case study

The SABC policy matter is centred around a report issued by the Office of the Public Protector in February 2014 (When Governance and Ethics Fail). The report revealed serious mis-governance at the SABC, most of which involved Motsoeneng (SABC v DA, 2015). The report prescribed, amongst other things, that disciplinary proceedings against Motsoeneng be instituted (SABC v DA, 2015). The SABC chose to ignore the prescribed action contained in the report, rather choosing to rely on an alternate report from a firm of attorneys, whose findings on the matter differed from those of the Public Protector (SABC v DA, 2015). Motsoeneng, who had been acting Chief Operating Officer (COO) until that point, was offered a permanent position as COO of the SABC. The DA launched an application to court following the failure by Muthambi and the chairperson of the SABC to implement the Public Protector's remedial action, which included instituting disciplinary proceedings against Motsoeneng, and obtained an order which stated that Motsoeneng should be suspended pending the findings of a disciplinary hearing on the basis of the Public Protector's remedial action (SABC v DA, 2015). The court also clarified that the remedial action prescribed by the Office of the Public Protector is binding and could only be set aside by a court pursuant to an application to review such report (SABC v DA, 2015).

In October 2015, the SCA upheld the order of the Western Cape High Court. The SCA found that *"(o)ur constitutional compact demands that remedial action taken by the Public Protector*

should not be ignored. State institutions are obliged to heed the principles of co-operative governance as prescribed by S41 of the Constitution" (2015, p. 36). The SCA further held that the Public Protector is a watchdog, and must not be muzzled. No one is entitled to ignore findings of this office, decisions or remedial action, or embark on a parallel investigation to that of the Public Protector and proceed to adopt the findings of such parallel investigation over the findings, decisions or remedial action prescribed by the Public Protector (SABC V DA, 2015). The SABC's Motsoeneng launched an appeal to the Constitutional Court citing that the decision of the SCA set a dangerous precedent by allowing interference in the running of state owned companies, public institutions and government decisions (Phakati, October 2015). The appeal was, however, withdrawn by Motsoeneng in January 2016 (Essop, 2016). This constituted Part A of the DA's application.

A disciplinary hearing was held in December 2015 which cleared Motsoeneng of any wrongdoing (Letsoalo, 2016). The Public Protector was not satisfied with the manner in which the remedial action prescribed by her office was implemented by the SABC (Letsoalo, 2016). After hearing Part B of the DA's application, in which it asked the court to set aside Motsoeneng's permanent appointment as COO of the SABC, the Western Cape High Court ordered in November 2015 that the permanent appointment be set aside (Phakati, November 2015) on the grounds that the decision to appoint Motsoeneng permanently was irrational in light of the findings of the Public Protector (Africa News Agency, 2016a). The application for leave to appeal launched by the SABC to the same court was denied in May 2016, and the subsequent application for leave to appeal lodged with the SCA was also denied in September 2016, with the SCA stating no prospects for the success of the appeal as a reason (Africa News Agency, 2016a).

Having failed to appeal the decision, the SABC appointed Motsoeneng to Group Executive of Corporate Affairs, a position he previously held at the SABC (Africa News Agency, 2016b). The DA launched another application with the Western Cape High Court to have Mosoeneng removed from this position (Phakati, November 2016). In December 2016, the court ordered that Motsoeneng could not hold any positions at the SABC until a disciplinary hearing was properly held in accordance with the Public Protector's report, or until the report was set aside following a review process (eNCA, 2016c). The SABC's application for leave to appeal this judgment was denied (Quintal & Phakati, 2017).

During July 2016, under the leadership of Motsoeneng, the SABC adopted a policy that it would stop airing footage of violent protests. This decision was made a few weeks prior to municipal elections being held. The SABC is the main news source for the majority of South

Africans. Approximately 29 million people (NAB State of the Broadcasting Industry Report, 2014) do not have access to private network channels, and watch the news in their primary language, which means that they are watching SABC news. The SABC policy decision had a substantial impact on the nation. Section 32 (1) (b) of the Constitution provides that everyone has the right of access to any information held by any person that is required for the exercise or protection of any rights. Many stakeholders in the communications and NGO sectors argued that this policy amounted to censorship, and was therefore unconstitutional. The matter was referred to the Independent Communications Authority of South Africa (ICASA), a Chapter Nine institution, which is an independent authority tasked with regulating broadcasting in the public interest, with a focus on fairness and diversity of views which broadly represent South African society.

ICASA made a finding to the effect that the SABC was required to withdraw the decision to refrain from broadcasting footage of violent protests and destruction of property on the news (Africa News Agency, 2016c). The SABC communicated that it did not agree with the order, and viewed the order as nothing more than a recommendation, which it would take on review (Africa News Agency, 2016c). Muthambi did not intervene. The matter was then referred to the North Gauteng High Court, where a settlement agreement was concluded between the SABC and the Helen Suzman Foundation (HSF), an organisation that aims to promote liberal constitutional democracy through public debate and research. The court prohibited SABC management from implementing the policy, and ordered the SABC to desist from implementing any further decisions not to broadcast violent protests, even where damage to property occurred (Bateman, 2016a).

Motsoeneng is alleged to have instructed SABC journalists, at an election offsite in June 2016, to refrain from questioning the President, allegedly stating that the President was special and should be treated with respect (Herman, 2016). Further allegations of a similar nature were made at the Parliamentary inquiry, held in December 2016, into mis-governance at the SABC (eNCA News Channel, 13 December 2016, Parliamentary Inquiry into the SABC). Evidence was heard from former members of the board, and employees who had been unlawfully dismissed from the SABC (the SABC 8) for challenging the broadcaster's censorship policies in terms of which they were instructed what was, and was not, permitted for broadcast (eNCA News Channel, 12 December 2016, Parliamentary Inquiry into the SABC).

These reports reflected a culture, at the top level of the SABC, of defending or protecting the head of the executive from criticism. The SABC is wholly owned by government, and Parliament decides its budget as well as who sits on the board. Government is the sole

shareholder, as represented by the then Minister of Communication. Therefore government, if it wished to do so, could exercise significant influence over the SABC. The DA has accused the President and Muthambi of exercising undue influence over the SABC (Hogg, 2016), which has resulted in poor governance within the institution, as it drives certain political interests and agendas. Further accusations have been made by the DA that Muthambi seeks to serve the President in her decision-making (ANA, 2016). It is also argued by the Centre for Constitutional Rights, amongst others, that the Broadcasting Amendment Bill, which was tabled in Parliament at the end of 2015 seeks to place more power over broadcasting in the hands of the President and Muthambi (Sibanda, 2016).

The Parliamentary inquiry into the mis-governance at the SABC has revealed that Motsoeneng ran the SABC with impunity. He was believed to be politically well connected, and was therefore allowed, by the board and Muthambi, to control the SABC as though he was on the board of directors, often sitting in on board meetings even though he had no legal right to be there (eNCA News Channel, 13 December 2016, Parliamentary Inquiry into the SABC). The testimony provided made it clear that Motsoeneng ran the SABC and exerted his will over the Group Chief Executive, the rest of the board and the company secretary (eNCA News Channel, 13 December 2016, Parliamentary Inquiry into the SABC).

No accountability has been taken for the censorship that took place in South Africa in the weeks immediately preceding the municipal elections of 2016. This is a manipulation of a large portion of the electorate who were not fully informed of events in the country prior to heading to the polls. These seem like desperate attempts by the ruling party to avoid bad publicity in the wake of an election. The accountability mechanisms at the SABC, Parliament and the executive level failed in this matter. Muthambi, as the Minister of Communications at the time, failed to hold the SABC board accountable or responsible for their actions, and the legislature failed to hold the Minister accountable for her failure to intervene and ensure that the public broadcaster conducted itself in an objective manner. The President failed to exercise strong leadership by intervening and holding Muthambi accountable. The courts were the only effective safeguard.

4.1.2 The Nkandla case study

This case study pertains to the so-called security upgrades undertaken at the President's private home in Nkandla, KwaZulu-Natal, and illustrates poor governance. The cost of the security upgrades escalated from R27,000,000 to R225,000,000. The Office of the Public Protector was asked to investigate the spending on the project, and released a report in March

2014 titled '*Secure in Comfort*'. The Public Protector found that the implementation of the security measures did not comply with the appropriate laws in that the processes set out in the Cabinet Policy were not followed, and the project significantly deviated from the measures that were recommended by the South African Police Services (SAPS) in their security evaluation report (Public Protector, 2014). The Report details how national legislation including the National Key Points Act No. 102 of 1980 and the Public Finance Management Act No. 1 of 1999 (PFMA) were not complied with, as well as government supply chain management provisions set out in Section 217 of the Constitution, Treasury Regulations and the Department of Public Works (DPW) Supply Chain Management policy (Public Protector, 2014).

The Public Protector found the actions of the DPW's officials to be unlawful and that they constituted improper conduct and maladministration (Public Protector, 2014). She found that a number of measures implemented by the DPW, including the "*Visitors' Centre, an expensive cattle kraal with a culvert and chicken run, a swimming pool, an amphitheatre, marquee area, some of the extensive paving and the relocation of neighbours who used to form part of the original homestead*" (Public Protector, 2014; p. 429), were not reasonably required for the President's security; they were unlawful and constituted improper conduct and maladministration (Public Protector, 2014). She found that the failure to restrict the excessive spending on non-security upgrades, especially after the media exposed the story in December 2009, constituted improper conduct and maladministration (Public Protector, 2014). Funds were deviated from the Inner-City Regeneration and the Dolomite Risk Management Programmes of the DPW in order to finance the upgrades to the President's private home, which in turn negatively affected those projects (Public Protector, 2014). This was in violation of Section 237 of the Constitution as well as the Batho Pele White Paper (Public Protector, 2014).

The Public Protector found that the President and his family unduly benefitted from the massive capital investment by virtue of the non-security upgrades (Public Protector, 2014). It was found that the President failed to uphold Section 96 of the Constitution by failing to protect state resources. This also constitutes a violation of paragraph 2 of the Executive Ethics Code, therefore amounting to conduct inconsistent with that of a member of Cabinet (Public Protector, 2014). She stated that the President should have taken reasonable steps in December 2009 when the costs were approximately R95,000,000 to enquire into the high costs and to correct any irregularities, as is required by Sections 96 and 237 of the Constitution (Public Protector, 2014).

The remedial steps prescribed by the Public Protector in terms of S182 (1) (c) of the Constitution included the President taking steps "*with the assistance of the National Treasury and the SAPS, to determine the reasonable cost of the measures implemented by the DPW at his private residence that do not relate to security*" (Public Protector, 2014; p. 442), and for the President to "*pay a reasonable percentage of the costs of the measures as determined with the assistance of National Treasury, also considering the DPW apportionment document*" (Public Protector, 2014, p. 442).

The President responded to the National Assembly on the Public Protector's report by stating the following: "*I deem the following to be appropriate: …the Minister of Police as the designated Minister under the National Key Points Act, to report to Cabinet on a determination to whether the President is liable for any contribution in respect of the security upgrades having regard to the legislation, past practices, culture and findings contained in the respective reports*" (Minister of Police, 2015, p. 1). Subsequent thereto the Minister of Police found all the work done at the President's residence were indeed security upgrades and therefore the President was not liable to pay any amounts towards the work done at his private residence (Minister of Police, 2015). The Minister of Police went on to indicate that completion of the outstanding work could commence at the President's private residence (Minister of Police, 2015). It is worth noting that National Treasury was left out of the process initiated by the President, even though the Public Protector had named the institution as part of the team that was to establish the costs of the non-security upgrades and the percentage thereof that the President would be liable to pay.

After significant upheaval in the National Assembly over the Nkandla reports and failure to obtain a direct response from the President regarding when he would pay back the money spent on the non-security upgrades (to which the President would respond by saying the matter was still in a process and he would be in a position to respond once it had been finalised), the Economic Freedom Fighters (the EFF), an opposition party in Parliament, launched an application directly to the Constitutional Court (Rabkin, 2015). The EFF sought an order from the court to the effect that the President had failed to fulfil his constitutional obligations by virtue of his failure to implement the remedial action prescribed by the Public Protector; that the court order the President to comply therewith; and that the National Assembly failed to perform its constitutional duty to exercise oversight over and hold the executive accountable (EFF v The Speaker of the National Assembly Republic of South Africa and President Jacob Gedleyihlekisa Zuma, Notice of Motion).

On 2 February 2016, contrary to the President's previous utterances on the matter, the President's attorneys sent a letter to the Constitutional Court ahead of the hearing of the matter in court (*Polity*, 2016). The letter confirmed that the President would pay a portion of the money spent on non-security upgrades, and thought it prudent that the Minister of Finance and the Auditor General make the determination regarding the amount to be paid by the President (*Polity*, 2016; Ferreira, 2016). Up until this point the President had affirmed his position that the Public Protector's remedial action did not equate to a court order, and were merely recommendations (eNCA, 2015). The matter was heard by the Constitutional Court on 9 February 2016.

In court the President's legal counsel conceded, and confirmed the President's acceptance that the Public Protector's remedial action in her Report was binding (Rabkin & Marrian, 2016; Ferreira, 2016; Nolan, 2016a). This is contradictory to what the President had asserted from 2014 to 2016, which resulted in two inquiries being commissioned and the subsequent issue of reports by the Minister of Police and the Special Investigating Unit. The President's counsel told the court that there had been legitimate confusion regarding the powers of the Public Protector until October 2015 when the SCA clarified this (De Wet, 2016, p. 10). The President's counsel, following these concessions, urged the court not to grant all of the orders sought by the EFF "*in this delicate time*" and "*in a dangerous year*" (Rabkin & Marrian, 2016, p. 2), which may be perceived as an attempt to warn the court not to discredit the President in an election year. The President's counsel went on to say *"(b)ut what would be wrong would be for this court to be inveigled into a position of making some form of wide, condemnatory order, which would be used effectively for … an impeachment in Parliament*" (Rabkin & Marrian, 2016, p. 2). These statements could be interpreted as attempting to influence the court's ruling on political grounds. This would involve the judiciary in political matters, which could result in the judiciary's integrity, independence and legitimacy being threatened.

The Minister of Police's counsel, in justifying the actions of the minister, advised the court that "*the minister's hands were tied*" (Mabuza & Dlamini, 2016, p 2) as he was simply following the instructions of the President and the National Assembly (Mabuza & Dlamini, 2016), thus indicating that political factors played a role in the Minister's decision-making on the matter. The EFF's counsel pointed out to the court that not only had the President defied the Public Protector's directives, but the National Assembly had failed to hold the President accountable for nearly two years (Mabuza & Dlamini, 2016). This reflected the failure of checks and balances between the executive and the legislature. The DA's counsel stated that the case reflected "*the systematic failure of the government and the National Assembly*" (Mabuza &

Dlamini, 2016, p. 3), bringing to the fore the failings of South Africa's democracy which to some extent stem from a powerful majority party.

On 31 March 2016, the Chief Justice of the Constitutional Court delivered the following unanimous judgment, which clarified further the standing of the Public Protector:

> "*an order will thus be made that the President's failure to comply with the remedial action taken against him by the Public Protector is inconsistent with his obligations to uphold, defend and respect the Constitution as the supreme law of the Republic; to comply with the remedial action taken by the Public Protector; and the duty to assist and protect the office of the Public Protector to ensure its independence, impartiality, dignity and effectiveness. Similarly, the failure by the National Assembly to hold the President accountable by ensuring that he complies with the remedial action taken against him, is inconsistent with its obligations to scrutinise and oversee executive action and to maintain oversight of the exercise of executive powers by the President. And in particular, to give urgent attention to or intervene by facilitating his compliance with the remedial action"* (EFF and Others v Speaker of the National Assembly and Others, pp. 52-54).

The Constitutional Court ordered that the remedial action of the Public Protector was binding, and further set aside the resolution of the National Assembly absolving the President from complying with the Public Protector's remedial action on the basis that it was inconsistent with the Constitution and invalid. The Court ordered that National Treasury determine the amount payable by the President within 60 days of the order being given, and that the President pay such amount within 45 days of such amount being approved by the Court. The Court further held that the President must personally pay such amount (EFF and Others v Speaker of the National Assembly and Others, 2016, pp. 52-54).

The Nkandla case study illustrated how ineffectively democracy works when the three branches of government do not perform their duties as prescribed by the Constitution. The case also shows the reluctance or refusal of the legislature to hold the executive accountable, as well as the manner in which power relations impact on decision-making.

4.1.3 The Bashir case study

President Bashir was charged by the International Criminal Court (the ICC) for war crimes and crimes against humanity perpetrated in Sudan. These crimes include murder, extermination, forcible transfer, torture, rape, directing attacks against civilians, and genocide (International

Criminal Court). The ICC issued an arrest warrant for President Bashir initially in March 2009 and again in July 2010 (Manyathi-Jele, 2015), however President Bashir is still free.

South Africa is a member state of the ICC, having signed and ratified the Rome Statute of the ICC (Rome Statute) in 1998 (Tladi, 2015). South Africa then passed the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (the Implementation Act), thereby incorporating the provisions of the Rome Statute into South African Law (Tladi, 2015). The purpose of the Implementation Act is to -

> *"To provide a framework to ensure the effective implementation of the Rome Statute of the International Criminal Court in South Africa; to ensure that South Africa conforms with its obligations set out in the Statute; to provide for the crime of genocide, crimes against humanity and war crimes; … to provide for the arrest of persons accused of having committed the said crimes and their surrender to the said Court in certain circumstances; to provide for co-operation by South Africa with the said Court;…"* (Act 27 of 2002).

