

‘Coercing Virtue’ in the Constitutional Court: Neutral Principles, Rationality and the *Nkandla* Problem

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The world does not expect logic and precision in poetry or inspirational pop-philosophy; it demands them in the law. The stuff contained in today’s opinion has to diminish this Court’s reputation for clear thinking and sober analysis.¹

I INTRODUCTION

The outcome in the *Nkandla* judgment² will have pleased many in society. Justice, some will have thought, had been achieved – in a matter which as the President’s counsel put it, had ‘traumatised the nation’.³ For those who are interested in politics, the judgment is refreshing. Yet, for those of us whose principal interest is the need for consistency and neutrality in constitutional adjudication, the ruling is deeply disheartening.

From the outset, I need to state my belief that the Court’s decision lacks substance and rigour. In my opinion, the judgment reads more like a pastoral and sermonic musing than a well-reasoned decision of the most senior court in South Africa. It is a quintessential example of an ‘outcome-based’,⁴ ‘mock-Solomonic’⁵ and consequentialist decision. Judges, I might add, are not ordinarily expected to have Holmesian⁶ writing skills, but since the most meaningful way of holding

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¹ See Scalia J (dissenting) in *Obergefell v Hodges* 135 S Ct 2584, 2629 (2015).

² *Economic Freedom Fighters v Speaker of the National Assembly* [2016] ZACC 11, 2016 (3) SA 580 (CC), 2016 (5) BCLR 618 (CC) (‘*Nkandla*’).

³ The President’s counsel made this statement during oral argument at the Constitutional Court hearing on 9 February 2016.

⁴ J Lewis ‘The Constitutional Court of South Africa: An Evaluation’ (2009) 125 *Law Quarterly Review* 440, 443.

⁵ *Ibid.* A ‘mock-solomonic’ decision is one characterised by apparently patronising or paternalistic and sanctimonious language and tone.

⁶ By ‘Holmesian’, I am referring to the United States’ Justice Oliver Wendell Holmes Jnr and South Africa’s Judge George Neville Holmes. Both jurists were notorious for their excellent writing skills and clarity of thought. For an account of the latter’s abilities see E Kahn *Law, Life and Laughter Encore: Legal Anecdotes and Portraits from Southern Africa* (1999) 132–133.

judges accountable is through their judgments, one expects Constitutional Court judgments to exhibit consistent, clear and concise legal reasoning.⁷

This is important for another two reasons. First, as the highest court in the land, its judgments bind all other courts.⁸ Second, the Court is loath to overturn its own decisions, even if it is wrong. The Court takes the view that judgments must *clearly* be wrong.⁹ With all this on the table, it seems fair to say that the Court is obliged to take great care to ensure that it issues well-reasoned, lucid and clear judgments. My point is that it is one thing for judgments to be wrong as a matter of law; it is quite another for them to be replete with broad platitudes yet lacking consistency in reasoning.

I must now defend my strong claims. I will start by saying what this article is *not* about. It is not about whether the Constitutional Court's decision in *Nkandla* was a morally or socially desirable one. Instead, this article is about whether the reasoning of the court was based on neutral legal principles rather than on the Court's desire to achieve public good. My main focus is on the reasoning of the Court; that is, the justifications it gives for its conclusions. I intend to show that these justifications are devoid of sufficient legal substance, rigour and clarity.

My critique of the Court's reasoning will heavily rely on the concept of 'neutral principles of law' as coined or popularised by Professor Herbert Wechsler in his famous Holmes lecture 'Towards Neutral Principles of Constitutional Law'.¹⁰ As I will explain, Wechsler's main argument was that judges should decide cases based on neutral principles, which are objective, apolitical legal standards that 'transcend the case at hand'¹¹ Neutral principles are also criteria that can be said to arise from reasoned judgement and not merely from judicial fiat or the pursuit of personal predilections.¹²

I draw my inspiration from Prof Wechsler's arguments because I find myself in a similar situation to him when he felt compelled to make the arguments he did in his lecture. By this, I mean that I welcomed the outcome in *Nkandla* as a citizen, but I dislike it as a scholar.¹³ In Wechsler's case, he was dealing with a

⁷ J Gauntlett 'The Sound of Silence?' (2011) *Journal of South African Law* 226, 227. The author criticises the Court for its track record of producing judgments that are neither well-reasoned nor clear and precise.

⁸ *Paulsen v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5, 2015 (3) SA 479 (CC), 2015 (5) BCLR 509 (CC) at para 13.

⁹ See *Turnbull-Jackson v Hibiscus Court Municipality* [2014] ZACC 24, 2014 (6) SA 592 (CC), 2014 (11) BCLR 1310 (CC) at para 57; *Department of Transport v Tasima (Pty) Limited* [2016] ZACC 39, 2017 (2) SA 622 (CC) at para 226 ('*Tasima*'). See too *Laubscher v Duplan* [2016] ZACC 44, 2017 (2) SA 264 (CC) at paras 59–87 (Froneman J, in a lone concurring judgment, effectively accuses the majority of refusing to overturn a decision which he believes is wrong.) See too J Brickhill 'Precedent and the Constitutional Court' (2010) 3 *Constitutional Court Review* 79; T Ngcukaitobi 'Precedent, Separation of Powers and the Constitutional Court' 2012 *Acta Juridica* 148; M Wallis 'Whose Decisis Must We Stare?' (2018) 135 *South African Law Journal* 1 at 16–17.

¹⁰ The lecture was later published in the *Harvard Law Review*. See H Wechsler 'Towards Neutral Principles of Constitutional Law' (1959) 73 *Harvard Law Review* 1.

¹¹ *Ibid* at 15.

¹² *Ibid* at 11.

¹³ I am sure every right-thinking citizen would be pleased with the Court ordering a President to reimburse the state where he is found to have benefitted unduly from excessive expenditure on his home at the taxpayer's expense. Therefore, to be clear, I write this article wearing my legal hat and not my citizen's hat.

number of US Supreme Court decisions, primarily *Brown v Board of Education*¹⁴ (a case now widely regarded as the Supreme Court’s most celebrated decision on the unconstitutionality of segregated public schools for white and black learners).¹⁵ Wechsler appears to have thought *Brown* was a progressive decision, and therefore liked it but he was concerned that it may have been based on the judges’ personal predilections rather than an objective application of law. It is in this sense that I think Wechsler and I share common ground.

Having outlined aspects that motivate my argument, what follows is an attempt to show why a measure of neutrality is not only necessary but also an imperative in South African constitutional adjudication. As stated, I will do so primarily through the lens of the *Nkandla* judgment. In Part I, I discuss the meaning of Wechsler’s neutral principles and my general views on the proper approach to constitutional adjudication. In Part II, I discuss the nature of the Public Protector’s Office and the role it plays in our constitutional democracy. I then proceed to outline the facts surrounding her investigation into the *Nkandla* issue, together with a synopsis of her findings. I also discuss the events that precipitated the *Nkandla* litigation, together with the gist of the outcome in the case. This is followed by a further discussion of the High Court’s decision in *SABC I*,¹⁶ which forms an important part of my examination of the *Nkandla* decision, as the Constitutional Court emphatically rejected its *ratio*. Then, in Part III, I discuss how rationality as a concept is understood in South African constitutional law. In so doing, I explain the nexus between rationality and neutral principles with a view to arguing that rationality constitutes a prime neutral principle. Part IV then sets out how the *Nkandla* Court failed to apply neutral principles in its reasoning, with the inevitable finding that the decision is therefore an unprincipled one. Finally, in Part V, I offer some concluding remarks.

II NEUTRAL PRINCIPLES: A CONSTITUTIONAL IMPERATIVE

As stated previously, Wechsler (and later, other writers, including Robert Bork and Kent Greenawalt) pioneered the principle of neutrality as a constitutional imperative in adjudication in his famous, yet controversial, Holmes lecture.¹⁷ Wechsler addressed the legitimacy of judicial review, in particular, his concern that the US Supreme Court was ‘coercing virtue’¹⁸ in that it was exercising its

¹⁴ *Brown v Board of Education of Topeka* 347 US 483 (1954) (‘*Brown*’).

¹⁵ See B Friedman ‘“Neutral Principles” A Retrospective’ (1997) 50 *Vanderbilt Law Review* 503, 507.

¹⁶ *Democratic Alliance v South African Broadcasting Corporation* [2014] ZAWCHC 161, 2015 (1) SA 551 (WCC) (‘*SABC I*’).

¹⁷ See Wechsler (note 10 above). The article is one of the most cited law review articles of all time; See F Shapiro & M Pearse ‘The Most Cited Law Review Articles’ (2012) 110 *Michigan Law Review* 1483, 1489. Notably, Sunstein refers to the article as the ‘most celebrated essay in all of constitutional law’. C Sunstein ‘Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion and Surrogacy)’ (1992) 92 *Columbia Law Review* 1, 5.

¹⁸ The term ‘coercing virtue’ is taken from the title of Judge Robert H Bork’s brisk but lucid book on judicial activism. Bork accused the US Supreme Court of abandoning its task as a neutral arbiter of disputes and taking sides in cultural wars through enacting in law the social agenda of liberals. That, he argued, was a coercion of virtue. See RH Bork *Coercing Virtue: The World-wide Rule of Judges* (2003).

judicial powers in an unprincipled manner.¹⁹ By criticising some of the court's decisions,²⁰ Wechsler argued that in order to exercise legitimate judicial power, courts should apply what he termed 'neutral principles' when deciding cases.²¹ He argued that neutrality inter alia required the formulation of adjudicative principles that were consistent and apolitical. Such principles, he argued, were ones that should be 'framed and tested as an exercise of reason and not merely as an act of wilfulness or will'.²²

Wechsler's primary motivation was his concern that the Supreme Court was deciding cases based not on general and transcendent principles of law but on the identities of the parties and on what the consequences of a decision would be.²³ This bothered him because as far as he was concerned, a judge should not be swayed by the potential consequences of his decision.²⁴ The essence of his thesis is well-captured by Martin Shapiro, who says that, for Wechsler, a judge

[m]ust content himself with the reasonable application of general principles to particular fact situations. This is not to say that the judge may not look beyond the case before him. Indeed, the insistence that the judge must take the long view is the hallmark of neutral standards. But the long view he is to take is not of the practical consequences of his decision but the long run viability of the standards he enunciates.²⁵

In essence, Wechsler was of the view that judges should not invent legal principles in order to deal with a particular dispute. This, he charged, would be *ad hoc* adjudication²⁶ since it would be tantamount to deciding cases based solely on their political and social predilections. In order to avoid this type of unacceptable judging, Wechsler argued that courts must develop and apply general principles. Courts, he said, should decide cases on grounds of 'adequate neutrality and generality, tested not only by the instant application but by others that the principles imply'.²⁷ A principled decision, he added, 'is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and neutrality transcend any immediate result involved'.²⁸

¹⁹ Wechsler (note 10 above) at 20.

