

The Nkandla Project, Institutions and Power: The (in)direct influence and the power of the President¹

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1. Introduction

This research explores the issue of the security upgrades in the private home of President Jacob Zuma. In particular, it explores the role played by and the powers of the various institutions involved in the upgrade of the security features of the private residence of President Zuma in the village of Nkandla, KwaZulu-Natal (the Nkandla Project). This issue came to the public through the investigative journalism of the Mail and Guardian (M & G) staffers who continued to dig even though the government denied that it was funding the upgrades of the security features (and construction) of the president's private residence (De Wet, 2014). The assumption is that the president holds enormous powers that led to the construction of the buildings in his home using tax payers' funds and flouting policies and regulations.

The Nkandla Project raises important questions about the various formal (and informal) institutions, their role and powers and involvement in the project. This section discusses the conceptual and theoretical frameworks that influenced the formulation of the research questions. The assumption is that there are institutions put in place in South Africa in order to prevent what happened in the Nkandla Project. However, the problem lies in the total disregard of the constitutional, legal and policy frameworks. This is as a result of the powers that the president seems to have over other institutions within and outside the government. There are no similar problems associated with the three previous presidents of South Africa post democracy in 1994, and this is what makes this issue and President Zuma, as the subject, very interesting. Even though former president Thabo Mbeki had his own fair share of problems, which include AIDS denialism and Zimbabwe quiet diplomacy amongst others(see for example, Gevisser, 2009), his problems did not generate such a huge interest. Further, President's Zuma's second term also highlight the

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second phase of the transition after twenty years of democracy. It is therefore of interest to scrutinise the direction to which the country may be heading.

The aim of this research is to examine the power relations between various institutions in and outside the government in relation to the Nkandla Project. Therefore the main research question for this paper is: How did the President's power (in)directly influence the institutions involved in the Nkandla Project? This main question will be answered by first examining the following: What are the institutions involved and what roles have they played in the Nkandla Project? What powers and influences do these institutions possess? What influence or power does the ruling party, the African National Congress (ANC), has over public policy especially with regards to the Nkandla Project? Would the president be held accountable for his part in the Nkandla Project? What would this mean for South Africa if the president is not held accountable?

Jacob Zuma, the President and the head of the Executive Branch of Government

Jacob Zuma is the fourth state president of South Africa since the post-apartheid era. He came to power in 2009 amidst his many personal, political and legal struggles which almost made him lose out on becoming the president. He survived rape charges, corruption charges and his own political party's internal struggles (for more, see Basson, 2012; Calland, 2013; Du Preez, 2013). For contextual purposes it is important to give a brief description of how one becomes a president in South Africa. The Constitution of the Republic of South Africa, 1996 (the Constitution, Sections) lays down the process of how one may become a president and the powers possessed by the successful candidate. In this regard, a president is elected from amongst the members of the National Assembly as both the head of state and the head of the executive (Constitution, sections 83(a), 86(1); De Vos and Freedman, 2014). However, even though the Constitution lays down the procedure, the voters go to the polls knowing who the potential president is going to be if their political party wins the elections, as South Africa's electoral system is proportional representation (Bekink, 2012; Klug, 2010). The election in the National Assembly becomes a mere formality. President Zuma is both the president of South Africa and the ANC. This is significant as it is often argued that government policies are

formulated at Luthuli house (the ANC headquarters) (AfriMAP and Open Society Foundation for South Africa, 2006).

The Constitution requires the president to “uphold, defend and respect the Constitution as the supreme law of the Republic” (Constitution, section 83(b)). As the head of the executive or cabinet which is responsible for policymaking and implementation, the president has the power to appoint cabinet members (ministers) and the deputy president (De Vos and Freedman, 2014). All cabinet ministers but two are appointed from the National Assembly and remain the members of the National Assembly (Constitution, section 91 (3)(c)). Most of the ministers also come from the ranks of the ANC. The president’s power to appoint ministers also includes the power to fire them (Constitution, section 91(2)). The ministers are usually fired when the president reshuffles the cabinet. Reshuffling happens when the president needs to fire a minister who is either underperforming or is implicated in some wrongdoing (De Vos and Freedman, 2014, Calland, 2013). During his first term, President Zuma has reshuffled the cabinet at least three times.