In June 2015, the South African government hosted the African Union Summit (the Summit). Amongst the invited guests was President Bashir, who attended the Summit regardless of an existing warrant issued by the ICC for his arrest and South Africa's membership of the ICC. The government communicated that it would not arrest President Bashir as he was protected by diplomatic immunity which had been afforded to all foreign members of state who attended the Summit (Tladi, 2015; Manyathi-Jele, 2015). The Southern African Litigation Centre (SALC) launched an application with the North Gauteng High Court for an order directing the South African government to arrest President Bashir while he was in the country (Tladi, 2015). The said court, while hearing the application and considering it, gave an interim order directing the South African government to prevent President Bashir from leaving South Africa until the court had handed down its final order on the matter (Tladi, 2015). However, before the final order was made, which directed the government to arrest President Bashir (Tladi, 2015), it transpired that the government had allowed President Bashir to leave South Africa. Following the order of court, which found that President Bashir did not have immunity from arrest and should have been arrested in accordance with the provisions of the Rome Statute and the Implementation Act (Tladi, 2015), the South African government indicated its intention to appeal the decision (Manyathi-Jele, 2015). The court held that government had acted unconstitutionally in allowing President Bashir to leave the country (Raborife, 2015).

The government had submitted to the high court that Bashir had immunity which was based on Article VIII of the hosting agreement concluded between the government and the African

Union (AU), and a ministerial proclamation under section 5(3) of the Diplomatic Immunities and Privileges Act 37 of 2001 (DIPA). Article VIII reads as follows:

> *"The Government shall afford the members of the Commission and Staff Members, delegates and other representatives of Inter-Governmental Organisations attending the Meetings the privileges and immunities set forth in Sections C and D, Article V and VI of the General Convention on the Privileges and Immunities of the OAU"* (The Minister of Justice and Constitutional Development v SALC, 2016).

The Minister of International Relations and Cooperation then published a notice in the Government Gazette recognising the hosting agreement and the immunity conferred by the said agreement in accordance with S5 (3) of DIPA. Dr Lubisi, the Director-General of the Presidency and the Secretary of Cabinet, testified that members of cabinet had met and had, on the advice provided by the Chief State Law Advisor, agreed that the conditions in the hosting agreement prevailed over the government's other legal obligations, however this was a temporary arrangement that would fall away after the summit (The Minister of Justice and Constitutional Development v SALC, 2016).

The high court found that Article VIII of the host agreement and S5 (3) of the DIPA, did not confer immunity to Bashir (The Minister of Justice and Constitutional Development v SALC, 2016). This was because, on the court's interpretation, Article VIII did not extend to heads of state, but only to the staff of the AU and any organisations with which it worked (The Minister of Justice and Constitutional Development v SALC, 2016). The high court also held that S5 (3) of the DIPA applied to organisations, and not heads of state (The Minister of Justice and Constitutional Development v SALC, 2016). On this basis, it was determined that the Minister of International Relations and Cooperation could not have conferred immunity to Bashir as that right had never existed (The Minister of Justice and Constitutional Development v SALC, 2016).

In the SCA the government relied on the immunity conferred by customary international law, which is codified in S4 (1) of the DIPA, in terms of which a head of state is immune from the criminal and civil jurisdiction of South African courts, arguing that the Implementation Act did not erode this immunity (The Minister of Justice and Constitutional Development v SALC, 2016). Government advanced an argument to the effect that S4 (2) of the Implementation Act did not remove the immunity enjoyed by heads of state, not even for crimes prosecuted by the ICC (The Minister of Justice and Constitutional Development v SALC, 2016). The SCA found that in terms of Article 98 of the Rome Statute, the immunity of non-member states is not

eroded, and remains intact, as the convention does not apply to them (The Minister of Justice and Constitutional Development v SALC, 2016). However, the Implementation Act waived Bashir's right to immunity, as Section 4 (2) (a) of that Act states that a position as an official of state would not constitute a defence (The Minister of Justice and Constitutional Development v SALC, 2016).

The SCA held "*I conclude therefore that when South Africa decided to implement its obligations under the Rome Statute by passing the Implementation Act it did so on the basis that all forms of immunity, including head of state immunity, would not constitute a bar to the prosecution of international crimes in this country or to South Africa cooperating with the ICC by way of the arrest and surrender of persons charged with such crimes before the ICC, where an arrest warrant had been issued and a request for cooperation made*" (The Minister of Justice and Constitutional Development v SALC, 2016, p. 68). The SCA argued that its approach was wholly consistent with South Africa's commitment to human rights at a national and international level. As such, it did not undermine customary international law, which provided Bashir with immunity, as Sections 232 of the Constitution entitled the South African government to depart from statute in order to ensure that laws are consistent with the Constitution (The Minister of Justice and Constitutional Development v SALC, 2016, p. 69).

The SCA also based its decision on historical confirmations from the government that it would be obligated to arrest Bashir if he entered the country (The Minister of Justice and Constitutional Development v SALC, 2016). This was expressed in respect of Zuma's inauguration and former president Nelson Mandela's funeral, which events Bashir did not attend so as to evade arrest (The Minister of Justice and Constitutional Development v SALC, 2016).

In substantiating its order, the SCA further held that in terms of Section 10 (9) of the Implementation Act, a Magistrate cannot refuse to issue an order submitting the person detained to the ICC on the basis that such person is a head of state (The Minister of Justice and Constitutional Development v SALC, 2016). Section 10 of the Implementation Act is headed 'Proceedings before competent court after arrest for purposes of surrender', which indicates that the section is relevant for the purposes of proceedings following arrest, and not for circumstances before arrest. Section 4 (2) (a) of the same Act refers to immunity as a defence, and not to the right to immunity in and of itself as ascribed to heads of state by international customary law.

These provisions were incorrectly applied by the SCA, and the writer is inclined to agree with the government's argument that Section 10 (9) of the Implementation Act does not apply in considerations of immunity prior to arrest (The Minister of Justice and Constitutional Development v SALC, 2016). Thus Section 10 (9) read with Section 4 (2) (a) do not strip Bashir of his right to immunity. The SCA reached too far in making this argument, and the writer contends that there is an error in the Act in that it omits to deal with immunity as a constraint to making an arrest, and only makes mention of it as a defence. The court's decision seems to suggest that the majority of judges were trying to find justification for the decision they wished to arrive at.

The ICC circumvented the immunity against arrest problem by means of Security Council Resolution 1593 (2005) which read as follows, the "*Government of Sudan … shall cooperate fully with and provide necessary assistance to the Court and the Prosecutor pursuant to this resolution*" (The Minister of Justice and Constitutional Development v SALC, 2016, p. 54). The ICC interpreted this to mean that Bashir's immunity had been waived, on the basis that his immunity presented a procedural bar from prosecution by the ICC, and the words 'cooperate fully' suggested that such immunity could be removed (The Minister of Justice and Constitutional Development v SALC, 2016). The SCA did not consider this line of reasoning stating that it had insufficient information to make a pronouncement on it. The SCA held that government was obligated to arrest Bashir in terms of South African law and irrespective of the rules of diplomacy (Nolan, 2016b).

It is important to contextualise and explain the politics pertaining to the ICC and the Security Council of the United Nations. The Security Council is composed of fifteen member states, five of whom are permanent members, and the remaining ten are changed every two years. Each member state has one vote, however the five permanent states (the United States of America (USA/US), United Kingdom (UK), China, Russian Federation and France) have a veto power, which means that an affirmative cumulative vote can be rejected by a single permanent member. This means that the power relations in the world are skewed. The Security Council is permitted to allow investigations by the ICC into crimes committed by heads of state who are not members of the Rome Statute and strip them of their immunity, but the five permanent members are protected from the same provisions, due to their veto powers. Many have argued, especially in light of the Report of the Iraq Inquiry (a report compiled by an independent committee mandated by the Prime Minister of England to consider the UK's involvement in the war in Iraq, commonly referred to as the Chilcot report) that the USA and UK should be charged for crimes against humanity for their role in starting a war in Iraq in 2003, which destabilised the Middle East. Approximately 24,865 civilian deaths occurred

between 2003 and 2005 during the Iraq war (Iraq Body Count), and thousands have died over the years since then due to a destabilised Middle East. The USA and the UK's leaders have not been charged with any crime, notwithstanding confirmations that they were unjustified in their invasion of Iraq.

Following this incident, the ANC National General Council resolved that South Africa must withdraw from the ICC (Phago, 2015; Raborife, 2015). The Constitutional Court was scheduled to hear the government's appeal on 22 November 2016 (Centre for Human Rights, 2016). However, it would no longer hear the matter following an announcement at a briefing on 21 October 2016 by the Minister of Justice and Constitutional Development, wherein the Minister announced that the executive had provided the ICC with notice that it was revoking its membership to the Rome Statute and that the government would withdraw its application for leave to appeal the SCA judgment (eNCA News Channel, 21 October 2016).

The Minister stated that the confusion regarding the applicability of immunity had been settled by the SCA, stating that the Implementation Act stood in the way of immunity, and that it was on this basis that the executive would revoke its membership as this limitation hindered South Africa's policy of peace keeping and negotiating conflict resolution on the continent, as the country could not host certain leaders as a result of the nullification of immunity (eNCA News Channel, 21 October 2016). More significantly the Minister said giving effect to the ICC warrant would have resulted in regime change in Sudan, and that South Africa would not take part in such actions (eNCA News Channel, 21 October 2016). Put differently, the government could not arrest Bashir because such arrest would have given effect to regime change in Sudan. Forced regime change is an extremely serious matter, and in recent times it has led to regional instability. Therefore, it is a very difficult decision to make given the harsh consequences that may follow and the responsibility that attaches to countries that interfere with foreign governments. This adds to the complexity of the decision government had to make when considering whether to abide by the interim court order.

The DA referred this decision to the Constitutional Court on the basis that the executive unilaterally decided to revoke South Africa's membership to the ICC without first addressing the matter with the legislature (Jordaan, 2016). Cabinet was of the view that it had the prerogative to enter into foreign agreements, and therefore it also had the prerogative to withdraw from such policies, without deferring to the legislature, and in this case the Implementation Act could be repealed after the executive provided notice of its withdrawal (eNCA News Channel, 21 October 2016; Jordaan, 2016). The DA's argument was that the legislation should have been repealed first, which is a function of the legislature, and further

that the public should have been consulted on the matter given its link to rights contained in the Bill of Rights (Jordaan, 2016). The DA accused the executive of failing to protect and promote the rights in the Bill of Rights, arguing that this suggested that the government was not committed to justice and human rights (Jordaan, 2016). The court held that the executive should have obtained approval from the legislature prior to withdrawing from the ICC, and that the hasty decision to withdraw suggested procedural irrationality (Allison, 2017).

4.2 Additional cases

Since 2009, there have been a number of indications that some state institutions have been infiltrated by politics and their structures manipulated for political gain. These incidents are relevant for this study as they provide further context to the current political environment in South Africa, and shed additional light on the findings that this report is expected to arrive at.

4.2.1 SASSA and the Department of Social Development

Leadership appears to be weak and focused on political gains, instead of effective governance and decision-making that benefits society. In the SASSA matter, the Minister of Social Development appeared to have engineered a situation wherein only a single supplier, Cash Pay Masters (CPS), would be able to provide the national grants payment service to the government from 1 April 2017. This notwithstanding its current contract with SASSA having been declared invalid by the Constitutional Court in 2013 (which declaration of invalidity was suspended to ensure that the provision of grants continued uninterrupted) (Ndlozi, 2017).

The chairperson of the SCOPA said it was clear that the situation had been engineered, stating that the question was simply 'who benefits?' (Herman, 2017). Gordhan said the following to SCOPA in March when he appeared before the Committee, ahead of the SASSA matter being heard in the Constitutional Court, "*follow the law, and do what is required to be done, and follow due process without too many other obligations being brought into the picture in terms of extracting money from the state for wrong purposes - let's put it plainly ... then life would be much more simple… it's not about whether you understand the law, it's a question of whether you want to abide by the law at the end of the day*" (eNCA Channel, 14 March 2017).

Upon realising that the Department could not take over the role of CPS due to capacity constraints, the Minister took minimal action, allowed time to elapse, and seemingly created a situation that would leave no other option but for the invalid contract to be extended (Ndlozi,

2017). The Department, which had been under a structural interdict imposed by the Constitutional Court, which was lifted after providing assurance to that Court that it would be able to take over the provision of grants in 2017, elected not to refer its inability to fulfil its undertaking to the Court. Instead, (going against the advice of several senior legal counsel) it decided to extend the contract that had been declared invalid by the Court. Black Sash, an NGO, referred the matter to the Court, on the basis of concerns pertaining to the terms of the new agreement, and specifically the alleged abuse and misuse of beneficiaries' details for profiteering on the part of CPS' affiliated companies (Evans, 2017).

At the hearing of the application, Chief Justice Mogoeng stated "*If something is done that is unconstitutional and unlawful is it not for you to spend sleepless nights to ensure it does not happen again?*" (TGM Digital, 2017) Referring to the Minister and SASSA's actions, he asked "*How did we get to this level that can be characterised as absolute incompetence?*" (TGM Digital, 2017). The Court grappled with understanding how the Minister and SASSA had allowed the situation to get so out of hand. The reason the CPS contract had been declared invalid had been because it did not meet the requisite Black Economic Empowerment requirements, thus failing to meet an ANC and government policy of economic transformation. Now, the Minister sought to extend this contract with the same supplier for a further period of two years. The Court extended the contract for a year, and held that the Department and SASSA had to report to it and the Auditor General on progress regarding the securing of a new service provider at specific intervals (Black Sash Trust v Minister of Social Development and Others, 2017). The Court was forced to intervene, and quite intrusively, into policy matters in this case because the Minister failed to perform her duties rationally.

While these events were unfolding, the President made a number of public statements, including in Parliament, supporting the Minister (Ndenze, 2017). Similarly, the recommendation made to the President (by the Committee that conducted the parliamentary hearings into the SABC) that Muthambi was not fit to hold that office seem to have made no impact, since the President asked the Minister to join the inter-ministerial committee on comprehensive social security, which negotiated the grants payment agreement with CPS – the President also nominated himself as chair of the committee (Africa News Agency, 2017a).

4.2.2 The Hawks

Berning Ntlemeza's appointment by the then Minister of Police, Nathi Nhleko, as the permanent head of the crime fighting unit, the Hawks, notwithstanding High Court judge Elias Matojane having found him to be "biased and dishonest", to be lacking in integrity and honour,

and to have made false statements under oath (*Mail & Guardian*, 2016) is an example of the appointment of an unsuitable candidate for a position that required a person with integrity, who is fit and proper, and uncompromised. The question remains why such an appointment was made. The Congress of the People (Cope) hold the view that the appointment was a calculated move steered by the President to appoint someone who could be manipulated into carrying out political instructions (RDM News Wire, 2015). Ntlemeza has a controversial past, which could be used to remove him from his position were he to refuse to follow political instructions, or attempt to investigate the President, argues Cope (RDM News Wire, 2015).

This is a plausible since the previous Hawks head, General Anwa Dramat, left that institution under suspicious circumstances. Initially Dramat was suspended for his alleged involvement in the deportation of several Zimbabwean murder suspects who were living in South Africa, charges many believed were unfounded, and ultimately Dramat was paid a hefty sum to leave the Hawks (RDM News Wire, 2015). Many, including Cope, believe that Dramat was suspended and later paid off because he started investigating the spending on the Nkandla project (RDM News Wire, 2015). Nxasana, discussed in section 4.2.5 below, was also removed from his position under suspicious circumstances.

The HSF took the Minister's decision on review to the high court, and a full bench of the high court held that Nhleko had failed to consider the adverse findings made by Judge Motajane against Ntlemeza when appointing Ntlemeza (Bateman, 2017). Nhleko confirmed that he would apply for leave to appeal the decision (Bateman, 2017).

4.2.3 The IPID

On 5 September 2016, the Constitutional Court found that the then Minister of Police (Nhleko) had acted unconstitutionally in suspending the head of the Independent Police Investigative Directorate (IPID), Robert McBride. Nhleko had based this suspension on allegations that McBride allegedly altered a report by the IPID which implicated former Hawks boss Dramat and former Hawks Gauteng head Shadrack Sibiya in the deportation of Zimbabwean murder suspects, as discussed in section 4.2.2 above, (Ngoepe, 2016). Sibiya was fired based on this report. The Minister conceded to the Constitutional Court that his actions were unconstitutional as he did not have the authority to suspend McBride (eNCA, 2016a). Nhleko then requested that the National Assembly launch an inquiry into McBride's fitness to hold office, stating that he would be able to legally suspend McBride once this inquiry had been launched (Gqirana, 2016). This has not occurred to date. McBride has said publicly on a number of occasions that he, and a number of his colleagues (including Sibiya and Dramat), were being targeted by the

NPA and the Hawks for trying to carry out their duties impartially and without political interference (Van Wyk, 2016b; News 24, 2016b).

4.2.4 National Treasury

Indicating that the NPA and the Hawks are being manipulated for political ends, Gordhan said on 11 October 2016 that -

> *"(t)his is a moment where all South Africans need to ask whose interests these people in the Hawks, the NPA and the NDPP are advancing. Where do they get their political instructions from and for what purpose? …I intend to continue doing my job. The cause of defending ethical leadership in government and throughout society is too important to allow ourselves to be deterred by this kind of harassment. The fight against corruption, maladministration, and the waste of public resources will continue*" (Ministry of Finance, 2016).

This statement followed the service of a criminal summons on Gordhan by the Hawks, in terms of which Gordhan was charged with fraud and theft for having approved a payment of approximately R1,000,000 in respect of pension moneys, while in his previous position as Commissioner of South African Revenue Services (SARS). The pension money was paid to Ivan Pillay upon his early retirement, and allegedly Pillay was not entitled to this payment from SARS (Fin 24, 2016a). Gordhan also noted that South African's needed to question the timing of the charges (eNCA, 2016b), which were brought roughly two weeks before the Minister was scheduled to deliver his mid-term budget speech.