²⁰ *Ibid* at 22.

²¹ Wechsler's main attack was directed at *Brown*, which he argued presented a conflict between two associational preferences: the desire by black students to attend school with white students versus the desire by white students to attend school without blacks. Wechsler argued that there was no principled basis upon which the court could have chosen one over the other. See Wechsler (note 10 above) at 31–34.

²² In saying this, Wechsler appears to have been motivated by Alexander Hamilton's declaration in the Federalist Paper No 78 ('[T]he judiciary has [and must apply] neither force nor will but merely judgment.')

²³ Wechsler (note 10 above) at 33–34.

²⁴ In making this assertion, he appears to have been influenced by Justice Benjamin Cardozo's remarks in *Re Rouss* 116 NE 782, 785 (1917) ('Consequences cannot alter statutes, but may help to fix their meaning.') Scholars often cite Justice Cardozo's remarks when arguing that a judge is unprincipled for being too preoccupied with the consequences of his decisions.

²⁵ M Shapiro 'Supreme Court and Constitutional Adjudication: Of Politics and Neutral Principles' (1962) 31 *George Washington Law Review* 587, 592.

²⁶ Wechsler (note 10 above) at 12.

²⁷ *Ibid* at 15.

²⁸ *Ibid* at 19.

The generality requirement, Wechsler argued, requires that the principles that form the basis of a decision must reach beyond the narrow facts and circumstances of a particular case. In this regard, Greenawalt explains that ‘if an opinion is so [focused] on the facts of a case that it gives little or no guidance as to how related situations would be treated, then the opinion fails the generality criteria’.²⁹ Wechsler’s views elicited widespread academic and judicial responses, both positive and negative.³⁰ In this regard, I must reiterate that I am aware that his views, which are widely regarded as positivist, may be thought by some to be inapposite in the South African constitutional matrix.³¹ For reasons articulated below, I beg to differ.

The call for more neutral reasoning in adjudication is also motivated by a concern that increasingly the South African legal psyche holds out that the courts are social and political forums.³² Indeed, there has been a suggestion by some in legal and political circles that because the other political branches are dysfunctional, the courts have somehow become a legitimate last resort. This view is misconceived. Not only will it lead to the delegitimation of the judiciary (because it will be regarded as just another political institution) it also deprives the people of certain liberties,³³ and leads to what Raoul Berger aptly termed ‘government by judiciary’.³⁴ My concerns in this regard are heavily influenced by an observation made by Justice John Marshall Harlan II in his instructive dissent in *Reynolds v Sims*, where he said:

[There is] a current and mistaken view of the Constitution and the constitutional function of the US Supreme Court. This view, in short is that every major social ill in this country can find its cure in some constitutional principle and that this court should take the lead in promoting reform when other branches fail to act. The Constitution is not the panacea for

²⁹ K Greenawalt ‘The Enduring Significance of Neutral Principles’ (1978) 78 *Columbia Law Review* 982, 987.

³⁰ C Black ‘The Lawfulness of the Segregation Decisions’ (1960) 69 *Yale Law Journal* 421; L Pollack ‘Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler’ (1959) 108 *University of Pennsylvania Law Review* 108; B Wright ‘The Supreme Court Cannot Be Neutral’ (1962) 40 *Texas Law Review* 599; V Countryman ‘The Constitution and Job Discrimination’ (1964) 39 *Washington Law Review* 74; Friedman (note 15 above) at 507; W Horton ‘Neutral Principles of Law and *Sheff v O’Neil*’ (1998) 30 *Connecticut Law Review* 219; R Turner ‘On Neutral and Preferred Principles of Constitutional Law’ (2014) 74 *Pittsburgh Law Review* 433.

³¹ Judge Dennis Davis is an avid critic of legal positivism and argues that it is constitutionally inappropriate in South Africa. See for example D Davis ‘The Twist of Language and the Two Fagans: Please Sir May I Have More Literalism!’ (1996) 12 *South African Journal on Human Rights* 504; D Davis ‘How Many Positivist Legal Philosophers can be made to Dance on the Head of a Pin? A Reply to Professor Fagan’ (2012) 129 *South African Law Journal* 59.

³² See Davis J’s comments in *Mazibuko v Sisulu* [2012] ZAWCHC 189, 2013 (4) SA 243, 256 (WCC); and *Mazibuko v Sisulu* [2013] ZACC 28, 2013 (6) SA 249 (CC), 2013 (11) BCLR 1297 (CC) at para 83.

³³ Every time a court settles a highly political dispute, it deprives the citizenry of the right to resolve that issue through other democratic processes, such as the ballot box. It limits the people’s ability to exercise ‘active liberty’. See S Breyer *Active Liberty: Interpreting our Democratic Constitution* (2005); F Cachalia ‘Separation of Powers, Active Liberty and the Allocation of Resources: The E-Tolling Case (2015) 132 *South African Law Journal* 285.

³⁴ See R Berger *Government by Judiciary: The Transformation of the Fourteenth Amendment* (1977) (Condemns numerous decisions of the US Supreme Court as examples of judicial overreach and undue activism. These arguments were developed further in his seminal article entitled ‘Constitutional Interpretation and Activist Fantasies’ (1993) 82 *Kentucky Law Journal* 1.)

every blot of public welfare nor should this court, ordained as a judicial body, be thought of as a general haven for social reform.³⁵

It is true that in the age of ‘transformative constitutionalism,’³⁶ with all its lofty promises about social and economic revolutions through law,³⁷ it may be thought that my restrained approach and yearning for the application of neutral principles (read together Justice Harlan II’s remarks) is inappropriate in the South African context.³⁸ I disagree. My views are similar to those held by some of our country’s leading jurists.³⁹ For example, only recently, Justice Wallis said:

[T]here is a grave difficulty if we pretend that every ... problem can find its solution in the provisions of the Constitution. It risks devaluing our most prized legal instrument as every disappointed litigant treats its terms as a grab bag into which they can dip in the hope of receiving relief from our highest court. That is a path that should be actively discouraged and eschewed by the courts.⁴⁰

The potential abuse of the Constitution by both litigants and the courts motivate me to call for restraint through urging interpreters of the law to engage in neutral and principled reasoning, as opposed to approaches that are outcomes based.

The call for neutral, principled and consistent adjudication is, in my view, timely for another reason. The number of dissenting judgments in the Constitutional Court is increasing and it is clear that the differences between the judges’ views

³⁵ *Reynolds v Sims* 377 US 533, 589 (1964). See too W Rehnquist ‘The Notion of a Living Constitution’ (1976) 54 *Texas Law Review* 693.

³⁶ K Klare ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *South African Journal on Human Rights* 146, 150; P Langa ‘Transformative Constitutionalism’ (2006) 17 *Stellenbosch Law Review* 351, 351–355; J Froneman ‘Legal Reasoning and Legal Culture: Our “Vision” of Law’ (2005) 3 *Stellenbosch Law Review* 4; D Moseneke ‘Fourth Bram Fischer Memorial Lecture: Transformative Adjudication’ (2002) *South African Journal on Human Rights* 309.

³⁷ Klare (note 36 above) at 150 (‘By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed ... to transforming a country’s political and social institutions and power relationships in a democratic, participatory and egalitarian direction ... Transformative constitutionalism connotes an enterprise of inducing large scale social change through nonviolent political processes grounded in law.’)

³⁸ See S Liebenberg *Socio-economic Rights Adjudication under a Transformative Constitution* (2009) 44–49. The author appears to suggest that Wechsler’s neutral principles are inapposite in the South African context. This, she argues, is because they require a formalistic and value-free approach to adjudication. She is, in my view, mistaken. Wechsler thoroughly appreciated that adjudication cannot be completely value-free and that absolute neutrality was impossible. He however urged judges to strive towards neutrality as far as they can. For an explanation of my point, see L Ackermann ‘Constitutional Comparativism in South Africa’ (2006) 123 *South African Law Journal* 497, 515–516.

³⁹ See, for example, L Ackermann *Human Dignity: Lodestar for Equality in South Africa* (2012) 288 (The author, a former Constitutional Court judge, embraces Wechsler’s neutral principles and argues that in the realm of South African equality law, human dignity should be the neutral principle that guides constitutional interpretation and adjudication.)

⁴⁰ M Wallis ‘The Common Law’s Cool Ideas for Dealing with Ms Hubbard’ (2015) 132 *South African Law Journal* 940.

are becoming sharp and heated.⁴¹ Importantly, most of these judgments differ on substantive principle rather than mere factual disagreements.⁴² As such, the need for consistency is made greater by the fact that members of the Court are themselves calling each other out for failing to be neutral and consistent in adjudication.⁴³ My call for neutral adjudication might not take South African jurisprudence to where we want it to be, or should be, but it is certainly a good starting point.

I should add that my call for neutrality does not mean a return to the apartheid era’s overly formalistic adjudication methods, which were often divorced from context and reality.⁴⁴ Neutral principles are not, as Bork in the US⁴⁵ and Ackermann⁴⁶ in South Africa have pointed out, completely valueless or rights limiting. Neutral principles are therefore not inconsistent with our constitutional project.⁴⁷ Moreover, neutral and principled adjudication is consistent with the tenets of the rule of law, a foundational value of our democracy, not least because it fosters legal predictability and certainty.⁴⁸

Having explained what neutral principles are, and why I believe South African judges would be well placed to adhere to them, I shall now turn to a discussion of the circumstances and legal context out of which *Nkandla* emerged.

III THE *NKANDLA* PROBLEM

In sketching the background from which the *Nkandla* judgment emerged, it is necessary to understand the role that the Office of Public Protector plays (alongside six other institutions established in terms of Chapter 9 of the Constitution) in supporting and strengthening South Africa’s constitutional democracy.⁴⁹ In particular, this institution is independent and subject only to the Constitution⁵⁰

⁴¹ See *Tasima* (note 9 above) at paras 221–223 and 231, in particular the judgments of Zondo and Froneman JJ and the manner in which they disagree. See too *City of Tshwane Metropolitan Municipality v Afriforum* [2016] ZACC 19, 2016 (6) SA 279 (CC) in particular the concurring judgment of Jafta J and the dissent by Cameron and Froneman JJ. The judges exchange harsh words, with the dissenting justices effectively claiming that Jafta J accuses them of harbouring racist sympathies, see para 29 (‘It is a grave insinuation that we seek to justify the protection of cultural rights under the guise of racism.’)

