STRATEGIC LITIGATION IN SOUTH AFRICA:
UNDERSTANDING AND EVALUATING IMPACT

DPhil Thesis

Jason Brickhill

Trinity College
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ABSTRACT

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This Thesis analyses the impact of strategic litigation in South Africa, being litigation that concerns interests beyond the immediate parties and pursues generally forward-looking goals involving social change. Part I develops an analytical and evaluative framework to assess impact and its value. Part II applies that framework to two case studies concerning litigation on the right to education and the appointment and removal of government officials.

I situate strategic litigation in the litigation process, considering the models and forms that it may take and the range of remedies that may result from it. The analytical framework identifies the type, temporality, people affected and reach of impact as its main dimensions, and, in respect of type, proposes a typology of legal, material and political impact to analyse the effects of strategic litigation. Recognising that litigation in South Africa takes place in a constitutional context, the Thesis proposes the values of social justice, democracy and the rule of law as a normative framework to evaluate the effects of strategic litigation.

In Part II, this analytical and evaluative framework is applied to two case studies. The first case study concerns six streams of litigation to compel government to provide certain educational inputs, including infrastructure, textbooks, furniture, teachers and scholar transport. The second case study, arising in the context of the phenomenon of 'state capture', considers litigation seeking to remove allegedly unfit officials from key state institutions and to compel the appointment of suitable persons.

The conclusion to the Thesis consolidates insights from across the case studies, ultimately arguing that the South African litigation environment is generally conducive to strategic litigation and that, given adequate litigation resources and appropriate litigation decisions, strategic litigation in South Africa is capable of contributing to significant legal, material and political impact and therefore to social change.

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Friends tease that my real reason to come to Oxford was to play table tennis, all other pursuits being secondary. It was a joy to rediscover competitive table tennis after a long hiatus, and especially to be a part of the wonderful table tennis community at Oxford, a kind, inclusive, talented and joyful space. I will cherish beautiful road trips across the UK for matches and tournaments and the personal peace that I found training each week with teammates. I was proud to play alongside you all, and especially to captain the Men's Blues team in my final year. You will always have a place at my table!

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LIST OF ABBREVIATIONS AND SHORT FORMS

AJCL	American Journal of Comparative Law
AJLS	African Journal of Legal Studies
ALR	American Law Review
ANC	African National Congress
APSR	American Political Science Review
ARLSS	Annual Review of Law and Social Science
ARS	Annual Review of Sociology
ASIDI	Accelerated Schools Infrastructure Development Initiative
ASSAL	Annual Survey of South African Law
BEFA	Basic Education for All
BULR	Boston University Law Review
C&J	Crime and Justice
CALS	Centre for Applied Legal Studies
CAPS	Curriculum and Assessment Policy Statement
CASAC	Council for the Advancement of the South African Constitution
CCL	Centre for Child Law
CCR	Constitutional Court Review
CESCR	Committee on Economic, Social and Cultural Rights
CESR	Center for Economic and Social Rights
CJQ	Civil Justice Quarterly
CLH	Comparative Legal History
CLR	California Law Review
COPE	Congress of the People
CUP	Cambridge University Press
CWRJIL	Case Western Reserve Journal of International Law
DA	Democratic Alliance
DBE	Department of Basic Education
DLR	Deakin Law Review
DNDPP	Deputy National Director of Public Prosecutions
DPCI	Directorate for Priority Crimes Investigations ('Hawks')
DSO	Directorate of Special Operations ('Scorpions')

DSR	Development Southern Africa
ECDoE	Eastern Cape Department of Education
EE	Equal Education
EELC	Equal Education Law Centre
EFF	Economic Freedom Fighters
FSULR	Florida State University Law Review
FUL	Freedom Under Law
FULJ	Fordham University Law Journal
HICLR	Hastings International and Comparative Law Review
HILJ	Harvard International Law Journal
HLR	Harvard Law Review
HoD	Head of Department
HSF	Helen Suzman Foundation
HSRC	Human Sciences Research Council
HUP	Harvard University Press
IBP	International Budget Partnership
IDEA	Institute for Democracy and Electoral Assistance
IFP	Inkatha Freedom Party
IJHR	International Journal of Human Rights
IJLE	Indian Journal of Law and Economics
ILR	Iowa Law Review
ILRB	Iowa Law Review Bulletin
ISS	Institute for Security Studies
JAAS	Journal of Asian and African Studies
JHRP	Journal of Human Rights Practice
JLS	Journal of Law and Society
JSAS	Journal of Southern African Studies
KZN	KwaZulu-Natal
KZNDoE	KwaZulu-Natal Department of Education
LDD	Law Democracy and Development
LDoE	Limpopo Department of Education
LRC	Legal Resources Centre
LSI	Law and Social Inquiry
LSR	Law and Society Review

ICESCR	International Covenant on Economic, Social and Cultural Rights
IPID	Independent Police Investigative Directorate
MK	uMkhonto weSizwe
MLR	The Modern Law Review
MP	Member of Parliament
NDPP	National Director of Public Prosecutions
NPA	National Prosecuting Authority
NUP	Northeastern University Press
OECD	Organisation for Economic Co-operation and Development
OJLS	Oxford Journal of Legal Studies
OPUP	Open University Press
OSF	Open Society Foundations
OSJI	Open Society Justice Initiative
OUP	Oxford University Press
PARI	Public Affairs Research Institute
PELJ	Potchefstroom Electronic Law Journal
PIRLS	Progress in International Reading Literacy Study
PUP	Princeton University Press
SACMEQ	Southern and Eastern Africa Consortium for Monitoriing Educational Quality
SACQ	South African Crime Quarterly
SADTU	South African Democratic Teachers Union
SAFLII	Southern African Legal Information Institute
SALJ	South African Law Journal
SARE	Southern African Review of Education
SAJHR	South African Journal on Human Rights
SAPS	South African Police Service
SCA	Supreme Court of Appeal
SDR	Social justice, democracy and the rule of law
SERI	Socio-Economic Rights Institute of South Africa
SJ	Speculum Juris
SLR	Stellenbosch Law Review

SPII	Studies in Poverty and Inequality Institute
SUP	Stanford University Press
SURIJHR	Sur International Journal on Human Rights
TAC	Treatment Action Campaign
TILJ	Texas International Law Journal
TLR	Texas Law Review
TWLS	Third World Legal Studies
UCP	University of Chicago Press
UDM	United Democratic Movement
UMP	University of Michigan Press
UTP	University of Tennessee Press
WLUP	Wilfrid Laurier University Press
WP	World Politics
WUP	Wits University Press
YLJ	Yale Law Journal
YUP	Yale University Press

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1. INTRODUCTION

1.1. Law and social change in South Africa

The complex relationship between law and social change has been studied extensively from a range of perspectives. This Thesis is centrally concerned with the potential of litigation to contribute to meaningful social change. The questions that I address are fraught with conceptual, analytical, normative and empirical contention. Globally, scholars across disciplines have sought to develop concepts and frameworks to analyse the role of courts, in particular, and the process and effects of litigation in different jurisdictions. Two main sets of related normative concerns have attracted attention – the legitimacy of the role played by courts in response to strategic litigation; and how to evaluate the effects of litigation. Empirical inquiries have explored what effects, if any, litigation actually has on society, how to understand and measure these effects, and how they came about. As this Thesis illustrates, context is crucial to these debates.

My argument is located in contemporary South Africa, where these debates arise in the context of spiralling inequality,[1] slow realisation of socio-economic rights,[2] and significant weaknesses in governance,[3] aggravated by high levels of corruption.[4] These challenges have led to urgent contestations around the role of courts and the potential of

[1] National Planning Commission, 'National Development Plan 2030: Our Future - Make It Work' (2012); 'Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change' (Speakers Forum, South African Parliament 2017); 'Inequality Trends in South Africa: A Multidimensional Diagnostic of Inequality' (Statistics South Africa 2019).

[2] Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Juta 2010); Malcolm Langford and others (eds), *Socio-Economic Rights in South Africa: Symbols or Substance* (CUP 2014).

[3] 'Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change' (n 1) 34.

[4] ibid 393. See Chapter 7.

litigation and more broadly of the Constitution itself.[5] South Africa is notable for its diverse, dynamic and sophisticated civil society with a history of opposition to repression and employing varied strategies and tactics to pursue social change, including strategic litigation. The Thesis asks: How can we best understand the process of strategic litigation under the South African Constitution? What is its potential for social change? What factors are likely to explain its impact in particular situations?

This Thesis is motivated by my work as a public interest lawyer and constitutional scholar in South Africa.[6] I engaged in litigation pursuing social change for about a decade, while teaching and writing on constitutional jurisprudence in this area. Across practice and academia, I found inadequate and incomplete answers to the research questions above. As the Thesis demonstrates, though I found rich international material answering the same research questions, much of this literature does not 'fit' South African constitutional and socio-economic conditions. At the same time, existing local contributions were incomplete or thin, tending to skate over difficult conceptual and methodological questions and to neglect one or more of theory, doctrine or the facts on the ground. The Thesis closely analyses the international material, and builds on existing South African work to advance my argument, answering the above research questions through a socio-legal lens.

1.2. Central argument of the Thesis

The central argument of this Thesis is that, under contemporary South African conditions, litigation offers significant potential to contribute to social change. The Thesis defines litigation of this nature as strategic litigation. Crucially, the Thesis develops a framework

[5] Constitution of the Republic of South Africa, Act 108 of 1996.

[6] I discuss my positionality in Chapter 5.5.

to analyse *and* evaluate the effects of such litigation. The framework[7] is both analytical and normative.

Analytically, the framework situates strategic litigation in its social, economic and political context. In doing so, I argue that the impact of strategic litigation is best explained by a combination of factors that incorporate structural considerations *and* the agency of litigation actors. The Thesis recognises, too, that the impact of strategic litigation is not unidimensional. Rather, I advance a typology of the legal, material and political impact of litigation. These effects, I argue, are inter-related and feed into the context for future litigation.

Normatively, in addition to assessing the 'success' of litigation against its stated objectives, the Thesis argues that strategic litigation in a constitutional democracy should be evaluated against a set of core constitutional values. The Thesis sets out conceptions of these values, grounded in the South African constitutional text and its interpretation by the courts. To demonstrate the application of this framework and understand its context-sensitivity, the Thesis conducts two case studies. These case studies relate to pressing contemporary challenges of inequality, poverty and governance in South Africa.

1.3. Structure of argument

The Thesis is structured in two parts. Part I (Chapters 2-4) builds the conceptual, analytical and evaluative foundation for a context-sensitive inquiry into impact in two discrete case studies in Part II (Chapters 5-7).

In Chapter 2, 'The Litigation Process', I advance an understanding of strategic litigation as a process, being one form of 'legal mobilisation'. I define strategic litigation as

[7] See Table 1.1 at the end of this Chapter.

litigation (i) relating to interests including, but extending beyond, those of the parties, (ii) pursuing generally forward-looking goals (iii) of social change. I locate strategic litigation as one among several strategies for social change. Importantly, drawing from legal mobilisation literature, I identify the factors likely to explain decisions to litigate and how to litigate. I set out these drivers of strategic litigation, comprising the litigation environment and resources. Along with litigation decisions, these drivers provide important analytical scaffolding for the Thesis as a whole. The litigation environment is the broader context of socio-economic, political and legal factors likely to influence decisions to mobilise the law. Litigation resources include suitable litigants, lawyers and funding.[8] Concerning litigation decisions, I move beyond the simplistic binary of whether or not to litigate, found in much of the literature, to focus on three key decisions – 'model' of litigation (including, for example, movement-based and client-based litigation); 'form' of litigation (including, for example, test cases and reviews); and relief. This understanding of the litigation process is crucial to explain impact.

Chapter 3, 'The Impact of Strategic Litigation', provides an analytical framework to understand the multidimensional effects of strategic litigation. On the difficult questions of causation and attribution, I argue for an approach that asks whether litigation materially contributed, directly or indirectly and potentially alongside other contributing factors, to particular effects. I review existing literature on the range of perspectives from which impact may be viewed and introduce four dimensions to understanding impact – type, people affected, reach and temporality. Central to Chapter 3 and the Thesis overall, I propose a novel analytical typology: legal, material and political impact. I discuss the need for this typology and the relationship across the three categories. I also introduce the

[8] Drawing on the concept of a 'support structure' in Charles Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (UCP 1998).

impact 'feedback loop', recognising that litigation impact itself feeds into the conditions for future litigation, and discuss the relationship between judicial remedies and impact. Finally, I argue that the factors likely (in principle) to influence impact may also be understood as aspects of the litigation environment, resources and decisions introduced in Chapter 2.

Chapter 4, 'Evaluating Strategic Litigation', turns to the evaluation of litigation impact. This is distinct from the empirical question of what the impact actually *is* and how it is understood analytically. I propose a three-layered evaluative approach consisting of 'success', normative appraisal and a heuristic of common risks and benefits. First, it asks whether litigation 'succeeded' in achieving its objectives. Secondly, it evaluates the overall impact against a set of constitutional values - social justice, democracy and the rule of law (the 'SDR framework'). It asks to what extent the litigation contributed to (or detracted from) these values. Finally, to act as a check on free-wheeling value judgements that risk either valorising or pillorying litigation, I offer a heuristic of significant risks and potential benefits. The heuristic, operating within the SDR framework, serves to prompt inquiry into potential blind spots.

Turning to Part II of the Thesis, Chapter 5 on 'Methodology and Methods' explains how I conducted the case studies in Chapters 6 and 7. Each case study investigates the legal, material and political impact of particular bodies of strategic litigation. In the process, they consider whether and to what extent the litigation environment, resources and decisions contributed to specific impacts. Each chapter then evaluates the impact of the litigation using the framework developed in Chapter 4.

Chapter 6, 'Education Provisioning', studies six streams of litigation invoking the right to a basic education in s 29(1)(a) the Constitution. The litigation sought to compel the state to provide specific educational 'inputs': eradicating so-called 'mud schools';

providing safe classrooms and infrastructure more generally, under binding 'Norms and Standards'; and securing textbooks, teachers, furniture, and scholar transport.

Chapter 7, 'Recapturing the State?', studies five streams of litigation concerning appointment to senior positions in the criminal justice sector and the executive during the Jacob Zuma presidency. It considers litigation relating to appointments in the National Prosecuting Authority (NPA), the specialist anti-corruption body known as the 'Scorpions' and later as the 'Hawks', the South African Police Service (SAPS), the Independent Police Investigative Directorate (IPID) responsible for investigating complaints against the police, and finally the Presidency and Cabinet.

In the Conclusion, I draw together some of the main findings from the case studies and reflect on their implications for the analytical and evaluative framework developed in Part I of the Thesis. I also set out my broader conclusions on the potential of strategic litigation to contribute to social change in South Africa.

1.4. Overall Thesis methodology and sources

Part I of the Thesis is predominantly theoretical and doctrinal. It advances a theoretical understanding of the process of strategic litigation as a form of legal mobilisation, developing key concepts such as strategic litigation and impact. The methodology is doctrinal in that it situates the conceptual understanding of strategic litigation – including explanations for the phenomenon and its impact – in the South African legal system. Although South Africa is a constitutional democracy governed by the Constitution,[9] it has its roots in English common law, Roman-Dutch civil law and African customary law.

[9] South Africa's transition to constitutional democracy was a two-stage process, beginning with the adoption of the Constitution of the Republic of South Africa, Act 200 of 1993 (interim Constitution), by the undemocratic apartheid Parliament. The interim Constitution came into effect on 27 April 1994. It provided for a process to adopt the final Constitution, whose text was required to be certified by the newly created Constitutional Court for compliance with 34 agreed Constitutional Principles.

These hybrid legal roots reflect the country's settler colonial history, apartheid, and the struggle for democracy. An understanding of this history is key to fully appreciating the changes wrought by the Constitution.

The doctrinal method is often treated as so implicit in legal research that it is scarcely articulated.[10] Doctrinal analysis ranges from the problem-based method used by practitioners and students to the identification and interpretation of laws, and systematisation as a form of theory-building.[11] At different points in the Thesis, I engage in all these forms, in particular in Chapters 2, 4, 6 and 7. Chapter 2 analyses the key rules of procedure, features of substantive law and legal culture that condition strategic litigation in South Africa. Chapter 4 draws on the Constitution, jurisprudence and academic literature in developing conceptions of social justice, democracy and the rule of law to evaluate impact. The case studies in Chapters 6 and 7 trace doctrinal developments regarding the right to education and the rule of law, among other areas of procedural and substantive law, to determine legal impact.

Part II of the Thesis employs mixed methods. In addition to the doctrinal method described above, the case studies use quantitative and qualitative approaches to determine material and political impact. My sources include quantitative data, especially government reports, budget documents and other data; and qualitative data, especially 40 semi-structured interviews with the litigants, lead lawyers, government officials and independent experts in the case study areas. As I explain in Chapter 5, the relationship between Parts I and II of the Thesis is partly iterative, rather than a simple linear progression from a theoretical framework applied to the case studies. While the core structure of Part I was

[10] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 DLR 83, 99.

[11] ibid 106.

finalised before the case studies, the case studies infused its content and influenced my approach to the Thesis as a whole.

1.5. Significant original contribution to knowledge

This Thesis is located at the nexus of literature broadly concerned with the role of courts and law in society. In every Chapter, I identify chapter-specific contributions being made to existing knowledge. Here, I set out the Thesis' contributions more generally.

At the broadest level, the Thesis speaks to enduring debates regarding constitutionalism, separation of powers, judicial review and the role of courts.[12] It illustrates the highly contextual nature of the role of courts and the impact of litigation. My approach to the breadth and complexity of impact exposes the false dichotomy created by dogmatic, universalist approaches seeking to discredit judicial review in all circumstances or to hold it out as a panacea. In doing so, the Thesis begins to build a nuanced theory of social change through litigation – when and to what extent it is possible and legitimate.

This Thesis advances the literature on legal mobilisation,[13] and sets out factors that explain the phenomenon and its effects – at the level of theory in Chapters 2-3 and empirically through the case studies in Chapters 6-7. Chapter 5, bridging Parts I and II, develops a methodology and methods to apply the multi-layered analytic and evaluative framework. It proposes a mixed methods approach to the empirical inquiry that the framework invites. Although there are existing studies of this nature from the Global South

[12] For example, Jeremy Waldron, 'The Core of the Case against Judicial Review' (2005) 115 YLJ 1346. For two contrasting approaches to the study of judicial review, see Grégoire Webber, Paul Yowell and Richard Ekins, *Legislated Rights: Securing Human Rights through Legislation* (CUP 2018); Theunis Roux, *The Politico-Legal Dynamics of Judicial Review: A Comparative Analysis* (CUP 2018).

[13] Introduced in Chapter 2. For an overview, see Lisa Vanhala and Jacqui Kinghan, 'Literature Review on the Use and Impact of Litigation' (Public Law Project 2018).

and other jurisdictions, the literature has tended (even in South African debates) to be dominated by studies from the US,[14] and there are no monograph-length South African works on the impact of strategic litigation under the Constitution.[15] The Thesis fills this gap. Finally, the study feeds into burgeoning literature on strategic litigation itself (especially impact), consisting of both academic works and civil society research reports.[16] Building on this literature, I offer a conceptually clear and theoretically sound understanding of the types of impact, its attribution, and importantly, an area in which many studies are silent, its evaluation.

In the South African manifestations of the global debates, I engage with and build on several intersecting bodies of literature, including some of my own earlier work. These include the literature on constitutional history (especially the discussion of legal culture in Chapter 2 and the case study in Chapter 7, covering an important period of recent constitutional history); substantive constitutional law, especially in the areas of the two case studies (education and socio-economic rights generally, and state capture and appointments);[17] broader theoretical accounts of South African constitutional law;[18] constitutional litigation and procedure,[19] especially more critical work on the relationship

[14] I engage with this literature in Chapters 2 and 3.

[15] For an influential study of *pre-democracy* litigation, see Richard Abel, *Politics by Other Means: Law in the Struggle against Apartheid, 1980-1994* (Routledge 1995).

[16] I discuss this in Chapters 2 and 3.

[17] See literature in Chapters 6 and 7.

[18] Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (CUP 2013); Stu Woolman, *The Selfless Constitution : Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (Juta 2013); James Fowkes, *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa* (CUP 2016).

[19] Max Du Plessis, Glenn Penfold and Jason Brickhill, *Constitutional Litigation* (Juta 2013).

between civil procedure and access to justice and human rights;[20] transformative constitutionalism;[21] and critical constitutional thought examining the potential of the Constitution and the courts to contribute to social change.[22] I draw together these different bodies of work, bridging theory, doctrine and empirical study where most of the contributions so far have neglected one or more of these dimensions.

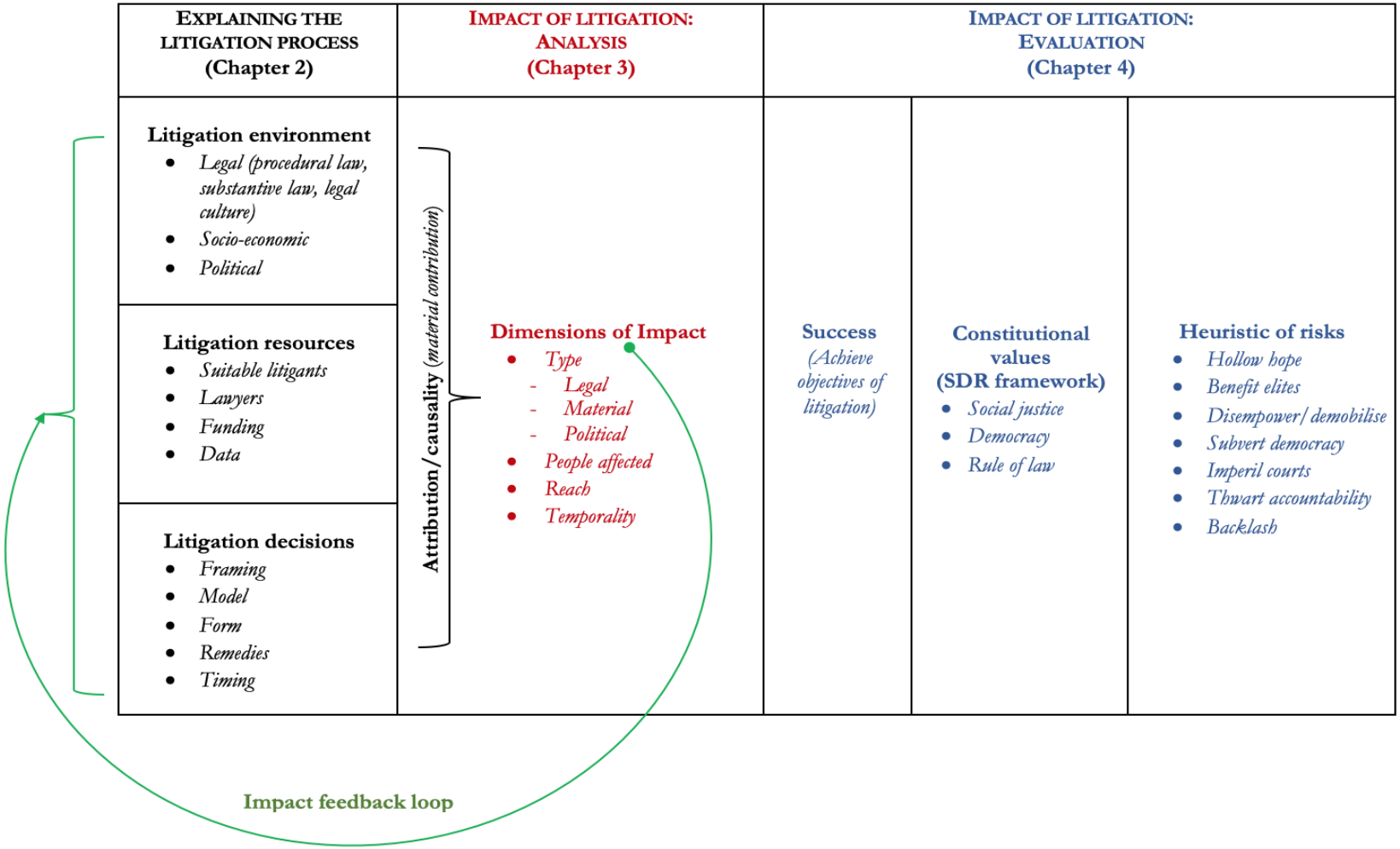
The Thesis as a whole contributes to the growing, and increasingly international, literature on courts and social change. Although grounded in the South African experience, it offers a conceptual, analytical and evaluative framework that is broadly relatable to other jurisdictions. In particular, the understanding of the litigation environment, resources and decisions, and the typology of legal, material and political impact, in Part I of the Thesis, are designed to be context-sensitive and applicable across jurisdictions. Part II of the Thesis contributes to the literature on socio-economic rights, and specifically the right to education, at a level of doctrine and empirical impact as well as litigation broadly related to the rule of law. *Table 1.1* below captures the central features of the analytical and evaluative framework developed in Part I of the Thesis, to which I turn in the Chapters that follow.

[20] Jackie Dugard, 'Court of First Instance?: Towards a pro-Poor Jurisdiction for the South African Constitutional Court' (2006) 22 SAJHR 261; Jackie Dugard, 'Courts and the Poor in South Africa: A Critique of Systemic Judicial Failures to Advance Transformative Justice' (2008) 24 SAJHR 214; James Fowkes, 'How to Open the Doors of the Court – Lessons on Access to Justice from Indian PIL' (2011) 27 SAJHR 434.

[21] Discussed in Chapter 2.4.1.

[22] Discussed under risks of strategic litigation in Chapter 4.5.1.

Table 1.1: Analytical and evaluative framework



2. CHAPTER 2: THE LITIGATION PROCESS

2.1. Introduction

In the Introduction, I explained the need for a close, comprehensive analysis of the impact of strategic litigation in South Africa. This Chapter explains the process of strategic litigation, setting the stage for the analysis of impact in Chapter 3 and evaluation in Chapter 4. I then apply the framework developed in Part I to the case studies in Part II.

I first introduce strategic litigation as a form of 'legal mobilisation'. I define it as litigation (i) relating to interests including but beyond the parties to litigation, (ii) pursuing generally forward-looking goals (iii) consisting of social or systemic change (of all normative stripes). I contrast it with three prominent alternatives – 'public interest litigation', 'cause-lawyering' and 'lawfare'.

Second, I locate strategic litigation as one among several strategies for social change. I analyse how litigants relate to government and other actors in the process. Relations with government or other potential adversaries can sit (and shift) along a continuum of confrontational, complementary, co-operative or co-opted. Here, I also explore different conceptions of 'solidarity'. This aids in understanding the various contextual relationships within which strategic litigation takes place and lays the groundwork for the framework of impact in Chapter 3.

Third, I explain the decision *to* engage in strategic litigation. I synthesise the literature to present two sets of influencing factors: the litigation environment, and litigation resources. The litigation environment is the broader context of socio-economic, political and legal factors likely to influence decisions to mobilise the law. Litigation resources include the availability of suitable litigants, lawyers and funding. Along with explaining why strategic litigation happens in the first place, these factors may also explain its impact. I return to this in later Chapters. Framing plays a key role in guiding action towards or away from litigation, bridging the predominantly structural

factors captured in the litigation environment and resources, and the agency exercised by those making the decision to litigate.

Fourth, I consider decisions about *how* to litigate ('litigation decisions'). Moving beyond the well-traversed binary of whether or not *to* litigate, I map key choices regarding how to litigate. Among the innumerable decisions made during litigation, I focus on three: (1) 'model' of litigation; (2) 'form' of litigation; and (3) relief. I define 'model' principally on the basis of the relationship between litigants and litigators, on the one hand, and the objectives or 'cause', on the other. I identify six models, namely: client-based, movement lawyering, campaign-based, research-based, Strategic Litigation Against Public Participation ('SLAPP' suits), and court-driven litigation. By 'form', I mean the technical shape of the litigation. Here, I discuss individual cases, test cases, structural or systemic litigation, and class actions and other group claims, including combination forms. Regarding relief, the broad and flexible remedial regime offers the possibility of remedies that include declaratory orders, interdictory/injunctive relief, money orders, structural interdicts and special costs orders.

2.2. Strategic litigation

2.2.1. Strategic litigation as legal mobilisation

Several theoretical traditions, mainly in political science, have sought to explain why people turn to the law (or not) and why or under what conditions it has certain effects. These approaches seek to explain 'legal mobilisation'. In the earliest and most cited use of the term, 'the law is … mobilized when a desire or want is translated into a demand as an assertion of rights'.[23] Here, I use legal mobilisation to mean the use of the law with the objective of securing social change, another term

[23] Frances Zemans, 'Legal Mobilization: The Neglected Role of the Law in the Political System' (1983) 77(3) APSR 700, 700.

widely used in the South African[24] and international[25] literature without definition, alongside similar terms like 'systemic reform'.[26] I use social change to mean wide-ranging shifts affecting significant numbers of people in relation to access to social goods, behaviours, practices, power relations, social roles, values or the operations of bureaucracies or institutions.[27] This construction of legal mobilisation encompasses the various strands of literature.[28]

Some qualify legal mobilisation, limiting it to litigation,[29] social movements (excluding other actors), [30] or adding normative qualifications, such as advancing human rights or 'legitimacy'.[31] Different uses have in common the law's potential to be an effective instrument for social change.[32] However, restricting the term to normatively attractive aims risks presuming or obscuring value judgements about the use of the law. I do not limit the term to social movements or to litigation, and make no normative assumptions about the social change pursued. While my focus is strategic litigation, the law may be mobilised in other ways, such as lobbying or advocacy, by a range of actors pursuing varied aims, as alternatives to litigation or alongside it, discussed below.

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[24] Eg., Steven Budlender, Gilbert Marcus and Nick Ferreira, *Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons* (Atlantic Philanthropies 2014); SERI, 'Public Interest Legal Services in South Africa: Project Report' (RAITH Foundation, Ford Foundation 2015); Jackie Dugard and Malcolm Langford, 'Art or Science - Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism' (2011) 27 SAJHR 39.

[25] Eg., OSJI, 'Strategic Litigation Impacts: Insights from Global Experience' (OSF 2018); Octávio Ferraz, *Health as a Human Right: The Politics and Judicialisation of Health in Brazil* (CUP 2020) 1–2.

[26] Gerald Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (2nd ed, UCP 2008) 4–6.

[27] Nico Wilterdink, 'Social Change', *Encyclopaedia Brittanica* (2020).

[28] See Vanhala and Kinghan (n 13).

[29] Varun Gauri and Daniel Brinks (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (CUP 2008) 14.

[30] Tshepo Madlingozi 'Post-Apartheid Social Movements and Legal Mobilisation' in Langford and others (n 2) 92.

[31] Jeff Handmaker and Thandiwe Matthews, 'Analysing Legal Mobilisation's Potential to Secure Equal Access to Socioeconomic Justice in South Africa' (2019) 36 DSR 889, 892.

[32] Lisa Vanhala, *Making Rights a Reality? Disability Rights Activists and Legal Mobilization* (CUP 2011) 6.

There is growing South African legal mobilisation literature,[33] to which this Chapter contributes. The international literature has been dominated by United States (US) scholarship, though this is changing. While US literature is helpful, it is closely tied to US conditions and experience.[34] Where I draw from international literature to better understand the litigation process in South Africa, I do so with this caution in mind. To begin, I define 'strategic litigation'.

2.2.2. Defining 'strategic litigation'

'Litigation' means 'the action or process of carrying on a suit in law or equity; legal proceedings'.[35] It is the act of instituting or conducting a lawsuit or legal proceedings. 'Strategic' means 'of, relating to, or characterised by the identification of long-term or overall aims and interests and the means of achieving them; designed, planned, or conceived to serve a particular purpose or achieve a particular objective'.[36]

'Strategic litigation' is a relatively new term now widely used by non-governmental organisations (NGOs), law firms and academia – in South Africa and globally. Ramsden and Gledhill's empirical study of contemporary usage observes, "'[s]trategic ligation" is everywhere, yet nowhere is it defined.'[37] It is used alongside terms like 'public interest litigation' ('PIL'), 'impact litigation', 'cause lawyering', 'lawfare', and 'human rights litigation/lawyering'.[38] These terms are

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[33] Eg., Jeff Handmaker and Remko Berkhout (eds), *Mobilising Social Justice in South Africa: Perspectives from Researchers and Practitioners* (Pretoria University Law Press (PULP) 2010); Dugard and Langford (n 24); Handmaker and Matthews (n 31); Jonathan Klaaren, 'Law and Mobilization against State Capture', *M Buthelezi and P Vale (eds) State Capture in South Africa: Critical and Comparative Perspectives* (forthcoming, WUP 2021).

[34] Gauri and Brinks (n 29) 16; Epp (n 8) 6; Anuj Bhuwania, *Courting the People: Public Interest Litigation in Post-Emergency India* (CUP 2017) 142.

[35] 'litigation, n.' *OED Online* (OUP September 2021) www.oed.com/view/Entry/109211. Accessed 28 September 2021.

[36] 'strategic, adj. and n.' *OED Online* (OUP, September 2021) www.oed.com/view/Entry/191312. Accessed 28 September 2021.

[37] Michael Ramsden and Kris Gledhill, 'Defining Strategic Litigation' (2019) 38 CJQ 407, 407.

[38] ibid 408; Helen Duffy, *Strategic Human Rights Litigation: Understanding and Maximising Impact* (Hart 2018) 3; OSJI (n 25) 8.

used interchangeably and overlap, but bear differences in emphasis, perspective and meaning. I adopt 'strategic litigation' because it is gaining currency in practice and scholarship and is most inclusive and least prone to contentious normative pre-commitments.

'Strategic litigation' is sometimes misused to refer to tactical choices made during litigation, which constitute 'litigation strategy',[39] or used loosely to refer to litigation that is 'clever' or effective. Strategic litigation, I argue, is litigation with three main characteristics. First, it relates to interests other than those of immediate parties.[40] Secondly, its objectives generally include forward-looking goals, without excluding compensation or restitution for litigants.[41] Finally, its objectives consist of social change, without presupposing its normative basis. Although strategic litigation is often used in association with human rights, it need not be.[42] It is a normatively neutral term accommodating 'cause variety'.[43] Strategic litigation encompasses civil and criminal litigation in common law or civil law systems at the domestic, regional and international levels.[44] I now briefly distinguish strategic litigation from 'public interest litigation', 'cause lawyering' and 'lawfare'.

'Public interest litigation' (PIL) is defined to mean '[l]egal practice that advances social justice or other causes for the public good'.[45] It refers to lawyering undertaken by 'public interest' or 'human rights' lawyers. PIL is self-consciously associated with political goals captured under the public interest, usually framed in terms of the enforcement of human rights. The concept of public

[39] Ramsden and Gledhill (n 37) 408.

[40] ibid 411. See also Duffy (n 38) 3.

[41] Ramsden and Gledhill (n 37) 412.

[42] ibid 413. Duffy (n 38) refers to 'strategic *human rights* litigation'.

[43] ibid 409–412.

[44] ibid 425.

[45] Bryan Garner and Henry Black, *Black's Law Dictionary* (11th edition, Thomson Reuters 2019).

interest litigation is contested in theory and in practice,[46] but is inescapably normative. Ramsden and Gledhill note that it is 'ethically grounded in assisting marginalised groups and the general cause of securing access to justice for such groups'.[47] In the US, it is often associated with the civil rights movement.[48] In India, although developed to promote access to justice for the vulnerable and marginalised,[49] a connotation it still carries, 'PIL' is primarily procedural, connoting a form of jurisdiction exercised by the higher judiciary.[50] In most jurisdictions, PIL is associated with normative commitments or substantive outcomes considered 'better' according to a set of values representing the public interest. In South Africa, PIL is best understood as 'the use of litigation to pursue objectives that extend beyond the interests of individual litigants in a case and that are normatively justifiable', usually with reference to human rights, constitutionalism and/or social justice.[51] The term therefore includes a normative pre-commitment significantly narrowing its meaning.

'Cause lawyering' is defined to mean '[t]he practice of a lawyer who advocates for social justice by combining the activities of litigation, community organizing, public education, and lobbying to advance a cause past its current legal limitations and boundaries'.[52] It has particular

[46] Scott Cummings and Deborah Rhode, 'Public Interest Litigation: Insights from Theory and Practice' (2009) 36 FULJ 603, 605.

[47] Ramsden and Gledhill (n 37) 419–420.

[48] ibid 420.

[49] Upendra Baxi, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' (1985) 4 TWLS 27, 108–109.

[50] Bhuwania (n 34) 2.

[51] Jason Brickhill, *Public Interest Litigation in South Africa* (Juta 2018) 6.

[52] Garner and Black (n 45).

resonance in US literature.[53] It connotes social activism by lawyers who share litigants' objectives.[54] Sarat and Scheingold suggest that a 'cause lawyer' is committed to, or at least involved in, the litigant's 'cause' or political objectives.[55] The term is infrequently employed in the South African literature. McEvoy, writing in the Northern Ireland context, uses 'struggle lawyer' alongside 'cause lawyering' to refer to lawyers who publicly align themselves with litigants' 'causes'.[56] 'Struggle lawyer' was used in South Africa to refer to lawyers acting in political trials, inquests and other politically charged litigation on behalf of opponents of apartheid.[57] These terms are also normatively loaded.

The term 'lawfare', a *portmanteau* of 'law' and 'warfare', has gained currency in South Africa,[58] but it is vague and unhelpful. It is broadly understood to mean the use or abuse of the law as a weapon to achieve political ends.[59] In 2001, anthropologists John and Jean Comaroff used the term, citing colonial and apartheid-era examples of abuse of law, to mean 'the effort to conquer and control indigenous peoples by the coercive use of legal means'.[60] While helpful in respect of highlighting law's coercive power, around the same time, the term was paradoxically used by a US Air Force lawyer to describe how international organisations were using international human rights

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[53] Austin Sarat and Stuart Scheingold, *Cause Lawyering: Political Commitments and Professional Responsibilities* (OUP 1998); Austin Sarat and Stuart Scheingold, *Cause Lawyers and Social Movements* (SUP 2006).

[54] Brian Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (CUP 2006) 156.

[55] Sarat and Scheingold, *Cause Lawyering: Political Commitments and Professional Responsibilities* (n 53) 3–5.

[56] Kieran McEvoy, 'Law, Struggle, and Political Transformation in Northern Ireland' (2000) 27 JLS 542, 551.

[57] The term 'attorney-activists' is used to refer to public interest lawyers in OSJI, *Strategic Litigation Impacts: Equal Access to Quality Education* (OSF 2017) 12.

[58] Theunis Roux, 'The Constitutional Court's 2018 Term: Lawfare or Window on the Struggle for Democratic Social Transformation?' (2020) 10 CCR 1; Michelle le Roux and Dennis Davis, *Lawfare: Judging Politics in South Africa* (Jonathan Ball 2019); Hugh Corder and Cora Hoexter, '"Lawfare" in South Africa and Its Effects on the Judiciary' (2017) 10 AJLS 105.

[59] Corder and Hoexter (n 58) 106.

[60] John Comaroff, 'Colonialism, Culture, and the Law: A Foreword Symposium: Colonialism, Culture, and the Law: Foreword' (2001) 26 LSI 305, 306. See also, J Comaroff and JL Comaroff (eds), *Law and Disorder in the Postcolony* (UCP 2006) 26.

law to obstruct US military objectives.[61] Amongst other instances, it was later employed by pro-Israel groups to criticise Palestinian supporters' use of international human rights law to oppose Israel's security practices.[62] More recently, it has been used to criticise the use of law to persecute democratically elected leaders in Latin America.[63]

'Lawfare' has predominantly negative connotations. Roux identifies three concerns embedded within it, namely that – litigating issues that should be resolved politically debilitates democratic politics; litigating politically contentious cases imperils judicial independence; and that litigants will abuse the law to delay cases or avoid accountability.[64] Others, recognising similar negative connotations, suggest that lawfare may also be deployed for 'good',[65] that it may refer to 'the use of litigation as a "weapon of the weak"'.[66] 'Lawfare' is a nebulous, normatively loaded and contradictory term.[67] It is unhelpful in research directed at investigating the very risks (or benefits) that it prejudges.[68]

'Strategic' litigation is not presumptively normative like PIL and cause lawyering. Nor does it suffer from lawfare's conceptual flaws. The idea that litigation is 'strategic' connotes simply that the litigation is conducted in order to attain a particular set of objectives beyond the immediate

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[61] Charles Dunlap, 'Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts' (Carr Center for Human Rights, John F. Kennedy School of Government, Harvard University, Working Paper, 2001), cited in Roux, 'The Constitutional Court's 2018 Term: Lawfare or Window on the Struggle for Democratic Social Transformation?' (n 58) 7.

[62] Leila Nadya Sadat and Jing Gengt, 'On Legal Subterfuge and the So-Called Lawfare Debate' (2010) 43 CWRJIL 153, 154.

[63] Cristiano Martins, Valeska Martins and Rafael Valim, *Lawfare : Waging War through Law* (Routledge 2021).

[64] Roux, 'The Constitutional Court's 2018 Term: Lawfare or Window on the Struggle for Democratic Social Transformation?' (n 58) 11–12.

[65] le Roux and Davis (n 58) 5.

[66] Corder and Hoexter (n 58) 106.

[67] See special issue of Case Western Reserve Journal of International Law (2010) on lawfare, including origins, meaning and usefulness.

[68] See Chapter 4.5.1.

case outcome.[69] These objectives may, but need not, concern the public interest or a cause. Strategic litigation derives its meaning from the *nature* of the objectives, rather than their specific content or normative pre-commitments.

Strategic litigation differs from 'ordinary' litigation.[70] Most litigation in common law jurisdictions concerns disputes between private persons or the state and private persons.[71] Objectives usually concern the immediate outcome of the case or at least the interests of the parties, rather than any broader objective of social change. Strategic litigation is also distinct from precedent-setting cases, which themselves only form a small proportion of cases reaching court. As Mulcahy notes, the vast majority of cases do not even result in court decisions; among those that do, many 'do not have precedent-setting potential, raise broader issues or even involve much law.'[72] However, in practice it may be difficult to draw bright lines between strategic litigation and ordinary litigation, such as cases arising from clinical legal services, especially because individual interests are often intertwined with broader objectives.[73]

Ultimately, strategic litigation might seek *any* form of social change and does not presuppose a normative commitment to promoting the interests of vulnerable persons or human rights. Strategic litigation thus draws within its scope litigation seeking to achieve an impact beyond the outcome of a discrete case. While the concept is value-neutral, its impacts can be assessed through a normative lens. Chapter 4 advances an appropriate evaluative framework.

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[69] 'Impact litigation' is similarly defined with reference to objective, namely to have 'impact'. Some consider it synonymous with strategic litigation, eg Ramsden and Gledhill (n 37) 422.

[70] Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (n 26) 5.

[71] Abram Chayes, 'The Role of the Judge in Public Law Litigation' (1976) 89 HLR 1281.

[72] Linda Mulcahy, 'The Collective Interest in Private Dispute Resolution' (2013) 33 OJLS 59, 63.

[73] Duffy (n 38) 48–49; SERI (n 24) 48.

2.3. Litigation and other strategies; litigants and other actors

2.3.1. Strategic litigation in relation to other strategies

Litigation is one strategy for pursuing social change, for some a last resort.[74] It is not even the only way to mobilise the law or human rights to pursue social change. Recourse to courts must be considered in a multi-institutional setting that includes, in particular, the legislative and executive branches, and alongside other potential strategies.[75]

Other strategies employing the law include research and analysis of laws and policies, public information, advice and assistance, social mobilisation and advocacy,[76] and judicial education to improve human rights literacy on the bench.[77] Even if litigation is used, it may not entail a formalised process culminating in a court order. Instead, it may create space for negotiation or mediation or produce a settlement. There are also strategies for social change that do not (or need not) invoke the law. Some involve *unlawful* conduct, like protest action that does not comply with statutory requirements or other forms of civil disobedience. Political strategies include formal engagement, such as lobbying or making submissions to Parliament, and informal engagement such as petitions, public campaigns and protest.

The 'choice' of litigation will always be contingent on the realistic availability of alternatives constrained by circumstances. It is often unrealistic to expect a 'choice' in the sense of full deliberation within a group.[78] Sometimes, such as when facing a threat of eviction, there will be no

[74] SERI (n 24) 38.

[75] Jeff King, *Judging Social Rights* (CUP 2012) 17.

[76] Budlender, Marcus and Ferreira (n 24) 4; SERI (n 24) 65; Vanhala (n 32) 6.

[77] Duffy (n 38) 249.

[78] Stuart Wilson, 'Litigating Housing Rights in Johannesburg's Inner City: 2004-2008' (2011) 27 SAJHR 127, 137.

real alternative to litigation.[79] However, it is important to understand litigation – and assess its impact – in light of available alternatives, which may also be employed simultaneously.

2.3.2. Relations with the state

Where the objective is to change government action or policy, actors may find themselves in a range of different relationships with the state. Much of the literature focuses on social justice or human rights organisations. Similar questions arise in relation to other actors, such as corporations. In this Thesis, I focus primarily on civil society.

No model can capture the full complexity of relations between actors. A useful starting point, however, is a recent study of different strategies for social change, including strategic litigation, suggesting an approach to understand relations between South African 'social justice organisations' and government.[80] The model includes four types of relationship – co-optation, co-operation, complementarity and confrontation.[81] These are best understood on a continuum, not strict categories. Co-optation and confrontation are at the two extremes. Where litigants and government have similar perceived goals and adopt similar perceived strategies to achieve them, the organisations become co-opted to the government's agenda and action. At the other end of the spectrum, where perceived goals *and* strategies diverge, a confrontational relationship is likely. In between these extremes, a complementary relationship arises where perceived goals are similar but strategies to achieve them differ (for example, where parties disagree about the use of litigation). Where strategies do not differ so sharply and goals remain shared, co-operation is more likely.

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[79] ibid 138.

[80] PARI, 'Confrontational, Complementary, Co-Operative or Co-Opted? Social Justice Organisations Working with the State' (RAITH Foundation 2016).

[81] ibid 15–16.

Litigation against the state tends to be understood as entailing a confrontational relationship, as do protest action and petitions within the law,[82] civil disobedience and even armed struggle outside it. However, the use of litigation is not axiomatically adversarial or confrontational.[83] Litigation may be used to pressure parts of government with tacit support or cooperation of other departments or individual bureaucratic reformers.[84] For example, treasury officials may support litigation seeking to compel the state to use public funds efficiently. Often, courts are acting to extend, not undermine, government's stated policy positions. Strategic litigation may clear certain impediments in the democratic process, such as political blockages,[85] monitoring deficits or incomplete political commitments.[86]

Co-operation, complementarity, co-optation and confrontation all have the potential to support positive outcomes.[87] Further, an actor may adopt different strategies over time and its relationship with the state may shift accordingly, even during the same case. This is illustrated by the range of strategies employed to secure the provision of antiretroviral drugs for those infected with HIV-AIDS in South Africa. Although culminating in the landmark Constitutional Court decision requiring the provision of nevirapine in *Treatment Action Campaign* ('*TAC*'),[88] several other strategies were employed, including social mobilisation, grassroots activism, marches, protest,

[82] ibid 34.

[83] ibid 35.

[84] Adam Shinar, 'Dissenting from within: Why and How Public Officials Resist the Law' (2013) 40 FSULR 601; Charles Epp, *Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State* (UCP 2009) 11; PARI (n 80) 35.

[85] Langford and others (n 2) 435.

[86] Gauri and Brinks (n 29) 26–27.

[87] PARI (n 80) 36.

[88] *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC).

submissions to parliamentary committees, monitoring and advocacy.[89] At times, the Treatment Action Campaign was positioned in a complementary or co-operative relationship to the state, although its relationship during the litigation became confrontational.[90]

2.3.3. Relations among non-state actors

In principle, a litigant can relate to non-state actors in similar ways as to the state. Vanhala observes that relational dynamics with other organisations or actors with an interest can range from cooperative to competitive or conflictual.[91] Co-optation is also possible, for example in the context of a community or NGO being 'captured' by government or business.

For potential allies, this raises questions about the principled basis for alliances and different conceptions of solidarity. On a thinner conception of solidarity, allies require agreement on means and ends (co-optation, or at least co-operation, in the 4-C framework). On a thicker conception, solidarity can be sustained where there is agreement on ends with deference as to means. For Kolers, solidarity is 'about working together *irrespective of whether we agree*.'[92] This opens up the possibility of co-operation, complementarity and co-optation relationships grounded in solidarity, with only confrontation excluding solidarity where there is disagreement on means *and* ends. For example, organisations may be in solidarity despite adopting different approaches to litigation decisions, such as their model or framing of issues. Complicating relations among litigation actors and the potential for solidarity are power relations among them, for example between poor communities or movements and middle-class, professional NGOs and lawyers.

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[89] Mark Heywood, 'Preventing Mother-to-Child HIV Transmission in South Africa: Background Strategies and Outcomes of the Treatment Action Campaign Case against the Minister of Health Current Development' (2003) 19 SAJHR 278.

[90] ibid 299–307.

[91] Vanhala (n 32) 34.

[92] Avery Kolers, *A Moral Theory of Solidarity* (OUP 2016) 7.

Several potential dynamics emerge, including the risk that lawyers and NGOs will disempower social movements, demobilise them away from more robust tactics, or romanticise them.[93] The case studies present an opportunity to explore these dynamics.

2.4. Explaining decisions to litigate

Why and how do people mobilise law through strategic litigation and what considerations best explain such decisions? The literature offers several explanations, emphasising different factors as drivers of, or barriers to, legal mobilisation. Influential approaches include political disadvantage theory, political or legal opportunity structure approaches, and resource mobilisation theories.[94] Although the structure-agency divide should not be overstated, some of this literature tends to neglect actor agency, emphasising structural considerations such as economic and institutional factors deterministically.[95] Much of the political science literature also tends to prioritise extra-legal considerations, downplaying legal doctrine as a factor. I draw on these approaches below in advancing a more comprehensive explanatory framework through two inter-related and overlapping categories of factors: the *litigation environment* and *litigation resources*.

The litigation environment and litigation resources capture the main considerations emerging from the literature. They can be understood as drivers of, or barriers to, litigation.[96] The litigation environment consists of the conditions establishing the broader context for litigation, in particular the legal, socio-economic, and political conditions. Litigation resources consist primarily of litigants themselves, lawyers and funding. While both change over time, the litigation

[93] Kate Tissington, 'Between Praxis and Paralysis: The Relationships Between Legal NGOs and Social Movements' (2010) 104 TRIALOG 56.

[94] Vanhala and Kinghan (n 13).

[95] Vanhala (n 32) 13–14; Susan Silbey, 'After Legal Consciousness' (2005) 1 ARLSS 323, 335.

[96] Siri Gloppen, 'Courts and Social Transformation' in Roberto Gargarella, Pilar Domingo and Theunis Roux (eds), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor* (Ashgate 2006) 46; Ferraz (n 25) 137–138.

environment is more enduring, slower to shift. Litigation resources may become available (or be withdrawn) following discrete interventions over a short period, such as following the creation of a new legal aid programme, or the establishment of new NGOs or public interest law centres. I argue that these considerations may all have important explanatory force, and many are arguably necessary conditions for strategic litigation, but I resist suggestions that any one factor is presumptively dominant. Their influence on impact, alongside the role of litigation decisions, is one of the central empirical questions in my case studies.

An understanding of these two categories, which tend towards the structural, can be enriched by drawing on the process of 'framing', which bridges structure and agency, discussed in section 2.4.3 below. This lays a basis to understand the decisions whether and, if so, how to litigate, which foreground actor agency.

2.4.1. Litigation environment

Attempting to encapsulate the context for strategic litigation, potentially a 'conceptually endless account of the entire society',[97] is a fraught exercise. While other features may be relevant, I argue that the most significant parts of the legal environment are the prevailing socio-economic, political and legal conditions. Here, I distil the most significant factors for strategic litigation in contemporary South Africa. As the discussion illustrates, the litigation environment in South Africa is generally conducive to strategic litigation.

2.4.1.1. Socio-economic conditions

The prevailing socio-economic conditions are likely to significantly influence which actors in society consider strategic litigation and on what issues. These conditions form the well from which many disputes spring. It is impossible to paint a comprehensive picture of socio-economic

[97] Martin Chanock, *The Making of South African Legal Culture, 1902-1936: Fear, Favour, and Prejudice* (CUP 2001) 21.

conditions, but I identify certain salient features. Persistent poverty and inequality – particularly on the basis of race, gender and urban/rural location – are probably the most significant.[98] This is evinced by lack of access (and/or unequal access) to particular social goods, such as housing,[99] education,[100] and land.[101] This is but a partial explanation for increased litigation on these issues, as there are similar problems in relation to other social goods, suggesting that legal and political conditions, processes of 'framing' and litigation resources discussed below likely influenced the growth of litigation in some areas but not others.

2.4.1.2. Political conditions

Political conditions affect decisions to mobilise the law. Political disadvantage theory approaches explain that groups are 'disadvantaged' in the traditional political arena and therefore take to litigation.[102] Early US legal mobilisation was driven particularly by politically marginalised groups, notably the National Association for the Advancement of Colored People from the 1930s, culminating in *Brown v Board of Education*.[103] Early studies largely attributed civil rights litigation to political disadvantage.[104] From the 1960s, several new organisations were formed that used litigation and other forms of legal mobilisation to seek reform of prisons, foster care, education, disability rights, public housing, pollution and more.[105] However, from the 1970s, conservative

[98] See authorities cited in Introduction.

[99] Wilson (n 78); Brian Ray, *Engaging with Social Rights: Procedure, Participation and Democracy in South Africa's Second Wave* (CUP 2016).

[100] Faranaaz Veriava, *The Right to Basic Education* (Juta 2019). See Chapter 6.

[101] William Beinart, Rosalie Kingwill and Gavin Capps, *Land, Law and Chiefs in Rural South Africa : Contested Histories and Current Struggles* (WUP 2021).

[102] Vanhala and Kinghan (n 13) 7.

[103] 347 US 483 (1954).

[104] Vanhala and Kinghan (n 13) 7.

[105] Tamanaha (n 54) 160.

groups in the US turned to litigation, employing the same legal strategies as the NAACP.[106] With the increasing use of litigation by more politically powerful groups in the US,[107] the limits of political disadvantage as an explanation for decisions to litigate became clear.[108] The use of strategic litigation by powerful actors is now a widely recognised phenomenon globally. It is also increasingly common in South Africa, for example in interventions opposing affirmative action and redistributive property laws.[109] Thus, there is often legal mobilisation by groups that cannot be characterised as politically disadvantaged. This does not discredit political disadvantage as one factor explaining legal mobilisation, but it cannot be *the* central factor in all instances. Rather, political conditions more broadly should be understood to influence decisions to litigate.

2.4.1.3. Legal conditions

The legal conditions affecting decisions to litigate include institutional conditions, substantive and procedural law, and legal culture. Within legal mobilisation literature, legal opportunity structure approaches focus on the rules governing access to courts, arguing that the extent of access significantly influences decisions to litigate.[110]

(a) Institutional legal conditions

At the institutional level, an independent and functional judiciary is widely recognised as a necessary condition for strategic litigation.[111] In turn, the supply of judicial services depends on

[106] ibid 162.

[107] Lee Epstein, *Conservatives in Court* (UTP 1985); Tamanaha (n 54).

[108] Vanhala and Kinghan (n 13) 7.

[109] Budlender, Marcus and Ferreira (n 24) 15–21; Nomfundo Ramalekana, 'What's so Wrong with Quotas? An Argument for the Permissibility of Quotas under s 9(2) of the South African Constitution' (2020) 10 CCR 251.

[110] Vanhala (n 32) 16.

[111] Gauri and Brinks (n 29) 15.

logistical, legal, and operational characteristics of the court structure.[112] Judicial structure and resourcing are significant factors, and may vary even within a jurisdiction.[113][114] In South Africa, while the judiciary faces challenges of resourcing, representativeness and management, it meets this functional threshold.[115]

(b) Substantive law

It is important that the substantive law supports, in principle, a claim – for example, justiciability of socio-economic rights or the review of executive action.[116] The relevant parts of the substantive law will obviously vary.[117] However, some general aspects are likely to be significant. These include to what extent the law recognises human rights – whether they are fully justiciable, directive principles or not guaranteed at all; whether open-textured or detailed rights provisions exist; whether the system recognises economic, social and cultural rights or only civil and political rights; whether it adopts a substantive or merely formal conception of equality; and whether it imposes positive or only negative duties.

In South Africa, a relatively wide set of issues is justiciable because of the breadth of the Constitution,[118] the express inclusion of constitutional values, the broad jurisdiction and remedial powers of courts and the resonance of 'transformative constitutionalism' and similar approaches calling for courts to exercise their powers in pursuit of social transformation.[119] In tension with

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[112] ibid 16.

[113] Nick Robinson, 'Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts' (2013) 61 AJCL 173.

[114] Gauri and Brinks (n 29) 17.

[115] See generally Cora Hoexter and Morné Olivier, *The Judiciary in South Africa* (Juta 2014).

[116] Ferraz (n 25) 142–143.

[117] Epp (n 8) 5.

[118] Corder and Hoexter (n 58) 117.

[119] Wilson (n 78) 131.

these features are legal principles embracing judicial minimalism and incrementalism, especially regarding socio-economic rights.[120] These principles may necessitate an incremental approach involving serialised litigation over several cases to achieve social change.[121]

(c) Procedural law

Procedural aspects likely to influence decisions to litigate include jurisdiction; judicial review powers, including whether in strong or weak form; standing, including public interest standing; the scope for third party intervenors and *amici curiae*; remedies; and costs. In South Africa, the Constitution heralded important changes in respect of all of these rules that tend to facilitate strategic litigation, especially in relation to constitutional rights. Here, I discuss the changes to standing, *amici*/intervenors and costs. I discuss remedy in 2.5.4 below.

The constitutional era saw the liberalisation of standing. Apart from standing to act in one's own interests,[122] the Constitution affords standing to those acting on behalf of another person who cannot act in their own name, those acting in the interest of a group or class of persons, anyone acting in the public interest and an association acting in the interest of its members.[123] Associational standing and public interest standing[124] enable strategic litigation to be instituted by a broader range of parties.[125]

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[120] Iain Currie, 'Judicious Avoidance' (1999) 15 SAJHR 138.

[121] Wilson (n 78) 130.

[122] *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* 2013 (3) BCLR 251 (CC) [32]-[43].

[123] Constitution, s 38, mirroring interim Constitution, s 7(4). See *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC).

[124] Constitution, s 38(d); Du Plessis, Penfold and Brickhill (n 19) 45.

[125] Corder and Hoexter (n 58) 117.

Relatedly, the rules of the superior courts now allow greater scope for the admission of *amici curiae* and intervening parties.[126] *Amici curiae* are typically admitted to advance legal argument in civil matters, though they have occasionally been admitted in criminal matters and sometimes granted leave to adduce evidence.[127] Intervening parties, by contrast, are admitted as full parties because they have a direct and substantial interest.[128] They have the procedural rights of a party. *Amici* are common in strategic litigation, given their potential to serve as 'radical outliers', to provide an alternative legal solution to difficult cases, or to fill gaps.[129]

The potential to recover costs and the risk of adverse costs orders can be significant considerations. At common law, the general rule in civil litigation was that costs follow the result.[130] After the adoption of the interim Constitution, the new default is that successful parties should be awarded costs, but unsuccessful parties invoking constitutional rights in good faith against the state should not be ordered to pay the state's costs.[131] Where the state wins, each party should pay their own costs.[132] This approach protects litigants who assert constitutional rights from costs, which might otherwise act as a powerful deterrent. In respect of *amici curiae*, the ordinary rule is that costs should be awarded neither for nor against them.[133]

(d) Legal culture

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[126] Du Plessis, Penfold and Brickhill (n 19) 51–59.

[127] ibid 54–56.

[128] ibid 49.

[129] Budlender, Marcus and Ferreira (n 24) 136–142.

[130] See *Fripp v Gibbon & Co* 1913 AD 354 at 357-8.

[131] *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC).

[132] ibid.

[133] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) [67].

Finally, I identify legal culture as potentially explaining decisions to litigate. 'Legal culture' is a notoriously amorphous term.[134] Drawing on legal sociologist Lawrence Friedman's work over several decades,[135] I define legal culture as ideas, attitudes, expectations and opinions about law and the legal system held by people in (South African) society, observable in professional and popular norms and attitudes, legal scholarship[136] and elsewhere. Importantly, legal culture is not necessarily uniform, static or universally shared,[137] but dominant strands may emerge. Legal culture can be internal (lawyers) and external (popular or 'lay'),[138] and might facilitate or constrain legal mobilisation. In particular, a 'human rights culture' may encourage certain strategic litigation.[139]

South Africa's legal history has seen major shifts in, and contestation over, legal culture.[140] One of the dominant strands during apartheid was the imposition of a strict separation between law and morality.[141] This positivistic principle enabled most of the legal profession to acquiesce in

[134] Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Ashgate 2006) 82–86.

[135] Lawrence Friedman, *The Legal System : A Social Science Perspective* (Russell Sage 1975); Lawrence Friedman, *Law and Society : An Introduction* (Prentice-Hall 1977); Lawrence Friedman, 'Legal Culture and the Welfare State' in Gunther Teubner (ed), *Dilemmas of Law in the Welfare State* (de Gruyter 1986); Lawrence Friedman, *The Republic of Choice : Law, Authority, and Culture* (HUP 1990).

[136] Epp (n 8) 20.

[137] Silbey (n 95) 329.

[138] Cotterrell (n 134) 85.

[139] Epp (n 8) 17.

[140] Chanock (n 97); John Dugard, *Human Rights and the South African Legal Order* (PUP 2015); Jens Meierhenrich, *The Legacies of Law : Long-Run Consequences of Legal Development in South Africa, 1652-2000* (CUP 2008); Tembeka Ngcukaitobi, *The Land Is Ours: Black Lawyers and the Birth of Constitutionalism in South Africa* (Penguin 2018).

[141] Dugard, *Human Rights and the South African Legal Order* (n 140) 395.

the imposition of discriminatory and unjust laws while claiming to be maintaining the rule of law.[142] This hypocritical legalism was exposed during apartheid and even led to calls for judges to resign.[143]

With the advent of democracy, 'transformative constitutionalism' came increasingly to represent orthodox legal culture, rejecting the ambivalence among (mainly white) legal professionals to the substantive content and purpose of the law. Central to legal culture in democratic South Africa is 'transformation' which, though contested, in all accounts connotes socio-economic change and combating inequality.[144] As Sibanda observes:

> From education, to sports, to the media, to business, to the economy, to politics, to language, to the courts, to policing, […] the grammar of transformation emerged as the common vector for negotiating and navigating change. […] Transformative constitutionalism has become the pre-eminent conceptual framing typifying post-1994 South African constitutionalism.[145]

Though critiqued by an influential school of critical legal scholars,[146] transformative constitutionalism is *the* hegemonic discourse,[147] expressly embraced by the Constitutional Court in

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[142] ibid 391; Chanock (n 97) 22.

[143] Raymond Wacks, 'Judges and Injustice' (1984) 101 SALJ 266; John Dugard, 'Should Judges Resign - A Reply to Professor Wacks' (1984) 101 SALJ 286; Raymond Wacks, 'Judging Judges: A Brief Rejoinder to Professor Dugard' (1984) 101 SALJ 295.

[144] K Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 SAJHR 146; Jason Brickhill and Yana Van Leeve, 'Transformative Constitutionalism - Guiding Light Or Empty Slogan' [2015] Acta Juridica 141.

[145] Sanele Sibanda, 'When Do You Call Time on a Compromise? South Africa's Discourse on Transformation and the Future of Transformative Constitutionalism' (2020) 24 LDD 384, 386–7.

[146] See Tshepo Madlingozi, 'Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution' (2017) 28 SLR 123; Sibanda (n 145); Sanele Sibanda, 'Not Purpose-Made! Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty' (2011) 22 SLR 482.

[147] Sibanda (n 145) 406.

the last decade.[148] In the first case using the term, Nkabinde J noted for a unanimous court that it 'has over the past decade found considerable resonance in our jurisprudence'.[149]

In the article introducing transformative constitutionalism, Klare identifies a disconnect between the 'transformative aspirations' of the Constitution and South Africa's 'conservative legal culture'.[150] Klare uses legal culture in the internal sense, to refer to 'professional sensibilities, habits of mind and intellectual reflexes' of the legal profession and bench in South Africa.[151] By 'conservative', Klare refers not to political ideology, but to traditions of legal analysis, in particular literalist, technicist, rule-bound approaches, alongside a 'reverence for law'.[152] There is little to no ethnographic research to confirm or refute Klare's claims, but they are widely, though not universally, accepted in the literature. As Roux observes, however, the influence of legal culture and different interpretive approaches is attenuated in South Africa because the Constitution is full-textured and explicit, especially in the Bill of Rights.[153] Courts have generally been receptive to strategic litigation, welcoming its role in developing the law.[154] This attitude is reflected in the approach to particular procedural rules discussed above.

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[148] In ten judgments: *Hassam v Jacobs* 2009 (5) SA 572 (CC) [28]; *Road Accident Fund v Mdeyide* 2011 (2) SA 26 (CC) [125]; *Print Media South Africa v Minister of Home Affairs* 2012 (6) SA 443 (CC) [97]; *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) [42], n 52; *Daniels v Scribante* 2017 (4) SA 341 (CC) [100]; *Mwelase v Director-General: Department of Rural Development and Land Reform* 2019 (6) SA 597 (CC) [47], fn 89; *AB v Pridwin Preparatory School* 2020 (5) SA 327 (CC) [127]; *Beadica 231 CC v Trustees for the time being, Oregon Trust* 2020 (5) SA 247 (CC) [74], [100], [206]-[231]; *Mahlangu v Minister of Labour* 2021 (2) SA 54 (CC) [55], [79], [114], [195] ; *King NO v De Jager* [2021] ZACC 4 [47], [77], [165]-[168], [195]-[236].

[149] *Hassam* (n 148) n 35.

[150] Klare (n 144).

[151] ibid 166.

[152] ibid 168.

[153] Theunis Roux, 'Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference?' (2009) 20 SLR 258.

[154] *Biowatch* (n 131) [19]; *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) [165].

2.4.2. Litigation resources

I understand litigation resources to include suitable litigants, lawyers and funding, and other resources such as data where relevant. While the litigation environment is generally conducive to strategic litigation, the picture is more mixed and contingent in respect of litigation resources.

Resource mobilisation approaches in the literature focus on the resources available to actors to enable them to mobilise the law. Epp, noting that cases do not reach courts 'as if by magic',[155] identified three types of resources as critical: organisations willing and able to conduct legal mobilisation, lawyers and funding.[156] I draw on Epp's 'support structure', but argue that suitable litigants should be understood more broadly than organisations. I discuss the importance of suitable litigants, lawyers and funding in the South African context.

2.4.2.1. Suitable litigants

Strategic litigation usually requires resources beyond the reach of most individuals.[157] As a result, as Galanter observes, 'repeat-players' enjoy a series of interlocking advantages over 'one-shotters'.[158] This is certainly so in South African conditions.[159] Repeat-players are more likely to litigate successfully, and can litigate cases that would not be cost-effective or justifiable for individual one-shotters.[160] As Ferraz observes, though, this is not just a question of money, but also time, energy, knowledge and confidence.[161] Repeat-players are also likely to litigate *in particular*

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[155] Epp (n 8) 18.

[156] ibid.

[157] ibid.

[158] Marc Galanter, 'Why the Haves Come out Ahead: Speculations on the Limits of Legal Change Essay' (1974) 9 LSR 95.

[159] Budlender, Marcus and Ferreira (n 24) 116–117.

[160] Epp (n 8) 19.

[161] Ferraz (n 25) 151.

ways, which I consider when I discuss models and forms of litigation below. In South Africa, several repeat-players are to be found among civil society organisations, trade unions, corporations and organs of state.

2.4.2.2. Lawyers

The second resource, legal representation, is indispensable for strategic litigation in South Africa.[162] This is not just a question of access to *any* representation, but access to lawyers well qualified to advance complex litigation.

In relation to the state, corporate actors and wealthy individuals, this is primarily a question of being able to secure the best representation for specific litigation, not of affordability or access to justice. However, for marginalised groups, communities and civil society, access itself is a significant barrier.[163] South Africa has a well-developed cadre of public interest law centres that employ strategic litigation to advance their particular causes or serve particular constituencies in society.[164] Several feature prominently in my case studies. Further, the extent to which the legal profession is demographically representative is likely to affect access to justice for marginalised groups.[165] In South Africa, the slow pace of transformation of the legal profession in respect of black and female practitioners is a factor limiting access to justice.[166]

2.4.2.3. Funding

Finally, funding is key. One of the advantages that repeat-players likely enjoy is the availability of funding. Organs of state have legal budgets funded by the fiscus. Corporate actors tend to finance

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[162] SERI (n 24).

[163] Ferraz (n 25) 150.

[164] Brickhill (n 51) 16–36.

[165] Epp (n 8) 20; SERI (n 24) 126–129; Madlingozi (n 146) 143–144.

[166] 'Transformation of the Legal Profession' (CALS 2014).

litigation through different forms of investment and insurance.[167] 'Champerty', or third-party for-profit litigation funding, is also lawful in South Africa.[168] In the absence of well-funded public interest law centres, legal mobilisation is likely to be the preserve of relatively well-off individuals,[169] the state and corporate actors.[170]

For poor people to become repeat-players, they require financial and organisational resources that will enable them to be proactive over a period of time.[171] Trade unions are one example of a collective who amass the resources to litigate, and have conducted significant strategic litigation in South Africa from the 1980s.[172] More broadly, legal aid has the potential to provide funding or free legal representation to enable poor and marginalised groups to litigate. The Constitution guarantees the right of access to courts, which includes a right to a 'fair hearing' as well as a right to state-funded legal representation in certain circumstances.[173] However, civil legal aid remains extremely limited as Legal Aid South Africa prioritises criminal matters.[174] This leaves public interest law centres as the most likely source of representation for poor people in strategic litigation.

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[167] Willem Van Boom, 'Insuring vs. Investing in Litigation: A Comparative Legal History of Litigation Insurance and Claim Investment' (2020) 8 CLH 2.

[168] *Price Waterhouse Coopers Inc v National Potato Cooperative Ltd* 2004 (6) SA 66 (SCA) [44]-[46].

[169] Gauri and Brinks (n 29); Octavio Ferraz, 'Harming the Poor Through Social Rights Litigation: Lessons from Brazil' 89 TLR 27.

[170] Epp (n 8) 3.

[171] Wilson (n 78) 131; Duffy (n 38) 27.

[172] Clive Thompson 'Trade Unions using the Law' in Hugh Corder, *Essays on Law and Social Practice in South Africa* (Juta 1988) 335–348.

[173] Constitution, s 34; *Legal Aid South Africa v Magidiwana* 2015 (6) SA 494 (CC); Jason Brickhill and Christine Grobler, 'The Right to Civil Legal Aid in South Africa: Legal Aid South Africa v Magidiwana' (2016) 8 CCR 256.

[174] ibid 257.

For public interest law centres and NGOs in South Africa, funding is a major constraint.[175] Donor funding was dwindling by 2012, as a result of shifts in the type and parameters of international funding, inadequate resourcing by domestic donors, and the effects of the global financial crisis.[176] That trend continues. There has been little empirical research into the role of funding in legal mobilisation. I explore this in my case studies.

2.4.3. Framing

Some of the dominant approaches in the legal mobilisation literature tend to emphasise structural factors, such as economic and institutional considerations, and downplay actor agency. In the previous sections, I focused on factors informing decisions to litigate. Recognising that disputes underpinning litigation are social constructs,[177] the divide between structural factors and agency may be bridged by drawing on 'framing'. Framing, coined by Goffman[178] and later employed in studies of social movements,[179] is a process of meaning-making that guides action.[180] Although often applied to groups, framing can also apply to individual decision-making.[181] In the context of legal mobilisation, the frame adopted by an actor gives meaning to the litigation environment and guides their decisions whether, and if so how, to litigate.[182] While the litigation environment,

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[175] Budlender, Marcus and Ferreira (n 24) 144; *Biowatch* (n 131) [16].

[176] Melanie Judge and Sean Jones (eds), *Striking the Rights Chord: Perspectives on Advancement from Human Rights Organisations in South Africa* (Inyathelo 2012) 2.

[177] William Felstiner, Richard Abel and Austin Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming ...' (1980) 15 LSR 631, 631.

[178] Erving Goffman and Bennett Berger, *Frame Analysis : An Essay on the Organization of Experience* (NUP 1986).

[179] Robert Benford and David Snow, 'Framing Processes and Social Movements: An Overview and Assessment' (2000) 26 ARS 611.

[180] Vanhala (n 32) 30–31.

[181] Anna-Maria Marshall, 'Injustice Frames, Legality, and the Everyday Construction of Sexual Harassment Symposium: In Their Own Words: How Ordinary People Construct the Legal World' (2003) 28 LSI 659; Vanhala and Kinghan (n 13) 8.

[182] Epp (n 8) 16.

resources and other structural factors condition litigation decisions, so too do normative values and framing.[183]

Different framing processes occur when actors give meaning to situations, identify them as grievances and decide to litigate; again when they present disputes publicly, particularly through appropriate 'messaging'; and finally in how disputes are characterised legally. In an influential article, Felstiner, Abel and Sarat provide a framework for studying this process, where unperceived injurious experiences may be perceived ('naming'), become grievances ('blaming') and ultimately disputes ('claiming').[184]

The first process of framing involved in legal mobilisation is naming. This arises from newly perceived grievances with the status quo, and involves framing an issue differently from dominant approaches.[185] It is what Merry calls 'naming injustice',[186] and Felstiner et al break down into the processes of 'naming' and 'blaming'.[187] A prevailing experience or situation is *perceived* as an injury, becoming a grievance.[188] As Madlingozi observes, framing is never entirely free, but is 'shaped by the macropolitical context and counter-framing by the state and other adversaries.'[189]

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[183] Vanhala (n 32) 27.

[184] Felstiner, Abel and Sarat (n 177).

[185] Epp (n 84) 16.

[186] Sally Engle Merry, *Getting Justice and Getting Even : Legal Consciousness among Working-Class Americans* (UCP 1990).

[187] Felstiner, Abel and Sarat (n 177).

[188] ibid 632.

[189] Tshepo Madlingozi, 'How the Law Shapes and Structures Post-Apartheid Social Movements: Case Study of the Khulumani Support Group' in Marcelle Dawson and Luke Sinwell (eds), *Contesting Transformation: Popular Resistance in Twenty-First Century South Africa* (Pluto 2012) 226–227.

'Claiming', in the context of legal mobilisation, entails expressing something as a legal entitlement, not a wish or preference.[190] It can include media and advocacy *outside* the courtroom;[191] and also characterising the dispute legally *within* legal proceedings.[192] Framing thus affects not only decisions whether to litigate but also *how* to litigate. For example, in McCann's study, there was a debate between lawyers and union feminists who supported adopting the rights-based framing of 'pay equity' and policy experts favouring the more technical term, 'comparative worth'.[193] In the end, both approaches found acceptance by activists and courts.[194] In Vanhala's study of disability rights litigation in Canada and the UK, the shift from a medical or social-welfare framing of disability to a rights-based framing helped explain which groups were likely to litigate.[195]

Framing and actors' 'logics of appropriateness' are also likely to influence *how* to litigate, in determining models and forms of litigation, as well as the combination of litigation with other strategies and how they relate to the state and other actors in the process.[196]

2.5. Litigation decisions: how to litigate

Much of the literature on legal mobilisation, litigation impact studies and broader literature on judicial review tends to limit its analysis regarding litigation decisions to a simplistic binary – whether to litigate or not. Some studies complicate this slightly by recognising that litigation may be used alongside other strategies, as discussed above, that it may be proactive or reactive ('sword'

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[190] Wilson (n 78) 129.

[191] Epp (n 84) 16.

[192] Budlender, Marcus and Ferreira (n 24) 121; Jonathan Berger, 'Litigating for Social Justice in Post-Apartheid South Africa: A Focus on Health and Education' in Daniel Brinks and Varun Gauri (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (CUP 2008) 86.

[193] Michael McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (UCP 1994) 66.

[194] ibid.

[195] Vanhala (n 32).

[196] ibid 30.

or 'shield'),[197] or that litigants may be a primary party (claimant or respondent/defendant) or an intervenor,[198] or distinguishing individual cases from collective/structural.[199] However, these studies neglect a crucial further dimension: *how* litigation is structured and run. I address this gap.