There was suspicion among political analysts of an internal power struggle between Gordhan and the President, with the latter wanting to gain access to the state purse, and former guarding it furiously. These suspicions were fuelled by the unexpected and abrupt firing of another previous Minister of Finance, Nhlanhla Nene, in December 2015 for no compelling reason; and the appointment of the relatively unknown Desmond van Rooyen. Van Rooyen, who was considered insufficiently experienced for the position, has been linked to the Gupta family, and has also been accused of leaking confidential National Treasury documents to the Gupta family during his time as Finance Minister) (Jika & Skiti, 2016). Gordhan's statement about defending ethical leadership, fighting against corruption, and his assertion that politics was behind the charges brought against him also fuelled speculation. Van Rooyen's appointment was reversed and Gordhan was appointed to the position four days later, following uproar from financial institutions (amongst others) as a result of the loss of billions of Rands from the South African economy, and the currency depreciating punitively in the wake

of the decision to fire Nene. It is believed that Gordhan was a grudge appointment for the President, who many believe favoured van Rooyen because of his political pliability. After appointing Gordhan (who would serve as Minister of Finance until being removed by the President on 31 March 2017), the President defended his appointment of van Rooyen, stating that van Rooyen was more qualified than any finance minister Zuma had ever appointed (Africa News Agency, 2016d), which was interpreted as an insult to Gordhan, who had served successfully as finance minister before Nene.

The Finance Ministry, echoing the utterances of then Minister Gordhan, stated that it was clear that the charges were contaminated by abuse for political ends (Ministry of Finance, 2016). The instituting of fraud charges against Gordhan came as a surprise because the Hawks and the NPA had been investigating the 'SARS rogue unit' for several months. An investigative unit which was ultimately named the 'High-Risk Investigations Unit' within the SARS was established in February 2007 during the time Gordhan was the Commissioner of SARS (Pather, 2016a). The unit's primary role was to ensure compliance with tax laws, at the centre of which was organised crime (Pather, 2016a). This unit later came to be referred to as the 'SARS rogue unit'. The Hawks had been investigating this unit for illegal activities for most of 2016, and it appeared as though Gordhan had been at the centre of its investigation. However, when asked by Gordhan what exactly was being investigated, the Hawks did not provide a substantive answer (Pather, 2016a). An argument can, and has, been developed that the Hawks and the NPA, motivated by political influences, were intent on discrediting Gordhan, in order to remove him from his position so that a few powerful people could gain access to the state's finances. Having failed to find grounds on which to charge Gordhan for the activities of the rogue unit, the suspicion is that the NPA deviated to the current charges.

It has emerged that the Head of the NPA, Abrahams, attended a meeting with the President and the Minister of Justice and Constitutional Development at the ANC's headquarters, Luthuli House, the day before Gordhan was charged. Pierre De Vos is of the opinion that it was improper for Abraham to visit the offices of the ANC, and that it created perceptions of bias and political interference (Madia, 2016). Abrahams confirmed that although the charges against Gordhan were not on the agenda for the meeting, they were discussed (Madia, 2016).

Many considered the charges against the Minister as weak, and failing to substantiate a case of fraud. A group of 81 chief executive officers from companies that canvass the South African financial sector (including law firms, banks, trade associations, investment, mining and telecommunications companies) released a joint statement in support of the minister. A portion

of it reads: "*We stand as one for the rule of law and against the decision to prosecute the Minister of Finance on charges that are, according to the preponderance of expert legal opinion, without factual or legal foundation and not in the public interest*" (Fin 24, 2016b). The charges also seem to have prompted some ANC leaders and Cabinet ministers to come out in support of the Finance Minister, amongst them the Deputy President.

The ANC Chief Whip, Jackson Mthembu, not only came out in support of the Minister, but also publicly called for the executive leadership of the ANC, including the President, to step down, stating that they (himself included) had failed to effectively lead society, and that new leadership was required to take the country forward (eNCA News Channel, 23 October 2016). He stated that the charges against Gordhan were unfounded, and he denounced the use of public institutions to settle political scores (eNCA News Channel, 23 October 2016). Mthembu is said to have accused the President of using state resources to fight Gordhan, and to have reminded the President of the protection afforded to him by the ANC when he faced fraud, racketeering and money laundering charges (Penny, 2016). The HSF and Freedom Under Law (FUL) (a non-profit organisation that aims to promote democracy and respect for the rule law, and litigates against state conduct in conflict with the rule of law) launched an application to the high court to have the charges against Gordhan set aside on the basis that they were without foundation and were invalid, stating: "*At best, the charges reveal dizzying incompetence at the NPA and the Hawks. At worst, they confirm our suspicions: that the criminal justice system is being undermined to serve particular political interests*" (TGM Digital, 2016a).

Abrahams dropped the charges against Gordhan amidst intensifying pressure from politicians (some from within the ANC), ANC stalwarts, civil society, and the impending court application, and to the dismay of the Hawks, on the grounds that a case for intention (a critical element for the charges of fraud and theft) could not be proven on the facts before them (Pather, 2016d).

Five months after the charges were dropped, the President removed Gordhan from his position as Minister of Finance on the grounds of an intelligence report that claimed that Gordhan was engaging with international investors with the intention of sabotaging the South African economy (Motau, 2017). Gordhan denied the allegations and called the report unintelligible (Motau, 2017), while the Deputy President, amongst others, called it unsubstantiated (Times Live, 2017). The President's official reason for firing Gordhan was to improve the efficiency and effectiveness of his Cabinet (Times Live, 2017). Many were of the view that Gordhan was very capable and effective as Finance Minister. The firing of Gordhan caused significant upset to the Deputy President, the Secretary General of the ANC, the

Treasurer General of the ANC, and the Deputy General Secretary of the SACP who suggested that the President's decision was influenced by outside forces, and despite their vehement opposition to the President's decision, the President proceeded with his decision (Times Live, 2017; Africa News Agency, 2017c).

4.2.5 The NPA

In another instance, former National Prosecuting Authority (NPA) head, Mxolisi Nxasana, left the NPA under dubious circumstances. The President informed Nxasana of his intention to suspend him pending the outcome of an inquiry into his fitness to hold office after one year into his employment in the NPA, on the grounds that Nxasana had failed to disclose that he had been acquitted of a charge of murder thirty years earlier (News 24, 2015a). These facts only emerged approximately one year after his appointment, which seems irregular as security checks should be conducted prior to such a key appointment being made. Ultimately, a private deal was struck between the President and Nxasana that saw the latter leave the office of the NPA with a large pay-out (The Presidency, 31 May 2015). The DA believed that the inquiry was a witch hunt against Nxasana, who in an assertion of his independence attempted to reinstate murder charges against crime intelligence head, Richard Mdluli (News 24.a, 2015). Mdluli, the DA argues, has a close relationship with the President, and Nxasana was pushed out of the NPA to protect Mdluli (News 24, 2015a).

It is noteworthy that Ntlemeza is known to be closely linked to Mdluli (*Mail & Guardian*, 2016). These circumstances suggest a network of powerful institutional leaders working together to protect each other from scrutiny and censure. In September 2016, high court judges Francis Legodi and Wendy Hughes ruled in favour of the General Council of the Bar's application in Pretoria that Nomgcobo Jiba, deputy national director of public prosecutions, and Lawrence Mrwebi, the Commercial Crimes Unit head (of the NPA), be struck off the roll of advocates on the basis that they were not fit and proper to be members of the Bar. The court's decision was based on a previous judgment related to a decision taken by the pair to drop criminal charges against Mdluli. The court found that Jiba and Mrwebi had been determined to avoid prosecuting Mdluli, despite the existence of a *prima facie* case and ignoring legal advice to this effect (TMG Digital, 2016b). Judge Legodi accused them of protecting Mdluli (Van Wyk, 2016a).

The NPA, however, refuses to charge the President on 783 counts of corruption. This, despite that fact that the President's corruptor, Shabir Schaik, was convicted of having a corrupt relationship with the President (the President was the Deputy President at the time).In

addition, the fact that the high court set aside the controversial decision taken by the then acting head of the NPA, Mokotedi Mpshe, in 2007 not to proceed with corruption charges against the then Deputy President (Zuma) on grounds of the Deputy President's possession of tapes containing conversations between the former head of special operations of the now disbanded Scorpions, Leonard McCarthy, and the former head of the National Prosecuting Authority, Bulelani Ngcuka. It was alleged that these tapes contained evidence of collusion to manipulate the process of prosecuting the Deputy President prior to the ANC's Polokwane conference in 2007 (Areff, 2015). The charges against the Deputy President were dropped by Mpshe prior to the Deputy President being sworn in as President of the Republic on the basis of evidence of a political conspiracy against the Deputy President being derived from the said tapes. This case is often referred to as the 'spy tapes' case.

The DA had been involved in a protracted legal battle to overturn this decision, which was achieved in April 2016 when the high court ordered that Mpshe had acted irrationally in withdrawing the charges against the President after coming under pressure (Evans, 2016). The DA states that the pursuit of the spy tapes saga is important for the rule of law (eNCA, News Channel, 16 October 2016). The decision of the high court has been taken on appeal to the SCA by the NPA and the President. The SCA requested oral arguments on the appeal, and if the appeal is allowed, the parties will argue the merits on the same day (Pather, 2016b). The date of the hearing has yet to be announced. Of significance is Mthembu's admission that the ANC protected the President from the charges. This is an indication that the NPA was manipulated during that time too, and that the ANC may have used its power to influence the NPA for political gain.

According to the NPA, its appeal is based on its view that the court order setting aside its decision not to charge the President with corruption and racketeering is a violation of the doctrine of separation of powers, as only the NPA may decide who to prosecute. In contrast, the NPA hastily charged the Finance Minister prior to ensuring that the elements of those crimes could be substantiated. This indicates a lack of consistency in the NPA's application of its constitutional duty at best, and at worst a politically compromised NPA.

The DA, in a press conference on 16 October 2016, raised concerns about "the politicisation of the NPA" (eNCA, News Channel, 16 October 2016). They refer to the selective prosecution employed by the NPA in charging Gordhan, but refusing to charge the President on 783 corruption charges (eNCA News Channel, 16 October 2016). The DA believes that the NPA is acting unconstitutionally by failing to act fairly and without prejudice (eNCA News Channel, 16 October 2016). It was further argued that Parliament should take charge of appointing the

head of the NPA, and not the President (eNCA News Channel, 16 October 2016). The DA stated that state institutions are being used to settle political scores (eNCA News Channel, 16 October 2016). The selective prosecutions of the NPA constitute a threat to the Constitution. The law cannot be used as a political tool to fight the enemies of the powerful, and to protect those who hold powerful positions. The Constitution in S179 (1) (a) provides the President with the power to appoint the head of the NPA, and subsection (3) states that the NPA must exercise its functions without fear, favour or prejudice.

4.2.6 State of Capture report

Events signify an internal battle between the then Minister of Finance and several state institutions, which seem to be pushing political agendas. On 14 October 2016, the Gordhan instituted an application with the North Gauteng High Court in which he asked the court for a declaration that the Minister of Finance could not interfere with the decisions taken by the major banks in the country to stop offering banking services to Gupta family linked companies (Myburgh, 2016). The application was precipitated by consistent pressure from the former CEO of Oakbay Investments (Pty) Limited (who resigned a few days after the application was filed). Oakbay Investments is a Gupta family owned company, which has been accused of dirty dealings with state owned companies. The CEO of Oakbay had been exerting pressure on the Minister to intervene in the banking matter to force the banks to resume their relationships with Oakbay (Politicsweb, 2016b). The Minister, in his papers, stated that he informed Oakbay that he could not legally interfere in the matter, but received several further requests from the company, which could be interpreted as applying pressure on the Minister to use his political power to force the banks to cooperate with Oakbay (Politicsweb, 2016b). In his application, the Minister presents evidence to the court of transactions considered to be suspicious and which could be in violation of South Africa's anti-money laundering laws, which could form the basis of the banks' refusal to do further business with the company for fear of falling on the wrong side of the law (Myburgh, 2016).

Gordhan's application was brought during the same period as the application by the President and van Rooyen, now the Minister of Co-operative Governance, to stop the Public Protector from releasing her interim report into the findings she made following her office's investigation into the Gupta family's 'capture' of the state. The investigation followed several allegations that the Gupta family had close relationships with the President and several ministers in his Cabinet, in addition to the President's son being in business with the Gupta family. Allegations, confirmed by Jonas and former ANC MP Vytjie Mentor, were made that the family influenced

Cabinet appointments. Both Jonas and Mentor stated that the Guptas had made them offers for Cabinet positions (Pather, 2016c), which is a power given only to the President in the Constitution. The release of the report was successfully blocked (Mabuza, 2016) until 1 November 2016 when the President withdrew his application, presumably due to the low prospects of success.

The report, which the President was taking on review at the time of completion of this thesis, reveals that the President refused to answer the Public Protector's questions pertaining to the investigation, and that the President failed to investigate allegations that the Gupta family had offered a Cabinet position to Jonas (State of Capture Report, 2016). The report raised concerns about the interest taken by the President and Mantashe in the appointment of boards for certain SOCs, and includes evidence that suggests the President may have acted inappropriately by trying to assist the Gupta family to secure business opportunities, and that Eskom, under the leadership of Brian Molefe (the CEO at the time) acted favourably towards a Gupta owned company in order to assist it to secure Eskom contracts (State of Capture Report, 2016). The report contains evidence that members of the Gupta family had close relationships with top leadership whom they felt would be able to discipline recalcitrant state officials (State of Capture Report, 2016).

The Public Protector prescribed that the President appoint a commission of inquiry to further investigate the matters raised in the report (State of Capture Report, 2016). The Public Protector stated that she directed the President to appoint the commission and prescribed the composition of the commission because the President was implicated in her report, and she wanted to avoid a conflict of interests (State of Capture Report, 2016). The President elected to take the report on review on the basis that the Public Protector does not have the authority to direct him to appoint a commission of inquiry, as only he has the authority to exercise this power in terms of the Constitution (Rabkin, 2016).

This is another example of the favouring of form over substance in governance. The allegations made are of a serious nature, and required urgent and decisive steps be taken to protect South Africa's democracy, as they indicate poor governance, maladministration and constitutional violations, which must immediately be halted. The President however elected to take the report on review with the aim of having it set aside, which, if successful, would absolve him of his duty to direct that the allegations be investigated further by a commission of inquiry. To date no other steps have been taken to investigate the allegations contained in the report. In fact, Molefe was promoted to an ANC member of Parliament.

4.3 Conclusion

The case studies and the additional cases reviewed in this chapter suggest political battles are being fought with the use of institutions, which can only serve to distract from their constitutional mandates. Self-interest and other political considerations influence or guide decision-making by some members of the executive, and constitutionalism is regularly not pivotal in the decision-making process.

The case studies consistently exhibit the tension between the rule of law and the political nature of the exercise of public power. They show that decision-making is influenced by politics and subjective interests, this is visible from the decisions that were made by members of the executive in the case studies, as well as some of the additional cases- for example the decision to allow Bashir to leave South Africa, the protection afforded to Motsoeneng, the appointment of Ntlemeza, the suspension of McBride, and the firing of Gordhan. The judiciary is playing a vital and substantial role in reviewing policy decisions, thereby getting involved in policy-making by making pronouncements on the decisions made by the executive, directing the executive regarding decision-making, and supervising the executive in the implementation of its judgments (for example in the Nkandla and SASSA cases). The case studies also show, as alluded to in this chapter, that accountability institutions such as the legislature and the Public Protector are ineffective in carrying out their mandates. The legislature is unwilling to hold the executive to account, while the Public Protector is diligent in its application of its functions, but has no support from the legislature or the executive, resulting in its remedial action being ignored or improperly implemented.

The judiciary has over the years assumed the role of holding the executive accountable, and the nature of the judgments in the Nkandla and SASSA cases indicate that the judiciary has lost faith in the legislature's ability to hold the executive to account. The series of case studies reported on in this chapter – both the three core and the additional cases – point in the direction of little accountability taken or censure given for public servants who fail to fulfil their duties. This finding, together with the nature of appointments made by the President and other members of the executive, suggests that rationality and integrity do not form the foundation of decision-making by the executive – a tentative and case study-based finding that will be tested further in the rest of this research project.

CHAPTER 5: RESEARCH FINDINGS II: INTERVIEWS

This chapter will discuss the responses received from four constitutional law experts to the questionnaire-style interviews. The questionnaire is attached to this research report as Annexure A. The questionnaire was utilised as a method to test, triangulate, and verify the research findings derived through the case study analysis. The questionnaire-style interviews were conducted with Professor Hoexter, retired Constitutional Court Justice O'Regan, retired Constitutional Court Justice Albie Sachs, and Senior Advocate Gilbert Marcus, who will be referred to as the respondents. The respondents' verbatim answers are attached to this report as Annexure B1, B2, B3 and B4. The rest of this chapter presents the interview-linked research findings.

5.1 Findings from the interviews

The definition of public policy used in this report was challenged by three of the respondents (O'Regan, Sachs and Marcus). They wanted to conceive of public policy as legislation and the contents of policy documents such as white and green papers – as something connected to laws or legislation. I explained to Justice Sachs and Advocate Marcus that public policy is a broad term that encompasses a variety of aspects, and that the exercise of public power did constitute public policy as it constituted decision-making by public officials, and specifically the executive. They accepted this explanation. Advocate Marcus preferred to refer to the decisions that were reviewed by the courts in the case studies as 'the exercise of public power', instead of public policy. As policy-making constitutes the exercise of public power, Advocate Marcus' preference for the use of this term was acceptable, and did not require any adjustment to the questions. The terms are used interchangeably in the answers. Set out below are the questions and a summary of the individual answers provided by the respondents.