⁴² See too *Economic Freedom Fighters v Speaker of the National Assembly* [2017] ZACC 47, 2018 (2) SA 571 (CC) at para 223 (Mogoeng CJ, dissenting, refers to the majority judgment as a ‘textbook case of judicial overreach’)

⁴³ See *Tasima* (note 9 above) at para 221.

⁴⁴ Most opponents to the adoption of ‘neutral principles’ in South Africa, often (wrongly) assume that it would lead to apartheid-era type adjudication. See P De Vos ‘A Bridge too Far: History as Context in the Interpretation of the South African Constitution’ (2001) 17 *South African Journal on Human Rights* 1, 3–5.

⁴⁵ R Bork ‘The Constitution, Original Intent and Economic Rights’ (1986) 23 *San Diego Law Review* 823.

⁴⁶ L Ackermann ‘Equality and the South African Constitution: The Role of Dignity’ (2000) 60 *Heidelberg Journal of International Law* 537.

⁴⁷ *Ibid.*

⁴⁸ See *Ex Parte Minister of Safety and Security: In Re S v Walters* [2002] ZACC 6, 2002 (4) SA 613 (CC) at para 57; K Malan ‘The Rule of Law Versus Decisionism in the South African Constitutional Discourse’ (2012) 45 *De Jure* 272. See too R Bork ‘Styles in Constitutional Theory’ (1985) 26 *South Texas Law Journal* 383.

⁴⁹ Constitution s 181(1).

⁵⁰ Constitution s 181(2).

and is required to exercise its duties impartially and to perform its functions without fear, favour or prejudice.⁵¹ Suspected unethical and improper conduct (such as maladministration) is subject to this Public Protector's investigatory powers. Once an investigation is finalised, the Public Protector must produce a report.⁵² Importantly, the Public Protector is not a 'passive adjudicator between citizens and the state, relying upon evidence that is placed before him or her before acting' and may thus (in the course of preparing a report) be expected to take positive action in certain circumstances.⁵³ For this reason the Constitution empowers the Office 'to take appropriate remedial action'.⁵⁴ In short, the Public Protector is a constitutionally recognised watchdog⁵⁵ who is responsible for investigating state organs to ensure that they practice good governance⁵⁶ and that there is an 'effective public service which maintains a high standard of professional ethics'.⁵⁷ Important to note when examining the *Nkandla* problem is that s 181(5) of the Constitution states that the Office is 'accountable to the National Assembly, and must report on [its] activities and performance of [its] functions to the Assembly'.⁵⁸ Moreover, the Office's constitutionally sourced powers and functions are supplemented by national legislation,⁵⁹ particularly the Public Protector Act.⁶⁰ This legislation elaborates on the powers and administrative functions of the Office. Having briefly explained the nature of the Public Protector's Office, I now turn to discuss the events and subsequent litigation surrounding the *Nkandla* debacle.

During 2011, the then Public Protector, Thuli Madonsela, launched an investigation into allegations of corruption and impropriety concerning the installation and upgrading of security facilities at the private residence of former President Zuma. This was after several South Africans, including a member of Parliament, complained that state resources were being abused in order to benefit the President's private interests.⁶¹ It was also alleged that there was no legal basis for the upgrades or that even if such authority existed, it was excessive and constituted unacceptable expenditure.⁶² It was further alleged that procurement

⁵¹ Ibid.

⁵² Constitution s 182 (1)(b).

⁵³ Ibid.

⁵⁴ Constitution s 182(1)(c). For an interesting discussion on the import of the words 'appropriate remedial action' see L Wolf 'The Remedial Action of the "State of Capture" Report in Perspective' (2017) 20 *Potchefstroomse Elektroniese Regsblad* 1.

⁵⁵ See generally CJ Tchawouo Mbiada 'The Public Protector as a Mechanism of Political Accountability: The Extent of its Contribution to the Realisation of the Right to Access Adequate Housing in South Africa' (2017) 20 *Potchefstroomse Elektroniese Regsblad* 1.

⁵⁶ Constitution s 182(1).

⁵⁷ *Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26, 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 161.

⁵⁸ Constitution s 181(5).

⁵⁹ Constitution s 182(2).

⁶⁰ Act 23 of 1994.

⁶¹ Office of the Public Protector *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* (2014) ('*Secure in Comfort Report*') 8.

⁶² Ibid.

processes had been flouted and that this had resulted in wasteful expenditure and that the President was guilty of unethical behaviour for his complicity in the project.⁶³

In March 2014, the Public Protector issued her landmark *Secure in Comfort* Report. She found that the expenditure by the state had been reckless and opulent, particularly in respect of the non-security upgrades. In this regard, she found that the state had flouted procurement processes and that the former President had misled Parliament by saying that his family had built its own houses in their Nkandla homestead and that the state ‘had not built any for it or benefited them’.⁶⁴ The Public Protector described the President’s contentions as ‘not true’.⁶⁵ She also found the President guilty of violating the Executive Members’ Ethics Act⁶⁶ (read with the Executive Ethics Code) in that he failed to ‘act in protection of state resources’.⁶⁷ This, she said, constituted conduct inconsistent with his duties as a member of the Cabinet and, therefore, by necessary consequence, a violation of s 96 of the Constitution.⁶⁸

In sum, the Public Protector found that the President had failed to act in accordance with his constitutional fiduciary duties by accepting undue benefits flowing from the improper use of state resources.⁶⁹ In line with her powers to take appropriate remedial action,⁷⁰ she directed the President to pay back a fair portion of the money spent on the residence.⁷¹ She further directed that he determine this amount with the assistance of the National Treasury and the South African Police Service (SAPS).⁷² The President was also ordered to reprimand the cabinet ministers who were involved for their reckless handling of the project.⁷³ Additionally, the President was directed to report to the National

⁶³ Ibid.

⁶⁴ Ibid at 438.

⁶⁵ The Public Protector, however, conceded that the President’s misleading of Parliament may have been unintentional because she found plausible his explanation that when he addressed Parliament, he had in mind his family’s dwellings and not other structures, such as the visitor’s centre.

⁶⁶ Act 82 of 1998.

⁶⁷ She argued that the President ought to have taken steps to ensure that the cost, scale and affordability of the upgrades were within reasonable bounds. This is even more so when one has regard to the fact that there had been widespread media reports from early stages of construction about the extravagant nature of the project.

⁶⁸ Constitution s 96 (conduct of Cabinet Members and Deputy Ministers) states:

- ‘(1) Members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation.
- (2) Members of the Cabinet and Deputy Ministers may not—
- (a) undertake any other paid work;
 - (b) act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or
 - (c) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.’

⁶⁹ *Secure in Comfort* Report (note 61 above) at 437–439.

⁷⁰ Constitution s 182(1)(c).

⁷¹ This concerned the non-security related costs of the upgrades, including the visitor’s centre, cattle kraal, chicken run, swimming pool and tuck-shop.

⁷² *Secure in Comfort* Report (note 61 above) at 438.

⁷³ The primary culprits were the Minister of Public Works (Geoff Doidge and then later Thulas Nxesi) and then Minister of Police, Nathi Mthethwa.

Assembly within 14 days with his comments and plan of action in relation to the Public Protector's report.⁷⁴

A protracted political storm followed her findings. The African National Congress (ANC) slammed Madonsela,⁷⁵ with its Secretary-General repeatedly accusing her of playing politics.⁷⁶ Opposition parties on the other hand (perhaps predictably) lauded the Public Protector's conclusions and called for the President to resign.⁷⁷ What matters, however, is that the President failed to comply with the remedial action by directing the Minister of Police – as part of a parallel process to the one ordered by the Public Protector – to determine whether he was personally liable to pay for any of the costs relating to the security upgrades. The Minister in turn conducted his own investigations into the Nkandla issue and, contrary to the Public Protector's instructions, determined that the President was not liable to pay anything.⁷⁸

In addition, Parliament itself conducted its own investigation and, in August 2015, it constituted a Parliamentary Ad Hoc Committee to deal with the Nkandla debacle. The committee rejected the Public Protector's findings and in doing so exonerated the President of any wrongdoing.⁷⁹ Notably, it concluded that the Public Protector had 'grossly exaggerated the scope, scale and cost of the Nkandla project with the result that South Africans were misled about the opulence of the private residence of the President'.⁸⁰ Parliament later voted to adopt the ad hoc committee's resolution.⁸¹ Opposition parties rejected the parliamentary process, calling it a sham. They insisted that the President was obliged to comply with the Public Protector's remedial action. The argument was that the Minister and Parliament's conduct, in exonerating the President, effectively sought unconstitutionally to set aside, undermine and circumvent the Public Protector's report and consequent remedial action.

The President's failure to comply with the report resulted in a political party, the Economic Freedom Fighters (EFF) later joined by the Democratic Alliance, instituting legal proceedings in the Constitutional Court requesting that the President's conduct be declared unconstitutional. The EFF also alleged that Parliament's exoneration of the President had been an unlawful attempt to set aside the Public Protector's findings, and that in so doing, Parliament had failed to fulfil its constitutional duty to hold the President (as a member of the Executive) accountable as required by s 181(5) of the Constitution.

⁷⁴ *Secure in Comfort* Report (note 61 above) at 438.

⁷⁵ 'ANC Responds to Nkandla Report' *Sowetan Live* (20 March 2014), available at <http://www.sowetanlive.co.za/news/2014/03/20/anc-responds-to-nkandla-report>.

⁷⁶ *Ibid.*

⁷⁷ C Bailey, N Olifant & J Wicks 'Pay Back and Resign: Opposition Parties want President to Return' *Sunday Tribune* (24 March 2014).

⁷⁸ *Statement issued by the Office of the ANC Chief Whip* (28 May 2015), available at <http://www.politicsweb.co.za/news-and-analysis/nkandla-nhlekos-report-appreciated--office-of-anc->.