The litigation process presents myriad decisions, including characterisation of issues, timing, and choice and role of litigants and lawyers.[200] I focus on three salient decisions: (1) *model*; (2) *form*; and (3) *relief*. I use 'model' to capture the relationship between litigation and the affected interests and/or 'cause'. By 'form', I refer to the technical or procedural shape of a case. I derive the models and forms from the international and South African literature, informed by my own experience in practice. The nomenclature is largely my own. Save where I say so, all are employed in South Africa. By relief, I refer to the remedy sought. Although some forms are likely to be associated with certain models, there is no necessary inter-relationship and actors adopting particular models may, in principle, employ any form. The use of models is informed by legal culture and the logics of appropriateness that govern particular organisations or a sector. The availability of forms and remedies depends on the rules of procedure in a jurisdiction.

Litigation decisions are closely associated with legal culture and the legal consciousness of specific actors.[201] Participants in a legal system have 'intuitions that are shaped by the prevailing legal and social values of the societies in which we live.'[202] These 'juridified intuitions… reflect our knowledge of, and commitment to, the basic legal values of our culture.'[203] Short of speaking

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[197] Handmaker and Matthews (n 31) 892.

[198] Vanhala (n 32) 7.

[199] Ferraz (n 25) 123–125.

[200] Berger (n 192) 86-89; Budlender, Marcus and Ferreira (n 24) 109–122.

[201] Silbey (n 95) 334.

[202] James Whitman, 'The Two Western Cultures of Privacy: Dignity versus Liberty' (2004) 113 YLJ 1151, 1160.

[203] ibid.

different 'languages', actors with broadly similar objectives in different jurisdictions may 'understand law in different ways, … speak law in multiple dialects, and … employ legal strategies in diverging and competing ways'.[204] This is a further reason why universalising or US-centred studies of legal mobilisation should be applied with caution in research in other jurisdictions.

Even within a jurisdiction, approaches differ. For example, in the same litigation, organisations may be more likely to focus on 'a broad strategy for change', while private lawyers may be inclined to keep a 'narrower focus on strategy within the case itself'. [205] Even among similar organisations, different theories of change, organisational structure, mandates and funding may cause organisations to adopt different approaches.[206] Similar considerations will see different approaches among corporate actors or organs of state which, on the surface, share the same nature and interests. These differences are likely to manifest in divergent litigation decisions, most notably regarding model and form of litigation.

2.5.1. Model

I demarcate models primarily based on the relationship between litigant, litigator and the objective or 'cause' underlying the litigation, although some models are also typified by specific tactics or modalities. I identify six archetypal models: client-based litigation, movement lawyering, campaign lawyering, research-based litigation, SLAPP suits, and court-driven litigation. There may also be hybrid models, and it is possible to switch models during litigation. The case studies in Chapters 6 and 7 include all the archetypes except SLAPP suits and court-driven litigation.

[204] McCann (n 193) 283.

[205] Duffy (n 38) 234.

[206] ibid.

(a) Client-based litigation

Client-based litigation prioritises the interests and preferences of the actual clients, who may include not just those nominally represented but also similarly situated persons who stand to benefit directly. The clients may be natural persons (whether individuals or communities) or juristic persons. These variations will obviously colour the approach, but the archetype is defined by the centrality of the client. This does not preclude the possibility that a larger cause is at issue, such as climate change in a matter in which a community is opposing a local mining development. The larger cause is likely to influence litigants and litigators significantly, but the client and their interests will still lie at the heart of decision-making. Client-based litigation includes 'community lawyering', which situates the client in a broader community and emphasises the need for lawyers to be relatively embedded in, or at least familiar with, the community.

(b) Movement lawyering

Movement lawyering entails a social movement being either the litigant or the driver of the litigation. Social movements range from relatively professionalised groups with formalised membership and permanent staff, resembling NGOs, to more disparate, loosely affiliated individuals or groups. They are broader than campaigns, which are issue-focused. I adopt Madlingozi's definition of a 'social movement' as a 'collective of marginalised actors who develop a collective identity; who put forward change-oriented goals; who possess some degree of organisation; and who engage in sustained, albeit episodic, extra-institutional collective action.'[207] I qualify Madlingozi's definition only in one respect: Social movements are not limited to marginalised actors; powerful actors, too, may form movements.

Movement lawyering usually pursues objectives that include an underlying cause, and, crucially, building the movement itself. The role of the movement is foregrounded in all litigation

[207] Tshepo Madlingozi, 'Post Apartheid Social Movements and the Quest for the Elusive New South Africa' (2007) 34 JLS 77, 93.

decisions. Gordon calls this approach 'law in the service of organizing',[208] where lawyers do not think that litigation alone will create social change, but that it will happen 'when communities organize, build enough power to shift the terms on which decisions about their future are made, and eventually enough power to enforce those promises'.[209] These lawyers adjudge litigation success in relation to how much power the groups that they support develop and how much closer it brings these groups to achieving their aims.[210] Prominent examples in the literature include Vanhala's case study of disability rights movements in the United Kingdom and Canada,[211] and McCann's study of the US pay equity movement.[212]

In South Africa, Madlingozi observes that 'all social movements, both rights-based and "counter-hegemonic"', employ litigation.[213] Although much of the literature focuses on social movements working to *advance* human rights, movement lawyering is not confined to 'progressive' movements. For instance, the trade union Solidarity litigates frequently to oppose affirmative action, and Afriforum, a membership-based 'organisation that mobilises Afrikaners, Afrikaans-speaking people and other minority groups in South Africa',[214] has litigated over language and property rights.[215]

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[208] Jennifer Gordon, 'Concluding Essay: The Lawyer Is Not the Protagonist: Community Campaigns, Law, and Social Change' 95 CLR 15, 2141.

[209] ibid.

[210] ibid.

[211] Vanhala (n 32).

[212] McCann (n 193).

[213] Madlingozi (n 189) 223.

[214] Afriforum website <www.afriforum.co.za> accessed 29 Sep 2021.

[215] Budlender, Marcus and Ferreira (n 24) 16–17.

(c) Campaign-based litigation

Campaign-based litigation entails litigation located within a broader campaign.[216] A campaign is distinct from a community or a social movement, as it need not be broad-based. A campaign is typically narrower than a movement; movements often pursue several campaigns. For example, feminist movements might adopt campaigns to decriminalise abortion, LGBTI movements for marriage equality and disability rights movements for inclusive education. However, campaigns need not be driven by movements. I am concerned with campaigns pursued, at least in part, through litigation.

This model's defining feature is an attempt, through effective 'messaging',[217] to project the litigant's preferred framing of an issue into the public discourse and secure support for it, in service of the campaign's objectives. Non-litigious methods, especially media and advocacy, are likely to feature significantly alongside litigation. Litigation in the campaign model is tailored to fit the broader strategy.[218] Although it is not necessary for an organised social movement to be involved, there are concerted efforts to secure public awareness and support.

The legitimacy of the campaign model is not universally accepted. Harlow, writing on trends in the UK, warned '[i]f we allow the campaigning style of politics to invade the legal process, we may end by undermining the very qualities of certainty, finality and especially independence for which the legal process is esteemed, thereby cutting its legitimacy'.[219] The scope for campaign-based litigation is partly a matter of legal culture and may also be constrained by rules of professional ethics. In South Africa, while the *sub judice* rule restricts what litigants may publicly

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[216] Eg., Katie Ghose, *Beyond the Courtroom : A Lawyer's Guide to Campaigning* (LAG Education and Service Trust 2005).

[217] ibid 26.

[218] ibid 313.

[219] Carol Harlow, 'Public Law and Popular Justice' (2002) 65 MLR 1, 2. But see Ghose (n 216).

say, and other rules limit what lawyers, in particular advocates, may publicly say regarding their own cases, there is reasonable latitude for media campaigns accompanying litigation.[220]

(d) Research-based lawyering

Research-based lawyering is associated with litigation organisations that also conduct research, such as academic institutions. Research is a feature of much strategic litigation, but a research-based model is where the research constitutes the primary foundation and origin of litigation. On this model, the first phase of work is research, whether fieldwork or desktop investigation, laying a basis for a decision to litigate. Often, there is no separate client or social movement, and the research institution litigates in its own name.

(e) SLAPP suits

A counterpoint to movement lawyering is strategic litigation against public participation, or 'SLAPP' suits. SLAPP suits attempt the opposite of movement lawyering – to prevent or discourage public participation.[221] Defamation, trespass and other civil claims are used as a strategy within a broader dispute.[222] In South Africa, SLAPP suits have emerged in response to environmental activism.[223] A related trend, as an approach to defending litigation, is the use of 'Stalingrad tactics'. This entails 'constantly raising unwarranted interlocutory points, mounting spurious defences, launching baseless counterclaims and appealing against every adverse ruling, irrespective of merits.'[224]

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[220] Budlender, Marcus and Ferreira (n 24) 23.

[221] Byron Sheldrick, *Blocking Public Participation : The Use of Strategic Litigation to Silence Political Expression* (WLUP 2014) 1.

[222] ibid 1–2.

[223] *Mineral Sands Resources (Pty) Ltd v Reddell; Mineral Commodities Limited v Dlamini; Mineral Commodities Limited v Clarke* 2021 (4) SA 268 (WCC).

[224] Corder and Hoexter (n 58) 115.

(f) Court-driven litigation

Finally, a rare model is *court-driven litigation*. The most prominent example comes from India, where 'the court can initiate a case on any public interest issue on its own, appoint its own lawyer, introduce its own machinery to investigate the issue and then order its own solutions to the issue at the level of the entire state,' even to the exclusion of litigants.[225] Although there have been calls to emulate India,[226] South African courts have not turned to initiating cases.[227] The closest they have come is inviting named organisations to intervene, or appointing counsel, as *amici curiae*;[228] and directing parties to adduce additional evidence or make submissions on particular issues.[229] The court-driven model is not found in South Africa, though elements of it may be present.

2.5.2. Form

Form is the technical shape of litigation. It covers how the litigation is structured to achieve its objectives. For instance, litigation may be used proactively (sword) or defensively (shield), for example to compel delivery of social housing or resist evictions, respectively. Another question is whether cases are run in a sequence or series, building upon an earlier round. Although my approach is general, it is also possible to demarcate forms of litigation more specifically, such as Ferraz's typology of health litigation in Brazil.[230] Here, I identify four forms: (1) individual cases; (2) test cases; (3) structural/systemic cases; and (4) class actions or group claims. These are not

[225] Bhuwania (n 34) 106.

[226] Fowkes, 'How to Open the Doors of the Court – Lessons on Access to Justice from Indian PIL' (n 20).

[227] Roux, 'The Constitutional Court's 2018 Term: Lawfare or Window on the Struggle for Democratic Social Transformation?' (n 58) 10.

[228] Eg., *Ferreira* (n 123) [4].

[229] *Mayelane v Ngwenyama* 2013 (4) SA 415 (CC) [94].

[230] Ferraz (n 25) 238–251.

watertight categories but archetypes, features of which may be found in the same case. My present purpose is not to evaluate their merits, but simply to describe them and some implications.

(a) Individual cases

Individual cases, on the face of it, are concerned only with the interests of the immediate parties,[231] and therefore do not generally constitute strategic litigation. They might take the form of damages claims or applications for injunctive/interdictory relief. Individual cases tend to be associated with the client-based model, but need not be, as illustrated below. A subset of individual cases constitute strategic litigation if deployed to pursue broader objectives, for example by seeking to change unlawful practices or policy by sheer weight of claims – in a 'cookie-cutter' approach. They may seek bottom-up reform by challenging bureaucratic practices that manifest in individual decisions but represent systemic trends,[232] pursuing broad policy changes that benefit a larger constituency.[233] Consider a case claiming damages in delict (tort) for unlawful immigration detention. At face value, it is not strategic litigation, being concerned only with individual interests. Now consider a single organisation bringing twenty such claims, coupled with a public campaign, or a social movement doing so, with the aim not only of securing individual damages but also of inducing bottom-up, systemic change. This could be contrasted with a single structural case, concerning the same issue, seeking to end the particular unlawful practice for all detainees.[234] South Africa witnesses significant litigation in the form of individual cases that might constitute strategic

[231] ibid 123.

[232] Epp (n 8); King (n 75) 70–71.

[233] Ferraz (n 25) 15.

[234] See Roni Amit, 'Winning Isn't Everything : Courts, Context, and the Barriers to Effecting Change Through Public Interest Litigation' (2011) 27 SAJHR 8.

litigation, though not on the scale of Brazil, for example, which sees over 100,000 individualised right to health cases a year alone.[235]

(b) Test cases

Secondly, *test case* litigation is a classic form of strategic litigation. This includes law reform litigation, such as constitutional challenges. The defining characteristic is that a single case is used to establish a principle or change the law in general, applicable to all similar cases in future – distinct from individual cases deployed strategically through weight of claims. In South Africa, prominent apartheid-era examples are *Komani*[236] and *Rikhoto*[237] successfully confronting racist influx control laws.[238] In the democratic era, among the most significant examples are the sequenced test cases concerning LGBTI rights, from the challenge to the criminalisation of sodomy to establishing same-sex marriage.[239]

(c) Structural/systemic cases

In contrast with individual and test cases, structural/systemic cases involve crafting 'structural responses to structural problems'.[240] To return to the example of immigration detention, structural/systemic litigation might entail seeking a general declarator of the rights of immigration detainees and ordering the state or another entity to investigate and report to the court on prevailing detention practice.[241] These are paradigmatically top-down interventions. They are likely

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[235] Ferraz (n 25) 9.

[236] *Komani NO v Bantu Affairs Administration Board, Peninsula Area* 1980 (4) SA 448 (A).

[237] *Oos-Randse Administrasieraad v Rikhoto* 1983 (3) SA 584 (A).

[238] Abel (n 15) 24–65.

[239] Budlender, Marcus and Ferreira (n 24) 27–34.

[240] Daniel Brinks and William Forbath, 'Social and Economic Rights in Latin America: Constitutional Courts and the Prospects for pro-Poor Interventions' (2010) 89 TLR 1943, 1953. Ferraz (n 25) 123 prefers 'collective cases'.

[241] *South African Human Rights Commission v Minister of Home Affairs* [2014] 4 All SA 482 (GJ).

to involve structural interdicts as remedy. Structural/systemic cases are fairly common in South Africa, though not as widespread as some might have expected given the broad standing and remedial rules.[242] Arguably, they are more likely to result in equitable outcomes,[243] a claim I explore in the case studies.

(d) Class actions / group claims

Several common-law jurisdictions allow class actions or group claims.[244] In recent years, a court-made class action regime has developed in South Africa and such litigation is increasing.[245] In a class action, one or more representative plaintiffs litigate on behalf of a broader class of similarly situated persons, all of whom stand to benefit if the case succeeds despite playing no active part in it. In South Africa, as elsewhere, class actions are required to commence with an application for 'certification', which is the court's authorisation for the case to proceed by way of class action.[246]

(e) Combining forms

It is possible to adopt strategies combining different forms. For example, a test case might foreshadow a large class action, as was the case with the litigation to secure damages for goldminers who contracted the disease silicosis, beginning with a test case against one company and culminating in an industry-wide class action.[247] It is also possible that criminal and civil proceedings run in tandem or in quick succession, so that securing a criminal conviction is used as a springboard for a civil claim.

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[242] Berger (n 192) 67.

[243] Ferraz (n 25) 125.

[244] Rachael Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart 2004).

[245] See Max du Plessis and others, *Class Action Litigation in South Africa* (Juta 2017).

[246] *Trustees for the time being of Children's Resource Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) [23].

[247] *Nkala v Harmony Gold Mining Company Limited* 2016 (5) SA 240 (GJ).

2.5.3. Controversies regarding model and form

The relationship between the model and form of litigation and outcomes is under-researched. Few studies consider how these choices affect impact, most considering only one model, without considering alternatives. Movement lawyering as a phenomenon has attracted significant attention, with sustained local contributions from Madlingozi,[248] Tissington[249] and Dugard.[250] Two main questions emerge from this literature – the effectiveness and ethical implications of particular models or forms.

One claim that emerges, expressly or by implication, is that movement lawyering is more likely to secure social change.[251] Budlender, Marcus and Ferreira identify *TAC* as 'a shining example as to how litigation – when run properly and as part of a series of broader strategies – can achieve social change.'[252] Dugard and Langford respond that this set *TAC* up as a 'Rolls Royce model', arguing persuasively that movement lawyering may not be realistic or necessary in some circumstances, and that it may 'blind us to alternatives or condition courts to presume that all future cases, particularly those concerning positive obligations, will resemble such a case and strategy.'[253] Some situations simply do not support movement-building, for example in the 'war on

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[248] Langford and others (n 2); Madlingozi (n 189); Madlingozi (n 207).

[249] Kate Tissington, 'Tacticians in the Struggle for Change? Exploring the Dynamics between Legal Organisations and Social Movements in Rights-Based Struggles in South Africa' in Marcelle Dawson and Luke Sinwell (eds), *Contesting Transformation : Popular Resistance in Twenty-First-Century South Africa* (Pluto 2012) 201–221; Tissington (n 93).

[250] Jackie Dugard, 'Choice From No Choice; Rights for the Left? The State, Law and the Struggle Against Prepayment Water Meters in South Africa' in Sara Motta and Alf Nilsen (eds), *Social Movements in the Global South* (Palgrave Macmillan 2011); Dugard and Langford (n 24).

[251] Duffy (n 38) 234; Daniel Brinks, 'Solving the Problem of (Non)Compliance in Social and Economic Rights Litigation' in César Rodríguez-Garavito, Julieta Rossi and Malcolm Langford (eds), *Social Rights Judgments and the Politics of Compliance: Making it Stick* (CUP 2017) 489; Malcolm Langford, 'Domestic Adjudication and Economic, Social and Cultural Rights: A Socio-Legal Review' (2009) 11 SURIJHR 91, 108.

[252] Budlender, Marcus and Ferreira (n 24) 57; Gilbert Marcus and Steven Budlender, 'A Strategic Evaluation of Public Interest Litigation in South Africa' (Atlantic Philanthropies 2008) 91.

[253] Dugard and Langford (n 24) 61.

terror context'.[254] The idea that movement lawyering is likely to be most effective is an oversimplification, overlooking the dynamics of varied contexts and failing to distinguish between different types of impact. I posit that other models may be more effective in particular situations and also that different models may be more likely to produce certain types of effects, but not others. I investigate this possibility in my case studies.

A related controversy concerns the ethical implications of different models. A common refrain is that movement lawyering is more people-driven, empowering and egalitarian than other models (or at least less disempowering).[255] This claim is overstated and reduces the comparison of models to a single consideration – agency or power. Even in relation to questions of agency and power, strategic litigation on the direct instructions of affected individuals or communities may grant them greater agency and voice than the disparate members of a large social movement. This, too, is a complex, contextual question, which I investigate in my case studies.

I explore these questions in the rest of the Thesis. Chapter 3 considers the relationship between model and form and impact. Chapter 4 identifies potential links between model and form and risks of strategic litigation. In the case studies in Chapters 6-7, I investigate what influence, if any, model and form had on different types of impact.

2.5.4. Relief

The final decision that I highlight is relief. In all contexts, remedy is a key litigation decision with implications for the litigation process and impact.[256] Sections 38 and 172 of the South African Constitution vest courts with broad remedial powers. Exercising these powers, courts have

[254] Duffy (n 38) 243.

[255] 'Social Justice Sector Review Report: Critical Reflections on the Social Justice Sector in the Post-Apartheid Era' (RAITH Foundation 2020) 34.

[256] Duffy (n 38) 266–268.

developed a number of novel remedies, building on the classic remedies in common law jurisdictions.[257] Litigants may seek several remedies in a single case, or series of cases. The range of remedies may be classed in five main types: (1) declaratory relief; (2) interdictory relief; (3) money orders; (4) structural interdicts; and (5) special costs orders.

First, the courts have the power to grant declaratory relief, including declarations of rights in relation to the Bill of Rights[258] and declarations of unconstitutionality of law or conduct.[259] In this regard, South African superior courts enjoy 'strong form' review powers. If a court finds that a law is unconstitutional, it *must* grant a declaration of invalidity.[260] Courts have the flexibility, however, to limit its retrospectivity[261] or suspend it (for example to give Parliament time to fix the defect),[262] and grant interim relief pending the final determination of a matter or during a period of suspension.

Secondly, a court may order interdictory/injunctive relief requiring that conduct be performed, ceased or refrained from. Thirdly, courts may grant orders for the payment of money, including damages or compensation. A party may even claim 'constitutional damages', though courts have granted them only rarely and only where the common law does not provide damages.[263] Fourth, courts may grant structural interdicts or 'supervisory' orders governing the sharing of

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[257] M Bishop 'Remedies' in Stuart Woolman and Michael Bishop, *Constitutional Law of South Africa*; Du Plessis, Penfold and Brickhill (n 19) 107–127.

[258] Constitution, s 38.

[259] ibid, s 172(1).

[260] ibid, s 172(1)(a); *Dawood v Minister of Home Affairs* 2003 (3) SA 936 (CC) [59]. Subject to confirmation by the Constitutional Court.

[261] Constitution, s 172(1)(b)(i).

[262] ibid, s 172(1)(b)(ii).

[263] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) [60]; *Modderklip* (n 133).

information or engagement among actors.[264] The most important, often granted in various combinations, include orders requiring the state to develop a plan to address a breach of rights and report to the court; mediation; meaningful engagement; and the appointment of a special master[265] or expert[266] to investigate and report to court or take action. Finally, the evolution of the rules governing costs presents new options. It is possible to seek costs payable *personally* by officials. The courts have done so against a cabinet minister[267] and the Public Protector (on a punitive scale).[268] Non-compliance has catalysed increasingly innovative remedies, especially structural interdicts and punitive costs orders.[269]

2.6. Conclusion

In this Chapter, I have located and defined strategic litigation in the international and local literature. I have identified the factors likely to explain decisions *to* litigate, and *how* to litigate in South Africa. In Chapter 3, I turn to impact and how it is to be understood analytically. I consider how the litigation environment, resources and decisions introduced here may influence impact.

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[264] Kent Roach and Geoff Budlender, 'Mandatory Relief and Supervisory Jurisdiction: When Is It Appropriate, Just and Equitable' (2005) 122 SALJ 325.

[265] *Mwelase* (n 148) [64]-[66].

[266] *Black Sash Trust v Minister of Social Development* 2017 (3) SA 335 (CC).

[267] *South African Social Security Agency v Minister of Social Development* 2018 (1) BCLR 1291 (CC) [37]-[38].

[268] *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) [148].

[269] Helen Taylor, 'Forcing the Court's Remedial Hand: Non-Compliance as a Catalyst for Remedial Innovation' (2019) 9 CCR 247.

3. CHAPTER 3: ANALYSING THE IMPACT OF STRATEGIC LITIGATION

3.1 Introduction

In Chapter 2, I defined 'strategic litigation' to have three main characteristics, namely that it concerns non-party interests, its objectives are generally forward-looking and those objectives consist of social change, without presupposing the normative basis for that change. I also discussed how, operating in the particular environment and with such resources as are available, litigants make key decisions, in particular what model and form of strategic litigation to adopt and what remedy to seek.

In this Chapter, recognising the centrality of impact to strategic litigation, I develop a conceptual and analytical framework. As Langford, Rodriguez-Garavito and Rossi put it, '[f]rom the perspective of strategic rather than individual-based litigation, impact is the ultimate prize.'[270] Nevertheless, there are sharply divergent approaches to conceptualising, establishing and evaluating impact. In Chapter 4, I will turn to evaluation, and in Chapter 5 to research methodology and methods.

I begin by situating the emerging South African debate on impact in the international discourse with reference to two broad approaches – materialist and constructivist. This discussion exposes a range of discrete questions. First, I consider causation and attribution, arguing for an approach that asks whether litigation materially contributed, directly or indirectly, to particular effects. Second, I introduce four dimensions of impact – type (*what*), people affected (*who*), reach (*where*) and temporality (*when*). Third, I delve further into type, introducing a typology of legal, material and political impact. Fourth, I analyse the relationship between these types of impact, demonstrating why it is necessary to distinguish them and how they inter-relate. Fifth, I introduce

[270] Malcolm Langford, César Rodríguez Garavito and Julieta Rossi, *Social Rights Judgments and the Politics of Compliance: Making It Stick* (CUP 2017) 35.

the impact feedback loop, explaining how litigation impact feeds into the conditions for future litigation. Sixth, I discuss the relationship between judicial remedies and impact. Finally, I end with a discussion of the factors likely (in principle) to influence impact in South Africa, drawing on the discussion of the litigation environment, resources and decisions in Chapter 2.

To begin, I locate the emerging debate on impact in South Africa within the burgeoning international literature.

3.2 The emerging debate on impact

In addition to an emerging body of scholarly literature, institutional donors that support strategic litigation in South Africa have recently commissioned studies on impact.[271] These reports have prompted debates across theoretical, doctrinal and tactical dimensions in academia,[272] the legal profession (especially the public interest sector), and donor community.

The South African literature has drawn substantially on foreign (particularly US) studies, treating the contributions of Rosenberg[273] and McCann[274] as a starting point or even a frame. Because the South African conversation situates itself in the international – and especially US – writing,[275] and because this literature offers considerable analytic, theoretical and methodological insights, I draw from it to develop my impact framework. However, given the significant differences between South Africa and these systems, the approaches, assumptions and conclusions

[271] Marcus and Budlender (n 252); Budlender, Marcus and Ferreira (n 24); SERI (n 24); OSJI (n 25); 'Social Justice Sector Review Report: Critical Reflections on the Social Justice Sector in the Post-Apartheid Era' (n 255).

[272] Dugard and Langford (n 24); Langford and others (n 2).

[273] Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (n 26).

[274] McCann (n 193).

[275] Budlender, Marcus and Ferreira (n 24) 107–108; SERI (n 24) 10–13; Langford and others (n 2) 21–22.

in these studies cannot be expected to be, and are not, automatically transferrable to South Africa.[276]

As Roux has noted, much of the field has been premised on the 'unconscious scientisation of the specifically American conception of the relationship between law and politics', which has had a distorting effect.[277] There is a risk that studies will generalise and universalise what impacts are possible and how they come about from American conditions, treating them as 'naturally' occurring preconditions in all jurisdictions. Comparative studies offer important conceptual and methodological insights, but should be approached with caution when investigating the potential and actual impact of strategic litigation in specific jurisdictions.[278] Bearing this in mind, I draw on international literature to identify ways of understanding impact, but ground my approach in South African conditions.

Influential impact studies have been conducted across several jurisdictions, notably the US,[279] Latin America[280] and India,[281] as well as comparative works.[282] These studies vary in breadth, focus areas, and their approach to defining and attributing impact, among other things. As an entry-point, the literature can be understood in relation to two archetypal approaches to impact

[276] Roux, *The Politico-Legal Dynamics of Judicial Review* (n 12) 7.

[277] ibid.

[278] Vanhala and Kinghan (n 13) 5.

[279] For an overview identifying leading studies, see Vanhala and Kinghan (n 13).

[280] See Brinks and Forbath (n 240). See also César Rodríguez-Garavito, 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America' (2010) 89 TLR 1669.

[281] Eg., Bhuwania (n 34); Gerald Rosenberg, Sudhir Krishnaswamy and Shishir Bail, *A Qualified Hope : The Indian Supreme Court and Progressive Social Change* (CUP 2019).

[282] Eg., Duffy (n 38); Vanhala (n 32); Gauri and Brinks (n 29); Epp (n 8).

discussed below – materialist[283] and constructivist.[284] Others similarly map the field in this way, but either do not name the two approaches[285] or adopt different terminology, for instance calling the materialist approach 'neo-realist'[286] and the constructivist approach a 'more expansive socio-legal framework'[287] or a 'legal mobilisation approach'.[288] The extent to which impact studies adopt materialist or constructivist approaches is a matter of degree, rather than strict categories, but the distinction provides a useful starting point.

The materialist approach concentrates on the 'direct and palpable effects' of litigation, applies a strict causality test. It considers a judgment effective if it produces an observable change in the conduct of those whom it directly targets.[289] It is exemplified by Rosenberg's *The Hollow Hope*.[290] The 'constructivist' approach focuses not only on changes in the conduct of those directly involved in a case, but also 'indirect transformations in social relations' or changes to social actors' perceptions.[291] It is exemplified by McCann's study on US pay equity struggles.[292] Constructivists view impact more broadly, focusing on indirect effects on attitudes, perceptions and power, in addition to the more tangible effects on which materialists focus. They adopt a more flexible approach to attribution, eschewing strict causation tests in identifying litigation impact. The two

[283] I employed 'materialist' in Jason Brickhill, 'Public Interest Alchemy: Combining Art and Science to Litigate for Social Change', *Twenty Years of South African Constitutionalism* (2014). It was subsequently adopted in SERI (n 24) 13.

[284] Rodríguez-Garavito (n 280) 1678; Langford, Rodríguez Garavito and Rossi (n 270) 84.

[285] Dugard and Langford (n 24); Langford and others (n 2) 21–22.

[286] Rodríguez-Garavito (n 280); Dugard and Langford (n 24).

[287] Dugard and Langford (n 24) 54.

[288] SERI (n 24) 13.

[289] Rodríguez-Garavito (n 280) 1677.

[290] Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (n 26).

[291] Rodríguez-Garavito (n 280) 1678.

[292] McCann (n 193).

approaches tend to depart from different epistemological premises and to adopt different research methodologies and methods.[293]

Drawing on these approaches, two key sets of questions have emerged in the South African literature. The first concerns tactics and strategy. Are there ways of approaching strategic litigation or conditions that increase prospects of success in court and achieving significant impact? The second set of questions asks how we measure or understand impact – the central inquiry of this Chapter. This has been framed as a debate between the materialist and constructivist understandings.[294] I explain that the two sets of questions – tactics and strategy, and impacts and evaluation – are related, but raise distinct issues. At times, however, they have become blurred in the literature.[295]

The first contribution to the South African debate came in 2008 with a report commissioned by the Atlantic Philanthropies,[296] and a second edition was published in 2014 ('the Atlantic Report').[297] The Atlantic Report analyses strategies that lead to social change, when combined with strategic litigation. Its most significant contribution was its articulation of seven factors[298] that the authors claim are likely to maximise the prospects of strategic litigation succeeding in court and leading to social change.[299] The Atlantic Report defines impact as 'a tangible and sustainable impact on the ground'.[300] Dugard and Langford critique this approach and

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[293] See Chapter 5.2.

[294] SERI (n 24).

[295] Brickhill (n 283).

[296] Marcus and Budlender (n 252).

[297] Budlender, Marcus and Ferreira (n 24).

[298] The seven factors are proper organisation of clients; overall long-term strategy; co-ordination and information-sharing; timing; research; characterisation; and follow-up.

[299] See Section 3.10 below.

[300] Budlender, Marcus and Ferreira (n 24) 96.

proposed an 'expanded model' of impact,[301] emphasising the political and politicising potential of strategic litigation and, in addition to material benefits, its 'enabling' impact.[302] The article usefully extends the analysis of impact beyond material impacts by adopting a constructivist approach, but applies its expanded 'socio-legal' conception of impact to only two cases, both socio-economic rights decisions of the Constitutional Court.[303]

In the South African literature, the materialist and constructivist approaches are converging, with recent contributions seeking to incorporate both components in an assessment of the impact of strategic litigation, an approach I support. A recent study by the Socio-Economic Rights Institute of South Africa (SERI) picked up on the 'emerging debate' between 'materialist' approaches and 'legal mobilisation theorists'.[304] The study calls for the application of a 'multi-dimensional approach' to assessing the value and impact of strategic litigation.[305] I similarly advance a multi-dimensional approach to assessing impact, but the dimensions are significantly different to those proposed in the SERI Report. This Thesis moves beyond the dichotomy between materialist and constructivist approaches. At its heart is my typology of legal, material and political impact and a richer understanding of how these forms of impact interact.

3.3 Attribution: causation / contribution

A particular controversy is how to attribute impact to litigation.[306] When can it be said that something is an effect, outcome or impact *of* particular litigation? The challenge arises because

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[301] Dugard and Langford (n 24).

[302] ibid 56.

[303] *Mazibuko* (n 154); *Leon Joseph v City of Johannesburg* 2010 (4) SA 55 (CC).

[304] SERI (n 24).

[305] ibid 54.

[306] Kathryn Sikkink, *Evidence for Hope: Making Human Rights Work in the 21st Century* (PUP 2017) 142; OSJI (n 57) 74; Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (n 26) 108.

litigation is but one of the possible strategies to seek social change and because there may be multiple or indeterminate causes of events. I argue for a move away from approaches based on strict 'but for' causation, towards an approach based on *material contribution* that is better attuned to complex scenarios. On this approach, impact is attributable to litigation if the litigation materially contributed to it, even if it cannot be established that it would not have ensued without the litigation or that the litigation was strictly necessary for that impact to occur.

Given that strategic litigation is, by definition, concerned with social change, it almost invariably takes place within a system influenced by a range of processes. The processes unfolding alongside strategic litigation might include the formal political process (legislative and executive action), social movements and activism, lobbying, commercial dealing, among others.[307] Some systemic reforms may even be overdetermined, in that the conditions for the change to take place were exceeded. Consider an example where a range of strategies was deployed contemporaneously, such as protest action, petitions, strategic litigation and lobbying of the executive. A test case court victory is followed by the executive introducing new draft legislation into Parliament to make provision for the social good that was in issue in the litigation and broader campaign. When could it be said that the litigation *caused* the change? It may be impossible to establish what would have happened without litigation, or if other strategies had not also been deployed. However, it will often be legitimate to infer that the litigation materially contributed to it.

The appropriate question is therefore not whether the litigation *caused* the change in any strict 'but for' sense, but rather whether it *contributed* to it, alongside other factors. Though much of the literature does not articulate an approach to attribution, some recent studies adopt a contribution-based approach.[308] I add the qualifier 'materially' to limit attribution to significant

[307] Duffy (n 38) 41.

[308] ibid 41–43; Sikkink (n 306) 142.

contributions to impact. Material contribution is a doctrine that has been applied in the law of delict (tort) in several common law jurisdictions in the context of indeterminate or multiple cause scenarios, for example in the context of occupational disease,[309] with calls in South Africa to develop the common law to this effect.[310] This approach replaces but-for causation with inquiring whether there has been a material contribution to risk. While the approach is not directly applicable to impact studies, it provides helpful guidance.

Whether litigation contributed materially to particular effects (and ultimately to social change) is a contextual inquiry,[311] drawing on a range of potential indicators that may provide evidence attributing change, at least in part, to the litigation.[312] One may look in the first instance to the judgment or order itself, government policy documents, parliamentary proceedings, speeches of officials and newspaper reports.[313] Other indicators include secondary literature, the timing of key events, statements by claimants and key actors in the policy-making process, surveys of public opinion,[314] or explicit references to court actions in policy-making processes.[315]

A key distinction is between effects arising *directly* from the implementation of an order and *indirect* effects,[316] including the 'catalytic,'[317] 'backlash' or 'rebound'[318] effects of litigation. For

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[309] The leading case is *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22. See Erik Knutsen, 'Ambiguous Cause-In-Fact and Structured Causation: A Multi-Jurisdictional Approach' (2003) 38 TILJ 249.

[310] *Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC) [94]-[115].

[311] Duffy (n 38) 40.

[312] Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (n 26) 109.

[313] ibid 109-123.

[314] ibid 127.

[315] Gauri and Brinks (n 29) 25.

[316] Rodríguez-Garavito (n 280) 1680; Gauri and Brinks (n 29) 21.

[317] Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (n 26) 228; Duffy (n 38) 41.

[318] David Landau, 'The Reality of Social Rights Enforcement' (2012) 53 HILJ 189, 247.

example, if litigation culminates in an order directing the state to provide housing to identified people and it does so in compliance with the order, that is a direct effect. An indirect effect might be seen where court awards of damages in test cases dealing with unlawful shootings by police prompt the police to introduce new forms of training designed to reduce the risk of such conduct. Effects or impacts can also be planned (objectives) or be unintended consequences. Unintended consequences can also be positive, windfall gains, or negative backlash. A graphic example of an unintended consequence can be seen in the litigation attempting to secure the arrest of President al-Bashir of Sudan on the strength of a warrant issued by the International Criminal Court (ICC).[319] Although the litigation succeeded, it prompted South Africa to seek to withdraw from the ICC, with the withdrawal itself challenged in court on the basis that the executive could not withdraw without parliamentary approval.[320] A material contribution approach caters for direct and indirect effects in complex scenarios.

3.4 Dimensions of impact

I have identified four dimensions that constitute impact – type (*what*), subject (*who*), reach (*where*) and temporality (*when*). Teasing out these dimensions enables a fuller analysis of the effects of litigation.

3.4.1 Type

The need for a 'multi-dimensional approach' that recognises different types of impact is widely accepted,[321] but there remain different ways of conceiving and categorising impact. I propose three

[319] *Minister of Justice and Constitutional Development v Southern African Litigation Centre* 2016 (3) SA 317 (SCA), holding that the government had an obligation to arrest President al-Bashir and to surrender him to the ICC.

[320] *Democratic Alliance v Minister of International Relations and Cooperation* 2017 (3) SA 212 (GP). Recently, Sudan committed to hand over al-Bashir to the ICC.

[321] Duffy (n 38) 39; Dugard and Langford (n 24).

categories – *legal*, *material* and *political* impact – under which more specific impacts can be identified. In this section, I explain why I adopt that approach in preference to others in the literature.

There is no magic in what typology one adopts, but a good typology allows impact to be more clearly and better understood. I advance my tripartite typology for two main reasons. First, it best describes the differences in effects. Secondly, it is practicable because it accords with the practice of doing strategic litigation and tracks the likely indicators or evidence of different impacts. In order to understand these reasons, it is helpful to consider how approaches to type of impact diverge in the literature.

As a preliminary point, it is necessary to distinguish type (*what?*) from *who* is affected. Some approaches blur the two, making it difficult to analyse. For instance, the SERI Report, arguing for a 'multi-dimensional approach', identifies six different 'sites' of impact, namely the outcome for particular individuals and groups, changes to law and policy, institutional changes, symbolic and discursive changes, expanding democratic space, and strengthening the public interest law sector.[322] Two (or possibly three) of the six 'sites' of impact relate to affected people, namely particular individuals or groups and the public interest sector, as well as possibly institutions. The remaining 'sites' of impact are not sites, in the sense of locations of impact, but *types* of impact. Duffy, who proposes nine 'levels' of impact,[323] similarly combines types of impact with affected constituencies. Among the nine levels are 'victim impact',[324] which is not a type but rather a constituency, and 'negative impact',[325] which is not a type but an evaluative claim. To be clear, who is affected and whether the effects are positive or negative are important questions, but they are not about the *type* of impact and I address them separately.

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[322] SERI (n 24) at 57.

[323] Duffy (n 38) 50.

[324] ibid 50–59.

[325] ibid 77.

The first key distinction is between effects on the law and effects on the world beyond the law. Studies of impact – whether tending towards materialist or constructivist approaches – invariably recognise the importance of identifying effects on actual conduct and conditions in the world – that is, material impact. The Atlantic Report, which focuses on material impact without using the term, asks whether 'rights have been used to produce a tangible and sustainable impact on the ground for those who ought to benefit from them'.[326] It includes changes to policy and law in its conception of impact as a 'tangible and sustainable change on the ground'.[327] However, this risks blurring effects on the law and the implementation of the law. It loses the crucial insight that law on the books is distinct from the law in practice.

The second key distinction is between those effects beyond the law that relate to tangible conduct and events (material impact) and more abstract effects, tracking the constructivist approach. Rodriguéz-Garavito describes material impact, which he distinguishes from 'symbolic' effects, to ask whether there has been 'an observable change in the conduct of those it directly targets'.[328] Rodriguéz-Garavito and Dugard and Langford have criticised materialist approaches to impact for leaving out of account effects on power relations.[329] They accept that material impacts are vitally important, but propose a typology that looks at two forms of impact – material and enabling – in two parallel, but separate processes, the judicial process and the mobilisation process.

Subsequent studies have similarly incorporated legal, material and what I describe as political impacts. In its study on education litigation in South Africa, Brazil and India, the Open Society Initiative adopts three categories, namely 'material impact', 'policy change and

[326] Budlender, Marcus and Ferreira (n 24) 96.

[327] ibid.

[328] Rodríguez-Garavito (n 280).

[329] ibid 1678–1679; Dugard & Langford (n 24) 55.

jurisprudential shifts', and 'agenda change'.[330] In my view, jurisprudential shifts and, insofar as the policy determines legal rights and obligations, policy should properly be understood as forms of legal impact. Langford et al, drawing on Rodriguez-Garavito,[331] also adopt a typology of three categories – material, political and symbolic/recognition. Their 'political' impact consists of 'transformation of power relations', including transforming external power structures ('power to'), developing alternative sources of power ('power with') and increasing their capacity to engage with powerful actors ('power within').[332] They understand 'symbolic/recognition' impacts as 'ideational facts such as discourses, attitudes, goals and values'.[333] This category of 'symbolic/recognition' impacts is difficult to separate conceptually or in practice from their notion of political impacts. Power relations operate within discourses. The relative power of social actors is informed by their respective attitudes, goals and values.

Consider, for example, litigation regarding evictions and the duty on the state to provide alternative accommodation to persons facing homelessness. Apart from material impacts relating to evictions law or policy that secure homes for people facing eviction, there may be a broader set of impacts. People facing eviction may come to consider themselves as having a right to state provision. Landlords may come to understand that eviction is not available to them at a whim or on demand. This may shift the entire balance of power relations among residents, landlords and the state. It may also change the discourse or paradigm from one in which property rights are paramount to one in which the need to avoid rendering people homeless is paramount or at least carries equal weight. The media may come to report more sympathetically on people facing eviction, referring to 'residents' and 'homes' rather than 'land invasion' and 'property'. It is difficult

[330] OSJI (n 25).

[331] Rodríguez-Garavito (n 280) 1679.

[332] Langford and others (n 2) 22.

[333] ibid 23.

to draw a line through these effects and characterise some as 'political' and others as 'symbolic/recognition' impacts. They are best understood and assessed together as forms of political impact.

In their comparative study of judicial enforcement of social and economic rights,[334] Gauri and Brinks adopt a different analytic framework of impact.[335] They distinguish four categories of impact. The first two categories are the direct effects of litigation on litigants themselves and direct effects on non-litigants. In addition, they refer to indirect effects on subsequent legal activity and indirect legislative or regulatory impact of a decision beyond its immediate beneficiaries. By indirect effects on subsequent legal activity, they mean 'indirect effects that are *internal* to legal settings and depend on subsequent judicial decisions'.[336] And by indirect legislative or regulatory impact, they mean 'indirect effects that are *external* to legal settings and result from political or bureaucratic/corporate decisions taken in light of or in anticipation of judicial rulings.'[337] These four categories draw two important lines of distinction. The first is between litigants and non-litigants. The second is between effects on legal activity within the legal system (a feature of the first three categories) and effects beyond the legal system. However, these categories tend towards the legalistic, adopting the lens of the law and legal proceedings to understand impact. The categories also tend to assume that effects on litigants are necessarily direct, and effects on the legal system and regulation are necessarily indirect. While this may have been generally the case with the type of socio-economic rights enforcement litigation in their study, neither assumption holds for strategic litigation generally. This approach accordingly fails fully to capture the nature of the effects of litigation on people and society.

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[334] On health and education litigation in South Africa, Brazil, India, Nigeria and Indonesia.

[335] Gauri and Brinks (n 29) 21.

[336] ibid.

[337] ibid.

From the point of view of conceptual clarity, therefore, I argue that it is best to consider impact in three broad categories – legal, material, and political impact. Legal impact denotes effects on the law itself, including policies that determine legal rights and obligations, and on legal culture. Material impact consists of effects on conduct, provision of goods or resources and payment of money. On this conception, material impacts would include: changes to the conduct or practice of the state or private persons (including cessation of conduct); the delivery of social goods; and payment of damages or compensation. Political impacts do not affect the legal rights of persons or their material conditions of life, at least not directly. Instead, they are concerned with the power associated with ideas, people and institutions. This category of impacts would include 'agenda change',[338] a shift in priorities of the state, expanding democratic space, creating greater rights awareness, a shift in discourse, increasing dialogue or shutting it down, increased community mobilisation, or shifting the balance of power in relations between parties. A potential negative impact in this category is the disempowering, demobilising effect of litigation.[339]

A typology of legal, material and political impacts is also practicable. As I discussed above in the context of causation and contribution, the primary indicators or evidence of legal, material and political impact are likely to differ.[340] As the table in Appendix I reflects, one will look in different places, or at least with a different lens, to discern legal, material or political impacts. Legal impacts will tend to be identified from judgments or orders, legislation and policy documents. Material impacts will be apparent from first-hand accounts and statistical data in official or academic studies. Political impacts are likely to be revealed by qualitative research such as interviews with key social actors, media reports, speeches of politicians and other actors and other

[338] OSJI (n 57) 67; Rosenberg, *The Hollow Hope : Can Courts Bring about Social Change?* (n 26) 111.

[339] Tshepo Madlingozi 'Post-Apartheid Social Movements and Legal Mobilization' in Langford and others (n 2) 92–130.

[340] See Chapter 5.2.

such sources. I return to type of impact in section 3.5, where I refine the categories of legal, material and political impact and discuss the relationship among them in section 3.6.

3.4.2 People affected

It is crucial to consider *who* is affected by litigation. This ranges from the parties to the population as a whole. I have defined strategic litigation as relating to interests beyond those of the parties, so this is also a threshold question.

A crucial perspective is, of course, that of the actual litigant. In litigation involving human rights, this is usually the rights-bearer. Litigants are likely to have a unique perspective on the change (or not) that results from litigation as they have greater proximity, information and interest. Indeed, the capacity of outside observers to capture the impact of rights violations on those affected is necessarily limited. As Baxi puts it, '[t]he violated peoples know, in their lived and embodied experience, the ways in which the reality of their suffering remains *unnameable.*'[341] There is a risk that, in describing the suffering of people and attempts to mitigate it through strategic litigation, we normativise and thereby normalise suffering.[342] That is, we transform '*unconscionable* human/social suffering' into merely '*unlawful* imposition of suffering'.[343] At the very least, this reminds us to pay particular attention to the interests and perspective of actual litigants when considering impact.

However, the 'internal' perspective of litigants does not tell the whole story. Other groups or constituencies who may be affected include broader communities (beyond individual litigants), litigators themselves, the legal profession or a section of it,[344] the judiciary, media, officials,

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[341] Upendra Baxi, *The Future of Human Rights* (3rd ed, OUP 2008) 8.

[342] ibid 7.

[343] ibid.

[344] Eg., the public interest law sector, private law firms or the bar.

policymakers, and organised civil society.[345] Litigants are embedded in social relations and these external perspectives must also be studied.

It is possible to apply a narrower or wider lens to impact.[346] King observes that the American literature shows a 'fascination with macro-level significant reform'.[347] By contrast, in Britain and other parts of the Commonwealth there has been substantial research into the impact of litigation on individuated decision-making and how complex welfare bureaucracies can be made fairer and more responsive to people's needs – that is, the 'micro-level' impact.[348] In South Africa, most of the literature consists of meso-level, article- or chapter-length case studies of high-profile litigation, usually on a single human right and in a set of closely-related cases.[349]

There is a significant ethical dimension to the question whom one considers when assessing impact. In test case litigation, the interests of immediate litigants and the intended beneficiary class of similarly situated persons are in play. This begs the question, who 'owns' the litigation? Writing on PIL in India, Bhuwania criticises the trend that sees individual litigants and other affected individuals sidelined. He observes how the law has developed to facilitate PIL without any individual claimants,[350] arguing that the litigation is driven by the court and a court-appointed *amicus curiae*, who is usually a senior advocate. Although this is an extreme example, and

[345] SERI (n 24) 57; OSJI (n 57) 81–83.

[346] Duffy (n 38) 37–39.

[347] King (n 75) 70.

[348] ibid.

[349] Eg., Berger (n 192); Dugard and Langford (n 24); Wilson (n 78); Malcolm Langford and Steve Kahanovitz, 'South Africa: Rethinking Enforcement Narratives' in Malcolm Langford, Cesar Rodriguez-Garavito and Julieta Rossi (eds), *Social Rights Judgments and the Politics of Compliance* (CUP 2017).

[350] Bhuwania (n 34).

not necessarily typical even of India, it highlights the risk that the interests of marginalised groups will be sidelined and the litigation captured by well-resourced interest groups.[351]

In South Africa, although standing rules have been liberalised, there has been no similar development and a party with standing is necessary to litigate. However, litigation often involves an individual litigant with a personal interest in certain relief as well as the interests of a broader category of persons.[352] Where it is possible to separate the concrete relief sought by individual litigants from the broader relief sought in the public interest and in the interests of other people, difficult ethical questions may emerge. Conflicts of interest may also emerge within groups of affected persons.[353] Where these tensions among competing interests arise, there is a risk that the interests of more powerful social actors will dominate and that litigation may exacerbate inequality.[354] I return to these risks in Chapter 4.

3.4.3 Reach

The third dimension of impact that I identify concerns the reach of the effects of litigation. This can vary in several ways and I note three important examples. These are: the reach of the order or relief flowing from the case, the applicability of precedent in a system with federal features and the extra-territorial impact of jurisprudence.

First, the effects of a case may be narrowed or broadened by the formulation of an order. A case concerning access to a social good, such as housing or water, might result in an order granting relief to identified claimants. It might go further, extending to all similarly situated persons

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[351] Sandra Fredman, *Human Rights Transformed* (OUP 2008) 139.

[352] Eg, *Gundwana v Steko Development CC and Others* 2011 (3) SA 608 (CC) concerning execution against movable property constituting a home.

[353] Eg, in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) [9], one group of occupiers facing eviction favoured in situ upgrades while the other favoured relocation.

[354] Gauri and Brinks (n 29) 22.

and it might do this in a number of ways, what Rodriguez-Garavito calls the 'sectoral effect' of litigation, for example on health care users or homeless citizens generally.[355] The order might strike down a law or policy or an exclusion from a law or policy so as to extend a benefit to a class of persons.[356] Or an order might invite or enable other persons similarly situated to the individual claimants to approach the court to seek similar relief in future.[357] Class action proceedings are a new and important procedural tool to extend relief to identifiable persons who are not before the court.[358]

The second modifier of reach might arise in constitutional systems with federal characteristics. In South Africa, the executive, legislative and judicial branches all operate within provincial borders in certain respects. Accordingly, it is possible that litigation may be undertaken to set aside or compel implementation of a provincial law or policy.[359] In addition, as the High Court divisions operate within demarcated territorial jurisdiction, some litigation results in orders which, though enforceable nationally, apply only to persons within the jurisdiction of a particular court.

Finally, a judgment may have effects beyond the territorial jurisdiction in which it applies. It may influence foreign litigators, academics and courts. For example, Gauri and Brinks describe the *Grootboom* decision on the right of access to housing in South Africa as having 'raised the hopes of housing and antipoverty activists around the world'.[360] In addition, in jurisdictions in which comparative law is taken into account by courts, including South Africa, strategic litigation

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[355] Rodríguez-Garavito (n 280) 1686.

[356] Eg, *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC).

[357] Eg, *Gundwana* (n 352) [59].

[358] See Chapter 2.5.2.

[359] Eg, *Abahlali Basemjondolo Movement SA v Premier of the Province of Kwazulu-Natal* 2010 (2) BCLR 99 (CC) concerning KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act 6 of 2007.

[360] Gauri and Brinks (n 29) 2.

conducted elsewhere may indirectly affect the development of jurisprudence. Roux has observed that the Constitutional Court's decisions have been 'cited by fellow judges in new and old democracies, and their jurisprudence written about and analysed in almost universally approving terms by legal academics'.[361]

3.4.4 Temporal dimension

Often the focus when considering the impact of strategic litigation is on the most immediate effects flowing directly from the judgment or order. However, strategic litigation may have additional intermediate and long-term effects apparent only much later. [362] Levels of compliance or enforcement may be higher over the long-term.[363] Taking a longer-term view will usually better capture the indirect or catalytic effects of litigation.[364]

Any enquiry into the impact of strategic litigation requires a baseline or starting point and an end point. This is so whether one is assessing the impact of a single case, a stream of litigation in relation to a particular issue or right, or the totality of strategic litigation within a jurisdiction.[365] The end point can be the actual end of the litigation, adopting a 'before and after' analysis that compares the situation before litigation to the factual situation at a determinate point afterwards.[366] Alternatively, one can compare the 'before' position to an 'alternative regime', a set of reasonable expectations about what would have happened had litigation not been conducted or another

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[361] Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (n 18) 3.

[362] Langford and others (n 2) 23; SERI (n 24) 54.

[363] Langford and Kahanovitz (n 349) 341.

[364] Rosenberg, *The Hollow Hope : Can Courts Bring about Social Change?* (n 26) 228; OSJI (n 57) 67.

[365] Eg, Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (n 18) 6 adopts the appointment and retirement of a new chief justice as the beginning and end points for his study.

[366] Langford and others (n 2) 23–24, referring to a 'no regime counter-factual'.

strategy been adopted.[367] (This does not mean reverting to a but-for approach to attribution. It is possible to combine material contribution attribution with 'alternative regime' approaches to timing.) One should not compare the reality of the litigation to an unrealistic 'ideal of public-interest-oriented, democratic, legislated policy-making'.[368] Nor should the effects of litigation be compared against an unrealistic model of watershed 'revolutionary' change. The alternative should be well-grounded in evidence. These methods are not mutually exclusive and may provide different insights when assessing impact.[369]

3.5 Types of impact

In this section, I develop the three types of impact – legal, material and political. I identify a range of possible forms of these impacts with examples and address the most useful sources of evidence of each. This typology of impact, along with associated remedies, examples and sources, is summarised in table form in Appendix I. Importantly, I do *not* make any strong predictive claims, but merely identify *potential* effects of strategic litigation in South African conditions. In the case studies in Chapters 6-7, I investigate which, if any, of these or other effects emerge. Further, although some of these impacts may appear self-evidently positive or negative, I make no normative or evaluative claims at this stage, leaving those questions for Chapter 4. At present, I am concerned with understanding plausible potential impacts analytically.

3.5.1 Legal impact

Legal impact is the effect on the law and legal culture. The strongest forms of legal impact – the central case of the concept – might be the judicial recognition of a new human right or the striking

[367] ibid 24.

[368] Gauri and Brinks (n 29) 22.

[369] In Langford and others (n 2), authors adopted one or the other of these two approaches.

down of law or executive action. However, legal impact extends to more intangible effects on canon and legal culture.

Legal impact includes not only effects on law, but also on government *policy* that actually determines rights and obligations in some way.[370] This is distinct from 'high' policy in the broad sense, for example an anti-immigration or pro-austerity stance, which I class as political impact because it is concerned with the power associated with ideas. However, legal impact would include, for example, the national policy on emergency housing adopted in 2003 that explicitly acknowledged that it was devised as a result of *Grootboom*.[371] Another example is seen in a later housing case, *Blue Moonlight*, which held that the exclusion of occupiers of privately-owned properties from Johannesburg's emergency housing policy was unconstitutional, resulting in their inclusion.[372]

Legal impact includes the making, unmaking or altering of the positive law. This process can be understood in different ways. A useful distinction is Cover's conception of the 'jurisgenerative' and 'jurispathic' effects of law, referring to the role of courts in creating or 'killing' law and legal meaning.[373] Beyond the positive law or at its margins, legal impact also includes effects on what statements of the law may be 'canonical' or viable, and effects on the legal culture. Balkin describes how litigation can

> make arguments that were previously considered 'off-the-wall', 'on-the-wall', and vice versa. Shifts in canonical status – from anti-canonical to canonical or canonical but controversial – reflect the political and theoretical struggles over constitutional meaning that characterize a particular era.[374]

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[370] Rodríguez-Garavito (n 280) 1684 refers to 'policy effect' of litigation, including the design of a policy.

[371] Langford and Kahanovitz (n 349) 327.

[372] *Blue Moonlight* (n 356).

[373] Robert Cover and others, *Narrative, Violence, and the Law : The Essays of Robert Cover* (UMP 1995) 53.

[374] Jack Balkin, '"Wrong the Day It Was Decided": Lochner and Constitutional Historicism' (2005) 85 BULR 677, 702.

Legal impact thus consists both of explicit doctrinal developments and less easily discernible changes to the canon and legal culture.

3.5.2 Material impact

Material impact is concerned primarily with conduct, goods and money. It includes the provision (or withdrawal) of social goods or services, the payment of money, and the performance (or cessation) of specific conduct. The term 'material' is widely used in the literature,[375] alongside terms such as 'concrete',[376] 'tangible',[377] or 'on the ground'.[378] Materialist approaches tend to focus on whether litigation results in in material impact.

Material impact is often, but not necessarily, the primary objective of litigants. This may vary according to the litigation model, being a likely objective, for example, of client-based litigation. Material impact includes the *enforcement* of law or policy; the performance or cessation of conduct; payment of compensation; damages or costs; the allocation of resources (including budgeting);[379] provision of a social good or service; provision of data; accountability measures, such as investigation or prosecution; and any bureaucratic or institutional reforms to which litigation contributes.[380]

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[375] Rodríguez-Garavito (n 280) 1679; Dugard and Langford (n 24) 64; Langford and others (n 2) 23; OSJI (n 25); Duffy (n 38) 39.

[376] Budlender, Marcus and Ferreira (n 24) 145; Duffy (n 38) 39.

[377] Budlender, Marcus and Ferreira (n 24) 96.

[378] ibid.

[379] Ferraz (n 25) 126.

[380] Epp (n 84).

3.5.3 Political impact

On my approach, political impact captures the effects of litigation on the *power* associated with ideas, people and institutions.[381] It is therefore concerned with 'small "p"' political effects on power. These include, but are not limited to, 'big "P"' Political effects on actors in the formal political process.[382] There have been a range of influential studies focusing on the impact of strategic litigation on politics and Politics.[383] Several identify what I class as political impacts, with some using 'political',[384] and others using distinct terms including 'mobilisation and empowerment',[385] 'instrumental',[386] 'non-material',[387] 'enabling',[388] 'symbolic',[389] 'ideological',[390] 'social or cultural', 'democracy impact',[391] or 'recognition'.[392] What is common to these conceptions is that they relate neither to effects on law itself nor to conduct, but to *power*. What differs is the nature and location of that power, and whether it relates to ideas, people or institutions. Political impact is also not a zero-sum game or uni-focal: litigation may mobilise one set of actors but

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[381] Robert Goodin, *The Oxford Handbook of Political Science* (OUP 2011) 5, defining politics as 'the constrained use of social power'. The *Oxford English Dictionary* defines 'politics' (among other senses) to mean 'actions associated with the acquisition or exercise of power, status or authority'.

[382] Abel (n 15) 7.

[383] Eg., Gordon Silverstein, *Law's Allure : How Law Shapes, Constrains, Saves, and Kills Politics* (CUP 2009).

[384] Paola Bergallo, 'Courts and Social Change: Lessons from the Struggle to Universalize Access to HIV/AIDS Treatment in Argentina' 89 TLR 33.

[385] Duffy (n 38).

[386] OSJI (n 25).

[387] ibid.

[388] Dugard and Langford (n 24).

[389] Rodríguez-Garavito (n 280); Langford and others (n 2).

[390] Bergallo (n 384) 1631.

[391] Duffy (n 38).

[392] Langford and others (n 2).

demobilise another.[393] In Silverstein's formulation, litigation can 'shape, constrain, save and kill politics'.[394] The same litigation can have different political effects for different ideas, people and institutions.

In relation to *ideas*, litigation may have a 'reframing effect', for example to reframe an issue as a human rights problem requiring an immediate reaction,[395] or narrowing what is understood as social justice.[396] It also has the potential to recognise and validate an ideology, worldview or identity, for example by protecting a minority's right to practice their religion or recognising the rights of lesbian, gay, bisexual, transsexual or intersex people.[397] Equally, it might demean and delegitimise. Litigation is also understood to have the potential of establishing 'the truth' or the historical record. A recent example is the litigation in South Africa to re-open the inquest into the 1971 death in police custody of activist Ahmed Timol.[398] While this litigation sought a conviction (material impact), the judgment re-opening the inquest can also be seen as setting the historical record straight by establishing that Timol was pushed to his death from a window, and did not commit suicide. Relatedly, litigation may result in an apology, either as an expressly ordered remedy,[399] part of a settlement,[400] or simply as a response to a judgment.

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[393] ibid 22.

[394] Silverstein (n 383) 2.

[395] Rodríguez-Garavito (n 280) 1687. See Chapter 2.4.3.

[396] Langford and others (n 2) 23.

[397] In South Africa, there is interest in whether successful LGBTI rights cases have changed public attitudes or reduced homophobia. See Carla Sutherland, Ben Roberts and Neville Gabriel, 'Progressive Prudes: A Survey of Attitudes towards Homosexuality & Gender Non-Conformity in South Africa' (HSRC 2016).

[398] *The Re-opened Inquest into the Death of Ahmed Essop Timol* [2017] ZAGPPHC 652.

[399] Eg., *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) [105]-[121].

[400] For example, the eventual settlement in the *Khadr* litigation discussed by Duffy (n 38) 43 required the Canadian government to apologise for the detention in Guantanamo of Omar Khadr, who was 15 years old at the time.

Regarding the power associated with *people*, the dominant themes in the South African literature are the potential mobilising or demobilising effects on social movements[401] and effects on actors in the formal Political process.[402] There has been limited empirical research into these potential effects in South Africa. I introduced this briefly in Chapter 2 as one of the controversies relating to litigation models, and address it as a risk of strategic litigation in Chapter 4.

Regarding political effects on *institutions*, a range of potential effects emerges from the literature, generally with a focus on government institutions. These are centrally concerned with how institutions relate to other actors and their standing or influence. Regarding relationships, litigation may have have 'co-ordination effects', seeing institutions collaborate on the design, financing or implementation of a policy.[403] Relatedly, there may be 'participatory effects' – opening up both judicial proceedings and policy making to governmental and non-governmental actors, including civil society organisations or movements.[404] Another possibility is an 'unlocking effect' that breaks institutional inertia,[405] or its corollary, 'locking' or 'freezing' an institution because of increased public attention. Sabel and Simon refer to the possibility that litigation will 'destabilise' an institution by stigmatising the status quo and opening the institution up to new forms of correction and the participation of previously marginalised stakeholders.[406] These and other potential political effects on institutions are particularly relevant to Chapter 7 on appointments/removals.

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[401] See, eg, Tshepo Madlingozi 'Post-Apartheid Social Movements and Legal Mobilisation' in Langford and others (n 2) 92–130.

[402] See, eg, le Roux and Davis (n 58).

[403] Rodríguez-Garavito (n 280) 1684.

[404] ibid 1685.

[405] ibid 1683.

[406] Charles Sabel and William Simon, 'Destabilization Rights: How Public Law Litigation Succeeds' (2004) 117 HLR 1015.

3.6 The inter-relationship of legal, material and political impact

I now address why it is crucial to distinguish legal, material and political impact and map their interaction.

Drawing the distinction enables researchers to identify these types of impact in relation to a single issue. Consider a simple example of litigation to compel the state to provide shelter to homeless people. The litigation culminates in the judicial recognition of a constitutional right to shelter in the event of a risk of homelessness; the state indeed provides shelter to the specific litigants; and, in the process, greater attention is given in the media and the legislature to the issue of homelessness. These are, of course, legal, material and political impacts – a right to housing, actual housing, and the salience of housing as a public issue and government priority. Where the impacts align in this way, they may appear to be layers of the same effect, but the legal-material-political typology allows them to be teased apart.

Further, the possibilities for each type of impact in a single scenario are far more variable and complex. Of course, they need not converge. Litigants might win in court, but not receive a house. Or they may lose in court, but nevertheless secure housing. In either scenario, there might either be greater social mobilisation and public attention to the issue of housing, or not. Crucially, distinguishing types of impact exposes 'paper victories', decisions with legal impact only.[407] In South Africa, the landmark *Grootboom* decision is sometimes labelled a paper victory, because Mrs Grootboom famously died without a house.[408] However, the reality is much more complex, as the litigation resulted in significant changes to housing law and policy and the provision of housing to thousands of other people, including to the Wallacedene community of which Mrs Grootboom

[407] Duffy (n 38) 229. Provides the example of the International Court of Justice ruling that the Wall is unlawful, which has been ignored by Israel.

[408] *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

was a member.[409] Converting a legal victory into material impact may require significant work and resources, and even follow-up litigation.[410]

3.7 Litigation as a process

For the purpose of studying impact, litigation is best understood as a process, rather than simply an action (litigating) and an outcome (a court decision). The legitimacy of the law and courts rests, at least in part, on the fairness of legal processes.[411] In turn, people are more likely to comply when they regard the process as fair.[412] In relation to impact, the process, and not merely the outcome, affects attitudes and behaviour. The litigation process in South Africa, consistent with most common law systems, may be broken down into at least the following main phases: pre-litigation steps; the institution of proceedings; exchange of pleadings/papers; hearing or trial; court decision at first instance; and appeal proceedings and outcome.

Each part of the process involves important litigation decisions[413] and may contribute to a variety of impacts. The impact of the litigation should be understood as the cumulative effects of the process based on an all-things-considered view of the process as a whole. Of course, the final court decision and its enforcement are usually most significant, but other parts of the process may have distinct, reverberating effects. For example, simply instituting litigation may affect the public discourse or generate activity within a social movement.[414] The exchange of pleadings/papers and the leading of evidence may secure the disclosure of new information. Sometimes, the purpose of

[409] Langford and Kahanovitz (n 349) 323–333.

[410] Epp (n 8) 8–9.

[411] Tom Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) 3 C&J 283.

[412] ibid 306.

[413] See Chapter 2.

[414] Duffy (n 38) 42.

the litigation is simply to preserve the status quo through delay, even without a final court order.[415] Generally, the litigation process is linear and forward-moving, as litigants cannot easily undo steps or go back, save for limited possibilities such as amending pleadings, rescission of judgments and appeal. Enforcement itself is also often a complex, multi-staged process.[416] Further, it is not only favourable court orders that generate impact. A settlement agreement may have a range of significant effects.[417] Finally, 'losing cases' may also have complex, and surprising results.[418] An overall appreciation of litigation as a process is therefore crucial.

3.8 Remedies and impact

Though the litigation process as a whole contributes to impact, the outcome and any order granted are undoubtedly significant. Remedy is perhaps the most direct, but not the only, factor conditioning impact. Although litigants may have objectives that are served simply by bringing a case, even if unsuccessful, such as mobilising around an issue, gaining publicity, preserving the historical record or shifting the agenda, most strategic litigation is planned with a view to securing a successful judicial outcome. Strategic litigation may have effects that are planned, and therefore flow from the relief framed by litigators being granted by the court. It may also have unintended results. There is therefore no direct correspondence between remedies and impact. However, certain types of remedy are likely to be associated with certain forms of impact. The scope of remedial possibility also places limits on the impact that may reasonably be expected to result from strategic litigation.

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[415] Karthik Rao-Cavale, 'The Art of Buying Time: Street Vendor Politics and Legal Mobilization in Metropolitan India' in Rosenberg, Krishnaswamy and Bail (n 281) 151–183.

[416] Langford, Rodríguez Garavito and Rossi (n 270).

[417] Owen Fiss, 'Against Settlement' (1984) 93 YLJ 1073; Duffy (n 38) 42.

[418] Douglas NeJaime, 'Winning through Losing' (2010) 96 ILR 941; Catherine Albiston, 'The Dark Side of Litigation as a Social Movement Strategy' (2010) 96 ILRB 61; Amit (n 234); Dugard and Langford (n 24).

In Chapter 2, I introduced the range of remedies that South African courts may grant in strategic litigation, which fall in the following categories: 1) declaratory relief, including declarations of unconstitutionality of law or conduct, reviews and declarations of rights; 2) interdictory relief requiring that conduct be performed or refrained from; 3) orders requiring the payment of damages or compensation; 4) structural remedies governing the sharing of information or engagement among role-players; and 5) special costs orders. Outcomes other than court orders may take the same form as judicial remedies or be quite different.

The remedies most likely to be associated with legal impact include reviews and declarations of constitutional invalidity, severance, reading-in, declarations of rights, and orders requiring the legislature to address constitutional defects in laws, as well as the reasoning of judgments developing the law. The remedies most likely to result in material impact are interdicts (prohibitory or mandatory), especially those requiring (cessation of) conduct or the provision of goods, and orders sounding in money (damages, compensation or costs). Newer constitutional remedies in South Africa associated with material impact include constitutional damages, structural interdicts and class actions. In respect of political impacts, engagement orders, apologies and declarations of rights are especially significant.

I do not suggest that there is a necessary link between these remedies and particular types of impact, only that there is likely a strong association. I explore this association in the case studies. In Appendix I, I set out the different forms of impact under these three categories, and suggest judicial remedies with which certain impacts are likely to be associated. I also provide some examples of the social good or form of social change to illustrate types of impact, and possible sources of evidence of each.

Some studies have considered how the 'strength' of the remedy affects impact.[419] A 'stronger' remedy might be understood to be one that is more directory, invasive and specific. However, this relationship is not one of simple proportionality where a stronger remedy produces 'greater' impact.[420] The possibility of expansive structural interdicts and other relatively dialogic remedies opens up interesting questions in South Africa. It is possible that such remedies, though arguably 'weaker', may generate greater impact. I explore the relationship between remedy and impact in the case studies.

3.9 The impact feedback loop

Reality is not static. I introduced the temporal dimension of impact above, noting how one can adopt a short-term view or take a longer lens, viewing effects over an extended period of time. Taking an extended view reveals that today's impact is part of tomorrow's terrain for litigation. This applies to all forms of impact – legal, material and political. In relation to legal impact, it can be seen most clearly in the doctrine of precedent. Cases decided today constitute legal precedent that inform the prospects of tomorrow's potential cases. Less narrow and hard-edged, the canon and legal culture may be shifted by judicial decisions in ways that will constrain or enable future litigation.[421]

In respect of material impact, this is more varied and factually contingent. The central point is that whatever tangible changes to the world may arise following litigation contribute to the factual starting position for future litigation. In the context of socio-economic rights litigation, if earlier litigation has seen government adopt a law or a plan to give effect to a right (as happened

[419] Langford and Kahanovitz (n 349) 320.

[420] Eg., Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (PUP 2008).

[421] Balkin (n 374).

following *Grootboom*, for example), this plan and the extent to which it has been implemented will provide the context for the next case.

So, too, does political impact provide one dimension of the terrain in which future litigation may arise. Views differ on the extent to which courts do and should take into account political changes. For Fowkes, writing on South African constitutional interpretation, to do so is a legal virtue. He argues that judges working under the Constitution can and should take into account social and political realities, making society a 'source rather than merely a recipient of legal interpretative activity'.[422] Drawing on South African examples, he argues that the influence of politics on legal decision-making is extensive and happens at the level of legal reasoning.[423] He understands the public backing or political support for an idea as its 'public status', and argues that courts do (and should) take into account the public status of ideas in their interpretative activity.[424] As Epp observes, judicial attitudes and the meaning of legal provisions are also 'partly constituted by the political economy of … litigation, particularly the distribution of resources necessary for sustained constitutional litigation.'[425] In other words, the availability of litigation resources, too, may affect the political context for litigation. It is also possible that litigation might be deployed specifically to increase the available resources, for example when litigating to secure legal aid.[426]

My account emphasises that the public status of ideas – a crucial part of the litigation environment – shifts over time, shaping the political context for future litigation. Writing on the Northern Irish context, McEvoy found that changes in attitudes towards law in the Republican Movement played a significant role in processes of transforming its overall strategy, including the

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[422] Fowkes, *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa* (n 18) 48.

[423] ibid 14.

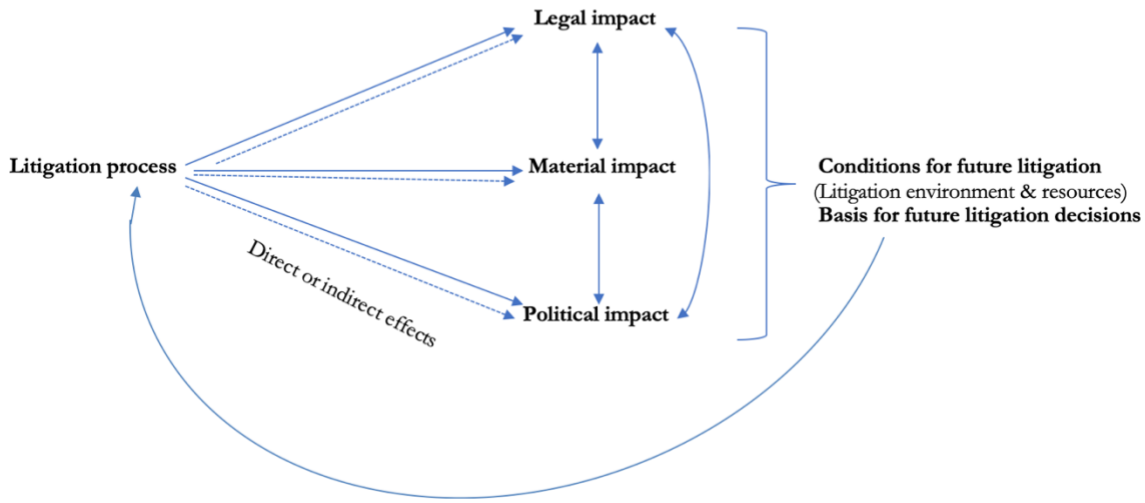
[424] ibid.

[425] Epp (n 8) 5.

[426] *Magidiwana* (n 173).

movement towards un-armed struggle.[427] Having traced events, he found that these developments were not 'linear or evolutionary', but 'linked to a complex dialectic between different forms of struggle and conjectures of time, place and individual actors'.[428] The impact feedback loop captures this complex dialectic, in which the legal, material and political impact of past strategic litigation feeds into the legal, socio-economic and political conditions (litigation environment), and may affect the resources available, for future litigation. I reflect this impact feedback loop in *Figure 3.1* below.

Figure 3.1: The impact feedback loop



It is in this complex dialectic between context and effects that it is possible to investigate the factors that influence particular impacts.

3.10 Factors likely to affect impact

There is considerable interest in *why* litigation has certain effects in particular cases. There is significant overlap between this question and the prior question, considered in Chapter

[427] McEvoy (n 56) 544.

[428] ibid.

2, why actors decide to litigate. As with decisions to litigate, the factors explaining impact are highly contingent. Nevertheless, a range of important factors emerges from the international and South African literature, both from theoretical work positing the likely factors and from empirical studies that identify contributing factors after-the-fact.

In South Africa, this debate arose sharply between the Atlantic Report[429] and Dugard & Langford's response.[430] The Atlantic Report identifies seven 'factors' that 'should generally be present in order to maximise the prospects of strategic litigation, used alongside other strategies,[431] succeeding and achieving social change'.[432] The seven factors are proper organisation of clients; overall long-term strategy; co-ordination and information-sharing; timing; research; characterisation; and follow-up.[433] Dugard and Langford criticised this approach as unduly 'scientific', arguing that 'there is no necessary strong correlation between the strategic decisions of litigators and winning in court'.[434] Positing the question whether strategic litigation is 'a matter of art or science', they argue that it is not a science because the causal relationship between litigation and both successful judicial outcome and impact is too complex - the litigation process is too unpredictable to rely on any preconceived formula. Dugard and Langford instead propose a 'more expansive model for analysing the impact and, concomitantly, the role or value of public interest litigation'.[435] A revised edition of the Atlantic Report emphasised that it had never

[429] Marcus and Budlender (n 252).

[430] Dugard and Langford (n 24).

[431] The other three strategies are public information, advice and assistance, and social mobilisation and advocacy.

[432] Marcus and Budlender (n 252) 6.

[433] ibid 119–148.

[434] Dugard and Langford (n 24) 41.

[435] ibid.

sought to provide 'a mathematical formula for success in litigation' and that litigation is 'subject to so many variables that outcomes are never certain'.[436] However, in the authors' view, the seven factors *do* maximise prospects that litigation will 'succeed'[437] and achieve social change.[438]

Two important insights emerge from this exchange. The first is the need to take a broader view of the variables influencing impact. The second is the utility, epitomised by the Atlantic Report, of identifying variables over which litigants have some control. The greater the agency that litigants enjoy in relation to a potential factor, the greater its potential utility in practice. Drawing on these two insights and the literature explaining *why*, and *how*, strategic litigation happens in Chapter 2, I argue that it is possible to identify three sets of factors likely to influence litigation impact: the litigation environment, resources, and decisions.

These three sets of factors sit on a structure-agency continuum. None are permanently fixed or static, nor entirely unconstrained and subject to litigants' choices. However, at the more structural end of the continuum is the litigation environment – the socio-economic, legal and political conditions in which litigation takes place. Several aspects of the litigation environment have been recognised as potentially influencing

[436] Budlender, Marcus and Ferreira (n 24) 111.

[437] See Chapter 4.3.