Question 1
Should the judiciary be involved in policy-making, and what are the risks associated with this role?

Hoexter, like Marcus, held the view that the judiciary is mandated by the Constitution to get involved in the policy-making process, regardless of its political nature. Hoexter said that the judiciary must be careful not to encroach too far into the executive's function, thus breaching the separation of powers doctrine and usurping the executive's role. In contrast, O'Regan's opinion was that courts do not get involved in the policy-making process, they simply either

uphold or declare law invalid. Sachs did not provide a direct response to whether the judiciary should be involved in policy-making, but seemed to suggest that the judiciary did engage to some extent in public policy when it declared government's decision not to roll out ARVs unconstitutional, and directed government to distribute ARVs to women living with HIV. He further stated that the role of the judiciary was to get other institutions to properly play their roles, and not to take over their functions. Marcus stated that South Africa's constitutional model is based on the separation of powers doctrine, and therefore courts are permitted to get involved in policy-making, however they must be careful not to go too far into the executive's function. He stated that this has not happened yet.

Question 2
What does the increasing number of public policy matters referred to the judiciary indicate about South Africa's constitutional democracy and its institutions?

Hoexter states that the overreliance on the judiciary exposes a weakness in South Africa's constitutional democracy, its institutions, and the electoral process. Marcus said that this was an indication that South African institutions were failing. O'Regan did not answer the question, but once again raised the definition of policy. Sachs did not provide an answer to this question.

Question 3
Is there an increasing reliance on the judiciary, and if so, is it a sign of a strong or weak constitutional democracy?

Sachs agreed that there was an increasing reliance placed on the judiciary to adjudicate over the exercise of public power. He said that this was a sign of a strong constitutional democracy. Sachs did not elaborate further save to state that the judiciary serves to strengthen democracy. Marcus agreed that there was an increase in reliance, and that this indicated both a strong and a weak constitutional democracy: weak as a result of the failure of the executive and the legislature to execute their constitutional duties, but strong in the sense that the judiciary is able to step in and rectify these imbalances. Hoexter said reliance was increasing, but it had always been high. This, according to Hoexter, is a sign of a weak constitutional democracy that lacks a sufficiently robust and reliable integrity system. O'Regan could not answer this question because of the way in which she defined and understood public policy.

Question 4
Does the reliance on the judiciary indicate a failure of other democratic avenues and institutions to play their role in South Africa's constitutional democracy?

Sachs said the reliance on the judiciary showed a failure of other democratic avenues and institutions to play their constitutional role properly and honestly. Hoexter and Marcus held the same view. O'Regan did not wish to comment on this question.

Question 5
Why are court judgements generally adhered to in South Africa?

Marcus said that court orders are generally abided by out of respect for the constitutional system South Africans chose, and defiance would mean that South Africa's constitutional democracy was in crisis. O'Regan said that the rule of law required judgments to be abided by, and any failure would be an infringement of the rule of law. Hoexter said judgments were abided by partly out of habit or tradition, and partly because the courts have become much more astute about the problem of evasion in recent years, hence the rise of the structural interdict as a remedy, and the growing tendency to hand down punitive cost orders against officials, and to find officials in contempt of court. Sachs did not respond.

Question 6
Is the evasion of court judgements a matter of concern for you, and why?

Hoexter said the evasion of court orders would mean the end of the rule of law, and the demise of an effective legal system. Similarly, O'Regan said it would signal that the rule of law was in peril. O'Regan, Hoexter and Marcus all seemed to be of the opinion that evasion of court orders is not currently a big concern. Marcus said we have had a few close calls, and conceded that that the executive had in fact evaded a court order in the Bashir case. Sachs did not comment.

Question 7
The Nkandla judgment included measures to ensure the implementation of the orders made. Was this a sign that the Constitutional Court did not trust the executive's commitment to checks and balances, the rule of law, and cooperative governance?

Marcus said that the courts would use structural interdicts where they were concerned about the implementation of their orders by a party, but that this mechanism has been used sparingly as it places a great supervisory burden on courts. He said some circumstances justified their use, for instance, the SASSA matter. Hoexter said that structural interdicts have become more common, as the courts have been anticipating reluctance or recalcitrance on the part of the executive, and have become more proactive in ensuring their orders are properly

implemented. Hoexter said that the nature of the orders made in the Nkandla case indicated distrust on the part of the Constitutional Court of the executive's commitment to the doctrine of checks and balances, the rule of law, and cooperative governance. O'Regan did not agree with the writer's assessment of the remedies prescribed in the Nkandla case, stating that court orders must be clear and must provide effective remedies, and further that courts therefore generally seek to give detailed, clear and effective orders. Sachs did not comment.

Questions 8 & 9

Will the ideologies of judges influence their decisions, and does the judiciary guard against their ideologies influencing their judgments?

Hoexter said the independence of the judiciary, both individual and institutional, is extremely important. However, personal ideology will influence judges' decisions, and no one seriously believes that judges are capable of being apolitical or neutral. She does however acknowledge that individuals are capable of behaving in surprising ways, for instance, judges appointed in the expectation that they will be pro-government may display unexpected independence of mind. According to Hoexter, judges generally make an effort to be impartial, but no amount of effort can eradicate the problem, partly because like other people, judges are not always conscious of their ideologies and prejudices. Marcus said that judges are influenced by their environment and their backgrounds, and that good judges are always conscious of this and constantly try to ensure that their judgments are not influenced by their personal ideologies.

O'Regan responded by stating that judges should be independent and impartial, and that impartiality is something that has to be actively developed by judges, individually and together. She said judges constantly need to remind themselves of the need to be impartial. Diversity on the bench makes it less likely that judges will reinforce one another's prejudices.

5.2 Summary of the findings

In summary, Professor Hoexter's opinion is that the level of judicial review that we are seeing is concerning and is indicative of a weak constitutional democracy and weak institutions. She attributes a lack of trust and effectiveness in alternative avenues and institutions to the overreliance on the judiciary, and states that this is a historical phenomenon that has continued to be practiced well into South Africa's constitutional democracy. She makes a point about some of the Public Protector's reports requiring judicial review prior to the prescribed remedial action being implemented – this was the case in the Nkandla and SABC matters, and possibly the State of Capture report (which has been referred to court for review, as discussed in section 4.2.6). Therefore, although the office of the Public Protector has

significant powers to hold the executive, legislature and other public officials accountable, the courts in the cases studied have had to act as catalysts or intermediaries to ensure full compliance with the prescribed remedial action, which is inefficient, inexpedient, and reflects disregard for the rule of law. Professor Hoexter states that the overreliance on the judiciary shows that South Africa's constitutional democracy lacks a sufficiently robust and reliable integrity system.

Justice O'Regan based her responses on a definition of public policy as established laws and legislation. As a result, a number of her responses did not engage with the questions in full. Therefore, instead of considering the actions of the President, the executive and the legislature in the Nkandla case study for example, she focused on the underlying legislation such as the PFMA and the Executive Ethics Code. While some of the responses she provided did not assist in triangulating the writer's research findings, she raised a number of valid points, and provided insights regarding judicial independence, acknowledging the problem and stating that diversity on the bench was a constructive way of addressing it. O'Regan raised the issue of empirical data pertaining to the increase of judicial review of public policy/ public power, which admittedly would enrich the research. The writer, in conducting research, launched an inquiry into the number of cases concerning the exercise of public power that were before the courts, and reflected these in some detail in the report (the case studies and the additional cases). These provided a strong indication of the frequency at which matters are referred to the judiciary, as well as the increasing nature of this trend. The case studies together with the additional cases provide strong evidence of the number of policy cases referred to the judiciary that are political in nature. One might challenge this theory by stating that there is no escalation of judicial review of public policy. The response to this is that this position is held by judges, respected scholars and several political analysts. This issue has become very topical, being discussed by politicians, retired members of the judiciary, political analysts, members of parliament, and the media. The number of policy matters before our courts in 2017 is significantly higher than it was ten years ago.

Justice Sachs, being a retired member of the judiciary, provided responses that were congruent with this state of affairs. He made it clear that the judiciary was not trying to take over the functions of other branches of government, but rather to get them working properly. He also stated that the function of the judiciary is to ensure that democracy remains open, elections are clean, and public institutions function in the manner prescribed by the Constitution. He wrote "(f)ar from undermining our democracy the courts have strengthened it".

Advocate Marcus, said that in every case in which he had been involved, the state always argued that involvement by the judiciary would constitute an encroachment on their functions, thus indicating the tension between the executive and the judiciary about the separation of powers doctrine has been a long-standing phenomenon. Advocate Marcus also said that in some cases there was a clear intention by the executive to protect the President. Thereby acknowledging that public power is influenced by subjective interests and politics.

5.3 Conclusion

The responses provided by the respondents show substantial convergence. Most respondents agreed that there was an increase in the reliance placed on the courts to adjudicate over matters pertaining to the exercise of public power by the executive, and that this indicated a weakness of other democratic avenues and institutions. The majority of the respondents also thought that the ideology of judges had to be managed in making judgments. The findings from the interviews are discussed further in Chapter 6, and are analysed in conjunction with the findings from the literature review and the case study review.

CHAPTER 6: COMPARATIVE ASSESSMENT OF THE CUMULATIVE RESEARCH FINDINGS

This chapter will focus on the research findings at a thematic level. Findings will be generated from the literature review in Chapter 3. Chapter 4 generated initial findings from the case study review. Chapter 5 presented the findings from the interviews. Chapter 6 now considers these findings collectively, and refines them, thereby enabling an analysis in Chapter 7 that will ultimately generate theoretical generalisations and answer the research questions. A post-positivist approach, which has been used throughout the research process, will be used to interpret the research findings in a balanced manner while simultaneously considering the context within which events occurred. It is essential that the data is interpreted within the context in which events occurred in order to answer the research questions as accurately as possible (Wisker, 2008). Post-positivism allows discretionary judgment in the interpretation of data (Patton, 2015, p. 106), and therefore meanings in this research will be generated from the data through a process of linking concepts, interpreting contexts and perceptions (Wisker, 2008). The application of the post-positivist paradigm, as described, will assist the writer in refining the research findings, and therefore to get closer to answering the research questions as accurately as possible. This chapter starts with an elaboration of the results of the interviews, which will assist in testing, corroborating and triangulating the writer's findings from the literature review and the case studies.

6.1 Findings from the interviews

The interviews showed that Hoexter, Sachs and Marcus agreed that there was an increasing reliance on the judiciary to adjudicate over the exercise of public power. The findings from the case study review also illustrated this point by showing that more and more cases are being referred to the courts without first exhausting all other democratic avenues available. The case studies revealed that this phenomenon was an indication of the weakness of accountability institutions, which were ineffective in executing their mandates, or were suppressed. Hoexter, Marcus and Sachs were also of the view that this phenomenon indicated that South Africa's institutions are weak. While Justice Sachs thought that the overreliance on the judiciary was a sign of a strong democracy, Hoexter thought it indicated a weak democracy. Advocate Marcus thought it indicated both.

Hoexter, Marcus and O'Regan did not think the evasion of court orders was much of a concern. Marcus and Hoexter were of the view that evasion of court orders was a concern for judges

and that judges would place safeguards in place where they were concerned that evasion of their judgments was likely to occur. The literature considered this challenge, showing the theories of American scholars, Vanberg (2005) and McGuire (2006), in this regard. From the findings of the case study review, we saw that the judiciary in the Nkandla and SASSA cases used supervisory interdicts to ensure compliance with, and the proper implementation of, their judgments. O'Regan seemed to suggest that evasion was not a consideration, and did not impact on the manner in which judgments were structured. Hoexter and Marcus thought that ideology influenced judgments, but judges worked towards mitigating this. O'Regan said mechanisms like diversity on the bench helped to mitigate judicial ideology. Judicial ideology was also discussed in the literature review – Gibson (2006), Cross and Lindquist (2007), Kramer (2012), and Abramowicz and Colby (2009) argued that judgments were influenced by the ideology of judges.

The above paragraphs show substantial convergence in the responses from the various respondents to some of the questions. Convergence is also present between the interview findings and the findings from the case studies. This convergence supports the bulk of the case study research findings. Convergence can also be seen between some of the literature review findings (discussed in section 6.2 below) and the interview findings - for example, judicial ideology, and the enforcement of judgments.

6.2 Findings from the literature review

Below is a consideration of the findings derived from the literature review in Chapter 3 of this report. In considering these findings, the initial findings of the case studies are used for purposes of contextualising the findings, therefore resulting in the merging of the two sets of findings.

6.2.1 Reasons for judicial review

Policy-makers do not unconditionally respect and recognise the principles of governance in the Constitution (Melber, 2014, p. 204). This is clear from the case studies and the addition cases. Rationality in decision-making and upholding constitutional values are principles that were lacking in the decisions taken by members of the executive in the case studies and additional cases. The President and the Minister of Police in the Nkandla case elected to make decisions that were in their best interests, instead of seeking the most prudent approach to the situation they were facing. In the Bashir case, the executive failed to take all precautionary

measures to ensure that Bashir did not leave the country, in so doing, flouting a court order. In both the Nkandla and SABC cases, the members of the executive chose to ignore the remedial action prescribed by the Public Protector, choosing rather to rely on more 'favourable' alternate reports. The courts cannot replace accounting institutions or the agency of citizens in holding government accountable, as this would be inappropriate (Melber, 2014; Klaaren, 2006). Through the case studies has emerged a theme that indicates a lack of political will from the executive to uphold the principles of the Constitution. The weakness and lack of political support for institutions that are mandated to hold the executive to account has encouraged opposition parties and public interest groups to refer disputes to the judiciary. This is why Swart and Coggin (2015) hold the view that political disputes are fought in courts in South Africa's democracy. Judicial review is a popular and frequently utilised method of holding government accountable.

This research has investigated the reasons that necessitate judicial review, and has found that irrationality in decision-making, which is informed by subjective interests, political considerations and power dynamics, often left unchecked by the legislature, leads to the referral of these matters to the judiciary for adjudication. Sometimes this occurred out of frustration at the failure of other democratic mechanisms (parliamentary inquiries, parliamentary committees, debates in the National Assembly), at times for political points scoring, and at other times in an attempt to influence executive decision-making.

The case studies revealed the underlying tension between the constitutional requirements for decision-making and the political considerations influencing decision-makers. The nature of politics conflicts with decision-making that is rational, transparent and consistent. Politics is inherent in decision-making, and therefore highlights the importance of accountability institutions in regulating the exercise of public power, in order to balance these conflicting forces. The judiciary cannot be responsible for achieving this balance, as its role is to test decision-making against constitutional requirements. It is not well placed to consider decisions through a political lens – something the legislature and Parliamentary committees are well suited to do.

6.2.2 Independence of the judiciary

South Africa has an independent judiciary- this can be seen from the case studies referred to in this report. However, there have been cases where the appointment (or non-appointment) of Justices has indicated an intention by the executive to appoint candidates who they think will best serve their interests – for instance commentators were surprised when the expected

incumbent for Chief Justice, Deputy Chief Justice Moseneke, was overlooked for that position in 2011, and the position was instead given to a relatively unknown and junior Justice of the Constitutional Court, Justice Mogoeng, who had only two years' experience in that court. Deputy Chief Justice Moseneke had served as a Justice in the Constitutional Court since 2002, and was appointed to the position of Deputy Chief Justice in 2005. Therefore, in 2011 when the position of Chief Justice became available, for many he was the obvious choice. This was the second occasion on which he was overlooked for the position (Pilane, 2016).

Accusations have been made that Deputy Chief Justice Moseneke was not appointed to this position as he was publicly critical of the ANC, and had been criticised by members of the tripartite alliance, including Gwede Mantashe, Zweli Mkize (senior ANC politician) and Blade Nzimande, for having blurred the lines between the executive, the legislature and the judiciary, thereby violating the separation of powers doctrine (Pilane, 2016). These incidents could be interpreted as the executive exercising power over the judiciary by trying to influence it by appointing judges that it thinks will hand down judgments that are in line with its policy objectives, or at the very least, judgments that are not overly critical of government.

But why is it important to the executive that the judiciary refrains from making critical statements against it? Law (2009) argues that courts draw to the public's attention actions by the other branches of state which do not comply with the Constitution, thus placing a significant amount of power in the hands of the judiciary. In this way, Law (2009) argues, courts are able to mobilise civil society against government. It may be argued that the executive, in appointing judges that it thinks will be lenient on government, is abusing its power by trying to limit the judiciary's ability to effectively carry out its function as a check on the powers of the executive and the legislature.

6.2.3 Ideology of judges

Where judges make decisions and then look for precedents in support thereof, room is left for abuse of the system and for preference and personal ideology to creep in. Many scholars believe that the ideology of judges will influence their judgments (Gibson, 2006; Cross & Lindquist, 2007; Kramer, 2012; Abramowicz & Colby, 2009). Judges have discretion even when acting within the legal confines set out above. The literature points out that judges are people, and although they have taken an oath to be impartial and independent, their prejudices (conscious and unconscious), backgrounds, and affiliations to certain people, parties and/or institutions may have an effect, whether consciously or unconsciously, on the manner in which they interpret abstract laws, policies or provisions. Just like the executive and the legislature,

the judiciary is also susceptible to political or ideological influence (Kramer, 2012), and are therefore capable of making incorrect decisions. There is no check on a Constitutional Court majority decision. It is final, and therefore gives a tremendous amount of power to the Constitutional Court, giving the court the power to impact significantly on public policy.