The National Assembly and the accountability of the Executive

The president, together with other cabinet members is individually and collectively accountable to the National Assembly (Constitution, 1996, section 92; Currie and de Waal, 2001). From time to time, they may be called upon to account individually to the National Assembly on matters that affect their respective portfolios. This is known as the checks and balance (Currie and De Waal, 2001). It is in this respect that the National Assembly may even choose to pass the motion of no confidence on the President individually or to the whole cabinet if the cabinet does not fulfil its constitutional mandate, through a simple majority vote of the members (Constitution, 1996, section 102). If the President is found to have violated the Constitution and the law, the National Assembly is required to remove the president from office with two-thirds majority votes (Constitution, 1996, section 189). The National Assembly has not tested these provisions even though the official opposition party has attempted to pass the motion of no confidence on President Zuma during his first year of office.

The Office of the Public Protector and its role in the Nkandla Project

In order to balance public power and to limit the power of the executive branch of government which is seen as the government branch that holds the most power, the Constitution also makes provisions for independent institutions of government (Constitution, 1996, section 181; Klug, 2010; Currie and de Waal, 2001). The Public Protector is one independent institutions established by Chapter 9 of the Constitution “to strengthen constitutional democracy” in South Africa (Constitution, 1996, section 181(1)). The Public Protector is required to act independently in order to execute her functions with impartiality (Constitution, 1996, section 181 (2)). The current holder of this position is Advocate Thuli Madonsela.

The Public Protector’s mandate includes investigating improper conduct within any sphere of the government (Constitution, 1996, section 182 (1(a); Madonsela, 2010). The Public Protector gets her mandate from the Constitution as well as from the enabling legislation, the Public Protector Act, 1994, and the Executive Members’ Ethics Act, 1998. The Public Protector is accountable to the National Assembly and is expected to submit a report to it at least once a year (Constitution, 1996, section 181 (5)). The Public Protector is important in this research as it is the institution that investigated the maladministration and the improper use of funds by those involved in the security upgrades of the private residence of the president (Public Protector, 2014). In this regard, the Public Protector released a report titled *Secure in Comfort: Report on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal Province* (Public Protector, 2014). This report has been a source of hope and frustration at the same time depending on one’s side of the debate. The Public Protector suffered a great deal of criticism from President’s sympathizers to the extent of calling her a CIA spy (The Citizen, 2014). However, the other half is putting all its hope on the Public Protector as the only hope since they do not think that the National Assembly will hold the president accountable for his role in the Nkandla Project.

The Findings of the Public Protector

The findings of the Public Protector regarding the Nkandla Project in relation to this research and in as far as the institutions involved are concerned are as follows:

Firstly, it was found that the actors involved deviated from proper procurement procedures as required by various laws and policies. One of the main problems was the promotion of the president's private architect, Mr Makhanya, to be the project manager even though he did not qualify to deal with security measures for the president. Mr Makhanya also acted as a go-between the president and the DPW. The Public Protector found that Mr Makhanya would opt for expensive options rather than to opt for the economic options as required. The Public Protector even the relevant ministers could not question Mr Makhanya's motives as he presented himself to be the president's proxy (Public Protector, 2014).

The Public Protector also noted that the President rejected any suggestions that he played a role in the appointment of Mr Makhanya and maintained that he merely introduced him to the DPW officials involved in the project but has never insisted on him being hired (Public Protector, 2014). The DPW Task Team report does not state whether the appointment of Mr Makhanya was neither irregular nor questionable. Instead, it reports that the appointment of the private professionals was "essential to ensure complete integration between the two separate projects (installation of security measures and the owner's own upgrading project)"; that the DPW did not possess professional indemnity; and because this was a fast-track project that needed a single team to work on all aspects (DPW, 2014, p. 9:31).

Secondly, besides the DPW which was responsible for the upgrades, the South African Police Services (SAPS), and the Department of Defence (DOD) were also involved for the security aspect of the project (Public Protector, 2014; DPW, 2014). The DPW Task Team report reveals that there was no coordination between these departments to determine appropriate budget for the project, hence the initial cost was R27-million without taking into account the costs of the needs of the departments responsible for the president's security (DPW, 2014). The Public Protector found that the reason for not following proper procurement procedures by those involved was the fact the project was for the urgent need for the security of the president (Public Protector, 2014). The flouting of the procedures included ignoring the requirement that for costs exceeding R20 million, a Special National Bid Adjudication Committee to approve a project which costs above. Instead of following this important requirement the DPW delegated to the KwaZulu-Natal regional office

an unlimited and unconditional authority to deal with this project (Public Protector, 2014).