[438] Budlender, Marcus and Ferreira (n 24) 111.

impact, including legal culture,[439] the identity and attitudes of judges, composition of courts,[440] the bureaucratic contingency,[441] and levels of compliance with courts decisions.[442]

Litigation resources, consisting primarily of suitable litigants, lawyers and funding, are more contingent and likely to shift over shorter periods of time. In relation to identifying suitable litigants, the literature suggests that the presence of repeat players,[443] securing litigants that are popular or sympathetic, [444] and combining individual and institutional litigants[445] are advantageous. Resources deployed over time may affect litigation conditions. In general, greater litigation resources are likely to be related to greater impact, but it is also likely that more specific relationships may emerge between, for example, the involvement of social movements as litigants and greater political impact, a possibility I explore in Chapters 6-7.

At the agency end of the continuum, litigation decisions are the choices in specific cases how to cross the terrain constituted by litigation environment, with the availability of litigation resources influencing the ease of doing so. The choice at the outset of what is litigated – the subject-matter of the claim – obviously affects impact.[446] I argue further that key litigation decisions around framing, model and form of litigation and remedies pursued are likely to influence impact. In relation to model, the literature already highlights the

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[439] Epp (n 8) 5.

[440] ibid.

[441] Ferraz (n 25) 147; Langford and Kahanovitz (n 349) 343; Epp (n 84).

[442] Ferraz (n 25) 147–149.

[443] Galanter (n 158).

[444] Langford and Kahanovitz (n 349) 343.

[445] Budlender, Marcus and Ferreira (n 24) 130.

[446] Ferraz (n 25) 125.

salience of the degree of mobilisation and presence of social movements,[447] and effective media coverage.[448] Rather than discrete, free-standing factors, I see these as central features of litigation models that are actively chosen (movement lawyering and campaign-based litigation, respectively). It is also likely that client-based litigation is likely to prioritise material impact for litigants above the political impact that movement and campaign-based models target. In respect of form, are structural cases indeed more likely to achieve structural (material) impact? Is the test case form most closely associated with legal impact?

3.11 Conclusion

In this Chapter, I have set out the dimensions of impact and the typology of legal, material and political impact, central to the Thesis. This typology will be applied to the case studies in Chapters 6-7 to analyse the impact of litigation on education and appointments. I have set out the relationship between the types of impact and litigation decisions that will also be assessed in the specific case studies. Having set out my analytical framework to identify types of impact, I now turn in Chapter 4 to set out a framework for evaluating impact.

[447] Duffy (n 38) 242; Langford and Kahanovitz (n 349) 345.

[448] Epp (n 84) 17.

Appendix I: Types of impact, remedies, goods/change and evidence sources

Impact	Judicial remedy	Examples of social good or other change	Possible evidence sources
Legal impact			
Change to the law or binding policy	Temporary regulation by court (interim interdict) Declaration of constitutional invalidity Severance Reading in orders Structural interdict requiring legislature to reconsider the law Structural interdict requiring the executive to develop a plan	Striking down of death penalty Striking down of prosecutions policy Striking down emergency housing policy	Judgment and order Legislative materials Government policy documents, statements
Material impact			
Enforcement of law or policy in practice	Review Declarator Interdict	Enforcing maximum detention period for immigration detention	Government reports Civil society / media reports Stakeholder interviews
Cessation of conduct	Review Declarator Interdict	Prohibition of eviction until alternative accommodation available	Government reports Civil society / media reports Stakeholder interviews
Payment of compensation or damages, or costs	Order requiring payment of common law damages, constitutional damages or compensation, or legal costs	Damages paid to all goldminers who contract silicosis	Civil society / media reports Stakeholder interviews
Allocation of resources, especially in budget	Order requiring state to plan or budget	Increase to provincial health budget	Budget statements, division of revenue statutes
Provision of a social good or service	Mandatory interdict for the provision of the social good or service Structural interdict requiring state to report to court	School furniture, textbooks Temporary emergency housing	Government reports Civil society / media reports Stakeholder interviews
Data / information gathering	Reporting order	List of beneficiaries of a government programme	Reports to court or parliamentary committees

Impact	Judicial remedy	Examples of social good or other change	Possible evidence sources
	Order requiring production of documents or review record, 'judicial peek' Meaningful engagement Mediation Remittal to administrative decision-maker for reconsideration or to lower court for trial/evidence		
Accountability / investigation / prosecution	Mandatory interdict requiring investigation, disciplinary hearing, commission of inquiry or criminal prosecution Striking from roll of legal practitioner	Order requiring criminal investigation Striking from roll of advocates of senior prosecutors	
Political impact			
Mobilising and empowering communities or groups	Meaningful engagement Public participation orders	Social movement established	Stakeholder interviews
Re-frame social discourse or narrative, prompt debate	Declarator Orders interdicting interference with protest Order precluding censorship or copyright enforcement Order impugning hate speech	Findings of corruption Protest Satirical expression Barring or punishing sexist, racist or homophobic speech	Media publications and broadcasts Media content survey
Identity impacts, recognition of new ways of being human	Declarator Declaration of constitutional invalidity	Decriminalisation of same-sex sexual relations Recognition of same-sex marriage Decriminalisation of private marijuana use	Stakeholder interviews and reports Media content survey
Restorative or empowering effects	Meaningful engagement Mediation Apology	Apology for defamation Erection of monument / plaque	Testimony or interviews Reports to court under structural interdict
Strengthen institutions Building democracy, strengthening rule of law	Removal orders Costs orders Order requiring public participation	Removal of unqualified official Public participation in law reform process	

Impact	Judicial remedy	Examples of social good or other change	Possible evidence sources
	Personal costs orders against officials		
Preserving the historical record, documenting injustice	Order re-opening an inquest or ordering a new investigation or trial	Judgment re-opening an inquest into an apartheid state murder	

4. CHAPTER 4: EVALUATING STRATEGIC LITIGATION

4.1. Introduction

The typology set out in Chapter 3, of legal, material and political impact, stops short of any measurement of scale or normative evaluation of what makes impact good, bad or indifferent. That is the task of this Chapter.

As Chapter 3 showed, the dimensions of impact can all be calibrated. One can take a longer or shorter view, a wider or narrower lens on impact, and filter to focus on different types of impact. For example, the value of strategic litigation might be determined through an assessment of legal impact flowing directly from a decision; the immediate, material impacts on litigant communities; or it could analyse the long-term political impacts for society. I define the 'value' of strategic litigation as the normative appraisal of *all* impacts – direct and indirect; intended and unintended; legal, material and political; immediate or long-term.

Once the dimensions are calibrated, one needs a set of criteria to evaluate impact. Many impact studies treat evaluative criteria as 'given', evaluating impact against implicit norms. This is problematic because it obscures evaluative choices, especially if only certain impacts are analysed. For example, simply describing a set of short-term, material impacts, like the expansion of child care grants by the state in terms of a court order, and treating the value of that impact as self-evident, may tell only part of the story. What happened to the functioning of the government department? Did it affect the national discourse on social welfare? If the litigation did some or all of these, how does one evaluate it? Evaluating impact is inherently contestable, but if the criteria are inexplicit, it becomes even more opaque and subjective.

I propose a three-layered evaluative approach consisting of 'success', normative appraisal and a heuristic of risks and benefits. First, it asks whether the litigation 'succeeded' in achieving its objectives. Secondly, it evaluates impact against a set of constitutional values – social justice,

democracy and the rule of law ('the SDR framework') – considering to what extent it promoted, or detracted from, these values. Finally, to act as a check on free-wheeling value judgements that risk valorising or pillorying litigation, it offers a heuristic of potential risks and benefits. The heuristic, operates within the SDR framework, prompts inquiry into blind spots. I apply this evaluative approach to the case studies in Part II.

4.2. Evaluating impact

There are many ways to evaluate impact, each offering advantages and insights. Some evaluative approaches tend towards qualitative evaluation while others tend towards the quantitative. These approaches include evaluation not only of impact, but of related concepts such as compliance or realisation or fulfilment of rights, which assist in developing an approach to evaluate impact.

Reviewing the literature on the impact of international human rights law, Hafner-Burton and Ron noted that 'opinions are shaped, at least in part, by the choice of research method.'[449] Researchers working in the 'more established case study tradition' tended towards more optimistic findings, whereas those adopting quantitative approaches were 'more skeptical'.[450] Among litigation impact studies, similar trends are observable in comparing studies emphasising quantitative data, such as Rosenberg[451] and Ferraz,[452] to studies with a more qualitative focus, such as McCann,[453] Duffy[454] and Vanhala,[455] but this trend should not be overstated. The point is that

[449] Emilie Hafner-Burton and James Ron, 'Seeing Double: Human Rights Impact through Qualitative and Quantitative Eyes' (2009) 61 WP 360, 363.

[450] ibid.

[451] Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (n 26).

[452] Ferraz (n 25).

[453] McCann (n 193).

[454] Duffy (n 38).

[455] Vanhala (n 32).

quantitative and qualitative approaches may diverge in their evaluation of similar subject-matter. This divergence tends to map onto the materialist-constructivist divide discussed in Chapter 3.

Different types of litigation may invite more quantitative or qualitative evaluation. For example, some civil and political rights outcomes will be less amenable to 'counting' than some economic, social and cultural rights outcomes,[456] though this distinction, too, should not be overstated. For example, the impact of litigation to secure (or suppress) the right to vote will be eminently 'countable'. The distinction between categories of rights is eroding.[457] I develop an evaluative approach that is sufficiently flexible to fit all strategic litigation, not only human rights litigation, and capable of evaluating the full range of legal, material and political effects.

Several quantitative approaches to evaluating human rights realisation have emerged in the literature. These include quantitative country indices, such as the SERF Index; [458] economistic approaches comparing legalisation of rights with fiscal outcomes;[459] and the use of a formula to give value to rights realisation, such as that developed by Gauri & Brinks. Some measures convert subjective, qualitative data into numeric data or 'qualitative ratings', such as Transparency International's Corruption Perception Index.[460] In particular, influential indices have been developed to quantify the rule of law, including the World Bank's Governance Indicators Project, the Heritage Foundation Rule of Law Index, the Freedom House Freedom in the World, Rule of

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[456] Sakiko Fukuda-Parr, Terra Lawson-Remer and Susan Randolph, *Fulfilling Social and Economic Rights* (OUP 2015) 13; Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (HUP 2011) 61–62.

[457] Nussbaum (n 456) 67.

[458] Fukuda-Parr, Lawson-Remer and Randolph (n 456). The SERF Index measures the enjoyment of rights and the fulfilment of state obligations in respect of the rights to food, housing, education, social security, health and work. In respect of each right, it identifies indicators and primary sources of data.

[459] Eg, Adam Chilton and Mila Versteeg, 'Rights Without Resources: The Impact of Constitutional Social Rights on Social Spending' [2017] Coase-Sandor Working Paper Series in Law and Economics No. 781. Chilton and Versteeg use a dataset of 196 countries' constitutional rights and data from the World Development Indicators to consider whether the adoption of constitutional rights to education and healthcare are associated with meaningful increases in government spending on education and healthcare, finding that it is not.

[460] Fukuda-Parr, Lawson-Remer and Randolph (n 456) 13.

Law Index and the World Justice Project Rule of Law Index.[461] Indeed, there are currently at least 150 governance indicators.[462]

In their comparative study, Gauri & Brinks use a formula to capture the impact of the 'legalisation' of social and economic rights:[463]

***Impact = (N_{ind}* DE_i) + (100N_{col}*DE_c) + N_{IE}*I),* where**

- N_{ind} is the number of individual cases (that is, cases brought by individuals);
- DE_i is the direct effect of those cases, calculated as the proportion of individual cases that favoured the plaintiff and in which the judicial order is implemented;
- N_{col} is the number of collective cases, which Gauri and Brinks multiply by 100, an arbitrary number meant to denote the average number of individuals potentially directly affected by each collective case in that policy area;
- DE_c is the direct effect of those collective cases;
- N_{IE} is a measure of 'the generalization of judicial remedies', that is, the estimated number of persons potentially reached by the indirect effects of litigation in each area, primarily through legislated changes introduced in response to litigation;
- I represents implementation, the estimated proportion of those benefits that that actually reached intended beneficiaries.

Although this appears complex, it simply represents in numbers elements of impact identified in Chapter 3 – direct and indirect effects; and individual and collective impact. It is concerned only with material impact. This formula distinguishes individual from collective cases.[464] This distinction is best understood in light of the varied nature of strategic litigation across the world. India typifies the use of 'collective cases', as PIL in India frequently involves structural orders directly affecting large numbers of people. Such 'structural reform litigation' is also commonly employed in

[461] Mila Versteeg and Tom Ginsburg, 'Measuring the Rule of Law: A Comparison of Indicators' (2017) 42 LSI 100, 101.

[462] ibid.

[463] Gauri and Brinks (n 29) 326.

[464] See Chapter 2.5.2.

Colombia[465] and South Africa. By contrast, in some Latin American countries, collective or structural cases are relatively rare, but thousands of individual claims are brought to secure socio-economic rights for individual claimants. For example, in Brazil, it is estimated that more than 100,000 cases a year are brought to secure access to medication from the state.[466] Gauri and Brinks, who were conducting a comparative study of the impact of socio-economic rights, wanted a formula that enables structural litigation to be sensibly compared to thousands of individual cases.

As Gauri and Brinks concede, their formula is imprecise. The use of 100 as the estimated direct beneficiaries of collective cases is arbitrary. A more accurate approach would count actual beneficiaries. This may not be possible when working across multiple jurisdictions, but in studies within single countries, it should be possible to secure more accurate quantitative information.

Attempts to evaluate impact solely based on numerical indices, ratings and formulae alone have major limitations. As Fukuda-Parr et al have observed, '[i]nherent in quantification is the transformation of a concept's meaning, which involves simplification, decontextualization and reification.'[467] This limitation relates to attempts to assign numerical values to non-numerical facts, as well as 'reduc[ing] complex social phenomena to simple measures and may thus mislead'.[468] It may be necessary in multi-country studies, given the sheer scale of data involved, to use primarily quantitative measures to enable comparison. However, in single-jurisdiction case studies like this Thesis, it is not necessary to sacrifice the sensitivity of qualitative evaluation in this way.

Several principles emerge from the approaches considered above that assist in deciding how best to evaluate the impact of strategic litigation in South Africa at case study level. First, to evaluate the full range of impacts, an approach that combines quantitative and qualitative data is

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[465] Rodríguez-Garavito (n 280).

[466] Ferraz (n 25) 9; Brinks and Forbath (n 240) 1946.

[467] Fukuda-Parr, Lawson-Remer and Randolph (n 456) 14.

[468] Versteeg and Ginsburg (n 461) 101.

optimal. Secondly, it is not appropriate to construct a numerical index or scale. While it would be possible to assign numerical values to the impact of specific cases or streams of litigation, using a formula similar to that of Gauri and Brinks, it would have little value in single-jurisdiction case studies. It is, however, still necessary to be able to provide some sense of scale of impact, and in appropriate cases to be able to quantify it in countable form.

In the next section, I introduce my proposed evaluative approach. It combines qualitative and quantitative dimensions. The qualitative aspects are assessing 'success', and a set of deeper substantive norms against which to evaluate impact, coupled with a heuristic of significant risks and benefits. The quantitative aspect entails assessing the scale of the impact against the evaluative norms. Where the impact of litigation is best understood as quantitative data – for example a number of beneficiaries or amounts of money – then the 'counting' of this data will inform the evaluation. I develop the approach below.

4.3. 'Success'

'Success' provides a thin normative frame against which to evaluate litigation qualitatively. Whether litigation is 'successful' is best understood as whether its objectives were achieved.[469] There may be short-term, medium-term and long-term objectives that may shift over time, including at different stages of litigation.[470] Litigation objectives can be understood in the same typology as impact – legal, material and political. For instance, test case litigation may primarily pursue law reform (legal impact); litigation in the movement lawyering model is likely to have movement building as one important objective (political impact); and a class action in the client-based model may be primarily aimed at securing damages for class members (material impact). Or litigation may be aimed at all three types of impact. In addition, different role-players may have different goals.

[469] Duffy (n 38) 237; Brinks (n 251) 476–478.

[470] Duffy (n 38) 238.

For example, the goals of individuals may overlap with, but differ from, the goals of NGOs, funders or partners.[471]

Evaluation for 'success' enables an understanding of the factors contributing to success. It also provides a benchmark and 'reality-check' against which to evaluate litigation because the objectives of litigants are likely to constitute their view of what was realistically attainable.[472] I include success as the first layer of evaluation, applied to the case studies in Part II. Successful litigation, however, does not translate into 'good' or normatively attractive impact. Successful litigation may contribute to 'bad' impact, and unsuccessful litigation might contribute to 'good' effects.[473] A thicker normative frame is therefore set out below.

4.4. Normative framework: Social justice, democracy & rule of law (SDR)

While many studies imply evaluative norms when discussing impact, this masks the actual normative work being done.[474] How do we know whether litigation effects are good, bad or indifferent, or matter at all? To answer this question requires a second, evaluative stage grounded in a conception of what constitutes a flourishing society.

I propose a set of three values as a working evaluative framework: social justice, democracy and the rule of law. I source these values in the South African Constitution. I use the term 'social justice' to mean a fair distribution of social goods, capabilities and social status, with fairness understood to include redistribution and racial and gender justice. Social justice, I explain,

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[471] ibid 237.

[472] Brinks (n 251) 478.

[473] Dugard and Langford (n 24); Amit (n 234); NeJaime (n 418).

[474] Some studies, though not fully articulating their evaluative norms, at least recognise the need to make evaluative claims explicit, eg, Epp (n 84) 225; Ferraz (n 25) 227.

encompasses the values of equality, dignity and freedom but is not limited to them. By 'democracy' I refer to the particular form of constitutional democracy envisaged by the Constitution focusing on democratic participation. I do not limit this to direct participation in the formal political process. Rather, democratic participation means the capacity to be an active participant in society. By the rule of law, I mean a system of governance under the Constitution characterised by legality, accountability and a 'culture of justification'. I explain why I have selected these three values before developing each one more fully.

4.4.1. Choice of values

There are three significant challenges in selecting evaluative norms: their legitimacy, including their source and the reasons for their normative force; how norms are applied; and the absence or exclusion of *other* norms.[475] I endeavour to be sensitive to these risks by interrogating the legitimacy of the norms that I propose, examining how they are applied, and considering what alternative norms or alternative conceptions of norms are excluded by my approach.

For a long time, the standard metric of country well-being was an economic measure of production or consumption, such as per capita income or gross domestic product.[476] Although these measures offer insights into the performance of a national economy, they have shortcomings as measures of human well-being. They say little about the *actual* distribution of goods and opportunities, levels of inequality and the experiences of people living in a society.[477] Other indices, notably the Human Development Index, sought to remedy these deficiencies by incorporating life

[475] Charles Mills, *Black Rights/White Wrongs: The Critique of Racial Liberalism* (OUP 2017) 84.

[476] Fukuda-Parr, Lawson-Remer and Randolph (n 456) 1; Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (HUP 2006) 71.

[477] Nussbaum (n 476) 71–72.

expectancy and educational attainment alongside per capita GDP, while retaining the advantages of measurable and comparable data.[478]

Following the adoption of the Universal Declaration of Human Rights, the human rights framework itself emerged as a powerful yardstick of human well-being.[479] Other fields began increasingly to draw on human rights.[480] The 'capabilities approach', developed primarily by Amartya Sen in the field of economics and by Martha Nussbaum in ethics, emerged as an alternative basis for understanding development[481] and justice,[482] with a close relationship to human rights.[483] Legal academics, social scientists, philosophers and economists have brought varied analytic and evaluative lenses to bear on litigation impact. Law and economics approaches have examined the impact of legalisation of rights on economic indicators such as government budgeting and spending.[484]

In selecting evaluative norms, I move from the universe of moral and political values to a uniquely South African set of constitutional values. It is possible to adopt norms related to the Constitution but external to it. For example, one study proposes criteria that include creating a sense of legitimacy for the new order; channelling conflict into political institutions; limiting agency costs or corruption; facilitating the provision of public goods.[485] While economic criteria, philosophical approaches to justice, faith-based values, and other values external to the

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[478] Nussbaum (n 456) 59–60.

[479] Fukuda-Parr, Lawson-Remer and Randolph (n 456) 3.

[480] Sikkink (n 306).

[481] Amartya Sen, *Development as Freedom* (OUP 2001); Nussbaum (n 456).

[482] Amartya Sen, *The Idea of Justice* (Penguin 2010); Nussbaum (n 476).

[483] Nussbaum (n 456) 62.

[484] Chilton and Versteeg (n 459).

[485] International IDEA, 'Assessing the Performance of the South African Constitution' (2016) 81–87.

Constitution may be fruitful areas of research for other fields, this Thesis conducts a constitutional evaluation of strategic litigation.

In this Chapter, I develop a normative framework within what the Constitutional Court has called the 'objective, normative value system' of the Constitution,[486] that is, *internal* constitutional norms. Although there is some favourable evidence,[487] whether public opinion would support my framework is outside the scope of this Thesis. Those who challenge the legitimacy of the Constitution[488] may reject the use of constitutional values for evaluation. I argue that the identified constitutional values provide a credible, normatively attractive and coherent framework for evaluation. The content of the selected norms is necessarily iterative. Whilst I give content to the SDR framework drawing from contemporary jurisprudence and literature, I leave open the possibility of the conceptions evolving to respond to the needs of society.

I adopt the SDR values for two reasons – textual grounding, and comprehensiveness. First, they are strongly grounded in the text of the Constitution, as interpreted by the courts, emerging as pre-eminent constitutional values. Even where there is broad agreement on the general concepts encapsulated in the SDR values, I acknowledge that there may be divergence over particular conceptions.[489] Secondly, the norms are sufficiently comprehensive to evaluate all strategic litigation under the Constitution. It may not be possible to identify a set of norms that is fully

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[486] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) [54]. See James Fowkes, 'Founding Provisions' in Stu Woolman and Michael Bishop (eds), *Constitutional Law of South Africa* (2nd edn, Juta 2014).

[487] In a survey of adult residents of Gauteng in 2015, the majority of respondents acknowledged as 'important' the values of equality, dignity, freedom, democracy and the rule of law. See International IDEA (n 485) 111. The Constitutional Court has held that public opinion is at best relevant but not particularly helpful in interpreting the Constitution: *S v Makwanyane* 1995 (3) SA 391 (CC) [87]-[88].

[488] Eg., Madlingozi (n 146); Mogobe Bernard Ramose, 'Towards a Post-Conquest South Africa: Beyond the Constitution of 1996' (2018) 34 SAJHR 326; Sibanda (n 145).

[489] Ronald Dworkin, *Law's Empire* (Hart 1998) 70.

inclusive (covering all possible impacts) and fully *exclusive* (not overlapping with the other norms),[490] but the aim is to get as close as possible. In addition to my case studies in Chapters 6 and 7, I also test the reach of the SDR norms against other case studies in the literature. Previous South African and international studies have largely focused on litigation to realise *human rights*.[491] These studies, while not expressly proposing any evaluative framework, have tended to imply evaluative norms that broadly correspond to the *social justice* and *democracy* components of SDR. However, they have tended *not* to emphasise the effects of litigation on promoting (or undermining) the rule of law. Given the role of law in South Africa's particular apartheid history, a substantive conception of the rule of law is crucial to evaluate strategic litigation under the Constitution.

SDR are not the *only* constitutional values. On my account, they are meta-norms central to the Constitution as a whole, given content by more specific constitutional norms. The values of dignity, equality and freedom, in particular, are central to the Bill of Rights,[492] and the Constitutional recognises a set of 'basic values and principles governing public administration', including among others accountability, transparency, responsiveness and public participation.[493] As developed below, social justice encompasses the values of dignity, equality and freedom; democracy embodies the values of responsiveness and public participation; and accountability is central to the rule of law. The SDR norms also bear close relation to transformative constitutionalism.[494] The SDR norms give content to the society that transformative constitutionalism aims to build. In the next sections, I develop working conceptions of the SDR

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[490] Donatella Della Porta and Michael Keating, *Approaches and Methodologies in the Social Sciences: A Pluralist Perspective* (CUP 2008) 9.

[491] True of almost all the literature on litigation impact in Chapters 2-4.

[492] Constitution, ss 7(1), s 36(1), s 39(1)(a).

[493] Constitution, s 195. See Anshal Bodasing, 'Public Administration' in Stu Woolman and Michael Bishop (eds), *Constitutional Law of South Africa* (2nd edn, Juta).

[494] Eg., *King* (n 148) [244]-[245]. See Chapter 2.4.1.3.

norms through a close reading of the Constitution, judicial interpretation and academic contributions.

4.4.2. Social justice

The Constitution reflects a running commitment to social justice throughout its text. The Preamble states that the Constitution seeks to 'establish a society based on… social justice and fundamental human rights' and to 'improve the quality of life of all citizens and free the potential of each person'. The founding values include the achievement of equality and the advancement of human rights and freedoms.[495] The Bill of Rights particularises this, entrenching a broad range of human rights, including economic, social and cultural rights.[496] The equality right not only provides for equality before the law[497] and prohibits unfair discrimination,[498] but expressly provides for restitutionary measures to 'promote the achievement of equality'.[499] Similarly, the property right not only protects against arbitrary deprivation of property and constrains the power to expropriate, but expressly recognises 'the nation's commitment to land reform and to reforms to bring about equitable access to all South Africa's natural resources'.[500] Accordingly, the Constitution commits to particular conceptions of equality and human rights that entail improving the quality of life of marginalised groups.

Beyond the constitutional text, social justice has been widely used by courts, activists and academics. There are competing conceptions and critiques of it as a concept, project and civil

[495] Constitution, s 1.

[496] ibid, ss 9-35.

[497] ibid, s 9(1).

[498] ibid, s 9(3)-(5).

[499] ibid, s 9(2).

[500] ibid, s 25(4).

society sector.[501] A normatively attractive conception of social justice for South Africa must be compatible with a diversity of opinions regarding the good life, supply sufficiently determinative criteria for evaluating concrete cases and be consonant with the other values of the Constitution.[502] Although its contours continue to be refined, in response to shifts in socio-economic conditions and political discourse in South Africa, several proto-features have begun to emerge in the jurisprudence of the Constitutional Court. These features roughly comport with equality, dignity and freedom,[503] but are not limited to them. The Court has referred to social justice in a significant proportion of judgments,[504] and reaffirmed its centrality to the Constitution on many occasions.[505]

'Social justice' captures the basic theme of improving the 'quality of life for everyone'.[506] From the jurisprudence, elucidated by academic commentary, some proto-features emerge. First, the Constitutional Court has emphasised that social justice connotes a distribution that benefits the least advantaged in society[507] – an idea similar to Rawls' understanding of a fair distribution of social goods.[508] According to Rawls, social and economic inequalities must be arranged so that they are 'to the greatest benefit of the least advantaged' and 'attached to offices and positions open to all under conditions of fair equality of opportunity'.[509] However, the constitutional conception of social justice departs from classical liberal approaches in two important respects – its approach to

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[501] Eg., Madlingozi (n 146); Sandra Liebenberg, 'Needs, Rights and Transformation: Adjudicating Social Rights' (2006) 5 SLR 5, 7.

[502] Liebenberg, 'Needs, Rights and Transformation: Adjudicating Social Rights' (n 501) 7.

[503] *Daniels v Cambpell* 2004 (5) SA 331 (CC) [54].

[504] A SAFLII search on 5 March 2021 recorded that the Constitutional Court has referred to social justice in 84 out of 838 judgments (10%).

[505] Eg., *Modderklip* (n 133) [36].

[506] *Grootboom* (n 408) [1].

[507] ibid [44]; *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) [43]-[44]; *S v Manamela* 2000 (3) SA 1 (CC) [44].

[508] John Rawls, *A Theory of Justice : Original Edition* (HUP 2020).

[509] ibid 302.

inequality and its understanding of freedom.[510] Whereas Rawls' approach sets itself against poverty but remains consistent with significant levels of inequality, allowing the rich to get richer if this benefits the least advantaged,[511] the constitutional conception of social justice prioritises equality. The Constitutional Court has repeatedly emphasised the centrality of equality to the constitutional value system, calling it a foundational,[512] 'bedrock',[513] and 'lodestar'[514] norm. Social justice, therefore, is not limited to mitigating poverty if inequality subsists.

Secondly, social justice entails a positive understanding of freedom, rather than merely a negative conception seeking to curtail state intervention. Rawls prioritises liberty over equality in that distributive justice generally yields to civil liberties.[515] This is not the case for social justice under the Constitution. The constitutional conception of social justice eschews narrow, negative understandings of individual freedom that prioritise state non-intervention.[516] Though the Court resisted early calls to commit to a conception of freedom,[517] later cases have moved towards a positive conception. For instance, the Constitutional Court invoked social justice to emphasise that the right to property 'as an individual right is not absolute but is subject to societal considerations', a right subject to internal 'tensions'.[518] To the extent that social justice includes

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[510] Both points draw on Fredman (n 351) 10–14.

[511] John Rawls, *A Theory of Justice* (Original, HUP 1971) 61.

[512] *Beadica* (n 148) [100].

[513] *Van Heerden* (n 507) [22].

[514] *King* (n 494) [77].

[515] Rawls (n 511) 61.

[516] Isaiah Berlin, *Four Essays on Liberty* (OUP 1969).

[517] *Ferreira* (n 123) [54].

[518] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services* 2002 (4) SA 768 (CC) [49]-[50].

freedom, it is tempered by substantive equality and is a positive freedom closer to the notion of 'capabilities'.

Although the courts have not expressly linked social justice to the capabilities approach of Sen and Nussbaum,[519] the emerging conception embraces its core ideas. *Grootboom* is a typical example in which the Constitutional Court famously held that 'housing entails more than bricks and mortar…there must be land, there must be services, there must be a dwelling',[520] identifying that the mere distribution of resources was inadequate to realise the right. The Court held that it was not possible to determine a minimum threshold for the progressive realisation of rights without identifying the actual needs and capacities to exercise rights, which will vary according to factors such as income, unemployment, availability of land and poverty.[521] This maps onto the capabilities approach that is fundamentally concerned with what people are actually able to do and be. On Nussbaum's account, 'resources are inadequate as an index of well-being, because human beings have varying needs for resources, and also varying abilities to convert resources into functioning.'[522]

'Functionings' are the various things a person might value doing or being, such as having a house or safe drinking water, attending school, casting a vote or more complex activities or personal states, such as being able to take part in the life of the community and having self-respect.[523] Capabilities - what people are *actually* able to do and to be[524] – enable people to achieve

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[519] The Constitutional Court has not referred to the capabilities approach or Sen or Nussbaum. Two lower court decisions have: *Law Society of the Northern Provinces v Mahon* 2011 (2) SA 441 (SCA) [31] (citing Sen on 'fairness'); *Naidoo v DPP* [2020] ZAKZDHC 39 [119] (citing Sen on justice and Nussbaum on capabilities in context of 'parity of participation' and equality of arms).

[520] *Grootboom* (n 408) [35].

[521] ibid [32]. See also *Ferreira* (n 123) [49], linking freedom to personal development and fulfilment.

[522] Nussbaum (n 476) 75.

[523] Amartya Sen (n 481) 75.

[524] Amartya Sen (n 482) 253; Nussbaum (n 476) 70.

these functionings, and include, for example, having been taught to read, having access to housing subsidies or bank loans, living in conditions conducive to a healthy lifestyle, and so on. In order for capabilities to be converted into functionings, an understanding of the complex socio-economic circumstances of the individual is required – such as group membership, whether they are disadvantaged on the basis of protected characteristics. Thus, on the capabilities approach, poverty is understood not merely as low income, but as the deprivation of basic capabilities.[525] Social justice under the Constitution is best understood to include not merely distribution of goods, but also realisation of capabilities.

In addition to goods and capabilities, the constitutional understanding of social justice is concerned with social status, related to the constitutional value of dignity. This includes notions of equal concern and respect and self-actualisation.[526] In this vein, Liebenberg draws on Fraser's concept of 'participatory parity' to advance a conception of social justice that recognises the right of all people to participate and interact as peers in social life.[527] Reflecting both the distribution and recognition dimensions, Chipkin similarly defines social justice to mean 'a situation where economic goods, political rights and social status are distributed fairly'.[528]

So far, drawing from the constitutional text and jurisprudence, read with related academic contributions, we have added the following flesh to social justice: (1) fair distribution of social goods; (2) realisation of each person's capabilities; (3)equal social status.

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[525] Amartya Sen (n 481) 87.

[526] *Ferreira* (n 517) [49]; Stu Woolman, 'The Architecture of Dignity' in Drucilla Cornell and others (eds), *Dignity Jurisprudence of the Constitutional Court of South Africa* (Fordham 2013) 78–79.

[527] Liebenberg, 'Needs, Rights and Transformation: Adjudicating Social Rights' (n 501) 7.

[528] PARI (n 80) 10.

These three elements correspond, respectively, to the values of equality, freedom and dignity. I do not propose a list of social goods and capabilities.[529] They are likely to emerge iteratively, through democratic engagement, and with reference to particular human rights.[530] However, I tailor this conception to South African conditions in two respects: the conception should account for prevailing inequality and encompass a strong *redistributive* element;[531] and, as the jurisprudence and literature recognises, it needs expressly to include addressing *racialised*[532] and *gender*[533] injustice, as the two dominant axes of historical inequality.[534]

With these two characteristics incorporated, my conception of social justice is *the fair distribution of social goods, the realisation of each person's capabilities and equal social status, with fairness understood to include redistribution and racial and gender justice*. This conception is well-grounded in constitutional text and jurisprudence.

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[529] Nussbaum (n 456) 75–78 proposed an open-ended list of 10 capabilities, constituting a 'partial' account of social justice, namely: life; bodily health; bodily integrity; senses, imagination and thought; emotions; practical reason; affiliation; other species; play; and control over one's environment. Nussbaum notes that her list overlaps substantially with the rights in the UDHR: Nussbaum (n 456) 62.

[530] Nussbaum (n 476) 78.

[531] Dikgang Moseneke, 'The Fourth Bram Fischer Memorial Lecture - Transformative Adjudication' (2002) 18 SAJHR 309, 318 referring to 'social *redistributive* justice'; *Van Heerden* (n 507) [25].

[532] Eg., *Mkontwana v Nelson Mandela Bay Municipality* 2005 (1) SA 530 (CC) [81]-[82]; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC). See also Joel Modiri, 'The Colour of Law, Power and Knowledge: Introducing Critical Race Theory in (Post-) Apartheid South Africa' (2012) 28 SAJHR 405; Madlingozi (n 146).

[533] Eg., *Hassam v Jacobs NO* 2009 (5) SA 572 (CC) [37].

[534] See Chapter 1.1.

4.4.3. Democracy

Democracy is a pre-eminent constitutional principle, articulated expressly or reflected in substance in provisions throughout the text, including the preamble,[535] founding provisions,[536] Bill of Rights,[537] the structural provisions relating to legislative branches at local, provincial and national spheres of government,[538] and in other miscellaneous provisions.[539] The Constitutional Court has emphasised that the Constitution's form of democracy is both representative and participatory.[540] The participatory dimension includes public participation in the legislative process.[541] The contours of democracy and the right to public participation under the Constitution are contested and demarcating them goes beyond the scope of this study. I limit myself to adopting a general conception of democracy sufficient for evaluating the impact of strategic litigation.

The Constitutional Court has referred to democracy in a high proportion of judgments,[542] repeatedly reaffirming its centrality. Based on a comprehensive analysis of the constitutional provisions and the jurisprudence interpreting them, Roux constructs a principle of democracy

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[535] The preamble provides that one of the aims of the Constitution is to 'establish a society based on democratic values...', commits the Constitution to 'lay[ing] the foundation 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' and embodies the goal of 'build[ing] a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations'.

[536] Constitution, s 1 provides: 'The Republic of South Africa is one sovereign, democratic state founded on the following values… (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government to ensure accountability, responsiveness and openness.'

[537] Constitution, ss 7, 36, 39.

[538] ibid, chapters 4, 6, 7.

[539] ibid, ss 181, 152(1), 195(1), 234 and 236.

[540] ibid, ss 72(1)(a), 118(1)(a).

[541] ibid.

[542] A SAFLII search on 5 March 2021 recorded that the Constitutional Court has referred to democracy in 376 out of 838 judgments (45%).

immanent in the Constitution.[543] This conception has at its core a system of representative government, through the medium of political parties, requiring regular elections (with universal adult suffrage) to ensure that representatives are held to account and that government listens and responds. Under this system, collective decisions should be taken by majority vote after due consideration of views of minority parties and the reasons for collective decisions publicly explained. Importantly, Roux's conception includes the guarantee of the rights necessary to maintain this form of government secured in the Bill of Rights and enforced by an independent judiciary.

Since Roux wrote, there have been three important developments implicating the constitutional conception of democracy. The first is the recognition of a justiciable right to public participation in the law-making process, such that democracy has both representative and direct participative dimensions.[544] The Court developed the approach to public participation in part from traditional African processes of consultation, such as imbizo/lekgotla.[545] The second is the recognition of political activity *outside* the formal system of government, in particular through protest, as part of democracy.[546] In *Mlungwana*, the Constitutional Court recognised the right to protest as central to constitutional democracy, linking it to public participation.[547] The court added that for people who cannot vote, especially children, 'assembling, demonstrating and picketing are integral to their participation in the political process'.[548] The third, in a somewhat unexpected

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[543] Theunis Roux, 'Democracy' in Stu Woolman and Michael Bishop (eds), *Constitutional Law of South Africa* (2nd edn, Juta 2006) 68–79.

[544] *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC); *Matatiele Municipality v President of the Republic of South Africa* 2006 (5) SA 47 (CC).

[545] *Doctors for Life* (n 544) [101].

[546] Constitution, s 17; *SATAWU v Garvas* 2013 (1) SA 83 (CC).

[547] *Mlungwana v S* 2019 (1) BCLR 88 (CC) [70].

[548] ibid [72].

recent development, is the shift from a strictly proportional representation system to the recognition of the constitutional right of independent candidates to run for office.[549]

I therefore adopt a conception of democracy to mean *a system of representative government, through the medium of political parties and individual representatives, requiring regular elections (with universal adult suffrage) to ensure that representatives are held to account and that government listens and responds, with collective decisions taken by majority vote after due consideration of views of minority parties and reasons for decisions publicly explained; with public participation in the law-making process and political activity (especially protest) outside the formal system*.

This conception has a number of features that distinguish democracy under the Constitution from crude majoritarian forms, including a strong emphasis on public participation, deliberation and responsiveness and the recognition of forms of political activity such as protest as central to democracy. I accept that hard cases will test this conception, but it provides a working concept for evaluation.

4.4.4. Rule of law

The rule of law finds strong textual recognition in the Constitution. It is one of the founding values in s 1(c) along with constitutional supremacy.[550] The Constitutional Court has emphasised its centrality to our constitutional order, holding that it 'informs the interpretation of many, possibly all, … rights.'[551] The Court has referred to the rule of law in a high proportion of judgments.[552]

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[549] *New Nation Movement NPC v President of the Republic of South Africa* 2020 (6) SA 257 (CC).

[550] Eg., *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) [58].

[551] *Dawood* (n 260) [35].

[552] A SAFLII search on 5 March 2021 recorded that the Constitutional Court has referred to the rule of law in 313 out of 838 judgments (37%).

However, there is no settled conception either in South Africa,[553] or internationally.[554] It is widely used without exposition in case law and academic literature.

Different conceptions of the rule of law are employed by over 150 indices developed to measure it internationally.[555] As four of the most prominent: the World Bank indicator includes crime and contract enforcement; the Heritage Foundation model is more focused on property rights and corruption; Freedom House focuses on human (civil) rights; and the World Justice Project is the most comprehensive, incorporating almost all the elements of the other models.[556]

Much of the theoretical debate turns on the place of moral reasoning in the law and whether to adopt a 'thin', largely procedural, conception or a 'thicker' conception incorporating substantive values.[557] However, there is much on which theorists agree. Fuller proposed a conception with eight *desiderata*: generality, publicity, prospectivity, clarity, consistency, practicability, stability and congruence between rules and their administration.[558] For Raz, the rule of law entails the principles that

> all laws should be prospective, open, and clear; laws should be stable; the making of laws should be guided, open, clear, and general rules; the independence of the judiciary must be guaranteed; natural justice must be observed; courts must have reviewing power over some principles; courts should be accessible; and the

[553] Frank Michelman, 'The Rule of Law, Legality and the Supremacy of the Constitution' in Stu Woolman and Michael Bishop (eds), *Constitutional Law of South Africa* (2nd edn, Juta 2004).

[554] Eg., Versteeg and Ginsburg (n 461) 104; TH Bingham, *The Rule of Law* (Penguin 2011).

[555] Versteeg and Ginsburg (n 461) 101.

[556] ibid 106–107.

[557] Lon Fuller, *The Morality of Law* (YUP 1964); Joseph Raz, *The Authority of Law* (OUP 1979).

[558] Fuller (n 557).

> discretion of crime-preventing agencies should not be allowed to pervert the law.'[559]

Raz and Fuller part on whether the rule of law is merely an ideal (as Raz contends)[560] or that it is necessary that the law conform to the rule of law to a certain degree in order to qualify as law (as Fuller does).[561] This question falls away in South Africa given the express constitutional entrenchment of the rule of law as a founding value and the development of a justiciable principle of legality which all law and state conduct must satisfy.

In South Africa, the best conception of the rule of law does not need to do the work that other constitutional values and the Bill of Rights do. Its core meaning relates to the relationship between governance and the law. However, it should not be understood to be content-neutral, as rule by *any* law. The rule of law takes on particular significance in the light of South Africa's history where the law was the vehicle for oppression and the official understanding of the rule of law was increasingly thinned out by the courts and political branches.[562] The constitutional conception of the rule of law sets itself against such abuse, emphasising not only legality of state action, but also robust principles of accountability and what has come to be described as a 'culture of justification',[563] and repudiates corruption.[564] By the rule of law, I therefore mean *a system of governance under the Constitution characterised by legality, accountability and a culture of justification*, *rejecting corruption, unlawfulness and abuse of authority*.

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[559] Raz (n 557) 211.

[560] ibid 224–225.

[561] Fuller (n 557).

[562] David Dyzenhaus, *Hard Cases in Wicked Legal Systems : South African Law in the Perspective of Legal Philosophy* (Clarendon Press 1991).

[563] Etienne Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 SAJHR 31.

[564] *S v Shaik* 2008 (5) SA 354 (CC) [223]; *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC) [4]; Firoz Cachalia, 'Precautionary Constitutionalism, Representative Democracy and Political Corruption' (2019) 9 CCR 45.

4.4.5. Qualifying evaluation: scale, contribution and positive/negative impact

The normative framework advanced above requires three further qualifiers – whether it promotes or detracts from the norms, the scale of the impact, and what contribution litigation made to it.

First, impact may be positive or negative, when judged against a set of norms.[565] A single case or stream of litigation may produce a combination of positive and negative impacts. For instance, a case may produce short-term positive impact but later result in negative impact or 'backlash', a risk that I explore below. A successful case extending a right to a particular social benefit (a legal impact) may prompt legislative reform to abolish the entitlement entirely. On my approach, this would be a *negative* impact on social justice.

The second aspect is scale. If litigation advanced democracy, for example, to what *extent* did it do so? One option is the use of quantitative data (or qualitative data converted to quantitative measures) on an index. As I explained above, the use of an index of this sort is particularly useful for country comparisons, but less so for comparing cases within a country. A more useful approach is that followed by Rodriguez-Garavito, evaluating the extent of a particular impact as 'high', 'moderate' or 'low'.[566] These qualifiers can be applied to the SDR framework, if it will be helpful to give a sense of scale. On this approach, for example, right to health litigation might have contributed to the delivery of anti-retroviral drugs for *all* HIV-positive persons nationally – a material impact. Considered in the context of the number of people in need, this might be evaluated as a 'high' contribution to social justice. Litigation that secured drugs for only one person – a drop in the ocean of need, though vital for them – might be 'low' in terms of scale but a full realisation of their rights in that circumstance.

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[565] Ferraz (n 25) 227.

[566] Rodríguez-Garavito (n 280) 1695. See also Brinks (n 251) 501.

Thirdly, in evaluating impact, one needs to consider the contribution of the litigation. In Chapter 3, I adopted 'material contribution' as the threshold to attribute impact. This approach acknowledges that other factors may have contributed, alongside litigation. The failure to do so risks overstating litigation impact and ignoring other strategies or events that contributed.

To sum up so far, I have articulated an approach that evaluates impact against the SDR framework, asking whether the impact promoted or detracted from those norms, (if a sense of scale is helpful) whether its contribution to the SDR norms is high, moderate or low, and what the contribution of litigation was in relation to other factors.

4.5. Heuristic of risks and benefits

Employing a set of values like the SDR framework tends to invite conclusions that successful litigation has contributed *positively* to realising social justice, democracy or the rule of law. Lawyers – especially those working in public interest practice as I have – are susceptible to valorising litigation. There is no basis to assume that impact will be positive, or even predominantly positive.

The literature reveals a range of negative effects that strategic litigation may have. Some approach these negative effects as inherent pathologies, others as contingent risks. It may be that certain negative effects become so likely as to be endemic in a particular legal system. However, the better approach – certainly in South African conditions – is to identify a range of risks. Drawing from international studies highlighting risks, I recognise that claims may be contested. I do not come down one way or another on those debates. I merely recognise that it has been plausibly argued that cases have had negative effects of a particular type and seek to draw from the insights offered by international perspectives in understanding the nature and extent of each risk in South African conditions.

While there is a near-infinite range of real-world contingencies, it is possible to discern seven significant risks. These are that litigation: (1) is ineffectual in achieving social change (a

'hollow hope'); (2) even if effective, mainly benefits relative elites; (3) is disempowering for communities and activists; (4) subverts democracy by 'judicialising' politics; (5) imperils courts; (6) is abused to delay justice or avoid accountability; and (7) produces unintended negative effects or 'backlash'. These risks broadly map onto the SDR framework as (1) and (2) relate primarily to social justice, (3) and (4) to democracy and (5) and (6) to the rule of law, while (7) (backlash) is variable and could relate to any of the SDR norms.

4.5.1. Risks

4.5.1.1. Hollow hope – no meaningful impact

The first risk is epitomised by Rosenberg's *The Hollow Hope*: that litigation is generally incapable of producing social change. *The Hollow Hope* has been influential in framing the South African discourse.[567] This risk has received the greatest attention and I address it in more detail than others below.

Rosenberg presents two competing views of the potential of courts to produce 'significant social reform', defined to mean policy change with nationwide impact.[568] The 'Dynamic Court' sees courts as 'powerful, vigorous and potent proponents of change'.[569] By contrast, the 'Constrained Court' is 'weak, ineffective and powerless'.[570] Although he considers neither view wholly determinative, Rosenberg concludes that in the US the Constrained Court view is more accurate than the Dynamic Court.[571] Rosenberg's conclusion, which runs counter to his original

[567] Eg., Budlender, Marcus and Ferreira (n 24) 107–108; SERI (n 24) 43–45.

[568] Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (n 26) 4–5.

[569] ibid 2.

[570] ibid 3.

[571] ibid 422.

hypothesis,[572] is based on a model in which three constraints operate to bring courts closer to the 'Constrained Court' model, namely the bounded nature of constitutional rights which prevents courts from hearing or effectively acting on many significant social reform claims and lessens the chances of popular mobilisation (Constraint I),[573] the judiciary's lack of sufficient independence from the other branches (Constraint II),[574] and the courts' lack of tools to develop policies and implement decisions (Constraint III).[575] If the three constraints are overcome and *one* of four conditions is met, courts may produce significant social reform. The conditions are: other actors offer positive incentives to induce compliance (Condition I); other actors impose costs to induce compliance (Condition II); juridical decisions can be implemented by the market (Condition III); or courts provide leverage, or a shield, cover, or excuse for persons crucial to implementation who are willing to act (Condition IV).[576]

Whether Rosenberg's model holds in American conditions is itself fiercely contested[577] and outside the scope of this Thesis. In Chapter 3, I discussed critiques of its approach to impact in the materialist/constructivist debate. For present purposes I am concerned with whether Rosenberg's theory provides a plausible account of South African conditions. It does not. As was apparent from my account of the litigation environment in Chapter 2, all three 'constraints' are

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[572] Simon Halliday, Patrick Schmidt, *Conducting Law and Society Research: Reflections on Methods and Practices* (CUP 2009) 164–165. Rosenberg explains that his initial interest was in how the courts *can* help the relatively disadvantaged. He shifted his 'theory' when the data did not fit.

[573] Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (n 26) 13.

[574] ibid 15.

[575] ibid 21.

[576] ibid 33–35.

[577] For a contemporaneous critique, see Malcolm Feeley, 'Hollow Hopes, Flypaper and Metaphors' (1992) 17 LSI 745. See Rosenberg's response, Gerald Rosenberg, 'Hollow Hopes and Other Aspirations: A Reply to Feeley and McCann' (1992) 17 LSI 761. Rosenberg published a list of major reviews and his responses when the second edition was published: Gerald Rosenberg, 'Ideological Preferences and Hollow Hopes: Responding to Criticism' [2008] UCP website. <https://press.uchicago.edu/books/rosenberg/index.html#position7> accessed 8 June 2021. For a critical response to Rosenberg on *Brown v Board of Education*, see Michael Klarman, *From Jim Crow to Civil Rights : The Supreme Court and the Struggle for Racial Equality* (OUP 2004).

substantially attenuated in South Africa.[578] Regarding Constraint I, the South African Constitution differs significantly from its US counterpart. It contains a far more expansive set of rights, including economic, social and cultural rights; it imposes negative *and positive* obligations on the state; is capable of horizontal application to private actors; and adopts a substantive conception of equality that permits (arguably requires) affirmative action. Rights in South Africa, though bounded, are not bounded to the same extent as in the United States.

On Constraint II, Rosenberg identified the politicised appointment process, the tendency of court decisions not to stray very often from public opinion, the power of Congress to override court decisions, and high levels of deference to government.[579] South Africa is different in all respects. Judicial appointments in South Africa are not political to the same extent as in the United States. Judges are appointed by a Judicial Service Commission that is designed to balance political and professional members, conducts public interviews and is required to provide the reasons for its decisions.[580] Although some JSC decisions and practices have been strongly criticised,[581] it has not been subordinated to party politics. In respect of public opinion, in the course of striking down the death penalty notwithstanding evidence of countervailing public opinion, the Constitutional Court expressly limited its role.[582] Although Parliament may pass or amend legislation to override court decisions on the common law or statute, it may not do so if the court strikes down legislation as unconstitutional and has limited room to do so if the court interprets legislation or develops the common law to give effect to constitutional norms. In practice, Parliament has rarely used legislation to override court decisions. Concerning deference, there is no indication in the overall

[578] See Wilson (n 78) 128. Argues Constraints I and II are not present in South Africa.

[579] Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (n 26) 13–14.

[580] *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC).

[581] Chris Oxtoby, 'The Appointment of Judges: Reflections on the Performance of the South African Judicial Service Commission' (2021) 56 JAAS 34.

[582] *Makwanyane* (n 487) [87], [187]-[188], [200], [206], [255], [259], [304].

record of the courts' decision-making or in high-profile, politically contentious decisions, that the judiciary is unduly deferential.[583] Overall, courts are substantially less structurally constrained in South Africa.

Regarding Constraint III, the South African position differs sharply. The Constitution confers broad and flexible remedial powers, which courts have used extensively. Structural interdicts, in particular, facilitate policy formulation and enforcement of orders. They enable courts to join relevant role-players, including government; to require government to place information before the courts and formulate a plan, with opportunities for affected parties to participate and comment. Courts have used a range of remedies to secure compliance from individual government officials, including joining named officials, contempt orders, attachment of property such as a minister's motor vehicle, and costs orders against officials in their personal capacity.[584] This combination of remedies tempers courts' institutional limitations in respect of formulating policy and implementing orders. While courts resist usurping the policy-making functions of government,[585] they act as a trigger to compel government to make policy where there is none or to address constitutional deficiencies in policy.[586]

Therefore, the Constrained Court model does not fit South Africa. Rosenberg's three Constraints, though not entirely absent, are significantly attenuated in the context of the comprehensive Bill of Rights, the institutional and political positioning of courts and their remedial powers. Since the Constraints are so attenuated, there is no need here to investigate whether the

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[583] Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (n 18).

[584] See Chapter 2.5.4.

[585] Eg., *Mazibuko* (n 154) [65], referring to 'the Court's institutional respect for the policy-making function of the two other arms of Government'.

[586] Eg., *Blue Moonlight* (n 356).

Conditions might be met. Instead, I ask: Are there nevertheless other features of the South African system that constrain courts' ability to produce social change?

In 2014, the revised Atlantic report asserted that 'virtually no one seriously contends that public interest litigation is inherently incapable of bringing about social change [in South Africa].'[587] Its authors concluded on the strength of their own empirical case studies that 'even a brief consideration of the practical consequences of the case studies… demonstrates the social change that can result from public interest litigation.'[588] There is no empirical work in South Africa suggesting that, in general, strategic litigation is incapable of producing social change. However, an emerging body of normative theory from one cohort of academics[589] – Madlingozi, Kok and Modiri – advances versions of a 'hollow hope' claim. Madlingozi argues that South Africa is in a time of 'neo-apartheid constitutionalism', in which the contemporary discourse of social justice, which is 'transformative constitutionalism's master frame for social emancipation, is actually complicit in the continuation of the anti-black bifurcated societal structure'.[590] While the thrust of this article is that the law is transforming South Africa but in the wrong way, Madlingozi commented elsewhere that, while the 'jury is still out', his 'sense is that 90% of court victories have been hollow.'[591]

Modiri advances a generalised critique regarding the limits of litigation in a series of contributions. He argues that the law (including litigation) in South Africa cannot address

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[587] Budlender, Marcus and Ferreira (n 24) 108.

[588] ibid.

[589] All either are, or have been, based in the Law Faculty of the University of Pretoria.

[590] Madlingozi (n 146) 125.

[591] Tshepo Madlingozi 'There is no "outside the law": How can Social Movements use the Law to bring about Radical Change and Social Justice' *NGOs and Social Justice in Africa* blog, 26 May 2014. Madlingozi later took up a leadership role at a public interest law centre.

structural issues of power and freedom and is not a 'means of serious social change'.[592] Modiri's argument neither offers any empirical evidence nor draws on judicial decisions.[593] The argument is theoretical, grounded principally in American literature.[594] For the reasons developed earlier in relation to Rosenberg's Constrained Court model, there is reason to be sceptical about applying theory developed in American conditions to South Africa, given the major structural differences in relation to the contents of the Bill of Rights, the position of the courts and their remedial powers. There is a further aspect of Modiri's argument, however: the threshold. He seeks to measure the effectiveness of litigation against the goal of the *complete eradication* of poverty. This is a higher threshold than social change as I define it (which he in any event argues that litigation cannot achieve).

Kok articulates a general 'pessimism about the potential role of law in transforming society', based mainly on ideas about how law influences behaviour.[595] His conclusion is 'not to say that law has *no* impact in changing a society', but rather that its transformative potential is often overestimated.[596] The methodology and materials do not support Kok's conclusion. He, too, draws predominantly on foreign, especially American, writing. Although he cites some comparative empirical studies, mainly from the US and the UK, he does not explain why they fit South Africa. He engages with some South African literature, but does not test his hypothesis against South African jurisprudence in any systematic way, let alone take account of empirical research on its impact. He mentions *TAC* as an example of a case that produced social change, and *Grootboom* as

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[592] Modiri (n 532) 129; Joel Modiri, 'Law's Poverty' (2015) 18 PELJ 224.

[593] Refers only to *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC), an unsuccessful right to health decision.

[594] In particular, the work of Iris Marion Young, Judith Butler, Wendy Brown and Drucilla Cornell.

[595] Anton Kok, 'Is Law Able to Transform Society?' (2010) 127 SALJ 59, 61.

[596] ibid.

one that did not.[597] This view of *Grootboom* is simplistic and inaccurate.[598] More fundamentally, these two cases alone offer no basis for the claim.

The critiques that suggest that litigation is *generally* incapable of contributing to social change, such as those of Madlingozi, Kok and Modiri, are unsubstantiated and overstated. They are based on attempts to universalise theoretical critiques set in foreign legal conditions without engaging with local empirical evidence. There is no persuasive case for a generalised 'hollow hope' claim in South Africa. This is not to say that this is not a very real *risk* in specific cases. Whether it eventuates, however, is a matter for investigation.

4.5.1.2. Benefits elites

Secondly, the risk that litigation will tend to benefit relative elites emerges from the broader literature concerning the relationship between human rights and equality,[599] social rights,[600] and several influential empirical studies.[601] The risk is illustrated by the findings of Gauri and Brinks' comparative study (which includes South Africa),[602] Bhuwania on India[603] and Ferraz on Brazil.[604]

Ferraz finds, on the basis of research empirical research, that two decades of right to health litigation in Brazil tended to benefit relative elites. Though in principle available to everyone,

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[597] ibid 82.

[598] Although Mrs Grootboom famously died without receiving a house, *Grootboom* (n 408) secured housing for many of the affected residents and resulted in changes to government law and policy regarding housing, especially emergency housing. See Langford and Kahanovitz (n 349) 318–333.

[599] Eg., Samuel Moyn, *Not Enough : Human Rights in an Unequal World* (HUP 2018); Sikkink (n 306).

[600] Eg., Katharine Young, *The Future of Economic and Social Rights* (CUP 2019); Landau (n 318); Brinks and Forbath (n 240).

[601] Epp (n 8) 203; Gauri and Brinks (n 29); Bhuwania (n 34); Ferraz (n 25); Galanter (n 158).

[602] See also Epp (n 8) 203.

[603] Bhuwania (n 34).

[604] Ferraz (n 25).

litigants were predominantly the relatively better off. Brazil has seen sprawling health litigation, averaging over 100,000-200,000 cases per year from 2014-2019, with high levels of success, costing the state billions of dollars.[605] However, this largely benefited only a small section of the population. On Ferraz's analysis, most litigants were 'better off than the average Brazilian, let alone the poorest'.[606] The litigation tended to seek expensive and sophisticated secondary medicines and hospital treatments, rather than prioritising primary health care, which is the greatest need of the most disadvantaged.[607] Ferraz attributes these consequences significantly to unequal access to justice.[608] Brazil has very limited state legal assistance for the poor, alongside high availability of private legal representation for those who can afford it.[609] Under my framework advanced in Chapter 2, Ferraz's findings can be understood as showing that a litigation-conducive litigation environment coupled with inadequate litigation resources for the poor and litigation decisions characterised by a preponderance of individual cases under a client-based model (rather than structural cases under a campaign or movement model) are likely to produce impact that favours elites.

Bhuwania reaches similar conclusions about PIL in India.[610] He focuses on procedural features of PIL that enable courts to lead, manage and even initiate cases, sometimes with minimal participation of (especially poor) people whose interests are affected.[611] Court-driven litigation was one of the litigation models identified in Chapter 2. Bhuwania argues that, instead of expanding

[605] ibid 9–11.

[606] ibid 223.

[607] ibid 116–122.

[608] ibid 150.

[609] ibid 160–191.

[610] Bhuwania (n 34).

[611] ibid 35–44.

legal aid, the legal process was 'transformed ostensibly to make it easier for people to access the courts'.[612] Tracing a set of 'court-led' Delhi cases, Bhuwania decries PIL as a 'slum demolition machine',[613] and reports similar anti-poor effects in other areas of law. Economist Varun Gauri identified similar trends, including higher win-rates for advantaged litigants.[614] Bhuwania's overall critique is contested, other studies agreeing that it is one feature of PIL in India, but identifying cases where court-driven litigation *has* benefited poor people.[615] One need not take a view on how endemic the risk is to recognise it as real. On my framework, Bhuwania's study reveals the risks when the litigation environment – especially rules of procedure and judicial powers – diminish the involvement of poor would-be litigants, and where inadequate litigation resources are available for them to protect their own interests. Despite some well-intentioned calls for South Africa to adopt some of the procedural relaxations of Indian PIL,[616] it has not.

The Bhuwania variant of the risk is unlikely in South Africa because there is minimal scope for court-driven litigation. South African procedural rules on standing, interventions and costs tend to *promote*, rather than curtail, participation in litigation by poor litigants.[617] However, the Ferraz variant is more likely. Gauri and Brinks observe that South Africa does not see the same frequency of individual cases with narrow remedies as Brazil, mitigating the risk.[618] This may be so, but South Africa is very similar to Brazil in respect of high levels of inequality and limited access to justice for poor people. I have described the very limited state provision of civil legal aid

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[612] ibid 33.

[613] ibid 89–106.

[614] Varun Gauri, 'Fundamental Rights and Public Interest Litigation in India: Overreaching or Underachieving?' (2011) 1 IJLE 71.

[615] See Rosenberg, Krishnaswamy and Bail (n 281).

[616] Dugard, 'Court of First Instance?' (n 20); Fowkes, 'How to Open the Doors of the Court – Lessons on Access to Justice from Indian PIL' (n 20).

[617] See Chapter 2.4.1.

[618] Gauri and Brinks (n 29) 336.

in Chapter 2. Its inadequacy may be partly tempered by the relatively strong public interest sector, but only where it is involved. The risk that strategic litigation will tend to benefit elites in South Africa is real.

4.5.1.3. Disempowering, deradicalising, demobilising

Thirdly, even if successful, strategic litigation may draw energy away from more radical political strategies, demobilising social actors. Rosenberg captured this concern in the metaphor of the 'Flypaper Court', the court luring reformers 'to an institution that is structurally constrained from serving their needs, providing only an illusion of social change.'[619] This concern has prompted fierce debates in the US literature.[620] Its prominent South African manifestations emerged in the 'lawfare',[621] critical studies,[622] and social movements literature.[623]

In relation to South African social movements, Madlingozi acknowledges the risk that 'lawyers do not just represent movements', but 'become framers for the movement and, due to their social status and resources, assume a de facto leadership role in movement campaigns.'[624] However, he argues that it is not inevitable that lawyers de-radicalise and sap the energy of movements. He explores whether this happened to the Khulumani Support Group, finding that legal tactics had 'not contributed to the disempowerment of Khulumani members'[625] and that litigating actually 'energised the movement in ways not seen before'.[626] Madlingozi cautions against

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[619] Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (n 26) 427.

[620] Eg., Stuart Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (2nd edn, UMP 2004); McCann (n 193).

[621] See Chapter 2.2.2.

[622] Madlingozi (n 146); Modiri (n 592); Modiri (n 532); Sibanda (n 146); Sibanda (n 145).

[623] Madlingozi (n 189); Tissington (n 93).

[624] Madlingozi (n 189) 231–232.

[625] ibid 223.

[626] ibid 232.

researchers concluding too readily that movements have been 'deradicalised' or 'demobilised' because 'most poor people's movements carry out intra-movement activities of empowerment and transformation, quietly, away from the validation of researchers'.[627] The related risk is that litigation will mobilise *opponents* of social change by instigating 'counter-mobilisation'.[628]

The risk of demobilisation of proponents of social change, or mobilisation of opponents, is real. It warrants empirical investigation, especially where movement lawyering or campaign litigation is employed.

4.5.1.4. Subvert democracy

Fourthly, there is the concern that litigating contentious social and political issues subverts democracy by overriding democratic choices and undermining the separation of powers. This concern – the 'counter-majoritarian dilemma' – dominates much of the normative theory literature on judicial review.[629] It has also emerged as a concern from socio-legal work. In a study of US federal 'institutional reform litigation', Sandler and Schoenbrod highlighted the risks for democracy, governance and the governed when courts effectively make public policy and tell institutions how to function.[630] When this happens, they argue, courts assume the responsibility that governmental officials should shoulder,[631] voters 'lose the ability to hold elected officials

[627] ibid 235.

[628] Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (n 26) 425; Klarman (n 577); Tamanaha (n 54).

[629] Eg., Alexander Bickel, *The Least Dangerous Branch : The Supreme Court at the Bar of Politics* (2nd ed., YUP 1986); Ran Hirschl, *Towards Juristocracy : The Origins and Consequences of the New Constitutionalism* (HUP 2004); Waldron (n 12); Webber, Yowell and Ekins (n 12).

[630] Ross Sandler and David Schoenbrod, *Democracy by Decree : What Happens When Courts Run Government* (YUP 2003).

[631] ibid 8.

accountable for the performance of governmental institutions',[632] and it often produces bad results.[633]

There is limited South African research exploring the effects of litigation on bureaucracies and governance practices. The expansive judicial role associated with transformative constitutionalism will tend to invite courts into the policy arena described by Sandler and Schoenbrod. However, the risk that judicial interventions will amount to usurping responsibility and will result in 'bad results' may be attenuated by the increasing reliance on structural interdicts that ensure that government must develop plans itself.[634] There is thus no basis to support a generalised concern that strategic litigation will subvert democracy in the ways outlined above. The risk is contingent and will require careful investigation.

4.5.1.5. Imperil courts

The fifth risk is that courts themselves become politicised and risk losing their independence – threatening the rule of law. For Hirschl, the politicisation of the judiciary and judicial appointments is the 'inevitable flip side' of the 'judicialisation of politics'.[635] South African courts have certainly been drawn into politically controversial cases.[636] Despite this, as discussed in Chapter 2, courts are generally perceived by academia and the public to have retained their independence and legitimacy. Roux has argued that the Constitutional Court is aware of the risk to its independence and has sought to mitigate it.[637] As Roux notes, this concern is prone to overstatement and needs

[632] ibid 9.

[633] ibid 8.

[634] See Chapter 2.5.4.

[635] Ran Hirschl, *The Judicialization of Politics* (OUP 2011) 254. See also Hirschl (n 629).

[636] le Roux and Davis (n 58); Corder and Hoexter (n 58).

[637] Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (n 18).

to be assessed contextually.[638] While one feature of the litigation environment in South Africa (the frequency of politically controversial cases) increases the risk, it is mitigated by another feature (the strong institutional independence and legitimacy of the judiciary). It nevertheless remains a significant risk.

4.5.1.6. Litigation abused to avoid accountability

The sixth risk, associated with the term 'lawfare',[639] is that individuals or the state itself will abuse the judicial process to avoid accountability. Corder and Hoexter, Davis and le Roux, and Roux have noted the use of delaying or 'Stalingrad tactics' by senior officials implicated in corruption.[640] A high-profile example is the litigation by Judge President Hlophe regarding allegations that in 2008 he attempted to influence judges of the Constitutional Court in litigation concerning former President Zuma.[641] Over a decade later, following several rounds of dilatory litigation, the judicial misconduct allegations were upheld but Judge Hlophe continues to litigate to avoid impeachment.[642] In relation to the state, two illustrative examples are the multi-round litigation over the release of a report commissioned by President Mbeki into electoral violence in Zimbabwe,[643] and litigation challenging state closure of refugee reception offices.[644] In both instances, the state exercised every available procedural step and appeal opportunity, delaying relief for several years.

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[638] Roux, 'The Constitutional Court's 2018 Term: Lawfare or Window on the Struggle for Democratic Social Transformation?' (n 58) 16–17.

[639] See Chapter 2.2.2.

[640] Corder and Hoexter (n 58) 115; le Roux and Davis (n 58); Roux, 'The Constitutional Court's 2018 Term: Lawfare or Window on the Struggle for Democratic Social Transformation?' (n 58) 17–18.

[641] Corder and Hoexter (n 58) 115.

[642] Jason Brickhill and others, 'The Administration of Justice' (2020) 1 Yearbook of South African Law 1, 35–41.

[643] *President of the Republic of South Africa v M & G Media Ltd* 2012 (2) SA 50 (CC).

[644] *Scalabrini Centre, Cape Town v Minister of Home Affairs* 2018 (4) SA 125 (SCA).

One factor that tends to increase this risk in South Africa is the unequal access to litigation resources, which means that the rich and powerful and the state are better able to litigate than poor people and communities, and to do so until all legal avenues are closed. However, features of the litigation environment mitigate the risk, including the strong remedies available to courts, such as personal costs orders and structural interdicts.

4.5.1.7. Unintended effects or backlash

Finally, successful litigation may have negative unintended effects or prompt backlash. This might take many different forms, such as changes to law or government practice to circumvent judicial decisions or reactions from private actors. The risk emerges from the international literature[645] and South African experience. Four local examples are illustrative.

Amit provides an example in the context of litigation concerning conditions of access to refugee reception offices for asylum seekers in South Africa.[646] The initial effects of the litigation were positive because asylum seekers no longer faced long queues, overnight waits or impractical pre-screening procedures.[647] However, these positives came 'at a high price' because '[a]s a result of this more efficient system, which requires status determination officers to issue ten decisions per day, individuals are given rote rejection letters that do not fairly or properly consider their asylum claims.'[648] Evaluating the impact of this litigation is not straight-forward, requiring one to weigh the initial, positive gains against the later negative consequences and consider the position

[645] Eg., Duffy (n 38) 238; Klarman (n 577).

[646] Amit (n 234).

[647] ibid 17.

[648] ibid.

of individual asylum seekers and the functioning of the institutional system. Backlash has also been a significant concern in relation to LGBTI rights litigation internationally,[649] and in South Africa.[650]

Third, a particularly dramatic example of backlash ensued from litigation to compel the government to arrest Sudanese head of state, Omar Al-Bashir and South Africa's subsequent decision to withdraw from the ICC, described in Chapter 3. Finally, in relation to private actors, Wallis has pointed to the concern that judicial decisions may create uncertainty for commercial law that could act as a disincentive to trade and drive commercial disputes away from courts and into private arbitration.[651]

The risk of backlash or unintended negative consequences is real. Any evaluation of strategic litigation needs to ask whether this happened, which will require going beyond the scope of the objectives of the litigation and its direct effects.

4.5.2. Potential benefits

The potential benefits of strategic litigation are, in many respects, the corollaries to the risks discussed above. They emerge from largely the same literature. They are also more readily suggested by applying the SDR framework to impact, as the values are framed positively and invite affirmative findings. I therefore address them briefly. Significant potential benefits include that ligation will: (1) advance social justice by realising (re-)distributing social goods and opportunities; (2) do so in ways that reduce poverty and/or inequality; (3) improve governance, for example by alleviating bureaucratic blockages or prompting reform; (4) enhance democratic participation and mobilise marginalised groups; (5) shift power and discourse; (6) strengthen the rule of law by

[649] Duffy (n 38) 238–239.

[650] Kerry Williams and Melanie Judge, 'Happy (N)Ever After? Public Interest Litigation for LGBTI Equality' in Jason Brickhill (ed), *Public Interest Litigation in South Africa* (Juta 2018).

[651] Malcolm Wallis, 'Commercial Certainty and Constitutionalism: Are They Compatible' (2016) 133 SALJ 545.

improving accountability mechanisms; or (7) produce unexpected 'windfall' gains. As with risks, this is certainly not a closed list.

4.6. Conclusion

In this Chapter, I have proposed an evaluative framework that considers whether litigation was 'successful' as against its objectives, coupled with evaluation against the SDR normative framework, guided by a heuristic of significant risks and potential benefits. The evaluative process is not a mechanical or check-box exercise. Evaluative conclusions are likely to be complex and mixed. They may be contested. However, the framework in this Chapter provides a set of organising criteria that guides evaluation.

5. CHAPTER 5: METHODOLOGY AND METHODS

5.1. Introduction

Part I of this Thesis outlines the analytic and normative framework for the Part II case studies. In Chapters 1 to 4, I explored the concept of strategic litigation, situating it in theory and practice. In this Chapter, I explain my approach to two empirical case studies on the impact of strategic litigation in South Africa – 'Education Provisioning' and 'State Recapture'.[652] The three central research questions in the case studies are: What was the legal impact of the litigation; what was its material impact; and what political impact did it have? These distinct forms of impact, though inter-related in important ways, entail distinct methodological approaches.

In the case studies, I investigate impact through the analytic framework of Chapter 3 and evaluate it following the approach in Chapter 4. The purpose of the case studies is to apply and refine that analytic and evaluative framework; and to explore the impact of strategic litigation in two significant areas. In this Chapter, I explain my decision to conduct two mixed methods case studies, which include quantitative and qualitative dimensions. I explain my use of certain methods, principally: analysis of legal texts; analysis of secondary data, especially budget and policy documents and non-governmental reports; and semi-structured interviews. I also note the scope for other researchers from various disciplines to go further. This Chapter draws on the research diary that I kept throughout my fieldwork, in which I made notes before, during and after interviews.

[652] I provide full citations to cases under the case studies in Chapters 6 and 7.

5.2. Mixed methods case studies

I employ case studies for exploratory, descriptive and explanatory purposes.[653] A case study offers a powerful tool to confront 'how' and 'why' questions, seeking to explain phenomena or events.[654] I use the case studies to investigate how and why strategic litigation contributed to certain impact. The methodology flows from my tripartite conception of impact: legal, material and political. My conception draws insights from the 'materialist' and 'constructivist' approaches to impact discussed in Chapters 2 and 3. Here, I touch briefly on some of their implications for my methodology and methods, situating my approach in the existing literature.

The materialist approach is exemplified by Rosenberg's *The Hollow Hope*, concentrating on the 'direct and palpable effects' of litigation, applying a strict causality test and considering a judgment effective if it produces an *observable change* in the conduct of those it directly targets.[655] This approach in the literature tends to adopt a positivist, empiricist epistemology, in terms of which reality may be objectively ascertained from a 'neutral' perspective. As I explain below, although my conception of material impact focuses on some of the questions that typify this approach, such as the use of quantitative data, I do not adopt all its epistemic assumptions.

The second broad approach adopts a 'constructivist' conception of law and society that looks not only at changes in the conduct of those directly involved in a case, but also at 'indirect transformations in social relations' or changes to social actors' perceptions.[656] It is exemplified by McCann's study on US pay equity struggles.[657] It tends to be associated with epistemological

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[653] Robert Yin, *Case Study Research: Design and Methods* (5th ed, SAGE 2014) 8.

[654] ibid 10.

[655] Rodríguez-Garavito (n 280) 1677.

[656] ibid 1678.

[657] McCann (n 193).

commitments that are post-positivist, as McCann characterises his study. This approach is largely empiricist, but recognises that reality is not easy to capture and should be understood in its context.[658] While the materialist approach tends to be more concerned with the perspective of the researcher ('the outsider'), constructivist approaches, which tend towards the qualitative end of the spectrum, emphasise the views of subjects ('insiders').[659]

These approaches to impact reflect varied epistemological and methodological commitments, leading to different methods. They may be understood as sitting at opposite ends of the quantitative-qualitative spectrum, with many studies situating themselves somewhere in between. Important choices must be made in an impact study. For example, should the researcher come to the field with already well-developed theory and concepts and even testable hypotheses,[660] or approach the study with a more open framework and concepts that guide empirical enquiry without seeking to prove or disprove any hypothesis?[661] How should the researcher position herself and what perspective should she adopt – distant or close to the subjects, 'insider' or 'outsider? Should the researcher adopt the perspective of the objective, neutral observer, as materialist approaches prefer, or the perspective of movement activists or other actors? Is the objective to uncover 'hard', verifiable data, as materialists might seek, or rich accounts of people's lived experiences, as constructivist approaches prefer?

My framework seeks to draw on the strengths of the materialist and constructivist approaches. From the materialist school, I take the principle that some aspects of impact are empirically discernible and there is value in investigating what actually happened. This involves

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[658] Donatella Della Porta and Keating (n 490) 22–32.

[659] Alan Bryman, *Quantity and Quality in Social Research* (Routledge 1988) 142.

[660] Eg, Rosenberg (n 26) presents his theory of Dynamic and Constrained Court models, which he tests and refines in case studies.

[661] Eg, Abel (n 15) 544 seeks to understand the value of litigation in context, rather than positing and testing a theory; resists advancing 'sweeping generalisations about the capacity of law to constrain state power'.

investigating whether an act was performed or 'counting' gains. For example, ascertaining how many schools were built or whether a particular person was in fact removed from public office may be empirically established. However, as Engle Merry explains, claims to objectivity of quantitative data should be approached with caution:

> The choice of measurement approaches, the construction of categories, the selection of data sources, the use of proxies to measure a concept when specific data are unavailable, and the label used for the phenomenon being measured are all matters of choice and interpretation. They define what the concept is, how it is understood, and what things can be counted to measure it.[662]

I experienced these challenges in the Education study. For example, what constituted a 'mud school' was not always clear in government data and there were similar challenges relating to units of furniture. Where I encountered conflicting data or controversies about categories, definitions and what to count, I explain my choices and remaining doubts.

In this study, my impact framework guides the construction of categories. The areas of enquiry are themselves constructed through acts of interpretation of 'relevance'. For instance, in a case related to the procurement of school furniture, I 'know' that the number of desks and chairs procured by the government and how much was spent on this exercise are relevant questions as they relate to the case. However, even the measurement of social facts of this sort hinges on categorising the social world, explicitly or implicitly, according to a model of how the world works.[663] Once obtained, the meaning or value of such data, even numerical data, also requires interpretation.[664] To recognise that 'the data do not speak for themselves'[665] and that their interpretation is influenced by one's perspective does not detract from the importance of

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[662] Sally Engle Merry, *The Seductions of Quantification: Measuring Human Rights, Gender Violence and Sex Trafficking* (UCP 2016) 20.