6.2.4 Accountability

The South African government conducts itself in a manner that suggests to the public that it does not fear public censure, probably based on the belief that public outrage will not translate into a loss of votes at the polls. Other measures for holding government accountable, such as elections, Parliamentary inquiries, and Chapter Nine institutions, have proven to be less effective than envisaged in the Constitution. Gordhan, Jonas, retired Deputy Chief Justice Moseneke, and Judge Kollapen (Klaaren, 2006) all stated that ultimately it is for civil society to hold the executive accountable.

The Nkandla judgment was handed down by the Constitutional Court four months prior to the 2016 municipal polls, wherein the ANC lost a significant amount of support in key Metropolitan areas. It is not impossible that the judiciary, through the judgment, played a significant role in the outcome of the election, which would show the power possessed by the judiciary. In this regard, Gibson (2006) points out that judges, themselves, are often not held to account like other policy-makers, and argues that the accountability mechanisms for the judiciary should be tightened. Gee *et al.* (2015) also point out this problem, stating that the independence of the judiciary must be balanced with accountability, especially because of the judiciary's substantial review powers in public policy matters.

6.2.5 Legitimacy

The judiciary is reliant on public support and transparency in the political environment in order for its judgments to be implemented (Vanberg, 2005). According to Vanberg (2005) public officials implement judgments to avoid losing public support. However, the Bashir and Nkandla cases showed us that cases do not attract the same level of interest from the public. The Nkandla case raised significant public attention and anger, while the Bashir case did not. Therefore, public support for the implementation of judgments depends on the nature of the case, and who it impacts. Vanberg also argues that the reliance that the judiciary has on the public for its legitimacy influences the decisions the judiciary ultimately makes, because the judiciary is concerned with maintaining this support. Advocate Marcus said that judges are influenced by their environments. This means that not only are judges influenced by their

background, they are also influenced by what is happening around them. They may possibly feel the same way citizens feel when watching the news or reading about events that they ultimately have to adjudicate over; or they may be accustomed to the general sentiment of the public regarding a matter that is known by the public, and they might make rulings on such matters that ensure they do not lose favour with the public.

There is a danger in the power of checks and balances given to the judiciary. If the judiciary fails to adhere as closely as possible to its duty to be impartial and fearless, this system will fail. Judges are continuously being tested by institutions who bring matters to court for political gain, and must be circumspect enough to recognise these manipulations. As Davis and Le Roux (2009) argue, the law may be used for good and bad, and political conflicts are being settled in courts more and more often. Law (2009) says many scholars hold the view that American officials often have selfish and strategic reasons for encouraging the resolution of important policy issues by the courts (2009). The findings from case study review have also shown that institutions, for example the political parties, may at times approach the courts for strategic purposes such as scoring political points with the public, and not necessarily for the merits of the cases they bring before the courts. These constitute abuses of the judiciary. Chief Justice Mogoeng stated that "*the judiciary must remain uncontaminated and uncorrupted, and that all members of the judiciary at all levels must resist corruption, and assure society that the judiciary is the custodian of South Africa's constitutional democracy*" (Bateman. 2016b). An enormous reliance is placed on the judiciary in South Africa to keep the executive and the legislature compliant with constitutional provisions. However, these very courts are increasingly put in positions wherein they are required to adjudicate over political cases, which will ultimately undermine their legitimacy.

6.2.6 Judiciary as policy-maker

A balance is required when dealing with public policy in order to ensure that the courts do not become *de facto* public policy makers, thus stepping into the shoes of the executive, and usurping its function. This balance cannot be achieved unless all branches of state fulfil their constitutional mandate to adhere to the principles in the Constitution and abide by constitutional provisions (Klaaren, 2006). If this is achieved, then the equilibrium will occur easily. Questions were also asked in the literature about the judiciary's fitness to make policy (Tushnet, 2003; Kramer, 2012), and whether judicial review violates democratic principles (Waldron, 2006; Law, 2009; Rautenbach & Malherbe, 2004). Some argued that the legislature and executive hold the required skills and have a better understanding of policy matters than the courts do (Kramer, 2012), while others thought the courts were better structured to

deliberate substantively on issues (see Tushnet, 2003). Tushnet (2003) raised concern about the elitism and the demographics of the judiciary, in the context of policy-making. In this regard, O'Regan stated (in response to the questionnaire) that diversity on the bench was one way of tackling the challenge of ideologies influencing judgments. As discussed in section 6.2.3, many scholars hold the view that judges are just as likely to be influenced by their ideologies as is the executive, and therefore question their suitability to make policy.

Tension between the three branches of state will always exist because South Africa's system of governance interlocks the executive, the legislature and the judiciary, ensuring that no branch of state is left untouched by the others. Their relationship is symbiotic as intended by the Constitution, says retired Deputy Chief Justice Moseneke (Du Plessis, 2015). He further states that "*I think, over time, all of us will mature in a variety of ways in how we run government, how we put people in positions of power, how we appoint judges and how we train them*" (Du Plessis, 2015, p. 2).

The evidence presented in Chapters 3 and 4 of this report suggests that politics is a significant factor in the decision-making process, and institutions are used to achieve political objectives. In the context of poor accountability and unresponsiveness from government, the judiciary has carried out its constitutional duty of ensuring that constitutional provisions are adhered to.

6.3 Generalisability of the case studies

The main limitation of this research, as identified in Chapter 1, is the use of only three case studies. Methodological strategy was such that subjectivity would be limited via triangulation and supplementation with additional information. Before the findings from the literature review, the case study review and the interviews are refined, it is prudent to establish the reasons why weight should be attributed to the findings derived from the case studies.

Weight is attributed to the case studies for the following reasons: firstly, those involved are members of the executive, including the President who took an oath to uphold the Constitution, therefore they should be held to a high standard; second, the President, as head of the country, failed to take accountability for the undue enrichment of himself and his family resulting from the money spent on his private home. Having a constitutional duty akin to a duty of care towards South Africa as a country, and its people, the President is required to exercise greater care in decision-making than is required of any other public official; third, the President saw no error in his failure to enquire into the soaring costs incurred in effecting the security

upgrades to his private residence in 2009 when the matter came to the attention of the public. This circumstance provides insight into the character of the President, showing a lack of integrity and conscience; fourth, members of the executive evaded a court order by allowing Bashir to illegally leave the country. The executive, as the top layer of policy-makers, put politics above constitutional checks and balances; and finally, at a time when there was confusion over the powers of the public protector, the President, his cabinet and the majority of the National Assembly, composed of the ANC, took a course of action in defiance of the remedial action of the Public Protector. This despite the spirit and substance of the Constitution indicating otherwise, and strong opposition from opposition parties, the media, some members of the public, respected scholars, public interest groups and even some members of the ANC's NEC.

6.4 Refinement of findings from the literature review, the case study review and the interviews

This section refines the findings of the entire study. The writer established from the research that decision-making by the executive is influenced by subjective interests, power dynamics and political considerations. Rationality and integrity were not the guiding principles of the decisions made by the executive. The protection of friends or allies also informed decisions that were made. Accountability institutions proved to be ineffective – the legislature failed to hold the executive to account, and the Public Protector's reports were not properly implemented until the judiciary intervened in the Nkandla and SABC case studies. The recommendations of the Parliamentary committee that investigated poor governance at the SABC have not been implemented by the President, who gave Muthambi more responsibilities, instead of considering whether to dismiss her, as recommended in the committee's report. Political considerations took precedence over constitutional provisions in the decision-making process in the three case studies.

The courts presided over political matters in the three case studies, and handed down controversial judgments in each case. The courts displayed respect for the separation of powers, but also showed a commitment to uphold constitutional values and carry out their duties without fear or favour. The SABC judgment was a landmark case in that it made the determination that the Public Protector's remedial action was not merely a recommendation, but enforceable unless taken on review to a court (SABC and others v DA and others, 2015). This was a bold judgment at a time when the President of South Africa had himself failed to implement the remedial action of the Public Protector.

In the Nkandla case, the Constitutional Court expressed its dissatisfaction with the manner in which the National Assembly and the Minister of Police conducted themselves and with their interpretation of the law. The Court told the President that his conduct was inconsistent with the Constitution, as was that of the National Assembly in failing to hold the executive to account. The North Gauteng High Court ordered that the South African government should have arrested Bashir, and the SCA told members of the executive that its conduct or the conduct of its counsel, of misleading the High Court in concealing the fact that Bashir had left the country notwithstanding a standing order prohibiting his departure, was disgraceful (The Minister of Justice and Constitutional Development and Others v The Southern African Litigation Centre and Others, 2015, p. 9), and dismissed the appeal.

The research also revealed that judicial review has certain strengths and weaknesses, but is an imperative function for democracies to ensure proper compliance with constitutional principles and duties. The ideology of judges is a challenge for the judiciary and for democracy, and requires consistent management. Judicial legitimacy is another challenge for the judiciary, as it requires the assistance and support of the public and public institutions to remain legitimate and credible. The implementation of judgments is something that judges are conscious of, and a few cases illustrated how the judiciary handles this challenge.

There was a strong convergence between the interview responses, the findings of the literature review, and case study review. These pertained to (1) the ideology of judges impacting their judgments, and (2) the increasing level of judicial review being an indication of the weakness of accountability institutions. Professor Hoexter and Advocate Marcus' views that the judiciary was unable to avoid the influence of personal ideology impacting judgments, strongly converged with the findings of the literature review regarding the weakness of judicial review as a result of judges' inability to divorce themselves from their ideologies. Justice O'Regan's statement about efforts to ensure that the bench is diverse and that judges must constantly remind themselves to be impartial, strongly indicates that this is a concern of hers.

Generally, there was also convergence with regard to the finding of the case study and literature review that there is increasing reliance being placed on the judiciary to adjudicate over matters of public policy/ the exercise of public power, with Professor Hoexter, Advocate Marcus and Justice Sachs agreeing with this theory. Advocate Marcus and Professor Hoexter said that the judiciary would put additional measures in place to ensure compliance with their rulings, which correlates with the findings from the case study review regarding the manner in which the Nkandla and SASSA judgments were structured.

There were a variety of views regarding whether the increasing reliance on the judiciary indicated a strong or weak democracy. Justice Sachs felt that it indicated a strong democracy, Professor Hoexter's view was that it indicated a weak democracy, and in Advocate Marcus' opinion this indicated both. This is the subject matter of the primary research question, which will be explored in Chapter 7. Below is a detailed account of the themes that were derived from the literature review, the case study review, and the interview responses.

6.4.1 Combined research themes

The findings from the literature review, the case studies, and the interviews are combined below and represented in the form of refined themes produced from the research.

Table 6: Refined themes

Themes	Theory	Occurrences	Political actors involved in the decision-making process
The influence of politics on public policy	The exercise of power by government officials is often influenced by politics. The research considered how decisions were reached and why certain decisions were made instead of others. The interactions of institutions with each other, and the power dynamics involved in such interactions, were an important aspect.	1. The Minister of Police's decision that the President was not liable to make payment for the 'non-security upgrades' to his private home. 2. The inaction on the part of the then Minister of Communications during the period of Motsoeneng's censorship policy. 3. The Minister of Communication's defense of Motsoeneng through the court system, as evidenced by the number of appeals that were launched. 4. The decision taken by members of the executive not to arrest Bashir, in contravention of a court order. Considerations of	1. The President, the Minister of Police, the legislature, the executive, the ANC. 2. Minister of Communications, Motsoeneng, ICASA, the executive, the legislature. 3. Minister of Communications, Motsoeneng, the Public Protector, the DA, (the judiciary). The executive, the legislature.

		relations and stability on the continent, the structure of the UN Security Council, and the track record of the ICC were taken into consideration in decision-making.	
The judiciary as a policy-making institution	Although the judiciary is involved in the policy-making process through judicial review, the judiciary is not best suited to direct and make public policy. Public policy is political in nature and the executive is best placed to dominate this function. In a well-balanced democracy, the judiciary's involvement in policy matters would be infrequent, as political matters would be engaged with in parliament or through other effective democratic avenues. The overreliance on the judiciary indicates that accountability institutions are weak.	Cases referred to the judiciary during the process of conducting this research include: ❖ Application to compel the President to implement remedial action prescribed by the Public Protector (Nkandla) ❖ Application to compel the SABC board and Minister of Communications to properly implement the remedial action prescribed by the Public Protector (Motsoeneng) ❖ Application challenging censorship policies at the SABC ❖ Application to compel the government to arrest Bashir ❖ Application to declare the withdrawal from the ICC invalid ❖ SASSA/ Department of Social Development case ❖ Review of the appointment of Berning Ntlemeza as head of the Hawks ❖ The review of the suspension of McBride	The judiciary, the executive, the legislature, opposition parties, public interest groups

		❖ Criminal charges brought against Gordhan ❖ Gordhan's application for a declaratory order ❖ Application to interdict the State of Capture report ❖ Application to review the State of Capture report ❖ Application to review the When Governance and Ethics Fail report ❖ Application for the reinstitution of criminal charges against the President (Spy tapes case) ❖ Application to suspend Abrahams	
Independence of the judiciary	The independence of the judiciary is a crucial consideration, especially when they make or influence public policy. Judges are influenced by their conscious/ sub-conscious views and values.	Same as above	Same as above
Accountability of public officers	The lack of accountability of the executive is a leading reason for referral of policy matters to the judiciary. Overreliance on the judiciary indicates that accountability institutions are weak. Conversely, judicial review can be dangerous because judges of the Constitutional Court are not really accountable for their rulings. Their rulings cannot be reviewed by virtue of being the highest court in the land.	The above list is a reflection of the cases canvassed in this research wherein public officials, particularly the executive, have failed to take accountability, and therefore the judiciary has been required to resolve the dispute. Referral to the judiciary reflects a failure on the part of institutions that are mandated to hold these institutions appearing in court accountable.	Same as above

These themes are discussed in detail below under their respective headings.

6.4.1.1 The influence of politics on public policy

This section will consider the influences on public policy, how institutions were used to protect the politically powerful, and the power dynamics between institutions.

6.4.1.1.1 Power dynamics and influences in decision-making

The manner in which the public officials involved in the case studies conducted themselves was inconsistent with constitutional requirements. The members of the executive involved failed to uphold the Constitution in their decision-making, and did not act in accordance with the rule of law. The legislature failed to step in to hold the executive accountable for its policy choices, and to bring them back in line with constitutional principles. The case studies highlight that political considerations are guiding and influencing decision-making, rather than the rule of law and constitutionality, and that South African political leaders do not consistently stand up against apparent wrong-doing. The Bashir case study highlights just how complex the political environment within which policies are made is. Government had to consider the consequences of arresting Bashir against those of not arresting him, they had to consider the implications and consequences of either decision (internationally and domestically), as well as the politics surrounding the ICC and United Nations. This case exhibited the tension between the constitutional law framework and the political realities that often face the executive in decision-making.

It must be noted though that the South African government had historically, and even at the time of these events, considered itself obliged to arrest Bashir (The Minister of Justice and Constitutional Development v SALC, 2016). This is in terms of the government's previous confirmations to this effect, as well as their admittance that the immunity granted to Bashir (in terms of the hosting agreement and DIPA) was temporary. This set of facts shows that the government manipulated the law to suit its agenda, by changing its position on its understanding of the Implementation Act in an attempt to defend its decisions. The political context within which these events unraveled must not be ignored.

There is merit to the arguments advanced by many African leaders that the ICC targets African countries more than it does European and American leadership. Prior to the Bashir incident there had been discussions within the African Union (the AU) about African member states of the ICC retracting their membership due to questions about the legitimacy of the ICC. The executive was under significant pressure at the time to maintain a good relationship with, and the respect of, other Africa leaders, which would have been impossible to maintain had they

honoured the order of the court. All of the aspects that were playing out at the time made the decision of whether to abide by the interim order a politically laden consideration. South Africa would have lost all credibility with its African counterparts had it abided by the order, but it would have been hailed as an exemplary example of a successful constitutional democracy on the continent by especially the West.

As described earlier in this research, public policy is influenced by desires, conflicts of interest, internal and external influences, political considerations, and involves interactions between actors involved in the process, hidden agendas, subjective interests, and the exercise of power (Booysen, 2006; Lukes, 1993; Ham & Hill, 1993). Many of these aspects may be identified in the manner in which the President and the Minister of Police acted, and the decisions they made in the Nkandla case study. The President effectively altered the nature of the remedial action imposed on him by the Public Protector by asking the Minister of Police to determine whether he was liable to pay for the 'non-security upgrades'. He singled out one of the two institutions identified by the Public Protector to assist in making the determination of the amount to be paid by the President, without explaining the reasons for this deviation. This was probably because he anticipated that the Minister of Finance (Nene at the time), who was later fired by the President for unclear reasons, would not have engaged in this 'alternative' process.

The Minister of Police, who in terms of the Constitution is appointed, and may be dismissed from his position, by the President, conducted his investigation, and found in favour of the President. This exercise of power raises questions about the political dynamics, power relations and considerations involved in the decision-making process. The President is known to fire those who oppose him. He is also entitled by the Constitution to appoint and dismiss members of his Cabinet. With these power dynamics in mind, as well as the President's unwillingness initially to concede personal liability for any of the improvements effected to his home, and the manner in which his instruction to the Minister was phrased, it appears impossible for the Minister to have come to any other decision without facing the possibility of losing his job. Deciding the matter on the basis of rationality and upholding the rule of law would have taken a tremendous amount of integrity and courage, and would probably have led to his dismissal. It is for these reasons, the research data suggest, that the Minister came to the decision that the "*visitors' centre, an expensive cattle kraal with a culvert and chicken run, a swimming pool, an amphitheatre, marquee area, some of the extensive paving and the relocation of neighbours who used to form part of the original homestead*" constituted security features. Clearly no deliberation founded on rationality would have produced such an outcome, and therefore it is clear that the Minister's subjective interests informed his decision.