The Public Protector also found that there was no proper planning and budgeting, nor there were clear boundaries for this important project (Public Protector, 2014). Instead the government opened a way for “a license to loot” because the organs of state involved failed to manage the process as required (Public Protector, 2014, p. 37). The Public Protector found a number of items that were not related to a security upgrade of the president’s private residence including the visitor’s centre, cattle kraal, chicken run, amphitheatre, marquee area and the swimming pool. The president’s family was found to have improperly benefitted from the upgrades (Public Protector, 2014). It is worth noting that that the DPW Task Team report rejects that what there is an amphitheatre and stated that the swimming pool was actually a fire pool which was a security measure against fires (DPW, 2014).

Thirdly, the Public Protector found that various public office bearers and officials were implicated in the maladministration and improper conduct during the project. These officials included the (previous and current) Ministers in the DPW (for providing “incorrect information on the legal authority and extent of the works of the president’s private residence”, Public Protector, 2014, p. 58); the Minister of Police (for not properly applying his mind when he declared that the Nkandla residence was a national key point); the officials of the DPW, the SAPS and the DOD (for not acquainting themselves with the relevant laws and policies). The President was also found to have “failed to discharge his responsibilities [as the ultimate guardian of public power and state resources]” (Public Protector, p. 65). In this regard, the Public Protector found that the president’s failure to take reasonable steps resulted in the violation of the Executive Ethics Code and was inconsistent with his office as contemplated in the Constitution (Public Protector, 2014).

The Public Administration and Public Servants and their role in the Nkandla project

In South Africa bureaucrats fall under the public administration that is central to the implementation of the decisions and policies of the executive branch (Bekink, 2012). In this regard, the Constitution established the public administration and the

principles that will guide it (Constitution, 1996, section 195). Public servants are expected to perform their duties in accordance with the following: they must exercise a high standard of professionalism and ethics; they must be development-oriented; they should respond to people's needs; they must encourage public participation in policy-making; and must be accountable (Constitution, 1996, section 195(1)(a)–(i)).

To ensure adherence to these values and principles, the Constitution establishes an independent and impartial Public Service Commission (PSC) (Constitution, 1996, section 196) in order to maintain “effective and efficient public administration and a high standard of professional ethics in the public service” (Constitution, 1996, sections 195(2)). The PSC's powers include monitoring and investigating adherence to applicable procedures in the public service (Constitution, 1996, section 196(4)(f)(iii)), and also possesses the power to investigate “any matter” including corruption allegations (Public Service Commission Act, 1997, section 10(1)). Although the PSC's role is critical in the Nkandla Project as evidenced by the provisions mentioned above regarding the public service, there is no known PSC investigation or report that has been published in this regard.

This research also examine the role and powers of the bureaucrats involved in the Nkandla Project, especially those who hold senior positions such as the director-generals and report to the political masters (cabinet ministers). The idea is to ascertain whether these bureaucrats have any kind of power to make decisions and to go as far as to act independently of their political masters in order to ensure compliance with policies and laws pertaining to procurement, even if it is for the benefit of the president. In this regard, Fukuyama (2013) advances three kinds of bureaucrats: first, the autonomous bureaucrats, who can perform their functions independently of their political masters; second, the semi-autonomous bureaucrats, who have some degree of autonomy and at the same time they do not act in isolation and they are open to criticism and feedback from those they are serving; and lastly, the non-autonomous bureaucrats, who cannot act independently from their political masters (who micromanaged them) and they lack any kind of discretion when exercising their set mandates.

An ideal bureaucrat would be someone who holds some kind of autonomy to be able to have discretion to ensure that the laws are not flouted in order to get the

president a huge mansion on the tax payers' coffers. Kim (2007, p. 34) argues that "interactions among political institutions create conditions under which policy implementers of the agency can simultaneously exhibit the behavioural characteristics of both political responsiveness and bureaucratic autonomy". Therefore, bureaucrats can strategize and be able to maneuver amongst competing and divided political institutions to make policy choices. But then again this depends on the existence of competing and divided political institutions.

Is South Africa heading towards Presidentialism?