[663] Martin Bauer and George Gaskell, *Qualitative Researching with Text, Image and Sound* (SAGE 2000) 8; David Silverman, *Doing Qualitative Research* (4th edn, SAGE 2013) 11.

[664] Bauer and Gaskell (n 663) 8.

[665] ibid.

quantitative research, such as tracking the number of new schools built in the Education study in Chapter 6 or ascertaining how much money was spent on the salaries of suspended holders of public office in the State Recapture study in Chapter 7. It simply means acknowledging that my conceptual framework, perspective and positionality influence my findings and their analysis.

I locate the causality question within an expanded understanding of the effects of litigation, a feature of contemporary legal mobilisation approaches. As explained in Chapter 3, my threshold for causal attribution is 'material contribution', rather than a strict 'but for' test, acknowledging that litigation is often one potential cause among several. This broadens the scope of my research to a wider range of relationships.

My contribution to the literature is to distinguish legal, material and political impact and to investigate all three types of impact (and their inter-relationships). My approach is rooted in the understanding of the interaction between law (especially litigation) and society articulated in Chapter 2. Importantly, an inquiry into each type of impact is a *distinct* research question, with implications for methodology and methods.

My approach to legal impact is somewhat positivistic. I am concerned mainly with 'black letter' law constituting the formal 'legal system',[666] as well as legal culture. While even the black letter law may be contested, I take the approach that we may ascertain what the law is, at least on paper, from legal sources. Many conceptions of law depart from this approach. McCann's conception of law as social practice, for instance, sees legal discourses as relatively malleable, and shaped and contested by participants in the system.[667] I do not adopt such an expansive understanding of law. The law in action does depart from the law in books.[668] Some of this

[666] I understand the legal system from the perspective of social systems theory as a closed, self-reproductive, iterative system (an autopoetic system as defined by Gunther Teubner (ed), *Autopoietic law: a new approach to law and society* (de Gruyter 1988). Other systems do affect it but my focus is on effects on the internal logic of the legal system.

[667] McCann (n 193) 6–7.

[668] Roscoe Pound, 'Law in the Books and Law in Action' (1910) 44 ALR 12.

divergence is accommodated in the concept of legal culture. I address the law *in practice* in my second category, material impact. Where the law in books and the law in action diverge irreconcilably, for example where a court orders the state to build new schools and it does not, this is an issue of implementation or compliance, captured by material impact.

Further, I distinguish between legal culture, made up primarily of the attitudes of insiders to the legal system, and political impact, which is not limited by reference to the law. I consider the impact that litigation has upon social movements' attitudes, standing and relationship to state actors as 'political impact', for instance. By contrast, whether lawyers and judges come to regard particular legal arguments as 'on-the-wall' or 'off-the-wall' arguments is a matter of legal culture.[669] The line between legal culture and these forms of political impact may be permeable. However, my analytic distinction prompts investigation of the impact that litigation has on the legal system and 'legal culture' and the effects on power outside the legal system.

Material impact – which consists of conduct and practices, including the payment of money – also lends itself to positivistic epistemology. Whether the state has delivered a certain number of textbooks, or whether the head of police crime intelligence has been removed, are empirically determinable questions. The subjective meaning generated by these facts may vary across actors, but I consider those to be largely questions of *evaluation*, not whether material impact has occurred in the first place. There are, of course, judgements to be made about what legal and material impacts are relevant. This is partly constrained by the objectives and parameters of the litigation. For example, in the *Textbooks* litigation, the objective was to secure textbooks for students and this was also the central legal issue. However, my approach to impact also explores unintended consequences, such as a budget cut to another line item to deliver textbooks. Actors

[669] Balkin (n 374).

may have different views on which effects warrant exploration. This does not change the empiricist nature of material impacts.

Political impact, which includes effects on the power associated with social actors, ideas and institutions, is located in and constituted by the views of people. The moral force of a call for textbooks, or the resonance of 'state capture' as a political cause for the eradication of corruption in government, are not subject to straight-forward empirical determination. There are no countable gains or independently observable practices. Rather, these claims are constructed by and located in the ideas and attitudes of actors in society.

While legal and material effects may be capable of objective verification, political effects are generally not as readily verifiable. Even effects that can be 'objectively' verified may be viewed differently by differently situated actors. One consequence of this approach is that legal, material and political impact may diverge. They are not necessarily congruent with one another. This possibility accords with social reality. It reflects the real likelihood that a case may revolutionise the law on an issue but have limited material impact; or that a 'losing' case or settlement, with little legal impact, may have political impact that reverberates through society.[670] By contrast, litigation may have massive legal and material impact but – perhaps because it is quite technical, poorly publicised or relates to a politically marginalised cause (such as refugee rights) – have limited political impact or even face negative public backlash.

5.3. Case study selection

I turn to how I settled on the level of inquiry ('litigation streams') and the subject matter of the case studies.

[670] Dugard and Langford (n 24) 60.

5.3.1. Level of study: litigation streams

Case studies allow for the investigation of multiple 'cases' – here, streams of litigation made up of individual court cases – and the pulling together of a set of cross-case conclusions.[671] Each case study examines several streams of litigation and adopts mixed methods, drawing on quantitative and qualitative data to address different issues. I adopted mixed methods because the different research questions (legal, material and political impact) require different research design. Mixed methods have the advantage of presenting a fuller picture,[672] one of the aims of my analytic framework. As McCann explains, 'multiple techniques can, to some degree, compensate for each other's deficiencies; furnish a broader foundation for critical analysis of interpretive constructions; and provide more plausible support for arguments confirmed by common findings.'[673] However, they bring challenges of requiring more time and skills,[674] as well as the possibility that data from different methods may be difficult to reconcile.

As discussed in Chapter 3, case studies at different levels may shed light on different aspects and there may be value to case studies ranging from the 'micro' level of in-depth studies of an individual case to the 'macro' level of *all* the cases on a relevant right or issue in a national jurisdiction.[675] I adopt the intermediate level, examining *streams* of litigation on education provisioning and institutional appointments and removals. As Duffy notes,

> [j]ust as litigation's effect cannot be isolated from political and social movements, nor can it be fully understood by isolating particular individual cases or judgments. Impact may only come into focus as we consider clusters or series of cases, which

[671] Yin (n 653) 18.

[672] Silverman (n 663) 65; Bryman (n 659) 137.

[673] McCann (n 193) 16.

[674] Silverman (n 663) 65.

[675] Eg., HSRC & School of Law, University of Fort Hare, 'Assessment of the Impact of Decisions of the Constitutional Court and Supreme Court of Appeal on the Transformation of Society' (2015).

> alone may be of minor significance or represent small steps forward. A key feature of litigation impact is therefore its cumulative nature.[676]

'Streams' are distinct from individual cases. A stream of litigation is a series of distinct cases that may have been brought by different parties in different courts (and therefore do not constitute one case) but relate to the same substantive issue and reflect some continuity of strategy. For instance, in the *Teachers* litigation, three separate cases were brought. The applicants were NGOs or schools, all seeking to have vacant teacher posts filled and teachers paid. In the *Hawks/Scorpions* litigation in State Recapture, the first cases were brought by an individual businessman, Hugh Glenister, and the later cases by different NGOs, especially the Helen Suzman Foundation. The legal institution evolved from the 'Scorpions' to the 'Hawks' following legislative reform, but all the cases in this stream concerned the independence of the state's corruption-fighting body. Acknowledging these sets of cases as streams recognises the connectedness of the cases that make them up, but also that they are not simply individual cases being pursued to finality in a linear fashion by identical actors.

By adopting the intermediate level of litigation streams, I lost out on the advantages of a wider or narrower lens. A study of fewer, individual cases, might enable more in-depth analysis of events, choices and explanatory factors. A wider lens at a higher level of abstraction, for example *all* Bill of Rights cases, might enable a deeper contribution to debate about the impact of the Constitution itself. However, the first 'micro' approach would not allow sufficient comparison of different approaches to litigation and the second 'macro' approach would be too abstract for meaningful empirical contribution, or else unmanageable. The intermediate approach of streams is best suited to my research questions and capacity. Having adopted the intermediate level, I found

[676] Duffy (n 38) 42.

that a combination of quantitative and qualitative research was necessary to bridge the macro-micro gap.[677]

5.3.2. Choice of cases

Here, I explain the choice of the two broad areas of litigation and streams within them. I explain the choice of specific cases under those streams in Chapters 6 and 7. The Education study focuses on strategic litigation involving the right to a basic education in which cases were brought to compel the government to provide resources to schools. The State Recapture study considers litigation to secure the appointment or removal of public officials from senior positions in state institutions in the criminal justice sector and the executive, in the context of allegations of 'capture' of these institutions by a network of corrupt political leaders and big business players.

I initially considered several other options within the vast pool. In my original research proposal, I proposed a third case study on housing litigation. I later decided to limit my research to two case studies to maintain sufficient depth. The housing study would have been similar to the Education study in significant respects, as it involves a socio-economic right and because the public interest organisations driving the work are largely the same. Also, it has already received more attention in the academic literature, including empirical research, than education.

I selected the case studies cognisant of similarities and differences between them, enabling valuable comparisons and contrasts. The similarities include that both areas of litigation were conducted in the same jurisdiction and based principally on the Constitution. Both involve litigation that is innovative (locally and internationally) and therefore of interest. Both involve litigation conducted over approximately a decade from 2010 to 2019. Both areas involve strategic litigation driven by four or five key protagonist organisations in each case, but with very different

[677] Bryman (n 659) 149.

profiles.[678] The protagonists in the Education study were public interest law centres, social movements and school communities. The protagonists in State Recapture were opposition political parties and democracy watchdog civil society organisations. Both sets of issues captured public attention. They epitomise two of the central challenges facing post-apartheid South Africa – socio-economic inequality and the integrity and effectiveness of the state.[679]

The differences include the forum and the rights implicated. Whilst the Education study mainly includes High Court decisions (because they were not appealed), the State Recapture study considers cases culminating in Constitutional Court decisions. Further, the Education study centres around a human right recognised in international law and the Constitution. The State Recapture cases are based mainly on the rule of law and constitutional principle of legality. This difference enables me to test the analytic and evaluative framework against different areas of litigation – rights litigation and rule of law litigation – to consider whether the analytic framework is able to capture the impacts of both with descriptive and explanatory force; and whether the evaluative framework *works* as a frame within which to consider the positive and negative impacts of the litigation. Although both case studies investigate the full range of impacts, the most significant impacts of the two areas, given their objectives and subject-matter, were likely to be quite different. In the Education study, the central inquiry is whether the litigation produced material impact in the form of the 'inputs' sought, such as infrastructure and teachers. In State Recapture, the inquiry focuses on the functioning and independence of institutions, the national discourse and confidence in the state – that is, mainly political impacts. In both case studies, I apply the full framework.

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[678] I use 'protagonist' to refer to key drivers of litigation who 'made it happen', not necessarily the formal parties cited in litigation.

[679] See Chapter 1.1.

5.4. Scope of case studies

5.4.1. Case study definition

The case studies are defined by reference to the relevant litigation process, from institution of proceedings (the baseline) to the outcome of the litigation in court, and its implementation and effects up to the time of study. It is appropriate to assess impact in relation to the past because we are interested in empirical comparisons, not comparisons to the ideal.[680]

In the Education study, the primary units of analysis for quantitative data are individual schools (eg., new schools built) or individual students (eg., textbooks or furniture provided to individual students). It considers effects across the Eastern Cape and Limpopo provinces, where most of this litigation took place. In the State Recapture study, the focus is the relevant institution, such as the NPA, considered in its constitutional role and context.

I assess impact cumulatively across streams. It is necessary not to view the litigation in isolation, as the phenomenon of litigation and its context are crucially connected. The potential to draw these connections is a strength of case study methods.[681] As for the temporal dimension of impact, both case studies concern a period of approximately a decade from 2010-2019. The impact of the litigation is still unfolding; my cut-off date limits the inquiry.

5.4.2. Education

The Education study considers six streams of litigation to make government provide educational 'inputs', including: (1) safe structures to replace 'mud schools' ('*Mud Schools*'); (2) norms and standards for school infrastructure ('*Norms and Standards*'); (3) textbooks ('*Textbooks*'); (4)

[680] Sikkink (n 306) 141.

[681] Yin (n 653) 16.

appointment and payment of teachers ('*Teachers*'); (5) school furniture ('*Furniture*'); and (6) scholar transport ('*Scholar Transport*').

I selected these six streams because all concern the state's positive duties under the right to basic education; they cover the field of education provisioning litigation with few exceptions;[682] they were brought by public interest law centres, but using different models and forms; they involve attempts to secure 'inputs' for all similarly affected learners provincially or nationally, as opposed to merely individual schools; although many included settlements, five of six streams generated reported judgments and all produced court orders;[683] although not entirely complete, they have progressed to the implementation stage; they centre primarily around two provinces, the Eastern Cape and Limpopo.[684] Using these provinces as the focal points, the chapter considers the effects of strategic litigation in the context of dysfunctional government departments. The Eastern Cape and Limpopo were both placed under administration by the national executive.[685] The litigation took place during that period. The period investigated runs from the start of 2010, when the first case was instituted, to end of March 2020, representing both the end of the 2019/20 state financial year and excluding the intervening impact of the COVID-19 pandemic.

5.4.3. 'State Recapture'

The case study has been a moving target, as new decisions were handed down while I was undertaking research. I selected cases based on three characteristics: remedy, institution, and political context. First, all the cases aimed to have senior public office-bearers removed or appointed. Secondly, the institutions are the NPA, SAPS, Scorpions/Hawks, IPID and the

[682] See Chapter 6.

[683] All except *Mud Schools*.

[684] *Norms and Standards* was national, the remainder provincial. Four streams concerned Eastern Cape, *Textbooks* was set in Limpopo and *Scholar Transport* included both Eastern Cape and KwaZulu-Natal.

[685] Constitution, s 100.

Presidency/Cabinet – providing five litigation streams. Finally, the political context of the cases concerned senior office-bearers alleged to have been allies of former President, Jacob Zuma, and allegedly implicated in 'State Capture', or adversaries. Also included are cases brought as part of the attempt to remove Zuma himself. This criterion also guides the timeframes for the study. It runs from Zuma's election as President in May 2009 to my selected cut-off of 30 September 2020 after his 2018 resignation, as his removal did not bring an end to litigation on his appointments. The first and second criteria limit the case study to litigation concerning appointments in five institutions. This does not cover the field of State Capture litigation, but is a coherent and practicable selection.

South Africa has seen substantial further litigation relating to State Capture, including: criminal proceedings and ancillary litigation (eg., reviews of prosecutorial decisions); procurement; the conduct of proceedings in Parliament, including the expulsion of opposition MPs and the blocking of cellular signal; and the appointment of various commissions of inquiry.[686] I have focused on appointments. The cases all involve similar legal issues and seek similar remedies relating to appointment or removal, and are therefore broadly comparable as streams. One stream of appointments litigation that meets most of the criteria but is excluded is the litigation concerning the appointment of Hlaudi Motsoeneng as Chief Operating Officer of the public broadcaster, the South African Broadcasting Corporation. I decided to limit my study to appointments in the criminal justice sector and the Presidency/executive itself.

During Zuma's presidency, from 9 May 2009 to 14 February 2018, opponents used several strategies to attempt to secure accountability and to remove appointees or protect incumbents. Here, the protagonists are not necessarily co-ordinated or even allies. Indeed, they include two opposition political parties that are at different ends of the political spectrum – the Economic

[686] For a list, see le Roux and Davis (n 58) 273–276.

Freedom Fighters (EFF) and Democratic Alliance (DA).[687] The other key protagonists are four civil society organisations whose work centres on the rule of law and constitutionalism: Freedom Under Law (FUL), the Helen Suzman Foundation (HSF), the Council for the Advancement of the South African Constitution (CASAC) and Corruption Watch.

On the other side of most of these cases were the incumbent office-bearers themselves, including Menzi Simelane, Mxolisi Nxasana, Shaun Abrahams (all National Directors of Public Prosecutions); Richard Mdluli (head of Crime Intelligence in the SAPS); Berning Ntlemeza (head of the Hawks); and, of course, Zuma himself. Also in this category, although its role was not uncomplicated, is the ruling party, the African National Congress (ANC).

5.5. Research perspective

Two related issues arise relating to the perspective from which I approach the research: positionality and standpoint.

5.5.1. Positionality

I was in legal practice from 2005-2016, and worked at the LRC from 2008-2016. I appeared in several cases discussed in Part I of the Thesis and some specific cases in the Education study. The LRC is a public interest law firm, established under apartheid to use the law to resist injustice, and continuing that work in the constitutional era. I worked for the LRC for 8 years until immediately before beginning this research, as an attorney (solicitor) and then advocate (barrister). As Director of its Constitutional Litigation Unit, I was responsible for leading strategic planning, litigating cases and training lawyers. This was known to most interviewees, who may still associate me with the LRC. I bring my own experiences and perspectives to the study – I do not claim 'neutrality'.

[687] Other opposition parties, the United Democratic Movement (UDM) and the Congress of the People (COPE) and the Inkatha Freedom Party (IFP) were involved as secondary players.

Insider status brings several advantages. I come to the research familiar with how the legal profession, including the public interest legal sector, are structured and operate; court procedure and the legal culture of South Africa; and different approaches to strategic litigation in practice. I am well-acquainted with many interviewees, which made it easier to secure interviews. Insider status, however, carries a risk of bias.[688] As a practitioner, the risks include that I might valorise litigation or that I might avoid 'hard' questions to avoid prejudicing professional relationships. As a lawyer who worked for the LRC, there is also a risk that I may be partial to its model of litigation, which is primarily client-based, rather than campaign-based or movement lawyering. The related risk arises that people whom I interview would expect these biases, and may even be influenced to tell me what they think I want to hear or react in another way.[689] I sought to mitigate these risks by disclosing my role at the LRC to respondents, seeking outlier or critical views among respondents and in the literature and looking to be reflexive and critical of my own biases and preconceptions.

My association with the University of Oxford would also affect how I am received and perceived. I believe that it increased the willingness of lawyers, activists and academics to grant interviews, but probably carried connotations of elitism and establishment politics, perhaps tempered by my personal and professional background. Regarding my personal background, it was probably known to about half of my interviewees that my parents fought in the South African and Zimbabwean liberation struggles and survived an assassination attempt carried out by an apartheid death squad targeting ANC operatives in exile.[690] Although the ANC is a central player in the State Recapture case study, I did not think that it was necessary to disclose this background to interviewees. Notwithstanding family background, I am conscious of my position of social

[688] Yin (n 653) 20.

[689] Bauer and Gaskell (n 663) 6.

[690] 'Truth and Reconciliation Commission of South Africa Report' (1998) Volume 2 121–122.

privilege in one of the world's most unequal societies, as an able-bodied, white heterosexual man, and the influence that this, too, might have. This leads me to the next aspect of perspective, concerning the extent to which it is possible to conduct 'objective' research and the role of the perspective of subjects of the study.

5.5.2. Objectivity and standpoint

In considering my positionality, I drew on insights of critical approaches. These include eschewing false notions of objectivity or neutrality, recognising the effects that my positionality will have on my research and adopting a reflexive approach; and exposing the power relations behind the events and processes that I consider.[691] Given the salience of race and gender as markers of historical and contemporary inequality in South Africa, critical race studies and feminist approaches are instructive. These insights are not inconsistent with my approach to legal and material impact. As Letherby observes, 'objectivity is possible but involves the critical scrutiny of all aspects of the research process'.[692] In particular, because conceptions of 'objective' reality have been dominated by white and male standpoints, it is necessary to expose and critique the race and gender dimensions of my research process and data. However, while recognising white and male dominance in the public and private spheres, it is also necessary to avoid simplistic binaries and take an intersectional approach to the various identity strands and axes of power relevant to my research.[693]

This is a challenge that researchers have faced when considering the impact of campaigns in which they have personally played some role. McCann, in his study on gender pay equity, conducted interviews with 100 activists and their written responses to a survey formed the core

[691] Gayle Letherby, *Feminist Research in Theory and Practice* (OPUP 2003) 45.

[692] ibid.

[693] ibid 46.

data for his study. He had a 'long history of interest and involvement in union politics',[694] and once he began his study he found himself attending rallies and becoming increasingly supportive of the cause. In grappling with his positionality and standpoint, McCann was influenced by Nancy's Hartsock's formulation of a 'feminist standpoint', and approached his study on a 'postpositivist' basis, from the perspective of the activists in the movement, who were predominantly women.[695] In using a feminist standpoint, Hartsock had drawn from Marxist historical materialism and adapted Marx's approach, in line with Iris Marion Young's call for a specifically feminist historical materialism.[696] While I do not adopt an unqualifiedly post-positivist approach, especially for legal and material impact, I do seek to unearth the empirical data and reflect on different perspectives on it. Political impact, in particular, opened up space for me to explore divergent perspectives.

This approach critiques 'neutrality' or 'objectivity', while not abandoning the disciplines and rigours of research. In McCann's case, the adoption of a feminist standpoint meant trying to understand the struggle for pay equity from the perspective of movement activists.[697] In my case it means adopting as my opening viewpoint the perspective of the learners, school communities and education rights activists in Chapter 6 and of the opposition political parties and NGOs in Chapter 7. In doing so, I recognise my positionality and biases and critique the power dynamics beneath the surface.

I adopt this perspective as a starting point, especially to understand the objectives of the litigation and whether it was 'successful'.[698] I acknowledge that the perspectives of actors differ. I

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[694] Simon Halliday, Patrick Schmidt (n 572) 175.

[695] ibid 181.

[696] Nancy Hartsock, 'The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism' in Sandra Harding and Merrill Hintikka (eds), *Discovering Reality: Feminist Perspectives on Epistemology, Metaphysics, Methodology, and Philosophy of Science* (Springer 1983) 283–310.

[697] Simon Halliday, Patrick Schmidt (n 572) 181.

[698] See Chapter 4.

also acknowledge that my interview sample is lawyer-heavy, which I consider justified given my focus on litigation and my inquiry into litigation decisions, objectives and 'success'. I also seek to present the perspectives of other stakeholders, including government officials and other independent actors. I have sought to mitigate the risk of bias by disclosing my involvement (in this Thesis and to interviewees), by conducting a comprehensive review of literature on the cases, and by including among my interviewees people likely to hold critical views. I specifically sought to give interviewees an opportunity to challenge my stance (or what they might expect it to be).

A related concern is the inevitability of gaps and silences. For ethical reasons, I do not interview children in the Education study. I also do not interview judges because they would be unlikely to agree to an interview, and because their judgments are expected to speak for themselves. I limit my interviews to parents and community members, lawyers, civil society leaders, academics and government officials. While it is manageable to interview the key lawyers, this would be impossible for the hundreds of schools or all the employees of the institutions. I endeavoured to include the perspectives of parents and community members through their affidavits in the cases (bearing in mind that they are drafted by lawyers to lay a basis for legal contentions), conducting interviews myself and by accessing interviews already given by community members to another study (conscious of the different methods of that study). It has been a challenge to secure interviews with state officials in both case studies, and especially with incumbent officials in State Recapture.

5.6. Research methods

Flowing from my conception of impact and my research questions, I have adopted a mixed methods approach that draws from various sources. My case studies investigate events both before and after the litigation. In relation to events *before* litigation – including the litigation environment, resources and decisions, other strategies, and objectives of litigation – my methods were analysis of court papers, contemporaneous media statements and reports and interviews. In respect of

events *after* litigation – in particular, impact – my methods varied according to type of impact. To investigate legal impact, I conducted legal (doctrinal) research based on court papers, written argument, judgments and legal academic material. My conception of material impact tends towards a positivist epistemology and thus invites quantitative research, primarily through analysis of previously collected data,[699] but also original research.

The data sources vary across case studies. The Education study involves substantial quantitative data, since important impacts involve counting how many inputs (schools, textbooks, teachers, and so on) were provided and how much money was budgeted and spent to do this. I therefore draw on provincial and national budget documents, including Treasury estimates of national expenditure and appropriation Acts, annual reports of the national and provincial education departments, reports to parliamentary committees and independent research reports. Where there were multiple sources, I sought to compare and triangulate, for example in trying to determine how many new schools were built.

The State Recapture study does not involve quantitative data to the same extent. There, material impact is more likely to emerge from tracing events chronologically and drawing connections by appropriate inference. There are some indirect material impacts of a more quantitative nature that warrant investigation, such as the number of high-level corruption prosecutions before and after certain appointments, and conviction rates, as well as public confidence surveys (a political impact).

In both case studies, interviews play a subordinate role in investigating legal and material impact. They are not a source of legal impact, although interviews influenced my view of specific legal impact. In respect of material impact, interviews were a source of evidence to the extent that the interviewee could speak authoritatively and from personal knowledge. For example, a lawyer

[699] Bryman (n 659) 12.

involved in *Furniture* could describe how, after the litigation, department officials instituted regular meetings with him to provide updates on delivery. He had direct knowledge. However, I do not look to the interviews as a source of data on the broad material impact of litigation, such as how many textbooks were delivered. Interviewees can only provide their opinion, which is likely to be less reliable than official reports (unless there is reason to doubt the reliability of official sources).

Political impact lends itself more to qualitative research, and my main methods here were interviews and analysis of media reports, government policy documents and so on. I describe my approach to my two main methods, analysis of statistical and other secondary data and interviews, more fully below.

5.7. Quantitative research: statistical data

My primary method for investigating material impact was quantitative research through analysis of secondary data. This method has several advantages, especially for the Education study, where I sought to quantify inputs and associated budgeting and expenditure. Apart from one research report that covered some of these streams and provided rough figures for provisioning and expenditure, this research has not been done before. Nor did the protagonist organisations have this information, with the partial exception of *Scholar Transport (KZN)* and *Scholar Transport (EC)*, which is the most contained stream, involving the smallest numbers.

I accessed official documents of National Treasury and the national and provincial education departments. I experienced several challenges analysing this data, three of which bear mention. First, much of it is provided annually, requiring me to carefully collate it for the full decade of study. Secondly, I found gaps, inconsistencies between figures provided by different departments, or a lack of fit between how time periods are defined (eg., calendar year versus financial year). I identified these problems early and attempted to reconcile inconsistencies, failing which I drew attention to differences in the data. Finally, in relation to budgeting and expenditure,

annual and medium-term budgets are adjusted, and expenditure differed sharply from initial budgeting in some cases. I needed to consider adjusted budgets.

5.8. Interviews

I turn to the purpose of my interviews, the sample frame, identifying interviewees and requesting interviews, and the interview process.

5.8.1. Purpose of interviews

I used mixed methods to explore different forms of impact. While the fit between types of impact and methods and sources of data is not strict or watertight, in general legal impact is ascertained from legal sources using doctrinal methods, material impact through analysis of secondary documents, and political impact through qualitative research. My interviews touched on all three types of impact in different ways.

I used semi-structured interviews, which are less structured than surveys, but more structured than participant observation or ethnography.[700] Although I used topic guides, I allowed respondents to take the interview to unplanned topics and for limited 'rambling'.[701] This created room for me to learn new things about events or see them in a new light. However, it was important that the interviews broadly cover my analytic framework of impact and explore potential explanatory factors thoroughly, which is why I adopted a semi-structured rather than unstructured approach.

The purpose of the interviews was four-fold: first, to secure first-hand accounts from key decision-makers of the context, objectives and how litigation decisions were taken; secondly, as a limited direct source of information on the material impact (eg., for material impact on the

[700] George Gaskell, 'Qualitative Researching with Text, Image and Sound' (SAGE 2019) 38.

[701] Bryman (n 659) 46.

protagonist organisation itself, such as increased funding) and as an indirect source as interviewees would refer me to other data; thirdly, as a source of political impact, for example, to understand shifts in power relations or the increased resonance of a term within civil society; and, finally, to explore the perspective of interviewees on all forms of impact and the efficacy of litigation, whether they considered it 'successful', lessons learnt, and so on, in order to assist my evaluation.

5.8.2. Interview sample

I primarily used a criterion-based or purposive approach, choosing interviewees with characteristics that make them well-placed to understand the subject-matter.[702] I complemented this with limited 'snow-balling' to secure independent and outlier views, but my primary approach was to interview based on the sample. For both case studies, the sample of potential respondents is reasonably defined by the parameters of the case studies. Each case has a defined set of parties and legal representatives. For reasons of practicality and time, my target was to interview approximately 20-25 persons in each case study, in line with Gaskell's recommendation for a single researcher in my position.[703] I acknowledge that this is a limited pool. Especially for the State Recapture case study, which had wide-ranging political implications, I am only able to glean a limited set of views.

I began by focusing on the 'protagonists' – in the Education study, the public interest law centres and social movements, and in the State Recapture case study, the political parties and civil society organisations. I then prioritised key decision-makers behind litigation. While these were collective decisions, they usually involved the directors or most senior legal officer, which I confirmed when making interview requests by e-mail. I was able to identify these people from

[702] J Ritchie, J Lewis and G Elam, 'Designing and Selecting Samples', *Qualitative research practice: a guide for social science students and researchers* (SAGE 2003) 79–80.

[703] Gaskell (n 700) 43.

organisations' websites or initial inquiries. As a second layer of decision-maker, I identified leaders of legal teams. In the interviews I explored how litigation decisions were taken.

I began with the protagonists because the main purposes of my interview include inquiry into litigation objectives and 'success'. Rosenberg, too, used *stated* objectives as his point of comparison to assess success, but he decided against interviews, instead drawing from contemporaneous statements. He explained that he was doing the study 30 years after the *Brown* litigation and

> didn't know how to disentangle what they thought in 1957 from what they were going to be telling me in 1987. I thought there was too much time lapsed. I didn't know if I'd be getting what they really thought back then or the way in which the society and culture had reinterpreted the events.[704]

Instead, Rosenberg relied on contemporaneous sources, such as biographies, correspondence and reported statements.[705] He was heavily criticised by Feeley for relying on contemporaneous statements to discern objectives.[706] Feeley compared this approach to a study of sports teams, contrasting coaches' preseason rhetoric with teams' actual performance, where coaches might talk about winning the championship only to narrowly survive relegation; or to comparing politicians' campaign promises with their policies after election.[707] The point is that lawyers and activists have good reason to talk up their aims before litigation, even if privately they would have described them more conservatively.

My approach avoids both Rosenberg's concern about belated interviews rationalising earlier events, and Feeley's worry about contemporaneous statements of goals being overstated. I have conducted interviews within 1-2 years of the end of the decade on which both case studies

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[704] Simon Halliday, Patrick Schmidt (n 572) 169.

[705] ibid.

[706] Feeley (n 577).

[707] ibid 750.

are based. This is soon enough to minimise risks of reconstructed accounts, and provides me with first-hand, considered accounts of objectives rather than exaggerated versions of objectives stated publicly to support a campaign.

In principle, I sought to repeat the process described for antagonists, though not as extensively. Ideally, I sought to secure one 'antagonist' interview for each stream. Apart from the challenge of limited time as a single researcher, I experienced difficulties securing consent from government officials and their legal representatives. This is a concern as it risks a skewed sample. To fill these gaps, I sought their perspective on the litigation from other sources, such as affidavits in the proceedings and media statements (bearing in mind Feeley's critique of contemporaneous public statements).

Following initial interviews, I employed limited snow-balling by requesting further interviews with people suggested by interviewees. I found that an introduction sometimes helped to secure access. For example, Mary Metcalfe, former Director-General of Higher Education and MEC for Provincial Education and former head of the School of Education at the University of the Witwatersrand, made introductions to trade unionists, academics and government officials, several of whom I did not know. These introductions led to three interviews. The disadvantage of snow-balling is that it tracks existing networks, which may skew the sample. However, I employed it only to a limited extent and for the very purpose of securing a broader range of views, including outliers.

The profiles of interviewees are set out in *Table 5.1* below.

Table 5.1: Profiles of Persons Interviewed

Education		
	Primary Role	Dual role[708]
Lawyers	11	11
Researchers at public interest organisations	1	2
Civil society or social movement leaders	3	4
Donors		1
Parents and teachers	2	2
Government officials	1	3
Trade union officials	1	1
Academics	2	5
Members of UN Treaty bodies		1
TOTAL	22	30
State Recapture		
Lawyers	7	10
Civil society or social movement leaders	6	6
Political party leaders/government officials	4	4
Academics	1	3
TOTAL	18	23

A challenge in the Education study was to secure interviews with government and trade union officials and their lawyers. I requested interviews with several officials and contacted the two largest teacher unions. Two officials – former Head of Department in the Eastern Cape, Modidima Mannya, and former MEC in Limpopo, Dickson Masemola, initially responded but ultimately did not grant interviews, without providing reasons. The largest teacher union, SADTU, did not

[708] Many interviewees occupy more than one role and/or change roles. Some researchers or movement leaders became lawyers; some government officials became academics. Therefore, the actual number of people interviewed appears under 'primary role'. 'Dual role' reflects the number and distribution of relevant roles that the interviewees have held.

respond to my request. I did interview the head of the second largest union, NAPTOSA. I also managed to interview three former government officials (two held education posts).

I have been conscious of the race, gender and class composition of those interviewed. The Education sample is overall broadly representative in race and gender terms, but consists almost exclusively of middle class lawyers, activists, academics and officials. They are all near the 'top' of the stratifications of civil society and government.[709] They constitute 'elites', being 'incumbents of leadership positions in powerful political institutions and private organizations who, by virtue of their control of intra-organizational power resources, are able to influence important (political) decisions'.[710] The networks – such as the public interest law sector – in which the relevant elites operate are not strictly defined, and their composition depends on the subject-matter. Influence in the networks tends to diminish as one moves from central to more peripheral actors.[711]

Elite interviews offer insight into the mindset of actors playing key roles in shaping events.[712] The elite status of interviewees brought advantages, including expertise, first-hand accounts by key decision-makers, access to secondary material including documents not in the public domain, and introductions to other interviewees. However, it may risk diminishing the perspective of community members directly affected by litigation. I attempted to mitigate this class imbalance by accessing interviews conducted by other researchers with community members and by contacting local social movement leaders for interviews. Ultimately, my sample remains predominantly elite interviews.

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[709] Victor Jupp, *The SAGE Dictionary of Social Research Methods* (SAGE 2019) 85.

[710] Ursula Hoffmann-Lange, 'Studying Elite vs Mass Opinion' in Wolfgang Donsbach and Michael Traugott, *SAGE Handbook of Public Opinion Research* (SAGE 2008) 53.

[711] ibid 54.

[712] David Richards, 'Elite Interviewing: Approaches and Pitfalls' (1996) 16 Politics 199, 199–204.

The State Recapture sample is similar in profile. If anything, it is more 'elite', as it includes heads of civil society organisations, leaders of opposition political parties and a senior official, the President's legal advisor. The most striking thing about the State Recapture sample was gender imbalance. Whereas half of the interviewees in the Education study were women (11 out of 22), the sample frame for the State Recapture study, once narrowed down to 25 people to approach, included only four women. I discuss this below and in Chapter 7.

5.8.3. Education sample frame

I began by selecting the six streams of litigation. When I began, they largely covered the field. Having selected the streams, I identified judgments in individual cases and the key organisations involved. The streams included eight judgments and nine orders or settlements without judgments.[713] The main protagonists were the public interest law organisations themselves – the LRC, Centre for Child Law (CCL), SECTION27 and Equal Education Law Centre (EELC) – and social movements Equal Education (EE) and Basic Education for All (BEFA).

Having tabulated the protagonists and antagonists and their lawyers, I identified repeat players. For example, the same two LRC attorneys (McConnachie and Sephton) were the responsible attorneys in all 4 LRC streams. On the antagonist side, the national Minister was the same across all the streams (Angie Motshekga). Applying this approach, I narrowed the sample down to a group of 30 for interviews. I secured interviews with 22 people (including two prior interviews of which I obtained transcripts).[714]

[713] See Chapter 6 Appendix I.

[714] See Chapter 6 Appendix II.

5.8.4. State Recapture sample frame

I divided the cases into five streams, each linked to one institution: the NPA, the Scorpions/Hawks, the SAPS, IPID and the Presidency/Cabinet. I tabulated the judgments according to the state institution to which they relate; the principal parties (protagonists and antagonists, including *amici curiae*); the relevant decision-makers at those organisations or entities; and the lead legal representatives (counsel and attorneys). The five streams include 22 judgments and two orders without judgments.[715]

Four NGOs – HSF, FUL, CASAC and Corruption Watch – were repeat players, as are some opposition political parties, especially the DA and EFF. For each, I listed the head as a potential interviewee. However, I anticipated that they might refer me to another person, such as a programme officer or party spokesperson. In addition, some of the lawyers appeared in multiple cases. Although my initial tabulation identified 70 potential interviewees, when repetition was eliminated, there were only 40. I eliminated counsel, such as David Unterhalter, who had been appointed judges. In relation to office-bearers, I excluded three people whom I considered highly unlikely to agree to an interview: former President Zuma, who is currently facing criminal charges for corruption; former head of SAPS Crime Intelligence, Richard Mdluli, who was convicted in 2019 and is in custody; and former Hawks Head, Berning Ntlemeza, in light of the targeted break-in at the HSF offices days after it launched the litigation to remove him and who now runs a private security operation.

As one of my objectives is to draw links and comparisons across streams, repeat player status was an important criterion for selecting interviewees, alongside covering all streams and seeking a balance of protagonists/antagonists, parties/lawyers and civil society leaders/political party leaders. Applying these criteria, I further reduced the list to approximately 25 potential

[715] See Chapter 7 Appendix I.

interviewees, including office-bearers, political party leaders, civil society leaders, social movement leaders, independent experts and lawyers. Ultimately, I conducted 18 interviews, 72% of my target.[716] The spread was reasonably even across categories, as I secured interviews with the heads of the 4 civil society organisations, three opposition political party leaders, leaders from the two national campaigns, #SaveSouthAfrica' and #UniteBehind, one academic/consultant and ten lawyers.[717]

5.8.5. Securing interviews

Initially, I sent a written request for an interview (Appendix I), including an information sheet providing details (Appendix II). If the respondent agreed, I made arrangements to meet them, at their office or other convenient location. Most interviews were conducted in person. However, after February 2020, the COVID-19 pandemic made it necessary to conduct interviews by video conferencing. This resulted in initial delays, but ultimately worked well. I do not consider that the lack of face-to-face contact detracted materially from the quality of interviews.

5.8.6. The interview process

At the start of the interview, I provided a consent form (Appendix III) and gave the respondent a chance to read and complete it. I explained the form, emphasising that – unless requested otherwise – the interview would *not* be anonymous and that it would be recorded and transcribed for use in my research, with attribution. I conducted interviews broadly following topic guides (Appendices IV and V). The purpose of the guides was to cover all the main issues, but to be sufficiently broad and flexible to allow me to focus on the interviewee and their views, including unexpected issues.[718] The main topics on the guide are: the role of the interviewee and how they

[716] See Chapter 7 Appendix II.

[717] One lawyer, Mpofu SC, was also EFF chairperson.

[718] Gaskell (n 700) 40.

and their organisation got involved; whether any non-litigious strategies were employed; the objectives of the litigation (if protagonist); legal, practical or other factors that presented barriers or advantages to litigating; legal, material and political effects; and any unintended effects or lessons learnt. The guides for the two case studies vary in the detailed subject-matter.

Before the interview, I prepared specifically for the interviewee, considering areas of emphasis or knowledge. If they had published on the topic, I familiarised myself with their work beforehand. I began each interview by asking about their roles and experience, as well as their relationships to the key organisations.

During each interview, I adopted a relatively active, dialogic technique. I did not adhere rigidly to the topic guide.[719] Although I sought to cover all the themes, I did so in varying sequences and I spent more time on some aspects with particular interviewees.[720] I played an active role in seeking explanations and examples and putting contrary views, including from other interviews, to the interviewee. The aim was to get a deeper understanding of their own role and perceptions, rather than a standard narrative that anyone involved might give.

The interviews varied in length, but most were 60-90 minutes, the duration I had planned when developing topics guides and requesting interviews. With one respondent who was centrally involved in three streams of the Education study, I conducted three interviews, and I interviewed three people under both case studies.

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[719] ibid.

[720] McCann (n 193) 18–19.

Table 5.2: Length of Interviews

Education	Average	1:20
	Shortest	50
	Longest	2:12
State Recapture	Average	1:28
	Shortest	1:08
	Longest	2:00

5.9. Ethical issues

My decision to conduct the two case studies and especially to conduct interviews raised several ethical issues. I secured ethics approval from the University of Oxford before beginning interviews.[721] The process enabled me to consider and address potential ethical concerns in advance. I recognise that this formal process did not relieve me of the responsibility to conduct ethical research. I decided at an early stage not to interview children for the Education case study, so issues relating to the effects of interviewing children do not arise. However, a number of other challenges did arise. These mainly related to the voluntary participation of interview respondents, their informed consent and the potential risks (and benefits) to them.[722]

My default approach was that interviews are not anonymous. I emphasised this at the start of interviews. I also explained that interviewees could request anonymity or request that a particular part of the interview not be quoted or attributed. All my interviewees were comfortable with attribution, although a few requested that particular statements not be attributed to them.

[721] CUREC 1A approval from Social Sciences and Humanities Interdivisional Research Ethics Committee (IDREC) ref no: R52517/RE001.

[722] Silverman (n 663) 184.

This was mainly for reasons of collegiality or organisational affinity, not out of safety concerns or anything of that nature.

I did not perceive any risks to the safety of interviewees arising from their giving interviews. I learnt from some interviews that some principals and teachers at schools faced intimidation and threats of dismissal for supporting litigation.[723] As I did not interview any teachers or principals myself, this risk did not arise. In State Recapture, the subject-matter does include potential criminal conduct. I considered it unlikely at the outset that my interviewees would be disclosing evidence of criminal wrongdoing beyond what is already in the public domain. However, I was sensitive to this risk. One interviewee asked that we remove our cellular phones from the interview venue (their office) to prevent electronic interception, and we did so. Another interviewee asked for certain statements not to be attributed. Overall, I was comfortable that my research has not put anyone at risk.

5.10. Management and analysis of data

5.10.1. Documents

Secondary analysis of documents was an important method, especially for legal and material impact. Regarding legal impact, I accessed not only judgments, but also the papers and written argument, and secondary legal material, such as journal articles, textbooks and research reports. The inquiry into material impact involved substantial documentary data, including government reports, budget documents and civil society reports.

I stored documents in electronic form on my laptop and external hard drive. None of the data was confidential and most could be accessed online. I did not wait until all my data was

[723] See Chapter 6.

gathered before beginning data analysis but began reviewing it in line with my research questions as I proceeded.[724]

5.10.2. Interviews

I recorded the in-person interviews on a handheld, digital recording advice, which I placed on the table, visible to interviewees, whom I also verbally asked for consent to record and have the interview transcribed (as per the consent form). I recorded online interviews using the recording feature of Zoom video conferencing software, with the same consent process. I took written notes in a journal during interviews.

The recorded interviews were all transcribed by the same transcriber.[725] The interviews are stored securely on my personal computer and an encrypted external hard-drive. When she transcribed an interview, the transcriber sent me the transcript by e-mail. I checked it against my written notes, correcting grammatical or other errors. If I was unclear about what an interviewee said, I checked the recording or sent queries to the interviewee by e-mail. The transcripts are approximately 30-50 pages (Times New Roman, double-spaced) each.

I uploaded the transcribed interviews to NVivo, with each case study allocated a separate folder. I applied nodes developed from my analytic framework for impact to code the interviews, namely: barriers; causation; effects on different constituencies (funders, judges, lawyers, communities, policy-makers and specific groups; impact (legal, material and political); lessons learnt; negative effects; non-litigious strategies; objectives; and unintended effects. I then coded the interviews one by one according to these nodes. The main nodes did not evolve from my initial set, but I did add some secondary nodes, such as 'non-litigious strategies', after the pilot interview.

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[724] Silverman (n 663) 233.

[725] I concluded an agreement with the transcriber, Shireen Hartley, in terms of which she was remunerated, with appropriate confidentiality terms.

The coding enabled me to view all responses according to each node. For instance, once I had done the coding, I could see all the relevant responses on 'material impact' or 'negative effects', which enabled me to write up these aspects of the case studies in a way that reflects all relevant answers. I was particularly interested in different perspectives on impact, including as between lawyers and other role-players and as between lawyers with a preference for different forms and models of litigation.

5.11. Refining the theoretical framework and findings

I came to the case studies with a preliminary theory in mind, namely the analytic and evaluative framework for impact in Chapters 3 and 4. It was important to come to the case studies with this framework reasonably developed, as I used it to structure my inquiry. It informed my methodology and methods, as explained above. There is, of course, a risk that going into the field with a preliminary theory in mind will skew the research. However, in my case that risk was limited because the preliminary theory consisted of a framework, intended to be reasonably comprehensive, of the nature and types of impact and a set of values and potential risks and benefits against which to assess it. It did not include any restrictive hypotheses to test empirically.

Other parts of the theory were inchoate when I began the case studies, in particular the factors that influence impact and how they relate to models and forms of litigation. Some aspects of the analytic framework, such as sub-categories and examples of *legal*, *material* and *political* impact were also developing. In relation to these inchoate aspects, I adopted a dialectical and iterative approach, developing and refining my thinking through the case studies.[726]

Having made findings on the factors influencing impact in my case studies, I face the challenge of generalising from individual cases. Case studies may be generalisable to theoretical

[726] David Leopold, 'Dialectical Approaches' in Marc Stears and David Leopold (eds), *Political Theory: Methods and Approaches* (OUP 2008) 126.

propositions but this has its limitations.[727] I apply my analytic framework to the case studies and explore the extent to which my findings might be generalisable, but do not seek to extrapolate probabilities or make statistical generalisations.[728] I am circumspect about attempting to develop sweeping theoretical generalisations from case studies about the impact of litigation. I draw my conclusions from the case studies alive to Abel's warning that '[m]ost of the observations are specific to a few cases. For each, there seems to be a counter-example.'[729] I bear the limitations of case studies in mind when drawing conclusions.

5.12. Conclusion

In this Chapter I have set out my methods and methodology for conducting the case studies in Part II of the Thesis. I discussed my approach to interviews, as well as how this approach relates to my theoretical framework set out in Part I of the Thesis. My methods explicitly account for the iterative nature of the case studies in refining the theoretical framework. I now turn to the case studies themselves.

[727] Yin (n 653) 21.

[728] ibid.

[729] Abel (n 15) 545.

Appendix I: Interview Request

Faculty of Law

[Personal details omitted]

The impact of strategic litigation in South Africa

Ethics Approval Reference: R52517/RE001

Dear [name]

I am writing to ask if you would be willing to be interviewed as part of the research towards my DPhil study into the impact of strategic litigation in South Africa.

My research considers the value of strategic litigation by developing a framework within which to understand and assess its impact. I will be looking at litigation in two case study areas, basic education provisioning and cases concerning appointments to or removals from public office. Please see the enclosed information sheet that provides further details.

The interview should not take more than one hour. It will be recorded and transcribed.

If you would like more information beforehand, please contact me [contact details omitted]

Jason Brickhill

Appendix II: Information Sheet for Interviewees

Faculty of Law

[Letterhead details omitted]

THE IMPACT OF STRATEGIC LITIGATION IN SOUTH AFRICA

PARTICIPANT INFORMATION
Ethics Approval Reference: R52517/RE001

1. ***Background and aims of the study***

This study hopes to assess and evaluate the impact of strategic litigation in South Africa in specific case study areas of the law, basic education provisioning; and appointments/removals from public institutions, including the National Prosecuting Authority, the Scorpions/Hawks, the South African Police Service, the Independent Police Investigative Directorate (IPID) and the Presidency. This student is funded by the Clarendon Fund, University of Oxford.

2. ***Why have I been invited to take part?***

You have been invited because of your role in the case study litigation. Those invited to be interviewed are primarily legal representatives or litigants involved in the case study litigation.

3. ***Do I have to take part?***

No. You can ask questions about the study before deciding whether or not to participate. If you do agree, you may withdraw at any time, without giving a reason and without penalty, by advising the researcher. If you withdraw, any data given will not be used/stored.

4. ***What will happen in the study?***

If you are happy to take part, you will be asked to answer oral questions. This should take approximately 1 hour and will be audio recorded with your consent. If you do not consent to audio recording, I will take written notes. The interview will take place at a mutually convenient venue or online.

5. ***Are there any potential risks in taking part?***

There should not be any specific risks involved. Data will be stored on an encrypted hard drive to protect confidentiality. If you do not consent to being quoted directly, no published statements will be attributed to you. Please read the information sheet and guideline questions before consenting.

6. *Are there any benefits in taking part?*

There will be no direct benefit to you from taking part.

7. *What happens to the data provided?*

The research data will be stored confidentially using an encrypted external hard drive. Your responses will **not** be anonymised. Personal data will be stored confidentially using the same external hard drive. The researcher, supervisors and transcriber will have access to research data.All research data and records will be stored for a minimum retention period of 3 years after publication or public release of the work of the research.

8. *Will the research be published?*

The University of Oxford is committed to the dissemination of its research for the benefit of society and the economy and, in support of this commitment, has established an online archive of research materials. This archive includes digital copies of student theses submitted as part of a postgraduate degree programme.

The research will be published in a thesis, parts of which may subsequently be submitted for publication in journal articles and/or books. On successful submission, it will be deposited both in print and online in the University archives. It will be published open access.

9. *Who has reviewed this study?*

This study has been reviewed by, and received ethics clearance through, the University of Oxford Central University Research Ethics Committee.

10. *Who do I contact if I have a concern about the study or I wish to complain?*

If you have a concern, please speak to the researcher [*contact details omitted*] or their supervisors, Prof Sandra Fredman and Prof Kate O'Regan [*contact details omitted*], who will do their best to answer your query. The researcher should acknowledge your concern within 10 working days and indicate how they intend to deal with it. If you remain unhappy or wish to make a formal complaint, please contact the relevant chair of the Research Ethics Committee at the University of Oxford:

[*contact details omitted*]

11. *Further Information and Contact Details*

[*contact details omitted*]

Appendix III: Consent Form

Faculty of Law

[*researcher's contact details omitted*]

PARTICIPANT CONSENT FORM
CUREC Approval Reference:
R52517/RE001

The impact of strategic litigation in South Africa

Purpose of Study: to analyse and assess the impact of strategic litigation under the South African Constitution

		Please initial each box
1	I confirm that I have read and understand the information for the above study. I have had the opportunity to consider the information, ask questions and had these answered satisfactorily.	☐
2	I understand that my participation is voluntary and I am free to withdraw at any time, without giving any reason, and without any adverse consequences/penalty.	☐
3	I understand that research data collected during the study may be looked at by designated individuals from the University of Oxford where it is relevant to my taking part in this study. I give permission for these individuals to access my data.	☐
4	I understand that this project has been reviewed by, and received ethics clearance through, the University of Oxford Central University Research Ethics Committee.	☐
5	I understand who will have access to personal data provided, how the data will be stored and what will happen to it at the end of the project.	☐
6	I understand how this research will be written up and published.	☐
7	I understand how to raise a concern or make a complaint.	☐
8	I consent to being audio recorded.	☐
9	I understand how audio recordings will be used in research outputs.	☐
10	I **give/do not give (delete whichever does not apply]** permission to be quoted directly in the research publication against my name	☐

11 I agree to take part in the above study. ☐

Name of Participant	Date	Signature

Name of person taking consent	Date	Signature

Appendix IV: Topic Guide – Education

Role

1. Role in [organisation]
2. Role in relation to [specific litigation]

Objectives

3. Who took decision to institute / oppose litigation
4. What other strategies, if any, did you consider or use apart from litigation?
5. Why did you turn to litigation and abandon other strategies, especially the political arena?
6. barriers to litigation, if any?
7. What hope to achieve through litigation?
8. To what extent, if at all, hoping to achieve the following (as relevant):
    a. Change in law [or defend existing law]
    b. Change in policy [or defend existing policy]
    c. Provision of [insert specific social good or service, eg school furniture]
    d. Compel a party to do/cease to do something
    e. Payment of compensation/damages
    f. Increase rights awareness
    g. Shift public agenda or discourse
    h. Other
9. Who decided how case / defence should be formulated, ie what evidence and arguments would be employed?
10. How did the objectives of the litigation influence how it was conducted?
11. Did any features of South African law – substantive or procedural – facilitate the litigation?
12. Did any impede it?

Effects

13. What were the effects of the litigation on (as relevant):
    a. clients,
    b. affected communities,
    c. strategic litigators,
    d. policymakers,
    e. the judiciary (and the law),
    f. media coverage,
    g. government officials,
    h. organised civil society
    i. funders
14. What do you consider the main/most significant effects of the litigation?
15. Causation/contribution? Direct/indirect effects?
16. What were the legal effects of the litigation – changes to law / policy
17. What were the material effects of the litigation – ie observable changes in conduct, payment of money?
18. What were the effects of the litigation on power relations, discourse or 'agenda'?
19. Effects on budget and expenditure?
20. Did the litigation produce any unintended effects?
21. Do you consider it successful? Why/why not?

Lessons

22. What did you/your organisation learn from the litigation?
23. What would you do differently, if anything, if you were starting again?

Appendix V: Topic Guide – State Recapture

Role

1. role in [organisation/political party]
2. role in relation to [specific litigation]

Objectives

3. Who took decision to institute / oppose litigation?
4. What other strategies, if any, did you consider apart from litigation?
5. What other strategies did you use before turning to litigation?
6. Why did you turn to litigation and abandon other strategies, especially the political arena?
7. Collaboration with other organisations?
8. What were the barriers to litigation, if any?
9. What did you hope to achieve through litigation?
10. Who decided how the case / defence should be formulated, ie what evidence and arguments would be employed?
11. How did the objectives of the litigation influence how it was conducted?
12. Did any features of South African law – substantive or procedural – facilitate the litigation?
13. Did any impede it?

Effects

14. What were the effects of the litigation on (as relevant):
    a. The person whose appointment or removal was in issue
    b. The institution, eg the National Prosecuting Authority
    c. Other related institutions
    d. strategic litigators themselves,
    e. policymakers,
    f. judiciary (and the law),
    g. media coverage,
    h. organised civil society
    i. funders
15. What do you consider the main/most significant effects of the litigation?
16. Causation/contribution? Direct/indirect effects?
17. What were the legal effects of the litigation – changes to law / policy
18. What were the material effects of the litigation – ie observable changes in conduct, payment of money?
19. What were the effects of the litigation on power relations, discourse or 'agenda'?
20. Did the litigation produce any unintended effects?
21. Do you consider the litigation successful? Why/why not?

Lessons

22. What did you/your organisation learn?
23. What would you do differently, if anything, if starting again?

6. CHAPTER 6: EDUCATION PROVISIONING

6.1. Introduction

This case study considers the impact of six streams of strategic litigation conducted between 2010-2019[730] on education provisioning: mud schools, norms and standards for school infrastructure, textbooks, teacher provisioning, school furniture and scholar transport.

Litigation on the right to a basic education has taken place in two main areas. Initially, there was litigation on the powers of SGBs and government in respect of the policies governing admissions,[731] language[732] and learner pregnancy.[733] More recently, litigation has been used to make government provide a range of educational 'inputs', particularly in the six streams on which I focus. I exclude the earlier school governance cases, which were brought by different actors (generally, better-off schools in major cities) and did not concern education deliverables or inputs. I explained my choice of six streams in Chapter 5. With limited exceptions, they cover the field of education provisioning litigation.[734] I was involved in three of the six streams.[735] This brought insight and access, but carries risks of bias. I discuss how I mitigated these risks in Chapter 5.

[730] I consider impact until end March 2020 (end 2019/20 financial year).

[731] *MEC for Education in Gauteng Province v Governing Body of Rivonia Primary School* 2013 (6) SA 582 (CC).

[732] *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC).

[733] *Head of Department, Department of Education, Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School* 2014 (2) SA 228 (CC). See Sandra Fredman, 'Procedure or Principle: The Role of Adjudication in Achieving the Right to Education' (2013) 6 CCR 165; Yana van Leeve, 'Executive Heavy Handedness and the Right to Basic Education: A Reply to Sandra Fredman Education' (2013) 6 CCR 199.

[734] *Western Cape Forum for intellectual Disability v Government of the Republic of South Africa* 2011 (5) SA 87 (WCC); *School Governing Body of Amasango Centre School v MEC for Education, Eastern Cape* (ECG) case no 3838/2009; *Komape v Minister of Basic Education* [2018] ZALMPPHC 18.

[735] *Norms and Standards I*; *Scholar Transport (EC)* and *Teachers I* and *II*. I was lead counsel in *Scholar Transport (EC)* and argued the matter; and junior counsel in the other two matters. In *Furniture* and *Mud Schools*, I was not on brief but did advise.

In attributing impact, I apply the threshold explained in Chapter 3, asking whether the litigation materially contributed to particular effects, alongside any other factors. My primary sources included legal materials (judgments, orders, court papers and settlement agreements); government reports and policy documents; national and provincial budget documents; research reports; media reports; discussions with researchers; and 22 semi-structured interviews.[736] The interviewees include the lawyers responsible for running the litigation; social movement and teacher union leaders; community members and teachers at some of the affected schools; current and former government officials; and leading academics in the field of education policy. There is a limited, but growing, body of secondary literature on this litigation including journal articles,[737] textbook chapters,[738] civil society reports,[739] a doctoral thesis[740] and two books on education rights.[741] As explained in Chapter 3, particular sources tend to correlate to types of impact. Legal impact is discerned from settlements, court orders, judgments and secondary legal literature. Quantitative data tends to be a key source for material impact. The interviews serve as sources of political impact, alongside media reports and government statements. Interviews also provide different perspectives on all forms of impact.

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[736] See Appendix II.

[737] Cameron McConnachie and Chris McConnachie, 'Concretising the Right to a Basic Education' (2012) 129 SAJHR 554; Fredman (n 733); van Leeve (n 733); Faranaaz Veriava, 'The Limpopo Textbook Litigation: A Case Study into the Possibilities of a Transformative Constitutionalism' (2016) 32 SAJHR 321; Alison Tshangana, 'The Impact of Litigation by the Legal Resources Centre for Adequate Classroom Infrastructure in South Africa' (IBP 2013).

[738] Jason Brickhill and Yana van Leeve, 'From the Courtroom to the Classroom: Litigating Education Rights in South Africa' in Sandra Fredman, Meghan Campbell and Helen Taylor (eds), *Human Rights and Equality in Education* (Policy Press 2018); Cameron McConnachie and Samantha Brener, 'Litigating the Right to Basic Education' in Jason Brickhill (ed), *Public Interest Litigation in South Africa* (Juta 2018).

[739] OSJI (n 57); Budlender, Marcus and Ferreira (n 24).

[740] Helen Taylor, 'Optimisation through Innovation: Judicial Exercise of Discretionary Remedial Power to Enforce the State's Positive Duties' (DPhil thesis, University of Oxford 2018) DPhil thesis, University of Oxford. Taylor focused on remedies and considered *Mud Schools*, *Furniture* and *Teachers*.

[741] Faranaaz Veriava, Anso Thom and Tim Fish Hodgson, *Basic Education Rights Handbook: Education Rights in South Africa* (SECTION27 2017); Veriava (n 100).

After covering each stream, I analyse their cumulative impact by applying the approach advanced in Chapter 3. I distil factors that influenced their impact – grouped under litigation environment, resources and decisions as framed in Chapter 2. I then evaluate the impact against the normative framework developed in Chapter 4. I begin with the context of the current crisis in schooling in South Africa and its roots in colonial and apartheid education policy.

6.1.1. The crisis in education

Contrary to denials by Minister of Basic Education, Angie Motshekga,[742] school education in South Africa is in crisis, reflected in poor educational outcomes, systemic inefficiencies, human capacity constraints, corruption and patronage and systemic inequality.[743] Recent studies have placed levels of literacy, numeracy and performance in science among South African students among the worst in the world. South Africa allocates approximately 6% of its GDP to education, above the OECD average.[744] Despite this, it fares poorly in international literacy and numeracy assessments – in absolute terms and relative to comparable countries. Three studies illustrate this.

First, in the 2016 Progress in International Reading Literacy Study (PIRLS), assessing fourth grade reading comprehension, South Africa ranked last out of 50 countries.[745] PIRLS found that 78% of grade 4 students cannot read for meaning in any language.[746] PIRLS also found massive provincial differences, with Limpopo Province (91%) and the Eastern Cape (85%) – the provinces central to my study – faring worst, contrasted with the best performing, Gauteng (69%) and the

[742] Motshekga was appointed in 2009, twice re-appointed and held the position at time of writing.

[743] Shaun Franklin and Daniel McLaren, 'Realising the Right to a Basic Education in South Africa: An Analysis of the Content, Policy Effort, Resource Allocation and Enjoyment of the Constitutional Right to a Basic Education' (SPII 2015) 37.

[744] Carmen Abdoll and others, *Mud to Bricks: A Review of School Infrastructure Spending and Delivery* (2014) 1. OECD average in 2010 was 5.4%.

[745] Ina Mullis and others, 'PIRLS 2016 International Results in Reading' (TIMSS and PIRLS 2017).

[746] ibid 55.

Western Cape (55%).[747] It also showed significant differences by test language with the lowest results for learners whose first language is an indigenous African language. The government's response was defensive, highlighting marginal improvements within South Africa, referring to another study by the department itself that had found better results and questioning some of the PIRLS data.[748]

Second, in the 2015 Trends in International Maths and Science Study (TIMMS) study, South Africa ranked last out of 39 countries in grade 9 science and second last in mathematics; at grade five level, South Africa was ranked 47th out of 48 countries in mathematics. South Africa also placed last among all the participating African countries. Alarmingly, Minister Motshekga welcomed the results on the basis that South Africa was the 'most improved education system in the world'[749] – having moved from worst to second worst since the previous study.

The third study by Southern and Eastern Africa Consortium for Monitoring Education Quality (SACMEQ) confirms that the regional picture is no brighter. According to the 2011 SACMEQ study of four Southern African countries,[750] South Africa had the lowest functional literacy among grade 6 students (73%),[751] and the second lowest functional numeracy (60%).[752] SACMEQ also highlighted internal variation across provinces, as South Africa had both the

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[747] ibid 5.

[748] Department of Basic Education response to release of Progress in International Reading Study 2016 results, 5 December 2017, <https://www.education.gov.za/Newsroom/MediaReleases/tabid/347/ctl/Details/mid/5986/ItemID/5522/Default.aspx> accessed 10 January 2018.

[749] 'Government celebrates South Africa's dismal maths and science scores' (*Business Tech*, 30 November 2016) <https://businesstech.co.za/news/government/145121/government-celebrates-south-africas-dismal-maths-and-science-results/> accessed 10 January 2018.

[750] Botswana, Mozambique, Namibia and South Africa.

[751] Nicholas Spaull, 'Primary School Performance in Botswana, Mozambique, Namibia, and South Africa' [2011] SACMEQ Working Paper Series 42. When the results were adjusted to reflect drop-out levels before Grade 6, South Africa was second lowest (65%), behind Mozambique (47%).

[752] ibid 43. Adjusted for drop-out rates, South Africa was second (54%), above Namibia (47%) and Mozambique (40%).

second best province (Western Cape) and the worst performing (Limpopo) across 40 provinces in the four countries.[753]

Disaggregating South Africa's performance, there is massive variation from the top performing provinces of the Western Cape and Gauteng and the worst performing, Limpopo and the Eastern Cape. This inequality closely tracks race and the urban/rural divide, with black learners in the former apartheid 'homelands' worst affected.[754] There has been progress in national rates of school completion, with 45% of 20-year-olds having passed matriculation[755] in 2017, compared to only 33% in 2007,[756] but provincial pass rates still track racial and geographical patterns of inequality.

The historical reasons for the crisis are clear. Under colonial rule and under apartheid after 1948, the education of black children was deliberately impeded. The white minority government created a system of segregated public schooling, giving extensive support to white schools and spending a tiny fraction on each black student of what was spent on whites.[757] The Bantu Education Act 47 of 1953 consolidated the apartheid government's policy of educating African children in segregated schools with drastically inferior infrastructure and less qualified teachers.[758]

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[753] ibid 28. Previously, SACMEQ II (2000) and SACMEQ III (2007) found Western Cape and Gauteng the top performing provinces in numeracy and literacy and Limpopo and Eastern Cape among the worst three provinces. SACMEQ Reading and Math Achievement Scores <http://www.sacmeq.org/?q=sacmeq-members/south-africa/sacmeq-indicators> accessed 10 January 2018.

[754] See Chapter 1.1.

[755] Final qualification on completing secondary school.

[756] Statistics South Africa 'National Census' 2011.

[757] McConnachie and Brener (n 738) 282.

[758] Brickhill and van Leeve (n 738) 149.

In 1960, for example, the government spent eleven times as much on a white child as on an African child.[759]

The legacy of the racist system of 'Bantu education' persists, and manifests in the infrastructure and provisioning of formerly black public schools, especially in the former apartheid homelands. A 2011 Department of Basic Education (DBE) report stated that over 3,500 schools still did not have access to electricity, 900 did not have sanitation facilities and 2,400 had no water supply, the majority of these in the former homelands.[760] The legacy of apartheid-era discriminatory education policy in school infrastructure has been exposed by the horrific deaths of three young children who drowned after falling into pit latrines at their primary schools – Michael Komape, a six-year-old boy who died in Limpopo in 2014 and Lumka Mthethwa and Viwe Jali, two five-year old girls who died in the Eastern Cape in 2018 in separate incidents.[761]

Unsurprisingly, census data confirms that individual poverty in South Africa closely tracks level of education. In 2015, individual poverty rates were 79.2% for people with no formal education, 35.6% for those who completed high school and only 8.4% for those with a higher education qualification.[762]

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[759] Pam Christie and Colin Collins, 'Bantu Education: Apartheid Ideology or Labour Reproduction?' (1982) 18 Comparative Education 59.

[760] Legal Resources Centre, *Fighting to Learn: A Legal Resource for Realising the Right to Education* (2015) 25.

[761] Veriava (n 100) 31. See also Athandiwe Saba, Bongekile Macupe and Raeesa Pather, 'Another child dies in a pit latrine' *Mail & Guardian* 16 March 2018.

[762] StatsSA *National Census* 2015.

6.1.2. The policy and legal framework

Education in South Africa is a shared responsibility of national and provincial governments,[763] with the national sphere responsible for policy-making and co-ordination and provincial governments for implementation. Both spheres are allocated education budgets.

Education was a key demand during the liberation struggle. The Freedom Charter proclaimed, under the heading 'the doors of learning and culture shall be opened', that '[e]ducation shall be free, compulsory, universal and equal for all children'.[764] In 1992, during the transition to democracy, the ANC's 'Ready to Govern' policy statement included principles to govern education policy to particularise the Freedom Charter's promise.[765] The education policy framework today is encapsulated in two main national policy documents: the *National Development Plan 2030* (NDP), the government's overarching policy statement; and *Action Plan 2019: Towards the Realisation of Schooling 2030*, the strategic plan of the national DBE. The NDP recognises that 'it is generally accepted that South Africa's education system needs far-reaching reforms'.[766] Both policy documents articulate objectives relating to the improvement of performance in literacy, mathematics and science. In relation to infrastructure, the NDP adopted as an objective to 'eradicate infrastructure backlogs and ensure that all schools meet minimum standards by 2016'[767] and that all schools should have 'high quality infrastructure' by 2030.[768]

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[763] Constitution, Schedule 4 Part A.

[764] *Freedom Charter* adopted by South African Congress Alliance, Kliptown 26 June 1955.

[765] Interview: Mary Metcalfe, former MEC: Education, Gauteng; former Director-General: Higher Education (Johannesburg, 21 March 2019). Metcalfe was one of the drafters of the education component of 'Ready to Govern'.

[766] National Planning Commission (n 1) 313.

[767] ibid 66.

[768] ibid 313.

The legal framework is undergirded by the Constitution. Section 29(1)(a) of the Constitution provides that '[e]veryone has the right to a basic education'. The government defines basic education as education up to the level of the General Education Certificate, which is the one-year reception class plus nine years of schooling up to grade 9.[769] The Schools Act adopts this as the compulsory period of basic education,[770] although the Constitutional Court has held that basic education includes grade 12 and matriculation.[771]

Importantly, the text of s 29(1)(a) does not make the right subject to the qualifications of 'progressive realisation' and the availability of resources, as with other socio-economic rights in the Constitution. In *Juma Musjid*, the Constitutional Court confirmed that basic education is 'immediately realisable' and not subject to these limitations.[772] It may only be limited in terms of a law of general application that passes the s 36 limitations test.[773] Another feature of s 29(1)(a) is that, unlike international and regional iterations, it does not provide for *free* basic education. This has left room for the legislature to permit public schools to charge fees.

For the first half of the decade considered here, South Africa was a signatory but not a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR).[774] ICESCR guarantees the right to education in art 13. Article 13(2)(a) provides that primary education 'shall be compulsory and available free to all' and art 13(2)(b) provides that secondary education 'shall be made generally available and accessible to all by every means appropriate, and

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[769] Department of Education *White Paper on Education and Training* (1995) [15].

[770] Schools Act, s 3(1).

[771] *Moko v Acting Principal of Malusi Secondary School* 2021 (3) SA 323 (CC) [31].

[772] *Governing Body, Juma Musjid Primary School v Essay NO* 2011 (8) BCLR 761 (CC) [37].

[773] ibid.

[774] International Covenant on Economic, Social and Cultural Rights (entered into force 3 January 1976) 993 UNTS 3.

in particular by the progressive introduction of free education'. On 12 January 2015, South Africa belatedly ratified ICESCR but included this declaration:

> The Government of the Republic of South Africa will give progressive effect to the right to education, as provided for in Article 13 (2) (a) and Article 14, within the framework of its National Education Policy and available resources.

This declaration seemingly represented an attempt to subject the state's obligations to 'progressive realisation' and 'available resources', at least on the international plane. I explore the role played by courts in interpreting the 'immediately realisable' character of s 29(1)(a) in this case study.

The first democratic government adopted framework legislation intended to transform the governance and performance of public schools, the South African Schools Act 84 of 1996 ('Schools Act'), two features of which are significant. The Schools Act established School Governing Bodies ('SGBs'), consisting of parents, community members and the principal, responsible for making certain policies and school governance.[775] Several cases discussed here were brought by SGBs. Further, the Schools Act was amended in 2005 to provide for the Minister to make regulations regarding funding and fees.[776] Funding is based on the ranking of public schools in five 'quintiles' based on local poverty levels, with quintile 1 the poorest and quintile 5 the wealthiest. Under the quintile system, government gives more funding to lower quintile schools, which can be used for non-personnel expenses, to compensate for their lower income from fees. In 2006, the DBE declared all quintile 1 and 2 schools to be strictly 'no-fee' schools. However, the funding received from the state is substantially less than the fees that fee-charging schools receive. Most of the schools involved in the case study are quintile 1 and 2 schools.

[775] Schools Act, s 16.

[776] Franklin and McLaren (n 743) 19–20.

Section 29(1)(a) of the Constitution and the Schools Act provide the legal foundation for the litigation in this case study. Against the backdrop of the policy and legal framework governing school education, the next section introduces the turn to litigation as a strategy.

6.1.3. Protagonists

A decade into democracy, the crisis in education drew increasing attention from civil society. EE, a national social movement, was formed in 2008. Its first campaign concerned school libraries but quickly refocused on issues of infrastructure and provisioning more broadly.[777] Public interest litigation centres began to focus on education rights litigation from around 2010, with LRC, CCL, SECTION27 and later EELC initiating strategic litigation. Although these organisations were all working on education, they took quite different approaches.

The LRC is the oldest, a national public interest law firm established in 1979 with offices in four parts of the country. Its Eastern Cape office based in Makhanda[778] conducted the education cases discussed here. The LRC operates in the traditional model of providing free legal services to poor clients (client-based litigation) although it also represents social movements. The CCL, which acted as institutional applicant in some of the cases brought by the LRC, was founded in 1998 at the University of Pretoria to conduct research and litigation on children's rights.[779] SECTION27, established in May 2010, is a public interest law centre concerned with the rights protected in s 27 of the Constitution – access to health care services, as well as the social determinants of health, including food, water, social security – and education.[780] Born out of the AIDS Law Project, which famously partnered with TAC, SECTION27 works closely with social movements and often

[777] Interview: Brad Brockman, former General Secretary of EE (Cape Town, 18 October 2018).

[778] Formerly Grahamstown.

[779] Brickhill (n 51) 26.

[780] ibid 34.

employs campaign litigation or movement lawyering. This is even more true of the final protagonist, the EELC. EELC was established in 2012, when several of the litigation streams were underway, as legal partner to the social movement, EE. EE had itself been founded in 2008 as a movement of learners ('Equalisers'), parents, community members and activists. EELC was established to engage in movement lawyering and community lawyering.[781]

The organisations collaborated in various ways, formally and informally. They pursued similar objectives through different approaches. I investigate how differences in organisational structure and approach may have influenced the approach to litigation (especially litigation decisions) and its impact.

6.1.4. Antagonists

The principal antagonists were the education authorities at national and provincial levels, in particular the national DBE and the provincial departments of education in the Eastern Cape ('ECDoE'), Limpopo ('LDoE') and KwaZulu-Natal ('KZNDoE'), as well as the national Minister, the provincial Members of Executive Council ('MECs') and Heads of Department ('HoDs'). However, even some government authorities were at odds. The Eastern Cape and Limpopo were both placed under administration by the national executive for failing to fulfil their constitutional obligations, including regarding education.[782]

I turn now to the six streams, beginning with *Mud Schools*. The streams involved multiple stages and overlap chronologically. I designate stages numerically, for example '*Mud Schools I*' and '*II*'.[783] This continuity reflects the fact that each case in a stream was brought by the same public

[781] Interview: Nurina Ally, former Head of EELC (Cape Town, 3 October 2018).

[782] Constitution, s 100.

[783] I define a new stage wherever the proceedings culminate in a substantive settlement, order or judgment.

interest law centre as part of a sequence, even if parties and case names differ. Appendix I provides a chronology of settlements, orders and judgments.

6.2. Mud Schools

6.2.1. Context and objectives

In 2004, President Mbeki promised, '[w]e shall ensure that there is no pupil learning under a tree, mud school or any dangerous conditions that expose pupils and teachers to the elements.'[784] EE reported that there were then approximately 572 mud schools in the Eastern Cape,[785] the worst affected province. Mud schools fall within the category of 'inappropriate structures', which also include schools made from asbestos or other unsafe materials. The first significant school infrastructure case became known as '*Mud Schools*'.[786] When it began in 2010, although the issue had received some media attention,[787] progress had been slow in replacing or rebuilding mud schools.

Mud Schools ran in two stages. In *Mud Schools I*, the LRC brought an application representing CCL and the parents of learners at seven schools against the national and provincial governments over their failure to provide the seven schools with adequate facilities.[788] The applicants' attorney, Cameron McConnachie, had worked as a teacher for seven years, including at a rural Eastern Cape

[784] President Thabo Mbeki, 'Address to Parliament' (21 May 2004) <https://www.gov.za/address-president-south-africa-thabo-mbeki-first-joint-sitting-third-democratic-parliament-cape-town> accessed 08 October 2021.

[785] Nika Soon-Shiong and others, 'Implementing Agents: The Middle Men in Charge of Building Schools' (Equal Education 2018) 7.

[786] *Centre for Child Law v Government of the Eastern Cape Province* (ECB) case no 504/10 ('*Mud Schools I*'). The LRC had earlier brought *Amasango* (n 682), concerning a single school for children living with disabilities.

[787] Interview: Cameron McConnachie, Regional Director: Makhanda, LRC (Makhanda, 19 September, 30 November and 21 December 2018); interview: Ann Skelton, former Director: Centre for Child Law, member of UN Committee on the Rights of the Child (Oxford, 11 July 2019).

[788] Cameron McConnachie and Chris McConnachie (n 737) 558.

school.[789] During his LLB, he wrote a mini-dissertation arguing that the right to a basic education required government to eradicate mud schools.[790] When he joined the LRC as a candidate attorney, the organisation took up the issue.[791] McConnachie and paralegal, Rufus Poswa, visited approximately 25 mud schools in Libode District. They asked teachers to describe their greatest challenges. The answers had one thing in common – infrastructure.[792] The LRC identified seven of the worst affected schools, which became applicants.

Generally, mud schools were built by local communities because of the apartheid government's neglect. This was true of all seven applicant schools in *Mud Schools I* –Nomandla, Tembeni, Madwaleni, Sidanda, Nkonkoni, Maphindela and Sompa, all senior primary schools in rural villages in Libode District. All but one were quintile 1 schools, the poorest category and therefore 'no-fee schools'. The schools consisted completely or partially of classrooms built by community members from mud and branches (or locally sourced wood), with no ceilings, and roofs that were made of thatch or corrugated iron.[793] Mrs Mtshazi, a teacher at Sompa Senior Primary School, explained:

> The mud structure could not accommodate everyone and … there would be three classes being taught in the same space and of course the learners would be distracted. …It was not easy maintaining concentration. Also, the classrooms did

[789] McConnachie (n 787).