⁷⁹ *Statement issued by Chairperson of the Ad Hoc Committee, Cedric Frolick* 'Nkandla: Ad hoc committee adopts Nhleko report' (6 August 2015), available at <http://www.politicsweb.co.za/news-and-analysis/nkandla-ad-hoc-committee-adopts-nhleko-report-par>.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

The judgment considered several important issues. The main issue concerned the nature and purpose of the Public Protector’s Office, including the ambit of its constitutional and statutory powers. The focus was on whether its powers included the ability to issue binding orders. The Court held that the Public Protector had the power to take binding remedial action and that the only way to avoid compliance would be through having the report set aside through judicial review.⁸² In line with this conclusion, the Court held that the President was bound by the remedial action taken against him by the Public Protector and that his failure to abide by it constituted a violation of his constitutional obligations.⁸³ In respect of Parliament’s conduct, the Court found that its resolution to reject the Public Protector’s findings was unlawful as such findings and remedial action could only be set aside by a court of law and that its move to absolve the President of any liability was inconsistent with its duties and obligations in terms of the Constitution.⁸⁴ In line with its findings, the Court ordered the National Treasury to determine the costs of the non-security upgrades at the President’s homestead and to work out a reasonable percentage for the President to pay.⁸⁵ Finally, the Court ordered the President to reprimand the Ministers involved in the project, in line with the Public Protector’s original directions.⁸⁶

While the decision was widely welcomed in the media as a victory for the rule of law, I will demonstrate that the decision was characterised by a failure to apply neutral legal principles. In doing so, I start by discussing *SABC I*, which was the prelude to the Constitutional Court’s decision in *Nkandla*. This is important because a crucial aspect of the *Nkandla* decision was its rejection of the reasoning and ultimate conclusion in *SABC I*. In particular, the High Court held that the Public Protector’s findings and remedial actions were not binding. It further held that if a subject of a decision did not wish to comply with any remedial action, then the subject had to set out rational grounds for non-compliance.⁸⁷

As stated, *SABC I* was arguably the first decision where a court of law was called upon to decide the pointed question of whether the Public Protector’s powers included the ability to make binding orders.⁸⁸ The Public Protector argued that on a proper construction of s 182(1)(c) of the Constitution read with the Public Protector Act, her powers were binding and enforceable and that any other interpretation would render her institution toothless and ineffective. The factual issue at the centre of the litigation was the lawfulness of the SABC Board’s

⁸² *Nkandla* (note 2 above) at para 82.

⁸³ The specific provisions were s 83(b) read with s 181(3) and s 182(1)(c) of the Constitution.

⁸⁴ *Nkandla* (note 2 above) at para 105. The provisions violated were s 42(3), s 55(2)(a) and (b) and s 181(3) of the Constitution.

⁸⁵ *Nkandla* (note 2 above) at para 105.

⁸⁶ *Ibid.*

⁸⁷ The *SABC I* decision was overturned by the Supreme Court of Appeal on precisely the same grounds advanced by the *Nkandla* Court. See *South African Broadcasting Corporation Soc Ltd v Democratic Alliance* [2015] ZASCA 156, 2016 (2) SA 522 (SCA) (*SABC II*).

⁸⁸ Previously, the most notable judgment on the Public Protector’s powers was *Public Protector v Mail and Guardian Ltd & Others* [2011] ZASCA 108, 2011 (4) SA 420 (SCA). The case concerned the nature of the duties of the Public Protector to investigate reports and complaints of corruption. The court held that the Public Protector is not an impartial adjudicator like a court, and has the duty to take proactive action where this is necessary to arrive at the truth.

appointment of Hlaudi Motsoeneng as the permanent Chief Operation Officer (COO) of the organisation. The appointment was made notwithstanding that the Public Protector had issued a report that found Motsoeneng to have behaved unethically by, amongst other things, misrepresenting his qualifications to the SABC, making irregular appointments and unilaterally raising salaries of certain employees during his stint as acting COO. In line with her findings, she recommended that the SABC board institute a disciplinary hearing against Motsoeneng and to report to her within 30 days detailing the steps it would take to comply with her directives.

No disciplinary action was taken. Instead, Motsoeneng was appointed as the permanent COO. The Communications Minister and SABC board justified this appointment by claiming that it had sought the advice of an independent law firm to investigate all the issues raised by the Public Protector and were satisfied by the firm's opinion, which cleared Motsoeneng of any wrongdoing. The Democratic Alliance instituted legal proceedings to set aside the appointment on grounds of rationality. The Public Protector argued that the Minister and board had no legal standing to ignore her findings absent a review by a court of law. The court rejected this proposition holding that her powers are akin to that of an ombudsman⁸⁹ who 'ordinarily do not possess any powers of legal enforcement'.⁹⁰ The court further stated that neither the Public Protector Act nor the Constitution contained any provision stating that the Public Protector had the power to make binding and enforceable orders.⁹¹ The court, however, found that the Public Protector's finding and remedial action could not simply be disregarded; there needed to be good reasons for doing so. As Schippers J put it:

The fact that the findings and remedial action taken against the Public Protector are not binding decisions does not mean that these findings and remedial action are mere recommendations, which an organ of state may accept or reject ... It seems to me that before rejecting the findings of the Public Protector, the relevant organ of state must have cogent reasons for doing so, that is, for reasons other than merely a preference for its own view.⁹²

The court further stated that a decision to accept or reject the Public Protector's findings and remedial action constitutes an exercise of public power and therefore has to be rational.⁹³ It went on to find that the SABC board had provided no grounds for its decision to reject the Public Protector's findings and remedial action.⁹⁴ The court also found that Minister had not shown that she had taken all the Public Protector's findings against Motsoeneng into serious consideration prior to authorising his permanent appointment, thereby rendering her decision irrational.⁹⁵ The appointment was accordingly declared unlawful and set aside.

⁸⁹ *SABC I* (note 16 above) at para 55.

⁹⁰ *Ibid* at para 55.

⁹¹ *Ibid* at para 58.

⁹² *Ibid* at paras 59, 66.

⁹³ *Ibid* at para 74.

⁹⁴ *Ibid* at para 78.

⁹⁵ *Ibid* at paras 81–82.

The importance of the *SABC I* decision lies in its established precedent to the effect that the Public Protector does not have the competence to issue binding orders. The Supreme Court of Appeal in *SABC II* overturned this aspect of the High Court’s decision. Thus, when the *Nkandla* matter came before the Constitutional Court it essentially had to decide on two competing views of the Public Protector’s powers. Ultimately, the Court favoured the binding approach. In adopting essentially the same reasoning as the *SABC II* decision, the Court concluded that the Public Protector had the power to issue binding orders. In the context of analysing the *Nkandla* decision (through the lens of neutral principles) I shall argue that the Constitutional Court failed adequately to show that the *SABC I* decision was *incorrect*, and that when one analyses the reasoning of the two decisions, it appears that Schippers J’s decision is the more *neutral one*, for he does not apply a standard invented or fashioned specifically to address the *Nkandla* problem but rather a general standard that would transcend the factual context at hand. Before I do this, I shall explain the concept of rationality as it is used in South African law, given its centrality to my argument.

IV RATIONALITY AS A CONSTITUTIONAL PRINCIPLE IN SOUTH AFRICA

A Rationality as a Prime Neutral Principle

The South African Constitutional Court has in a series of cases reiterated and entrenched the principle that every exercise of public power is subject to the Constitution⁹⁶ and is thus susceptible to judicial review.⁹⁷ This constraint on exercises of public power is governed by the rule of law in s 1(c) of the Constitution,⁹⁸ a key element of which is the principle of legality and its requirement that all exercises of public power must, at the very least, be lawful and rational to pass constitutional muster.⁹⁹ In respect of rationality specifically, Chaskalson P in *Pharmaceutical Manufacturers* stated that:

What the Constitution requires is that public power ... be exercised in an objectively rational manner. ... Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful.¹⁰⁰

⁹⁶ See *New National Party v Government of the Republic of South Africa* [1999] ZACC 5, 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) at paras 19 and 24; *United Democratic Movement v President of the Republic of South Africa* [2002] ZACC 21, 2003 (1) SA 495 (CC), 2002 (11) BCLR 1179 (CC) at para 55.

⁹⁷ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17, 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) at paras 56–58. (The Court interpreted legality to mean ‘the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law’.) See too *Kaunda v President of South Africa* [2004] ZACC 5, 2005 (4) SA 235 (CC) at para 244.

⁹⁸ For excellent discussions on the rule of law, see A Price ‘The Evolution of the Rule of Law’ (2013) 130 *South African Law Journal* 649; T Bingham *The Rule of Law* (2010).

⁹⁹ *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1, 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) (‘*Pharmaceutical Manufacturers*’) at paras 89–90.

¹⁰⁰ *Ibid* at paras 89–90.

In effect, for an exercise of public power to be rational, it must not be arbitrary or display ‘manifest naked preferences’.¹⁰¹ In applying the rationality test, a court essentially employs a relatively deferent means–ends analysis to determine whether there is a causal connection or relationship between the conduct in question and the purpose of the power.¹⁰² In *Booyesen* Gorven J, after critically engaging with a number of authorities, aptly captured the nature of a rationality enquiry by noting that the test is twofold:

Firstly, the [decision maker] must act within the law and in a manner consistent with the Constitution. He or she therefore must not misconstrue the power conferred. Secondly, the decision must be rationally related to the purpose for which the power was conferred. If not, the exercise of the power would, in effect, be arbitrary and at odds with the rule of law.¹⁰³

Although rationality review is generally regarded to be a deferential method of review,¹⁰⁴ critics have argued that if left unchecked it can form the basis for undue judicial activism.¹⁰⁵ This can be seen, for instance, in the expansion of rationality review to include the duty to take into account relevant considerations and further, to cover the entire decision-making process by which a decision was reached.¹⁰⁶ There is also frequent disagreement on the nature of the rationality standard,¹⁰⁷ a prime example of which was *Merafong* where Van der Westhuizen J, writing for the majority, noted the differences in opinions with the dissenting judgments by saying:

We disagree on the rationality standard to be applied in this matter. I recognise that legislative conduct must be rational, but, in my respectful view, the judgment of my esteemed colleague goes beyond a constitutionally appropriate application of the requirement of rationality.¹⁰⁸

That said, what is clear is that the principle does not give courts carte blanche to strike down legislative enactments or governmental conduct merely because it deems the acts unwise, morally questionable or because it thinks that there

¹⁰¹ *Prinsloo v Van der Linde Prinsloo* [1997] ZACC 5, 1997 (3) SA 1012 (CC) (‘*Prinsloo*’) at para 36.

¹⁰² *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3, 2006 (3) SA 247 (CC), 2005 (6) BCLR 529 (CC) at para 74. Note, that in respect of impugned legislative enactments the test is whether the law is rationally related to a legitimate government purpose. *Ibid* at para 25.

¹⁰³ *Booyesen v Acting National Director of Public Prosecutions* [2014] ZAKZDHC 1, 2014 (2) SACR 556 (KZD) (‘*Booyesen*’) at para 15.

¹⁰⁴ *Ibid* at para 43.

¹⁰⁵ See A Price ‘Rationality Review of Legislation and Executive Decisions: *Poverty Alleviation Network* and *Albut?*’ (2010) 127 *South African Law Journal* 580, 581; L Kohn ‘The Burgeoning Constitutional Requirement of Rationality and the Separation of Powers: Has Rationality Review Gone Too Far?’ (2013) 130 *South African Law Journal* 810; IM Rautenbach ‘Rationality Standards of Constitutional Judicial Review and the Risk of Judicial Overreach’ (2018) 1 *Tjyskrif vir die Suid-Afrikaanse Reg* 1.