The actions of the President and the Minister of Police constituted non-compliance with the provisions of the Constitution. The President effectively muzzled the Public Protector by requesting that a separate enquiry be conducted, which resulted in the issuing of a report contradicting that of the Public Protector. This parallel report was then accepted by the National Assembly, by virtue of the ANC's majority in Parliament, a move the minority parties fiercely opposed. The President and the ANC members of the National Assembly argued that the remedial action prescribed by the Public Protector had the effect of mere recommendations, and it was therefore not necessary to follow them in the event that a parallel investigation was initiated, which produced different results. This was a simplistic interpretation of Chapter Nine of the Constitution as it is clear that in substance the Public Protector is a watch dog, a check on public power, a position further entrenched by the SCA in The Public Protector v Mail and Guardian Ltd (2011) case discussed in Chapter 3.

There is a trend in President Zuma's administration of choosing form over substance in complying with legal provisions and duties, which often provides his government with a shield or delay mechanisms for engaging with the underlying substantive issues. There are many instances of this and it can be seen in the approach taken by the SABC; the President and the National Assembly to the Public Protector and her reports; the lack of action taken by the President over allegations of state capture and evidence seemingly corroborating such allegations; the chosen interpretation of legal provisions (over other competing interpretations) without considering the context and intention of the underlying legislation or legal provisions; the manner in which character, ethics, integrity are seemingly no longer prerequisites to holding public office; and the practice of not substantively justifying decisions as long as the correct procedure was followed.

The President's decision to take the State of Capture report on review on the basis that a commission of inquiry may only be established at his prerogative displays this strategy, and begs the question whether the claims contained in the report are not of concern to the President, the executive and the legislature. The SASSA matter is a recent example of the same strategy, wherein the substantive questions about the lack of BEE credentials of the preferred service provider and the avoidance of approaching the court, were not addressed by the Minister of Social Development or the President (in publicly defending the Minister).

Firing Gordhan in circumstances where Dlamini and Muthambi retained their Cabinet positions, also signifies that the decision to remove Gordhan was motivated by political and/or subjective interests. Applications to court were filed by the DA and EFF following Gordhan's removal from Cabinet, these included an application to interdict the Cabinet reshuffle initiated

by the President, and an application to compel the Speaker of the National Assembly to hold an early session for a motion of no confidence in the President (Africa News Agency, 2017b).

These events signify that in decision-making, there are instances where political considerations may override constitutional obligations. Compliance with the rule of law and the careful, prudent and substantive application of constitutional provisions and principles may be trumped by subjective interests, hidden agendas and the exercise of power by some over others.

6.4.1.1.2 The use of institutions to protect the politically powerful

The SABC did not appreciate the principles on which the courts based their decisions. An investigation conducted by the office of the Public Protector made findings of dishonesty, maladministration, improper conduct and abuse of power on the part of Motsoeneng. Motsoeneng was found to be acting in an unprofessional and unethical manner in terms of the Public Protector's report, and yet the SABC board and Muthambi continued to support and defend him. These actions by Muthambi and the SABC board were inconsistent with the rule of law, as the support afforded to Motsoeneng was not based on rational decision-making, and in fact represented the arbitrary exercise of public power. From the testimony provided at the inquiry into governance at the SABC, it is clear that Muthambi influenced the board to appoint Motsoeneng as permanent COO, and allowed him to control the broadcaster while providing him with protection from censure (eNCA News Channel, 13 December 2016, Parliamentary Inquiry into the SABC).

Muthambi did not intervene during the censorship incident and stated publicly that there was no need for her to interfere with 'operational' matters at the SABC (Quintal, 2016). The President as the head of the executive did not publicly intervene either, and Parliament only met with the COO and the Minister after the court had struck down the policy. Parliament's inquiry into mis-governance at the SABC happened too late, and after the courts had been asked to step in on numerous occasions to effectively deal with the recurring problem. The executive and the legislature failed to enforce their checks and balances effectively. The research indicates that the executive protected Motsoeneng, and Motsoeneng protected the executive from public criticism, thus indicating a symbiotic relationship between the leadership at the public broadcaster and the executive. According to Moe, the manipulation of institutions for personal gain by politicians weakens the governance of institutions (1994). The SABC has proved this statement to be true, as the CEO and company secretary were sidelined by the

COO and board members who supported the COO; journalists were also intimidated and fired when they refused to follow unlawful instructions.

It may also be deduced from the facts of the Nkandla case study that state institutions were used to protect the President from liability, a view Advocate Marcus agrees with. The Constitutional Court exposed the irrationality inherent in the decisions taken by the institutions involved, including the Speaker of the National Assembly, the President and the Minister of Police (EFF v Speaker of the National Assembly, 2016). The irrationality of the decisions taken by the National Assembly and certain members of the executive had been highlighted time and again by constitutional law scholars and experts, opposition parties, certain members of the ruling party, and civil society interest groups. Notwithstanding this, the ANC protected the President and ignored the substantive values inherent in the Constitution, thus putting their political interests before those of the country, and ensuring that they remained in the President's favour (this behaviour is similar to the protection afforded to the President by the ANC in respect of the spy tapes matter). This was a clear example of manipulation of institutions and the law to protect the President. The ANC did not publicly censure the President following the court ruling.

The additional cases also indicate that the Hawks and NPA may not always act independently and objectively, and that they may in fact be used in political battles to defeat the enemies of the powerful.

6.4.1.1.3 State institutions and power dynamics

The case studies together with the additional cases signal that power dynamics, politics and subjective interests influence public policy. Institutions are used to fight political battles. Strong institutions that conduct themselves with integrity are attacked and weakened, and protection from censure is afforded to those who have access to the powerful. This theme is important because it has affected the quality and effectiveness of the checks and balances that ensure that South Africa's constitutional democracy is founded on accountability, responsiveness and the rule of law. In this way, it undermines the founding provisions of the Constitution, and incrementally erodes the quality of South Africa's democracy. The result is a dilution of the independence of institutions and their power and ability to properly implement their mandates. Weak institutions translate into a weak state.

Institutions are used to fight political battles. The case studies reveal that the SABC was used as a propaganda machine for the ANC, at least in the months leading to the 2016 local

elections, although many allege that the SABC has been practicing censorship for years. The President used the Minister of Police and the National Assembly for protection against liability from reimbursing the state for his undue enrichment due to overspending at his Nkandla residence. Although the outcome was positive, in holding the ANC and the President accountable, the EFF used the judiciary as a tool to hurt the image of the ANC, and used the outcome of the proceedings to discredit the President frequently.

The study reveals that the NPA and the Hawks were focused on charging Gordhan, presumably for purposes of discrediting him and removing him from his position as Finance Minister. The hasty and very public bringing of fraud charges against Gordhan, and the frustration expressed by the Hawks following the dropping of the charges, substantiate the perception that they were targeting the Minister. Questions have been asked about why the same vigor has not been employed by the NPA to prosecute the President for corruption linked to the spy tapes issue. Based on the data from these case studies, it is difficult to draw any other inference besides one that finds that the President enjoys the support and protection of the NPA and the Hawks, the two most powerful law enforcement bodies in South Africa's democracy. It will be up to the judiciary to decide whether the President faces the charges related to the spy tapes case, but the NPA is likely to continue to resist the process.

6.4.2 Judiciary as a policy-making institution

The case studies reveal an unwillingness by the legislature to hold the executive accountable for violations of the Constitution. The case studies have revealed that the executive places subjective interests and politics ahead of constitutional principles. Constitutional principles are upheld in times of convenience, and avoided or explained away when they are inconvenient. The South African government does not have an unwavering commitment to the Constitution and the rule of law, or to protecting the country's constitutional democracy, this is why there is an escalation of policy decisions referred to the judiciary. This tells us that the three branches are not working together, and as Moseneke and Kollapen have said, the system of separation of powers only works when everyone does their job prudently and with integrity (Klaaren, 2006; Du Plessis, 2015).

The case studies and additional cases reviewed suggest a developing trend wherein those without political power use the judiciary as a tool for the achievement of their political goals. Judge Mlambo, former Deputy Chief Justice Moseneke, and the President have alluded to this development (Justice Mlambo, eNCA, 24 November 2016 (16:30); Moseneke, eNCA News Channel, Helen Suzman Lecture, 17 November 2016; Wiener, 2016; eNCA News Channel,

18 November 2016). The challenge is how to balance the constitutional right to review public policy with the democratic values of majority rule by elected public officials. Tension emerges between those who have the democratic right to make policy and those who have the constitutional right (and finances) to review it. It is ultimately the perception of the motives behind the actions of both groups that cause the tension.

It is important to consider what motivated the HSF to launch an application to the high court for Abraham's suspension; what motivated the President to appoint Abrahams to the position of head of the NPA; what motivated Abrahams to lay criminal charges against the then Minister of Finance and then withdraw them on the basis of insufficient evidence; what motivated Abrahams to appeal the high court ruling which overturned the NPA's decision to drop the corruption charges against the then Deputy President; what motivated the EFF to take the President to court for spending on Nkandla; and what motivated the DA to refer the ANC's policy to withdraw from the ICC to court? The political factors that motivate these decisions are the origins of the tension, and the judiciary often has to engage in these political matters. Judicial review has its shortcomings, as discussed in section 3.3, which have their own set of consequences and implications. Judges are not completely impartial, and their subjective views and ideologies will to a certain extent determine their judgments (Cross & Lindquist, 2007; Gibson, 2006; Kramer, 2012; Abramowicz & Colby, 2009). Judges are not the most appropriate arbiters in politically sensitive matters – these matters are meant to be resolved and engaged with by the executive and/or the legislature and/or civil society, as courts cannot and should not engage with the politics inherent in certain policies. This increases the threat of evasion of court orders, which in turn threatens the judiciary's legitimacy. Engaging in these matters also increases the chances of the judiciary becoming politicised and losing legitimacy.

Although a positive result of all the cases being reviewed by the judiciary is that legal principles and constitutional provisions are being developed, the Bashir case shows that a choice in how to interpret a legal provision will impact the decisions made by a court. These decisions affect public policy, and at times result in the formulation of new or altered policies. The case shows how difficult the roles of judges are, and provides an indication of how judges are susceptible to making decisions based on their subconscious beliefs. The case also illustrates the inherent conflict in the doctrine of separation of powers and checks and balances, as well as the conflict between politics and rational decision-making. It shows Cabinet deviate from well-established policies on political grounds, and the resistance of this change from several minority groups through the courts. This was a case of significant importance for South Africa and it saw the law and politics conflict with each other on an international stage. The judiciary was placed in an awkward position of having to preside over a politicised policy matter, which had serious

political consequences for the country. The executive and other members of the ANC were furious with the decision reached by the court, arguing that the matter was not one to be decided by a court. Government described the ruling made by the SCA as having far reaching consequences for diplomacy (Nolan, 2016b).

Regardless of the controversy, the executive failed to uphold the Constitution by failing to ensure that Bashir remained in the country until a final order was made by the court. This case is of importance because it exposes the conflicts of checks and balances as well as the dynamics of democracy. The Constitution obliges the executive and the legislature to abide by court decisions, this applies even when the former believe those decisions are wrong. This matter was highly political, and its implications very significant. It brought to the surface the underlying tensions between African countries and the western powers. It involved making political decisions (with moral implications) that would affect South Africa's relationship with other African states, and non-African states. Government was indeed in an unenviable position. It chose to put politics above the law.

The nature of the orders made by the Constitutional Court in the Nkandla judgment may be construed to indicate that the Court did not trust members of the executive and state institutions to properly and prudently enforce its remedial action, and therefore directed that National Treasury return to the Court with its determination for the Court to satisfy itself that the amount determined for payment by the President was objectively determined. The words 'the President must personally pay', and the provision of a time frame within which payment must be made, also indicate distrust in the President by the Court. The SASSA judgment illustrated the same phenomenon. The court did not trust the Minister of Social Development to independently oversee the process of concluding a transparent agreement with CPS, and securing a new service provider within a year. It therefore allocated the supervisory roles to itself, National Treasury and the Auditor General. Professor Hoexter and Advocate Marcus said that where courts do not trust a party to implement their orders, they will use the structural interdict to ensure compliance.

6.4.3 Independence of the judiciary

The judiciary enjoys independence from the other branches of state to a great extent, and these protections are provided for in the Constitution. The judiciary therefore is able to conduct its function without fear or favour. The judiciary, however, is unelected which places it in a special position of being able to make policy, whilst not being directly accountable to any other branch of government. This creates tension with the other branches that must abide by its

orders, and many scholars consider it undemocratic (Kramer, 2013; Abramowicz & Colby 2009; see Tushnet, 2003; Gibson, 2006). Democratic or not, the reality in South Africa is that the judiciary is the only well-functioning branch of state from a constitutional perspective. It is of concern, however, that this branch is not, and cannot naturally be, as impartial as it is required to be, and therefore its judgments may always be influenced to some degree by personal ideology. Professor Hoexter and Advocate Marcus stated that the judiciary's judgments would be susceptible to the ideologies of judges, and Justice O'Regan explained the measures put in place to attempt to minimise ideological influences in judgments.

6.4.4 The accountability of public officers

The Constitution provides, as founding provisions, that universal suffrage, regular elections and a multi-party democratic system, will ensure accountability and responsiveness from government. These are the founding principles of democracy. This theory struggles to find application in South Africa's democracy, because it is characterised by a majority party that identifies with the majority of citizens as a result of the liberation struggle. Minority parties have found it difficult to break the strong ties between citizens and the ANC. In this context, the ANC has been able to conduct itself with minimal accountability and responsivity, often going through the procedural motions (inquiries, reports) with no tangible results or outcomes.

This practice was employed during the Nkandla matter, wherein numerous investigations were conducted and reports compiled, all finding in contrast to the Public Protector, that the President was not liable to pay for the enrichment to his property by virtue of irregular expenditure of state funds. The National Assembly effectively set aside the remedial action prescribed by the Public Protector. The President then relied on these reports as a negation of any liability to pay for his unjustified enrichment, relying on the protection of ANC members in the National Assembly. The judiciary de-legitimised the ANC's strategy by setting these reports aside and stating that the rational course of action would have been to refer the Public Protector's report to the judiciary, as opposed to deciding that the Minister of Police's report absolved the President from any liability. The judiciary accused the legislature of usurping its powers by deciding to set aside the findings of the Public Protector's report, a function only the judiciary is allowed to undertake, through a review process. The judiciary told the President that he failed in his duty to uphold the Constitution.

The effect of the judgment, and an important observation, is that it took the involvement of the judiciary for the executive to be held accountable. This judgment would be used by all the minority political parties to discredit the ANC and the President in the election campaign. It is significant to note that the worst performance of the ANC occurred in an election four months

after the judgment. If we accept that there is a correlation between the judgment and the election results, then we accept that the judiciary has influence over the electorate. Also of significance is the evidence that voting patterns are starting to change in significant terms.

On 6 October 2016, Gwede Mantashe thanked the outgoing Public Protector for saving the ANC from itself, stating: "*you saved us from ourselves from time to time, that is something we have not acknowledged publicly, but do so quietly*," (Politicsweb, 6 October 2016a). This was a powerful admission of the need for checks and balances on state power. There is no publicly visible policy on holding members of cabinet accountable when they have failed to ensure that they, and the institutions that they are responsible for, operate effectively and within the confines of the law. Equally, there is an unwillingness by the legislature to hold the executive accountable for violations of the Constitution. This weakness of accountability institutions often results in executive action being taken on review to the judiciary.

The ANC is often heard on the news pleading with its members to adhere to its principle of dealing with dissent and disagreements internally, and not in public. This policy, which members of the ANC have observed for most of the ANC's period of governance, could explain the silence from members of the ANC in Parliament. Regardless of their personal views, they did not speak against the official party position on the Nkandla matter. It was only after the judgment, that a few senior ANC members spoke out against the decisions taken on the matter, with Gwede Mantashe, secretary general of the ANC, stating that the National Executive Council of the ANC had advised the President to take the report on review (Ndenze *et al*., 2016, p. 5). This advice was not followed, indicating that the President, in decision-making, acted against the advice of some senior members of the ruling party; he also did this in his decision to fire Gordhan.

Notwithstanding the President's repeated failure to heed senior party member's advice, the party supported and protected the President. This behaviour indicates an unwillingness to speak out publicly about individual views and beliefs, thus revealing the power dynamics within the ruling party. The fear to show dissent on the basis of job security and political ambitions inhibited ANC leaders from upholding the Constitution and holding the President accountable. This is a pattern that continues to repeat itself, and those who are vocal tend to lose favour with the party's leadership.

6.5 Conclusion

The themes generated in this chapter were derived from the findings of the content analysis of the case studies, the findings from the literature review, and the findings from the interviews. Several correlations emerged between the initial findings of the research (case studies and literature review) and the responses to the questionnaire regarding the impact of the ideology of judges on their judgments, and the weakness of accountability institutions in South Africa, which is evidenced by the reliance placed on the judiciary. There was also a strong correlation regarding the increasing reliance on the judiciary to review the exercise of public power. Chapter 7 will take the analysis that has unfolded in this chapter further in order to generate analytic generalisations, and to answer the primary research question.

CHAPTER 7: ANALYSIS OF FINDINGS

This chapter will refine the themes of this report by identifying and extracting the essence, or the most important aspects, that they bring to light concerning executive decision-making and judicial review of those decisions. These will constitute lessons learned from the study which are capable of generalisation, and are referred to as analytic generalisations. Thereafter, the analytic generalisations will be analysed further until the primary research question is answered.