[790] ibid.

[791] ibid.

[792] ibid.

[793] Public Service Accountability Monitor, 'Education Budget Brief 2018' (2018) 1.

> not have doors and this made being in the classroom in the winter months very uncomfortable.[794]

The schools were represented by 'infrastructure crisis committees' of parents and community members, formed for the litigation.[795] The CCL was first applicant, providing an institutional applicant acting in the public interest.

Although schools had written letters or sent deputations to the ECDoE, there had not been protests or other mobilisation as school communities, especially at rural schools, were isolated, out of the public eye.[796] When *Mud Schools* began, there were no binding laws on school infrastructure. This presented challenges framing the cause of action and exacerbated a lack of reliable data.

The objectives of *Mud Schools I* were to establish that the basic education right includes safe school structures; and, as a test case, to have seven particularly bad mud schools in the Eastern Cape fixed and provided with safe classrooms, furniture and water.[797] No relief was sought for similarly placed schools, expected to be tackled if the test case succeeded.[798] However, the settlement extended to all mud schools nationwide. *Mud Schools II* sought to build on the settlement and support its implementation by requiring government to publish a list of mud schools with plans for each. The underlying objective was to ensure that *all* mud schools were identified and eradicated, whether by building new school buildings, merger or closure.

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[794] Interview by LRC researchers with Mrs Mtshazi, Principal, Sompa Senior Primary School (Makhanda, 25 November 2015).

[795] Interview: Steven Budlender, advocate, Johannesburg Bar (Johannesburg, 26 September 2019).

[796] Mtshazi (n 794).

[797] McConnachie (n 787).

[798] ibid.

6.2.2. Mud Schools I

Mud Schools I was settled on 4 February 2011, shortly before the hearing. The DBE and provincial government committed to providing safe structures for the seven applicant schools but also to eradicate *all* mud schools across the country, allocating R8.2 billion ($US570 million) over four years and undertaking to provide a plan to achieve this. R6.36 billion ($US440 million) was specifically earmarked for the Eastern Cape. The DBE launched a new programme, the Accelerated Schools Infrastructure Development Initiative (ASIDI), to 'eradicate' mud schools and provide water, electricity and sanitation.

6.2.3. Mud Schools II

By January 2014, three years after the settlement, ASIDI was far behind schedule, with many schools still needing assistance and no clear plan. Many mud schools had not been included in the master list and many were unaware whether or when they were to receive new buildings.[799] The LRC was instructed by 63 new schools to bring *Mud Schools II*.[800] This case, too, produced a settlement that was made a court order, in which national and provincial government committed to releasing a list of all mud schools indicating the plan for each school.

6.3. Norms and Standards

6.3.1. Context and objectives

The second case, also EE's largest campaign to date, concerned regulations to set uniform minimum standards ('Norms and Standards') for public school infrastructure. Section 5A(1)(a) of the Schools Act provides that the Minister 'may, after consultation with the Minister of Finance

[799] Legal Resources Centre (n 760) 3.

[800] *Centre for Child Law v Government of the Eastern Cape Province* (ECB) case no 504/10 ('*Mud Schools II*').

and the Council of Education Ministers, by regulation prescribe minimum uniform norms and standards for school infrastructure'. Though couched in permissive language, EE argued that the Minister was *required* to make Norms and Standards given the government's constitutional obligation to provide basic education. The effect of the Norms and Standards would be to set a national minimum standard for public school infrastructure in regulations with the status of binding law, not mere policy. Although the Act gave the national Minister the power to make Norms and Standards, the obligations to implement them would fall primarily on provincial governments.

The litigation ran in two stages – compelling the Minister to promulgate Norms and Standards, and challenging their constitutionality. Each stage had different objectives. The first sought to compel the Minister to promulgate the Norms and Standards as binding regulations setting minimum standards for public school infrastructure.[801] The second sought, by way of constitutional challenge, to remedy defects in the Norms and Standards.[802] Ultimately, the objectives of *Norms and Standards* were to improve education infrastructure at public schools so as to improve the quality of education. For EE, there was a second level of objectives: to build the movement and to use litigation to drive social mobilisation and activism on education.[803] Another objective was to improve governance in education, especially in the two worst performing provinces, the Eastern Cape and Limpopo.[804] The long-term nature of the campaign and the fact that the ultimate material objectives – adequate school infrastructure – could not be realised in a short period were well understood by EE's student members, the 'equalisers'. EE's then General Secretary, Brad Brockman, recalls:

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[801] Brockman (n 777); McConnachie (n 787); interview: Geoff Budlender, advocate, Cape Bar (Oxford, 19 June 2019).

[802] Ally (n 781); Budlender (n 801).

[803] Brockman (n 777).

[804] ibid; McConnachie (n 787).

> Equalisers would say things like, 'We are not doing this for us. We are doing it for our brothers and sisters who are in primary school' or 'we are doing this for all other students that still need to go to school.'[805]

6.3.2. Norms and Standards I

In the first stage, EE employed various forms of advocacy and protest, including extensive letters, petitions, marches and other forms of protest action, securing promises from the Minister on which she later reneged.[806] During the same period, SECTION27 also attempted to secure attention for school infrastructure issues across Limpopo Province by submitting a detailed report to the Parliamentary Portfolio Committee on Basic Education and relevant Cabinet Ministers. They received no substantive response to the report.[807] EE eventually turned to litigation as a last resort, represented by the LRC. On 19 November 2012, with EE members preparing to hold a #FixOurSchools camp of 150 people outside the court,[808] the Minister conceded and the parties concluded a settlement agreement. The Minister agreed to provide the two applicant schools with sufficient infrastructure and to promulgate Norms and Standards.

6.3.3. Norms and Standards II

The second stage involved a constitutional challenge to the Norms and Standards by EE, now represented by the newly established EELC. When the Minister failed to publish the regulations by May 2013, a further round of litigation was launched to compel her to do so. The Minister then released a draft set of regulations for public comment. EE organised public hearings and received extensive comments from communities and organisations nationwide.[809] The Minister amended

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[805] Brockman (n 777).

[806] Brockman (n 777); Ally (n 781).

[807] Interview: Adila Hassim, advocate; former Director of Litigation: SECTION27 (Johannesburg, 1 October 2018).

[808] EE Annual Report (2012) 12.

[809] Brockman (n 777).

the initial draft in response to comments. On 29 November 2013, the Minister finally promulgated Norms and Standards.[810] However, concerned that they fell short of constitutional standards, EE brought a constitutional challenge, which was upheld in the Bhisho High Court on 19 July 2018.[811] On 29 October 2018, the Constitutional Court refused the Minister leave to appeal on the basis that there were no prospects of success, upholding the High Court judgment by default and bringing an end to the litigation.

6.4. Textbooks

6.4.1. Context and objectives

The third stream concerns textbooks in Limpopo, the second province in which the national government intervened on the basis that provincial government was failing. This set the scene for *Textbooks*, but it is necessary to begin earlier.

In 1948, the newly installed National Party government implemented the apartheid curriculum, the Christian National Education Policy, based on a philosophy of white supremacy that appealed to religious authority.[812] After the transition to democracy, government implemented major changes. In 1998, the first post-apartheid curriculum, 'Curriculum 2005', was introduced.[813] It was an outcomes-based curriculum underpinned by strong social goals. Minimalist on content, it focused on learning outcomes to be achieved by relating teaching to local contexts. However, it soon became apparent that this approach was failing because of poor levels of teacher content

[810] Regulations relating to Minimum Uniform Norms and Standards for Public School Infrastructure *Government Notice R 920,* 29 November 2013.

[811] *Equal Education v Minister of Basic Education* [2018] 3 All SA 705 (ECB) ('*Norms and Standards II*').

[812] Veriava (n 737) 322.

[813] ibid 323.

knowledge, especially in historically disadvantaged schools.[814] The curriculum was revised to place greater emphasis on content, first with the Revised National Curriculum Statement (RNCS) in 2002 and then the current Curriculum and Assessment Policy Statement (CAPS) in 2009. A key feature of CAPS was mitigating poor teacher content knowledge through textbooks.[815] CAPS was to be incrementally rolled out from 2012-2014, with new CAPS-aligned textbooks to go to specific grades each year.

On 5 December 2011, Limpopo Province was placed under administration by the national executive. Announcing the intervention, the Joint Ministerial Team identified the areas of health, education, public works and roads and transport as problem areas.[816] It highlighted the LDoE's failure to procure textbooks for the 2012 school year. Shortly after the intervention, the Task Team released a report referring to non-delivery of textbooks as a 'symptom of 'morass and decay' in the provincial department.[817] One of the first steps following the intervention was to cancel an 'unscrupulous tender award'[818] for the procurement of textbooks awarded to a private company, EduSolutions, in 2010.

In early 2012, acting on a report in the Sowetan newspaper,[819] SECTION27 investigated the failure to deliver textbooks in Limpopo. All the schools that it visited had not received textbooks.[820] The Limpopo textbooks litigation saw three High Court decisions and a judgment of the Supreme Court of Appeal (SCA). SECTION27 'naively' assumed that the litigation would be

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[814] ibid.

[815] ibid.

[816] 'Media Statement: Joint Ministerial Team on Limpopo Section 100 Intervention', (19 January 2012) <http://www.treasury.gov.za/comm_media/press/2012/2012011901.pdf> accessed 08 October 2021; ibid 325.

[817] Veriava (n 737) 325.

[818] *Section 27 v Minister of Education* 2013 (2) SA 40 (GNP) ('*Textbooks I*') [17].

[819] Hassim (n 807).

[820] Veriava (n 737) 326.

limited to a single case,[821] but it ultimately became serialised litigation. I refer to the High Court judgments as '*Textbooks I*', '*Textbooks II*'[822] and '*Textbooks III (HC)*'[823] and the SCA judgment as '*Textbooks III (SCA)*'.[824] *Textbooks I* and *Textbooks II* involved applications in the North Gauteng High Court brought by SECTION27 as an institutional applicant, and were decided by Kollapen J. *Textbooks III* was brought by Basic Education for All (BEFA), a community-based organisation formed after the first two rounds, and was decided by Tuchten J in the High Court ('*Textbooks III (HC)*') and went on appeal in *Textbooks III (SCA).*

Several individual schools initially agreed to bring the case, but shortly before it was launched they came under pressure from the LDoE. The schools received telephone calls from officials warning them not to participate.[825] SECTION27 decided to act as applicant and secured legal representation from the Centre for Applied Legal Studies (CALS).[826] Before SECTION27 got involved, there had been no mobilisation around textbooks.[827] SECTION27 wrote to the education authorities, drawing attention to the situation and, when government failed to meet its undertakings to remedy the problem, launched *Textbooks I*. Later, SECTION27 helped to establish BEFA, the applicant in *Textbooks III*.[828]

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[821] Hassim (n 807).

[822] Order, 12 October 2012, case number 24565/2012, North Gauteng High Court ('*Textbooks II*').

[823] *Basic Education for All v Minister of Basic Education* 2014 (4) SA 274 (GP) ('*Textbooks III (HC)*').

[824] *Minister of Basic Education v Basic Education for All* 2016 (4) SA 63 (SCA) ('*Textbooks III (SCA)*').

[825] Hassim (n 807).

[826] ibid.

[827] ibid.

[828] ibid.

SECTION27 had two main objectives: first, to secure all prescribed textbooks for all Limpopo public schools that had not received them ('every learner, every book'[829]); and secondly, to develop the law.[830] SECTION27's approach was 'obligation-centred', as it sought to establish that the substantive content of the right to a basic education includes textbooks and that government is constitutionally obliged to provide them; that these obligations are not subject to progressive realisation; and that education rights must be understood in the context of South African history and their role in socio-economic upliftment and equality.[831]

6.4.2. Textbooks I and *II*

In *Textbooks I*, Kollapen J held that the failure to provide textbooks in Limpopo violated the rights to education, equality and dignity, certain provisions of the Schools Act and s 195 of the Constitution, which sets out the basic values and principles governing public administration. The Court ordered the DBE to deliver textbooks to learners in grades R, 1, 2, 3 and 10 on an urgent basis between 31 May 2012 and 15 June 2012. It also ordered the DBE to develop a 'catch-up plan' for grade 10 learners. The order entitled the applicants to approach the court on the same papers for further relief. When the government failed to meet these commitments, the matter was re-enrolled before Kollapen J in *Textbooks II*. The Court made a new order extending the deadline to 12 October 2012.[832] There was no judgment.

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[829] ibid.

[830] Interview: Nikki Stein, advocate, former attorney, SECTION27 (Johannesburg, 2 April 2019); interview: Nthabiseng Pooe, advocate, former Researcher: SECTION27 (Johannesburg, 3 April 2019); Hassim (n 807); interview: Faranaaz Veriava, Head of Education: SECTION27 (Johannesburg, 28 March 2019).

[831] ibid.

[832] *Textbooks II* order (n 822).

6.4.3. Textbooks III

Textbooks III (HC) was brought as an urgent application in 2014 by BEFA, which replaced SECTION27 as applicant. Tuchten J granted an order declaring that the right in s 29(1)(a) includes the right of every learner at a public school to be provided with every prescribed textbook; declaring non-delivery a violation; noting that the government respondents had undertaken to deliver outstanding textbooks by dates in May and June 2014; and ordering the Minister and MEC to deliver an affidavit setting out their requests for funds for the 2015 academic year and particulars of the Limpopo textbook budget allocation; and granting costs.[833] However, he refused a structural interdict.

On appeal, the SCA in *Textbooks III (SCA)* upheld Tuchten J's finding of a rights violation, confirmed that s 29(1)(a) entitles every learner to every prescribed textbook and, upholding a cross-appeal, declared the DBE and LDoE had failed to comply with the order in *Textbooks II*. BEFA had abandoned its cross-appeal against Tuchten J's refusal of structural relief, which fell away.

6.5. Teachers

6.5.1. Context and objectives

The fourth stream concerns the appointment and payment of teachers in the Eastern Cape. Every year, in a process of 'post provisioning', provincial education departments declare the number of teacher posts and then allocate posts to individual schools.[834]

The Eastern Cape has faced a double-edged endemic problem relating to teacher placements. The province has experienced massive rural-urban migration since democracy, which has reduced enrolment figures in rural schools and put pressure on urban schools. The ECDoE

[833] *Textbooks III (HC)* [82].

[834] Employment of Educators Act 76 of 1998, s 5.

has faced resistance to its attempts to transfer teachers, which have been blocked by the South African Democratic Teachers Union (SADTU).[835] This left the province with approximately 3,000[836] to 4,000[837] vacant teacher posts in 2012, while it also had about 7,000 teachers in excess – that is, 'double-parked' at schools with sufficient teachers. Schools faced with unfilled vacancies were forced to use their own funds to pay teachers or ask community members to fund-raise for this purpose.[838] This stream of litigation concerned attempts to have vacant posts filled and teachers occupying such posts paid by government.

The objectives of the litigation were to secure the appointment of teachers to the approximately 3,000-4,000 vacant posts and to secure payment for teachers who had been employed by SGBs when government failed to fill vacant posts.[839] The ancillary objective, at a systemic level, was to secure compliance with the applicable legal process for the advertising, appointment and payment of teachers.

6.5.2. Teachers I

There were two High Court applications, '*Teachers I*' and '*Teachers II*'.[840] Both produced judgments, and more than one court order each along the way. In 2012, the LRC brought *Teachers I* on behalf of the CCL, six individual schools and an association of other SGBs. The schools had attempted unsuccessfully to secure the appointment of teachers to their vacant posts by writing numerous letters to the ECDoE. At schools in Bethelsdorp there had been protests over vacancies and

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[835] Veriava, Thom and Fish Hodgson (n 741) 251.

[836] *Teachers II* [9].

[837] McConnachie and Brener (n 738) 294.

[838] Interview: Sarah Sephton, former Regional Director: Makhanda, LRC (Makhanda, 28 September 2018).

[839] ibid.

[840] The LRC called the litigation 'Post Provisioning'.

schools had been temporarily closed.[841] In *Teachers I*, the High Court ordered the ECDoE to declare the province's teacher post establishment and fill *all* vacant posts with teachers temporarily, and then permanently. [842] Most of the order was made by agreement, following concessions by the ECDoE, but because some issues were in dispute and fully argued, the court delivered a judgment.[843]

Despite the order requiring all vacant posts to be filled, there was limited compliance in filling vacancies at the applicant schools and in the province generally. Two subsequent interlocutory applications were brought to enforce *Teachers I* in respect of 17 schools, resulting in further orders by agreement in March and June 2013, identifying specific posts to be filled.

6.5.3. Teachers II

Following largely unsuccessful attempts to enforce *Teachers I* beyond the individual school applicants, the LRC brought a second case, structured very differently in an attempt to identify and assist schools with vacancies and unpaid teachers.[844] *Teachers II* was an application in two parts brought on behalf of Linkside High School and 31 other schools. Part A sought relief for 32 schools – to have teachers appointed to vacant posts and to reimburse schools for the cost of having paid teachers to fill those posts in the preceding three years. Part B sought to certify an opt-in class action to secure equivalent relief for all similarly situated schools across the province. The High Court made an order by agreement granting the relief for the 32 applicant schools and certifying the class action on 20 March 2014.

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[841] Sephton (n 838).

[842] *Centre for Child Law v Minister of Basic Education* 2013 (3) SA 183 (ECG) ('*Teachers I*') [35].

[843] *Teachers I* [9].

[844] Budlender (n 795).

Part B was partly opposed. The ECDoE resisted a 'deeming' order sought by the applicants that would 'deem' teachers identified by SGBs to have been appointed by the ECDoE if it failed to act, and resisted the appointment of chartered accountants as 'claims administrators' to handle claims for unpaid salaries by schools opting into the class action. The Court handed down an order granting all the relief sought on 17 December 2014, including the deeming order and the claims administrators, and delivered judgment on 26 January 2015.[845]

6.6. Furniture

6.6.1. Context and objectives

Furniture had its genesis in *Mud Schools*, where part of the original relief sought for the seven schools was adequate furniture, and almost all the mud schools that the LRC visited had massive furniture shortages.[846] There were children sitting on floors or makeshift furniture made by turning over beer crates and putting a plank along the top for a chair; or five or six children were crammed into a desk made for two.[847] Teachers complained that children could not do writing exercises.[848] Although all seven schools in *Mud Schools* received furniture under the settlement, the LRC was aware that the problem was widespread and investigated further.

The LRC discovered that the ECDoE had conducted an audit of furniture needs in April/May 2011. The audit found that, out of 5,700 Eastern Cape schools, nearly 1,300 schools

[845] *Linkside v Minister of Basic Education* [2015] ZAECGHC 36 ('*Teachers II*').

[846] McConnachie (n 787).

[847] ibid.

[848] ibid.

lacked furniture, affecting 605,163 learners (over 50%) in the province.[849] The audit costed this need at R274.2 million (US$19.2 million).

The LRC's objectives in *Furniture* were to establish that the right to a basic education includes school furniture of an appropriate standard; obtain accurate information about provincial furniture needs; secure furniture for the applicant schools and all similarly placed learners; and, in the process, improve the system of furniture delivery.[850]

6.6.2. Furniture I

Furniture saw three phases, the first two resulting in orders by agreement and the third the only judgment. It began in August 2012, when the LRC launched an application on behalf of three individual schools and the CCL, seeking relief on behalf of the schools and all similarly situated schools in the Eastern Cape ('*Furniture I*'). The schools were represented by parents' committees, not SGBs, given the intimidation of school staff in *Mud Schools*.[851]

Following negotiations, a settlement agreement was concluded and made an order of court on 29 November 2012. The order directed government to complete a comprehensive audit of furniture shortages, by appointing a 'Furniture Task Team', publishing a circular to all schools informing them of the audit and inviting responses, and verification of furniture requests by visits to the schools, all with deadlines.[852] The order also provided that government would 'endeavour to ensure' that the furniture needs established through the audit would be delivered to schools by 30 June 2013.[853] The three applicant schools received furniture, but the audit was incomplete and

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[849] Disclosed by government in answering papers in *Save our Schools and Communities v President of the Republic of South Africa*, case no. 50/2012, Bhisho High Court.

[850] McConnachie (n 787).

[851] ibid.

[852] *Furniture III* [6].

[853] ibid [5].

'shoddy' – ending at schools beginning with 'M', and listing identical furniture needs for several very different schools.[854]

6.6.3. Furniture II

In August 2013, the LRC launched further proceedings based on non-compliance. Four further schools, represented by parent committees, were joined as applicants.[855] On 26 September 2013, a settlement was reached and an order made by agreement in *Furniture II*. This order provided for the appointment of an independent body, the Independent Development Trust, to conduct a fresh audit, and for delivery of furniture within 90 days to all affected schools.[856] Following further non-compliance, the LRC supplemented the papers and set the matter down for hearing in *Furniture III*.

6.6.4. Furniture III

In *Furniture III*,[857] Goosen J made an order declaring the respondents in breach of s 29(1)(a) of the Constitution 'by failing to provide adequate, age and grade appropriate furniture which will enable each child to have his or her own reading and writing space'. The court further declared the respondents in breach of the order in *Furniture I*; directed them to deliver to the parties and the court a copy of the completed audit of furniture needs and, within 90 days of delivering the audit, to ensure that all schools identified as having shortages in the audit receive furniture.[858]

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[854] McConnachie (n 787).

[855] *Furniture III* [7].

[856] *Furniture III* [8]-[9].

[857] *Madzodzo v Minister of Basic Education* 2014 (3) SA 441 (ECM) ('*Furniture III*').

[858] *Furniture III* [41].

6.7. Scholar Transport

6.7.1. Context and objectives

According to a 2013 study by Statistics South Africa, almost three quarters of South Africa's 14 million school-going children (72.9%) walked all the way to and from school.[859] In KZN, which had the highest number, more than two million primary and secondary school learners walked all the way to school in 2013.[860] Of this number, 210,000 learners walked for more than an hour in one direction; and 659,000 walked for between 30 minutes and an hour each way.[861] Some learners in KZN had to walk over 13 km one way to school, forcing them to wake up just after 3am to start the day.[862] Such long walks to reach school present risks to the safety of learners, and affect attendance and academic performance.[863] These effects are experienced overwhelmingly by poor, black learners in rural areas because under apartheid the government forcibly relocated many black South Africans to inaccessible areas with inadequate transport infrastructure.[864]

There have been two streams of litigation to secure scholar transport – by the LRC in the Eastern Cape ('*Scholar Transport (EC)*'); and later by EELC in KZN ('*Scholar Transport (KZN)*'), with SECTION27 as *amicus curiae*. The LRC litigation resulted in a reported judgment.[865] The EELC litigation secured an initial settlement, but is ongoing.

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[859] Statistics South Africa, 'General Household Survey 2013' (2014) 21.

[860] Solminic Joseph and Julian Carpenter, 'Scholar Transport' in Veriava, Thom and Fish Hodgson (n 741) 276.

[861] ibid

[862] ibid 277.

[863] ibid 278-9.

[864] ibid 286.

[865] *Tripartite Steering Committee v Minister of Basic Education* 2015 (5) SA 107 (ECG) ('*Scholar Transport (EC)*').

The objectives in both the Eastern Cape and KZN were essentially the same and included attaining clarity on the policy regarding who qualifies for scholar transport in each province, securing transport for learners at the applicant schools and ultimately securing transport for all other similarly affected learners in each province. The LRC litigation in the Eastern Cape also sought a judicial finding that the right to education includes scholar transport and to identify, amidst some confusion, the policy governing scholar transport in the province.[866] The litigation by the EELC, which was part of EE's #LongWalktoSchool campaign, also sought to secure a *national* policy on scholar transport and to build EE's organising capacity in KZN.[867]

6.7.2. Scholar Transport (EC)

Scholar Transport (EC) was brought by a group of Eastern Cape SGBs. The first applicant, the Tripartite Steering Committee, was a committee of three SGBs from Mdantsane; the second was Masivuyisiwe Secondary School in Alice. The Tripartite Steering Committee SGBs litigated in their own interest but also in the interests of other Eastern Cape schools and in the public interest.[868] The applicants sought relief on two levels. First, they sought orders compelling the national and provincial departments of education to provide free scholar transport to identified learners at their four schools.[869] Secondly, they sought systemic relief requiring the respondents to publish the criteria used to determine which learners qualify for scholar transport; publish a record/database of those who qualify; allow comment on that record/database by learners who wish to be added to it; provide scholar transport to all learners who qualify and provide reasons to any who do not;

[866] Sephton (n 838).

[867] Ally (n 781).

[868] *Scholar Transport (EC)* [4]-[5].

[869] ibid [9].

maintain and update the database in future, keeping it open to the public; and file periodic reports on steps taken.

Plasket J granted some, but not all, of the relief sought in a judgment handed down on 25 June 2015, which was not appealed. He held that scholar transport is part of the content of the right to a basic education, approving an obiter dictum by Kollapen J in *Textbooks I*.[870] The court also identified a particular provincial policy as 'the framework within which scholar transport as an aspect of s 29 of the Constitution is applied'.[871] The policy states that learners 'who have to walk a distance of 10km or more to and from school (5km one way)' qualify for free scholar transport.[872]

Regarding the applicants, Plasket J distinguished between the Masivuyisiwe Secondary School and the three Mdantsane schools. Masivuyisiwe had initially been promised scholar transport for 26 learners by the ECDoE, which was not provided. Plasket J ordered it to implement its decision and provide transport.[873] The position was different for the Mdantsane schools, whose request on behalf of 146 learners had been refused on the basis of 'insufficient funds'.[874] In relation to these schools, the court reviewed and set aside the refusal and remitted their requests to the Acting HoD of the ECDoE to reconsider within a month.[875] The court emphasised that in reconsidering the applications the HoD must apply the scholar transport policy flexibly and as a means of meeting the department's obligations under s 29(1)(a) of the Constitution.[876] Finally,

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[870] ibid [17]-[19].

[871] ibid [20], referring to Determination of Policy Relating to Scholar Transport, Provincial Notice No. 67, *Provincial Gazette* 1010 of 12 May 2003.

[872] ibid [22].

[873] ibid [34].

[874] ibid [35].

[875] ibid [48]-[58].

[876] ibid [57].

while it declined to grant the relief relating to publishing the applicable policy and database, the court ordered the respondents to report to court on their 'progress in adopting a new scholar transport policy and how and when it either has been or will be published'.[877]

6.7.3. Scholar Transport (KZN)

Consistent with its approach to litigation as a last resort, EE first launched a campaign for scholar transport in KZN in 2014 (#LongWalkToSchool). It was directed at both provincial government (demanding transport for learners in Nquthu) and the national department (demanding a national policy). The campaign actions included writing letters to the Department and meetings with officials, culminating in a march to the KZNDoE's offices on 9 April 2015 by 500 EE members. Siphilisa Isizwe, an organisation based in Manguzi, KZN represented by SECTION27, was admitted as *amicus curiae*, supporting EELC's application and highlighting the needs of learners with disabilities.

On 7 November 2017, the High Court made an order by agreement among the parties, directing the KZN departments of education and transport to provide scholar transport to the 12 applicant schools.[878] The order also required the KZNDoE to report to court periodically.

6.8. Cumulative impact

I turn to identifying the legal, material and political impact across the six streams of litigation. Although some emerging literature has discussed the jurisprudence and a couple of publications have gone further to investigate material impact, this part of the Chapter makes a unique contribution in providing a comprehensive account, much of it based on original empirical research, of all three forms of impact across this body of litigation.

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[877] ibid [67(d)].

[878] Order of High Court, KwaZulu-Natal Division, Pietermaritzburg, case number 3662/17P, 7 November 2017.

6.8.1. Legal impact

The most significant legal impacts were articulating the content of the right to a basic education, clarifying the state's duties, and important remedial innovations.

6.8.1.1. Content of right

The six streams established that the substantive content of the right includes safe and adequate school infrastructure,[879] teachers (and non-teaching staff, including administration, security and maintenance),[880] textbooks,[881] furniture[882] and scholar transport.[883] In addition to confirming the right's high-level content, the litigation contributed to developing the detailed content for each input – in judgments, regulations and policies.

In relation to school infrastructure, the Norms and Standards promulgated pursuant to *Norms and Standards I* prescribe minimum standards for, among other things, accessibility for people with disabilities,[884] school sizes,[885] classroom size,[886] electricity,[887] water,[888] sanitation,[889]

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[879] *Norms and Standards II* [176].

[880] *Teachers I* [16], [31]; *Teachers II* [2].

[881] *Textbooks I* [25]; *Textbooks III (SCA)* [41].

[882] *Furniture II* [20]-[21].

[883] *Scholar Transport (EC)* [18]; *Teachers I* [1] (obiter); not decided, but conceded by the state in *Scholar Transport (KZN)*: Answering Affidavit [14.6]-[14.10].

[884] Reg 6.

[885] Reg 8.

[886] Reg 9.

[887] Reg 10.

[888] Reg 11.

[889] Reg 12.

libraries,[890] science laboratories,[891] sport and recreation facilities,[892] communication facilities,[893] and perimeter security and school safety.[894] They also set timeframes for compliance – periods of three, seven or 10 years from the date of publication, or by the end of 2030, for different aspects.[895] The three-year and seven-year periods have already passed, so government is obliged, in principle, to have met these targets. The 10-year deadline fast approaches in 2023.

6.8.1.2. Duties

The six streams also developed the state's duties under s 29(1)(a) in three important respects – actual provision, immediate realisation and universality.

The courts in all six streams confirmed that the right imposes a justiciable positive duty on the state (principally provincial education departments) to actually provide these 'inputs'.[896] This is in contrast to the approach to other socio-economic rights, including health,[897] housing[898] and water,[899] where the state's principal obligation is to develop a reasonable plan to progressively fulfil the right,[900] and the courts have generally shied away from ordering direct provision.[901] In the case

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[890] Reg 13.

[891] Reg 14.

[892] Reg 15.

[893] Reg 16.

[894] Reg 17.

[895] Reg 4(1)(b).

[896] *Textbooks I* [25]; *Furniture* [20]; *Teachers I* [32]-[33]; *Scholar Transport (EC)* [19].

[897] *Soobramoney* (n 593).

[898] *Grootboom* (n 408).

[899] *Mazibuko* (n 154) [51]-[60].

[900] Constitution, ss 26(2) and 27(2).

[901] Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (n 2); Langford and others (n 2); David Landau, 'South African Social Rights Jurisprudence and the Global Canon: A Revisionist View' in Rosalind

study litigation, the courts coupled direct provision with structural remedies because they recognised a duty to provide. I return to remedies below.

At the beginning of the case study decade, the Constitutional Court had held that the right is 'immediately realisable', subject neither to progressive realisation nor resource availability,[902] but the implications of this were untested. This sits in tension with South Africa's 2015 declaration, under the ICESCR, purporting to subject the right to progressive realisation and available resources, at least on the international plane. The first non-binding 'guidelines' on school infrastructure in *Norms and Standards* attempted the same. Despite this, five streams[903] – *Norms and Standards*,[904] *Textbooks*,[905] *Teachers*,[906] *Furniture*[907] and *Scholar Transport*[908] – applied and refined 'immediately realisable'.

As the right is immediately realisable, any failure to fulfil it is a limitation – unlike other socio-economic rights subject to progressive realisation. However, this does not mean that courts will order immediate relief. Two constitutional devices offer flexibility – limitations and remedial powers. If the delay is authorised in a law of general application (such as legislation or regulations), the state bears the obligation to justify the limitation in terms of s 36 of the Constitution, as it attempted to do in *Norms and Standards II*.[909] If the limitation is not justified, courts still enjoy

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Dixon and Theunis Roux (eds), *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Local and International Influence* (CUP 2018) 406.

[902] *Juma Musjid* (n 772) [37].

[903] All except *Mud Schools*, which produced no judgment. However, the order made by settlement is consistent with the principle.

[904] *Norms and Standards II* [180].

[905] *Textbooks I* [21]; *Textbooks III (HC)* [42]-[43]; *Textbooks III (SCA)* [36].

[906] *Teachers I* [1].

[907] *Furniture III* [15];

[908] *Scholar Transport (EC)* [16]-[19].

[909] *Norms and Standards II* [185]-[86].

remedial flexibility – as demonstrated in all the cases – to craft remedies that require the state to plan and provision over time. However, courts in all the cases emphasised the particular urgency of education provisioning.

The specific approach to urgency – both in hearing cases on an urgent basis and granting relief embodying urgency – is an important implication of the 'immediately realisable' principle. The approach emerging from the six streams entails that education provisioning is inherently urgent,[910] and courts must consider relevant features of the school calendar, such as the start of the school year,[911] examinations and, more broadly, that a child's progress through schooling does not stand still, but continues with or without resources.

Regarding infrastructure, the binding character of the Norms and Standards enables actors to hold government accountable. They also enable national government to hold provinces, which must report on implementation, accountable.[912] Initially, the required provincial annual plans were not published, but EELC secured them through access to information requests.[913] The Norms and Standards also provide for mediation and arbitration of disputes.[914] This does not preclude litigation, but may provide a viable alternative dispute resolution mechanism. The Norms and Standards were strengthened by *Norms and Standards II*, which struck down seven regulations, reading in additional words to remedy some constitutional defects. The effect of its order was to stipulate timeframes for the elimination of unsafe structures and other hazards; remove the condition that had made implementation subject to the resources and co-operation of other

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[910] *Textbooks I* [20].

[911] *Textbooks III (SCA)* [52].

[912] Metcalfe (n 765).

[913] Ally (n 781).

[914] Reg 20(2).

government entities; bring schools already planned but not in existence at date of promulgation within the Norms and Standards; and require provincial reports to be published.

Although designed to ensure delivery, the Norms and Standards may be double-edged. First, they may preclude the direct reliance on the constitutional right seen in the other five streams. In recent litigation, government has invoked them as a defence, because they prescribe time periods and processes for delivery.[915] Secondly, they risk being used as a ceiling rather than a floor. For example, they refer to schools with 'no sanitation', arguably overlooking schools with pit toilets, which are the greater numerical need (see *Table 6.2*).

In addition to immediate realisation, the streams required *universal* realisation - the principle that education is an 'individual right' requiring realisation for every learner.[916] Despite state opposition, this principle was firmly established in *Textbooks III (SCA).*[917] The SCA emphasised that the DBE had itself set the standard of a textbook for each learner in its policy.[918] In other streams, universality is implicit, but still present. The *Mud Schools* settlement was premised on 'eradicating' mud schools.[919] *Furniture III* ordered the state to provide a space for 'each child' to read and write,[920] and *Norms and Standards II* rejected the Minister's argument for a discretion to 'prioritise' certain schools.[921] Across streams, courts took into account the number of learners lacking each input and formulated orders designed to ensure that *all* received it.

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915 Eg., *School Governing Body, Makangwane Secondary School v MEC: Department of Education, Limpopo*, Case No. 3158/2018 (LDP), unreported 1 February 2019.

916 Hassim (n 807); Veriava (n 830), Stein (n 830); Pooe (n 830).

917 *Textbooks III (SCA)* [41]-[42], [52], approving *Textbooks III (HC)* [82].

918 *Textbooks III (SCA)* [42].

919 *Mud Schools I* settlement agreement.

920 *Furniture III* [41].

921 *Norms and Standards II* [192].

The partial exception is *Scholar Transport*. *Scholar Transport (EC)* held that the right applies only 'where scholars' access to schools is hindered by distance and an inability to afford the costs of transport'.[922] Amidst confusion over several draft policies, *Scholar Transport (EC)* confirmed the policy governing scholar transport in the Eastern Cape,[923] which states that learners who have to walk 10km or more (5km one way) qualify.[924] In *Scholar Transport (KZN)*, confusion about which policy applies in KZN arose. EE's Scholar Transport campaign and the associated *Scholar Transport (KZN)* litigation appears to have contributed to a National Learner Transport Policy, published in 2015.[925] However, it refers simply to 'needy' learners who 'walk long distances', without concretising criteria. EE submitted detailed comments,[926] but the national policy has not been amended and the position in KZN remains unclear.

6.8.1.3. Remedies

The six streams deployed innovative remedies, coupling orders for direct provision with increasingly complex structural interdicts. The structural interdicts generally involved fact-finding, reporting and enforcement components. The readiness of the courts to grant structural interdicts stands in contrast to the reticence of the Constitutional Court in its early socio-economic rights decisions.[927]

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[922] *Scholar Transport (EC)* [19].

[923] ibid [20].

[924] 'Determination of Policy Relating to Scholar Transport' Provincial Notice No. 67, Provincial Gazette 1010 of 12 May 2003.

[925] 'National Learner Transport Policy', Government Notice No. 997, Government Gazette 39314 of 23 October 2015.

[926] 'National Learner Transport Policy a step in the right direction – But not far enough', Equal Education, 25 January 2016.

[927] Roach and Budlender (n 264).

A particular innovation was the use of various fact-finding mechanisms to investigate backlogs. These included the order requiring the government to publish lists of mud schools and plans in *Mud Schools II*; the department-run and later independent audits in *Furniture I*, *II* and *III*; the appointment of a claims administrator in *Teachers II*; and the appointment of the Verification Team in *Textbooks*.[928] Courts across the six streams ordered government to report on progress and plans. These reports also provided important sources of data.

The orders included novel enforcement components, especially in *Teachers*. *Teachers II* was the first ever class action to be certified and succeed on the merits under the new class action rules.[929] *Teachers II* made two further orders that broke new ground. The first was an order 'deeming' teachers recommended by SGBs and occupying vacant posts to have been appointed by the ECDoE if it failed to fill posts. Roberson AJ acknowledged that this involved the court assuming an executive function, concluding that teacher appointments 'should not be left to the designated functionary'.[930] The second was the appointment of auditors as 'claims administrators' to process the claims of schools that opted into the class action, a role akin to a special master. Although special masters, common in the US, had been foreshadowed,[931] they had not been employed in South Africa.[932] Finally, at the stage of enforcement, *Teachers* saw another innovation, when the LRC had the Minister's official vehicle attached to secure payment of R29 million ($US2 million) to the applicant schools. It was paid within a couple of days.[933]

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[928] The Verification Team was appointed, not by court order, but by agreement among the parties. *Textbooks III (SCA)* endorsed its findings.

[929] James Rooney, 'Class Actions and Public Interest Standing in South Africa: Practical and Participatory Perspectives' (2017) 33 SAJHR 406.

[930] *Teachers II* [26].

[931] *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality* 2015 (2) SA 413 (SCA) [35].

[932] Appointment of special masters subsequently approved in *Mwelase* (n 148), citing *Teachers II* at fn 80.

[933] Sephton (n 838).

Overall, the six streams produced significant legal impact in respect of the education right, the state's duties and remedies.

6.8.2. Material impact

The cumulative material impact of the six streams includes deliverables provided and funds budgeted and spent, which are considerable. I track this impact to the end of the 2019/20 financial year, preceding the COVID-19 pandemic. This impact was possible only because of the courts' approach to the right and the state's duties, illustrating the relationship between legal and material impact.

The six streams materially contributed to the construction of approximately 250 new schools to replace mud schools; hundreds of thousands of textbooks; approximately 400,000 items of school furniture; the appointment of over 500 teachers to vacant posts at 139 schools, and payment of over R129 million (US$9 million) in unpaid teacher salaries; the provision of scholar transport to almost 4,000 learners at 4 Eastern Cape and 12 KZN schools. These services were provided to over a million learners, predominantly poor black learners attending the country's poorest schools in quintiles 1-3. Expenditure on these services runs into billions of Rands. *Mud Schools* alone saw a commitment to spend R8.2 billion (US$570 million) and actual expenditure approaching R10 billion (US$700 million). Expenditure on each of the other five streams is in the hundreds of millions of Rands (tens of millions US$), with Norms and Standards likely to require expenditure in the tens of billions of Rands (billions of US$) over the next two decades.

My claim is not that the litigation was the sole cause, but that the litigation *at least* materially contributed – significantly accelerating and increasing delivery or expenditure.[934] Where I do not expressly make a stronger causal claim, I impute material contribution to the litigation. In addition to provision and budgeting/expenditure, I make findings concerning the deeper impact (if any) on

[934] See Chapter 3.3.

educational outcomes and quality; employment, business opportunities, corruption and wastage; bureaucratic changes; data; and litigation funding and resources.

6.8.2.1. Provision of inputs

Save for the partial overlap of *Mud Schools* and *Norms and Standards*, each of the streams related to a different 'input' – mud schools, other infrastructure, textbooks, teachers (appointments and salary payment), furniture and scholar transport. Here, I provide findings on how many of each input were provided and how many learners benefited.

a) Mud schools

First, I consider how many mud schools were rebuilt, merged or closed. The seven applicant schools were rebuilt 1-2 years after the *Mud Schools I* settlement, initially with temporary structures and then permanent buildings.[935] Though the LRC originally sought relief only for seven schools, the settlement covered all mud schools nationwide. Based on media reports and contemporaneous interviews, media and education experts have credited *Mud Schools I* with the establishment of ASIDI.[936] The DBE's 2010/2011 Annual Report links *Mud Schools I* and the settlement to the new conditional grant of over R8bn to 'eradicate mud schools' and the commitment to provide immediate relief to the seven applicant schools.[937] After the settlement, eradicating mud schools nationally became the LRC's objective.[938]

[935] McConnachie (n 787).

[936] Tshangana (n 737) 15.

[937] DBE Annual Report (2010/2011) 26.

[938] McConnachie (n 787).

Following settlement, government provided at least three different national figures for mud schools remaining, ranging from 395 in 2011[939], to 496 in 2012[940] and 2013,[941] and 510 in late 2013.[942] The LRC[943] and ASIDI[944] have been operating on the basis of the latest, highest figure – 510, with 395 reportedly the number of strictly 'mud' schools. ASIDI used 510 as the baseline until 2015,[945] then revised it to 483.[946] In understanding this baseline, I note that before ASIDI was launched in 2011, government had already been building schools. In 2009/10, pre-ASIDI, the DBE reported construction of 17 new schools.[947] However, these were largely entirely new schools, not replacements of mud schools. The 2004 estimate of 570 mud schools had not been significantly reduced when ASIDI began in 2011.

In 2011, the Development Bank of Southern Africa (DBSA) and implementing agents were appointed, and they appointed contractors under ASIDI.[948] *Mud Schools II* later required government to publish a list and plans. More information became available regarding the number of schools, government's plans (to build, merge or close) and status updates. Government established a dedicated ASIDI website[949] and began to release a quarterly newsletter, *The ASIDI Brief*. There are still discrepancies, but there is sufficient consistency to form a picture of the

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939 DBE's 2012-13 Annual Performance Plan 61; DBE Strategic Plan (2011-14), cited in Abdoll and others (n 744) 51.

940 29 May 2012, DBE provincial breakdown of the list of schools in presentation to Parliament, cited in Abdoll and others (n 744) 54.

941 National Planning Commission (n 1) 312.

942 Abdoll and others (n 744) 55. The first 'ASIDI Brief' Vol 1 (February 2013) also uses 510.

943 McConnachie (n 787).

944 'ASIDI Brief' Vol 1 (February 2013) 2.

945 DBE presentation to Select Committee on Appropriations 2 June 2015.

946 ASIDI website <www.education.gov.za/Programmes/ASIDI.aspx> accessed 8 June 2019.

947 DBE Annual Report (2009/10) 55.

948 Nika Soon-Shiong and others (n 785) 8.

949 ASIDI website (n 946).

number of schools re-built, closed and remaining. *Table 6.1* sets out the number of new schools built according to three government sources: National Treasury, DBE and ASIDI.

Table 6.1: Number of mud schools constructed

Year	National Treasury – per year	DBE – per year	ASIDI – cumulative running total	
	Mud Schools I (settlement 4 February 2011)			
2011/12	-	-	-	
2012/13	17	17	Feb 2013	10
			April 2013	17
2013/14	36	40	October 2013	40
	Mud Schools II (settlement 21 August 2014)			
2014/15	57	57	June 2014	65
			Oct 2014	79
			Feb 2015	91
2015/16	51	51	April 2015	106
			Aug 2015	116
			Nov 2015	129
			Feb 2016	135
2016/17	16	16	June 2016	162
2017/18	12	12 fully + 10 'sectionally completed'	Jan 2018	184
2018/19	50	21	April 2018	202
2019/20	59	26	March 2019	214
			June 2019	220
			March 2020	241
Total	**298**	**240**		**241**

(Sources: National Treasury Estimates of Annual Expenditure; DBE Annual Reports; ASIDI website; ASIDI Briefs)

Progress was initially slow. In 2014, economists predicted completion in 2023/24.[950] From 2014 it accelerated in the context of growing public attention and *Mud Schools II*, which settled that year, requiring the publication of lists and plans. *Mud Schools II* likely contributed to the acceleration, alongside changes to implementing agents and contractors and completion of delayed

[950] Abdoll and others (n 744) 69.

projects targeted for earlier years.[951] In late 2013, the DBE claimed that it was opening 'one school a week' in the Eastern Cape,[952] though this was disputed.[953] From 2014-2016, despite consistently missing targets, 148 schools were completed.[954] Progress slowed again from 2017-2019, with only 28 schools completed from 2016/17-2017/18. Treasury attributed 'low achievement' in part to finalising mergers and closures during this period.[955]

Treasury and DBE report 298 and 240 schools built respectively.[956] ASIDI reports 241, 200 of them in the Eastern Cape. DBE and ASIDI figures match and are more reliable. These sources, though not aligning perfectly, confirm that by 2019/20 approximately 250 mud schools had been rebuilt against the baseline of 510 schools.

The baseline was also reduced by closures and mergers. In 2014, the DBE earmarked 211 schools with low enrolments (below 135 learners) for closure or merger.[957] However, it decided not to close 61 because they were remote and instead to rebuild them, [958] leaving 150 to be closed or merged. [959] This ought to have reduced the baseline to 360 mud schools. In March 2018, the DBE reported that 367 construction projects were being implemented nationally under ASIDI, 298 of them in the Eastern Cape,[960] which would include most remaining mud schools (as well as

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[951] See Nika Soon-Shiong and others (n 785).

[952] 'ASIDI Brief' Vol 3 (August 2013) 6.

[953] Africa Check, 'Is South Africa's Education Department really delivering a new school a week?' *Daily Maverick* 9 October 2013, finding many schools being 'handed over' had already been open or were not complete.

[954] DBE Data, Table 1.

[955] National Treasury *Estimates of National Expenditure* (2019) 260.

[956] EE reported 196 schools built in the Eastern Cape from 2009-2017: Nika Soon-Shiong and others (n 785) 8.

[957] DBE Annual Report 2014/15 101.

[958] National Treasury *Budget 2018, National Estimates of Expenditure – Basic Education* 2.

[959] ASIDI 'Master List' identifies 31 schools as merged or closed: ASIDI website (n 946).

[960] DBE presentation to Parliamentary Portfolio Committee on Education 6 March 2018, <https://pmg.org.za/committee-meeting/25904/> accessed 11 April 2020.

other projects). In late 2018, the LRC estimated that, excluding closures/mergers, there were only approximately 35 mud schools among the baseline figure of 510 where construction was not at least underway at the end of 2018.[961] In 2019, the DBSA reported only 18 schools still awaiting attention.[962]

The overall picture reflects stop-start progress from 2011-2014, the period initially promised. While different sources vary, they reflect that approximately half of the baseline 510 schools have been rebuilt, with approximately 100 under construction, 150 closed or merged, and a relatively small number of 18-35 still requiring construction to commence or an alternative plan. While government *was* building new schools before *Mud Schools* (17 in 2009/10), it had neglected replacing mud schools. From the baseline of 510 mud schools, approximately 400 (over 75%) have either been rebuilt or closed/merged; and most of the remainder are under construction.

DBSA reported that the 111 schools completed from 2013-2017 benefited 43,632 learners who enrolled at those schools during that five-year period.[963] Extrapolating, approximately 241 schools completed should benefit approximately 100,000 current learners and hundreds of thousands more into the future. These learners are almost all black children attending schools falling in quintile 1, predominantly in rural Eastern Cape. In addition, thousands of teachers will teach under improved conditions. The DBE reported that almost all principals of mud schools were women.[964]

b) Infrastructure: water, electricity, sanitation

One of the challenges in assessing material impact is, as former Gauteng MEC for Education and national Director-General of Higher Education, Mary Metcalfe, explained, that '[t]here is no

[961] McConnachie (n 787).

[962] ASIDI website (n 946).

[963] ibid.

[964] 'ASIDI Brief' Vol 3 (August 2013) 2.

reliable information for [school] infrastructure.' While this was a challenge with *Mud Schools*, at least ASIDI is a ring-fenced programme with specific budget allocations and monitoring. Metcalfe added that while there are thousands of toilets that need to be replaced, 'none of the officials know which those are because there is no proper monitoring.'[965] In her view, the most reliable data was the National Education Infrastructure Management Systems (NEIMS) survey, though it, too, has deficiencies. EE has developed internal research capacity to monitor infrastructure delivery, budgeting and spending, which complemented my own research.[966]

The Norms and Standards were promulgated on 29 November 2013. The first deadline passed on 29 November 2016, by which no schools should have been without water, electricity or sanitation. By 29 November 2020 – the second deadline – adequate sanitation was required. *Table 6.2* confirms that the 2016 targets were missed for schools with *no* water, electricity and sanitation, though government reports that these minimum water and sanitation targets were met by 2018 and 2020 respectively. The 2020 deadline required schools with pit latrines only to receive adequate sanitation. In 2020, NEIMS reported 3,164 remain.

[965] Metcalfe (n 765).

[966] Interview: Sibabalwe Gcilitshana, EE's Policy and Training Parliamentary Officer, and Hopolong Selebalo, EE's Co-Head of Research (Cape Town and Johannesburg, 15 November 2018).

Table 6.2: Public schools nationally with no water, no electricity, no sanitation and with pit latrines

Schools with:	2011	2013	2016	2018	2020
No Water	2,401	1,772	171	0[967]	0
No Electricity	3,544	2,925	569	269	117
No Sanitation	913	822	68	37	0
Pit Latrines	11,450	10,915	9,203	8,702	3,164

(Source: National Education Infrastructure Management Systems (NEIMS) Reports)

Table 6.2 shows slow progress between 2011-2013, then acceleration from 2013, in addressing water, electricity, schools with no sanitation and schools with pit toilets. This suggests a correlation with the Norms and Standards promulgated in 2013. However, the progress reflected in the NEIMS reports cloaks the fact that government consistently missed annual targets.

Though focused on mud schools, ASIDI had also been established in 2011 and included these aspects of infrastructure for a subset of schools. ASIDI committed to providing water to 1,145 schools, electricity to 932 schools and sanitation to 939 schools. By end 2019/20, the DBE reported providing 1,012 schools with water, 372 with electricity and 877 with sanitation under ASIDI (all included in the NEIMS figures above).[968] *Mud Schools* sought water and electricity, but not sanitation, for the applicant schools. While *Mud Schools* may have contributed to the inclusion

[967] In a 2018 written response to a parliamentary question, DBE stated 49 schools were without water.

[968] ASIDI website (n 946).

of these services in ASIDI, this is unclear. It appears that litigation provided impetus for ASIDI's launch in 2011 but its scope was at least partly pre-determined by government. ASIDI gathered pace from 2013 when the Norms and Standards imposed deadlines for these types of infrastructure. The increased speed of delivery in relation to these aspects of infrastructure is likely attributable to a combination of ASIDI (following *Mud Schools*) and the promulgation of the Norms and Standards (following *Norms and Standards I*). In addition, late in this period SECTION27 launched *Komape* on sanitation,[969] which I excluded. Throughout this time, EE and EELC were also campaigning, engaging government and releasing research updates that undoubtedly contributed to delivery.

c) Textbooks

Textbook delivery following *Textbooks* is best understood as a percentage of *every* Limpopo learner in every applicable grade receiving *every* prescribed textbook (100%) – the objective of the protagonists and the court-endorsed standard. One of the main issues in dispute between the parties was determining the shortfall at different points. Although textbook delivery is an ongoing need for schools, the crucial period was the 3-year phase from 2012-2014 when the curriculum shift happened. *Textbooks* sought to achieve 100% delivery of new textbooks to all the grades covered by the change, initially in 2012 and then 2013 and 2014. At the start of *Textbooks 1* in 2012, every school visited by SECTION27 in Limpopo had not received textbooks. It appears that no new textbooks had been delivered – a 0% baseline.

After *Textbooks 1*, the DBE claimed that 99% of textbooks had been delivered in Limpopo. SECTION27 disputed this, based on reports from schools, and the parties agreed to the appointment of an independent person, Mary Metcalfe, to verify delivery.[970] The Metcalfe

[969] *Komape* (n 682).

[970] Metcalfe (n 765).

Report, based on a sample of 100 schools, found delivery levels of 15% in June 2012 (not 99% as claimed), increasing to 48% on 3 July and 78% on 11 July 2012.

Unreliable government data and inability to communicate with all Limpopo schools made the monitoring exercise 'one of the hardest things [SECTION27 had] ever done'.[971] Eventually, SECTION27 ended the efforts to implement the *Textbooks I* and *Textbooks II* orders. Even within the SECTION27 team, there are different views about the level of compliance achieved.[972] Although they could not say that there was '100% compliance', they were satisfied that schools in the grades affected by the curriculum change in 2012 had received textbooks.[973]

By 2014 the same issue arose in relation to the next set of grades switching curriculum, prompting *Textbooks III*. By then, BEFA was the institutional applicant, a local movement with 50 members.[974] BEFA provided a 'warning system and an alarm' to monitor new issues of non-delivery.[975] The extent of non-delivery in 2014 was again disputed. When *Textbooks III (HC)* was brought in March 2014, on the DBE's version, 39 schools had not received the 22,045 textbooks due to them.[976] In the SCA appeal, BEFA adduced new evidence to show that, following visits to 29 of the schools, 18 had still not received all their textbooks.[977] Further delivery did follow the SCA judgment. SECTION27 was not able to conduct any broad appraisal of the extent of further delivery, but whenever a school reported non-delivery, the LDoE reportedly followed up.[978]

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[971] Hassim (n 807).

[972] ibid; Veriava (n 830); Stein (n 830); Pooe (n 830).

[973] Hassim (n 807).

[974] *Textbooks III (HC)* [2].

[975] Hassim (n 807).

[976] *Textbooks III (SCA)* [17].

[977] ibid.

[978] Hassim (n 807).

Overall, the level of delivery in 2014 appears eventually to have been high, possibly close to 100%. SECTION27 did not bring any further enforcement proceedings, although one member of the team felt that it might have been beneficial to bring a 'compliance case' to identify and address any remaining delivery failures.[979]

d) Teachers – appointments and salary payment

The main objectives of *Teachers* were to have teachers appointed to all vacant posts in the Eastern Cape and to reimburse schools that had been forced to pay teachers whom government ought to have paid. Following the order in *Teachers I* requiring *all* vacant posts to be filled, the LRC switched approach, identifying individual vacancies at specific schools. The number of teachers appointed and the sums of money reimbursed to schools must be discerned from court judgments and papers. The only study to have considered the question found that *Teachers II* secured the permanent appointment of 145 teachers and payment of R109 million (US$7.6 million) to 123 schools over the two phases,[980] but this figure omits appointments following *Teachers I* and Part A of *Teachers II*. *Table 6.3* below reflects the number of teachers appointed and funds paid to schools.

[979] Stein (n 830).

[980] OSJI (n 57) 60.

Table 6.3: Teachers appointed and amounts paid to schools for teacher salaries

Case	Teachers appointed	Money paid to schools for teacher salaries
Teachers I (following judgment and order of 7 March 2013)	35 teachers at 17 schools[981]	Salaries paid to teachers who had previously gone unpaid at 17 schools (amount unknown)
(Following further order)	105 teachers at same 17 schools	
Teachers II (Part A)	Approximately 180 teachers at 32 schools[982]	R28 million to 32 schools
Teachers II (Part B)	259 teachers[983] at 90 schools	R81,445,339.99 to 90 schools
Total	**579 teachers at 139 schools**	**+R110 million to 139 schools**

Table 6.3 above represents the *direct* impact of *Teachers I* and *II* – appointments and payments under court orders. According to available data, 579 teachers were identified for appointment at 139 schools in terms of court orders, and approximately R110 million (US$7.7 million) was paid as reimbursement for teacher salaries, to 139 schools.

This quantification does not include indirect effects. *Teachers I* ordered the ECDoE to fill *all* vacant posts. The LRC considered that there had been little compliance with this order beyond declaring the post establishment.[984] This is a striking example of the difference between legal

[981] Annexure "CCL1" to Replying Affidavit in enforcement proceedings.

[982] Applicants' Heads of Argument in *Teachers II* (Part A); *Teachers II* [3]-[9].

[983] *Teachers II* [9].

[984] Sephton (n 838).

impact (order to fill *all* vacant posts) and material impact (limited appointments at 17 schools following enforcement proceedings). It may be that some additional appointments at non-applicant schools were made, but it is difficult to know how many were filled under this generalised order, or under the shadow of the litigation.

The LRC has not been able to track teacher appointments, beyond its individual client schools, but attorney Sarah Sephton acknowledged that the litigation failed to resolve the macro problems of thousands of teachers in excess and vacancies.[985] The litigation did seem to prompt the ECDoE to claim in 2014 that it was 'slowly turning around the history of the non- and late implementation of the yearly post provisioning declarations for educators, which leads to the non-filling of substantive vacant posts and non-movement of additional educators'.[986] However, in 2016, after *Teachers II*, the ECDoE still reported a vacancy rate of 33% of which 60% had been vacant for over 12 months.[987]

A further comment is necessary regarding the profile of the beneficiaries, especially the 90 schools that opted into the *Teachers II* class action. Joining the class action required schools to respond to notice published in print media and on radio, and to furnish documents to prove claims. The poorest schools – with the worst staff shortages, administrative capacity and connectivity – were often unable to join the class action or did not have paperwork to support claims.[988] The overall beneficiary profile, therefore, was not the very poorest schools in the province.

Measured against the baseline of approximately 3,000 vacant posts, the litigation achieved limited success, below 20%. However, this figure represents approximately 579 classes of children

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[985] ibid.

[986] ECDoE Annual Report (2014) 17.

[987] ECDoE Annual Report (2016) 61.

[988] Sephton (n 838); Sarah Sephton 'Post Provisioning' in Veriava, Thom and Fish Hodgson (n 741) 257.

who have teachers after the litigation – approximately 20,000 learners.[989] The beneficiaries also include the hundreds of teachers who were appointed and paid, and the affected school communities (some of whom had been paying teachers themselves).

e) Furniture

Following the *Furniture I* order, in January 2013, the ECDoE delivered furniture to the three applicant schools. However, it failed to produce the required audit. *Furniture II* also yielded an incomplete and unreliable audit, and it was only after *Furniture III* that a reasonably workable audit was produced and furniture delivery accelerated. A 2017 study found that the litigation resulted in the delivery of over 200,000 items of furniture from 2013-2016.[990]

According to available data, the figures are now significantly higher, exceeding 400,000 items of furniture to over 1,000 schools.[991] There has been further delivery, and the process is ongoing. This is a moving target, as the ECDoE explained in a report to court:

> The audited requirements change each time new furniture is delivered or existing furniture is damaged, is stolen or gets worn out or broken during use at the various schools',[992] and learner numbers also change.[993]

f) Scholar transport

Scholar Transport (EC) secured transport for approximately 172 learners at four schools. In KZN, transport was secured for approximately 3,500 learners at 15 schools.[994] This represents fewer than 1% of the approximately 370,382 learners that the KZNDoE estimated to need it in the

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[989] Based on modest estimate of 33 learners per class. Many classes in Eastern Cape are far larger, even exceeding 100 learners, but small classes are also found in rural schools.

[990] OSJI (n 57) 60. The ECDoE Annual Report (2016/17) 12 reported over 200,000 items of furniture delivered.

[991] Affidavit of HoD, Themba Kojana, reporting to court, 28 June 2017.

[992] Affidavit of Acting HoD, Sizakele Netshilaphala, reporting to court, 31 October 2016 [26].

[993] ibid [27].

[994] EE newsletter by General Secretary Noncedo Madubedube, April 2019, referred to approximately 3,000 learners.

province.[995] The proportion of learners who benefited *directly* in both cases was very low. In the longer term, securing provincial scholar transport policies and an umbrella national policy may contribute to scaling up to meet the overall need. EE's campaign in KZN continues.

6.8.2.2. Budgeting and expenditure

Here, I set out my findings regarding budgeting and expenditure on the provisioning above.

g) School infrastructure

Until 2011, education infrastructure was funded by provinces spending from their general 'equitable share' allocations from national government. This changed significantly so that provinces now use very little of their equitable share but instead use a combination of two conditional national grants, which may only be used for education infrastructure - the School Infrastructure Backlogs Grant (SIBG), which funds the nationally administered ASIDI programme, and the Education Infrastructure Grant (EIG), which allocates national funds to provinces. The EIG is a schedule 4 grant, which is an allocation to a province to supplement the funding of programmes already funded by provincial budgets. The SIBG is a schedule 5 grant, which is an allocation for a special purpose of national interest, without the need for additional funds from the provincial budget. The SIBG was created to fund ASIDI. Delivery under the Norms and Standards is funded by provincial budgets, supplemented by the national EIG. In practice, the EIG contributes most of the provincial spend.

As SECTION27 budget analyst Daniel McLaren explained, infrastructure funding 'has fundamentally changed from provinces using their block grant funding to a National Treasury-disbursed conditional grant situation, overseen by the National Department but still spent by the

[995] KZNDoE 'First Respondent's Report Pursuant to Order of Court Dated 7th November 2017', 29 March 2018 [8.2], revising earlier estimate of 90,000 learners.

provinces.'[996] This has seen National Treasury and the national DBE exerting much greater control and according much greater priority to education infrastructure. McLaren commented that 'it is hard to think of another way of throwing money at the issue'.[997]

The SIBG was created in the 2011/12 Mid Term Expenditure Framework (MTEF) commencing 1 April 2011, following the *Mud Schools I* settlement on 4 February 2011. This was a dedicated new national grant 'to eradicate and replace inappropriate school infrastructure, such as mud school buildings and other unsafe structures' and 'to ensure that all schools have access to basic services, such as water, sanitation and electricity.'[998] Although National Treasury documents discussing the SIBG do not mention *Mud Schools*, allocations aligned with the settlement for the three-year MTEF from 2011-2014.[999] The budget documents describing ASIDI began, after 2013, to include references to the Norms and Standards. *Figure 6.1* tracks allocations to the SIBG in the mid-year adjusted budget and what was spent.

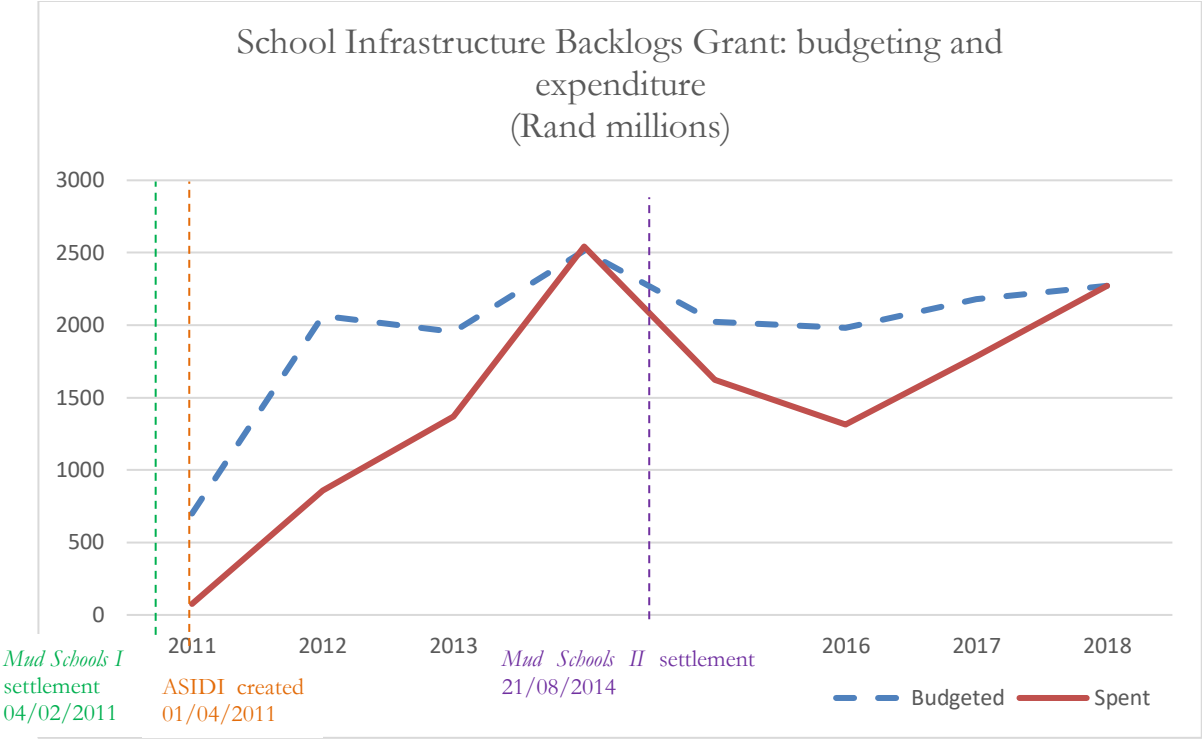
[996] Interview: Daniel McLaren, Researcher and Budget Analyst: SECTION27 (Johannesburg, 2 April 2019).

[997] ibid.

[998] National Treasury: Estimates of National Expenditure (2014).

[999] Division of Revenue Act 2011; Minister of Finance, '2011 Budget Speech', 23 February 2011, 18.

Figure 6.1: SIBG budgeting and expenditure



Initially, spending was woeful. In ASIDI's launch year 2011/12, it was under 11%, increasing to 41.6% in 2012/13.[1000] Clearly, the R8.2bn could not be spent in three years and Treasury adjusted projected expenditure, blaming contractors for delays.[1001] In 2013/14, the end date was extended to 2015/16.[1002] In 2014/15, Cabinet approved deductions to the SIBG to 'align this allocation more closely with the ability of the sector to deliver school infrastructure' and further extended the deadline to 2016/17.[1003]

As *Figure 6.1* reveals, spending picked up following the first two years. Ultimately, from 2011/12 to 2017/18, government budgeted approximately R13.5bn and spent just over R9.5bn,

[1000] Abdoll and others (n 744) 68.

[1001] Estimates of National Expenditure - Vote 14: Basic Education (2015) 3.

[1002] Estimates of National Expenditure - Vote 14: Basic Education (2013) 21.

[1003] Estimates of National Expenditure - Vote 14: Basic Education (2014) 6.

representing 71% of the adjusted budget allocations. Spending under ASIDI has already exceeded the R8.2bn (US$570 million) promised in the settlement, but a portion relates to water, electricity and sanitation. However, government has taken more than twice as long as initially planned to spend those funds and ASIDI is unfinished.

The SIBG has continued to be rolled over, despite National Treasury indicating that it intended to move the dedicated SIBG to the general EIG.[1004] However, Treasury stated that, by that point, it expects to have replaced 510 inappropriate structure schools.[1005] Government intends to draw a line underneath ASIDI when complete and then redirect funds towards school infrastructure generally, to give effect to the Norms and Standards.

Figure 6.2 below sets out budgeting and spending on the EIG. The EIG was created in 2011, when the education portion was moved from a general grant for provincial infrastructure to create an education-specific grant.[1006] In 2010/2011, R3,162,800,000 was spent on school infrastructure.[1007] The EIG is now the main source of funding to implement the Norms and Standards. In 2011, Treasury identified school infrastructure as 'the spending focus' for programme 4 of the Education budget for the medium-term expenditure framework.[1008]

[1004] Estimates of National Expenditure - Vote 14: Basic Education (2017) 248.

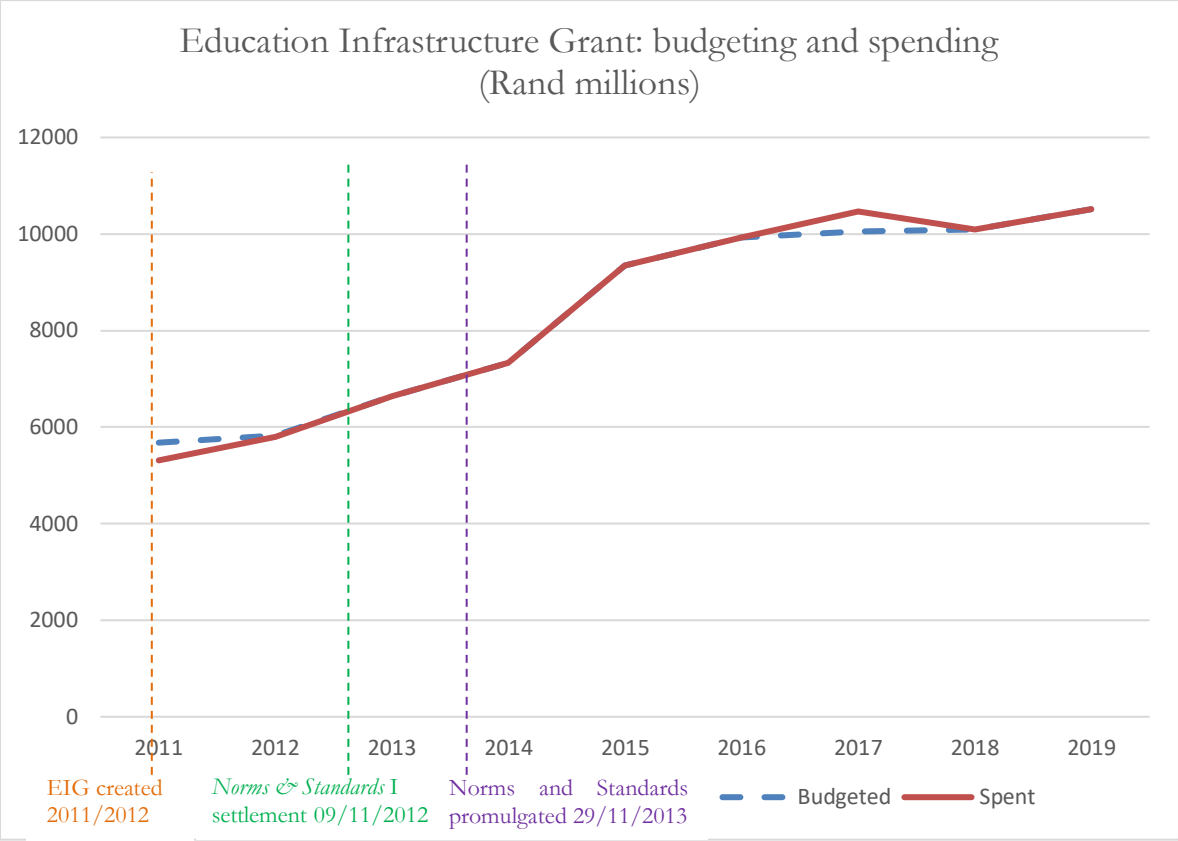
[1005] ibid.

[1006] Estimates of National Expenditure (2011) 298.

[1007] Treasury Estimates of National Expenditure (2012) 315.

[1008] Treasury Estimates of National Expenditure (2011) 306.

Figure 6.2: EIG budgeting and expenditure



The EIG saw double-digit percentage growth for several years after it was created in 2011, alongside the simultaneous growth in the SIBG. Education infrastructure was a high budget priority over this period. The EIG did not experience the chronic underspending that characterised the SIBG in its early years, probably because it was not entirely new (replacing the earlier general grant for provincial infrastructure) and because its spend was spread across all provinces, while the SIBG was mainly spent in under-performing provinces, especially the Eastern Cape. This period of growth and prioritisation followed the *Mud Schools* settlement and coincided with the litigation of *Norms and Standards I* (settled in late 2012), the promulgation of the Norms and Standards (late 2013), lasting more or less up to the decision in *Norms and Standards II* (19 July 2018). Treasury documents over this period explain spending as complying with the Norms and Standards. It is therefore reasonable to conclude that the litigation, especially *Norms and Standards I*, materially contributed to increased spending from 2012-2017.

However, in 2018 the DBE announced a budget cut of R7.3bn ($US510 million) budget from medium-term national education infrastructure allocations.[1009] This included a cut of R3.569 billion ($US250 million) from the SIBG, allocating just under R4 billion ($US280 million) for the three years from 2018/19-2020/21. Over this period, the total education allocation in the budget was reduced by 0.9% in 2016/17, 0.2% in 2017/18, 1.9% in 2018/19 and 1.6% in 2019/20. The infrastructure cuts were much higher. Treasury acknowledged that the DBE expected this to delay outstanding projects.[1010]

This budget cut has been attributed to general fiscal constraints but also to the need to allocate funds to fee-free higher education, following the successful #FeesMustFall campaign.[1011] This allocation to fee-free higher education came at the expense of basic education, including school infrastructure.[1012] This was an unintended consequence of that campaign. In 2017/18 and 2018/19, higher education received nominal budget increases of over 19%, while basic education received nominal increases of 6.55% and 6.66%,[1013] and education infrastructure allocations were cut.

Notwithstanding budget cuts, *Mud Schools* and *Norms and Standards* generated massive material impact in respect of budgeting and expenditure, with over R13 billion (US$910 million) budgeted and R9.5 billion (US$660 million) spent under ASIDI on mud schools and water, electricity and sanitation. Over the same period, the newly created EIG spent over R75bn. The claim is not that none of this would have happened without the litigation, but that the litigation –

[1009] DBE presentation to Parliamentary Portfolio Committee on Education, 6 March 2018 <https://pmg.org.za/committee-meeting/25904/> accessed 10 November 2019.

[1010] Treasury Estimates of National Expenditure (2018) 265.

[1011] Public Service Accountability Monitor (n 793) 6.

[1012] ibid.

[1013] Treasury Estimates of Annual Expenditure (2018) and (2019).

alongside EE's campaign, the efforts of bureaucrats and other factors – materially contributed to the level, urgency and priority of the budgeting and spending on education infrastructure, including the establishment of the conditional SIBG primarily to fund mud school eradication and the education-specific EIG to replace a general provincial infrastructure grant.

h) Furniture

The 2011 audit conducted before *Furniture* costed provincial furniture requirements at R274.2 million. In April 2013, immediately after *Furniture I*, the ECDoE had budgeted only R30 million. In October 2013, Provincial Planning and Treasury authorised a conditional grant of R60 million. In both 2014/15 and 2015/16, Provincial Treasury allocated amounts just over R100 million, but capacity to spend was low. A 2017 study found that the litigation resulted in the allocation of R300 million (US$21 million) from 2013-2016.[1014] By 2016/17[1015] and 2017/18,[1016] when manufacturing and procurement capacity had increased, the province reported spending a further R230.5 million and R184.6 million, respectively. Spending since the litigation begun stands at over R700 million (US$46.1 million).

i) Scholar Transport

Scholar Transport (EC), which has so far only secured transport for 172 learners at four schools, has not yet significantly increased budgeting or expenditure. EE reported that *Scholar Transport (KZN)* initially compelled provincial government to allocate an additional R30 million (US$2.1 million) to scholar transport.[1017] The HoD's report under the court order stated that R206 million was allocated in 2018/19 was, but that the projected expenditure was R297 300 000 and that, in addition to this shortfall of R91 million, a further amount of R53 million had been overspent the

[1014] ECDoE Annual Report (2016/17) 12; OSJI (n 57) 60.

[1015] ECDoE Annual Report (2016/17) 235.

[1016] ECDoE Annual Report (2017/18) 218.

[1017] EE newsletter (n 994).

previous year. This put the total shortfall at R 144 300 000.[1018] The HoD added that it was necessary to secure additional funding to meet this need, noting that EE had offered to assist in lobbying for a conditional grant.[1019] The DBE and National Treasury have committed to developing a conditional grant for scholar transport – like the SIBG that funded ASIDI – but have yet to do so. If it is created, tracking spending will be easier.

6.8.2.3. Educational outcomes/quality

A key question is the extent to which securing education 'inputs' contributes to improving 'outputs' – quality of education and educational outcomes. The first aspect is whether infrastructure and other inputs provided are used effectively. However, there is a deeper question about the effect that inputs, optimally used, have on educational outcomes.

The state accepts the inputs-outcomes link for infrastructure, the Minister referring to 'improvement in the quality of teaching and learning through… the provision of adequate, quality infrastructure'.[1020] There is no data available to track across beneficiary schools. Two of the applicant schools in *Mud Schools*, Sompa and Nkonkoni, reported that academic performance in the affected classes improved after mud structures were replaced with proper classrooms,[1021] but this provides little basis to extrapolate.