¹⁰⁶ *Democratic Alliance v President of the Republic of South Africa* [2012] ZACC 24, 2013 (1) SA 248 (CC), 2012 (12) BCLR 1297 (CC) (‘*Simelane*’) at paras 34 and 39.

¹⁰⁷ A more recent example of such disagreements is *Electronic Media Network Limited v e.tv (Pty) Limited* [2017] ZACC 17; 2017 (9) BCLR 1108 (CC).

¹⁰⁸ *Merafong Demarcation Forum v President of the Republic of South Africa* [2008] ZACC 10, 2008 (5) SA 171 (CC), 2008 (10) BCLR 968 (CC) (‘*Merafong*’) at para 8.

are better methods for achieving the desired goals.¹⁰⁹ The courts may thus not second-guess the legislature or the executive.¹¹⁰ Furthermore, in *Bel Porto*, the Court emphasised that the mere fact that there may be more than one rational way of dealing with a particular problem does not make the choice to prefer one means, over another, irrational.¹¹¹

The effect of the development of the rationality doctrine is that regardless of the nature of the issue at hand or the identities of the parties, once there is an exercise of public power, rationality principles come into play. Since it applies in a wide variety of circumstances, the principle meets Wechsler’s requirement that judicial tests be formulated in such a way that they transcend the immediate dispute.¹¹² Put differently, rationality is neutral because the lawfulness of an act does not turn on its desirability or its social consequences.¹¹³ Accordingly, whether one is dealing with a decision to appoint a senior public prosecutor,¹¹⁴ a decision not to prosecute,¹¹⁵ a decision by the executive arm of government to withdraw from a treaty,¹¹⁶ or a decision on whether reasons must be given as to why an aspirant judge was not recommended for appointment,¹¹⁷ courts have been able to review and set aside actions based on the principle of rationality. It is for that reason that I say the rationality doctrine comfortably meets Wechsler’s demand that courts must apply standards that go beyond the particular facts of a case.¹¹⁸ As a standard that applies across the board to all exercises of public power irrespective of the nature of the issue at hand, rationality is a sufficiently general standard,¹¹⁹ which if *properly applied*, allows judges to avoid deciding cases based on their personal predilections or sympathies towards particular litigants.

Moreover, in *Prinsloo*,¹²⁰ the Court explained that at the centre of the rationality principle is the need to avoid public power being exercised in a

¹⁰⁹ *East Zulu Motors (Pty) Limited v Empangeni/Ngwelezane Transitional Local Council* [1997] ZACC 19, 1998 (2) SA 61 (CC) at para 24.

¹¹⁰ *Poverty Alleviation Network v President of the Republic of South Africa* [2010] ZACC 5, 2010 (6) BCLR 520 (CC) at para 66.

¹¹¹ *Bel Porto School Governing Body v Premier, Western Cape* [2002] ZACC 2, 2002 (3) SA 265 (CC), 2002 (9) BCLR 891 (CC) at para 45.

¹¹² Wechsler (note 10 above) at 27.

¹¹³ *S v Jordan (Sex Workers Education and Advocacy Task Force & Others as Amici Curiae)* [2002] ZACC 22, 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC) at para 30.

¹¹⁴ *Simelane* (note 106 above).

¹¹⁵ *Democratic Alliance v Acting National Director of Public Prosecutions* [2016] ZAGPPHC 255, 2016 (2) SACR 1 (GP).

¹¹⁶ *Democratic Alliance v Minister of International Relations and Cooperation (Council for the Advancement of the South African Constitution Intervening)* [2017] ZAGPPHC 53, 2017 (3) SA 212 (GP).

¹¹⁷ *Judicial Service Commission v Cape Bar Council* [2012] ZASCA 115, 2013 (1) SA 170 (SCA).

¹¹⁸ Wechsler (note 10 above) at 27.

¹¹⁹ This does not mean that each case is not decided on its particular facts. All it means is that the legal principle enunciated in the case must be capable of being applied to other similar circumstances. Cases should not be decided through formulating or inventing legal principles in order to deal with a particular set of facts. This much was acknowledged by Wallis AJ in *Makate v Vodacom* [2016] ZACC 13, 2016 (4) SA 121 (CC), 2016 (6) BCLR 709 (CC) at para 160.

¹²⁰ *Prinsloo* (note 101 above) at para 36.

manner that manifests ‘naked preferences’.¹²¹ One of Wechsler’s principal arguments was that neutrality was central to the legitimate exercise of judicial power, for it would ensure that the Supreme Court does not function as a ‘naked power organ’ (that is, a body whose decisions are informed by personal preferences as opposed to consistent legal principles).¹²² What we see here is a clear nexus between rationality and neutrality through the need to ensure that public power is not exercised in an arbitrary or whimsical manner.

Finally, because the rationality principle applies ‘across the board’, it meets Wechsler’s requirement that a legitimate principle is one that provides ‘guidance on the potential outcome of a different case where the principle might be applied’.¹²³ In other words, it is trite that for the exercise of public power to be constitutional, it has to be rational. The principle of rationality provides a process of reasoning that can be expected of public officials. It also provides a process of reasoning against which lawyers can test whether a particular act is or will be constitutional.¹²⁴ It is this process of reasoning that provides a common language for us to be able to legitimately and constructively criticise a court when we believe it has erred.

Having explained why I believe rationality is a neutral principle, it is necessary to explain why it ought to have been the principle that guided the Court in *Nkandla*.

B Rationality as Default Neutrality

In *Nkandla*, the Constitutional Court dismissed the High Court’s view in *SABC I* that the Public Protector’s powers were not binding but that compliance could nevertheless be avoided by providing rational reasons.¹²⁵ Does the Court’s reasoning in this regard bear scrutiny? My argument here is that there was no principled reason, as matter of law, to discard Schippers J’s reasoning, other than a desire to achieve an outcome viewed as noble.

In developing this argument, the starting point is to note that the Constitution does not set forth a standard, criterion or threshold in respect of the force and effect of decisions relating to the Public Protector or indeed any other Chapter 9

¹²¹ See too *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* [2006] ZACC 23, 2007 (4) SA 395 (CC), 2007 (4) BCLR 339 (CC) at para 36; *Nyathi v Member of the Executive Council for the Department of Health Gauteng* [2008] ZACC 8, 2008 (5) SA 94 (CC) at para 140; *Simelane* (note 106 above) at para 93.

¹²² See Wechsler (note 10 above).

¹²³ Greenawalt (note 29 above) at 988.

¹²⁴ I do not mean to say that lawyers will be able to make such determinations with perfect accuracy. Law is never black and white. It is therefore not surprising that the rationality principle itself has not been applied in a manner that is perfectly consistent. See M Du Plessis & S Scott ‘The Variable Standard of Rationality Review: Suggestions for Improved Legality Review’ (2013) 130 *South African Law Journal* 597. In any event, what the law requires is reasonable clarity, not perfect lucidity. See *Savoi v National Director of Public Prosecutions* [2014] ZACC 5, 2014 (5) SA 317 (CC) at para 20.

¹²⁵ It is important to note that the ‘true rationality’ of non-compliance would be tested on review. A party who refuses to comply can inform the Public Protector or the complainant and provide reasons. If neither the Public Protector nor the complainant is satisfied, he or she could approach a court which would make the final determination on the rationality of those reasons.

institution.¹²⁶ It does not state whether such decisions ought to be binding or not in the same manner in which it does in respect of court orders.¹²⁷ In the *absence of a standard set forth in the Constitution*, in my view, the *Nkandla* Court could only have exercised one of the following options: the first option was to develop and apply a standard that would equally apply to all Chapter 9 institutions,¹²⁸ in line with the generality requirement of neutrality. The alternative option was to use a default (or baseline)¹²⁹ principle in respect of how the exercise of public power must be governed or guided. That default position is the principle of rationality.

In sum, it seems to me that the rationality principle is a prime neutral principle that ought to have been applied in the Public Protector cases, not because of my *personal* preference for any particular standard or the desirability of a particular outcome in those cases. I deem rationality to be an eminent neutral principle because it is the *only* legal standard that applies in every instance where there is an exercise of public power. As a result, it curbs a court’s ability to decide a case based on its aim to reach a desired goal and in doing so, limits the power of a court to fashion or invent a principle in order to decide a particular case in a particular way. Having explained why I believe the rationality principle is neutral, I shall now turn to a discussion of why the reasoning in the *Nkandla* decision fails the test of neutrality.

V WHY THE *NKANDLA* DECISION FAILS THE TEST OF NEUTRALITY

In my view, the *Nkandla* decision fails the test of neutrality for at least five reasons. These reasons must be understood within the context of my view that the Court failed *adequately to justify* that the ‘binding standard’ had been neutrally *derived*,¹³⁰

¹²⁶ As an aside, I find it problematic that judges tend to develop judicial tests, which often have no grounding in the text or language of the Constitution. The danger of this is that these tests end up being meaningless ruses which allow judges to reach decisions that they prefer. See *Whole Woman’s Health v Hellerstedt* 579 US (2016) at 11–14 (Thomas J dissenting). Closer to home, see C Courtis ‘Rationality, Reasonableness and Proportionality: Testing the Use of Standards of Scrutiny in the Constitutional Review of Legislation’ (2011) 2 *Constitutional Court Review* 37.

¹²⁷ Constitution s 165(5) states that all court orders are binding in nature. Notably, no similar provision exists in respect of the findings of Chapter 9 institutions.

¹²⁸ Building on Wechsler’s argument, the venerable Judge Bork argued that it is not sufficient for courts to merely apply neutral principles. Principled adjudication requires that principles also be neutrality derived. I agree. See RH Bork ‘Neutral Principles and Some First Amendment Problems’ (1971) 47 *Indiana Law Review* 1 at 7.

¹²⁹ I emphasise the word ‘mandatorily’ because, as Judge Bork pointed out, in order for judges to be truly neutral it is not enough for them merely to choose and apply any ‘set of principles’ and then claim reasoning in neutrality merely through consistency of application. The choice or derivation of principle is important, and forms part of neutrality. In this regard, a court must choose a principle that is more consistent with constitutional precedent, text, history and logic, rather than invent a completely new principle in order to deal with a particular case. See D Beatty *The Ultimate Rule of Law* (2004) 161.

¹³⁰ See generally Bork (note 128 above).

having proper regard to the intention of the framers of our Constitution¹³¹ read with the text of the Constitution.¹³² It therefore seems to me that the Court simply invented the ‘binding standard’, and then tried to justify it by offering unconvincing reasons of questionable neutrality. This is particularly so when one has regard to the Court’s rejection of Schippers J’s judgment which, as I have argued, relied on an eminently neutral principle.