The main research question that this research seeks to answer is whether the president (in)directly influenced the institutions involved in the Nkandla Project. The powers and limitations of the president according to the Constitution have been explained above. However, the political reality of SA is that one-party dominance often overshadows processes meant to be democratic (Maseng, 2014). Indeed, recent events surrounding the Nkandla Project lead one to assume that president holds enormous powers than he constitutionally possesses. The question is whether this should of concern is not so much about the power about what this possession of these powers mean for the future of South Africa when the power is centred on the person of the president (Ndulo, 2001). Van Cranenburgh (2008) argues that excessive concentration of power in the President or the executive is a serious cause for concern, because it may lead to presidentialism.

Presidentialism is defined as the power "intensely personalized around the figure of the president". Presidentialism can even take place in countries with liberal democracy that has a constitution and clearly defined powers Van de Walle (2003, p.310). Accordingly (Van de Walle (2003, p. 310)),

Regardless of their constitutional arrangements, it is also a fact that power is intensely personalised around the figure of the president. ... He is literally above the law, controls in many cases a large proportion of state finance with little accountability, and delegates remarkably little of his authority on important matters.

In countries where there is presidentialism the corruption increases and the formal institutions become weak (Bratton, 2007; Asante, 2012).

Professor Ndulo (2001) further observes that the monumental powers and the dominance of the political system as a consequence are the most striking features of

the presidency in African states. As a result, the presidential power remains inadequately checked, and the executive branch of government becomes a super branch and other branches become subordinates. Further, the presidency tends to intensify personal rule, adopt authoritarian measures and repress competitive and effective opposition and restrict free political activity at all levels of society. However, according to Ndulo (2001), South Africa an exception as it has effective constitutional checks and balances and South Africa serves as a good example to other African states. He also observes the fact that the South African president and his cabinet are accountable to the National Assembly collectively and individually. As one reads about the events surrounding the excessive use of state funds towards security upgrades and further constructions to extend the private residence of the president, one cannot help but wonder if Ndulo's assertions still hold true. The assumption is that under the current leadership, South Africa is heading towards presidentialism. The assumption is based on the analysis discussed below.

So far the analysis of the events concludes that the public office bearers, who are members of the executive and the various senior department officials, flouted various policies and the laws including the Constitution to ensure that the president's residence was upgraded. The research also concludes that that there was corruption involved in the Nkandla project government. One of the many definitions of corruption includes the "use of public funds for private gain" (Doig, 1995; Madonsela, 2010). This is also evidenced by the findings of the Public Protector that the President and his family improperly benefitted from this project and that the president failed to discharge his duties as the ultimate guardian of the public resources. He did not ask any questions in relation to the Nkandla Project. One would expect that the president would ask questions when he finds his private residence being expanded to such great lengths, and would ask questions to his subordinates about the use of public funds in this instance. This is especially so, when the *M & G* started asking questions about the project and later publishing stories about it from 2009 when the amount was still relatively low (R65-million) (De Wet, 2014).

South Africa has the formal institutions such as the rule of law that puts limits to the exercise of power by the executive power (Bratton, 2007; Lindberg, 2007) and has other institutions established to strengthen the democracy and to hold the executive accountable (Constitution, 1996). Somehow, these institutions did not

seem to matter to these officials during the Nkandla Project. There are three problems that this research foresees relating to this: firstly, the non-autonomous bureaucrats who rely to their political masters for direction when performing their functions; secondly, the excessive power of the executive that seems to dominate the legislature to which it should account; and lastly, the president, on his own, also holds excessive power.

In relation to bureaucrats, it is clear that they took disregard of the rule of law (the Constitution and relevant legislation) to ensure the continuation of the Nkandla Project. They relied on their political masters who define and design how bureaucrats should conduct service delivery (Mc Lennan, 2007). One therefore questions the role played by these bureaucrats in achieving the ideals envisaged in the Constitution to make South Africa better than it was before 1994. This also does not resemble the bureaucrats envisaged by the Constitution which requires them to follow ethical values and principles including accountability (Constitution, 1996, section 195). With some kind of autonomy these bureaucrats would be able, for example, to ask questions about the use of public funds for private gain and to follow the proper procurement procedures. It is in this regard that academic writers have correctly advanced an argument for the semi-autonomous status bureaucrats (Fukuyama, 2013; Kim, 2007).