7.1 Refinement of research findings

The above themes can be refined into the following concise statements, which constitute analytic generalisations:

7.1.1 there is no effective separation between the legislature and the executive in the context of checks and balances. This is the result of the ANC being a majority party in Parliament, and the party failing to enforce that separation by embracing public dissent and debate from party members in Parliament;

7.1.2 South Africa's accountability institutions are weak. Some accountability institutions, which attempt to enforce their duties to hold others accountable either find that they lack the political support to properly carry out their duties, or they become victimised and targeted in order to discourage them from persisting on that course. The judiciary is the only branch that has retained an image of integrity and courage, and as a result civil society, opposition parties, NGOs and other public interest groups trust the institution, therefore reinforcing its legitimacy;

7.1.3 the judiciary's inability to make rulings that are not based on the ideologies of judges is a negative aspect of judicial review, particularly given the nature (and frequency) of policy matters that are coming before them. The judiciary is being pushed further into the realm of policy-making the more the executive fail in their constitutional duties. This is because the more frequent, intentional and systematic irrational decision-making becomes, the more frequently the judiciary will feel the need to use more intensive and obtrusive mechanisms to ensure compliance with its judgments, which also helps the judiciary retain a strong public image. The structural interdict that was utilised in the SASSA and Nkandla cases, amongst others, is an example of a mechanism that allows

> the judiciary to step quite deeply into the functional area of the executive in order to ensure that the executive abides by its constitutional duties. The structure of South African politics and power relations is such that the judiciary is being forced into the role of policy-maker by the very actions of the branch that constantly complains about judicial encroachment. The judiciary finds itself in a position where it needs to assume a greater role in policy-making in order to ensure that the rule of law isn't incrementally dispensed with. The converse should also be true – if the executive make decisions based on the rule of law and constitutionalism, the judiciary should refrain as far as possible from engaging in policy matters.

Weak accountability institutions allow politics to infiltrate and influence policy decisions, which makes those decisions susceptible to judicial review. This was the case in all the case studies. Accountability institutions have a crucial role to play in balancing the application of constitutional principles with the politics inherent in decision-making. Where this role is properly performed, the judiciary's influence or impact on decision-making and policy would be significantly reduced. The legislature is well placed to ease the tension between political considerations and the constitutional law framework applicable to executive action. When matters appear before the courts, the courts are unable to take a pragmatic approach to these issues, and must strictly apply the provisions of the Constitution. The conflict between the rule of law principle and the politics of decision-making must be managed. The most constructive tools for managing this is through legislative checks, and other available political avenues such as Parliamentary committees or ad hoc committees.

Where the executive performs very poorly (and the legislature doesn't hold them to account), the judiciary is required to work that much harder to maintain the constitutional balance, which may result in more invasive judicial review. To answer whether the level of judicial review of public power currently occurring indicates a strong or weakening constitutional democracy requires consideration of a number of factors raised in the literature, which include considering whether it is constitutional for the judiciary to encroach further and further into the territory of the executive; whether the executive, as elected representatives of the majority of society, should be allowed to make decisions free from the intervention of the judiciary; and whether the judiciary should get involved in politics.

The Constitution is silent on the finer details regarding the separation of powers and checks and balances. As discussed, the judiciary sets these parameters itself, and will therefore go as far as is necessary to fulfil its constitutional mandate of protecting the Constitution. The supervisory interdict is one of the most intrusive mechanisms available in this regard.

Therefore, it appears to be within the confines of the Constitution for the judiciary to interfere as far as is necessary in order to fulfil legitimate constitutional obligations.

The case studies have indicated that the judiciary is the only effective check on executive power, without which construction would be continuing at Nkandla at the state's expense, censorship at the SABC would be ongoing. Without a police guard, the rule of law would often be ignored for political gain and expediency. Furthermore, as illustrated in the SASSA and SABC cases, the ANC's first priority is no longer to strive for the welfare of the South Africans, or its supporters. Therefore, the judiciary is not stopping the ANC from delivering on its promises to its supporters, but rather from taking decisions that benefit political elites and are far removed from the achievement of the promises made to the electorate. Judicial review is therefore a necessary function in South Africa's constitutional democracy.

Politics is about a struggle for resources and power. It is inherent in policy, whether to a small or larger degree. It is highly emotive and subjective. Involvement by the judiciary in highly political matters may compromise its objectivity and its legitimacy. As discussed in section 3.3.4.5, the judiciary relies on civil society for its legitimacy. The judiciary is supposed to be the objective and impartial arbiter of disputes between parties who cannot come to a solution independently. It is therefore imperative that the judiciary focusses on the objective facts and avoids considerations of a political nature, as far as this is possible, in order to reach equitable decisions. Ideally, where the legislature fails to check executive power, civil society and opposition parties should fight the political battles with the executive.

The research has established the judiciary's policy in the review process and found that the judiciary is a vital element for the maintenance of constitutional order. The judiciary has held the executive accountable when other institutions have failed. Some authors have argued that judicial review is not democratic, and that it is influenced by considerations of retaining legitimacy. Others have argued that it is not suitable for the judiciary to engage in policy-making. In response to these arguments, the writer found that the judiciary is constitutionally authorised to engage in policy-making, and that the judiciary has been entrusted with the responsibility of determining how far it is permitted to encroach into the sphere of the executive. Given that members of the executive are not appointed on the basis of their knowledge in a certain industry or area of practice, and given that they and the legislature do not exhibit special constitutional interpretation skills, the judiciary is well placed to deliberate and make findings on the constitutionality of acts of public power. In addition, members of the judiciary are appointed by the JSC, which, as discussed in section 4.3.4.5, is strongly

influenced by the President and the National Assembly. Therefore, there is a certain amount of control regarding who sits on the bench, and what their qualifications are.

The judiciary, like any other organ of state, is concerned with preserving its legitimacy. However, the case studies and interviews have shown that the judiciary will fulfil its functions even when faced with tough political cases that may upset the executive and in some cases members of the public. The judiciary tries to retain its legitimacy by exhibiting integrity in its judgments, and fulfilling its constitutional mandate. Whether judicial review is democratic has been debated for centuries. If democracy is simply about the will of the representatives of the majority, then judicial review is undemocratic. However, democracy is more complex than that, and involves protecting not only the minority from the tyranny of the majority, but also protecting society as a whole, and constitutionalism, from unconstitutional, irrational, subjective decision-making, that seeks to benefit only the decision-maker, or an elite few who are politically connected.

The negative aspects of judicial review should not be ignored, and society should constantly be mindful of them. Ideology will always be present in judicial decision-making. We also cannot assume that all judges seek to be objective. Some judges may also be amenable to manipulation in exchange for personal gain. The most significant trade-off emanates from the judiciary getting more involved in decision-making with the understanding that judges are not free from their ideologies when making judgments. This state of affairs is not ideal, especially when they are expected to guide, direct or impact executive decision-making. Democracy is an imperfect design, but it is what government, as the agents of the society, signed up for, and a system that society endorsed. We must therefore abide by it. Where improper behaviour occurs, whether on the part of the judiciary or the executive, it must be dealt with as the Constitution requires.

The research indicates that the level of judicial review of executive decision-making experienced in South Africa is indicative of a weakening constitutional democracy. This is because irrationality in decision-making is often subjected to judicial review before it is corrected, and the legislature is failing to fulfil its constitutional role of holding the executive to account. The research has acknowledged the existing conflict between the political nature of policy-making and the constitutional requirements applicable to decision-making. This conflict makes the role of the legislature in holding the executive to account more pronounced, as it is instrumental in ensuring a balance is achieved in the exercise of executive power in order to avoid contraventions of the Constitution. Reliance on maintaining an effective constitutional democracy is placed on the judiciary, therefore showing the weakness of accountability

institutions. The challenge with this is that judicial rulings are not free of personal ideology, and therefore have the potential to impact policy in unintended ways, and may place further strain on the relationship between the executive and the legislature.

Justice Sachs argued that the level of judicial review of the exercise of public power is indicative of a strong democracy, presumably because the judiciary is able to maintain the balance where the executive and the legislature fail. However, depending on a single branch of government to keep the other two branches accountable to the Constitution cannot be the basis of a strong democracy. The fact that the executive normally abides by court orders indicates that South Africa's constitutional democracy is not in crisis, but it does not suggest that it is strong. The Constitution envisages a strong democracy as one in which all branches of state fulfil their constitutional mandates prudently and in accordance with its prescripts - this would entail the three branches working together.

7.2 Conclusion

This research report set out to establish whether the level of judicial review currently experienced in South Africa is an indication of a strengthening or weakening democracy. Public policy was defined as public power. The writer, through three selected case studies, investigated executive action and decision-making; and through the literature review, investigated the judiciary's policy on the doctrine of separation of powers and checks and balances, considered the arguments of numerous scholars pertaining to various aspects related to judicial review such as judicial ideology and independence, and then considered the consequences of judicial review on its current scale. The writer conducted questionnaire-style interviews with four constitutional law experts. The interview responses assisted the writer in testing, corroborating and triangulating the results from the literature and case study reviews in order to ensure objectivity and reliability. The writer found significant convergence between the findings of the literature and case study reviews and the interview responses. The research produced findings, which were used to generate themes.

The research revealed that judicial review has inherent weaknesses, which include ideological influences in decision-making; and the possibility of fairly intrusive judicial review, depending on the extent of the infractions committed by the executive in the decision-making process, and the likelihood that the court order will be implemented. The judiciary is not free from ideology in making judgments (Kramer, 2012; Abramowicz & Colby, 2009; see Tushnet, 2003), however, it is allowed to review and make pronouncements on the decisions of elected

government officials, therefore engaging in policy-making. This means that the views and beliefs of unelected members of the judiciary influence executive policies. The judiciary is not neutral. Judges are affected by their life experiences, their political affiliations, their views of the world, the philosophies they identify with, and their immediate environment. All of which will inadvertently inform their judgments.

Ultimately, the writer found that the overreliance placed on the judiciary to adjudicate over decisions made by the executive, which are referred to it for resolution, is indicative of a weak constitutional democracy, characterised by weak accountability institutions (primarily a weak legislature).

CHAPTER 8: CONCLUSION

The methodology of this study was based on a naturalistic approach to data analysis. A qualitative study was carried out, which sought insights in order to answer the research questions. Through a process of induction, content analysis of documentation was used to draw themes from the data, while remaining mindful of the context within which the text was written or occurred, and various data analysis tools were used to produce analytic generalisations. The literature review considered the writings of numerous scholars on the subjects of judicial review, judicial independence, judicial legitimacy, the enforcement of judgments, and the judiciary's role in policy-making. A vast amount of knowledge and insight was derived from these articles. Case studies were used to gain insight into what motivated executive decisions and the reasons for the increasing level of judicial review of these decisions. Interviews in the form of questionnaires were used to test, corroborate and triangulate the findings from the literature and case study reviews.

The aim of this report was to understand whether the increasing level of judicial review of executive decisions is a sign of a strong or weak constitutional democracy. The theoretical framework set out the foundational requirements for decision-making, being respect for the rule of law and constitutionalism. This means that all decisions made by the executive are required to be based on rationality and aligned with the values of the Constitution. The theoretical understanding of public policy adopted by this research revealed at the outset that there is tension between the constitutional requirements applicable to the exercise of public power, and the political characteristics of policy-making. Members of the executive are frequently faced with political pressures and subjective preferences that often shape the decisions that they make. This, in recent times, has impacted on the rationality, transparency and consistency of executive decision-making, resulting in numerous instances of judicial review, as reflected in the case studies and additional cases. The political nature of decision-making further highlighted the need for an effective accountability function by the legislature – something that the research showed to be lacking.

The literature review considered the strengths and weaknesses of judicial review. This involved considering how independent the judiciary is, whether the ideology of judges impacts their judgments, how accountable the judiciary is, how the judiciary maintains its legitimacy, the manner in which the doctrine of separation of powers was applied by the judiciary, and the resultant relationship between the judiciary and the executive. This led to the consideration of the consequences of judicial review, which exposed some weaknesses associated with

judicial review, for example, the potential for the ideology of judges to influence their judgments, and the consequent impact this has on policy.

The three case studies were investigated thereafter. This was a process of establishing how the executive had made decisions, under what circumstances these decisions were made, and the power dynamics that existed between various actors in the decision-making process. The case studies together with the additional cases revealed that politics and subjective interests influenced the decisions that the executive made. They also illustrated the weakness of accountability institutions, which failed repeatedly in holding the executive to account. The lack of political will to protect and endorse these institutions was also revealed through the case study review. The questionnaire-style interviews showed substantial convergence with the findings from the literature and case study reviews. There was convergence on the impact of ideology on judicial judgments, and the weakness of accountability institutions, signalled by the overreliance placed on the judiciary to review executive decision-making. There was also convergence on the overreliance placed on the judiciary, and the increasing nature of judicial review of executive decisions. The findings from the literature review, case study review and the interviews were analysed collectively, and themes were derived. Through further analysis of these themes, using tools such as context interpretation, rival explanations, many sources of evidence, and drawing patterns, the writer was able to answer the research questions.

The research illustrated the important role assumed by the judiciary in South Africa's constitutional democracy. The number of matters referred to the judiciary regarding complaints of irrationality in decision-making is increasing. This is due to the lack of effective accountability institutions to resolve disputes. Institutions that try to exercise their authority often suffer victimisation. This was illustrated in the way the former Ministers of Finance, Nene and Gordhan, were treated. Other individuals who appear to have been victimised include McBride, Sibiya, Dramat, and Nxasana.

The additional cases revealed that public institutions, including their leadership, were used to fight political battles, and to protect the powerful and their friends. Integrity was lacking in the character of some individuals who were appointed to hold senior positions in key institutions. The case studies and additional cases have shown that where this happened, those institutions were likely to get involved in political battles. The NPA and the Hawks are examples of this phenomenon, and have shown themselves to lack independence and neutrality. Court battles have become a frequent feature in the executive decision-making process, and millions of Rands of state funds are used to finance public litigation.

The writer had three research questions. The first involved attending to an in-depth investigation of the actions taken and decisions made by members of the executive, which were ultimately reviewed by the judiciary, and found to fall short of the requirements of the Constitution. The second and third questions looked at the judiciary's involvement in public policy and the consequences thereof. This involved an investigation of the judiciary's approach to the doctrine of separation of powers, and an in-depth literature review pertaining to the strengths and weaknesses of judicial review.

The research revealed that in all the case studies, the decisions made by the executive did not pass the rationality test, and were driven by subjective interests and political considerations. The case studies were relevant during the period of conducting this research, and unfolded over a period of about three years. They displayed that at times politics is inextricably linked to decision-making, and that power dynamics and political influence often affect the decisions ultimately made. The additional cases assisted in substantiating the generalisations that were made following the investigation of the case studies. They also played the important role of providing context with regard to the political environment in which public power was exercised.

The increasing level of judicial review experienced since 2009 signifies that the other branches are not applying themselves in accordance with their constitutional duties. It is also indicative of an unhealthy relationship between political parties, because it shows that they cannot resolve issues through political processes and procedures, and often require the judiciary to intervene. These circumstances make the country more susceptible to opportunists who wish to push their policy agendas through court processes, taking advantage of the opportunities created by poor governance. High levels of judicial review are indicative of a deterioration of institutions and the weakening of a democratic state. The DA is often guilty of using the court as its first resort for resolving political disputes with the executive or government. The EFF is also adopting this style of public litigation. This concept of lawfare was raised by the former Deputy Chief Justice Moseneke and the President (Moseneke, eNCA News Channel, Helen Suzman Lecture, 17 November 2016; Wiener, 2016; eNCA News Channel, 18 November 2016).

The research indicates that some members of the executive have made decisions based on political considerations, which have resulted in contraventions of the Constitution. We cannot rely on the judiciary alone to limit and check executive power. The Constitution envisages a country where the executive, legislature, judiciary and civil society work together to assist each other, act as a check on each other's power, and ultimately hold each other accountable. The

judiciary's function is to check executive and legislative power in order to ensure that infractions of the Constitution are corrected, and this function has been required frequently. It is not the primary responsibility of the courts to hold the executive accountable, but this is exactly what is playing out in South African courts. What is required is for civil society to exercise its agency by holding its government accountable, and ultimately punishing the ruling party at the polls if it fails to self-correct. Failure to exercise this fundamental democratic mechanism will result in the de-legitimisation and politicisation of the judiciary.

The judiciary's function post-2009 has involved holding government accountable and responsive, and being the arbiter of institutional battles and disputes which are rooted in politics. In the Nkandla case, the legislature failed to hold the President accountable, and in fact together with the Minister of Police, protected the President from censure and responsibility. In the SABC case, the court had to correct the then Minister of Communication's decision to silence the Public Protector, and in the Bashir case, the court told government that they had failed to uphold constitutional principles by failing to abide by the law and adhere to a court order. Several accountability mechanisms are ineffective, and the judiciary bears the burden. Chapter Nine institutions are not given the deference prescribed by the Constitution, and their rulings are often taken to court before they are implemented, thus revealing the lack of commitment by the executive to the spirit and substantive provisions in the Constitution.

The fact that the judiciary is able to review policy, and that its orders are generally implemented indicates that the judiciary is a strong and legitimate institution. Conversely, the fact that the judiciary is so involved in executive decision-making, often having to reprimand members of the executive and the legislature for their decisions and actions, is indicative of a weak constitutional democracy, with weak institutions. The risk of referring copious political decisions to the judiciary for review is that the courts are likely to lose their legitimacy due to their constant involvement in political matters.

Ethical leadership is demonstrated by integrity, competence, accountability, responsibility, fairness and transparency, and involves the anticipation, prevention or mitigation of negative impacts or consequences, resulting from the institution's activities, on the economy, society and the environment (King IV Report, 2016, p. 20). The Constitution calls for accountable, responsive, rational and fair leadership for the upliftment of all South Africans. The President Zuma administration is failing to ensure proper, rational decision-making, which failure results in poor outcomes for citizens.