A What is the Source of the Power to Bind?

First, it is not clear from the judgment whether the Court would be willing to apply the same binding standard to other Chapter 9 institutions. The judgment appears to suggest that the binding nature of the Public Protector’s powers is primarily based on s 182(1)(c) of the Constitution, which permits her to take ‘appropriate remedial action’.¹³³ This much is evident from the Court’s statement that it would be inconsistent with these words to conclude that ‘the Public Protector enjoys the power to make only *recommendations*’.¹³⁴ It is also evident from the Court’s reasoning that these ‘wide powers’¹³⁵ ‘point to a realistic expectation that binding and enforceable remedial steps might frequently be the route open to the Public Protector to take’.¹³⁶ If this reasoning is anything to go by, one would presume that the other Chapter 9 institutions *do not* have the power to make binding orders. This is so because none of the other Chapter 9 institutions has the constitutionally specified power ‘to take appropriate remedial action’.¹³⁷

However, as already stated, the Court also appears to suggest that the reason why the Public Protector’s powers are binding is because she is constitutionally mandated to be independent, impartial and to exercise its powers ‘without fear, favour or prejudice’.¹³⁸ The Court implies that the massive financial and human

¹³¹ It is notable that at no point did the Court refer to CODESA negotiations, or reports or minutes of the Technical Committee (set up by the Constitutional Assembly) charged with drafting the Constitution’s provisions dealing with the Public Protector. One would think that the views of those who drafted or participated in the framing of the concerned constitutional provisions would matter in determining the meaning of the provisions under consideration. On the relevance of the views of the framers, see *Mansingh v General Council of the Bar & Others* [2013] ZACC 40, 2014 (2) SA 26 (CC), 2014 (1) BCLR 85 (CC) at para 25–28. While South African courts have said they are not *strictly bound* by the framers’ intention, they have acknowledged the importance of having regard to them: see *S v Makwanyane & Another* [1995] ZACC 3, 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at paras 12–19.

¹³² There are some who believe that the words ‘take appropriate remedial action’ are what justified a conclusion that the Public Protector has the power to issue binding orders. That is speculative because it is not what the Court said. It did not say those words are the foundation of its findings or the *ratio*. Moreover, if one has regard to the rest of the Court’s rhetoric about how ‘no constitutionally or statutorily sourced decision can be ignored willy nilly’ and that such decisions must be ‘acted upon’, it seems to me that the Court may well have reached the same conclusion (that the Public Protector has the power to issue binding orders) even if the Constitution had not specifically used the words ‘take appropriate remedial action’.

¹³³ Constitution s 182(1)(c).

¹³⁴ *Nkandla* (note 2 above) at para 70 (emphasis added).

¹³⁵ *Ibid* at para 71.

¹³⁶ *Ibid* at para 67.

¹³⁷ These words appear in s 182(1)(c) of the Constitution, which deals with the powers of the Public Protector.

¹³⁸ *Nkandla* (note 2 above) at paras 49–50.

resources afforded to the Public Protector are also relevant to the determination of whether the Office has the power to issue binding orders.¹³⁹ Furthermore, the Court suggests that the binding nature of its decisions is directly linked to the rule of law which dictates that ‘no statutorily sourced decision may be disregarded willy-nilly [as it has] legal consequences and must be complied with or acted upon’ unless set aside by a court of law.¹⁴⁰ Relying on what was said *Kirland*,¹⁴¹ the Court also suggests that a subject is bound by a decision because the rule of law requires that people be bound by a decision regardless of whether they agree with it or not.¹⁴²

If the contentions in the last paragraph are the principled bases of the Court’s decision, then surely other Chapter 9 institutions – which share similar features – have the power to make binding orders? This is an example of the Court’s imprecise reasoning.¹⁴³ In sum, due to the Court’s amorphous reasoning, it is difficult to tell from the judgment whether it would be willing to hold that the findings of other Chapter 9 institutions have binding effect.¹⁴⁴ This lack of clarity means that the judgment fails the test of neutrality, which requires courts to formulate and apply principles that transcend the facts of the case before them. This, in turn, requires a judgment that makes it clear which principles will be applied in similar cases.¹⁴⁵ For that to happen, the ratio of a decision must be clear and pointed.

The extent of the imprecision of the *Nkandla* decision manifests itself in the subsequent decision of *Tasima*. This case concerned the validity of certain court orders, and whether an organ of state is bound to comply with an order that enforces an arguably invalid administrative act.¹⁴⁶ As stated, it appears that in *Nkandla* a central part of Mogoeng CJ’s justification as to why the Public Protector’s powers were binding was his declaration that:

No decision grounded on the Constitution or law may be disregarded without recourse to a court of law. ... No binding and statutorily sourced decision may be disregarded willy-nilly.¹⁴⁷

In *Tasima*, the meaning of that central aspect of the *Nkandla* judgment was at the heart of the issue faced by the Court as to whether every administrative act

¹³⁹ Ibid.

¹⁴⁰ Ibid at paras 73–75.

¹⁴¹ *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* [2014] ZACC 6, 2014 (3) SA 481 (CC), 2014 (5) BCLR 547 (CC) (*Kirland*) at paras 105–106. This would also be in line with the principles affirmed in cases such as *Merafong City Local Municipality v AngloGold Ashanti Limited* [2016] ZACC 35, 2017 (2) SA 211 (CC).

¹⁴² *Nkandla* (note 2 above) at para 75.

¹⁴³ At a public gathering in April 2016, shortly after the judgment was delivered, Jeff Radebe – the country’s longest serving cabinet minister and former Minister of Justice – stated that his interpretation of the *Nkandla* judgment was that it meant that all other Chapter 9 institutions’ findings were binding. It bears mentioning that Radebe is a lawyer by qualification.

¹⁴⁴ The Constitutional Court’s inconsistency in adjudication and lack of neutrality is nothing new. It was pointed out by Nugent JA in *Makambi v Member of Executive Council, the Department of Education, Eastern Cape Province* [2008] ZASCA 61, 2008 (5) SA 449 (SCA) at para 21.

¹⁴⁵ Greenawalt (note 29 above) 988.

¹⁴⁶ *Tasima* (note 9 above).

¹⁴⁷ *Nkandla* (note 2 above) at para 74.

(including all remedial action taken by the Public Protector) is binding unless set aside on appeal or review. The majority in *Tasima* answered that question in the affirmative, while the minority argued that some administrative acts are not binding. Notably, however, both the majority¹⁴⁸ and minority¹⁴⁹ judgments in *Tasima* purported to rely on Mogoeng CJ's statement in *Nkandla* to support their conclusions. In so doing, they sought to clarify the nub of the *Nkandla* decision. Zondo J (writing for the minority) and Froneman J (concurring with the majority) disagreed quite strongly on the ratio of the *Nkandla* decision. Zondo J held that the *Nkandla* decision was materially based on a belated concession by the President to the effect that the Public Protector did have the power issue binding orders.¹⁵⁰ Froneman J, on the other hand, characterised the concession made by the President in the case as 'neither the ratio nor the logical underpinning of the ratio of the [*Nkandla*] judgment by this Court'. Again, in response to Zondo J, Froneman J went on to ask:

Is it seriously intended to state or imply that if the President did not make the concession then this Court's decision would have been different? And that this Court would have concluded that the President was entitled to ignore the Public Protector's report without approaching a court of law to have it set aside? Surely not.¹⁵¹

That a central aspect of Mogoeng CJ's judgment in *Nkandla* caused confusion among his own colleagues in a later case can only mean that the decision fails the test of neutrality, for 'a formulation so-open ended that it leaves uncertainty as to its meaning'¹⁵² will not pass the test of neutrality. Moreover, the fact that the Court needed to 'clarify' the meaning of a central aspect of the *Nkandla* decision in a later judgment is itself evidence enough of the *Nkandla* judgment's lack of clarity. To make matters worse, in *Tasima*, supposedly a clarificatory judgment, Mogoeng CJ concurred with a minority decision that rejected the majority's interpretation of his own decision in *Nkandla*. The effect of this is that the unanimous decision in *Nkandla* may not have been so unanimous after all. Therefore, one would be on good ground to argue that the *Nkandla* judgment was decided on a basis where there was never a true meeting of minds.¹⁵³

I should add that it is true that now and then judges may disagree on a prior decision, but the *Tasima* disagreement is not *merely* a disagreement about the obiter or some minor aspect of the *Nkandla* decision. It is a *sharp* disagreement about the *ratio* – the most important aspect of a judgment. One would understand if the disagreement had occurred some years later, with new or some different members of the Court, but this is not the case. One is left to wonder about such a core disagreement so soon after the initial decision.

In any case, in terms of my argument on neutrality, I need go no further that point out that the ratio is *unclear*, and there can be no better proof than subsequent

¹⁴⁸ *Tasima* (note 9 above) at para 149.

¹⁴⁹ *Ibid* at paras 210–216.

¹⁵⁰ *Ibid*.

¹⁵¹ *Ibid* at para 230.

¹⁵² Greenawalt (note 29 above) at 988.

¹⁵³ *Brink v Humphries & Jewell (Pty) Ltd* [2004] ZASCA 131, 2005 (2) SA 419 (SCA).

disagreement on the ratio by justices of the Court. That is sufficient to meet the neutrality criteria.¹⁵⁴ Furthermore, the *Tasima* confusion adds credence to my view that this decision was arguably rushed, and insufficiently thought through, in its haste to achieve a particular outcome.

B Public Officials are Correction Averse: Outcome-Based Reasoning

A cardinal component of neutrality, as Wechsler and Bork framed it, is that courts must not invent legal principles in order to deal with a particular case. Yet, disturbingly, the *Nkandla* judgment does just that. As I see it, Mogoeng CJ’s reasoning proceeds from a constitutionally incorrect assumption, that is, that public officials are generally prone to act in bad faith or are averse to corrective counsel. This is evident in his comments that:

[A]llegations and investigation of improper conduct against all, especially public office bearers are generally bound to attract a very unfriendly response. An unfavourable finding of unethical or corrupt conduct coupled with remedial action, will probably be strongly resisted in an attempt to repair or soften inescapable reputational damage. It is unlikely that unpleasant findings and a biting remedial action would be readily welcomed by those investigated.¹⁵⁵

This poor reasoning and indictment on all public officials is unfortunate. Not only is it factually incorrect, because there are many public officials who are willing to correct their wrongs in constructive ways, it is also legally misconceived because the Constitution requires that we always assume that public office bearers will act in good faith.¹⁵⁶ It is one thing to suggest that government officials are infallible human beings prone to mistakes,¹⁵⁷ it is quite another to suggest, as the Chief Justice did, that they will generally be averse to corrective counsel from the Public Protector. The latter is, in my view, wrong in both fact and law.