Secondly, “the rules of the game” (North, 1990) require the legislature to hold the president accountable to it and to explain the decisions taken (Constitution, 1996). However, because the executive members are also members of the National Assembly, this makes it difficult for the National Assembly to hold the executive accountable (Pieterse, 2004, p. 383, noting that “in South Africa than elsewhere, the legislature has become the least powerful branch of government”; Motala, 1995). For example, various ministers are implicated and were found to have committed maladministration in the Nkandla Project (Public Protector, 2014), however, it is doubtful that the National Assembly will hold them to account.

This is also evidenced by the recent move by the ANC members of the National Assembly to elect Zuma’s loyalist, Baleka Mbete, as the Speaker of the National Assembly to ensure that the Nkandla Project and the surrounding issues are buried (News24, 2014). Max Sisulu, the former Speaker was released of his duties after the fifth elections on the rumours that the ANC was not happy that he

established an *ad hoc* committee to deal with the report of the Public Protector (SAPA, 2014). Columnists are therefore convinced that Mbethe will make sure that the president is not held accountable. One may then wonder if the legislature is not abandoning its constitutional mandate to hold the president and the members of the executive accountable. That is why one can then argue that because of the domination of the ANC both in the executive and the legislative branches of government and therefore the balance of power is tipped in favour of the executive ((Van de Walle, 2003; Bratton, 2007; van Cranenburgh, 2008, van Cranenburgh 2011; Lynch and Crawford, 2011).

The Nkandla Project shows that the president holds enormous powers over various officials involved in the Nkandla Project, and this resulted in the proper enforcement of the constitutional and legislative provisions (Kumssa and Mbeche, 2004). This, is further demonstrated by the fact that not too long ago, the Constitution and the relevant laws were also ignored in another incident that involved the landing of a private plane in our national Air Force Base Waterkloof in 2013, all in the name of the President to make sure that President's family friends, the Guptas, were happy at the. Amongst the cries and anger from the public, the president claimed to have had nothing to do with that incident, the same response the president is giving in relation to the Nkandla Project – that he knew nothing about it (Motumi, 2014). However, it is worth mentioning that the President has recently asked the Speaker of the National Assembly for an extension as he is studying the various reports on the Nkandla Project (The Presidency, 2014a).

Outside the formal institutions of government the executive is also powerful as the president and majority of ministers are also members of the ANC. It has been correctly argued that the constitutions do not regulate the role of the political parties and therefore political parties; though they play an integral part in a democracy they are left on their own to decide how they influence their leader whose powers are also prescribed in the constitution as a formal institution (Stokes, 1999). This leaves the relationship between the president and the majority political party unregulated. Therefore, there is a distorted line between the separation of state and the party at the executive level. The fact that the executive formulates and implements policies that originate from the ANC conferences also plays a role in this problem (AfriMAP and Open Society Foundation for South Africa, 2006).

This further explains why the ministers implicated in the Nkandla Project disregarded the rule of law and relevant policies to ensure that the project continued. It also explains why in various media the ministers and the ANC secretary general went to great lengths to protect the president to the point of attacking the president (these facts are well presented in various media in South Africa, both in print and visual media). This phenomenon of presidentialism is not unique to South Africa, states who have the same institutions as ours trend to have a similar problem. It is argued that the problem lies with the fact that the members of the cabinet are also members of the National Assembly (Asare, 2012). Ordinarily, this arrangement is supposed to minimise the powers of the executive, but in African states it instead strengthens this power as those members of the National Assembly who are appointed as the ministers do everything they can to stay in power (Asare, 2012; Ndulo, 2001).

Conclusion

In his research on presidentialism in southern Africa, Professor Ndulo (2001) concluded that southern African save for South Africa states have presidentialism. He appraised South Africa for being a good example of a country with institutions that include a constitution, independent institutions to support democracy and the set and clear powers of the president, the executive and the legislature. However, the current research findings have found otherwise. This research has found that during the Nkandla Project, traces of presidentialism in South Africa President are evident irrespective of the processes and requirements laid down by the Constitution. Further, this research has shown that the majority party plays a role and is influential in policy-making and especially in the Nkandla Project as the ministers are doing all they can to please the president, only because they want to keep their jobs and because they too belong to the majority party. This was also shown by discussing the role played by the bureaucrats who have to abide by their political masters' wishes even when the political master has not expressly demanded what need to be done.

One could then ask what the solution should be to this problem. The brief response is that this is a complicated issue which needs debate on the mandate of the National Assembly and an open mind. The research is ongoing.

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