Leading educationist, Brahm Fleisch, commented that the evidence linking textbooks to outcomes is contested and there is only a 'loose link' in South Africa because the textbooks are set

[1018] KZNDoE (n 995 [8.2]-[8.5].

[1019] ibid [9.7].

[1020] Annual Report (2017/2018) 9.

[1021] Interview by LRC researchers with Mr Khutshwa, Parent, Nonkoni Senior Primary School (Makhanda, 25 November 2015); Mtshazi (n 794).

at the curriculum level and not at the actual reading level of learners.[1022] In his view, the importance of securing textbooks has been 'wildly overstated'.[1023] Fleisch highlights underlying problems of literacy that diminish the impact of textbooks, indicating a need for other measures to target literacy.

6.8.2.4. Employment, business, wastage and corruption

Indirect material effects include employment creation and business opportunities, as well as wastage and corruption. Available data is incomplete but illustrative.

The massive infrastructure projects described above created significant business and employment opportunities. *Mud Schools* contributed to creating business for small and medium enterprises and generating employment for construction under ASIDI. DBSA reported in 2012 that ASIDI had created 4,500 jobs and that the target was to ensure that 35% of beneficiaries are women, 30% youth and 2% people with disabilities.[1024] In 2019, it claimed that 1,267 small, medium and micro-enterprises and subcontractors benefited and 12,061 jobs were created.[1025] *Norms and Standards* similarly contributed to employment and business creation, on an even larger scale nationwide, though difficult to quantify and ongoing.

Furniture contributed to creating business for furniture suppliers in the Eastern Cape and creating employment, both in the audit process and furniture delivery, although difficult to quantify. In terms of business, conditions were attached to the procurement processes requiring the inclusion of small and medium scale furniture producers and stipulating a minimum percentage

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[1022] Interview: Brahm Fleisch, Professor of Education Policy, University of Witwatersrand; former Director of Education, Gauteng (Johannesburg, 2 April 2019).

[1023] ibid.

[1024] 'ASIDI Brief' Vol 3 (August 2013) 4.

[1025] ASIDI website (n 946), accessed 20 March 2019.

of orders that must come from the Eastern Cape.[1026] The ECDoE appointed 154 unemployed graduates to conduct the audit.[1027]

However, there was also significant wastage. For example, following *Mud Schools*, some replacement schools were 'white elephants' – too large for the needs of local communities and too isolated for learners further away.[1028] The procurement processes around the construction programme also generated disputes, some litigious. This slowed progress and consumed state resources. In 2017/18, the Auditor General reported almost R155 million in 'irregular expenditure' on ASIDI, mainly the result of supply chain processes not being followed and implementing agents being unlawfully appointed,[1029] illustrating the risk of corruption from 'accelerated' procurement processes. The majority of the ASIDI projects have been late and over-budget.

6.8.2.5. Bureaucratic changes

The litigation across several streams contributed to changes in the operation of education bureaucracies at national and provincial level. The clearest instances concern infrastructure, textbooks and furniture.

After the initial slow progress of ASIDI and infrastructure delivery under the SIBG and the EIG respectively, there was significant investment in the capacity of provinces to manage and plan, with dedicated infrastructure directorates established within provincial education departments.[1030] This increased capacity for infrastructure roll-out.

[1026] See, eg, affidavit of HoD reporting to court, 31 January 2017 [61], referring to 35% minimum Eastern Cape procurement.

[1027] Affidavit of Acting HoD, Sizakele Netshilaphala, reporting to court, 30 August 2016 [15].

[1028] McConnachie (n 787).

[1029] DBE Annual Report (2017/18) 183, 186.

[1030] McLaren (n 996).

Over the course of *Textbooks*, the LDoE systems for textbook procurement and delivery also improved. This was one reason why SECTION27 lawyers decided not to litigate after *Textbooks III*, because 'there are now better systems in place to report shortages and a more responsive person on the other side who will correct that situation.'[1031] However, Metcalfe had recommended broader reforms that the DBE did not adopt.[1032]

After *Furniture III*, HoD the ECDoE developed a set of 'Draft Guidelines for the Management of Furniture in ECDoE Schools'.[1033] These are now being implemented. In addition, the ECDoE now engages informally with the LRC, reporting periodically on furniture delivery and addressing any school complaints received by the LRC.[1034] The ECDoE has also implemented a live online system for recording furniture orders and delivery, significantly improving its data and delivery.[1035]

6.8.2.6. Data

Across several streams, the litigation contributed to improving the information available on need and delivery through a combination of organisations' own efforts, government reporting under court supervision and improved government data systems, though there were also unsuccessful attempts to deploy technology to assist.

In 2010, Treasury identified the 'lack of credible information' as 'a major constraint in the provision of school infrastructure [that] made it difficult to monitor progress and plan'.[1036] By the

[1031] Stein (n 830).

[1032] Metcalfe (n 765).

[1033] Affidavit of HoD, Themba Kojana, reporting to court, 28 June 2017 [82].

[1034] McConnachie (n 787).

[1035] ibid.

[1036] National Treasury Estimates of Annual Expenditure (2010) 261.

end of the decade, this was much improved. An ASIDI website and newsletter were launched following *Mud Schools*. *Mud Schools II* specifically compelled the ECDoE to address gaps and problems in its original list of mud schools. Regarding infrastructure more broadly, after EELC initially had to press for their release, all provinces have now also begun to publish annual infrastructure delivery reports required under the Norms and Standards, though their quality is uneven.[1037] After EE proposed that the DBE develop a template, it did so but the provinces have not employed it.

Furniture contributed to better data on Eastern Cape furniture needs, but not without hiccups. The court-ordered audit was flawed, but improved as implementation proceeded. In its independent monitoring attempts, working with the Center for Economic and Social Rights (CESR), the LRC attempted to deploy two apps for use by schools in reporting furniture needs. The first app, 'Juggle', was piloted with approximately 80 principals, but there was little to no uptake due to lack of cellular data or network coverage, and glitches with the app.[1038] The LRC attempted using WhatsApp groups of school representatives, which failed to gain traction.[1039] For the CESR and LRC, '[a]n important lesson learned from this pilot exercise was the need for critical reflection when estimating the organizational capacity that is necessary to ensure the sustainability of a new tech-based approach.'[1040] The LRC reverted to traditional methods, especially visiting rural schools.[1041] The combination of the LRC's communication with its client schools, gradual improvements in furniture audits under court supervision and improvement in the ECDoE's

[1037] Ally (n 781).

[1038] Allison Corkery, 'OPERA in Practice: Strengthening Implementation of Strategic Litigation in South Africa' (CESR and LRC 2017) 10.

[1039] ibid.

[1040] ibid.

[1041] McConnachie (n 787).

systems, including a new 'live' online system, updated weekly, produced more transparent and accurate data on furniture needs in the province.[1042]

In *Textbooks*, the Metcalfe Verification Report and SECTION27's own investigations secured clearer data on the extent of non-delivery. SECTION27 developed a prototype smart phone app, which it attempted to use to monitor textbook delivery at client schools, but this did not work for similar reasons to the LRC's technology-driven efforts in *Furniture*.[1043] *Scholar Transport (KZN)* contributed, mainly through court-ordered reporting coupled with EE and EELC's investigations, to securing better data on the provincial need, which the KZNDoE revised during the litigation, and to setting that need as the basis on which the department needs to budget.

6.8.2.7. Litigation funding and resources

Following early successes, particularly *Mud Schools I* and *Textbooks I*, institutional donors became increasingly supportive of education provisioning work.[1044] SECTION27 was able to appoint an additional staff member, purchase a vehicle to support monitoring in Limpopo, and generally allocate more resources to education;[1045] the LRC appointed an education researcher;[1046] and EE consolidated research capacity to track implementation.[1047] Most significantly, EELC was launched amidst enthusiastic donor support.[1048] By the end of the decade, the litigation organisations secured grant funding for this work from the following principal sources:

[1042] ibid.

[1043] Stein (n 830).

[1044] McConnachie (n 787); Ally (n 781); Veriava (n 830); Skelton (n 787); Sephton (n 838); Hassim (n 807).

[1045] Hassim (n 807).

[1046] Sephton (n 838).

[1047] Gcilitshana (n 966).

[1048] Ally (n 781).

Table 6.4: Education litigation funding

LRC[1049]	ELMA Foundation, Open Society Foundations (OSF), Ford Foundation, Claude Leon Foundation
CCL[1050]	ELMA Foundation, OSF, Claude Leon Foundation, Sigrid Rausing Trust, World Children's Prize, DG Murray Trust, Save the Children, Raith Foundation, Constitutionalism Fund
SECTION27[1051]	Claude Leon Foundation, Medico, Anonymous Dutch donor, Jannie Mouton Foundation, Mary Oppenheimer and Daughters Foundation, Foundation for Human Rights, Legal Aid South Africa, Swedish International Development Agency, OSF[1052]
EELC[1053]	Ford Foundation, Cameron Schreier Foundation, Claude Leon Foundation, Sigrid Rausing Trust, OSF

For the LRC, CCL and SECTION27, the funding was largely education-specific. For EELC, which focuses on education, it was 'core' funding. Several donors supported more than one of the organisations. Most of the donors are philanthropic institutions, both international and South African, and generally private, except state funding provided by LASA for one SECTION27 case.

There is no indication that the work was 'donor-driven'. Rather, institutional donors responded favourably to early successes. Chris Stone, then President of OSF – which funded all four organisations – attributed OSF's strong support to three main reasons: 'enthusiasm for the energy, creativity, dynamism of the organisations'; the importance of the right to education in

[1049] Email from Cameron McConnachie (Regional Director, LRC) to author (11 November 2020).

[1050] Email from Ann Skelton (former Director, CCL) to author (30 November 2020).

[1051] Email from Faranaaz Veriava (Programme Head: Education, SECTION27) to author (30 November 2020).

[1052] OSF provided core funding.

[1053] Email from Robyn Beere (Deputy Director, EELC) to author (8 December 2020), identifying donors from 2015-2020.

South Africa and the potential for litigation, alongside other strategies, to make a meaningful contribution to it; and a more general commitment to strengthening socio-economic rights.[1054] He emphasised that South African education rights litigation has 'lessons to teach beyond South Africa'.[1055]

6.8.3. Political impact

The litigation's political impact – alongside other strategies and developments – has seen a shifting of national discourse, in which education rights and specifically school infrastructure have gained prominence. In the process, government priorities have shifted. The litigation also contributed to movement-building, community mobilisation and strengthening civil society collaboration.

6.8.3.1. Public discourse, media attention

Since *Mud Schools* began in 2010, education provisioning litigation gained increasing public prominence. The standout streams for public attention were *Textbooks* and *Norms and Standards*, reflecting the choice of campaign-based and movement lawyering models.

Although the LRC used a client-based model and did not prioritise media, *Mud Schools* was widely reported on radio and in print media, especially in the Eastern Cape.[1056] Tshangana identified 31 print media reports on mud schools from 2004 to May 2012, most (21) published in 2009-2011 during the litigation. Media attention grew when EE began campaigning on the issue, alongside the LRC's litigation.[1057] Media attention played a key role in prompting national

[1054] Interview: Chris Stone, former President: OSF, 30 November 2020, Oxford.

[1055] ibid.

[1056] Tshangana (n 737) 1.

[1057] ibid 5.

government to take control of the response, facilitating settlement as national government wished to avoid a precedent.[1058]

Textbooks secured enormous public attention. It was reported on consistently on radio and in the print media as 'the Limpopo textbook saga'.[1059] Hassim observed that the issue resonated so powerfully with the public because it cut across class and because it shocked people for 'this government and this ruling party with the Freedom Charter to not provide books to the poorest learners in the poorest province'.[1060] She also suggested that the Metcalfe Report helped capture public attention.[1061] This political impact can be attributed to SECTION27's media campaign. Hassim reports that 'it really became almost personal and we thought a lot and strategised daily, we networked, we called on others to speak on the issue and we wrote about it ourselves'.[1062] *Norms and Standards* similarly received substantial media attention, peaking when EE engaged in marches or other movement actions.[1063]

Teachers and *Scholar Transport (EC)* stand in contrast to these highly publicised cases. Apart from some spontaneous protests at schools in Port Elizabeth, there was no mobilisation by schools on teacher vacancies and EE did not take up the issue.[1064] The LRC put out media releases at litigation milestones, which the responsible attorney attributed to expectations from funders, questioning whether media attention made much difference.[1065] She acknowledged that the media

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[1058] ibid 17.

[1059] Veriava (n 737) 321. See, eg, Linda Chisholm, 'The Textbook Saga and Corruption in Education' (2013) 19 SARE 7.

[1060] Hassim (n 807).

[1061] ibid.

[1062] ibid.

[1063] Brockman (n 777); Ally (n 781).

[1064] Sephton (n 838).

[1065] ibid.

reports benefited the LRC's profile, but suggested that embarrassing the department might have played into the hands of ECDoE officials claims that the LRC lawyers had a 'personal vendetta against them'.[1066] *Scholar Transport (EC)* similarly secured limited coverage, mainly in local print media. By contrast, *Scholar Transport (KZN)* – adopting a movement lawyering model driven by EE and EELC – attracted significantly more attention, despite being in all other respects comparable to *Scholar Transport (EC).*

6.8.3.2. Government priorities

Annual reports of education departments and treasuries, the President's State of the Nation addresses and policy documents reflect that, over the decade of the litigation, basic education rights – and particularly school infrastructure – became a top priority.

Mud Schools and *Norms and Standards* contributed to government treating education infrastructure as *the* highest budget priority within what was already its largest allocation (basic education), at least for a time. In government and civil society, the litigation explicitly linked infrastructure and quality and outcomes of education. National Treasury referred to 'improv[ing] the quality of teaching and learning through the provision of infrastructure and learning materials'.[1067] As discussed above, the empirical evidence is still emerging, but the *idea* of the link is solidly established across government and civil society. Regarding *Furniture*, from a position of 'almost total lack of attention to furniture in the ECDoE's strategic planning',[1068] the situation gradually shifted. The ECDoE adopted the delivery of 'adequate, quality school furniture' as a 'key policy priority' and in 2016/17 included it among its seven 'strategic goals'.[1069] Similarly, the *Scholar*

[1066] ibid.

[1067] Estimates of National Expenditure – Basic Education (2016) 2

[1068] Allison Corkery (n 1038) 7.

[1069] ECDoE Annual Reports (2016/17) 44; (2017/18) 43, 50.

Transport stream clarified provincial policies and contributed to the adoption of a national policy, reflecting greater prioritisation of scholar transport.

6.8.3.3. Movement-building, mobilisation, civil society collaboration

Greater awareness of the right to education may be shifting expectations – from viewing government service delivery as beneficence to constitutional duty. As one interviewee explained, very often parents were themselves denied basic education and are accustomed to a 'system that its designed to give [them] less and so it is difficult for them to demand more.'[1070] The shift in expectations emerged from the limited community views I could access.[1071] Following *Mud Schools I*, Mrs Mtshazi, the principal of Sompa Senior Primary School, reported that after it was rebuilt 'the learners enjoy being at school and the parents are proud of the school.'[1072] After another of the applicant schools, Nkonkoni, had been rebuilt in 2014, Mr Khutshwa, a parent, described how the community was shifting its focus to holding local government accountable for other services and expecting them to be 'more visible in the community'[1073]

Similarly, lead counsel in *Furniture*, Ngcukaitobi, experienced that the litigation engendered in client community members 'a sense of belief in the Constitution'.[1074] Liebenberg commented that the process of this litigation 'offer[ed] many opportunities for building solidarity and organisation amongst school communities in the Eastern Cape – a precondition for the sustained realisation of the right to education in the province.'[1075] While the LRC maintains communication

[1070] Stein (n 830).

[1071] Khutshwa (n 1021); Mtshazi (n 794).

[1072] Mtshazi (n 794).

[1073] Khutshwa (n 1021).

[1074] Interview: Tembeka Ngcukaitobi, advocate and former Director: Constitutional Litigation Unit, LRC (Oxford, 18 June 2019).

[1075] Sandra Liebenberg, 'From the Crucible of the Eastern Cape: New Legal Tools for the Poor' [2015] SJ 16, 17.

with individual schools, the potential identified by Liebenberg has not translated into formal mobilisation or movement-building, as the LRC stayed with the client-based model. However, the LRC has built strong trust with Eastern Cape school communities, sustained by personal visits and regular contact.

Norms and Standards had significant political impact internal to EE and radiating outwards. Norms and Standards was – and remains – EE's largest campaign. At the time of *Norms and Standards I*, EE had built significant momentum but had been unable to achieve its first objective – compelling the Minister to make regulations. The litigation unlocked this possibility, and enabled the movement to press ahead with the campaign. EE considers litigation a 'last resort' when all other forms of activism have been exhausted. One of the consequences of EE's discomfort with litigation appears to be that it has downplayed the role of litigation in securing the Norms and Standards. Stephanie Bell's study of the campaign, drawing primarily on EE interviews, gives little attention to litigation and far more to the political activism and running of the movement.[1076] This highlights how impact, especially political impact, varies according to perspective.

One of the most significant internal effects for EE resulted from what was, from a litigation perspective, an insignificant step. Following the publication of an initial draft and public comments on it, the Minister requested a time extension. The EE National Council was inclined to grant it, as advised by EE's legal team, but put it to a vote and the membership voted to refuse it.[1077] Despite the vote, EE's National Council granted the extension. This brief episode had major consequences for relations within EE. It has been written up as a university teaching case study.[1078] Bell, too, regarded the incident as central. Based on interviews with a wide range of EE members,

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[1076] Stephanie Bell, *Knowing Politics: Knowledge and Democratic Citizenship in South Africa's Education System* (DPhil Thesis, Department of Politics and International Development, University of Oxford 2015).

[1077] Brockman (n 777); Eric Smalley, 'Fighting for Equality in Education: Student Activism in Post-Apartheid South Africa' (CaseConsortium, Columbia University 2014) 2.

[1078] Eric Smalley (n 1078).

she found that '[t]he massive victory, three years in the making, did not come without costs. The ambiguity of the membership vote meant some members thought that their National Council had betrayed them in offering the Minister the extension'.[1079] As a result, 'a rift opened up between the leadership/management and lower ranking staff/volunteers/members'.[1080] This development highlights some of the challenges of movement lawyering.[1081]

Norms and Standards also laid the foundation for the decision to establish the EELC, a law centre to partner EE and provide legal support for its campaigns. As I describe above, EE was represented by the LRC in the first phase. After the Norms and Standards were secured, EELC – established in 2012 – took over representing EE.

SECTION27's work with school communities in *Textbooks* gradually built trust and solidified relationships with Limpopo school communities. Communities strongly associated the organisation with the textbooks issue:

> [W]hen the learners and people in the street would see the [SECTION27] car they would start singing 'textbooks, textbooks, textbooks'. Even long after the textbooks case whenever they saw the vehicle it was their association with SECTION27 and textbooks.[1082]

Mobilisation around textbooks in Limpopo catalysed the formation of a new community-based organisation, BEFA.[1083] This is an example of litigation prompting the formation of a local social movement, as contrasted with the Norms and Standards campaign launched by a national movement. BEFA has faced several challenges. During its inception, it was highly dependent on

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[1079] Stephanie Bell (n 1077) 223.

[1080] ibid 226.

[1081] See Chapter 2.5.3.

[1082] Hassim (n 807).

[1083] Veriava, Thom and Fish Hodgson (n 741) 269.

SECTION27 for organisational, financial and governance support.[1084] After the litigation, it has struggled to maintain momentum.[1085] Nthabi Pooe, in a view shared by colleagues, suggested that SECTION27's 'deep involvement in BEFA and interest in sustaining its success' may have led SECTION27 to be 'too hands-on and directory' initially, with the result that BEFA members became over-reliant.[1086] However, BEFA remains functional in Limpopo and may provide a bulwark in future against the LDoE's bureaucracy and the authoritarianism exhibited in its intimidation of schools.

The litigation across the six streams also contributed to building collaborative relationships within the PIL sector. Interviewees felt collaboration had worked well where another organisation intervened as amicus curiae to cover additional aspects in support of the litigation.[1087] Tensions around strategic differences and competition over funding were alleviated when the five legal organisations – LRC, CCL, SECTION27, EELC and CCL – met regularly.[1088]

6.8.3.4. Relationships with government

The litigation process shaped the relationships of communities, civil society organisations and movements (especially EE) with the government in various ways, not limited to placing them in confrontational relations. In Chapter 2, I introduced a model that understands such relationships as confrontational, complementary, co-operative and co-opted, and also offered a conception of solidarity among non-state actors. The streams reflect dynamics of complementarity and co-

[1084] Hassim (n 807); Stein (n 830); Pooe (n 830).

[1085] Hassim (n 807); Pooe (n 830).

[1086] Pooe (n 830).

[1087] Hassim (n 807); Stein (n 830); McConnachie (n 787); Ally (n 781); Skelton (n 787); Veriava (n 830).

[1088] ibid.

operation emerging with government, and growing solidarity among school communities, public interest law centres and social movement members.

Norms and Standards boosted EE's national profile. In the process, it shifted EE's relationship with government. Before the litigation, the Minister and other government officials had publicly derided EE. On 18 June 2013, days after new papers were filed in *Norms and Standards*, the DBE official handle tweeted that 'to suddenly see a group of white adults organizing black African children with half-truths can only be opportunistic & patronizing.'[1089] Despite widespread condemnation, the DBE did not delete or retract the statement. However, this confrontational dynamic shifted. Following the first order, the Minister instructed the team drafting the Norms and Standards to meet with EE to discuss concerns about the draft,[1090] and she personally met EE.[1091] The litigation, coupled with EE's other strategies, literally secured a seat at the table for EE.

Textbooks affected relationships between schools and government in various ways. Schools and principals were bullied into withdrawing as applicants. One deponent to a key affidavit, the principal of Hanyani Thomo High School, was pressured into falsely recanting his evidence that books had not been delivered to his school.[1092] He deposed to a second affidavit saying that he had been coerced into the litigation by SECTION27. He later explained to SECTION27's counsel, Adila Hassim, that he and his wife (also a civil servant) had been threatened with dismissal if he

[1089] DBE tweet, 18 June 2013, < https://twitter.com/DBE_SA/status/347000424525594624> accessed 8 October 2021.

[1090] Brockman (n 777).

[1091] Budlender (n 801).

[1092] Hassim (n 807).

did not do this.[1093] SECTION27 limited their replying affidavit to saying that he had recanted under intimidation.[1094]

However, after *Textbooks I* succeeded, schools were emboldened. There was 'much more willingness to complain' about non-delivery from schools that were already involved and others.[1095] Schools that reported not receiving textbooks were generally prioritised for delivery.[1096] The intimidation did not end, though, and signs of a confrontational dynamic persisted. SECTION27 was forced to remove signage from the vehicle because principals were concerned about being seen to host SECTION27.[1097] SECTION27 submitted a complaint to the Public Protector about intimidation of principals, but nothing came of it.[1098]

Intimidation of schools was one of the reasons why SECTION27 sought the involvement of the South African Human Rights Commission (SAHRC) to monitor implementation – in order to have a credible, independent entity monitoring delivery.[1099] The SAHRC's counsel, Ngcukaitobi, initially found its chairperson, Lawrence Mushwana, 'reluctant to take an oppositionist stance to government'.[1100] However, Ngcukaitobi persuaded the SAHRC that it was appropriate for it to assume a monitoring role, given its constitutional mandate.[1101] Ultimately, however, the SAHRC monitoring was ineffective as it did not dedicate sufficient resources or capacity to the process,[1102]

[1093] ibid.

[1094] ibid.

[1095] ibid.

[1096] ibid.

[1097] ibid; *Textbooks III (HC)* [30].

[1098] Hassim (n 807).

[1099] ibid.

[1100] Ngcukaitobi (n 1074).

[1101] ibid.

[1102] Hassim (n 807).

lacked clarity about its role and – like some schools – experienced intimidation.[1103] Ultimately, the SAHRC's monitoring simply 'piggy-back[ed] on the SECTION27 and BEFA monitoring', without adding real value.[1104]

One indication of the pressure that the public profile of the case brought to bear on government was the decision to appoint the high-level 'Verification Team', headed by Mary Metcalfe, to investigate textbook delivery. The Verification Team helped to generate a clearer picture of textbook non-delivery and the reasons for it. This is an indication of the relationship shifting from confrontational towards co-operative.

Textbooks also affected the fraught intra-governmental relations given that the national executive had intervened in Limpopo. Metcalfe reported that the administrator appointed by the national DBE, Dr Anis Karodia, 'was not fully integrated into the [LDoE] and had very little real power, and there was a lack of clarity around him and an uneasy hosting of him in that department.'[1105] The litigation seems to have exacerbated tensions and may have contributed to Karodia's removal after he issued a damning report confirming the textbooks crisis, which SECTION27 used in the litigation.[1106] SECTION27's Stein explained that 'Dr Karodia… was trying to expose a number of aspects of corruption [in the provincial department] and the Minister and the MEC and the HoD kept silencing him and you see that in many of the reports'.[1107]

The Metcalfe Verification Team later made recommendations regarding the s 100 intervention in its report. Metcalfe recalled that she had prepared a detailed set of proposals of the 'necessary secondary legislation' to give substance to s 100, but when she presented it to the DBE

[1103] Stein (n 830).

[1104] ibid.

[1105] Metcalfe (n 765).

[1106] Hassim (n 807).

[1107] Stein (n 830).

they did not like it and insisted that she remove it from the final report.[1108] These recommendations were never acted upon. The s 100 intervention was ultimately left to 'fizzle out' by national government without achieving its objectives to restore the healthy functioning of the LDoE.

Teachers affected the already strained relations between the largest teacher trade union, SADTU, and the ECDoE in relation to post provisioning. It prompted spin-off litigation by SADTU in an unsuccessful attempt to prevent the ECDoE from transferring teachers to fill vacancies;[1109] and then by the ECDoE itself in an attempt to prevent SADTU blocking filling of posts.[1110] The latter case settled, seemingly securing a ceasefire between the union and government. Apart from its obstructionist approach in relation to *Teachers*, SADTU did not feature significantly in the other streams and provided no meaningful support.

South Africa's second largest teacher union, NAPTOSA, although not entering any litigation, related differently to EE and SECTION27 during the case study period, including engaging with SECTION27 on teacher post provisioning.[1111] NAPTOSA's president explained that, while the public interest law centres are 'pupil-centred' and NAPTOSA is a teachers' union, NAPTOSA believes that 'if we improve the lot of teachers, the lot of learners improves automatically and vice versa', laying a basis for collaboration.[1112] NAPTOSA therefore supported *Norms and Standards* and was 'very happy' with the litigation outcome.[1113]

[1108] Metcalfe (n 765).

[1109] *South African Democratic Teachers Union (SADTU) v MEC for the Department of Basic Education: Eastern Cape* [2013] 2 All SA 474 (ECB).

[1110] *Head of Department of Education, Eastern Cape v South African Democratic Teachers Union* [2016] ZAECGHC 71.

[1111] Interview: Basil Manuel, President: NAPTOSA (Pretoria, 3 April 2019).

[1112] ibid.

[1113] ibid.

Teachers also shifted the balance of power between the provincial department and some SGBs on teacher appointments. Before the litigation, SGBs were at the mercy of the department. Their only option, if the department failed to fill vacant posts, was to rely on volunteer teachers or parents, or fundraise to pay teachers themselves. For schools that opted into the *Teachers II* class action, the deeming order meant that, if the department failed to act, qualified teachers occupying vacant posts whom SGBs had recommended would be deemed to have been appointed by the ECDoE. Similarly, the appointment of chartered accountants as claims administrators in the class action transferred government functions (checking salary claims and paying schools) to a private actor.

In *Scholar Transport (KZN)*, the KZNDoE's report to court commented on the shift in relationships: 'As there is now mutual respect and understanding between the Applicant and the DOE, I [the HoD] foresee a greater degree of collaboration which will ultimately benefit all learners deserving of transport.'[1114] *Scholar Transport (KZN)* therefore appear to have contributed to securing greater respect for EE and EELC by provincial authorities and shifting the relationship from predominantly confrontational to more complementary or co-operative. The Report also commented on the relationship between the two key provincial government departments – education and transport – stating that 'despite challenges that existed in the past between the two provincial departments, there is now a constructive working relationship and much progress has been achieved'.[1115]

6.8.3.5. Civil society and donor attitudes

The litigation contributed to increased support for education provisioning work within the public interest legal sector and the donor community.

[1114] KZNDoE (n 995) [9].

[1115] ibid [6.6].

Early on, *Mud Schools* received particular attention. It resulted in the LRC directing more attention and resources towards education litigation.[1116] Other organisations were also influenced, and EE leaders at the time were encouraged to consider litigation in their campaigns.[1117] Funders, too, responded favourably. Several conducted visits to the Eastern Cape schools, and the donor environment became more receptive to education litigation,[1118] translating into greater resources.[1119]

6.9. Factors influencing impact

The case study reveals a range of factors that influence impact. Some factors were particularly relevant to one type of impact, for example affecting political rather than legal impact. Distilling these factors enables an assessment of whether other strategic litigation, in comparable conditions, *may* be capable of producing similar impact.

The most important factors are (i) the procedural law; (ii) substantive law; (iii) judicial attitudes and identity of judges; (iv) suitable litigants; (v) lawyers; (vi) funding; (vii) availability of data; (viii) choice of issues; (ix) framing; (x) model of litigation; (xi) form of litigation; (xii) government response; (xiii) remedies. Factors (i)-(iii) relate to the litigation environment, (iii)-(vii) to litigation resources, and (viii)-(xii) concern litigation decisions. These categories run from most structural (environment) to most agency-based (decisions), with resources in between.[1120] I discuss these below.

[1116] McConnachie (n 787); Sephton (n 838).

[1117] Brockman (n 777).

[1118] McConnachie (n 787); Stone (n 1054).

[1119] See Section 6.8.2.7.

[1120] See Chapter 2.4-2.5.

6.9.1. Litigation environment

6.9.1.1. Procedural law

Several procedural rules[1121] facilitated the litigation, including broad standing rules (eg., *Textbooks I* and *II*), the insulation from costs under the *Biowatch* rule, and the broad remedial powers of courts, enabling them to grant complex structural orders in all six streams, order the audit in *Furniture*, grant the deeming order and certify the class action with a private claims administrator in *Teachers II*, and grant the other relief discussed above. These features of the procedural landscape, which apply to all constitutional litigation, enabled litigation without having all affected schools before court, extending the reach of cases beyond the parties and facilitating the enforcement of province-wide orders.

6.9.1.2. Substantive law

Features of the substantive law specific to the right to basic education in s 29(1)(*a*) were highly significant. Most importantly, the courts held that the right is immediately realisable without being subject to progressive realisation or resource constraints; that its content includes infrastructure, textbooks, teachers, furniture and transport; that it is an individual right applicable to every learner; and that education is inherently urgent and linked to the particular timing of the school year. Each of these principles played important roles in case outcomes and the cases across streams incrementally established and reinforced them.

These principles enabled courts to enforce the state's positive duties to provide the 'inputs' in ways that courts have been hesitant to do in relation to other socio-economic rights, which are subject to progressive realisation and resource availability. This enabled increasingly robust remedies that translated, in several streams, into material impact at scale. While textual differences

[1121] See Chapter 2.4.1.3(c).

remain, it may be possible to employ some of the principles and techniques employed in the six streams in other socio-economic rights litigation in future. If it is possible to give substantive content to other socio-economic rights and to couple orders to actually provide (water, food, housing, etc) with appropriate structural relief, similar scaled up material impact might be possible, even operating within the frame of progressive realisation subject to available resources.

6.9.1.3. Judicial attitudes, identity

The judgments reflect judicial attitudes receptive to strategic litigation on education rights. Most begin with emphatic statements regarding the importance of education. In *Textbooks III (SCA)*, Navsa JA opened by quoting former enslaved person and activist, Frederick Douglass, who said 'once you learn to read, you will be forever free', and Kofi Annan calling education 'a bridge from misery to hope'.[1122] The various High Court judgments express similar, if less evocative, sentiments.[1123] Several judgments also emphasise the need to address the legacy of inequality in education, *Scholar Transport (EC)* describing basic education in the Eastern Cape being in 'a crisis of immense and worrying proportions'.[1124] All eight judgments resonate with the concept of 'transformative constitutionalism', which is increasingly central to legal culture.[1125]

As for the identity of individual judges,[1126] the dataset of eight judgments is insufficient to draw far-reaching conclusions. For one thing, all the cases were successful, with only *Textbooks III (HC)* partially unsuccessful. There is nothing striking about the race of the judges, the majority being black. It is notable that they are all men, except Roberson J (*Teachers II*) and Msizi AJ (*Norms*

[1122] *Textbooks III (SCA)* [1].

[1123] See, eg, *Furniture III* [1].

[1124] *Scholar Transport (EC)* [1].

[1125] See Chapter 2.4.1.3(d).

[1126] See, eg, Jackie Dugard, 'Testing the Transformative Premise of the South African Constitutional Court: A Comparison of High Courts, Supreme Court of Appeal and Constitutional Court Socio-Economic Rights Decisions, 1994–2015' (2016) 20 IJHR 1132, 1152.

and Standards II), reflecting the slow pace of gender transformation. Race and gender do not shed any explanatory light on outcomes.

Strikingly, however, six of the eight judgments (75%) were authored by four judges whose pre-appointment careers included significant human rights work: Navsa JA (*Textbooks III (SCA)*), Kollapen J (*Textbooks I*), Plasket J (*Teachers I* and *Scholar Transport (EC)*), and Goosen J (*Furniture III*).[1127] One respondent involved in *Textbooks* agreed that judges' identity in this sense was a factor, remarking that judge Kollapen 'just got it'.[1128] Similarly, counsel in *Furniture* commented that judge Goosen's background as an activist and human rights lawyer meant that his judicial philosophy supported the realisation of rights.[1129] The remaining three judgments were written by Roberson J,[1130] Msizi AJ[1131] and Tuchten J.[1132] Tuchten J's judgment in *Textbooks III (HC)* refusing structural relief represents the most executive-minded and narrowest view of the role of courts. Although there is insufficient data to draw firm conclusions, the case study suggests that judges' professional background, especially whether they have done substantial human rights work, is a significant factor in explaining outcomes and therefore impact in these streams.

[1127] Navsa JA (*Textbooks III (SCA)*), Plasket J (*Teachers I* and *Scholar Transport (EC)*), and Goosen J (*Furniture III*) worked for the LRC; Kollapen J (*Textbooks I* and *II*) was head of Lawyers for Human Rights, head of the SAHRC and chair of the Legal Resources Trust, the LRC's governing body.

[1128] Veriava (n 830).

[1129] Ngcukaitobi (n 1074).

[1130] *Teachers I*; Teachers *II*.

[1131] *Norms and Standards II*.

[1132] *Textbooks III (HC)*.

6.9.2. Litigation resources

6.9.2.1. Suitable litigants

The case study reflects a diverse range of types of applicant, including individual schools (SGBs or specially-created committees), social movements (EE and BEFA), and public interest law centres litigating in their own name (CCL and SECTION27). In addition, applicants across streams put up evidence from learners, teachers, parents and experts. This range of litigants and deponents to affidavits brought several important advantages that contributed to success, combining micro-level, personal perspectives of learners and teachers with macro-level perspectives of movements, NGOs and experts. Institutional applicants benefited from the broad standing rules discussed above. In addition to primary parties, the litigation saw several *amici curiae* joining, generally to support protagonists, including in *Teachers I*, *Norms and Standards II* and *Scholar Transport (KZN)*.

6.9.2.2. Lawyers

The problems prompting litigation were not new. However, school communities had not received significant attention from civil society, especially public interest law organisations. This changed after 2010, with the LRC, CCL, SECTION27 and (from 2012) EELC devoting increasing attention and resources to education provisioning. The capacity of litigators and their partners emerges as a powerful factor influencing impact. This includes staffing, ability to access and communicate with schools, media and communications, research capacity and ability to monitor implementation at scale and to conduct budget analysis, which varied across organisations and affected impact.

In terms of staffing, legal teams were comparable in size across the streams. However, SECTION27 and EELC had some notable differences. SECTION27 had greater internal communications and research capacity, and is the only public interest law centre with a specialist

budget analyst.[1133] Although only appointed after *Textbooks*, budget analysis now informs SECTION27's approach to education litigation. EELC was able to draw on the considerable human resources of its partner, EE, including communications personnel, campaign organisers and a dedicated research team.[1134] Although EE's research has not directly fed into the litigation, it is key to the new phase of monitoring implementation.

An important factor that has not received attention in the literature is language – the capacity to communicate with clients in their first language, a challenge in the context of South Africa's eleven official languages. SECTION27's Pooe, who traversed Limpopo throughout *Textbooks*, commented that this is vital for building trust and communicating in a nuanced way about difficult issues in litigation.[1135] Tshangana commented that LRC attorney McConnachie's 'origins and connections in the province, his ability to speak Xhosa and his personal experience [as a former teacher] and commitment to the issue made him uniquely qualified and driven to pursue [*Mud Schools*].'[1136] The same goes for LRC paralegal Rufus Poswa in that stream. Speaking to learners and community members in their first language, coupled with familiarity with local context, enables lawyers to better represent them and support their struggles.

In terms of communications capacity, the approach of the different organisations and the extent to which they prioritised media work derives from their litigation model. Interviewees generally, including those not directly involved, recognised *Textbooks* as garnering most media attention, followed by *Norms and Standards*.[1137] This reflects SECTION27's campaign-based model and EE's movement lawyering approach.

[1133] McLaren (n 996).

[1134] Selebalo and Gcilitshana (n 966).

[1135] Pooe (n 830).

[1136] Tshangana (n 737) 4.

[1137] Fleisch (n 1022); Manuel (n 1111).

6.9.2.3. Funding

I identified favourable donor attitudes as a political impact and resultant funding as a material impact above. While the litigation success contributed to securing funding, funding was itself a crucial factor in enabling the litigation, reflecting the impact feedback loop. As each stream ran into further phases in attempts to scale up and reach more schools, greater resources were required. The vast majority of these resources were received from the donors identified in *Table 6.4* above. All six streams depended on external funding, without which litigation would have been impossible.

6.9.2.4. Availability of data

The availability of data was crucial at two levels – individual schools and the 'system' (here, province). At the level of individual schools, the ability to prove claims depended on record-keeping. In *Teachers*, this prevented some schools from participating in the class action and meant that the beneficiary group excluded many of the worst-off schools. Data at a systemic level was a central issue through all six streams. The availability of baseline data of the furniture shortfall and costing, which the LRC obtained through other litigation, was crucial for *Furniture*. Later, securing *accurate* data from government became one of the main objectives and impacts in *Mud Schools*, *Textbooks* and *Furniture*. In *Textbooks*, BEFA provided a 'warning system and an alarm' to monitor new issues of non-delivery.[1138]

6.9.3. Litigation decisions

6.9.3.1. Choice of issues

Choice of issues channels the direction of litigation and determines objectives. The choice is influenced by the methods of engaging with school communities. For example, early on EE had

[1138] Hassim (n 807).

an initiative asking students to take photographs of something they wanted to change. The choice of photography as the medium led students to focus on infrastructure, which took EE into infrastructure.[1139] Before *Mud Schools* and *Textbooks*, LRC and SECTION27 visited school communities and asked students and teachers to answer questionnaires.[1140] This approach, too, led to prioritisation of inputs, especially infrastructure. SECTION27 lawyers picked up on textbooks from media reports, but after visiting schools realised that textbooks were not necessarily schools' biggest concern, and began work on sanitation.[1141]

Approaches that focus on asking students, parents and teachers to identify their concerns are likely to be responsive, empowering and engaged. However, as emerged from interviews, these approaches are unlikely to emphasise other systemic problems, such as numeracy and literacy levels, teacher attendance and performance, and governance issues,[1142] for three main reasons: first, school communities are likely to focus on tangible concerns affecting their daily experience;[1143] second, expectations are lowered by having been subjected to inadequate education provisioning for generations;[1144] finally, they have a 'view from below', rather than considering statistics and other evidence of systemic issues, such as inequitable funding, as officials and academics might.[1145]

[1139] Metcalfe (n 765).

[1140] McConnachie (n 787); Hassim (n 807); Stein (n 830); Pooe (n 830).

[1141] Hassim (n 807); Veriava (n 830); Pooe (n 830).

[1142] Fleisch (n 1022); Metcalfe (n 765).

[1143] McConnachie (n 787); Hassim (n 807).

[1144] Stein (n 830).

[1145] Metcalfe (n 765).

Interviewees who were not involved in bringing any of the cases – from academia,[1146] the trade union sector;[1147] and former government officials[1148] – generally agreed that the six issues are vitally important and that it was right to litigate them. Metcalfe noted that the Programme to Improve Learning Outcomes, which ran workshops at thousands of schools, raised all six issues.[1149] However, as I discuss below when evaluating the litigation's social justice implications, interviewees identified several different issues that they would now prioritise.

6.9.3.2. Framing

Related to choice of issues is how they are framed, both legally and outside court. Protagonists framed the cases and campaigns with reference to some common themes, including the legacy of discriminatory education provisioning under apartheid, racial and class equality and hope for the future. There was variation across organisations and streams. The CCL tended to see itself as 'less activist' than some of the other protagonists and preferred to frame issues in more 'technical' language, while also centring the views and interests of children.[1150] *Textbooks* was the most effective example of framing, as reflected in the public attention generated and the ringing, at times poetic, language of the three judgments. *Norms and Standards* probably represented the most challenging issues to 'frame' – because the claim is technical and abstract – making EE's success in building a campaign around it even more remarkable. EE framed the campaign very effectively as 'this generation's struggle', resonating powerfully with the South African freedom struggle.[1151]

[1146] Interview: Nic Spaull, Senior Researcher in Economics, Stellenbosch University, Director: Funda Wande (Cape Town, 25 March 2019); Fleisch (n 1022).

[1147] Manuel (n 1111).

[1148] Metcalfe (n 765).

[1149] ibid.

[1150] Skelton (n 787).

[1151] Eg, EE's *Norms and Standards* campaign video 'Build the Future', available on YouTube, uses the words 'Every generation has its struggle', against a graphic of raised fists holding pencils, a reference to the symbol of uMkhonto

Mud Schools – avoiding the technical term 'inappropriate structures' – was also effective framing. By contrast, *Teachers* represented a missed opportunity, the LRC employing the ungainly statutory term 'post provisioning' inside and outside court.

6.9.3.3. Model of litigation

The six streams include client-based, campaign-based and movement models.[1152] In Chapter 2, I noted that the claim is often made in South African and international literature that litigation to achieve social change is 'most effective' when used in conjunction with social mobilisation. Viewing impact through the typology of legal, material and political impact, this case study challenges and complicates that claim. The campaign-based and movement models generated greater political impact, but the picture is mixed in relation to legal and material impact.

The LRC used a client-based model, focusing on legal and material impact in *Mud Schools*, *Furniture*, *Teachers* and *Scholar Transport (EC)*.[1153] It assisted communities to form 'crisis committees' specifically to bring cases, but made no attempts to build movements. While it released media statements at key points, it did not run campaigns.[1154] This is reflected in the impact of these streams – significant legal and material impact, but less impact on public discourse and social mobilisation.

SECTION27 used a campaign-based model throughout *Textbooks*, and a movement model when BEFA was established for *Textbooks III (HC)*. *Textbooks* was the best use of framing, securing widespread public attention. SECTION27 received criticism, however, for running the *Textbooks*

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weSizwe (armed wing of ANC), a hand clenched around a spear: <https://www.youtube.com/watch?v=zJ1Xxg0kghg> accessed 10 July 2021.

[1152] See Chapter 2.5.1.

[1153] LRC website <http://lrc.org.za/our-work/education-childrens-rights/> accessed 12 November 2018 referring to 'important developments in the jurisprudence' and significant 'direct and material impact'.

[1154] McConnachie (n 787); Sephton (n 838).

litigation in it is own name initially and without a social movement.[1155] One SECTION27 lawyer attributed this to a 'belief in a certain formula of "this is how it should always work"'.[1156] This was alluding to the '*Treatment Action Campaign* Rolls Royce model' discussed in Chapter 2. *Norms and Standards* is the only stream in this model, combining national mobilisation and litigation. Geoff Budlender, the attorney in *Treatment Action Campaign* and later senior counsel in *Norms and Standards*, explained that he always saw *Norms and Standards* as 'a latter-day *TAC*', recalling that 'it was fundamentally similar, and I remember having that discussion when people came to see me, in the campaign on the ground and the nature of the issue. It just felt like *TAC*.'[1157]

As the only stream with national reach, and the most long-term objectives, *Norms and Standards* was best suited to this model. Unlike the other streams – whose direct material impact can be measured in short-term deliverables – the infrastructure improvements to which it contributes will be discernible over a longer period. At this stage, it has laid a legal foundation for those objectives, and consolidated EE's position as a national movement with healthy membership, resourcing and credibility. The litigation had important political impact on the movements themselves. *Norms and Standards I* galvanised EE at a time when its flagship campaign had hit a wall, compelling the Minister to make regulations when every other non-litigious tactic had failed. Litigation delays in *Norms and Standards II* may have contributed to some loss of momentum in the movement, however, as the constitutional challenge took three years.

One finding from a comparison based on litigation model concerns timing. Movement lawyering was considerably slower than client-based litigation. In *Mud Schools*, *Furniture, Teachers* and *Scholar Transport (EC)* – all client-based – it was possible to secure relief (material impact) for the individual affected schools within approximately a year of initial demand. By contrast, *Norms*

[1155] Hassim (n 807).

[1156] Stein (n 830).

[1157] Budlender (n 801).

and Standards I took almost four years from initial demand to securing regulations. Treating litigation as a last resort, EE exhausted the gamut of campaign actions from petitions and letters to marches and vigils from around May 2010 to launch of litigation on 29 February 2012. During this time, EE built the movement, gained expertise and shifted the national discourse, but did not secure regulations. Only once the litigation was launched did it accelerate, obtaining an order by settlement in less than a year on 16 November 2012, and the publication of the Norms and Standards a year later, 29 November 2013.

This point is illustrated by a comparison of *Scholar Transport (EC)* and *Scholar Transport (KZN)* adopting client-based and movement models respectively. In *Scholar Transport (EC)*, the LRC obtained a judgment resulting in the provision of transport within a year. In *Scholar Transport (KZN)*, the campaign ground on for four years before the launch of litigation brought a settlement and the provision of transport. In all other respects, these cases are comparable – scale, policy and legal conditions for the case and extent of government opposition.

Social movement involvement also did not translate automatically into effective monitoring and implementation. Although the capacity to scale up relief was variable - being especially limited in *Scholar Transport* and *Teachers* - client-based litigation was no less effective than movement lawyering in scaling up. Other factors, such as the capacity to secure school-level data and effective structural remedies were more significant in addressing systemic blockages and scaling up relief across a province than the ability to marshal public support. Attempts by the LRC and SECTION27 to deploy cellular-phone solutions for monitoring were unsuccessful. The audits conducted in *Furniture* and the Verification Team investigation in *Textbooks*, alongside 'old-fashioned' client-based visits to schools, though imperfect, were the most effective means of monitoring delivery. By contrast, BEFA appears to have played a limited role in providing monitoring and securing data across Limpopo in *Textbooks*. Social movements, and their impact on power relations and discourse, did not translate into, or replace, effective monitoring structures.

Though Equalisers contributed to gathering the supporting affidavits when LRC launched *Norms and Standards I*, in monitoring implementation of the Norms and Standards, EE and EELC have developed professional research capacity at their offices, rather than deploying national movement structures for this purpose.

While movement lawyering was slower in relation to material impact, the faster client-based streams had limited political impact. *Norms and Standards* and *Textbooks* did the most to draw attention to the national education crisis and to shift the paradigm. A narrower legalistic approach, without broad mobilisation, would not have achieved this. As infrastructure litigation shifts into the long game of implementing the Norms and Standards – across all aspects of infrastructure and all provinces – and in the context of government austerity and cuts to the education infrastructure budget, it will be significant that education infrastructure is prominent in national discourse.

6.9.3.4. Form of litigation

The case studies also highlight the significance of the technical form of cases. The litigants employed test cases,[1158] two-track individual/structural litigation,[1159] a class action,[1160] and a constitutional challenge.[1161] The most common form was two-track litigation, seeking relief for individual schools *and* systemic relief for similarly situated schools.[1162] *Teachers II* employed a different two-track form – an opt-in class action. These approaches enabled implementation to be scaled up. Only in *Scholar Transport (EC)* and *Scholar Transport (KZN)* has scaling up to a systemic level not (yet) taken place.

[1158] *Mud Schools I*; *Teachers I*.

[1159] All six streams.

[1160] *Teachers II* & *III*.

[1161] *Norms and Standards II*.

[1162] Contrasting, eg, with health litigation in Brazil, where 97% of claims were individual cases: Ferraz (n 25) 124.

All six streams became 'serialised', running into second and third rounds with orders becoming increasingly detailed and robust in later rounds following non-compliance. This reflects the advantages of an incremental approach to social rights litigation, in which the intrusiveness of the remedy is inversely correlated to the extent of compliance.[1163] Importantly, cases began narrowly and expanded in later phases as protagonists acquired better data and understanding of reasons for non-compliance.

6.9.3.5. Government response

A significant factor contributing to legal and material impacts was government litigants' response. As Tshangana notes, one of the advantages of litigation is precisely that it 'compels government to formulate an on-the-record response [whereas] other tools – such as protest marches, press releases, and social media campaigns – often do not'.[1164] *Norms and Standards I*, for instance, forced the Minister to explain reneging on promises to make regulations. However, the case study reveals the significance of the nature of government's response for impact. In all six streams, government conceded that the right to a basic education included the claimed deliverables. Only in *Textbooks* was this partially disputed, with government denying that *every* child is entitled to *every* prescribed textbook. In *Norms and Standards*, government resisted the obligation to make regulations, settling at the eleventh hour. In *Scholar Transport (EC)*, government accepted the principle but argued that the specific learners did not qualify. In addition to these concessions, every stream saw some core issues resolved by settlements, narrowing the issues for courts. [1165] Government conceding a substantive right and some relief swung momentum and made it more likely for courts to grant far-reaching relief.

[1163] King (n 75) 300.

[1164] Tshangana (n 737) 19.

[1165] *Mud Schools I*, *Norms and Standards I*, *Furniture I*, *Teachers I*, *Scholar Transport (KZN)*.

6.9.3.6. Remedies

Finally, the case study indicates that the level of material impact – especially the capacity to scale up – depends in part on the extent to which relief was framed expressly with that objective, and whether it included effective mechanisms to monitor and enforce compliance. In this regard, the highest levels of material impact were seen in *Mud Schools, Furniture* and *Textbooks*, all of which included court-sanctioned mechanisms to identify and reach all schools. In *Mud Schools*, this was achieved by ordering the ECDoE to publish its list and plans; in *Furniture* by government and then independent audits; and in *Textbooks* by the Verification Team investigation and, to a lesser extent, SAHRC monitoring. The attempt to reach all schools in *Teachers* placed the burden on schools to opt in to the class action, which reached almost 100 schools but tended to exclude the very poorest.

6.10. Evaluation

I now consider whether the litigation was 'successful' as against its objectives, and secondly evaluate impact against the SDR framework, coupled with the heuristic of risks and benefits, developed in Chapter 4. My analysis of impact above is undoubtedly normatively inflected, and readers are likely to have begun to evaluate it according to implicit value commitments. In this section, however, I appraise it against an articulated value frame drawn from the Constitution. I do so conscious that other evaluative frames might shed different light on it and that, even applying the same norms, perspectives may differ. For example, a learner and a member of a social movement may attach different weight to the social justice implications of replacing mud schools versus mobilising school communities.

6.10.1. Success

All six streams were broadly successful in achieving the protagonists' objectives, though levels of success vary.

Mud Schools did not succeed in establishing legal precedent on education infrastructure, but exceeded initial objectives in securing a settlement committing the state to eradicate mud schools and R8.2bn to that end. It succeeded in securing replacement buildings for the seven applicant schools and for over 250 other schools and is approaching the goal of 'eradicating' mud schools.

Norms and Standards I similarly did not secure legal precedent because it, too, was settled, but achieved the main objective of securing regulations. *Norms and Standards II* rounded off the objectives by addressing the defects in the initial norms. All EE's challenges to the Norms and Standards were upheld. EE achieved the objective captured in its #FixTheNorms campaign. *Norms and Standards* also broadly achieved EE's objective of building the movement around its flagship infrastructure campaign, which was at risk of stalling following the exhaustion of non-litigious strategies. In terms of infrastructure roll-out, it has been partially successful (especially on electricity, water and sanitation), though there is still a long way to go on many of the aspects of infrastructure covered by the regulations.

Textbooks successfully confirmed – at both High Court and SCA level – that s 29(1)(a) includes the right of every learner to receive every prescribed textbook, achieving its legal objectives. Although material impact, on available data, probably did not reach 100% delivery, it did reach a very high level and succeeded in securing textbooks for tens of thousands of learners. SECTION27's objectives of galvanising a Limpopo-based education movement was partially realised through BEFA.

Furniture was successful in confirming that the education right includes furniture and in securing school furniture for all the applicant schools but also hundreds of thousands of additional learners, and improving furniture procurement and delivery in the Eastern Cape.

Teachers achieved its legal objectives, including establishing that the right includes teachers and confirming the duty on provincial governments to declare the post establishment, appoint teachers to vacant posts and pay them. Its material impact reflects only partial success, securing

appointments to a significant proportion of vacancies and salary repayments but not resolving the systemic problem.

Scholar Transport (EC) and *Scholar Transport (KZN)* were partially successful, both securing provincial transport policies that can be enforced in future, and securing scholar transport for identified individual learners, but neither case has yet seen the broader, unmet need met in KZN or the Eastern Cape. *Scholar Transport (EC)* also achieved the objective of establishing that the s 29 right includes scholar transport.

Overall, the six streams of litigation were broadly successful, with qualified success in respect of legal objectives in *Mud Schools* and *Norms and Standards I*, and in respect of material objectives especially in *Teachers* and *Scholar Transport* and substantial success on political objectives, especially in *Norms and Standards*. In the next section, I evaluate the impact against the SDR framework and the heuristic of risks and benefits developed in Chapter 4. I pay particular attention to risks because of my own positionality and the protagonist-heavy weighting of interviews.

6.10.2. Social justice

I define social justice to mean *the fair distribution of social goods, the realisation of each person's capabilities and equal social status, with fairness understood to include redistribution and racial and gender justice*.[1166] The social justice implications of the six streams emerge, in particular, from the development of the substantive content of the education right and the material impact of improved provisioning. Cumulatively, the streams fleshed out the substantive content of the right and the positive duties of the state – not merely to adopt a reasonable plan, but to actually provide each input. This touches on the redistributive dimension of social justice, providing a legal framework to address inequality in public school infrastructure.

[1166] See Chapter 4.4.2.

Nor were these legal developments 'hollow'. In this respect, the case study stands in sharp counterpoint to the findings, for example, of Rosenberg in his study on American school desegregation litigation.[1167] Five streams contributed to significant material impact, at scale; the last, *Scholar Transport*, is ongoing. This benefits hundreds of thousands of learners in different ways, many more in the future, as well as thousands of teachers, in ways that can contribute to better teaching and learning. The beneficiaries across the six streams are the most disadvantaged learners as against the socio-economic and education performance indicators discussed in Section 6.1.1 above, who are almost all black learners at the poorest schools in the former apartheid homelands, mainly in the Eastern Cape and Limpopo. With this provisioning, the racial justice dimension of social justice is promoted. In general, the litigation did *not* succumb to the risk of benefiting relative elites highlighted by Bhuwania in India and Ferraz in Brazil.[1168] The partial exception is *Teachers*, where the nature of the class action requiring schools to opt in and prove claims tended to exclude the very poorest schools. However, the schools that did participate were still poor schools (mostly quintile 2 and 3, no-fee schools) and not truly 'elites'. Given that the case concerned claims sounding in money, requiring action proceedings (unlike other streams), there may have been no alternative to a class action.

If one accepts that better provisioning improves quality, these learners are likely to better realise their capability to be educated and have better prospects for their quality of life and future opportunities, building on the dignity aspect of social justice. Sen and Nussbaum both recognise being educated as a vital capability.[1169] School furniture – 'each child's own reading and writing space'[1170] – illustrates how the means to achieving the capability to be educated is an end in itself.

[1167] Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (n 26).

[1168] Bhuwania (n 34); Ferraz (n 25). See Chapter 4.5.1.1.

[1169] Amartya Sen (n 481) 294; Nussbaum (n 476) 76.

[1170] *Furniture III* [41].

The recognition of education as an 'empowerment right' in *Textbooks I* resonates with the idea of education as creating further capabilities and realising human dignity.[1171] The risk of daily violations of dignity and personal security is reduced.

However, the capabilities approach to social justice reveals that aggregate improvements and even improved averages across education inputs risk masking persistent education inequalities. Simply giving each learner the same inputs will not necessarily translate into each learner realising their capability to be educated. Some learners – especially black, rural and female learners – will face greater adversity in 'converting' educational inputs into outcomes because of poverty, remoteness, disability and so on.[1172] The case study reflects Sen's 'coupling effect' – not only is it more difficult for the most disadvantaged learners to get the inputs in the first place, but it is also more difficult for them to convert them into educational outcomes.[1173] Equalising inputs is not enough to realise social justice.

As Fleisch put it, 'the litigation now needs to pivot away from high-level resourcing issues … The arc of the litigation needs to change.'[1174] Interviewees acknowledged the need to shift from litigating 'inputs' to focus more on 'outputs' – quality and outcomes.[1175] Some expressed doubts about whether it is possible to litigate these issues directly. Fleisch commented, 'the biggest challenge is early reading and mathematics' but that litigation cannot get teachers to change practices.[1176] While it may not be possible to litigate outcomes and teaching practice directly, a range of systemic issues emerged that relate to outcomes.

[1171] *Textbooks I* [4].

[1172] Amartya Sen (n 481) 88.

[1173] ibid.

[1174] Fleisch (n 1022).

[1175] McConnachie (n 787); Spaull (n 1146); Stein (n 830).

[1176] Fleisch (n 1022).

Metcalfe commented that 'what is absent is the less visible, material forms of education for which government is also responsible [and] working out what systems government needs to put in place in order to correct this.'[1177] Metcalfe, who headed provincial basic education and national higher education departments, remarked that government's interventions are characterised by 'magical thinking' – that if there is a policy in place, what it says will happen.[1178]

Those I spoke to, especially from outside the public interest sector, agreed on the need to bring together educationists and litigators to develop strategies – to consider what is possible through the law and what would have most beneficial impact. Spaull implored, 'The litigators need to find the good people in government and discuss the issues. It is sad that there is so much in common in terms of values and objectives but they don't talk.'[1179] For Metcalfe, too, what is needed is a 'coming together of educationists and litigation experts [to discuss] what would really shift the dial'.[1180] Interviewees proposed several issues that would 'shift the dial':

- Teacher development, qualifications, training [1181]
- Teacher support, especially improving ratio of district officials to schools;[1182]
- Post provisioning in foundation phase;[1183]
- Over-sized classes;[1184]

[1177] Metcalfe (n 765).

[1178] ibid.

[1179] Spaull (n 1146).

[1180] Metcalfe (n 765).

[1181] Spaull (n 1146).

[1182] Metcalfe (n 765).

[1183] Fleisch (n 1022).

[1184] Spaull (n 1146).

- Language of instruction;[1185]
- Procurement; corruption; accountability;[1186]
- Education funding;[1187]
- Corrupt appointments, role of SADTU, conflicts of interest in the bureaucracy.[1188]

Considering this smorgasbord of views, the arc of education rights litigation may begin to bend towards issues relating to teachers, especially training and support, which raise of issues of unequal resourcing in ways that are less visible than education provisioning. Having laid a foundation for addressing deficiencies in provisioning, there is impetus for further interventions that target funding and inequality, quality of teaching and learning, and literacy and numeracy challenges. Given the impact of the provisioning litigation, it is likely that litigation will be considered as one promising strategy to confront these challenges.

Against the litigation's positive contribution can also be weighed the unintended negative effect of some wasted resources, arising from overspending, tender disputes, and corruption in several streams and the building of 'white elephant' schools that are too large for small school communities, and underspending on maintenance when priorities shifted to new infrastructure. Despite these effects and the limitations of providing inputs, the streams of litigation substantially contributed to furthering social justice.

[1185] Metcalfe (n 765).

[1186] Stein (n 830); Spaull (n 1146).

[1187] McLaren (n 996).

[1188] Spaull (n 1146).

6.10.3. Democracy

I adopted a conception of democracy to mean *a system of representative government, through the medium of political parties and individual representatives, requiring regular elections (with universal adult suffrage) to ensure that representatives are held to account and that government listens and responds, with collective decisions taken by majority vote after due consideration of views of minority parties and reasons for decisions publicly explained; with public participation in the law-making process and political activity (especially protest) outside the formal system.*[1189]

While the litigation did not concern the structures of representative democracy directly, all six streams facilitated the participation of school communities in some way, forcing government to 'listen' and respond. All six streams required government to report to the parties and/or the court.

Mud Schools began the shift. It enabled some of the most marginalised school communities to assert their rights after being neglected for more than 15 years of the democratic era. The litigation resulted in their interests being accorded greater priority by government. This reflects an approach that corrects existing imbalances in formal democratic participation (which tends to prejudice marginalised voices). Some parents and teachers were emboldened to tackle other service delivery issues, but no broad social movement emerged from *Mud Schools*, *Furniture*, *Teachers* or *Scholar Transport (EC)*. From *Textbooks* emerged a local social movement, BEFA.

EE's rise as a leading national social movement ran parallel to *Norms and Standards*, its biggest campaign. Where the litigation lost momentum, there are indications that EE also flagged as a movement. However, *Norms and Standards* captured the imagination of a new generation of activists and drew thousands of learners, teachers and parents into the public discourse. The litigation forced government to engage with EE and school communities, compelling government to publish draft Norms and Standards for public comment, opening up an important opportunity

[1189] See Chapter 4.4.3.

for participation. A large number of public comments were received and the draft was amended to take them into account. The Minister also instructed the drafting team to meet with EE and its lawyers directly and she herself met with them,[1190] a rare form of face-to-face engagement with a national minister.

The risks of subverting democracy and imperilling courts by taking them into the political arena did not materialise. There was some negative backlash, including intimidation of Limpopo schools and the DBE's derision of EE, but this went against the grain of the overall positive democratic shifts.

6.10.4. Rule of law

I proposed a conception of the rule of law as *a system of governance under the Constitution characterised by legality, accountability and a culture of justification*, *rejecting corruption, unlawfulness and abuse of authority.*[1191] All six streams contributed to holding the provincial and national education authorities accountable, requiring government to fulfil constitutional rights and, as the streams unfolded, to comply with court orders. All the streams created new law, by giving content to the education right or prompting a new policy in *Scholar Transport* or regulations in *Norms and Standards*. In using the law as a tool and site of struggle, these streams brought state non-delivery into the frame of the law and held government to account.

In *Mud Schools*, *Furniture*, *Teachers* and *Scholar Transport (EC)*, accountability was achieved through client-based litigation. In *Norms and Standards*, a national movement was able to press its demands for school infrastructure in the language of rights and using the law as an instrument of accountability. This can be contrasted with the prevalence of service delivery protests in which South African communities articulate their despair at the failure to deliver housing, water and other

[1190] Brockman (n 777); Budlender (n 801).

[1191] See Chapter 4.4.4.

services through protests which sometimes turn violent and attract violent police responses.[1192] As the Constitutional Court commented in the context of the #FeesMustFall protests at universities, '[t]he destruction of property and incitement of violence is discordant with our constitutional dispensation.'[1193] EE's campaign, harnessing social mobilisation, protest and even civil disobedience, did so within the constitutional paradigm in ways that promoted the rule of law. So, too, did BEFA in Limpopo, in its localised efforts.

Some indirect, negative rule of law effects – implicating the lawfulness and anti-corruption elements of the rule of law – can arguably be seen in the tender disputes and the hiring and firing of contractors and implementing agents in *Mud Schools*[1194] and *Furniture*. Such disputes may be a feature of all state procurement, and in *Textbooks I* the court declared the previous tender awarded to Ed-U-Solutions unlawful and sought to restore the rule of law. However, in *Mud Schools* and *Furniture*, the 'accelerated' nature of ASIDI and the furniture process may have contributed to cutting corners in procurement processes and inadequate contractual arrangements with implementing agents and contractors. These processes improved, but they reflect a level of non-compliance during early stages, undermining the rule of law. Ngcukaitobi commented that, with the benefit of hindsight, he would have crafted the relief in *Furniture* to align better with procurement laws.[1195]

There is a risk that court-ordered delivery of public goods will circumvent procurement controls and even facilitate corruption. This tension between realising rights and procurement compliance is increasingly confronting courts. Again, this rule of law downside is outweighed by the gains secured by vindicating constitutional rights, and requiring government to discharge its

[1192] See Jackie Dugard 'Urban Basic Services' in Langford and others (n 2) 285–291.

[1193] *Hotz v University of Cape Town* 2018 (1) SA 369 (CC) [39].

[1194] Nika Soon-Shiong and others (n 785).

[1195] Ngcukaitobi (n 1074).

duties and operate within a 'culture of justification'. The risks of imperilling courts by taking them into overly 'political' terrain and of litigation being abused to avoid accountability did not manifest.

6.11. Conclusion

It is appropriate to end with a comment on the future direction of education provisioning litigation. The six streams are all 'live' to varying degrees. The additional issue of sanitation is receiving increasing attention and has already been subject to litigation by SECTION27[1196] and a campaign by EE. *Norms and Standards* is entering a phase of implementation. Geoff Budlender, EE's senior counsel, estimated it will be the work of years if not decades.[1197] Teacher union head, Basil Manuel, predicted that it will not be complete in his lifetime.[1198] Further litigation to secure information and delivery under the Norms and Standards is likely. Prompted by EE, the DBE developed a template for provincial infrastructure reports, but provinces have not used it. Budlender suggested that, if provincial reports are poor, it may be necessary to litigate to set a baseline standard; and then to hone in on specific aspects of infrastructure and geographical locations, much as the other five streams here have done.[1199] Recent budget cuts are also likely to invite legal challenge. Whatever forms it may take, education rights litigation will continue.

[1196] *Komape* (n 682).

[1197] Budlender (n 801).

[1198] Manuel (n 1111).

[1199] ibid.

Appendix I: Chronology of Settlements, Orders and Judgments

Date	Settlement/Order/Judgment	Citation
4 February 2011	*Mud Schools I* settlement made order of court	*Centre for Child Law v Government of the Eastern Cape Province* (ECB) case no 504/10
17 May 2012	*Textbooks I* judgment	*Section 27 and Others v Minister of Education* 2013 (2) SA 40 (GNP)
3 July 2012	*Teachers I* judgment	*Centre for Child Law v Minister of Basic Education* 2013 (3) SA 183 (ECG)
4 October 2012	*Textbooks II* settlement made order of court	
9 November 2012	*Norms and Standards I* settlement agreement concluded (no order)	
29 November 2012	*Furniture I* settlement made order of court	
7 March 2013	*Teachers I* enforcement order by consent	
29 November 2013	Norms and Standards promulgated by Minister	Regulations relating to Minimum Uniform Norms and Standards for Public School Infrastructure *Government Notice R 920,* 29 November 2013
20 February 2014	*Furniture II* judgment	*Madzodzo v Minister of Basic Education* 2014 (3) SA 441 (ECM)
20 March 2014	*Teachers II* Part A order made	
5 May 2014	*Textbooks III (HC)* judgment	*Basic Education for All v Minister of Basic Education* 2014 (4) SA 274 (GP)
21 August 2014	*Mud Schools II* settlement made order of court	
17 December 2014	*Teachers II* judgment	*Linkside v Minister of Basic Education* [2015] ZAECGHC 36
25 June 2015	*Scholar Transport (EC)* judgment	*Tripartite Steering Committee v Minister of Basic Education* 2015 (5) SA 107 (ECG)
2 December 2015	*Textbooks III (SCA)* judgment	*Minister of Basic Education v Basic Education for All* 2016 (4) SA 63 (SCA)
7 November 2017	*Scholar Transport (KZN)* order made by agreement in High Court	
19 July 2018	*Norms and Standards II* judgment delivered	*Equal Education v Minister of Basic Education* [2018] 3 All SA 705 (ECB)
29 October 2018	*Norms and Standards II* leave to appeal refused	

Appendix II: Interviews

Interviewee	Institutional affiliation	Cases personally involved	Date and location of interview(s)
1. **Ally**, Nurina	Attorney, Head of EELC	Norms & Standards	3 October 2018, Cape Town
2. **Brockman**, Brad	Former staff member and General Secretary of EE	Norms & Standards	18 October 2018, Cape Town
3. **Budlender**, Geoff	Advocate, Cape Bar; founder and former Director of Legal Resources Centre; former Director-General of Land Affairs, national government	Norms and Standards, Teachers	19 June 2019, Oxford
4. **Budlender**, Steven	Advocate, Johannesburg Bar	Mud Schools, Teachers	26 September 2019, Johannesburg
5. **Fleisch**, Brahm	Professor of Education Policy, Division of Education Leadership and Policy Studies, University of the Witwatersrand; former Director of Education, Gauteng Province	No direct involvement	2 April 2019, Johannesburg
6. **Gcilitshana**, Sibabalwe	Parliamentary Officer: Policy and Training, EE	Norms & Standards	15 November 2018, Cape Town and Johannesburg
7. **Hassim**, Adila	Advocate, Director of Litigation, SECTION27	Textbooks, Teachers	1 October 2018, Johannesburg
8. Mr **Khutshwa**[1200]	Parent, Nkonkoni Senior Primary School	Mud Schools	25 November 2015, Makhanda
9. **Manuel**, Basil	Executive Director, National Professional Teachers Organisation of South Africa (NAPTOSA); former teacher and principal	Norms and standards, general	3 April 2019, Pretoria
10. **McConnachie**, Cameron	Attorney, LRC; former teacher	Mud Schools, Norms & Standards, Furniture	Three interviews: (1) 19 September 2018 (2) 30 November 2018 (3) 21 December 2018, Makhanda
11. **Mclaren**, Daniel	Researcher and budget analyst, SECTION27	Scholar Transport (KZN)	2 April 2019, Johannesburg
12. **Metcalfe**, Mary	Former MEC for Education, Gauteng; former Head of School of	Textbooks	21 March 2019, Johannesburg

[1200] Interview conducted by LRC under Open Society study; transcript on file.

	Education, University of the Witwatersrand; former Director-General: Higher Education; one of drafters of ANC post-apartheid education policy		
13. Ngcukaitobi, Tembeka	Advocate, Johannesburg Bar and Pan African Bar Association of South Africa; former Director of Constitutional Litigation Unit, Legal Resources Centre	Furniture, Textbooks	18 June 2019, Oxford
14. Pooe, Nthabiseng	Advocate, Researcher, SECTION 27	Textbooks, Norms & Standards, Scholar Transport (KZN)	3 April 2019, Johannesburg
15. Mrs **Mtshazi**[1201]	Principal, Sompa Senior Primary School	Mud Schools	25 November 2015, Makhanda
16. Selebalo, Hopolang	Co-Head of Research, EE	Norms & Standards	15 November 2018, Cape Town and Johannesburg
17. Sephton, Sarah	Advocate (previously attorney), LRC	Teachers, Scholar Transport (EC)	28 September 2018 (Post Provisioning), Makhanda
18. Skelton, Ann	Former Director, Centre for Child Law; UNESCO Chair in Education, University of Pretoria; Member, UN Committee on Rights of the Child	Mud Schools, Teachers, Furniture	19 July 2019, Oxford
19. Spaull, Nic	Senior Researcher in Economics, Stellenbosch University; Director of Funda Wande; Board member of SECTION27	No direct involvement	25 March 2019, Cape Town
20. Stein, Nikki	Advocate (previously attorney), SECTION27	Textbooks, Norms & Standards, Scholar Transport	2 April 2019, Johannesburg
21. Stone, Chris	President, Open Society Foundations	General	30 November 2020, Oxford
22. Veriava, Faranaaz	Advocate and Head of Education Programme, SECTION27	Textbooks, Scholar Transport (KZN)	28 March 2019, Johannesburg

[1201] Interview conducted by LRC under Open Society study; transcript on file.

7. RECAPTURING THE STATE?

7.1. Introduction

On 14 February 2018, a parliamentary motion of no confidence vote looming the following day, Jacob Zuma resigned as President of South Africa. A few months earlier, on 7 August 2017, he narrowly survived a similar motion 198-177 with 25 abstentions. Around 30 members of his own party, the ruling African National Congress (ANC) supported that motion, conducted by secret ballot. When the ANC announced that it was 'recalling' him as President and would remove him in Parliament if he did not go, he resigned.

Underpinning calls for Zuma's removal – including the national campaigns #SaveSA and #UniteBehind – was a claim of 'state capture'. The state, particularly Zuma, had allegedly been 'captured' by a corrupt alliance of private capital (including the billionaire Gupta family) and government officials. An influential 2017 interdisciplinary study interrogated the concept of state capture and its manifestation under the Zuma presidency.[1202] It rejects, as oversimplification, the conception of Zuma and his allies as a criminal network that captured the state.[1203] Rather, state capture should be understood as a 'political project at work to repurpose state institutions to suit a constellation of rent-seeking networks that have been constructed and now span the symbiotic relationship between the constitutional and shadow state'.[1204] This is 'akin to a silent coup', with a handful of individuals and companies connected to the Gupta-Zuma network strategically co-ordinated to constitute the 'shadow state'.[1205]

[1202] Haroon Bhorat and others, 'Betrayal of the Promise: How South Africa Is Being Stolen' (2017). Later published as a book: Ivor Chipkin and others, *Shadow State: The Politics of State Capture* (WUP 2018).

[1203] Haroon Bhorat and others (n 1203) 2.

[1204] ibid.

[1205] ibid.

Six processes allegedly consolidated power in this shadow state: ballooning the public service to create a compliant bureaucracy; 'sacking… the "good cops" from the police and intelligence services and their replacement with loyalists prepared to cover up illegal rent seeking (with some forced reversals)'; redirecting procurement spending of state-owned enterprises; side-lining Cabinet in favour of informally constituted elites; the consolidation of a group of provincial ruling party leaders known as 'the Premier League' to control the ANC; and, finally, control of National Treasury.[1206] I investigate the removal of the 'good cops' and senior officials from the key institutions responsible for policing, prosecutions and combating corruption and control of the executive itself. The other dimensions of state capture also saw significant litigation, which falls outside the scope of my study.[1207]

In order to de-fang the state's capacity to investigate and prosecute alleged corruption and other crimes committed by him and his allies, Zuma allegedly placed loyalists at the head of all the organs of state with investigative and prosecutorial powers. Over the course of Zuma's presidency, 9 May 2009 to 14 February 2018, opponents used a variety of strategies to secure accountability and remove compromised appointees. The relevant institutions included the NPA, the SAPS, IPID, the specialist corruption-fighting body, 'the Scorpions' (later replaced by 'the Hawks'), and ultimately Zuma himself as President.

Unlike Chapter 6, the protagonists here are ideologically and structurally disparate.[1208] They include two opposition parties at opposite ends of the political spectrum – the EFF and DA. The other key protagonists are four NGOs working on the rule of law and constitutionalism: FUL, HSF, CASAC and Corruption Watch. The protagonists employed litigation as one strategy in

[1206] ibid 3.

[1207] le Roux and Davis (n 58) 273–276. The authors identify 48 cases relating to state capture.

[1208] Chipkin and others (n 1203) 1.

seeking to remove allegedly compromised incumbents and secure the appointment of independent officials.

I selected five streams of litigation related to high-level appointments/removals in the NPA, SAPS, Hawks, IPID and the national executive, that is the head or second tier of leadership, during Zuma's presidency. I explain my methodology and methods in Chapter 5. To recall, my main methods are textual analysis and elite interviews. Textual sources included judgments, court orders and court papers; secondary literature; media reports and government documents. *Appendix I* provides a chronology of judgments and orders. There is limited legal literature,[1209] but several important social science studies on state capture,[1210] the criminal justice sector,[1211] and books by investigative journalists and others.[1212] I do *not* draw on the proceedings of the Commission of Inquiry into State Capture, chaired by Deputy Chief Justice Zondo. The Commission commenced after my time period and has yet to conclude. I limit myself to exploring whether the litigation may have contributed to its establishment. I conducted 18 semi-structured interviews, including the heads of the four NGOs, the main decision-makers at the three most-involved opposition parties, the lead lawyers for all these parties, leaders of the two national social movements, and President Ramaphosa's legal advisor.[1213]

None of the studies so far have integrated the legal, material and political effects of litigation in depth across the five streams – one unique contribution of this Chapter. Writing in

[1209] le Roux and Davis (n 58); Klaaren (n 33).