In moving from a presumption that public officials are inherently correction averse, the Court cast aside a prior presumption that public officials, particularly those who have taken an oath to uphold the Constitution, will be presumed to act in good faith unless the contrary is shown.¹⁵⁸ This novel approach, at odds with principle and precedent, can plausibly be attributed to the Court’s endeavour to reach its desired result. Changing tack on principle in this manner is at odds with Wechsler and Bork’s concept of neutrality in adjudication. The Court’s conduct is even more unfortunate when one considers that in a subsequent case, the Court appeared to revert to the principle that we must presume that public officials will act in good faith.¹⁵⁹ This gives one the impression that its departure from

¹⁵⁴ Greenawalt (note 29 above) at 986–987.

¹⁵⁵ *Nkandla* (note 2 above) at para 55.

¹⁵⁶ *Minister of Health v Treatment Action Campaign* [2002] ZACC 15, 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC) at para 129. See *Kirland* (note 141 above) at para 88.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Glenister v President of the Republic of South Africa* [2008] ZACC 19, 2009 (1) SA 287 (CC), 2011 (7) BCLR 651 (CC) at para 56.

¹⁵⁹ *United Democratic Movement v Speaker of the National Assembly* [2017] ZACC 21, 2017 (5) SA 300 (CC), 2017 (8) BCLR 1061 (CC) at paras 92–94.

this principle in *Nkandla* was an ‘ad hoc improvisation’¹⁶⁰ fashioned to achieve a preconceived outcome.

It is important to emphasise here that neutrality is not just bias, in the sense of a lack of impartiality, but poor reasoning, which can strongly be linked not to bona fide judicial error but rather a desire to reach a noble outcome. Importantly, as Wechsler explains, the ‘virtue or demerit of a judgment turns ... entirely on the reasons that support it, and their adequacy to maintain any choice of values it decrees’.¹⁶¹ If a judgment is simply poorly reasoned, it is susceptible to criticism on grounds of neutrality, particularly in circumstances where there is reason to believe that a court preferred a particular – politically more desirable – outcome. This, I am afraid, is what the *Nkandla* decision appears to have done.

C Conflating Rationality with Self-help

The reasoning in the *Nkandla* decision deeply mischaracterises the gist of the *SABC I* judgment by suggesting that it permits remedial action to be rejected merely because the subject does not like it. This is plainly incorrect: Schippers J in *SABC I* expressly stated that a subject could not merely ignore a decision made by the Public Protector¹⁶² in the absence of rational reasons for doing so.¹⁶³ Important in this regard is the fact that rationality is an objective standard.¹⁶⁴ Therefore, the mere fact that a decision on how to deal with a report is taken by the subject does not mean that the process or its outcome is entirely at the mercy of the decision maker, as suggested by the Chief Justice. If the subject fails to react rationally to the decision, his or her actions will be liable to be set aside on judicial review. The *Nkandla* Court failed to appreciate this point.

In sum, the Court conflated rationality with self-help¹⁶⁵ because it seems to have hastily concluded that the *SABC I* approach means a subject will be allowed to disregard or ignore decisions of the Public Protector.¹⁶⁶ This is incorrect: ignoring a decision ‘willy-nilly’¹⁶⁷ and rational non-compliance are two very different things. Yet, the judgment fails to appreciate the importance of this distinction by assuming that a person who does not comply with remedial action of the Public Protector is in effect ‘willy-nilly’ ignoring the decision. Rational non-compliance is clearly a more onerous standard than mere disregard of a decision. This is evidenced by the requirements for rational non-compliance delineated by Schippers J in *SABC I*. In this regard, he explained that the following steps ought to be followed by the subject of remedial action or findings taken by the Public Protector:

¹⁶⁰ See *Elk Grove Unified School Dist v Newdow* 542 US 1, 25 (2004)(Rehnquist CJ, dissenting).

¹⁶¹ Wechsler (note 10 above) at 19–20.

¹⁶² *SABC I* (note 16 above) at para 74.

¹⁶³ *Ibid* at para 59.

¹⁶⁴ *Pharmaceutical Manufacturers* (note 99 above) at para 86; *Simelane* (note 106 above) at paras 14–26.

¹⁶⁵ *Nkandla* (note 2 above) at paras 72–75.

¹⁶⁶ *Ibid*.

¹⁶⁷ *Ibid* at paras 67 and 74.

- (1) Proper consideration of the findings and remedial action and on that basis decide whether to accept and comply with the action.
- (2) Ensure that both the process of making such a decision and the decision itself are rational in the light of the purpose of the Office, which is to ensure good governance by public officials.
- (3) Engage with the Public Protector in the event that a decision is taken not to accept the findings or implement the remedial action.
- (4) Apply for judicial review of the Public Protector’s investigation and report.¹⁶⁸

It is, however, important to note that the rational non-compliance standard would not prevent anyone, such as the complainant or the Public Protector, from reviewing a subject’s non-compliance in a court of law. This is what happened in *SABC I*, where the Democratic Alliance successfully reviewed the SABC board’s failure to act rationally in relation to the Public Protector’s findings and remedial action. If there was ever any doubt that the Chief Justice mischaracterised the nub of the *SABC I* decision, his conclusion that Schippers J’s rationality argument is at ‘odds with the rule of law’¹⁶⁹ should be proof enough. This is because it is trite that rationality is at the centre of the rule of law.¹⁷⁰ It is then quite difficult to comprehend how Schippers J’s rationality-based argument can be properly termed contrary to the rule of law principle. The only conclusion to be drawn is that the Chief Justice simply mischaracterised the crux of the *SABC I* decision in pursuit of a desire to find that the Public Protector should have the power to issue binding orders. This mischaracterisation led the Chief Justice to offer shoddy reasons for rejecting Schippers J’s holding. To me, this places his decision on shaky ground as far as neutrality is concerned. Neutrality, after all, requires clarity in justification through properly explained and reasoned judgments.¹⁷¹ It therefore seems to me that pointing out the porousness of a court’s reasoning is part and parcel of exposing what may be an apparent lack of neutrality.

D Is an Effective Remedy Required to be a Binding Remedy?

Again, neutrality requires that a judge’s reasoning be principled not just in its formulation, but also in its justification for choosing one interpretation over another.¹⁷² In my view, the *Nkandla* Court failed to do this adequately. Proper justification requires a court to base its decisions either on empirical evidence or trite constitutional principles, including presumptions. A court may not justify

¹⁶⁸ *SABC I* (note 16 above) at para 72.

¹⁶⁹ *Nkandla* (note 2 above) at para 72.

¹⁷⁰ See, generally, Price (note 98 above).

¹⁷¹ In order to show neutrality, the Constitutional Court had to engage adequately with the *SABC I* decision and demonstrate why it was wrong through justifiable reasoning. After all, superior courts do not operate or pronounce on legal principles in a vacuum. Often, when a matter comes to our appellate courts, lower courts have pronounced on a matter and it is the duty of the superior court to either affirm or reject the lower court’s decision. In so doing, the court has a duty to engage with the reasoning of the lower court. This is precisely why the Constitutional Court is often reluctant to hear matters as a court of first and last instance, mainly because it claims to value the views of the lower courts. Notably, in the *Nkandla* matter, the Court failed to do this properly in its rejection of the High Court’s decision in *SABC I*.

¹⁷² Greenawalt (note 29 above) at 986–987.

conclusions based on suppositions, conjecture or convenient assumptions, which is what the Court did in *Nkandla*.

The *Nkandla* Court's interpretive reasoning appears largely to be based on a view that its approach is necessary to ensure that the Public Protector's powers are effective. In this regard, it seemed to suggest that a non-binding remedy would be an 'ineffectual one',¹⁷³ arguing that if the Public Protector's remedial action 'were by design never to have binding effect, then it is incomprehensible just how the Public Protector could ever be effective in what she does'.¹⁷⁴ That, of course, is not necessarily true. Many institutions take decisions that help sustain our constitutional democracy without doing so through the force of binding powers.¹⁷⁵ Moreover, there are examples of where the Public Protector's remedies were effective, even at a time when they were not regarded as having binding effect.¹⁷⁶ Bishop and Woolman capture the essence of this point as follows:

One of the most common criticisms levelled against the Public Protector and ombudsmen in general is that the institution lacks the power to make binding decisions. In truth, however, the ability of the Public Protector to investigate and to report effectively – without making binding decisions – is the real measure of its strength [because] 'through the application of reason, the results are infinitely more powerful than through the application of coercion. While a coercive process may cause a reluctant change in a single decision or action by definition it creates a loser who will be unlikely to embrace the recommendation in future actions. By contrast, where change results from a reasoning process, it changes a way of thinking and the result endures to the benefit of the potential complainants in the future.'¹⁷⁷

The *SABC I* judgment accepted this view.¹⁷⁸ Yet, rather bafflingly, the *Nkandla* Court failed to engage with its reasoning, let alone demonstrate why such reasoning would be constitutionally flawed. This failure means that the Court's decision fails the test of neutrality, which demands that if a court rejects one particular viewpoint it needs convincingly to show why it has done so. It is not enough for a court simply to view one argument as preferable.¹⁷⁹ Here, the *Nkandla* Court rejected the reasoning of the *SABC I* decision without engaging with it or seeking

¹⁷³ *Nkandla* (note 2 above) at para 49.

¹⁷⁴ *Ibid* at para 56.

¹⁷⁵ The Auditor-General ('AG'), also a Chapter 9 institution whose powers are set out in s 188 of the Constitution, is generally thought not to have the power to issue binding orders. Notably, s 188 does not confer the on the AG the power to 'take appropriate remedial action' as is the case with the Public Protector.

¹⁷⁶ History shows us that the Public Protector can be effective even without 'binding powers'. For example, in 2011, the Public Protector issued a report implicating then Police Commissioner Bheki Cele in wrong-doing. At that stage, not many (including the Public Protector) thought that the report or remedial action was binding. However, the report's 'recommendations' formed the basis of a presidentially established inquiry led by Judge Jake Moloï. The inquiry, largely corroborating and confirming the Public Protector's findings, recommended that Cele be fired. He was fired. The Public Protector's report and her remedial action had clearly been effective.

¹⁷⁷ M Bishop & S Woolman 'Chapter Nine Institutions: Public Protector' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2008) Chapter 24A p3, quoting S Owen 'The Ombudsman: Essential Elements and Common Challenges' in L Reif (ed) *The International Ombudsman Anthology* (1999) at 51.

¹⁷⁸ *SABC I* (note 16 above) at para 57.