Annexure A: Questionnaire

Questionnaire

Introduction

The purpose of this research is to establish whether the increasing referral of policy matters to the judiciary for review strengthens or weakens South Africa's constitutional democracy. Despite the guiding provisions in the Constitution, a significant number of public policy decisions have been referred to the judiciary for review from 2009 to date, on the grounds of the unconstitutional exercise of power by mainly the executive. It appears as though recourse to the courts has become the norm for resolving political disputes which are better suited for resolution through other channels provided for in the Constitution, including voting and checks and balances between the executive and the legislature. Public policy in this research is understood as the actions and decisions of public officials. The research is concerned with aspects of public policy such as the actions, omissions, decisions and non-decisions, political influence, and political considerations that inform public policy.

Interview questions

1. When the judiciary reviews public policy, it gets involved in the policy-making process. Should the judiciary be involved in policy-making, or should it place itself at a distance, and be hands-off? Are there risks associated with this role? What do you regard as the major risks?

2. There has been an increase in the number of public policy matters referred to the judiciary in recent years, especially evident in the period 2009 to date[1]. What does this trend, in your opinion, indicate about the state of South Africa's constitutional democracy and its institutions?

3. Can we say therefore that there is an increasing reliance on the judiciary? If so, is this increased reliance on the judiciary a sign of a strong constitutional democracy or a weak constitutional democracy, and why?

4. Does the reliance on the judiciary indicate a failure of other democratic avenues and institutions[2] to play their role in South Africa's constitutional democracy?

5. The judiciary lacks the power to enforce its judgments. Several international governments are known to evade the enforcement of court judgments which they are not in agreement with. In the light of this statement, why are court judgments generally adhered to in South Africa?

[1] These include the referral of the South African government's decision not to arrest President Al Bashir, contrary to its obligations to the ICC under the Rome Statute and the Implementation of the Rome Statute of the International Criminal Court Act, to the North Gauteng High Court by the Southern African Litigation Centre; the referral of the decision of the SABC not to implement the prescribed actions contained in the Public Protector's report (When Governance and Ethics Fail) pertaining to Hlaudi Motsoeneng; the referral of the failure of the President to implement the remedial action contained in the Public Protector's report (Secure in Comfort), and the subsequent failure of the legislature to hold him accountable.

[2] Institutions like the legislature, and the public through the exercise of their vote, etc.

6. Is the evasion (failure to implement or poor implementation to avoid giving substance to judgments) of court judgments a matter of concern or not? Please tell me the reasons for your answer.

7. In the Nkandla case, the Constitutional Court included measures in its judgment which can be interpreted as mechanisms to ensure the proper implementation of its orders[3]. Does this signify distrust on the part of the Constitutional Court of the executive's commitment to the doctrine of checks and balances, the rule of law, and cooperative governance?

8. What is your view on the level of independence required of members of the judiciary? Is there any merit to the Attitudinal Model theory, in terms of which it is argued that the ideology of judges will influence their decisions?

9. Does the judiciary guard against subjective beliefs and ideologies influencing judgments?

10. Is there anything else you would like to share with me regarding the evolving relationship between the judiciary and political institutions in South Africa – any specific cases that you might not have referred to so far in this questionnaire, and/or any additional insights you may have as a constitutional law expert?

THANK YOU FOR YOUR TIME.

[3] Timeframes were included in the judgment regulating when the determination by the Minister of Finance of the amount to be paid by the President should be made, and when payment must be made by the President. The Constitutional Court also ordered that the monetary determination should be referred to the Court for approval.

Annexure B: Responses to the questionnaire-style interviews

B1. Professor Cora Hoexter

1. The judiciary is constitutionally bound to review the actions and decisions of public officials, not least in terms of the rule of law (s 1(c)) and s 33 of the Constitution. This means that some judicial involvement in policy is inevitable. Furthermore, it is impossible to draw a clear distinction between law and policy. For one thing, law embodies policy; and then, as Davis and Klare point out, solving legal problems necessarily involves choices influenced by 'norms, values, ideas, sensibilities and experiences external to the corpus of legal authorities and reasoning procedures'. Those ideas will of course include policy.

   That said, courts should certainly be aware of the danger of becoming too closely involved in policy-making. The main risk is that of usurping the policy-making role of the executive and thus breaching the separation of powers. So courts are wise to exercise deliberate restraint or deference in this regard, and failure to exercise restraint could impose intolerable strain on the relationship between the courts and the government.

2. In my view the trend exposes the weakness of our constitutional democracy and its institutions, including the electoral process. As I have explained in my work, South Africans have always been inclined to rely too heavily on the remedy of judicial review, mainly as a result of the paucity of other reliable safeguards and remedies in our system before 1994. For example, we had no general ombud until 1979, the year in which the Advocate-General was introduced, and that was a narrowly conceived and not very accessible remedy in any event.

   Today judicial review is still the most prominent remedy in our system of public law, and it has been made more accessible and more attractive in various ways – for instance, by the liberal rules of standing found in s 38 of the Constitution, and by the Constitutional Court's ruling that every exercise of public power is justiciable to some extent. Some public-law remedies, such as relief offered by the Public Protector (PP), are not yet effective enough to discourage resort to judicial review. In fact, as we saw with the Nkandla saga, the enforcement of a remedy granted by the PP (or other such institution) may itself depend on judicial review. Other remedies (such as internal administrative appeals) are not sufficiently trusted, or may be offered by institutions that appear to have been 'captured'. So judicial review remains the most significant

method of holding officials to account and of controlling exercises of public power – and it is being used more than ever.

3. Yes, reliance on the judiciary does seem to be increasing; but as indicated above, it has always been heavy. It is a sign of a weak constitutional democracy that lacks a sufficiently robust and reliable 'integrity system'. People feel that the courts offer the only reliable and effective relief from unlawfulness, corruption and so on. (That is nothing new either: even under apartheid the courts were always regarded as the most trustworthy institution, or the least untrustworthy).

4. Definitely. See my answer to Question 2 above.

5. Partly out of habit or tradition, I suppose, and partly because our courts have become much more astute about the problem of evasion in recent years – see eg the rise of the structural interdict as a remedy, and the growing tendency to order costs against officials de bonis propriis and to find officials in contempt of court. Our courts are definitely aware of the problem of non-compliance with judgments, and have been responding to it quite creatively.

6. Yes, it is a matter of huge concern. Widespread disobedience of court judgments would effectively spell the end of the rule of law and the death of the Constitution. There would no longer be an effective legal system.

7. Yes, without a doubt. This type of order has become more common, as I have indicated above. Particularly since Nyathi, the courts have been anticipating reluctance or recalcitrance on the part of the executive instead of simply assuming that the order will be carried out unproblematically.

8. Independence (both individual and institutional) is extremely important, which is one reason why South Africa opted for a Judicial Service Commission and abandoned the old system for appointing judges by the executive.

   As to personal ideology, of course it will influence judges' decisions: the Realists taught us that many years ago, and today no one seriously believes that judges are capable of being apolitical or neutral.

In apartheid South Africa the truth of the Realists' insights was very obvious, for liberal judges could be relied upon to hand down liberal judgments and politically conservative judges could reliably be expected to hand down 'executive-minded' judgments. This still happens today, but the phenomenon is much less obvious than it used to be. One reason is that South African politics are not nearly as stark as they were before 1994, and it is quite possible for a judge to be conservative in relation to certain issues (eg gender equality) and liberal in others (eg individual freedom). And of course, individuals are capable of behaving in surprising ways: for instance, judges appointed in the expectation that they will be pro-government may display unexpected independence of mind.

9. Yes, I think judges generally make an effort in this regard, but no amount of effort can eradicate the problem -- partly because like other people, judges are not always conscious of their ideologies and prejudices.

10. I can recommend the introduction to a book I co-edited with my former Wits colleague Morné Olivier, The Judiciary in South Africa (Juta 2014), and you may also find some of the chapters of the book useful where they bear on the relationship.

B2: Justice Catherine O'Regan

1. I think it is very important that you define the concept "public policy". It is very difficult to answer this question without knowing your definition of public policy. Do you include within it legislation, regulations, interdepartmental practices? I refer to the following quote from my Helen Suzman Memorial lecture:

   The Constitution does not define "policy," although it does stipulate that "the development and implementation of national policy" is a task for the executive.[4] The Shorter OED gives a useful definition of policy as "a course of action adopted and pursued by a government." This is, I think, the sense in which the President used the word "policy" in the two speeches referred to above.

   The Constitution does not define "policy" probably because policy is not a distinct legal category. Different legal tools can be used to implement "policy." So policy may be encapsulated in legislation, or through regulations made in terms of legislation, or it may take the form of executive instructions to bureaucrats or it may be pursued through the conduct of officials. These different tools have different constitutional and legal implications. Time does not permit me fully to elaborate these different consequences. At a general level, all policy, however pursued, must comply with the three constitutional constraints that I have already mentioned: the requirements of legality and rationality, and compliance with the Bill of Rights." See O'Regan 28 (2012) *SA Journal on Human Rights* 116 – 134.

   Because I am not sure what you mean when you speak of "public policy", it is not clear to me whether you think the "law", especially legislation, is "public policy". From the perspective of the law, once public policy becomes law, then courts are bound to implement it unless it is inconsistent with the Constitution. That is their constitutional task, and that is a fundamental plank of the rule of law.
   Of course at times this may be politically controversial, but controversy cannot deter courts from performing their constitutional role.

   When courts uphold or implement law (or indeed strike it down as unconstitutional), they are not "becoming involved in the policy-making process, they are simply either enforcing the law or determining the constitutional limits of legitimate law-making. I refer you to the lecture cited above.

[4] Section 85(2)(b) of the Constitution.

2. It is not clear to me why you describe the three examples you give as “policy” matters. In all these cases, the court was concerned with the proper interpretation and application of legislation and the Constitution. This is the task of courts.

3. What do you mean by an increasing reliance on the judiciary? By whom? This question seems to require some empirical research. Have you done it? Can you provide me with the data. Without seeing the data, I would not want to comment.

4. No comment.

5. The rule of law, a founding value of our Constitution, requires judgments of courts to be implemented. If judgments are not implemented, it raises questions about the rule of law. Whether there has been a failure to comply with the orders of the Constitutional Court or other courts in South Africa is an empirical question. It would be interesting to see any data you have gathered on this issue. Without seeing empirical data, I would not want to comment.

6. Again this is a question that requires empirical research. Certainly if it were to be established that court orders were regularly not being implemented, it would e a matter of concern, as it would be an indication that the rule of law was in peril in South Africa.

7. I am not sure that I agree with your analysis of the Nkandla judgment. Court orders must be clear and must provide effective remedies. Courts therefore generally seek to give detailed, clear and effective orders.

8. Judges should be independent and impartial. I am not aware of the Attitudinal Model theory. However, in my view, impartiality is something that has to be actively developed by judges individually and together. Judges constantly need to remind themselves of the need to be impartial. It is one of the reasons that diversity on the bench is a good idea, for a diverse bench (race, gender, class, religion, background etc) makes it less likely that judges will reinforce one another’s prejudices.

9. See answer to para 8 above.

10. No

B3: Justice Albie Sachs

From: Albie Sachs [mailto:albie@albiesachs.com]
Sent: 16 March 2017 03:00 PM
To: Ndjwili-Potele, Puleng P <Puleng.Ndjwili-Potele@standardbank.co.za>
Cc: susan@albiesachs.com; 'Firoz Cachalia' <Firoz.Cachalia@wits.ac.za>
Subject: RE: Thesis on public policy and judicial review

From: Ndjwili-Potele, Puleng P [mailto:Puleng.Ndjwili-Potele@standardbank.co.za]
Sent: 16 March 2017 11:18 AM
To: albie@albiesachs.com
Cc: susan@albiesachs.com; 'Firoz Cachalia' <Firoz.Cachalia@wits.ac.za>
Subject: FW: Thesis on public policy and judicial review

Dear Justice Albie,

Thank you for your response and guidance.

Public policy can be understood to include legislation/law and the decisions made by government officials (the exercise of public power). I am concerned mostly with the latter. My research focuses on decisions made by members of the executive, and in some cases the legislatures response thereto. The Nkandla matter as well as the Al Bashir/ICC and SABC/ Motsoeneng matters are considered in detail in this regard. I also make reference to the recent SASSA and Department of Social Development incident that is currently unfolding. So, in this regard, I think we are on the same page.

I have noted your responses below, and thank you for your input.

Would you be able to provide your opinion on:

1. Whether you agree that there is increasing reliance being placed on the judiciary to adjudicate over public policy matters;

- "o exercises of public power, yes; on public policy, no".

2. Whether this is a sign of a strong constitutional democracy or a weak constitutional democracy (I think you may have already answered this one below, but please clarify);

- "strong"

3. Whether the reliance on the judiciary indicates a failure of other democratic avenues and institutions to play their role in South Africa's constitutional democracy.

- "Yes, the main judicial intervention has been to get the institutions to play their constl role properly and honestly, not to take over their functions".

I acknowledge that you are very busy at the moment, and thank you for taking the time to help me.

I would appreciate your response to the above questions, even if very brief.

Thank you for your time.

Kind regards
Puleng

From: Albie Sachs [mailto:albie@albiesachs.com]
Sent: 03 March 2017 10:51 AM
To: Ndjwili-Potele, Puleng P <Puleng.Ndjwili-Potele@standardbank.co.za>
Cc: susan@albiesachs.com; 'Firoz Cachalia' <Firoz.Cachalia@wits.ac.za>
Subject: FW: Thesis on public policy and judicial review

Puleng… I am travelling and busy as anything, so my answers will be terse and not couched diplomatically. Basically I think you are raising an important issue but barking up the wrong tree … it's your definition of policy that is wrong. In Treatmet Action Campaign case we were dealing with policy, and decided that the social and economic rights provisions in our Bill of Rights PROVIDED AN OBLIGATORY CONSTITUTIONAL FRAMEWORK IN WHICH POLICY HAD TO BE DETERMINED [excuse capitals] and that the refusal to roll out ARVs to women living with HIV was unconstitutional… this decision is said to have saved the country from social disaster, and we now have the biggest ARV programme in the world.

But the cases to which you refer since 2009 deal not with institutional policy as such but with institutional authority, the classical work of judiciaries throughout the world, of special importance in our country where the Constitution has such special meaning and the top Court is called the Constitutional Court. Think of cases dealing with appointments by those in high places of crooks to head institutions to deal with crooks in high places; dropping of charges of corruption against a top political figure, on inappropriate grounds; calling the IEC to account for not being vigilant enough in ensuring public confidence in elections; holding the President to account for not heeding the Public Protector's report on flagrantly unwarranted spending on security upgrades to his private home, ad Parliament for not providing proper oversight of the Executive in this case. There are many more in similar vein. The decision on the ICC withdrawal was similarly based on process, not substance.

That's what the Courts are there for. Not to govern the country, but to ensure that our democracy remains open, our elections clean and that out public institutions function in the manner prescribed by the Constitution. Far from undermining our democracy the courts have strengthened it. Parliament has been reinvigorated by the Nkandla decision. Elections are meaningful. People speak their minds.

On the issue of the role played by ideology in judicial decision-making, I invite you to read my book The Strange Alchemy of Life and Law [OUP 2009] ad my more recent We the People, Insights of an Activist Judge [Wits UP].

Good luck with you thesis…

Judge Albie

B4: Advocate Gilbert Marcus

1. The purpose of the Constitution is to curb the abuse of power. The Constitutional Court is the guardian of the Constitution. The constitutional model that we agreed to assigns this model. Certain decisions are extremely policy laden and highly executive in nature. The judiciary has the authority to adjudicate over any policy matter, but it recognises that certain decisions are so deeply policy related that they do not get involved. The E-Tolls case is an example.

   South Africa's constitutional model is based on separation of powers, and therefore the court should be involved in policy-making when other branches fail. The risk is that the judiciary could go too far, but this hasn't happened yet.

2. In every policy case he has been involved with, the state has always argued in its papers that for the court to interfere would be an improper invasion of the separation of powers doctrine.
   Yes, there is an increase in the number of policy decisions referred to the judiciary. Our institutions are failing. The Nkandla case, the SABC case and the Bashir case were policy charged matters, and in some of these cases attempts were made to protect the President. There are limits to the exercise of all public power.

3. Yes, there is an increase. This is a sign of both a weak and a strong constitutional democracy. Weak because the executive and the legislative branches are failing to execute their constitutional duties effectively, and strong because the judiciary is rectifying the imbalances. Therefore, it is indicative of a working democracy.

4. Yes.

5. We chose this constitutional model, and therefore all parties must comply with it. There is a natural tension between the executive and the judiciary due to the separation of powers doctrine and the system of checks and balances. Defiance would mean that our constitutional democracy is in crisis.

6. We have had a few close calls, the worst being when Manto Tshabalala said publicly that she would not implement the order to distribute Neviropene to pregnant women as directed by the court. She did, however, implement the court order. Evasion is not a big concern, although this did occur in the Bashir case.

7. The Constitutional Court is sparing in its use of supervisory orders/ structural interdicts because they are a pain in the backside for them – having to monitor the case and implementation of its orders. However, some circumstances justify their use. The SASSA and Department of Social Development case is an example as the court may feel that the Department can't be trusted. This mechanism should be used in limited circumstances. The court will use this mechanism where it is concerned about the implementation of its orders by a party.

8. Judges are influenced by their environment. The American Realist Movement believes that judicial decisions, in large measure, are the outcome of a judge's life experiences. Good judges are constantly conscious of their own biases, and work to ensure that their biases don't interfere with their judgments. In the SARFU case, the court acknowledged that judges are the product of their backgrounds.

9. See 8 above

10. It is important to understand the constitution in light of our history. The Constitutional Court has done remarkably well. We signed up for the for this system of constitutional supremacy, and we must abide by it.

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