[1210] Bhorat and others (n 1203); Chipkin and others (n 1203).

[1211] Johanna Mugler, *Measuring Justice: Quantitative Accountability and the National Prosecuting Authority in South Africa* (1st edn, CUP 2019); Sanja Kutnjak Ivkovich and others, *Police Integrity in South Africa* (Routledge 2020).

[1212] Pieter-Louis Myburgh, *The Republic of Gupta: A Story of State Capture* (Penguin 2017); Jacques Pauw, *The President's Keepers: Those Keeping Zuma in Power and Out of Prison* (Tafelberg 2017); Thandeka Gqubule, *No Longer Whispering to Power: The Story of Thuli Madonsela* (Jonathan Ball 2017); Bryan Rostron, *Robert McBride: The Struggle Continues* (Tafelberg 2019); Mcebisi Jonas, *After Dawn: Hope after State Capture* (Picador Africa 2019); Pieter-Louis Myburgh, *Gangster State: Unravelling Ace Magashule's Web of Capture* (Penguin 2019).

[1213] See Appendix II.

2020 on some of the NPA state capture litigation from the perspective of legal mobilisation theory, Klaaren identifies several important topics for further research. I address several, including how the 'second generation' organisations collaborated and whether the litigation represents 'a significantly new phase in the construction of the rule of law in South Africa',[1214] and 'the role(s) of law in countering and advancing both the phenomenon of corruption and the political project of state capture.'[1215] In addition, alongside Chapter 6, this Chapter applies and refines the framework developed in Part I, laying the basis for some general conclusions.

The Chapter is structured as follows. Section 7.2 provides factual and legal context and introduces key role-players. Sections 7.3 to 7.7 recount the litigation in the five streams identified above. In each stream, I cover the objectives, model and form of litigation, and outcomes. Section 7.8 analyses legal, material and political impact – drawing connections, aggregating and comparing impacts. Section 7.9 identifies the factors with greatest influence on impact. Section 7.10 evaluates impact against the Chapter 4 framework. The Conclusion identifies unanswered questions and still-unfolding impacts.

7.2. The context

7.2.1. Factual context

An important dimension of the new Constitution was the establishment of institutions to build constitutional democracy, including in the criminal justice sector. The Final Constitution consolidated this institutional design, establishing the NPA, SAPS, Auditor-General, and intelligence services. The Constitution also established the Public Protector, Human Rights Commission and other independent institutions to 'support' constitutional democracy.

[1214] Klaaren (n 33).

[1215] ibid.

The newly created justice institutions secured some high-level corruption convictions. The greatest corruption controversy related to the 'Arms Deal', a massive military procurement programme. ANC Chief Whip Tony Yengeni was convicted in 2003 of defrauding parliament during the arms deal. In 2005, then Deputy President Zuma's financial advisor, Schabir Shaik, was convicted of corruption, including a charge of soliciting a bribe for Zuma during the arms deal.[1216] With Zuma under investigation by the Scorpions, President Mbeki dismissed him as Deputy President. However, Zuma was later elected ANC president on 18 December 2007.[1217] At the time, he faced charges of racketeering, money laundering, corruption and fraud. After the ANC won the 2009 general elections, Zuma became President.[1218] Even now, the prosecution is ongoing, having been repeatedly delayed by interlocutory litigation by Zuma.

Having assumed the presidency, which he held for two terms, Zuma made a plethora of appointments. I focus on the criminal justice sector. However, Zuma made two important sets of appointments early on. First, he appointed four new judges to the Constitutional Court[1219] and replaced the four Presidential appointees to the Judicial Service Commission (JSC).[1220] In 2011, he appointed Mogoeng Mogoeng as Chief Justice, controversially overlooking Deputy Chief Justice Moseneke. Mogoeng's nomination received considerable opposition from civil society, with concerns expressed about his lack of experience, limited reported judgments, gender sensitivity and independence, and that he had been a prosecutor during apartheid.[1221] Judicial appointments

[1216] *S v Shaik* 2008 (2) SA 208 (CC).

[1217] Chipkin and others (n 1203) 4.

[1218] ibid.

[1219] Justices Froneman, Khampepe, Jafta and Mogoeng, replacing the last of the original judges appointed in 1994, Justices Langa, Mokgoro, O'Regan and Sachs.

[1220] Dumisa Ntsebeza, Ishmael Semenya, Vas Soni and Andiswa Ndoni.

[1221] Jason Brickhill and others, 'The Administration of Justice' (2011) 2011 ASSAL 1, 9–24.

processes, too, saw litigation, including by the HSF.[1222] A second important appointment was Thulisile Madonsela, whom Zuma appointed in 2009 as Public Protector (equivalent to ombudsperson), approved by a unanimous National Assembly.

As Zuma's presidency unfolded, civil society attention pivoted towards appointments, especially in the criminal justice sector,[1223] with concerns about individuals, but also process, including appointment procedures and criteria. Many key appointments had been put in the gift of the President, with limited transparency and inconsistent or inadequate criteria for appointments. Civil society adopted litigation as one strategy to tackle appointments and state capture more broadly, producing what Klaaren describes as 'a brief extraordinary period of collective legal mobilization'.[1224]

7.2.2. Legal context

Appointments are governed by the Constitution and legislation specific to institutions – the National Prosecuting Authority Act 32 of 1998 ('NPA Act'), the South African Police Service Act 68 of 1995 ('SAPS Act', governing SAPS and the Hawks), and the Independent Police Investigative Directorate Act 1 of 2011 ('IPID Act'). The Constitution itself establishes the NPA[1225] and SAPS,[1226] and requires them to be structured in terms of national legislation. The Constitution mandates legislation to establish an independent police complaints body (IPID)[1227] and the Constitutional Court has held that the Constitution requires an independent anti-corruption body,

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[1222] *Justice Alliance of South Africa v President of Republic of South Africa* 2011 (5) SA 388 (CC); *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC).

[1223] Chipkin and others (n 1203) 8–9.

[1224] Klaaren (n 33).

[1225] Constitution, s 179.

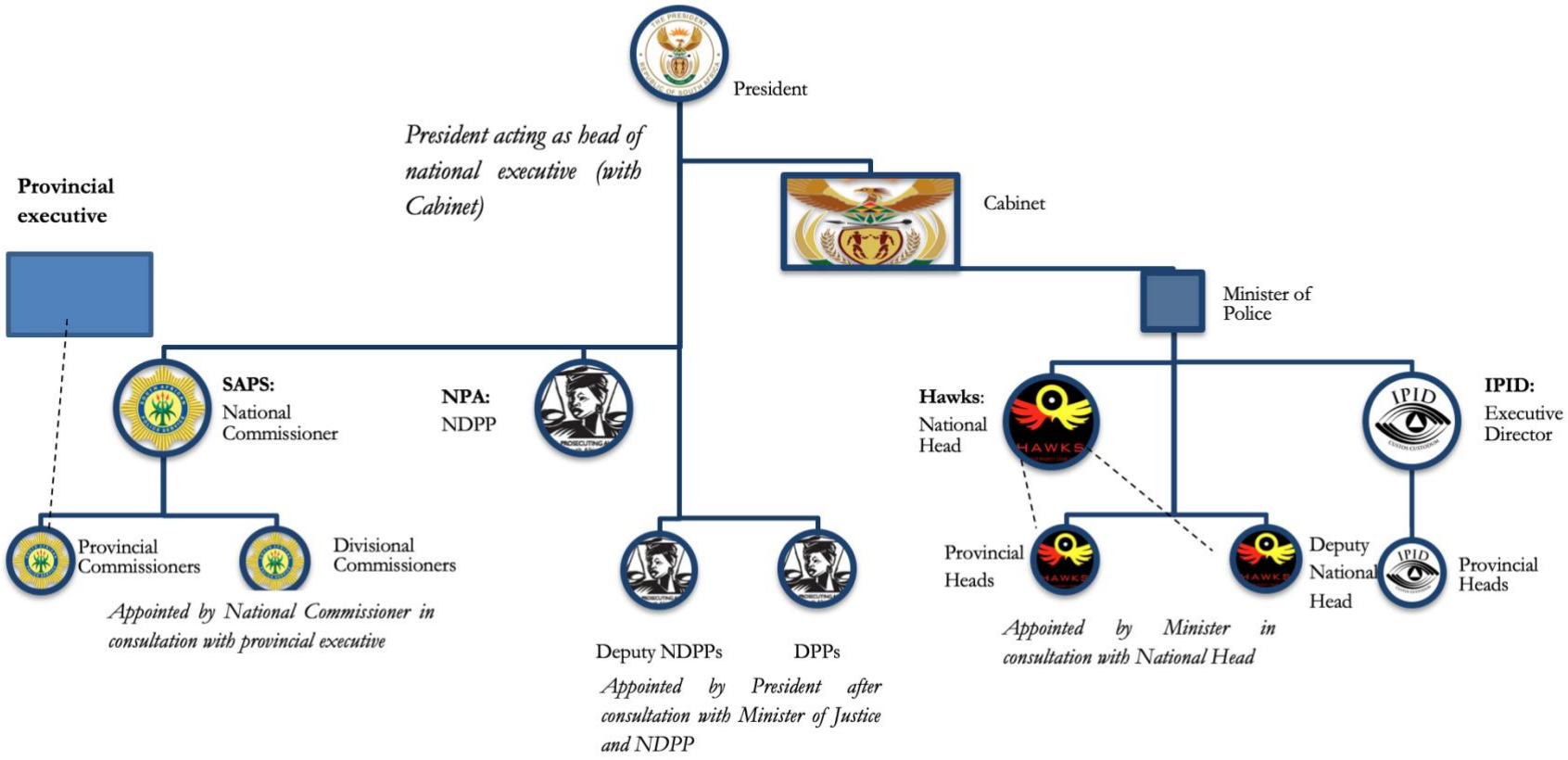
[1226] Constitution, ss 199 and 205.

[1227] Constitution, s 206(6).

a role fulfilled by the Scorpions and later the Hawks.[1228] The power to appoint the head of each institution, and the tier beneath the head, is reflected in the organogram in *Figure 7.1*.

[1228] See Section 7.4.2.

Figure 7.1: Organogram – appointments



The President *directly* appoints the heads of SAPS and the NPA, and *indirectly* controls the appointment of the heads of the Hawks and IPID, who are appointed by the Minister of Police, herself appointed by the President. The President makes the direct appointments not as 'head of state', but as head of the national executive, exercising executive authority 'together with the other members of the Cabinet',[1229] which the Constitutional Court describes as 'a collaborative, collective venture between the President and Cabinet.'[1230] Murray and Stacey argue that the President 'must have the support of the Cabinet'.[1231] This does not apply to Cabinet appointments, such as Minister of Police, which the President makes alone.[1232] For the second tier of leadership, the head appoints any deputies or provincial heads of SAPS,[1233] the NPA and IPID,[1234] while the Minister of Police appoints the Deputy and Provincial Heads of the Hawks in consultation with the National Head.[1235]

The legal position concerning *who* makes appointments, substantive eligibility criteria, the appointment process, and suspension and removal at the *start* of the case study period in 2009 is captured in *Table 7.1*:

[1229] Constitution, s 85(2).

[1230] *Minister for Justice and Constitutional Development v Chonco* 2010 (4) SA 82 (CC) [19].

[1231] Christina Murray and Richard Stacey, 'The President and the National Executive' in Stu Woolman and Michael Bishop (eds), *Constitutional Law of South Africa* (2nd edn, Juta 2014) 18.

[1232] ibid 7.

[1233] SAPS Act, s 6(2). Constitution, s 207(3) provides that the National Commissioner appoints provincial commissioners with the concurrence of the provincial executive.

[1234] IPID Act, s 20.

[1235] SAPS Act, ss 17CA(4) and (5).

Table 7.1: Legal requirements for appointments and removals at commencement of case study period (2009)

Institution: Head	**Who appoints?**	**Substantive criteria**	**Appointment process**	**Suspension**	**Removal**
NPA NDPP	President[1236]	Legal qualifications to practise in court; fit and proper person, with due regard to experience, conscientiousness and integrity	President appoints at sole discretion. President may extend term for two years beyond 65-year retirement age, provided not exceed 10-year term[1237]	President may suspend indefinitely without pay pending inquiry into fitness to hold office[1238]	President may remove following inquiry into fitness to hold office, subject to final approval of Parliament;[1239] or may be removed by resolution of Parliament[1240]
SAPS National Commissioner	President[1241]	No eligibility criteria	President appoints at sole discretion	If National Commissioner has lost the confidence of Cabinet, President may suspend pending inquiry, with remuneration unless President determines otherwise, until board of inquiry reports[1242]	If Cabinet has lost confidence in her, or misconduct is alleged, President may establish a board of inquiry, to consist of Supreme Court judge as chairperson and two other suitable persons. Board makes recommendations to President, who may remove.[1243]

[1236] Constitution, s 179(1); NPA Act, s 9.

[1237] NPA Act, s 12(4).

[1238] NPA Act, s 12(6)(a).

[1239] NPA Act, s 12(6)(b)-(d).

[1240] NPA Act, s 12(7).

[1241] Constitution, s 207(1); SAPS Act, s 6.

[1242] SAPS Act, s 8(3).

[1243] SAPS Act, ss 8-9.

Institution: Head	Who appoints?	Substantive criteria	Appointment process	Suspension	Removal
Hawks National Head	Minister of Police with concurrence of Cabinet[1244]	Fit and proper person with due regard given to experience, conscientiousness and integrity	Minister appoints and reports to Parliament after appointment[1245]	Minister may suspend: (i) pending inquiry into National Head's fitness;[1246] or (ii) after proceedings commence for removal of National Head in Committee of National Assembly[1247]	Minister may remove following an inquiry into her fitness to hold office or following proceedings in Committee of National Assembly[1248]
IPID Executive Head	Minister of Police[1249]	Suitably qualified person[1250]	Nominated by Minister of Police; appointment must be confirmed or rejected by Parliamentary Committee[1251]	Minister may suspend at sole discretion.[1252]	Minister may remove on account of misconduct, ill health or inability to perform office effectively[1253]

[1244] SAPS Act, s 17CA(1).

[1245] SAPS Act, ss 17CA(1) and (3).

[1246] SAPS Act, s 17DA(2).

[1247] SAPS Act, s 17DA(5)(a).

[1248] SAPS Act, 17DA(1).

[1249] IPID Act, s 6(1).

[1250] ibid.

[1251] IPID Act, s 6(2).

[1252] IPID Act, ss 6(3)(a) and 6(6); Public Service Act (Proclamation 103 of 1994), ss 16A(1), 16B, 17(1) and 17(2); IPID Regulations, reg 13.

[1253] IPID Act, s 6(6).

At the beginning of the case study period, there were interpretive questions about these provisions. In *Table 7.4* below, I set out the state of the law and practice at the *end* of the case study period. Cases turned on compliance with requirements and, in some cases, their constitutionality.

7.2.3. Protagonists

The protagonists included incumbents at institutions, NGOs and opposition political parties.

The first category is incumbents whom Zuma sought, directly or indirectly, to remove. These include Nxasana (NPA); Dramat, Sibiya and Booysen (Hawks); McBride (IPID); and Gordhan and Jonas, the Minister and Deputy Minister of Finance (Cabinet). While some challenged suspensions or removals, much of the litigation was driven by NGOs or opposition parties and opposed by the state, with incumbents at the middle of a tug-of-war. Although incumbents sought to protect their *own* interests, these cases nevertheless constitute 'strategic litigation' as defined in Chapter 2. The individuals, or NGOs or political parties that intervened, articulated objectives extending beyond incumbent interests, in particular concerning institutional integrity and the rule of law. A final protagonist was the businessman, Hugh Glenister, who brought a trilogy of cases concerning the Scorpions/Hawks, litigating in the public interest.[1254]

The second group of protagonists was four NGOs. I interviewed their heads – Lawson Naidoo (CASAC),[1255] Nicole Fritz (FUL),[1256] David Lewis (Corruption Watch),[1257] and Francis

[1254] See Section 7.3.

[1255] Interview: Lawson Naidoo, Executive Secretary, CASAC, (Johannesburg, 5 September 2019).

[1256] Interview: Nicole Fritz, Executive Director, FUL (Johannesburg, 20 December 2019).

[1257] Interview: David Lewis, Executive Director, Corruption Watch (Johannesburg, 25 September 2019).

Antonie (HSF)[1258] and their lead lawyers.[1259] I give a brief account here of their founding, structure, animating philosophies and approaches.

The four NGOs are fairly young, all but HSF founded around Zuma's 2009 ascent to the presidency. Klaaren describes them as part of a 'second generation of post-apartheid public interest law organisations'.[1260] The protagonists in Chapter 6, especially the LRC, would be 'first generation'. FUL was founded in early 2009, with retired Constitutional Court justice, Johann Kriegler, a driving force and still heavily involved.[1261] It was founded in the aftermath of allegations that Judge President Hlophe of the Western Cape High Court attempted to influence two Constitutional Court judges to rule in Zuma's favour in a case concerning his corruption prosecution.[1262] CASAC was founded in 2010, 'very much in the immediate aftermath of the ANC's Polokwane Conference [which elected Zuma party leader in 2008] and the sort of populism that was associated with that.'[1263] Corruption Watch was founded in 2012 at a time of growing concern at corruption in the public and private sectors, including scandals implicating Zuma.[1264] The HSF is the oldest, founded in 1993.

The NGOs have much in common structurally.[1265] Unlike Chapter 6's protagonists, they are not public interest law centres, and act as litigants, not litigators. They are similar in size as

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[1258] Interview: Francis Antonie, Director, HSF (Johannesburg, 27 September 2019).

[1259] Discussed under each stream.

[1260] Klaaren (n 33).

[1261] Fritz (n 1256).

[1262] ibid.

[1263] Naidoo (n 1255).

[1264] Lewis (n 1257) highlighted a 2013 incident when the Gupta family landed a private airplane carrying wedding guests at Waterkloof Military Airbase outside Pretoria, and the controversy concerning upgrades to Zuma's residence in Nkandla.

[1265] CASAC website <www.casac.org.za/executive-and-advisory-council> accessed 09 October 2021.

small-to-medium NGOs dependent on donor funding.[1266] CASAC and FUL are the smallest, each employing only one substantive employee, CASAC's Executive Secretary and FUL's Executive Director. Although CASAC and FUL have minimal staff, they draw heavily on governing and advisory structures. CASAC's Executive Committee and Advisory Council include notable civil society activists, retired judges, academics and veterans of the liberation struggle. Decisions to litigate are taken by the Executive Committee, following proposals from the Executive Secretary or another member, and the advocates who argue CASAC's cases often come from its Advisory Council.[1267] FUL similarly has an engaged Board of Directors.[1268] HSF and Corruption Watch are larger, with staff complements of 13 and 24 respectively.[1269] The majority of HSF's staff are white, while the majority of Corruption Watch's staff are black. Taking into account the active involvement of non-remunerated board members and advisors, CASAC and FUL are commensurate in size to Corruption Watch and HSF, and their governance structures have a majority of black members.

All four organisations are centrally concerned with the rule of law and corruption. In interviews, I explored whether their conceptions of these concepts vary. CASAC's Naidoo explained that 'there is sufficient consensus among us on certain key aspects of the Constitution to enable us to work together' and identified appointment processes in key institutions as a good example of consensus.[1270] FUL's Fritz noted that the organisations, especially FUL and HSF, are

[1266] See *Table 7.5*.

[1267] Naidoo (n 1255).

[1268] Fritz (n 1256).

[1269] HSF website listed 13 staff <www.hsf.org.za/about/hsf-staff> accessed 17 February 2020.

[1270] Naidoo (n 1255).

often conflated on social media, but that there are differences, either of ideology or tactical approach.[1271]

Although not easily discerned from a distance, the NGOs have differences of ideology and political positioning. HSF has its roots in the liberal political establishment in South Africa (as personified by Helen Suzman, a white liberal parliamentarian who opposed apartheid policies), and is expressly committed to liberalism and to a conception of the Constitution as 'a liberal document'.[1272] Lewis (Corruption Watch) described HSF as 'a liberal foundation in the best and most difficult senses of the word'.[1273] HSF's Antonie explained that they are 'aware of some of the tensions within liberalism' and that different 'strains of liberalism' inform their approach, which produces 'interesting differences, especially around economic policy'.[1274] He added, 'if liberalism has articulated anything,… it is the rule of law'.[1275] The other three organisations tend to emphasise values of substantive equality and social justice, rather than liberal values, but the rule of law is emphatically embraced by all four. Corruption Watch centrally focuses on corruption.

All four NGOs employ litigation, but adopting different litigation models. The differences emerge from the public materials of the organisations and, in particular, interviews with their heads. A typical comment was, 'we are different in our styles and our objectives'.[1276] HSF and FUL generally adopted a research-based model, while CASAC and Corruption Watch employed campaign-based litigation.

[1271] Fritz (n 1256).

[1272] HSF website <www.hsf.org.za/about/about-the-helen-suzman-foundation> accessed 10 March 2019.

[1273] Lewis (n 1257).

[1274] Antonie (n 1258).

[1275] ibid.

[1276] Lewis (n 1257).

The third category of protagonists was opposition political parties, most significantly the DA and EFF. However, the United Democratic Movement (UDM), Congress of the People (COPE) and Inkatha Freedom Party (IFP) also participated, with the UDM in a leading role in two important cases. I interviewed DA Federal Chairperson, James Selfe,[1277] EFF Chairperson, Dali Mpofu,[1278] UDM President, Bantubonke Holomisa,[1279] and their lead lawyers.

The DA and the EFF are the largest opposition parties by representation in national and provincial legislatures. Both have governed metropolitan municipalities and the DA has governed a province, the Western Cape. However, they represent different constituencies and ideological or policy positions. The DA has its roots in two strands of South African pre-democratic politics. It traces its roots to the Progressive Party, a white liberal opposition party under apartheid formed in 1959. However, it has drawn from the support base of the National Party, which governed under apartheid and was first renamed the 'New National Party' in 1997 before being dissolved in 2005. The DA is the official opposition in Parliament, securing 22.23% of the vote in 2019. The EFF was founded in 2013 as a breakaway from the ANC. It styles itself as a black socialist party, its members of Parliament donning red berets and overalls to identify with the working class. The EFF is the second largest opposition party in Parliament and received 6.35% of the vote in 2019. The EFF and the DA's model of litigation can best be characterised as campaign-based or, if the parties constitute movements, as movement-based. They combined litigation with formal political action, especially in Parliament. For the EFF, this includes consistent use of disruptive tactics.

Beyond the NGOs, political parties and incumbents, the litigation happened in parallel with two national movement-based campaigns (#SaveSA and #UniteBehind). I interviewed

[1277] Interview: James Selfe, Federal Chairperson, Democratic Alliance, Cape Town (online), 3 June 2020.

[1278] Interview: Dali Mpofu SC, advocate and former EFF Chairperson (Johannesburg, 30 April 2020).

[1279] Interview: Bantubonke Holomisa, UDM President (Mqanduli, 7 February 2021).

leaders from both – Mark Heywood (#SaveSA)[1280] and Zackie Achmat (#UniteBehind).[1281] CASAC played a role in the formation of #SaveSouthAfrica, by supporting dialogue across NGOs, trade unions, political parties and others concerned about state capture.[1282] Although neither movement litigated, they organised around cases.

#SaveSA began to operate properly from late 2016, and subsided in late 2017 when Ramaphosa won the ANC Presidency.[1283] It was most active in 2017. The highlight was a series of marches across South Africa on 7 April 2017 following Zuma's sacking of the Minister and Deputy Minister of Finance.[1284] On 14 May 2017, the night before the hearing in *Secret Ballot*, #SaveSA activists slept outside the Constitutional Court and the following day joined a march led by opposition parties, especially the EFF.[1285]

#UniteBehind describes itself as 'a civil society collaboration constituted of over 20 organisations that organises and mobilises around common campaigns and local struggles.'[1286] Veteran activist, Zackie Achmat, explained that #UniteBehind's approach to state capture and concepts such as 'independence' of institutions was based on an understanding of citizenship and the experience of people.[1287] Its affiliates do not include any of the NGO protagonists. Unlike #SaveSA, #UniteBehind continued to operate after Zuma's fall from power. It runs four campaigns, one being 'State Capture'. One of the highlights of #UniteBehind's actions on state

[1280] Interview: Mark Heywood, former Executive Director of SECTION27, a leader of #SaveSouthAfrica campaign (Oxford, 3 December 2019).

[1281] Interview: Zackie Achmat, activist and one of the leaders of #UniteBehind (Cape Town, 6 September 2019).

[1282] Naidoo (n 1255).

[1283] Heywood (n 1280).

[1284] ibid; Chipkin and others (n 1203) 9.

[1285] ibid.

[1286] #UnitedBehind website <https://unitebehind.org.za> accessed 17 April 2019.

[1287] Achmat (n 1281).

capture was 'the People's March' on 7 August 2017, the day before the actual secret ballot vote. #UniteBehind described how 'thousands of people, independent of political parties' marched demanding Zuma's resignation.[1288]

Despite congruent goals and some overlap in affiliation, #SaveSA and #UniteBehind were seen partly as rival campaigns.[1289] They did not collaborate with the NGOs or political parties. I do not explore these dynamics, but limit myself to how the two campaigns affected, and were affected by, the litigation.

7.2.4. Antagonists

The antagonists include Zuma and individuals whom he appointed (directly or indirectly) and whose appointment or removal was in issue in the litigation, namely Simelane, Jiba, Nxasana,[1290] and Abrahams (NPA); Ntlemeza (Hawks); and Mdluli (SAPS). I explore the individual circumstances of each incumbent and connections between them under each stream.

I now move to the five streams in which the attempt to recapture the state using strategic litigation unfolds, situated in the NPA, Scorpions/Hawks, SAPS, IPID and the Presidency/Cabinet.

7.3. Without fear or favour – the National Prosecuting Authority

I begin with litigation directed at removing all four NDPPs who led the NPA during Zuma's presidency – Simelane, Jiba, Nxasana and Abrahams. I set out the institutional context of the NPA and then deal with the cases relating to each NDPP.

[1288] #UniteBehind website <https://unitebehind.org.za/campaigns/state-capture-corruption/> accessed 17 April 2019.

[1289] Achmat (n 1281); Heywood (n 1280).

[1290] Both protagonist *and* antagonist, because Zuma sought to remove him but NGO protagonists resisted his restoration to office after he accepted a 'golden handshake'.

7.3.1. Context and objectives

Establishing an independent prosecuting authority was a priority for the liberation movements and an important issue during constitutional negotiations.[1291] One question during the certification of the Final Constitution was whether it was acceptable to have a national prosecutions head appointed by the President rather than a series of provincial heads, with the concern that she might be more susceptible to political influence. The Court held that the arrangement was acceptable because executive action threatening independence would be subject to 'constitutional control by the courts'.[1292]

Section 179 of the Constitution provides for a single national prosecuting authority, structured in terms of an Act of Parliament and consisting of an NDPP, 'who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive' and Directors of Public Prosecutions (DPPs) and prosecutors.[1293] The Constitution empowers the NPA to institute criminal proceedings and carry out incidental functions. National legislation must ensure that DPPs are 'appropriately qualified' and responsible for prosecutions in specific jurisdictions, subject to the powers of the NDPP.[1294]

Importantly, s 179(4) requires that the NPA exercise its functions 'without fear, favour or prejudice'. The NDPP's functions and powers are articulated in s 179(5), which provides that she must determine prosecution policy (with concurrence of the responsible Minister) and issue policy directives, and may intervene in the prosecution process when policy directives are not complied with. It further confers on the NDPP the power to review a decision to prosecute or not. This

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[1291] Mugler (n 1212) 7.

[1292] *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) [146].

[1293] Constitution, s 179(1).

[1294] ibid, s 179(4).

power has been the site of contestation, including reviews of decisions of successive NDPPs regarding Zuma's prosecution. Notwithstanding the entrenched independence of the NPA, s 179(6) provides that the responsible Cabinet Minister must 'exercise final responsibility over the [NPA]'. All other aspects of the NPA are left to national legislation,[1295] the NPA Act.

The NPA Act governs appointment. It provides simply that for appointment as NDPP, Deputy Director or Director the person must possess legal qualifications that would entitle him or her to practise in all courts in the Republic; be a 'fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned' and, in the case of the NDPP, be a South African citizen. Section 10 provides that the President must appoint the NDPP in accordance with s 179 of the Constitution, but says no more about the process. An NDPP serves a non-renewable term of 10 years. Democratic South Africa should be on its third NDPP. Instead, Shamila Batohi is the *sixth* permanent appointment (or the ninth if substantial acting appointments are included). In *Nxasana/Abrahams*, the Constitutional Court described the recent history of the NPA as 'one of paralysing instability'.[1296]

The first three NDPPs (Ngcuka, Pikoli and Mpshe) were removed prematurely by the President succeeding the appointing President. Subsequently, all the Zuma-appointed NDPPs (Simelane, Nxasana and Abrahams) were removed by the Constitutional Court or, for Jiba's acting stint, replaced by Zuma under the shadow of litigation. The latter category – NDPPs under Zuma – is my focus. *Table 7.2* below captures the history of the office.

Table 7.2 NDPPs succession

[1295] ibid, s 179(7).

[1296] *Corruption Watch NPC v President of the Republic of South Africa* 2018 (2) SACR 442 (CC) ('*Nxasana/Abrahams (CC)*') [6].

Office-bearer	Term	Appointed by / Removed by (President or court)	Circumstances of removal
Bulelani Ngcuka	1998-2004	Mandela / Mbeki	Announced that, despite a 'prima facie case' against Deputy President Zuma, would not charge him; accused of being an apartheid spy by Zuma supporters; Hefer Commission of Inquiry cleared him; resigned
Vusi Pikoli	2005- 8 Dec 2008	Mbeki / Motlanthe	Suspended by Mbeki; investigated and cleared by Ginwala Commission of Inquiry; dismissed by Motlanthe; his challenge to dismissal settled out of court
Mokotedi Mpshe (Acting)	2009	Motlanthe / Zuma	Zuma replaced him with Simelane as permanent NDPP
Menzi Simelane	25 Nov 2009 - 5 Oct 2012	Zuma / court	Removed by Constitutional Court following his testimony at Ginwala Commission
Nomgcobo Jiba (Acting)	2012-2013	Zuma / Zuma	Zuma replaced her with a permanent appointment after litigation launched to compel him to appoint; subsequently struck from roll of advocates by High Court, but reinstated to roll following appeal
Mxolisi Nxasana	1 October 2013-11 May 2015	Zuma / court	Removed by Constitutional Court
Shaun Abrahams	18 June 2015 – 13 August 2018	Zuma / court	Removed by Constitutional Court
Silas Ramaite (Acting)	September 2018 – 31 January 2019	Ramaphosa / Ramaphosa	Ramaphosa replaced him with Batohi as permanent NDPP
Shamila Batohi	1 February 2019 - present	Ramaphosa / n/a	-

7.3.2. Simelane

The first NDPP appointed by Zuma was Menzi Simelane.[1297] Simelane had served as Director-General (DG) of the Department of Justice (2005-2009). Simelane's conduct as DG towards his predecessor NDPP, Vusi Pikoli, sowed the seeds for his own removal. Pikoli had been suspended by President Mbeki on 23 September 2007. Pikoli's suspension was prompted by his intention to arrest and prosecute SAPS National Commissioner, Jackie Selebi.[1298] President Mbeki appointed a commission of inquiry headed by former Speaker of Parliament, Frene Ginwala, to inquire into Pikoli's fitness to hold office. Naidoo (later CASAC's Executive Director) served as the Commission's Deputy Secretary. As DG, Simelane presented the government's submissions and testified.[1299]

Simelane was cross-examined by Trengove. This cross-examination later played a central role in his removal.[1300] Trengove described Simelane as 'the main driver behind the dismissal of Pikoli'.[1301] The Ginwala Commission found that government had failed to justify Pikoli's suspension.[1302] It made adverse credibility findings against Simelane.[1303] Minister for Justice and Constitutional Development, Enver Surty, requested the Public Service Commission (PSC) to investigate, which it did, recommending disciplinary action against Simelane.[1304] Meanwhile, a political transition transpired. Kgalema Motlanthe served a short stint as President, during which

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[1297] *Democratic Alliance v President of South Africa* 2013 (1) SA 248 (CC) ('*Simelane (CC)*') fn 9.

[1298] ibid [54].

[1299] ibid [4.4].

[1300] ibid [50ff].

[1301] Interview: Wim Trengove SC, advocate, Johannesburg Bar (Johannesburg, 30 September 2019). Trengove acted for Pikoli before the Ginwala Commission.

[1302] Ginwala Commission Report [349].

[1303] ibid [4.5].

[1304] ibid [4.6]-[4.7].

he dismissed Pikoli notwithstanding the Ginwala Commission's recommendation.[1305] Zuma assumed the presidency. His Justice Minister, Jeff Radebe, rejected the recommendations of the PSC to discipline Simelane.[1306] Two days later, Zuma appointed Simelane, who had been appointed a Deputy NDPP just six weeks earlier, as NDPP.[1307]

The DA brought an application to the High Court, which held that the appointment raised concerns but was not unlawful.[1308] On appeal, the SCA set aside Simelane's appointment.[1309] A unanimous Constitutional Court held that Simelane's appointment should be set aside, since the process followed by the President was irrational as he failed to take into account the Ginwala Commission's findings and Simelane's conduct.[1310]

7.3.3. Jiba

Following *Simelane*, Zuma appointed Nomgcobo Jiba Acting NDPP. CASAC eventually brought an application directly to the Constitutional Court to compel Zuma to make a permanent appointment. Naidoo explained: 'Jiba at that stage was acting for a period of 18 months and we felt that someone in an acting position for that period of time undermines the perception of independence.'[1311] Having ignored CASAC until it launched, Zuma confirmed in his answering affidavit that he would make an appointment,[1312] and then appointed Mxolisi Nxasana as NDPP on 1 October 2013, Jiba reverting to a Deputy NDPP. Naidoo commented that, while Minister of

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[1305] ibid Recommendation [I] and [4.11].

[1306] ibid [4.8].

[1307] ibid [4.8]-[4.10].

[1308] *Democratic Alliance v President of the Republic of South Africa* [2010] ZAGPPHC 194 ('*Simelane (HC)*').

[1309] *Democratic Alliance v President of the Republic of South Africa* 2012 (1) SA 417 (SCA) ('*Simelane (SCA)*').

[1310] *Simelane (CC)* [86].

[1311] Naidoo (n 1255).

[1312] ibid.

Justice, Radebe and Zuma may have wished to appoint Jiba permanently, 'Zuma realised that that appointment would be likely to be reviewed and so he didn't want to go down that path' because of the earlier *Simelane* decision.[1313]

As NDPP, Nxasana conducted an internal investigation, requesting the Minister of Justice to take disciplinary action against Jiba. One of the allegations – related to the SAPS case study below – was that Jiba blocked the prosecution of SAPS Crime Intelligence head, Richard Mdluli. The Minister refused to act against Jiba. FUL launched litigation to compel the President to suspend her.

The High Court upheld the application.[1314] The majority (Motlhe and Tlhapi JJ) set aside the decision of the NDPP (Abrahams) to withdraw criminal charges against Jiba and set aside the President's failure to suspend and discipline her.[1315] The court directed the President to institute disciplinary proceedings against Jiba, but suspended this order until proceedings by the General Council of the Bar (GCB) to have her struck off the roll of advocates were finalised. The court interdicted Jiba from performing functions relating to her offices until the GCB proceedings were finalised.

The High Court upheld the GCB's application to have Jiba struck from the roll. However, the SCA overturned the striking-off order in a 3-2 split decision. The Constitutional Court refused leave to appeal, holding that the matter raised no constitutional issues.[1316] Ramaphosa appointed a commission of inquiry to investigate her fitness for office, headed by retired judge, Yvonne Mokgoro. It recommended Jiba not be reinstated and she left the NPA for private practice.

[1313] ibid.

[1314] *Freedom Under Law v National Director of Public Prosecutions* 2018 (1) SACR 436 (GP) ('*Jiba*').

[1315] ibid [108].

[1316] *General Council of the Bar v Jiba* [2019] ZACC 23 ('*Jiba striking off (CC)*').

7.3.4. Two birds with one stone: Nxasana and Abrahams

Nxasana, whom interviewees described as a 'small town attorney'[1317] and 'a low key guy, an odd appointment if stature in the legal community is viewed as a qualifying criteria',[1318] surprised many by asserting his independence, including requesting the Minister to act against Jiba.[1319] The civil society leaders and lawyers whom I interviewed regarded him as honest and a person of integrity, if lacking the gravitas to head the NPA.[1320]

The relationship between Nxasana and Zuma quickly soured. The President suspended Nxasana, threatened disciplinary charges, and then offered a settlement in an approach the Constitutional Court described as 'first a stick; then a carrot; a stick once more; and eventually a carrot'.[1321] The President ultimately offered Nxasana a 'blank cheque' settlement – Nxasana agreed to go, for R17,357,233.[1322]

Shaun Abrahams, a mid-ranking prosecutor, was appointed to replace him. CASAC, FUL and Corruption Watch brought applications in the High Court to set aside Abrahams' appointment and the Nxasana golden handshake payment. Corruption Watch and FUL brought a joint application, seeking to set aside the settlement, remove Abrahams and restore Nxasana as NDPP. CASAC brought a separate, similar application but argued that Nxasana was too compromised to reinstate and challenged two provisions of the NPA Act: s 12(4), allowing the President to extend the term of office of an NDPP (or deputy) for two years beyond the 65-year retirement age,

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[1317] Trengove (n 1301).

[1318] Lewis (n 1257).

[1319] ibid; Naidoo (n 1255).

[1320] Naidoo (n 1255); Trengove (n 1301).

[1321] *Nxasana/Abrahams (CC)* [25].

[1322] ibid [11].

provided that this did not exceed the 10-year term; and s 12(6), authorising the President to suspend an NDPP indefinitely and without remuneration.

For Corruption Watch, the main objectives were to remove Abrahams and improve the appointment process.[1323] FUL took up the matter to challenge the political interference with the independence of the office of the NDPP.[1324] FUL had already brought litigation to challenge some of Abrahams' decisions as NDPP, and considered that he was 'effectively a kind of stooge for Zuma'.[1325]

The High Court set aside both appointments and even barred Zuma from appointing the next NDPP on the basis of conflict of interest, directing that his deputy (Ramaphosa) do so.[1326] The matter was referred for confirmation and the Constitutional Court unanimously held that Nxasana's removal and Abrahams' appointment were invalid, and that the impugned provisions of the NPA Act were unconstitutional.[1327] Madlanga J concluded that s 12(4) regarding extension encourages incumbents to curry favour and undermines independence,[1328] and that the s 12(6) suspension provision was susceptible to abuse.[1329] The Court split on whether to reinstate Nxasana. Jafta J (Petse AJ concurring) held that it should.[1330] The majority, however, held that Nxasana was tainted and should repay the settlement and vacate office.[1331] The High Court order that the Deputy

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[1323] Lewis (n 1257).

[1324] Fritz (n 1256).

[1325] ibid.

[1326] *Corruption Watch v President of the Republic of South Africa* 2018 (1) SACR 317 (GP) ('*Nxasana/Abrahams (HC)*').

[1327] *Nxasana/Abrahams (CC)* [89]-[92].

[1328] ibid [42].

[1329] ibid [45].

[1330] ibid [127]-[129].

[1331] ibid [82]-[87].

President must make the appointment because the President (then Zuma) was conflicted fell away. Instead, the President (now Ramaphosa) was ordered to appoint a new NDPP.

7.4. Drawn stings and clipped wings – the Scorpions and Hawks

The second stream concerns the specialist corruption-fighting institution, originally the Directorate of Special Operations (DSO) – 'the Scorpions' – and later the Directorate for Priority Crimes Investigations (DPCI) – 'the Hawks'. A line of cases litigated by businessman Hugh Glenister during the Scorpions-Hawks transition challenged the legislative framework, including the appointment/removal provisions. After the transition, the Hawks had two national heads: Anwa Dramat and Berning Ntlemeza. Litigation was instituted, first unsuccessfully, to attempt to prevent Dramat's unlawful removal by Zuma, and second, successfully, to remove Ntlemeza. Here, I consider the *Glenister*, *Dramat* and *Ntlemeza* litigation.

7.4.1. Context and objectives

The Scorpions were established in 1999 and became operational at the start of 2001. They were headed by a DNDPP, Leonard McCarthy, and governed by the NPA Act, with powers to investigate *and* prosecute. This contributed to effective prosecution by combining investigators and prosecutors in one institution, reflected in high conviction rates.[1332] It was perceived, however, to foster an independence from the SAPS which, together with the Scorpions' early successes in prosecuting politicians, led to distrust among politicians.[1333] The Scorpions were disbanded in 2008 and the new Hawks were located in the SAPS, despite litigation attempting to prevent the change.

The Hawks – officially DPCI – were established by an amendment to the SAPS Act inserting a new Chapter 6A, placing them firmly in the SAPS, with no prosecutors. The Chapter

[1332] Joey Berning and Moses Montesh, 'Countering Corruption in South Africa: The Rise and Fall of the Scorpions and Hawks' [2016] SACQ 5–6.

[1333] ibid 6–7.

deals with composition,[1334] functions,[1335] staffing,[1336] appointment, remuneration and conditions of service of National, Deputy and Provincial Heads,[1337] and removal of the National Head.[1338]

Ntlemeza was the second National Head of the Hawks, after Anwa Dramat, who served from 2009-2014. Leadership succession in the Scorpions and the Hawks is set out below.

Table 7.3 Scorpions/Hawks National Head succession

Office-bearer	**Term**	**Appointed by / Removed by (President or court)**	**Circumstances of removal**
Scorpions (DSO)			
Leonard McCarthy	1999-2008	Mbeki / n/a	Scorpions disestablished by Parliament and replaced by Hawks
Hawks (DPCI)			
Anwa Dramat	2009-2014	Zuma / Zuma	Suspended by Minister of Police; suspension struck down by High Court and appeal dismissed; resigned
Berning Ntlemeza	2014-2017	Zuma / court	Removed by High Court; leave to appeal refused by SCA and Constitutional Court
Godfrey Lebeya	2018-present	Ramaphosa	

7.4.2. Glenister

The *Glenister* trilogy concerned the fate of the Scorpions, the transition to the Hawks, and the legal provisions governing independence, including appointment and removal of the National Head. *Glenister I* was an attempt to prevent the disbanding of the Scorpions and their relocation from the

[1334] SAPS Act, s 17C.

[1335] ibid, s 17D.

[1336] ibid, ss 17DB, 17DE.

[1337] ibid, s 17CA.

[1338] ibid, s 17DA.

NPA to the SAPS. The Constitutional Court dismissed the challenge for prematurity, as the legislation was before Parliament.[1339]

The legislation passed, but Glenister mounted a new challenge, which succeeded in *Glenister II*.[1340] The Constitutional Court struck down the whole of Chapter 6A of the SAPS Act establishing the Hawks for failing 'to secure an adequate degree of independence for the [Hawks]'.[1341] Its main reasons were the absence of specially secured conditions of employment, the imposition of oversight by a committee of political executives, and the subordination of the [Hawks'] power to investigate at the hands of members of the executive.'[1342] Regarding employment conditions, the Court found a lack of employment security and that appointments were not 'sufficiently shielded from political influence'.[1343]

The Court approved the decisions to disestablish the Scorpions and situate the Hawks in the SAPS, rather than the NPA, but required Parliament to improve the institutional independence of the Hawks. HSF participated as *amicus curiae* in *Glenister II*, and its argument – a novel interpretation of the duties provision in s 7(2) of the Constitution taking into account South Africa's international law obligations to combat corruption – persuaded the majority of the Court. In response to the decision, Parliament amended the SAPS Act to address the Court's concerns.

A third instalment lay ahead, directly relevant to Dramat's challenged suspension. In *HSF/Glenister III*, litigated jointly by Glenister and the HSF, the Constitutional Court struck down further provisions of Chapter 6A, holding that the amendments had not gone far enough to render

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[1339] *Glenister v President of the Republic of South Africa* 2009 (1) SA 287 (CC) ('*Glenister I*').

[1340] *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) ('*Glenister II*').

[1341] ibid [251], [5] of order.

[1342] ibid [248].

[1343] ibid [249].

the Hawks sufficiently independent.[1344] The Court struck down several provisions, including s 17DA(2) and part of s 17DA(1), which authorised the Minister to suspend the National Head 'pending an inquiry into his or her fitness to hold such office as the Minister deems fit' and subsequently to remove them. The Court struck down these provisions, leaving intact subsections (3)-(4), which authorise the Minister to remove the head of the Hawks only after a Parliamentary Committee inquiry and subject to approval by a two-thirds vote of the National Assembly.[1345] The timing was portentous: judgment was delivered on 27 November 2014; less than a month later, on 23 December 2014, Dramat was suspended.

7.4.3. Dramat

The first National Head of the Hawks, Anwa Dramat, a former uMkhonto weSizwe (MK) operative who had been sentenced to 12 years' imprisonment on Robben island, was appointed by Zuma in 2009. Dramat was suspended in late 2014 and Ntlemeza was appointed acting National Head. The stated reason was that Dramat and Shadrack Sibiya, Gauteng Hawks Head, had been involved in the illegal rendition of Zimbabwean nationals from South Africa in 2011. Dramat claimed that this was a reprisal for an investigation. In a letter to the Minister following his suspension, Dramat stated:

[1344] *Helen Suzman Foundation v President of the Republic of South Africa; Glenister v President of the Republic of South Africa* 2015 (2) SA 1 (CC) ('*HSF/Glenister III*').

[1345] ibid [90].

> I have recently called for certain case dockets involving very influential persons to be brought or alternatively centralised under one investigating arm and this has clearly caused massive resentment towards me.[1346]

These 'dockets' reportedly related to the investigation against Zuma in the Nkandla scandal.[1347] Dramat was suspended the day after requesting them.[1348]

HSF successfully challenged Dramat's suspension. The decision was a straight-forward application of *Glenister III*, Prinsloo J holding that the Minister of Police lacked the power to suspend Dramat following the striking down of s 17DA(2) of the SAPS Act.[1349] The court also set aside Ntlemeza's acting appointment, its validity having depended on Dramat's suspension.[1350]

However, *Dramat* was never implemented. Dramat never resumed office but resigned in April 2015,[1351] saying he was being 'pushed out'.[1352] Ntlemeza later claimed that his acting appointment was withdrawn when the High Court set it aside, but he was immediately re-appointed to act after Dramat and the Minister settled.[1353]

[1346] *Helen Suzman Foundation v Minister of Police* [2015] ZAGPPHC 4 ('*Dramat*') [10].

[1347] SAPA, 'Hawks not investigating Nkandla, say police' *Mail & Guardian* 30 December 2014.

[1348] ibid.

[1349] ibid [31].

[1350] ibid [41].

[1351] Founding Affidavit (*Ntlemeza*) [54].

[1352] *Dramat* [11].

[1353] Answering Affidavit, Berning Ntlemeza, [10]-[11].

7.4.4. Ntlemeza

On 10 September 2015, Minister of Police Nhleko appointed Ntlemeza as National Head of the Hawks. He had been acting since 2014, when Dramat vacated office. Ntlemeza entered the police in 1986 as a Sergeant and was promoted to Lieutenant (1990), Captain (1992) and Major (1994).[1354]

Once he was appointed to act, Ntlemeza suspended Gauteng Provincial Hawks head, Sibiya. Sibiya alleged that Ntlemeza was punishing him for investigating Mdluli, head of SAPS Crime Intelligence, and having him charged with murder.[1355] The High Court (Matojane J) set aside Sibiya's suspension, in the process making adverse findings against Ntlemeza.[1356] Within days of Ntlemeza's permanent appointment, on 14 September 2015, he suspended KwaZulu-Natal provincial Hawks head, Booysen.[1357] That suspension, too, was set aside.[1358]

On 16 March 2016, HSF and FUL launched litigation to remove Ntlemeza from office. Part A of the application sought urgent interim relief, pending final determination of the review of the appointment, interdicting Ntlemeza from exercising any power or discharging any function or duty as head of the Hawks.[1359] Delivering judgment on 18 April 2016, Tuchten J agreed that the matter was urgent,[1360] but refused interim relief. He found that the evidence did not constitute a 'compelling, exceptionally clear case' for the grant of an interim interdict, in particular because he was not persuaded that irreparable harm would result if Ntlemeza remained in office until Part B

[1354] Annexure "MBN20" to Ntlemeza's Answering Affidavit, High Court [C].

[1355] *Helen Suzman Foundation v Minister of Police* [2016] ZAGPPHC 1191 ('*Ntlemeza (HC urgent)*') [23].

[1356] *Sibiya v Minister of Police* [2015] ZAGPPHC 135 ('*Sibiya*').

[1357] *Ntlemeza (HC urgent)* [30].

[1358] *Booysen v National Head of the Directorate for Priority Crime Investigation* [2015] ZAKZDHC ('*Booysen*').

[1359] *Ntlemeza (HC urgent)* [11].

[1360] ibid [17].

was decided.[1361] He noted that Ntlemeza 'has a propensity for taking disciplinary proceedings against his highly placed fellows without justification', but found no suggestion that Ntlemeza was planning to do the same to anyone else and that such conduct could in any event be challenged in separate proceedings.[1362]

It took another year for the main relief in Part B to be decided. On 17 March 2017, a full court of the North Gauteng High Court (Mabuse J, with Kollapen J and Baqwa J concurring) set aside Ntlemeza's appointment, ordering the Minister and Ntlemeza to pay HSF and FUL's costs.[1363] Ntlemeza applied to the High Court for leave to appeal. HSF and FUL delivered a counter-application seeking a declarator that the operation and execution of the main order not be suspended pending any appeal proceedings. The High Court dismissed the application for leave to appeal but granted the counter-application, effectively bringing Ntlemeza's removal into effect, albeit temporarily.

Ntlemeza appealed to the SCA on the merits and the interim execution order. The SCA delivered a short judgment upholding the interim execution order, ordering that Ntlemeza must vacate office immediately, pending any appeals.[1364] It dismissed Ntlemeza's main appeal on 14 June 2017 without a judgment because there were 'no reasonable prospects of success' and the Constitutional Court also refused leave in an order without a judgment on 5 September 2017.

[1361] ibid [69].

[1362] ibid [68]-[69].

[1363] *Helen Suzman Foundation v Minister of Police* 2017 (1) SACR 683 (GP) ('*Ntlemeza (HC)*').

[1364] *Ntlemeza v Helen Suzman Foundation* 2017 (5) SA 402 (SCA) ('*Ntlemeza (SCA)*').

7.5. Set a Thief – the South African Police Service

7.5.1. Context and objectives

This stream concerns litigation to remove Richard Mdluli, Divisional Commissioner: Crime Intelligence. As head of crime intelligence, he was in the second rung of the SAPS hierarchy, reporting to the National Commissioner. One of the main allegations against Jiba, the Acting NDPP and DNDPP, was that she shielded Mdluli from prosecution. Ntlemeza at the Hawks was also alleged to be protecting him. Sibiya successfully challenged Ntlemeza's decision to suspend him as provincial Hawks Head, alleging that the motive for the suspension was that Sibiya was investigating Mdluli.

The Constitution establishes a national police service, which must be structured to function in the national, provincial and local spheres of government,[1365] and must 'prevent, combat and investigate crime, … maintain public order, … protect and secure the inhabitants of the Republic and their property, [and] uphold and enforce the law'.[1366] The Constitution required national legislation to provide for its powers and functions. The SAPS Act plays that role.

The SAPS is headed by a National Commissioner appointed on a five-year term. Much like the history of the NDPP, from 1995-2019 only one completed a full term. The National Commissioner in turn appoints divisional heads, including crime intelligence. Nine different people (six permanent, three acting) served as National Commissioner.[1367] Though none were removed through litigation, this instability is relevant to Mdluli's appointment because, with Selebi

[1365] Constitution, s 205(1).

[1366] ibid, s 205(3).

[1367] Ivkovich and others (n 1212) 710.

suspended as National Commissioner, Police Minister Nathi Mthethwa instructed acting Commissioner, Tim Williams, to appoint Mdluli, notwithstanding Williams' serious concerns.[1368]

When appointed, Mdluli faced charges of the kidnapping and murder of Oupa Ramogibe, his ex-girlfriend's partner. Like Ntlemeza, Mdluli was part of the apartheid security apparatus. He joined at 21 in 1979. He is alleged to have been a member of the East Rand unit of the Special Branch, a police division responsible for arresting, interrogating, torturing and murdering anti-apartheid activists, and is alleged to have personally interrogated activists.[1369] Sibiya of the Hawks sought to investigate, but was suspended by Ntlemeza. Mdluli publicly claimed that there was a conspiracy against him by various police (including Dramat) because of his loyalty to Zuma.[1370] Mdluli was initially suspended and disciplinary proceedings were instituted against him at SAPS. He was also criminally charged. However, these decisions were reversed by SAPS and the NPA,[1371] prompting litigation by FUL.

7.5.2. Mdluli

FUL's application sought in part A to interdict Mdluli from carrying out his functions and the National Commissioner from assigning any tasks to him pending finalisation of review proceedings. In Part B, FUL sought to review and set aside the decisions of the NPA to withdraw criminal charges against Mdluli, and of the SAPS to withdraw disciplinary proceedings and to reinstate him to his post. Makgoba J granted the interim relief on 6 June 2012.[1372]

[1368] ibid.

[1369] 'Mdluli was apartheid "SB" policeman' *News24* 13 May 2012.

[1370] *Freedom Under Law v National Director of Public Prosecutions* 2014 (1) SA 254 (GNP) ('*Mdluli (HC)*').

[1371] See Section 7.3.2.

[1372] *Freedom Under Law v National Director of Public Prosecutions*, case number 26912/2012, unreported, North Gauteng High Court, 6 June 2012 ('*Mdluli (HC interim relief)*').

Murphy J granted Part B on 23 September 2013.[1373] First, the High Court set aside two NPA decisions to withdraw criminal charges against Mdluli: the decision by Mrwebi, Head of the Specialised Commercial Crimes Unit, to withdraw charges of fraud, corruption and money laundering;[1374] and the decision of Jiba, then acting NDPP, to withdraw charges of murder, kidnapping, intimidation and assault with intent to cause grievous bodily harm.[1375] The court ordered the NPA to reinstate both sets of charges.[1376] Secondly, the court set aside the decision of the National Commissioner of Police[1377] to withdraw disciplinary proceedings, and ordered the new National Commissioner[1378] and Mrwebi to institute fresh disciplinary proceedings.[1379] Thirdly, the court set aside the National Commissioner's decision to reinstate Mdluli as Head of Criminal Intelligence.[1380]

On appeal, the SCA largely upheld the High Court order.[1381] The SCA did reverse the order setting aside the murder-related charges, accepting that they had been provisionally withdrawn pending an inquest.[1382] It replaced the order *directing* the NPA to reinstate charges against Mdluli with an order recording the NPA's undertaking to decide whether to reinstate charges.[1383]

[1373] *Mdluli HC*.

[1374] ibid [241(a)].

[1375] ibid [241(b)].

[1376] ibid [241(e)].

[1377] Lt Gen Nhlanhla Mkhwanazi in acting capacity following suspension of Bheki Cele, who was later dismissed by Zuma.

[1378] Riyah Phiyega.

[1379] *Mdluli (HC)* [241(c)]-[(f)].

[1380] ibid [241(d)].

[1381] *National Director of Public Prosecutions v Freedom Under Law* 2014 (4) SA 298 (SCA) ('*Mdluli (SCA)*').

[1382] ibid [43]-[44].

[1383] ibid [53].

7.6. Who guards the guardians? IPID

7.6.1. Context and objectives

The fourth stream concerns the institution designed to provide oversight over the police, including SAPS and the Hawks. Section 206(6) of the Constitution requires national legislation to establish an 'independent police complaints body', which must 'investigate any alleged misconduct of, or offence committed by, a member of the police service'. In 1997, the 'Independent Complaints Directorate' (ICD) was created under the SAPS Act. In 2011, it was restructured and re-named as IPID, now governed by the IPID Act. IPID's first Executive Director was Francois Beukman, who was appointed in 2009 and due to leave in 2014. He resigned unexpectedly on the day of the 'Marikana massacre' on 16 August 2012, when SAPS members shot and killed 34 striking mineworkers.[1384]

After an acting stint by Koekie Mbeki, Robert McBride was appointed Executive Director of IPID on 3 March 2014 by Zuma.[1385] He was previously Chief of the Metropolitan Police of Ekurhuleni Municipality. Before democracy, he served in MK and was sentenced to death for carrying out a 1986 bombing that killed three young women and injured 69 people before receiving amnesty from the Truth and Reconciliation Commission.[1386]

IPID's mandate also covers the Hawks. On 24 March 2015, the Minister of Police placed McBride under 'precautionary suspension' for allegedly tampering with IPID's report to exonerate Dramat on the rendition complaint.[1387]

[1384] 'Francois Beukman's sudden resignation sparks speculation' *Mail & Guardian* 13 September 2012.

[1385] *McBride v Minister of Police* 2016 (2) SACR 585 (CC) [3] ('*McBride (CC)*').

[1386] Rostron (n 1213). See also, *Citizen 1978 (Pty) Ltd v McBride* 2011 (4) SA 191 (CC).

[1387] *McBride (CC)* [9]-[12].

7.6.2. McBride

McBride launched a High Court application to challenge his suspension and the constitutionality of provisions of the IPID Act, IPID Regulations and the Public Service Act dealing with suspension and removal of an IPID Executive Director. CASAC and HSF were admitted as *amici curiae* and made legal argument. CASAC also put up expert evidence 'to highlight the importance of independence to the legitimacy and effectiveness of the police'.[1388]

The High Court (Kathree-Setiloane J) upheld McBride's challenge to the legislative scheme and set aside the decisions to suspend McBride and institute disciplinary proceedings.[1389] The High Court held that s 6(3)(a) and 6(6) of the IPID Act, ss 16A(1), 16B, 17(1) and 17(2) of the Public Service Act and regulation 13 of the IPID Regulations are inconsistent with s 206(6) of the Constitution.

The matter was referred to the Constitutional Court for confirmation of the order of invalidity. HSF was again admitted as *amicus curiae*, its counsel explaining that HSF sought to emphasise that the case was not just about a 'disgruntled McBride'.[1390] A day before the hearing, the Minister conceded the unconstitutionality of the impugned provisions and the decisions to suspend and discipline McBride, but asked the court to order that the relevant Portfolio Committee of Parliament be deemed to be seized with the disciplinary inquiry.[1391]

In a unanimous judgment, the Court confirmed the order of invalidity in respect of the impugned provisions.[1392] The Court suspended the order for 24 months to allow Parliament to cure the defects, pending which it ordered that s 6(6) of the IPID Act be read as providing that ss

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[1388] *McBride v Minister of Police* [2016] 1 All SA 811 (GP) ('*McBride (HC)*') [7].

[1389] ibid.

[1390] Interview: Carol Steinberg SC, advocate, Johannesburg Bar (Johannesburg, 5 March 2020).

[1391] *McBride (CC)* [20].

[1392] ibid [58].

17DA(3) to (7) of the SAPS Act apply to the suspension and removal of the IPID Executive Director. These provisions permit suspension only after the start of removal proceedings by a Parliamentary Committee, and removal only after such committee makes a finding of misconduct, incapacity or incompetence, or the National Assembly adopts a resolution calling for removal. *Glenister II* had earlier struck down ss 17DA(1)-(2), which allowed suspension without Parliamentary involvement.[1393] The Court further declared the decision to suspend McBride invalid but suspended that order for 30 days to allow the National Assembly and the Minister, if they so chose, to suspend McBride in terms of the re-crafted interim scheme devised by the Court.

7.7. Pay back the Money! The President and Cabinet

7.7.1. Context and objectives

The final stream relates to Zuma himself and his Cabinet. It involves four cases, three targeting Zuma[1394] and the last an attempt to review a Cabinet reshuffle. These cases differ from the previous streams in that the President and Cabinet Ministers are democratically elected, if indirectly. Ngcukaitobi, who acted for the EFF throughout, described the first three cases as a 'trilogy' related to the EFF's broader political strategy of removing Zuma.[1395] Other opposition parties, especially the DA and UDM, also played key roles. The fourth case, *Cabinet Reshuffle*, was brought by the DA. The NGO protagonists (and others) participated as *amici curiae*.

There are two constitutional mechanisms to remove a President – impeachment under s 89, or a motion of no confidence under s 102(2). Section 89(1) provides that the National Assembly, by resolution of at least two thirds of its members, may remove the President from office on the grounds of serious violation of the Constitution or the law; serious misconduct; or

[1393] *Glenister II*, applied in *Dramat*.

[1394] Interview: Tembeka Ngcukaitobi SC, advocate, Johannesburg Bar (Oxford, 18 June 2019).

[1395] ibid.

inability to perform the functions of office. Section 102(2) provides that if the National Assembly, by a vote supported by a majority of members, passes a motion of no confidence in the President, the President, Cabinet and Deputy Ministers must resign. Opposition parties pursued both routes.

The sequence began with *Nkandla*, the EFF seeking to enforce the Public Protector finding that Zuma must pay back money spent on non-security upgrades to his family home. Although not expressly framed as being about removal, this possibility was ever-present from the beginning of the litigation and during the hearing, with argument about whether he had breached his oath of office (arguably, grounds for removal). Secondly, in *Secret Ballot*, opposition parties successfully reviewed the refusal by the Speaker of Parliament to allow a secret ballot on a vote of no confidence against Zuma.[1396] It succeeded, the vote took place in secret and Zuma narrowly survived. Thirdly, in *Impeachment Process*, opposition parties sought to compel the Speaker to implement a parliamentary process to decide on an impeachment motion.[1397] Finally, *Cabinet Reshuffle* saw the DA seek to review Zuma's Cabinet reshuffle removing Pravin Gordhan and Mcebisi Jonas as Minister and Deputy Minister of Finance.

7.7.2. Nkandla

The Public Protector, Madonsela, investigated expenditure on upgrades to Zuma's private residence at Nkandla, KwaZulu-Natal and produced a report[1398] concluding that non-security upgrades paid for by the state constituted a breach by the President of ss 96(1), (2)*(b)* and *(c)* of the Constitution.[1399] These provisions require Cabinet members to act in accordance with a code of ethics, to avoid conflicts of interest and not to use their position to enrich themselves or

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[1396] *United Democratic Movement v Speaker, National Assembly* 2017 (5) SA 300 (CC) ('*Secret Ballot*').

[1397] *Economic Freedom Fighters v Speaker of the National Assembly* 2018 (2) SA 571 (CC) ('*Impeachment Process*').

[1398] Public Protector 'Secure in Comfort' Report 25 (2013/14).

[1399] *Economic Freedom Fighters v Speaker, National Assembly* 2016 (3) SA 580 (CC) ('*Nkandla*') [7].

improperly benefit any other person. She also concluded that there had been breaches of the Executive Members' Ethics Act 82 of 1998 and the Executive Ethics Code.[1400]

The Public Protector took remedial action against the President in terms of s 182(1)(c) of the Constitution, directing him, with the assistance of National Treasury and SAPS, to determine the reasonable cost of the non-security-related upgrades, pay a reasonable percentage of their cost as determined by National Treasury, and reprimand the Ministers involved.[1401] The President submitted a report to the National Assembly refusing to comply,[1402] and it voted to absolve him.[1403] This prompted litigation by the DA and the EFF to compel compliance.[1404]

First, however, the DA and EFF focused political energy on Nkandla. Events in parliament became charged and conflictual, with EFF MPs asking the Speaker of Parliament to take action against Zuma, which she failed to do. The EFF began to chant 'pay back the money!' whenever Zuma appeared in Parliament and would no longer allow Zuma to address Parliament. The disruptions descended into physical altercations when the Speaker directed parliamentary security to eject EFF MPs, who were subsequently disciplined and suspended for a month. This culminated in litigation successfully invalidating s 11 of the Powers' Privileges and Immunities Act 4 of 2004, on which the Speaker had relied to eject MPs, the Court finding the removal unlawful.[1405] However, the political impasse remained. EFF Chairperson, Mpofu, explained that all the 'political options had been exhausted' and parliamentary processes were a 'sham and 'cover-up'.[1406]

[1400] ibid.

[1401] *Secure in Comfort* (n 1398) [11.1].

[1402] *Nkandla* [11].

[1403] ibid [12].

[1404] ibid [13].

[1405] *Democratic Alliance v Speaker, National Assembly* 2016 (3) SA 487 (CC).

[1406] Mpofu (n 1278).

Ngcukaitobi, who had regularly represented the EFF, felt the situation was getting into 'dangerous territory', and took the initiative to contact EFF leader, Julius Malema, and suggest that the EFF move from 'the political arena' to legal intervention.[1407] Malema took two or three weeks to come back to Ngcukaitobi, consulted some senior counsel, who considered the case a non-starter, but eventually gave the go-ahead.[1408] Mpofu explained that the decision was taken by the 'EFF leadership', its top six officials (including Mpofu), and that litigation was a 'last resort'.[1409] Ngcukaitobi drafted the application, Trengove led the team and Mpofu joined for the hearing.[1410] Mpofu secured Bar Council approval to act, given the potential conflict of interest with his EFF position.[1411]

Meanwhile, the DA had launched a similar application in the Western Cape High Court. When the EFF approached the Constitutional Court directly, the DA applied for direct access.[1412] DA Federal Chairperson, James Selfe expressed regret that the EFF got to the Constitutional Court first and claimed pole position.[1413]

Protagonists' objectives differed. The DA and EFF leaders were very open about their political goals, essentially to weaken Zuma and the ANC.[1414] Mpofu recalled that Zuma's removal was not an immediate aim, but 'there was an awareness that this might not be the end of it and that the ultimate prize would be to politically embarrass the ruling party by removing the

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[1407] Ngcukaitobi (n 1394).

[1408] ibid.

[1409] Mpofu (n 1278).

[1410] Ngcukaitobi (n 1394); Trengove (n 1301); Mpofu (n 1278).

[1411] Mpofu (n 1278).

[1412] *Nkandla* [13].

[1413] Selfe (n 1277).

[1414] Mpofo (n 1406); Selfe (n 1277).

President.'[1415] However, these were not their only objectives. Mpofu and Selfe identified accountability and strengthening institutions as aims.[1416] Ngcukaitobi characterised the EFF's objectives as ending the standoff in Parliament and holding Zuma to account for misusing state resources.[1417] He also understood *Nkandla* as part of the EFF's broader 'political strategy' to remove Zuma as ANC President.[1418]

Marcus, who represented the Public Protector, explained that '[Madonsela's] focus […] was self-consciously confined to her powers alone.'[1419] Madonsela kept a 'dignified distance from all that accompanied her report and the extraordinarily vituperative attacks on her personally', and she took a deliberate decision *not* to ventilate those issues, while 'the EFF approached the matter very, very differently.'[1420] She did not take a position on Zuma's removal.[1421] Madonsela's objective was to secure the office of the Public Protector and ensure that its remedial action was effectively enforced.[1422] This was the key *legal* question – the effect of remedial action taken by the Public Protector in terms of s 182(1)(c) of the Constitution, which provides that the 'Public Protector has the power, as regulated by national legislation . . . to take appropriate remedial action'.

The Court delivered judgment on 31 March 2016, Mogoeng CJ reading the entire judgment, not merely the usual summary and order. It was broadcast live on television and radio across numerous national stations. The court held that the Public Protector's remedial action is

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[1415] Mpofu (n 1278).

[1416] Ibid; Selfe (n 1277).

[1417] Ngcukaitobi (n 1394).

[1418] ibid.

[1419] Interview: Gilbert Marcus, advocate, Johannesburg Bar (Johannesburg, 3 March 2020).

[1420] ibid.

[1421] ibid.

[1422] ibid.

not limited to non-binding recommendations, but may be binding.[1423] On the facts, the remedial action *was* binding.[1424] The Court directed National Treasury to determine the 'reasonable costs' of the non-security measures – 'the visitors' centre, the amphitheatre, the cattle kraal, the chicken run and the swimming pool'[1425] – and to determine a reasonable percentage of those costs to be paid personally by Zuma.[1426] It directed Zuma to 'reprimand' the Ministers involved.[1427] Finally, it declared invalid the parliamentary resolution absolving him, and directed the President, Minister of Police and National Assembly to pay the costs.[1428] On 27 June 2016, National Treasury proposed that Zuma repay R7,814,155. The Court approved the amount.

7.7.3. Secret Ballot

Secret Ballot was the second case concerning attempts to remove Zuma. Although brought by UDM, the EFF was a lead protagonist. It concerned whether a motion of no confidence in Zuma tabled by UDM could be held by secret ballot. The 'trigger' for the motion of no confidence was a 2017 Cabinet reshuffle.[1429] It was alleged that threats of physical violence and dismissal had been directed at ANC MPs who supported the motion.[1430]

The EFF's lead counsel, Ngcukaitobi, revealed that *Secret Ballot* was 'inspired by the EFF'[1431] and EFF Chairperson Mpofu, who acted for the EFF in *Nkandla* but now represented

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[1423] *Nkandla* [69]-[71].

[1424] ibid [76].

[1425] ibid [105].

[1426] ibid.

[1427] ibid.

[1428] ibid.

[1429] *Secret Ballot* [13]; see also Section 7.7.5.

[1430] ibid [15].

[1431] Ngcukaitobi (n 1394).

UDM, confirmed that having UDM bring it was 'a tactical move'.[1432] UDM President, Holomisa, revealed that the decision to litigate was based on UDM's 'research and intelligence' regarding the possibility of securing a two-thirds majority with a secret vote.[1433] This was the UDM's objective. CASAC intervened to provide a civil society voice, as all the parties were political parties with 'a vested interest in the argument and outcome'.[1434]

As in *Nkandla*, the Constitutional Court delivered a unanimous judgment through Mogoeng CJ. It held that a motion of no confidence aims to ensure regular governmental accountability and serves the public interest,[1435] and that the Speaker has a discretion to allow a secret ballot,[1436] exercising Parliament's power to regulate its own process under s 57 of the Constitution.[1437] The Court remitted the matter to the Speaker to decide whether to have a secret ballot, indicating factors to consider. The Speaker announced a secret ballot. This was the eighth motion of no confidence in Zuma, but the first secret ballot. On 8 August 2017, it was narrowly defeated 198-177.

7.7.4. Impeachment Process

Running in parallel to the motion of no confidence was an attempt to impeach Zuma under s 89(1) of the Constitution. On 5 April 2016, the DA brought an impeachment motion that failed. The EFF wrote to the Speaker requesting a fact-finding inquiry into whether the President should be impeached. She refused. The EFF, UDM and COPE brought an application directly to the

[1432] ibid; Mpofu (n 1278).

[1433] Holomisa (n 1279).

[1434] Naidoo (n 1255).

[1435] *Secret Ballot* [43]-[48].

[1436] ibid [29].

[1437] ibid [58]-[59].

Constitutional Court, and the DA intervened. The applicants argued that the National Assembly had failed to put in place the necessary mechanisms to hold the President accountable in terms of s 89, and that it had failed to hold Zuma accountable because it had failed to scrutinise his constitutional violations identified in *Nkandla*. Corruption Watch was admitted as an *amicus curiae*.

Whereas *Nkandla* and *Secret Ballot* produced unanimous judgments, *Impeachment Process* split the Court. A majority judgment of seven justices by Jafta J granted the application. A dissent of four justices by Zondo DCJ would have dismissed it. Mogoeng CJ wrote a further dissent and Froneman J a short concurrence.

Jafta J for the majority distinguished impeachment under s 89(1) from no confidence motions under s 102. While the Constitution imposes no conditions for a motion of no confidence beyond a majority vote in the National Assembly, s 89(1) allows impeachment only in the event of a serious violation of the Constitution or the law, serious misconduct, or inability to perform the functions of office.[1438] Jafta J held that s 89(1) could not entail individual members determining for themselves what constitutes a 'serious violation of the law or the Constitution' or 'serious misconduct', and that it requires an 'institutional predetermination' of what constitutes these grounds. Therefore, any process for removal must be preceded by a preliminary inquiry, its form to be determined by the National Assembly, which must make rules to govern the process.[1439] The majority made an order declaring the National Assembly's failure to make rules unconstitutional and directing it to do so;[1440] and declaring the failure to determine whether Zuma had breached s 89 unconstitutional and directing it to fulfil that obligation, too.[1441]

[1438] *Impeachment Process* [137].

[1439] ibid [180]-[182].

[1440] Order [2]-[3].

[1441] Order [4]-[5].

7.7.5. Cabinet Reshuffle

The final case in this stream concerned not Zuma's removal, but a challenge to his decision to remove the Minister and Deputy Minister of Finance, Gordhan and Jonas. *Cabinet Reshuffle* began soon after *Nkandla* but ended after *Secret Ballot* and *Impeachment Process*. The events surrounding the four cases are intertwined.

Just after midnight on 30 March 2017, in the aftermath of *Nkandla*, Zuma announced a Cabinet reshuffle. The most contentious part and the basis of the challenge was the removal of Gordhan and Jonas. Two days later, the DA launched an urgent application to review the decision in terms of Rule 53 of the Uniform Rules of Court and requested the reasons for the decision and the record. This is a standard step in a review, but reviewing a Cabinet reshuffle was unprecedented.

The received wisdom, reflected also in interviews, was that reviewing a Cabinet reshuffle was a bridge too far. When asked why CASAC did not intervene in this litigation, despite being sympathetic, Naidoo recalled 'we didn't have a serious discussion about it because I think it was obvious to all of us that you simply cannot challenge the presidential authority to appoint members of Cabinet.'[1442] The DA's objective was not actually to reverse the reshuffle. Budlender, its lead counsel, revealed that he had advised at the outset that the prospect of setting aside the reshuffle was 'next to nothing' but that if the DA wanted to 'flush out some reasons and a record, that [was] potentially viable'.[1443]

When the President failed to provide the record and reasons, the DA launched an interlocutory application to compel production. The High Court (per Vally J) granted the

[1442] Naidoo (n 1255).

[1443] Interview: Steven Budlender SC, advocate, Johannesburg Bar (Johannesburg, 19 June 2019).

application, holding that Rule 53 applies to a review of an executive decision of this nature.[1444] Vally J directed the President to deliver the reasons and record within just 5 days, recognising the urgency of the pending review.[1445]

Zuma appealed to the SCA, but while the appeal was pending, he resigned and was replaced by Ramaphosa. Ramaphosa had already removed the Zuma-appointed Minister of Finance and his deputy (Gigaba and Buthelezi) and appointed Gordhan as Minister of Public Enterprises.[1446] As a result, the underlying review had been withdrawn. President Ramaphosa nevertheless asked the Court to decide the issue. The SCA held that it was moot and dismissed the appeal.[1447] Ramaphosa applied for leave to appeal to the Constitutional Court, which split.[1448] The majority (per Mogoeng CJ) refused leave to appeal for mootness.[1449] Dissenting, Jafta J (Nicholls AJ concurring) would have granted leave and upheld the appeal. In the minority's view, Rule 53 does *not* apply to the review of a decision of the President to remove Cabinet Ministers.[1450]

7.8. The impact of the litigation

I now analyse the legal, material and political impact of the five streams. These types of impact, although analysed separately, are intertwined and overlapping. A specific event may reflect all three. For example, removing an incumbent from office (material impact) is difficult to disentangle from the associated loss of power and influence (political impact) and the development of the law on

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[1444] *Democratic Alliance v President of the Republic of SA* 2017 (4) SA 253 (GP) ('*Cabinet Reshuffe (HC)*') [30].

[1445] ibid [5].

[1446] ibid [8].

[1447] *President of the Republic of South Africa v Democratic Alliance* [2018] ZASCA 79 ('*Cabinet Reshuffle (SCA)*').

[1448] *President of the Republic of South Africa v Democratic Alliance* 2020 (1) SA 428 (CC) ('*Cabinet reshuffle (CC)*').

[1449] ibid [35].

[1450] ibid [86].

requirements for appointment justifying removal (legal impact). In addition, many effects are still unfolding, especially deeper institutional legacies.

7.8.1. Legal impact

The most significant legal impacts concerned (i) legality review; (ii) institutional independence; (iii) the law and practice of appointments; (iv) the Public Protector's role and status of her remedial action; (v) removal of a President or Cabinet Minister; and (vi) the rule of law and separation of powers; (vii) legal culture; and (viii) remedies.

7.8.1.1. Legality review

The litigation significantly expanded and developed legality review. It initially consolidated a form of procedural rationality review (*Simelane*), and later built the integrity and independence of state institutions into the conception of the rule of law on which legality review is based.