¹⁷⁹ Sunstein (note 17 above) at 5.

properly to comprehend its fabric and logic. This arguably adds credence to the view that the decision was an act of will, and not a neutrally considered legal judgement. Time and again, the Court has said it values the views of lower courts and has insisted that these courts have a role to play in the development of our constitutional jurisprudence.¹⁸⁰ In fact, where it has previously disagreed with a lower court it has often engaged in a detailed and methodological analysis of that court’s reasoning and ultimate conclusion. Not only is this desirable for it provides jurisprudential guidance to lower courts,¹⁸¹ it is also consistent with the principle that ours is a constitutional order undergirded by a ‘culture of justification’.¹⁸² By devoting no more than a paragraph to the *SABCI* decision, and then tersely rejecting it based on shaky logic, the Court undermined its own practices and constitutional principle. This was arguably attributable to its desire to achieve a particular outcome. Conduct of this sort violates the concept of neutral and principled adjudication.

Furthermore, as already stated, principled and neutral adjudication requires courts to base their conclusions on either facts and evidence or trite legal principles. In *Nkandla*, Mogoeng CJ appears to have simply concluded that the Public Protector needed to have binding powers to be effective. However, in reaching this conclusion, he failed to rely on any evidence that would justify this conclusion. In fact, as the Bheki Cele saga shows,¹⁸³ the Public Protector has previously been shown to be effective without binding powers. One would surmise that such a conclusion required the Court to interrogate the historical effect of the Public Protector’s reports and remedial action. Indeed, had it done so, it would have been met with evidence of compliance and effectiveness of her previous reports and remedial action, even in the absence of binding powers. So preoccupied with a preferred outcome was the Court that it omitted to engage in a basic factual and evidential interrogation. In sum, the conclusion that the Public Protector must have binding powers in order to be effective was neither based on sufficient facts nor principles of law.

E ‘Without Fear, Favour or Prejudice’: What Does this Have to do with Binding Decisions?

In attempting to buttress his argument regarding the binding nature of Public Protector’s powers, Mogoeng CJ pointed out that the Constitution requires that the Public Protector perform her functions ‘without fear, favour or prejudice’.¹⁸⁴ This, so the argument went, is indicative of the fact that her powers had to be effective and, by necessary consequence, binding. According to the Court, to hold otherwise would be a mockery of the fact that the institution must be

¹⁸⁰ *Fourie v Minister of Home Affairs* [2003] ZACC 11, 2003 (5) SA 301 (CC).

¹⁸¹ LTC Harms ‘The Puisne Judge, the Chaos Theory and Common Law’ (2013) 131 *South African Law Journal* 1.

¹⁸² E Mureinik ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 *South African Journal on Human Rights* 31 at 32; see too *Jordan* (note 113 above) at para 22.

¹⁸³ See earlier discussion (note 176 above).

¹⁸⁴ *Nkandla* (note 2 above) at para 49.

impartial.¹⁸⁵ This reasoning is unconvincing. Impartiality has less to do with the ‘binding’ nature of decisions as much as it has to do with ensuring fair process and fostering public confidence in the decision-making processes of institutions. Put differently, the requirement of impartiality is meant to insulate an institution from improper influence and does not support the conclusion that the Public Protector’s decisions are binding. In essence, impartiality is a requirement directed at an institution and its processes and not the manner in which the outcome is implemented.¹⁸⁶ Again, the Court’s reasoning is so unconvincing that it provides evidence that the Court was trying to rationalise a pre-determined and perceived outcome.¹⁸⁷ This type of result-oriented adjudication is at odds with the principle of neutrality.

VI CONCLUDING REMARKS

The aim of this paper has been to argue that the *Nkandla* judgment is unfortunate and arguably unprincipled (in the Wechsler sense of the term). This is so even if the factual context of the case might have rendered the outcome desirable. This outcome can be seen to have involved reigning in a President who had seemingly become a law unto himself. Yet, the path chosen by the Chief Justice and the justification he gave for his conclusions was not sufficiently neutral. Schippers J’s judgment was thus preferable in at least one way: he applied rational non-compliance, a neutral principle, in resolving the issue before him. Rationality, as I have argued, is the most neutral principle available to us because it applies across the board to every exercise of public power. This kind of principled neutrality is not only possible in South African adjudication, it is in fact an imperative.¹⁸⁸

Finally, I need to say a few other things about the *Nkandla* decision. Let me not be misunderstood: I reiterate that like the US Supreme Court’s decision in *Brown*, the Constitutional Court’s judgment is a political victory for many ordinary folk and certainly for opposition politicians. It embarrassed the President who was forced to issue an apology to the nation. It embarrassed the National Assembly, which is meant to be one of our most honourable institutions in democratic South Africa. However, from the point of constitutional principle, the judgment is evidence that proper teaching about principled adjudication does not always prevail over a desire by both political litigants and sympathetic judges to reach preferred outcomes by whatever means possible. In the name of the Constitution and the rule of law, the Court clearly sought to put politics over principle in its bid to call a naughty president to order. While it is indeed true that in law ‘context is everything’,¹⁸⁹ does this legitimately extend to deciding matters that fall within

¹⁸⁵ Ibid at paras 49, 66 and 83.

¹⁸⁶ H Lee & E Campbell *The Australian Judiciary* (2nd Edition, 2013) 5.

¹⁸⁷ C Thomas ‘Judging’ (1997) 45 *University of Kansas Law Review* 1.

¹⁸⁸ For example, the view that Wechsler’s principle of neutrality has an important part to play in South African constitutional adjudication has been endorsed by former Constitutional Court Judge Ackermann (note 39 above).

¹⁸⁹ *R v Secretary of State for the Home Department, Ex parte Daly* [2001] 3 All ER 433 (HL) at 447a. This statement has been cited with approval by the Constitutional Court in *Paulsen* (note 8 above) at para 53; *Minister of Health v New Clicks South Africa (Pty) Ltd* [2005] ZACC 14, 2006 (2) SA 311 (CC) at para 145.

the purview of politics? I would argue not.¹⁹⁰ Some might say desperate times call for desperate measures. However, my view is that whatever measure is employed, it should not be at the expense of utilising neutral principles in adjudication. The Constitution, after all, is meant to be an enduring document whose meaning should not be twisted in order to deal with political problems of the day.¹⁹¹ I fear that this is what the Court did.

¹⁹⁰ *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1, 2009 (2) SA 277 (SCA) at paras 15–19.

¹⁹¹ *S v Mhlungu* [1995] ZACC 4, 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC) at para 84. In rather extravagant terms, Stu Woolman takes issue with my call for neutrality and argues quite predictably that it is inapposite in the South African context. (See S Woolman ‘A Politics of Accountability: How South Africa’s Judicial Recognition of the Binding Legal Effect of the Public Protector’s Recommendations Had a Catalysing Effect that Brought Down a President’ (2016) 8 *Constitutional Court Review* 155, fn 135). I think that underlying his arguments are serious misunderstandings that require a response. The core of my argument is that it is not the duty of a court to use whatever ‘stratagems’ are available to shore up a failing state institution. Its role is far more limited – it is to say what the law is not and what it should be. See *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others* [2008] ZACC 10, 2008 (5) SA 171 (CC), 2008 (10) BCLR 968 (CC) at paras 303–310 (Skweyiya J, dissenting) (‘This Court is not and cannot be a site for political struggle. ... Courts deal with bad law; voters must deal with bad politics. ... A democracy such as ours provides a powerful method for voters to hold politicians accountable when they engage in bad or dishonest politics: regular, free and fair elections.’); *National Federation of Independent Business v Sebelius* 567 US 519 (2012) at 538 (‘Members of this court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation’s elected leaders, who can be thrown out of office if the people disagree with them. *It is not our job to protect the people from the consequences of their political choices.*’) Woolman also states that the Constitution ‘presses for non-neutral outcomes designed to effect adequate redress for centuries of depredation, degradation, dispossession and dehumanisation experienced under colonial rule and the apartheid regime’. First, it is important to point out that the Constitution envisages that its transformative polycentric objectives will be furthered *primarily* by the executive and the legislature. That is precisely why the Preamble says: ‘We, the people of South Africa, recognise the injustices of our past ... therefore, *through our freely elected representatives*, adopt this Constitution as the supreme law of the Republic so as to — [h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; [l]ay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law’. In other words, it is the people through their elected representatives and not judges who are the primary drivers of societal change. Second, that the Constitution enshrines these transformative objectives does not mean it appointed the judiciary to decide cases solely with a view of reaching politically desirable outcomes. The Constitution’s ‘majestic generalities’ are not a font or template for courts to do as they please. As Kentridge AJ once said, ‘the Constitution does not mean whatever we wish it to mean’. *S v Zuma & Others* [1995] ZACC 1, 1995 (2) SA 642 (CC) at para 17. In any event, no provision in the Constitution says neutral principles are inconsistent with our dispensation. So, what Woolman and the like-minded seek is a Constitutional Court which delivers politically desirable results, which would otherwise be difficult to obtain through the ballot box. A court which departs from paying strict fidelity to the text of the Constitution is inevitably bound to see in the Constitution’s language a vision of ‘meaning’ which turns to rest upon nothing but the personal views of its members. Either judges are bound by the text or they are bound by nothing. Woolman finds it depressing that my call for neutrality is influenced by the views of Judge Bork. The depression would be understandable if Woolman properly appreciated Bork’s views, which he does not. For example, he charges that during his senate confirmation hearings Bork made statements to the effect that he would overturn certain politically desirable decisions. He is wrong. Bork made no promises to overturn any decision if appointed to the Supreme Court. Bork also never argued that women should be denied ‘entitlement to reproductive choice.’ In fact, he made it clear that the issue of abortion was a policy matter for the legislatures and not the Supreme Court to decide. Accordingly, saying that such a matter should be left for the people to decide cannot be correctly characterised as a determination to ‘deny’ women ‘entitlements to

reproductive choice'. Finally, when the people of South Africa, like the people of the US, ratified and adopted their Constitution, they envisaged a particular society that they would build. They envisaged that social changes would happen through democratic processes; they envisaged that once a leadership fails them or acts politically errantly, they would vote the leadership out of power. This is precisely why Nelson Mandela said: 'If the ANC does to you what the apartheid government did to you, then you must do to the ANC what you did to the apartheid government.' By that he meant throw the ANC out of power and *not* run to the courts. Dare I say, a juristocracy will inevitably lead to a country the people themselves do not recognise. See RH Bork *A Country I Do Not Recognise: The Legal Assault on American Values* (2005). Those who oppose neutrality in favour of results-oriented judging are flirting with a path to judicial dictatorship. As for Woolman's views on Bork's role in the 'Saturday Night Massacre', Bork offers a full appraisal of the constitutionally laudable reasons for his actions in *Saving Justice: Watergate, the Saturday Night Massacre, and Other Adventures of a Solicitor General* (2013).