The 'supremacy of the Constitution and the rule of law' is one of the founding values of the Constitution.[1451] Early on, the Constitutional Court established rationality review as low-threshold review for all exercises of public power, rooted in the principle of legality, itself an incident of the rule of law.[1452] Legality requires holders of public power to act within the powers conferred on them;[1453] act in good faith and not misconstrue their powers;[1454] and not exercise powers arbitrarily or irrationally.[1455] The Court even asserted jurisdiction over constitutionalised powers previously characterised as 'prerogative'.[1456] In the first *Certification* judgment, the Court had

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[1451] Constitution, s 1(c).

[1452] *Pharmaceutical Manufacturers of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC).

[1453] *Fedsure* (n 550) [56], [58].

[1454] *President of the RSA v South African Rugby Football Union* 2000 (1) SA 1 (CC) [148].

[1455] *Pharmaceutical* (n 1452) [85].

[1456] *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC).

asserted the independence of the NPA and foreshadowed that 'any legislation or executive action inconsistent therewith would be subject to constitutional control by the courts'.[1457] The only earlier high-profile appointment litigation was *Masetlha*, a challenge to President Mbeki's dismissal of the head of the National Intelligence Agency. The Court had taken a deferential view, accepting that the President could dismiss Masetlha on grounds of loss of trust,[1458] but held that Masetlha was entitled in contract to be paid out for his term.[1459] This was the limited foundation on which the five streams built.

Simelane (CC) held that both the decision and the *process* by which it was made must be rational.[1460] The Court relied on *Albutt*, which set aside a decision by the President as Head of State to grant presidential pardons because the failure to hear victims rendered it irrational.[1461] *Simelane (CC)* extended this principle to decisions of the President as head of the national executive.[1462] The Court criticised Simelane, but declined to decide whether he was 'fit and proper'.[1463] Instead, it concluded that the *process* was irrational because of the failure to take into account the Ginwala Commission's findings and Simelane's conduct before it.[1464]

Procedural rationality provides a powerful check on improper appointments, especially where a candidate has a skeleton in their closet in the form of an adverse credibility finding by a court or evidence of dishonesty in a previous role. *Simelane (CC)* has been cited with approval in

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[1457] *Certification* (n 1292) [146].

[1458] *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) [82]-[86].

[1459] ibid [91].

[1460] *Simelane (CC)* [34].

[1461] *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC).

[1462] *Simelane (CC)* [35].

[1463] ibid [91].

[1464] ibid [86].

many subsequent cases concerning legality review[1465] and the NPA.[1466] The requirement that the decision-making process be rational was applied in several judgments in this Chapter. It was the decisive review ground in *Mdluli*,[1467] *Ntlemeza*,[1468] and the decision suspending the South African Broadcasting Corporation Chief of Operations.[1469]

By the end of the period, the courts were showing an increasing awareness of the risk of bad appointments and corruption.[1470] Courts became willing to scrutinise process and, increasingly, the substantive merits of appointments to leadership posts in the criminal justice institutions. Moving from the procedure-based reasoning in *Simelane (CC)*, later cases – *Ntlemeza*, *Mdluli*, *Jiba*, *Nkandla* – represent 'substantification' of the rule of law. *Ntlemeza (HC)* was the first substantive finding that an appointee is not fit and proper. Not only did the court uphold a *Simelane*-style process challenge based on failure to consider adverse judicial findings,[1471] but held that Ntlemeza was objectively not 'fit and proper' and therefore 'disqualified from being appointed the National Head of the [Hawks].'[1472]

7.8.1.2. Institutional independence

The litigation confirmed that the independence of the NPA, the Hawks and IPID is constitutionally entrenched, and gave substance to it in the context of appointment, suspension and removal of heads of the institutions. *Simelane (CC)* gave content to the role of NDPP.

[1465] By 23 September 2020, cited with approval by 35 cases in South African Law Reports.

[1466] *General Council of the Bar of South Africa v Jiba* 2017 (2) SA 122 (GP) [42]; *Nxasana/Abrahams (CC)* [20].

[1467] *Mdluli (HC)* [126], fn 41.

[1468] *Ntlemeza (HC)* [27].

[1469] *Democratic Alliance v South African Broadcasting Corporation* 2015 (1) SA 551 (WCC) [31]; *South African Broadcasting Corporation Soc Ltd v Democratic Alliance* 4 All SA 719 (SCA).

[1470] Eg., *Cabinet Reshuffle (HC)* [5], *Nkandla* [56], *Secret Ballot* [88].

[1471] *Ntlemeza (HC)* [27], [37]-[38].

[1472] ibid [37]-[38].

Nxasana/Abrahams (CC) took this further, expanding on the centrality of the NDPP's independence, engaging in a more exacting examination of the President's conduct, and striking down two statutory provisions that weakened the NDPP's independence and security of tenure. Prof Chris Stone, a global criminal justice expert who has been involved with the NPA in an advisory capacity since 1996, commented that *Nxasana/Abrahams* 'means that… Batohi is the most independent [NDPP] there has ever been in South Africa and arguably one of the most independent chief prosecutors of any country, anywhere.'[1473]

Glenister II and *HSF/Glenister III* developed this principle in the context of the Scorpions/Hawks, which was later applied to strike down removal provisions and invalidate Dramat's removal in *Dramat*. *McBride* – relying on *Glenister II* and *HSF/Glenister III* – confirmed that IPID's independence is constitutionally entrenched, rooted in s 206(6) of the Constitution.[1474]

7.8.1.3. Law and practice on appointments

Successful constitutional challenges were accompanied by changes in appointment practice, including approaches not expressly required in the legislation or judgments. Although practice is material, not legal impact, I deal with them here because these changes are best understood together and given proposals to entrench them in law. *Table 7.4* reflects cumulative changes to law and practice.

[1473] Interview: Chris Stone, Professor of Practice of Public Integrity, Blavatnik School of Government, University of Oxford (Oxford, 30 November 2020).

[1474] *McBride (CC)* [31].

Table 7.4: Requirements for appointments and removals at end of case study period (2019)

Note: Where provisions in force in 2009 were struck down by courts, this is reflected in ~~strikethrough~~. New legal requirements introduced by legislation or courts are in **bold**. Where a new practice (not law) has been adopted, it is added in *italics*.

Institution: Head	**Who appoints?**	**Substantive criteria**	**Process**	**Suspension**	**Removal**
NPA NDPP	President[1475]	Legal qualifications to practise in court; **objectively**[1476] fit and proper person, with due regard to experience, conscientiousness and integrity	President appoints *on recommendation of independent panel* ~~President may extend term of office for two years beyond 65-year retirement age, provided does not exceed 10-year term~~[1477]	President may suspend ~~indefinitely without pay~~[1478] pending inquiry into fitness to hold office	By President following inquiry, subject to final approval of Parliament;[1479] or may be removed by resolution of Parliament[1480]
SAPS National Commissioner	President[1481]	No eligibility criteria	President appoints at sole discretion	If National Commissioner has lost confidence of Cabinet, President may suspend pending inquiry, with remuneration unless President determines otherwise, until board of inquiry reports[1482]	By President upon recommendation of a board of inquiry, established by the President, to consist of a Supreme Court judge as chairperson and two other suitable persons[1483]

[1475] Constitution, s 179(1); NPA Act, s 9.

[1476] *Simelane*.

[1477] ~~Section 12(4), NPA Act;~~ *Nxasana/Abrahams (CC)*.

[1478] *Nxasana/Abrahams (CC)*.

[1479] NPA Act, ss 12(6)(b)-(d).

[1480] ibid, s 12(7).

[1481] Constitution, s 207(1); SAPS Act, s 6.

[1482] SAPS Act, s 8(3).

[1483] ibid, ss 8-9.

Hawks National Head	Minister of Police with concurrence of Cabinet[1484]	**Objectively**[1485] fit and proper person with due regard given to experience, conscientiousness and integrity	Minister appoints and reports to Parliament *after* appointment[1486]	Minister may suspend: ~~(i) pending inquiry into National Head's fitness; or (ii)~~ [1487]after proceedings commence for removal of National Head in Committee of National Assembly[1488]	By Minister of Police ~~following an inquiry into her fitness to hold office or~~ [1489]after Parliamentary Committee recommends removal
IPID Executive Head	Minister of Police[1490]	Suitably qualified person[1491]	Nominated by Minister of Police; appointment must be confirmed or rejected by Parliamentary Committee[1492]	Minister may suspend ~~at sole discretion~~[1493] **after the start of removal proceedings initiated in a committee of the National Assembly**[1494]	Minister ~~may~~ **shall** remove ~~on account of misconduct, ill health or inability to perform office effectively~~ **upon either (i) finding of incompetence, incapacity or misconduct by committee of National Assembly; or (ii) resolution by National Assembly**[1495]

[1484] SAPS Act, s 17CA(1).

[1485] *Ntlemeza (HC)*.

[1486] SAPS Act, ss 17CA(1), (3).

[1487] *Glenister III*.

[1488] SAPS Act, s 17DA(5)(a).

[1489] *Glenister III*.

[1490] IPID Act, s 6(1).

[1491] ibid.

[1492] IPID Act, s 6(2).

[1493] IPID Act, ss 6(3)(a), 6(6); Public Service Act, ss 16A(1), 16B, 17(1) and 17(2); IPID Regulations, reg 13.

[1494] *McBride (CC)*.

[1495] *McBride (CC)*, reading in SAPS Act, ss 17DA(3)-(5).

Although the litigation produced no new law or policy on the NDPP appointment process, Ramaphosa introduced a new approach. CASAC and others had been calling for a more open, inclusive process for years before *Nxasana/Abrahams*.[1496] Previous NDPPs – Ngcuka, Pikoli and Simelane – were not interviewed,[1497] and Abrahams was only interviewed by two or three Cabinet Ministers, which Naidoo suggested was done to 'cover their tracks in terms of a possible review'.[1498] Civil society used *Nxasana/Abrahams* to lobby for a new process.[1499] The President's legal advisor, Nokukhanya Jele, explained the Presidency's approach: '[N]othing in the [NPA] Act tells us how to do it. Let's choose the best possible imaginable way to do it.'[1500]

She commented that, in designing a process, the fact that 'most of the leadership [was] in hiatus… or under a cloud' and the need to 'work towards renewing faith in these fundamental institutions were our primary guides'.[1501] Ramaphosa settled on an approach involving an independent panel conducting public interviews and making recommendations to him.[1502] The panel, chaired by the Minister of Justice, consisted of representatives designated the Law Society, General Council of the Bar, Advocates for Transformation, National Association of Democratic Lawyers, Black Lawyers Association, Auditor-General and SAHRC. They were provided with process guidelines developed by

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[1496] Naidoo (n 1255).

[1497] Stone (n 1473).

[1498] ibid.

[1499] ibid.

[1500] Interview: Nokukhanya Jele, Special Advisor to President Ramaphosa (Legal) (Johannesburg, 27 January 2021).

[1501] ibid.

[1502] ibid.

the Presidency and the NPA code of conduct and code of ethics.[1503] The guidelines referred to *Nxasana/Abrahams*, noting that it had given the President 90 days to make an appointment.[1504] The panel shortlisted and publicly interviewed candidates, recommending three candidates to Ramaphosa, who selected Batohi.[1505]

NGO interviewees considered the process a significant improvement,[1506] and the President's legal advisor commented that 'we see the process […] as a huge success.'[1507] Several emphasised that it needs to be legally entrenched.[1508] Some suggested using the JSC instead of a specially-appointed panel. CASAC's Naidoo argued that the NPA 'effectively straddles the executive and the judiciary' and 'its relationship with the judicial process is so integral that it may be appropriate for the JSC to interview candidates and provide a shortlist to the President from which to make the appointment.'[1509] Lewis supported the JSC as a 'model', arguing that the process should not be entirely insulated from political influence, but should be 'qualified' by input of the public, the profession and experts.[1510]

[1503] ibid.

[1504] Provided by Jele; copy on file.

[1505] Jele (n 1500).

[1506] Naidoo (n 1255); Lewis (n 1257); Fritz (n 1256); Antonie (n 1258).

[1507] ibid.

[1508] Naidoo (n 1255); Lewis (n 1257).

[1509] Naidoo (n 1255).

[1510] Lewis (n 1257).

7.8.1.4. The Public Protector

Nkandla settled the question of the legal status of remedial action taken / ordered by the Public Protector, holding that it may be binding, approving *SABC*.[1511] Academic opinion is divided on whether *Nkandla*'s interpretative approach is correct,[1512] or not.[1513] *Nkandla* has had further, indirect legal impact.

After Madonsela, Busisiwe Mkhwebane was appointed. She is widely regarded by commentators, including civil society interviewees, as 'captured' by Zuma. In a series of successful reviews, her conduct has been repeatedly criticised by courts,[1514] including twice being ordered to pay costs personally and on a punitive scale.[1515] In 2019, Parliament commenced proceedings for her impeachment.[1516] Mkhwebane launched proceedings to interdict the process.[1517] Represented by Mpofu, she relied heavily on *Nkandla* and *Impeachment Process*.[1518] She initially invoked *Impeachment Process* to argue that Parliament could not impeach her without adopting impeachment rules, and Parliament subsequently

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[1511] *SABC v Democratic Alliance* 2016 (2) SA 522 (SCA).

[1512] Cachalia (n 564) 67–68; Stu 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) VIII CCR 155, 173.

[1513] Mtendeweka Mhango and Ntombizozuko Dyani-Mhango, 'The Powers of the South African Public Protector: A Note on Economic Freedom Fighters v Speaker of the National Assembly' [2020] AJLS 1; Michael Tsele, '"Coercing Virtue" in the Constitutional Court: Neutral Principles, Rationality and the Nkandla Problem' (2016) 8 CCR 193.

[1514] *South African Reserve Bank v Public Protector* 2017 (6) SA 198 (GP); *Public Protector* (n 268); *Democratic Alliance v Public Protector* [2019] ZAGPPHC 132; *Gordhan v Public Protector* [2019] ZAGPPHC 311.

[1515] *Public Protector* (n 268); *Democratic Alliance v Public Protector* [2019] ZAGPPHC 349.

[1516] Constitution, s 194.

[1517] *Public Protector v Speaker of the National Assembly* [2020] ZAWCHC 117 ('*Public Protector Impeachment*').

[1518] Mpofu (n 1278).

adopted rules governing removal of Chapter 9 heads.[1519] Facing impeachment, she then invoked *Nkandla* to contend that the Public Protector has higher status than other Chapter 9 institutions and should have greater constitutional protection against removal,[1520] and that *Nkandla*'s holding on reviewability generated extensive litigation, making negative judicial findings inevitable and excusable.[1521] She also invoked *Impeachment Process* to challenge the rules that Parliament had adopted as unconstitutional.[1522] Impeachment proceedings continue.

7.8.1.5. Removal of President or Cabinet Minister

The Presidency stream, especially *Secret Ballot*, *Impeachment Process* and *Cabinet Reshuffle*, developed the law significantly regarding removal of a President or Cabinet Minister.

Secret Ballot established that the Speaker has the power to hold a motion of no confidence by secret ballot. The Speaker must exercise this discretion considering seven factors: whether the chosen procedure would allow members of the National Assembly to vote according to their conscience and in the public interest;[1523] whether circumstances are peaceful, or toxified and potentially hazardous;[1524] the Speaker's impartiality;[1525] the need to enhance the effectiveness of motions of no confidence as accountability and

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[1519] ibid [33].

[1520] ibid [28]; Mpofu (n 1278).

[1521] *Public Protector Impeachment* [41].

[1522] *Public Protector Impeachment* [96].

[1523] *Secret Ballot* [74].

[1524] ibid [88].

[1525] ibid [87].

consequence-management tools;[1526] the possibility of corruption or bribes in the event of a secret ballot;[1527] the value of transparency;[1528] and that the decision must be rational and non-arbitrary.[1529] Future decisions by the Speaker in the exercise of this power will be justiciable, though the standard and intensity of review remain to be determined. *Impeachment Process* compelled the National Assembly to make rules to govern the removal of a president.

The legal effect of *Cabinet Reshuffle* is less clear. On the High Court decision, the President's decision to reshuffle Cabinet is, in principle, reviewable, and the President must provide reasons and the record of the decision. The Constitutional Court does not confirm this principle. The minority expressly held that the President is not obliged to provide record or reasons. The majority finding of mootness suggests that the Court is unlikely to entertain such reviews.

7.8.1.6. Rule of law, constitutional democracy and separation of powers

The five streams reflect a 'new phase in the construction in the rule of law in South Africa'.[1530] What conceptions of the rule of law, constitutional democracy and the separation of powers undergird this jurisprudence? What theoretical frame best explains the courts' interventions (and non-interventions)? Emerging literature offers contenders.

[1526] ibid [44].

[1527] ibid [88].

[1528] ibid [80].

[1529] ibid [86].

[1530] Klaaren (n 33).

These include a tactical adjudicative approach (Huq); 'precautionary constitutionalism' and an 'anti-corruption principle' (Cachalia); and a 'constitution-building' approach (Fowkes).

For Huq, drawing on Roux[1531] and focusing on a sub-set of the cases,[1532] the decisions reflect 'tactical' attempts by the courts to protect democracy that are not explained by a 'consistent theoretical touchstone'.[1533] Huq considers this a virtue, as 'a court seeking to defend democracy pursuant to the rule of law would be ill-served by a single, fixed theoretical framework.'[1534] While some decisions fit this approach, there are discernible doctrinal developments that give content to the conceptions of the rule of law, constitutional democracy and the separation of powers – especially viewed across the five streams.

Previously, a thinner conception of the rule of law predominated, in the sense of acting within the law. This conception was akin to the administrative law concept of the rule of law, concerned primarily with arbitrary and unauthorised exercises of power.[1535] Decisions across the streams developed a thicker conception that includes the integrity and healthy functioning of constitutional institutions, in turn demanding substantively appropriate appointments. This conception has implications for legality review and remedies in appointment cases, but also for the application of discrete doctrinal rules. Two examples are *Ntlemeza (HC)* holding that the fitness for office of the head of the Hawks is

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[1531] Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (n 18).

[1532] *Nkandla*, *Secret Ballot*, *Nxasana/Abrahams (CC)* and *Democratic Alliance* (n 1405).

[1533] Aziz Huq, 'A Tactical Separation of Powers Doctrine' (2019) 9 CCR 19, 26.

[1534] ibid.

[1535] Cachalia (n 564) 52.

a question in which *all South Africans* have an interest, and therefore standing to sue; [1536] and *Ntlemeza (SCA)* holding that the integrity of the Hawks, safeguarded by the rule of law, outweighed Ntlemeza's interests and required immediate execution of the removal order before appeals were finalised.[1537]

This thicker conception of the rule of law is understood to be necessary to safeguard constitutional democracy.[1538] The concept 'constitutional democracy' is deployed to frame several cases,[1539] but without definition.[1540] Cachalia identifies in these developments a 'precautionary constitutionalism', with the Constitution acting as a precautionary device to manage the risks associated with democratic government.[1541] Drawing on Ely,[1542] judicial review is thus democracy-reinforcing, not inconsistent with the separation of powers. Cachalia contends that democracy-reinforcing judicial review 'applies to both the harm to the democratic process and the harmful consequences for individuals and minorities that might result from a "dysfunctional process".'[1543] Cachalia defines the rule of law to include 'all legal constraints that a self-governing community imposes over time and through experience to *safeguard* the integrity of the institutions and

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[1536] *Ntlemeza (HC)* [3].

[1537] *Ntlemeza (SCA interim execution order)* [45].

[1538] *Nxasana/Abrahams (CC)* [20].

[1539] *Nkandla* [1]; *Secret Ballot* [1].

[1540] Huq (n 1534) 20.

[1541] Cachalia (n 564) 50.

[1542] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (HUP 1980).

[1543] Cachalia (n 564) 57.

processes of political contestation, collective decision-making and representation in a self-governing political community.'[1544]

'Precautionary constitutionalism' is a negative conception of constitutionalism, based on risk mitigation through constraints on the state.[1545] Fowkes' 'constitution-building' account articulates a positive conception, in which courts develop doctrine and craft remedies to promote the healthy functioning of constitutional institutions. Several of the cases can be read in this light. For instance, the need for the Public Protector to be rendered 'effective' is a central plank in the *Nkandla* conclusion that remedial action must be binding.[1546]

The negative conception (precautionary constitutionalism) and the positive (constitution-building) conception are not mere corollaries. The constitution-building model does not assume that, if threats are eliminated, institutions will function well. It sees courts actively concerned institutional performance. This has implications for the separation of powers. The constitution-building approach will justify judicial interventions where this is necessary to enable institutions to function effectively, not merely to eliminate obvious threats.

7.8.1.7. Legal culture

The judgments reflects a subtle change to legal culture, reflected in judicial recognition that corruption is a serious problem; litigation interventions that role-players and courts considered viable; and in the tone of judgments. Corruption is a common theme through

[1544] ibid 52. (emphasis added)

[1545] Nicholas Barber, *The Principles of Constitutionalism* (OUP 2018) 19.

[1546] *Nkandla* [50], [54], [56], [66]-[67].

the judgments.[1547] Over the decade, increasingly direct challenges to appointments came to be considered viable by litigators and courts, given the right facts.

Regarding tone of judgments, in the period preceding the case study, Roux identified the use of 'diplomatic language' employed by the Constitutional Court to manage its relationship with government and the ANC in cases such as *TAC*.[1548] In the cases under study, the Court used strong, emotive language, sometimes employing metaphors of 'battle' or violence (notably the 'sword' in the opening paragraph of *Nkandla*). However, this tone extended only to those implicated in corruption or seen as threats to the integrity of institutions. This trend may be partly a matter of judicial temperament, such rhetoric observed across the Chief Justice's judgments. Undoubtedly, though, some judgments reflected heightened concern over corruption and judicial willingness to intervene.

7.8.1.8. Remedies

In addition to ground-breaking direct[1549] and indirect removal orders,[1550] courts were sometimes willing to remove powers ordinarily vested in other organs of state. In upholding the review of the NPA's withdrawal of criminal charges against Mdluli, the High Court granted substitution, reinstating charges against him rather than remitting the matter to the NPA.[1551] (However, the SCA partly overturned this.) In *Nxasana/Abrahams (HC)*, the High Court shifted the power to appoint the NDPP from President to Deputy

[1547] Eg., *Cabinet Reshuffle (HC)* [5], *Nkandla* [56], *Secret Ballot* [88].

[1548] Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (n 18) 383–386.

[1549] *Simelane*, *Ntlemeza*, *Nxasana/Abrahams*.

[1550] *Jiba*, *Mdluli*, *Secret Ballot*, *Impeachment Process*.

[1551] *Mdluli (HC)* [237]. The SCA partly overturned this order.

President, though this fell away because Ramaphosa assumed the presidency. However, such orders remained the exception.

7.8.2. Material impact

The litigation had material impacts ranging from direct and immediate to more indirect, diffuse, and still unfolding. They relate to (i) removal or retention of officials; (ii) institutional independence and performance; (iii) expenditure; (iv) information; (v) unlawful conduct; and (vi) the State Capture Commission.

7.8.2.1. Removal/retention of officials

The most prominent, immediate impact was to remove compromised officials from leadership positions in the NPA, Hawks and SAPS, and to contribute to the removal of Zuma as President. Incumbents who were targeted during the Zuma presidency, (including McBride, Dramat, Sibiya and Booysens) despite litigation attempting to *keep* them in office, largely left office.

a) The NPA

Jiba, *Simelane* and *Nxasana/Abrahams* removed three incumbent NDPPs and one acting NDPP from office. The Constitutional Court removed Simelane and Abrahams from office directly and prevented Nxasana from returning to office, creating the vacancy to which Batohi was appointed. In between, Jiba was removed as acting NDPP under the shadow of pending litigation, then dismissed from the NPA after the High Court mandated an investigation into her fitness for office. Jiba, Abrahams and Nxasana all returned to private practice.

b) The Hawks

Dramat, Sibiya and Booysen all left, *despite* court victories overturning suspensions. Ntlemeza was successfully removed through litigation, though not immediately. Steinberg commented that *Ntlemeza* showed 'how critical interim orders are. When you are fighting a rogue state, stopping individuals actually getting into office is absolutely critical.'[1552] It took almost a year for the main review to be decided and upheld by the full bench on 17 March 2017, and Ntlemeza pursued further appeals, purporting to hold onto office until all were exhausted. He remained in office for well over a year after Tuchten J's decision refusing interim relief in April 2016. During this time, Ntlemeza moved to replace the provincial Hawks heads, including Sibiya and Booysen, and reconstitute the leadership with Zuma loyalists. Minister of Police, Nhleko, sought to cast this in a positive light, stating that in his 18 months 'at the helm of the [Hawks], [Ntlemeza] proved himself to be fearless, independent and has demonstrated integrity and honesty', stating that he 'stabilised' the Hawks, 'filled more than 80% of the vacant posts' and 'assisted me in appointing the Provincial Heads of DPCI in all the provinces'.[1553] Ntlemeza also appointed a new Deputy National Head.[1554] After Ntlemeza's removal, in 2018 he reportedly opened a private 'investigation and security company', Itucare.[1555] Seswantsho Godfrey Lebeya was appointed new National Head from June 2018.

[1552] Steinberg (n 1390).

[1553] Answering Affidavit of Nkosinathi Nhleko, Minister of Police, *Ntlemeza (HC)*, 25 March 2016 [28].

[1554] Founding Affidavit *Ntlemeza (HC)* [45].

[1555] Abram Mashego 'Guess what Ntlemeza is doing now?' *City Press* 27 May 2018.

c) SAPS

Mdluli was ultimately removed as head of crime intelligence. Following his suspension in 2013, he was only discharged in 2018. During the intervening period, Crime Intelligence saw 12 acting divisional commissioners.[1556] Only after Mdluli was discharged was Peter Jacobs permanently appointed. Throughout this period, Mdluli received full pay, including bonuses, amounting to several million Rand.[1557] The chairperson of Parliament's Portfolio Committee on Police, Francois Beukman, commented that Mdluli's discharge would enable the appointment of a 'permanent leader with the requisite skills, energy and innovative plans to guide the division on its mandate' and that making a permanent appointment would bring 'essential' stability.[1558] With new leadership at the NPA, Mdluli was prosecuted and convicted in 2019 of kidnapping and assault with intent to do grievous bodily harm.[1559] He is serving a 5-year sentence and facing further fraud-related charges.

d) IPID

McBride prevented McBride's premature removal, overturning his suspension and keeping him in office for two-and-a-half years to complete this term. He left IPID on 28 February 2019 after the Police Minister made a decision not to renew his contract, supported by the Parliamentary Portfolio Committee on Police.[1560] DA MPs opposed this, criticising the

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[1556] Zintle Mahlati 'Suspended crime intelligence boss Richard Mdluli "relieved of duties"' *Independent Online* 17 January 2018.

[1557] ibid

[1558] ibid.

[1559] Greg Nicolson 'Richard Mdluli gets jail time and leave to appeal denied' *Daily Maverick* 29 September 2020.

[1560] Bekezela Phakati 'Police Committee agrees on not renewing Robert McBride's contract as IPID boss' *TimesLive* 28 February 2019.

IPID Act's provision for renewal as threatening IPID's independence.[1561] McBride launched an application to challenge the non-renewal, but it did not proceed.[1562] In 2020, he was appointed head of foreign intelligence at the State Security Agency (SSA).[1563]

e) President

Zuma's removal was not effected directly by court order. He resigned. The relationship between material and political impact illuminates how the litigation affected the balance of power and political support for Zuma (discussed below), materially contributing to his resignation. The account of material impact here provides the bare bones of these events. *Secret Ballot* secured the first motion of no confidence by secret ballot. It was narrowly defeated but over 30 ANC MPs supported it, which had never happened with open motions subject to the whip. Finally, *Impeachment Process* resulted in Parliament making new rules for impeachment and commencing the process with Zuma, though he resigned before a vote. By the time *Impeachment Process* was decided on 29 December 2017, Zuma was no longer ANC President. His term had expired and Ramaphosa was elected ANC president on 18 December, narrowly defeating Zuma's ex-wife and preferred candidate, Nkosazana Dlamini-Zuma.

Zuma resigned as President on 14 February 2018 following a decision of the ANC National Executive Council that he should be 'recalled'. The ANC directed Zuma to resign, failing which it would bring a motion of no confidence, tabled for 15 February 2018. In his televised resignation speech, Zuma said, 'I fear no motion of no confidence or

[1561] ibid.

[1562] ibid.

[1563] Qaanitah Hunter 'Robert McBride to head foreign branch of State Security Agency' *News24* 16 July 2020.

impeachment', claiming to be resigning because he did not want any 'life [to] be lost' or for the ANC to be divided in his name.[1564] Despite his protestations, I argue that *Nkandla*, *Secret Ballot* and *Impeachment Process* materially contributed to his forced resignation. This conclusion is embedded in the political effects of this litigation stream discussed below, which added layers of invisible constraints and effectively left Zuma with no option. Criminal charges of corruption have been reinstated against him and the State Capture Commission is also investigating allegations against him.[1565]

7.8.2.2. Institutional independence and performance

The impact on institutional independence and performance is still emerging. The general view of interviewees was that the litigation may have succeeded in renewing leadership, but it will take longer to fix 'hollowed out institutions'[1566] and deeper institutional problems. It is difficult currently to ascertain what effect, if any, the appointments litigation had on the performance of the criminal justice system in terms of crime rates, levels of corruption and conviction rates but there are indications of improving public trust and institutional performance in the NPA and SAPS.

f) NPA

A recently published empirical study offers some evidence of health and public confidence over the relevant period.[1567] Mugler conducted an 18-month multi-site, ethnographic study

[1564] Zuma's resignation address: <https://www.youtube.com/watch?v=Eoz0dlM0gZU> accessed 10 June 2018.

[1565] After my cut-off of September 2020 and outside the scope of this Thesis, Zuma was committed to prison by the Constitutional Court for civil contempt for failure to appear at the Commission, then granted medical parole.

[1566] Antonie (n 1274).

[1567] Mugler (n 1212).

into the NPA from 2008-2012. Her focus was not the high-profile prosecution of politically connected accused, but the hundreds of thousands of 'ordinary' prosecutions each year.[1568] Mugler found that during her fieldwork from 2008-2012, mainly in the Simelane incumbency, 'the independence struggles at the top of the organisation had not affected the morale of the whole organisation.'[1569] My interviewees generally considered that prosecutor morale dropped later, over the years 2010-2017 after *Simelane*.[1570] Mugler found that the NPA's failure to prosecute high-level officials, especially after 2009, 'led to ongoing doubts over the leadership of the NPA – its integrity, competence and independence.'[1571] Mugler reported that, even after charges against Zuma and the Guptas were reinstated in 2018, there remain 'concerns about the capability of the NPA to take on such complex cases of corruption after years of inaction and avoidance'.[1572]

Conviction rates are a complex and contested area. There are at least three different approaches to measuring conviction rates. The NPA uses a 'trial-to-conviction' rate comparing convictions to the number of cases the NPA takes to trial.[1573] SAPS uses a 'report-to-conviction' rate with the number of cases reported at police stations as the comparator.[1574] Some NGOs compare convictions to the number of reported and

[1568] ibid 19.

[1569] ibid 72.

[1570] Naidoo (n 1255); Lewis (n 1257); Fritz (n 1256); Antonie (n 1274); Stone (n 1473).

[1571] Mugler (n 1212) 17–18.

[1572] ibid 19.

[1573] ibid 142.

[1574] ibid.

unreported cases of an offence, such as rape.[1575] Conviction rates under these approaches vary wildly, and are deployed by different stakeholders to paint a brighter or gloomier picture.[1576] While the NPA trial-to-conviction rate hovered around 90% throughout my period, the SAPS report-to-conviction rate was around 30% and the conviction rates for sexual offences against estimated cases even lower.[1577]

Litigation concerning NDPP appointments had limited impact on the thousands of 'ordinary' prosecutions. Mugler reports that members attending the Parliamentary Committee NPA briefings from 2008 to 2016 would begin with performance data, then shift focus, asking about specific high-profile cases and 'the appointment of controversial NPA members to the NPA executive; the image of the NPA and the morale amongst NPA employees at times when the NDPP was suspended or under attack'.[1578]

Following Batohi's appointment, several of these concerns diminished, especially controversial appointments. She swiftly established a dedicated 'Investigating Directorate' in the NPA – with a similar dual mandate to the Scorpions – to investigate and prosecute state capture.[1579] Chipkin et al consider actions by the NPA to act against Gupta-linked companies in 2018 'a healthy sign'.[1580]

Nevertheless, interviewees generally considered that litigation alone had not restored the NPA to full health. Trengove cautioned that 'people do not realise how badly

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[1575] ibid 143.

[1576] ibid 153.

[1577] ibid.

[1578] ibid 126.

[1579] Ivkovich and others (n 1212) 9660.

[1580] Chipkin and others (n 1203) 12.

damaged the NPA really is and how long it is going to take to fix it because the problem lay not only at the top but throughout the organisation.'[1581] Lewis agreed that the NPA was 'much more damaged than anybody could have imagined' and that Batohi 'comes into an institution where she couldn't trust one person'.[1582] Naidoo pointed to the problem of compromised leaders in other senior posts in the NPA, including its provincial offices.[1583] Stone commented that 'the tragedy of those ten years was watching the capacity disappear both in the NPA and the rest of the justice system. The routines are gone. The training is long gone. The management incentives to excel in that work are gone.'[1584] He emphasised the importance of international benchmarking in assessing the future performance of the NPA concerning high-level corruption.[1585]

g) SAPS and Hawks

The picture is similar with the SAPS and Hawks. A study on police integrity in South Africa published in 2020 sheds light on levels of corruption and trust in the SAPS.[1586] According to survey data, confidence in the police was at its highest at 74% in 1994-1998, dropped to 60% in 1999-2004, 52% in 2005-2014 and hovered around 50% the remainder of the decade.[1587] A 2018 Afrobarometer survey found that 66% of people had 'no trust' or 'just

[1581] Trengove (n 1301).

[1582] Lewis (n 1257).

[1583] Naidoo (n 1255).

[1584] Stone (n 1473).

[1585] Stone (n 1473).

[1586] Ivkovich and others (n 1212).

[1587] ibid 9660.

a little' trust in police.[1588] Ivkovich et al do credit reforms in the Hawks and Crime Intelligence following the Ntlemeza-Mdluli period as steps in the right direction to restoring trust but argue that large-scale reform remains necessary.[1589]

7.8.2.3. State expenditure

The litigation directly affected state expenditure, though not on the scale discussed in Chapter 6. *Nxasana/Abrahams (CC)* required Nxasana to pay back the full amount of over R10 million (after tax) received in the 'golden handshake'. However, when I did my interviews, he had not repaid it.[1590] Notwithstanding success in court, Dramat took early retirement from the Hawks and received R3 million.[1591] *Nkandla* required Zuma to 'pay back the money', being a portion of the costs of the non-security upgrades. He repaid R7,814,155. Several interviewees considered this too low, arguing that the amount should not have been limited to the five specified items, but agreed it was not insignificant.[1592] *Mdluli* ended the wastage of paying Mdluli's full salary throughout his suspension, but only when he was finally removed.

The litigation cumulatively saw the state incur substantial legal costs, as every case surveyed awarded costs against the state. The state also had to pay the fees of its own counsel. These amounts are not in the public domain, but it is certainly tens if not hundreds of millions of Rands. The litigation, having drawn to a close, curtailed this particular

[1588] ibid.

[1589] ibid 9631.

[1590] Naidoo (n 1255); Lewis (n 1257).

[1591] Chipkin and others (n 1203) 124.

[1592] Mpofu (n 1278); Trengove (n 1301); Marcus (n 1419).

expense. These financial savings must be seen in perspective. As Huq points out 'the Nkandla graft, while not trivial, is hardly significant in comparison with the pattern of wholesale state capture associated with the Guptas', which 'imperils the nation's fiscal standing'.[1593] To the extent that the litigation contributed to ending this large-scale fiscal detriment associated with state capture (both through direct corruption and indirect economic harm), that will be a far greater contribution. It is too early to say.

7.8.2.4. Information

Several cases resulted in disclosure of information not previously in the public domain. In general, all the litigation required parties to provide versions on oath, revealing new details. A notable instance was *Nxasana*, which disclosed substantial information. When the review was launched, the Presidency did not provide a full record but Nxasana himself disclosed substantial correspondence that was not in the public domain and that provided a fuller picture of events surrounding his removal.[1594] *Cabinet Reshuffle* had potential to bring to light new information regarding Gordhan and Jonas' dismissal as Ministers – after the High Court compelled the provision of reasons and the record – but the review was withdrawn after the matter became moot.

7.8.2.5. Break-ins, threats, surveillance, violence

One of the litigation's unintended effects was to provoke unlawful acts, including break-ins, threats, surveillance and violence, in particular around *Ntlemeza* and *Mdluli*.

[1593] Huq (n 1534) 36.

[1594] Naidoo (n 1255).

Just two days after launching *Ntlemeza*, there was a break-in at HSF's offices, targeting laptops and hard-drives, reminiscent of apartheid security branch 'dirty tricks' operations.[1595] HSF's Antonie believed their correspondence was the target, as 'lots of police were writing to us and I was meeting a lot them'.[1596] To date, there has been no progress in the investigation. HSF never recovered its property.[1597] On 18 March 2017, the day after *Ntlemeza (HC)* was delivered, another break-in targeted the Office of the Chief Justice. Fifteen laptops containing personal information about judges were stolen,[1598] and never recovered.[1599] Similar break-ins were reported at the Hawks offices and the NPA in July 2017, with no evidence of forced entry and targeting documents and computers.[1600] Given the dates and that the HSF break-in happened first and that later, similar incidents targeted the judiciary, NPA and Hawks, the timing suggests a link to *Ntlemeza*. In addition, Dramat reportedly received threats to himself and his family if he did not leave the Hawks,[1601] and Steinberg received threatening SMSes during *Ntlemeza* and believed that her phone was tapped.[1602]

Further, in 2012, Adv Muzi Sikhakhane's home was burgled and only documents stolen, including an affidavit by Tokyo Sexwale asking the Public Protector to investigate

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[1595] Antonie (n 1258).

[1596] ibid.

[1597] Antonie (n 1274).

[1598] Sabelo Skiti, 'Thieves steal laptops containing sensitive information from Chief Justice Mogoeng's office', *Times Live* 18 March 2017.

[1599] Jeanette Chabalala, '27 months and counting: still no arrests after PCs stolen from Chief Justice's offices', *News24* 26 June 2019.

[1600] ibid.

[1601] Antonie (n 1274).

[1602] Steinberg (n 1390).

Mdluli.[1603] In the same month, Glynnis Breytenbach, the prosecutor leading Mdluli's prosecution, was shot at while driving home.[1604] It is not known who carried out these acts. At least one interviewee anonymously suggested that Mdluli was involved on the basis that he had an interest in *Ntlemeza* as Ntlemeza was shielding him from investigation. One of Ntlemeza's first acts as acting Hawks head had been to suspend Sibiya, who claimed this was done to stop him from investigating Mdluli for kidnapping and murder.[1605] It is not clear that there has been any investigation into Mdluli or Ntlemeza's involvement.

7.8.2.6. State Capture Commission

The litigation contributed to the establishment of the State Capture Commission. It was not a direct consequence of the litigation, and there were other, possibly more proximate contributing factors, especially Public Protector Madonsela's final report, recommending a Commission of Inquiry into State Capture.[1606] Zuma resisted its release, including through litigation.[1607] Days before resigning, in the shadow of litigation to compel him to do so, Zuma appointed the State Capture Commission on 23 January 2018. Its work is ongoing, but outside the scope of this Thesis.

7.8.3. Political impact

The main political effects of the litigation concerned (i) Zuma's hold on power; (ii) the public discourse on corruption and state capture; (iii) perceptions of corruption and trust

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[1603] 'Mdluli affidavit stolen from lawyer's home' *Mail&Guardian* 9 May 2012.

[1604] 'Mdluli prosecutor shot at' *News24* 30 April 2012.

[1605] Section 7.4.4 above.

[1606] Public Protector 'State of Capture' Report 6 (2016/17).

[1607] *President of the Republic of South Africa v Office of the Public Protector* [2018] 1 All SA 576 (GP).

in the institutions; and (iv) tensions among judges. Again, other factors – especially national movements, media and party politics – also contributed.

7.8.3.1. Loosening Zuma's hold on power

All five streams, especially the Presidency stream, shifted the balance of political power. The *Nkandla* stream weakened the 'Zuma faction' in the ANC and Zuma's hold on power. The other streams contributed by removing Zuma allies from the leadership of the NPA, SAPS Crime Intelligence, and Hawks, and retaining (temporarily) a perceived adversary, McBride, in IPID, exposing Zuma and his allies to investigation and prosecution.

Interviewees agreed that the removal of key Zuma 'lieutenants', especially Ntlemeza and Mdluli, shifted the balance, exposing loyalists engaged in criminal activities to investigations and prosecutions that had previously been blocked. Had Ntlemeza been removed in 2016, when Tuchten J refused interim relief, this impact would have been greater. After the removal of Abrahams and appointment of a new NDPP, several Zuma allies, including Mdluli, ANC MP Bongani Bongo (a former member of Zuma's Cabinet), and Zandile Gumede, former mayor of Durban, were finally prosecuted.[1608] The shift in power is also seen in decisions of the NPA to *end* prosecutions of perceived Zuma adversaries, such as Gordhan and Ivan Pillay, charges widely considered trumped up.[1609] However, many report growing public impatience at the slow process of high-level state capture prosecutions.[1610]

[1608] Lewis (n 1257).

[1609] Mugler (n 1212) 18; Chipkin and others (n 1203) 125.

[1610] Lewis (n 1257); Naidoo (n 1255). See Ivkovich and others (n 1212) 9631.

The Presidency/Cabinet stream affected the big 'P' political picture for Zuma, the ANC and the opposition. This line of cases was regarded as giving the EFF a 'huge boost',[1611] while the DA felt that the EFF had stolen a march on it by getting to the Constitutional Court first in *Nkandla*.[1612] Holomisa considered that UDM's success as lead applicant in *Secret Ballot*, in the face of 'the ANC caucus bullying us [in Parliament] because they had the numbers', demonstrated what a 'small party' was able achieve.[1613] Overall, the trilogy of cases strengthened opposition parties and the ANC grouping opposed to Zuma. During and after *Nkandla*, #paybackthemoney trended on Twitter in South Africa.[1614] Afterwards, the EFF ascribed the epithet of 'constitutional delinquent' to Zuma, which stuck in the public discourse,[1615] several interviewees using the term.[1616] The view across interviewees, typified by Steinberg, was that *Nkandla* played a 'huge role' and was 'the beginning of the end' for Zuma.[1617] Academic literature generally concurs that the litigation, alongside social and political mobilisation, played a major role in Zuma's resignation.[1618]

Each successive legal defeat weakened Zuma politically. The opposition's motion of no confidence following *Secret Ballot* received unprecedented support from 30 or more ANC MPs, and was only narrowly defeated. As Huq observes, '[p]aradoxically,… the

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[1611] Mpofu (n 1278); Ngcukaitobi (n 1394); Steinberg (n 1390).

[1612] Selfe (n 1277).

[1613] Holomisa ((n 1279).

[1614] 'South Africa's Jacob Zuma to repay Nkandla upgrade funds' BBC News, 3 February 2016.

[1615] Eg., Justice Malala 'The State and its leader have gone rogue' *Talk of the Town* 27 February 2017.

[1616] Holomisa (n 1279); Ngcukaitobi (n 1394); Steinberg (n 1390).

[1617] Steinberg (n 1390).

[1618] Woolman, 'A Politics of Accountability' (n 1513) 156; Huq (n 1534) 38; Klaaren (n 33).

secrecy of the no-confidence vote allowed legislators to generate a credible public signal of the extent of dissatisfaction with the Zuma presidency.'[1619] Expressing a typical view across interviewees, Naidoo commented that *Secret Ballot* 'weakened the Zuma Presidency [because] so many ANC members must have voted in favour of the motion', demonstrating that his hold over the ANC was precarious.[1620] Viewed more abstractly, *Secret Ballot* shifted power from the centralised 'party in government' to the 'more diffuse parliamentary party',[1621] though how this will manifest in future is uncertain.

Marcus called this the 'judicial demise of President Zuma', explaining that 'he had so many setbacks in the courts […] that his standing as President was so significantly diluted that I don't think he could have withstood the political tide.'[1622] This reflected a general consensus among respondents that court defeats and successive, unsuccessful motions of no confidence and impeachment chipped away at Zuma's hold on power. Of course, other events also contributed, especially growing opposition from within the ANC and its allies, media, trade unions, religious bodies, organised business, academia,[1623] and the #UniteBehind and #SaveSA movements,[1624] and events such as the reaction of the markets and the ANC's poor performance in municipal elections in 2016 when the party lost control of most of the main metropolitan municipalities.[1625] Alongside these factors,

[1619] Huq (n 1534) 38.

[1620] Naidoo (n 1255).

[1621] Huq (n 1534) 38.

[1622] Marcus (n 1419).

[1623] Chipkin and others (n 1203) 8–11.

[1624] Achmat (n 1281); Heywood (n 1280).

[1625] Achmat (n 1281).

litigation materially contributed. Chipkin et al identify litigation, social mobilisation, political mobilisation and efforts to 'unsettle hegemony' by building a new discourse as four 'effective tactics' used by civil society to oppose state capture.[1626]

7.8.3.2. Shifting public discourse

The litigation focused public attention on the criminal justice sector and appointments, in the broader context of corruption. Corruption has always been a significant feature of national politics, especially during apartheid,[1627] but manifested specifically as 'state capture' during Zuma's presidency. The litigation contributed to bringing appointments in the criminal justice sector into the heart of the state capture discourse. It increased public consciousness around appointments and public support for judicial interventions.[1628] This is apparent in the frequency and extent of media reporting on the appointments litigation and the links drawn by media to state capture.[1629] Following the transition to Ramaphosa, there were also increasing references to the role of appointments in combating corruption and reversing state capture.[1630]

The litigation ran amidst contestation between two competing narratives: 'state capture', and a counter-narrative propagated by Zuma allies centred on 'White Monopoly Capital' (WMC) and 'Radical Economic Transformation' (RET). RET was used from

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[1626] Chipkin and others (n 1203) 11–12.

[1627] Jonathan Hyslop, 'Political Corruption: Before and After Apartheid' (2005) 31 JSAS 773; Hennie Van Vuuren, 'Apartheid Grand Corruption: Assessing the Scale of Crimes of Profit in South Africa from 1976 to 1994' (ISS 2006); Hennie Van Vuuren, *Apartheid Guns and Money : A Tale of Profit* (Hurst 2018).

[1628] Lewis (n 1257).

[1629] Chipkin and others (n 1203) 8–13.

[1630] State of the nation addresses by President Ramaphosa 2018-2021 <wwww.thepresidency.gov.za> accessed 14 April 2021.

about 2011 by sections of the ANC to refer to a 'project to leverage the procurement budgets of State-Owned Enterprises to displace white firms and create new, black-owned and -controlled industrial enterprises.'[1631] As Huq observed, these rhetorical tactics involved demonising white people or stoking anger at foreign elites in order to distract the public from governance failures.[1632] However, the terms became increasingly discredited as a pretext to resist constitutional constraints and a cover for illegality.[1633] UK public relations firm Bell Pottinger ran a campaign based on WMC and RET for Gupta-owned company Oakbay. When this emerged, in 2017 Bell Pottinger was expelled from the Public Relations and Communications Association,[1634] and collapsed into administration.[1635] In the same year, the Pan African Language Board announced that 'state capture' was the South African 'word of the year', having been used 20,231 times in over 11,000 newspaper editions.[1636] Although the litigation did not use the term 'state capture', it was widely regarded as a response to state capture. It is reasonable to infer that that litigation contributed – alongside efforts by social movements and political parties – to its currency.

There is evidence of growing public awareness of corruption in South Africa during the relevant period. Mark Heywood, one of the founders of #SaveSouthAfrica, commented that *Nkandla*, *Secret Ballot* and *Nxasana/Abrahams*, but 'not particularly *Mdluli*,

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[1631] Chipkin and others (n 1203) 5.

[1632] Huq (n 1534) 29.

[1633] Chipkin and others (n 1203) 5–6.

[1634] 'Bell Pottinger expelled from trade body for South African campaign' *BBC News* 4 September 2017.

[1635] 'Bell Pottinger collapses after South African scandal' *BBC News* 12 September 2017.

[1636] 'State Capture named SA word of the year' *Daily Maverick* 16 October 2017.

Ntlemeza, *McBride*' had this effect for the national movements.[1637] Reflecting the impact feedback loop,[1638] Heywood described how the 'litigation […] sharpened the issues in relation to politics and fed a movement, and then the movement […] inspired further litigation or gave confidence to further litigation.'[1639] The period after the litigation saw the launch of new anti-corruption initiatives, including the NGO Open Secrets and the People's Economic Tribunal, a civil society process. Chipkin et al describe this as a period of 'a new kind of political activism […] that focuses on defending honourable civil servants and building progressive state administrations'.[1640]

Transparency International's Corruption Perception Index allocates countries a score each year out of 100, with 0 representing a perception as 'highly corrupt' and 100 'very clean'.[1641] South Africa's score increased from 44 in 1995 to approximately 50 for the rest of that decade. From 2000-2009, it averaged 47.4 and did not drop below 44. During Zuma's presidency from 2010-2017, it averaged 43.3 and ranged from 41-45. In 2019, after Zuma resigned in 2018, it went up from 43 to 44 and remained there in 2020. Afrobarometer surveys showed a modest improvement in the proportion of South Africans who say the government is doing a 'very well/fairly well' fighting corruption, from an all-time low of 20% in 2015 to 25% in 2018.[1642] South Africa was thus *perceived*,

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[1637] Heywood (n 1280).

[1638] See Chapter 3.9.

[1639] ibid.

[1640] Chipkin and others (n 1203) 8.

[1641] Transparency International, 'Corruption Perceptions Index' <www.transparency.org/en/cpi> accessed 5 March 2021.

[1642] 'Afrobarometer Dispatch 292' (9 April 2019) <https://afrobarometer.org/publications/ad292-small-improvements-not-yet-new-dawn-south-africans-still-see-high-levels> accessed 10 June 2020.

internationally and locally, to be most corrupt during the Zuma years, this perception improving slightly after his resignation. This data is consistent with interviewees' view that the litigation drew attention to corruption from 2010-2017.

Ivkovich et al agreed that recent developments are likely to 'grow public trust' in the criminal justice system in the short-term.[1643] They highlight Lebeya and Batohi's appointments to head the Hawks and the NPA respectively and the establishment of the dedicated 'Investigating Directorate' in the NPA to investigate and prosecute state capture.[1644] However, they argue that deeper structural reforms are necessary in the long-run. My interviewees generally shared this assessment, saying that the cumulative effect of the litigation had restored *some* confidence in the system, but that problems remain.[1645]

While *Nxasana/Abrahams* may have raised public awareness about the NPA and its role, Lewis was struck that 'people who should really know don't get what the independence of the NPA means, the number of people who said, "Well, great, we got rid of Abrahams. Now Ramaphosa must instruct the NPA head to do what he wants her to do!"' Lewis worried that respect for the NPA's independence is *not* part of political culture.[1646] He commented that, while Ramaphosa has shown respect for its independence,

[1643] Ivkovich and others (n 1212) 9660.

[1644] ibid.

[1645] Naidoo (n 1255); Fritz (n 1256); Antonie (n 1274); Lewis (n 1257).

[1646] Lewis (n 1257).

if he is removed and Ace Magashule[1647] or David Mabuza[1648] comes to office, Shamila Batohi will be 'target number one'.[1649]

The litigation consolidated the emergence of a group of NGOs focused on appointments. Naidoo commented that the litigation also made the NPA aware of 'the critical role that civil society organisations have played in rescuing their institution' and led the incumbent NDPP (Batohi) to have a much more open relationship with NGOs. There is now an 'open door policy in place where [NGOs] can raise issues and concerns directly with her'.[1650]

There are indications that the jurisprudence on requirements for appointment as NDPP have filtered into the culture of Parliament and the executive. Interviewees who have followed appointments processes subsequent to *Simelane* confirmed that it has penetrated the consciousness of political decision-makers, at least to some degree. Naidoo suggested that this has happened 'to some extent', at least in relation to the NPA.[1651] He attributed Zuma's decision not to permanently appoint Jiba after her acting stint to his fearing that the appointment would be set aside based on *Simelane*.[1652] He suggested that this awareness is less present in Parliament, where 'a lot of the onus is left on civil society' to vet candidates.[1653] Lewis emphasised the need to protect the NDPP's independence and

[1647] ANC Secretary-General.

[1648] Deputy President of South Africa and ANC.

[1649] Lewis (n 1257).

[1650] Naidoo (n 1255).

[1651] Naidoo (n 1255).

[1652] ibid.

[1653] ibid.

strengthen appointment processes while leaving appropriate room for politics and politicians in the process.[1654] Batohi's appointment as NDPP was 'welcomed across the board'.[1655] Naidoo, having attended the NPA's first strategy workshop in 5 years, found senior prosecutors 're-energised' following her appointment and that the Court's comments in *Nxasana/Abrahams* regarding their role resonated with prosecutors.[1656]

7.8.3.3. Tensions in the courts

Certain cases generated tensions *within* the courts. Although there are subtle instances in lower court decisions,[1657] the clearest instance is *Impeachment Process*. The Chief Justice's dissent used unusually strong language, calling the majority decision 'a textbook case of judicial overreach – a constitutionally impermissible intrusion by the Judiciary into the exclusive domain of Parliament',[1658] and 'an unprecedented and unconstitutional encroachment into the operational space of Parliament by Judges.'[1659] This elicited a response from Jafta J for the majority,[1660] and a separate concurrence by Froneman J (joined by six judges) solely to address the Chief Justice's comment.[1661] While this tone may

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[1654] Lewis (n 1257).

[1655] Naidoo (n 1255).

[1656] ibid.

[1657] Eg., Tuchten J's references to Matojane J in *Ntlemeza (HC urgent)* and references to Tuchten J in *Ntlemeza (HC)* and *Ntlemeza (SCA)*.

[1658] *Secret Ballot* [223].

[1659] ibid [254].

[1660] ibid [218]-[219].

[1661] ibid [280].

not be unusual in other appellate courts, it is atypical in South Africa. The heightened political stakes appear to have contributed to judicial tensions.

7.9. Factors influencing impact

The key factors influencing impact that emerged from my research are: (i) procedural law; (ii) substantive law; (iii) legal culture; (iv) gendered nature of the corruption space; (v) suitable litigants; (vi) lawyers; (vii) funding; (viii) framing; (ix) model of litigation; (x) form of litigation; (xi) timing. Factors (i)-(iv) relate to the litigation environment, (v)-(vii) to litigation resources, and (viii)-(xi) to litigation decisions.

7.9.1. Litigation environment

7.9.1.1. Procedural law

The litigation across streams benefited from the general procedural advantages identified in Chapter 6, including broad standing rules, protective costs rules, and flexible remedial powers.[1662] In relation to standing, the general approach was articulated by courts as conferring standing on any person to challenge unlawful appointments in the public interest (especially in *Ntlemeza*).[1663] This enabled litigation by NGOs and political parties, not merely incumbents. Relatedly, *amici curiae* were a common feature of the litigation and interviewees considered them influential, all four NGO protagonists participating at least once as *amici*. In respect of costs, the protection of the *Biowatch* rule was considered important, though Selfe commented that the DA considered political parties more at risk

[1662] See Chapter 2.4.1.3.

[1663] Section 7.8.1.6 above.

of costs than NGOs.[1664] Finally, the broad remedial powers exercised by courts enabled both direct removal orders and structural orders requiring disciplinary proceedings that may lead to removal.[1665]

7.9.1.2. Substantive law

The substantive content of the law, as at the start of the case study period *and* as it coalesced through the cases (reflecting the impact feedback loop), was also significant. At the outset, the Constitution guaranteed the independence of the NPA and IPID, and, following judicial interpretation in *Glenister II*, the Hawks. Legislation was thin on procedural and substantive requirements for appointments. However, it was well-established that every exercise of public power must satisfy the principle of legality.[1666] The pre-case study law offered a reasonable basis to challenge high-level appointments.

Crucially, *Simelane (CC)* established *procedural* rationality review, which allowed courts to set aside appointments without second-guessing the executive, laying the foundation for appointments litigation early in the Zuma years. Later decisions increasingly solidified that foundation, adopting an objective standard of review of appointment decisions and seeking to bolster the integrity of institutions.[1667] The litigation bolstered the pre-existing principle that *all* exercises of public power are, in principle, reviewable, culminating in the finding in *Cabinet Reshuffle (HC)* that even Cabinet reshuffles are subject

[1664] Selfe (n 1277).

[1665] Section 7.8.1.8 above.

[1666] Section 7.8.1.1 above.

[1667] *Ntlemeza*, *Nxasana/Abrahams*, *McBride*.

to judicial scrutiny. By the end, the substantive law offered a better-than-level playing field for appointment challenges.

7.9.1.3. Political context

The shifting political context significantly influenced protagonists' litigation decisions and impact. A typical view was Steinberg's comment that there had been a 'shift in the mind of the judiciary', culminating in a 'sea change' from a default assumption of government's good faith to increasing sensitivity to corruption and willingness to intervene.[1668] Marcus commented that by the time *Nkandla* was brought, 'the political tide against Zuma had swung fundamentally', suggesting the outcome might have been different if it had been brought a year before, when [Zuma] was far more secure in his office.'[1669] Marcus likened *Nkandla* to *TAC*,[1670] recalling, 'I don't think President Mbeki's thinking [regarding anti-retroviral drugs for HIV-AIDS] had changed but the Government's approach had certainly undergone at least a shift before the judgment was handed down.'[1671]

7.9.1.4. Judicial attitudes

The cases represent an incrementalist *judicial* approach, developing the law on appointments challenges carefully and consistently across the cases.[1672] This incrementalism happened amidst political shifts. There was general consensus among interviewees that courts would have been unlikely to make such far-reaching decisions a

[1668] Steinberg (n 1390).

[1669] Marcus (n 1419).

[1670] Marcus appeared for the TAC.

[1671] Marcus (n 1419).

[1672] King (n 75).

decade earlier.[1673] In a typical response, Trengove suggested that *Nxasana/Abrahams (HC)* granted such robust relief (barring Zuma from appointing the next NDPP) because the 'political tide' had turned against Zuma.[1674]

The approach is illustrated by the chronology in Appendix I. Almost half the judgments over the decade came in an 18-month period from 31 March 2016 (*Nkandla*) to 29 December 2017 (*Impeachment Process*). Zuma's term as ANC President ended on 18 December 2017 and he resigned as President on 14 February 2018. Reflecting a litigation 'bell curve',[1675] the bulk of the judgments came in the period immediately preceding his fall from power and became increasingly interventionist to that point. Subsequently, the Constitutional Court demonstrated a less interventionist approach in *Jiba striking off (CC)* and *Cabinet Reshuffle (CC)*.

Do the characteristics of the judges bear any relation to judicial attitudes? There are 22 judgments – 11 High Court (including 3-judge full benches), 4 SCA and 7 Constitutional Court. I focus on the High Court since the Constitutional Court sits *en banc* and the SCA in 5-judge panels. In terms of race, the High Court sample is fairly representative, with 11 black judges and 6 white judges in total, and only 5 white judges authoring sole or majority judgments. Women judges are under-represented, with only one of 10 High Court judgments written by a woman.[1676] This tracks the concern about the gendered nature of the 'corruption space' discussed below.

[1673] Steinberg (n 1390); Marcus (n 1419); Trengove (n 1301).

[1674] Trengove (n 1301).

[1675] Interview: Max du Plessis SC, advocate, Durban bar (Durban, 30 April 2020).

[1676] Kathree-Setiloane J in *McBride* (HC).

Regarding professional background of the High Court judges, similarly to Chapter 6, half[1677] had human rights-focused careers prior to appointment, namely judges Kollapen,[1678] Baqwa,[1679] Murphy,[1680] Kathree-Setiloane,[1681] and Mlambo.[1682] This may reflect that Judge Presidents tended to allocate these cases to judges with public law and human rights law expertise. The most executive-minded judgments are *Simelane (HC)* by Van der Bijl AJ and *Ntlemeza (HC urgent)* by Tuchten J, whose judgment in *Textbooks III* was similarly an outlier in Chapter 6. This is an area for further research.

7.9.1.5. The gendered nature of the corruption space

While identifying interviewees, I was struck that my sample was skewed in gender terms. Among 25 potential interviewees, limited to heads of NGOs and political parties and 'repeat player' lawyers, only 5 were women (20%) – none of the heads of political parties; only one of four NGO heads; two holders of public office; and two advocates (both junior counsel at the time). The pattern was similar over my broader sample of over 70 potential interviewees, before limiting to repeat players.[1683] This was in contrast to Chapter 6, where (applying the same approach) my interview sample was evenly balanced and over 50% were women. This raised a red flag, which I explored further.

[1677] The remaining judges were Van der Bijl AJ, Matojane, Prinsloo, Mabuse and Tuchten JJ.

[1678] Former National Director of Lawyers for Human Rights, Commissioner of SAHRC and chair of LRC's Trust. See Chapter 6.9.1.3

[1679] First Public Protector from 1995-2002.

[1680] Former attorney and academic, teaching at University of the Western Cape, focusing on human rights, especially labour and land.

[1681] Former clerk of Constitutional Court; practice with significant proportion of human rights work.

[1682] Trustee of Legal Resources Trust; pre-appointment practice with substantial human rights work.

[1683] See Chapter 5.8.4.

Interviews and a closer examination of some court proceedings confirmed this early impression that the 'corruption space' is heavily gendered.[1684] Carol Steinberg, counsel in three of the streams,[1685] said that this is an issue in 'the whole corruption area'.[1686] She said, 'I have felt […] bullied in the area of corruption, which I have never felt in any other matter.'[1687] She described one exchange with Judge Tuchten during the *Ntlemeza (HC urgent)* hearing concerning Ntlemeza's reputation:

> [H]is response … was a moment as a woman at the Bar I will never forget. He said to me, "Ms Steinberg, a man is his job." Then he looked at me and was embarrassed and said, "Maybe that's the case for some women these days, too." I said, "I hope I am a lot more than my job, my lord."[1688]

Steinberg also described how, during the same hearing, a male senior advocate representing the state 'stood up and pushed me away from the podium to make an objection, physically pushed me away and Judge Tuchten said nothing. I was frankly too shocked to say anything.'[1689] Briefing patterns in corruption cases also reflect systemic discrimination against women.[1690] It is not that women are absent from the streams; some (such as Jiba, Batohi and Madonsela) feature prominently. Rather, women are under-represented and those women who work in the 'corruption space' frequently experience sexism and misogyny.

[1684] Steinberg (n 1390); Jele (n 1500).

[1685] *Ntlemeza*, *McBride*, *Nkandla.*

[1686] Steinberg (n 1390).

[1687] ibid.

[1688] ibid.

[1689] ibid.

[1690] 'Transformation of the Legal Profession' (n 166) 49–51.

These court-room and professional experiences were accompanied by violence and threats, including threats to Madonsela and her children,[1691] to Dramat,[1692] to some of the lawyers,[1693] the attempted shooting of prosecutor Glynnis Breytenbach, break-ins and theft of data surrounding *Ntlemeza*, and a fear that communications were being intercepted. The atmosphere of the litigation was imbued with toxicity generally absent from the Education study. I suggest that the gendered nature of the space contributed to this.

7.9.2. Litigation resources

7.9.2.1. Suitable litigants

The protagonists were a more disparate group than the cohesive, collaborative protagonists in Chapter 6. Significantly, they were all 'repeat-players'.[1694] generally and in this area. The NGOs, EFF and DA litigated frequently across the area. The UDM was more circumspect, its leader explaining that they 'select their battles', litigating 'where the cases are a threat to the sustainability of our democracy'.[1695]

The NGOs collaborated in various ways, with a greater degree of collaboration than I had anticipated, though still less than in Chapter 6. Corruption Watch had historically aligned most closely with CASAC,[1696] and FUL with HSF, [1697] but increasingly

[1691] Marcus (n 1419).

[1692] Antonie (n 1274).

[1693] Steinberg (n 1390).

[1694] Galanter (n 158).

[1695] Holomisa (n 1279).

[1696] Lewis (n 1257).

[1697] Fritz (n 1256).

all four organisations came to consult and collaborate more closely, their respective heads explained.[1698] Absent any convening structure, the organisations met regularly in various settings and held informal discussions. The leaders now often pick up the phone to their counterparts.[1699] Often, two or more would act as co-applicants in the litigation or one of the organisations would intervene as *amicus curiae* in litigation initiated by another. Naidoo added that from around 2018 there began to be more co-ordination among the four NGOs but it was 'less litigation-oriented and more about what we can do collectively to try and help the rebuilding of these institutions.'[1700] The NGOs supported, but did not collaborate directly with, the #SaveSA and #UniteBehind movements, which never litigated.

The involvement of partisan political actors was a complicating factor. At times, NGOs avoided intervening in litigation brought by political parties, Antonie explaining that HSF were 'wary' of political parties litigating.[1701] Selfe remarked that the NGOs 'would probably have run a mile' if the DA suggested collaboration,[1702] and Mpofu and Holomisa confirmed that the EFF and UDM also did not actively engage with them.[1703] However, the NGOs frequently intervened as *amici curiae* in the Presidency/Cabinet stream. Among the parties, the EFF, UDM and COPE collaborated with each other, but not with the DA,

[1698] Naidoo (n 1255); Fritz (n 1256); Lewis (n 1257); Antonie (n 1258).

[1699] ibid.

[1700] ibid.

[1701] Antonie (n 1258).

[1702] Selfe (n 1277).

[1703] Mpofu (n 1278); Holomisa (n 1279).

even when pursuing similar objectives.[1704] The EFF and DA had a competitive dynamic, for example seeking to be the first to the Constitutional Court in *Nkandla*.[1705]

The actors' relationships to government (and each other) shifted among the four-C framework (confrontation, complementarity, cooperation and co-optation). The primary relationship of protagonists to government was confrontational, at least in relation to the central government under Zuma, though this changed to more complementary or co-operative after Ramaphosa assumed power. President Ramaphosa withdrew opposition to some Zuma-era cases, including *Nxasana/Abrahams*[1706] and others outside the case study.[1707] Protagonists' relationships among themselves ranged from complementary to co-operative. The NGOs resisted being co-opted by the political parties, and the political parties resisted being co-opted by one another and, for the EFF and DA, even resisted co-operating.

7.9.2.2. Lawyers

The protagonists' lawyers were generally *not* the public interest law centres encountered in Chapter 6, save that the LRC represented CASAC. The other protagonists tended to use private attorneys, generally acting pro bono for FUL, HSF and Corruption Watch, and on a fee-charging basis for the political parties. Webber Wentzel acted for FUL, HSF and Corruption Watch, mostly pro bono, playing a major role.[1708] Minde Schapiro and Smith,

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[1704] Mpofu (n 1278); Holomisa (n 1279); Selfe (n 1277).

[1705] Selfe (n 1277).

[1706] *Nxasana/Abrahams (CC)* n 5.

[1707] Jele (n 1500).

[1708] Fritz (n 1256); Antonie (n 1258); Lewis (n 1257).

long-time lawyers for the DA, represented them throughout.[1709] The EFF changed attorneys and counsel but retained Ngcukaitobi as counsel throughout.[1710] The UDM used different attorneys but had a long-standing relationship with Mpofu and opted to brief him as counsel twice.[1711] Lead counsel included many of the leading public law advocates in South Africa, with some overlap to the counsel in Chapter 6.[1712] Interviews emphasised the importance of the lawyers understanding the political context. Holomisa commented, for example, that Ngcukaitobi and Mpofu really 'listened' and understood why the UDM wanted to take a particular approach.[1713]

7.9.2.3. Funding

A crucial factor was the availability of funding or pro bono legal services. Political parties paid for legal services under litigation budgets.[1714] Their major sources of funding are formal state funding, private donations, and member subscriptions. Selfe confirmed that the cost of litigating was an important factor in deciding to litigate because litigation 'is hugely expensive and even if we do get a costs order it seldom pays for everything', so at times the DA would leave it to others, especially the NGOs.[1715]

For the NGOs, the bulk of litigation costs were covered by pro bono services provided by attorneys (Webber Wentzel for HSF, FUL and Corruption Watch; LRC for

[1709] Interview: Elzanne Jonker, DA's attorney at Minde Schapiro & Smith (Cape Town, 3 June 2020).

[1710] Mpofu (n 1278); Ngcukaitobi (n 1394).

[1711] Holomisa (n 1279). This was despite the fact that Mpofu was former EFF Chairperson.

[1712] Tembeka Ngcukaitobi and Steven Budlender.

[1713] Holomisa (n 1279).

[1714] Holomisa (n 1279); Selfe (n 1277); Mpofu (n 1278).

[1715] Selfe (n 1277).

CASAC) and counsel, and through costs awards in successful cases. However, there remained associated costs, including research, advocacy and media engagement, covered by donor funding from the sources below. FUL and CASAC have smaller staff complements, and so require less funding.[1716]

[1716] Fritz (n 1256).

Table 7.5: Funding sources for appointments litigation 2010-2019

CASAC[1717]	Atlantic Philanthropies, Massmart, Millennium Trust, OSF, Oppenheimer Memorial Trust, Sigrid Rausing Trust, Standard Bank
Corruption Watch[1718]	Andrew Roberts Memorial, Atlantic Philanthropies, Aveng, Ball Family Foundation, Bertha Foundation, Business Leadership South Africa, Claude Leon Foundation, Congress of South African Trade Unions, ELMA Foundation, Ford Foundation, Gesellschaft für Internationale Zusammenarbeit, Hans Seidel Foundation, Heinrich Boell Stiftung, HIVOS, J&J Group, Mary Oppenheimer & Daughters Foundation, Millennium Trust, OSF, RAITH Foundation, Oppenheimer Memorial Trust, Transparency International
FUL[1719]	Remgro, Millennium Trust, Social Justice Initiative, Jannie Mouton Foundation
HSF[1720]	*Unknown*

Interviewees confirmed that institutional donors, local and international, strongly supported appointments litigation, some even making proactive approaches to all four organisations to offer support after early successes.[1721] As with Chapter 6, however, there is nothing to suggest that this litigation was donor-driven.

[1717] Email from Lawson Naidoo to author (13 May 2021).

[1718] Email from David Lewis to author (12 May 2021); Corruption Watch annual financial statements 2012-2020 <www.corruptionwatch.org.za.> accessed 12 May 2021.

[1719] Email from Nicole Fritz to author (11 May 2021).

[1720] Unavailable publicly; requested via email but not received.

[1721] Fritz (n 1256).

7.9.3. Litigation decisions

7.9.3.1. Framing

Outside court, protagonists – NGOs and political parties – framed appointments disputes in relation to state capture. This became the dominant framing. In court, there was a shift from a more technical, procedural and politically acontextual framing (*Simelane (CC)*) towards increasingly substantive and contextualised approaches (*Ntlemeza, Mdluli*, *Nxasana/Abrahams*), by litigants and courts. By this point, parties were willing to characterise incumbents as 'captured' (without necessarily using the term), and courts were increasingly receptive.

7.9.3.2. Model

The litigation was predominantly research-based or campaign-based (or some combination), as well as some client-based litigation driven by incumbents. As Heywood observed, in contrast to Chapter 6, 'none of these cases originated in movements'.[1722] The movements #SaveSouthAfrica and #UniteBehind ran parallel to the litigation, feeding into and being fed by it. So too did the activities of the opposition parties in Parliament and outside, leading joint protests with the two movements and basing motions against Zuma on court outcomes. All of these non-litigious activities were bolstered by, and in turn bolstered, the litigation, in an ongoing impact feedback loop that contributed to the political impact.

HSF and FUL generally employed a research-based model, while CASAC, Corruption Watch and the political parties employed campaign-based models emphasising

[1722] Heywood (n 1280).

public engagement. HSF styles itself as a 'think-tank' and adopts a research-based model, desktop legal and policy research informing proposed litigation.[1723] Antonie explained that 'the research comes out with certain conclusions and it's on the basis of those conclusions that we will initiate litigation', but added that HSF also sometimes intervenes in litigation launched by others.[1724] HSF's research process on appointments included a series of symposia attended by academics, lawyers and judges, and government officials.[1725]

CASAC and Corruption Watch used an avowedly campaign-based model, situating litigation in broader campaigns and prioritising alliances with other civil society actors. Both employ media and social media frequently. For CASAC, litigation is a 'last resort'.[1726] Corruption Watch's primary focus is popular mobilisation and it sees litigation and legal research as supporting its campaigns and public engagement.[1727] Lewis explained that, for Corruption Watch, securing publicity and public debate is a crucial litigation objective, whereas for other organisations 'outcome is all-important'.[1728] He underscored the legitimate space to be 'left to politics'.[1729]

By contrast, FUL employs litigation as its primary strategy, with a low-key public profile and limited media activity. Fritz confirmed that 'largely or exclusively our focus ha[s] been litigation and that is just the function of the resources we have and our

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[1723] Antonie (n 1258).

[1724] ibid.

[1725] ibid.

[1726] Naidoo (n 1255).

[1727] Lewis (n 1257).

[1728] ibid

[1729] ibid.

expertise', describing one instance where FUL convened a civil society media campaign and joint statement as 'anomalous'.[1730] Although FUL did not publish its research as HSF did, its model is best understood as research-based.

The research-based model of HSF and FUL likely contributed particularly to the shift in legal culture,[1731] by drawing attention of lawyers and judges to state capture and its legal implications, and to the legal impact of enriched conceptions of legality review, the rule of law and institutional independence.[1732] The campaign-based model of CASAC and Corruption Watch, likely contributed particularly to changing legal culture, the public discourse,[1733] and changing political winds.[1734] However, the effect of distinct models was attenuated by the politicised context. Because of widespread media coverage, research-based litigation was effectively converted into campaign-based litigation even if litigants like HSF and FUL took no steps to mobilise or campaign.

7.9.3.3. Form

The notable forms of litigation across the streams were individual cases and test cases. The individual cases included interim interdicts to block appointments or suspensions, reviews to set aside appointments, and interdictory/injunctive relief requiring particular action, such as instituting disciplinary proceedings. The test cases included constitutional challenges to legislation and Parliamentary processes and rules.

[1730] Fritz (n 1256).

[1731] Section 7.8.1.7.

[1732] Sections 7.8.1.1 and 7.8.1.6.

[1733] Section 7.8.3.2.

[1734] Section 7.8.3.1.

The highest success rates were seen in constitutional challenges to legislation (*Glenister II & III*, *Nxasana/Abrahams*, *McBride*) and Parliamentary processes and rules (*Secret Ballot*, *Impeachment Process*), reviews of appointment decisions (*Simelane*, *Nxasana/Abrahams*, *Ntlemeza*) and cases that pursued removal *indirectly* by seeking to compel disciplinary or other accountability processes (*Jiba*, *Mdluli*, *Secret Ballot*, *Impeachment Process*).

Two other sub-forms saw limited success. First, cases aimed at *keeping* incumbents in office (*Dramat*, *Sibiya*, *Booysen* and *McBride*) were successful in court but all four officials left their positions regardless – a disjunct between legal and material impact. This indicates that retention is harder to enforce than removal, particularly because retention involves the willingness of incumbents to remain despite hostility. The second was urgent litigation to prevent an appointee from taking up office or exercising powers. The dismissal of *Ntlemeza (HC urgent)* allowed Ntlemeza to stay in office for over a year, influencing many Hawks appointments. However, similar relief was granted in *Mdluli*, barring him from exercising powers pending disciplinary proceedings.

7.9.3.4. Timing

Timing was a significant factor. Politically, from around 2014/15, there was a groundswell of popular opposition to Zuma. In addition to new NGOs, social movements arose, cutting across traditional divides and opposition parties collaborated (EFF, UDM and COPE) or at least reluctantly co-operated (EFF and DA).

This shift in political context was paralleled by changing legal and judicial attitudes. The protagonists were emboldened by early legal victories. Antonie commented that

Glenister II 'gave us confidence to tackle new things differently'.[1735] The NGOs and political parties adopted an incrementalist approach, extending principles from one institution to the next (eg., from the Hawks to IPID in *McBride*). This was coupled with a shift from more procedural approaches early on (*Simelane*) to increasingly substantive approaches to appointments challenges (*Ntlemeza*, *Mdluli*). This incrementalism can be seen both as litigation strategy and adjudicatory approach. As litigation strategy, Steinberg compared these streams to the carefully sequenced cases on LGBTI rights discussed in Chapter 2.[1736]

7.10. Evaluation

I evaluate cumulative impact, using the approach developed in Chapter 4. This includes asking whether the litigation was 'successful', measured against its objectives; and considering the impacts normatively, against the SDR framework and Chapter 4's heuristic of risks.

7.10.1. Success

In terms of courtroom success, out of 22 judgments, only two failed – *Simelane (HC)* and *Ntlemeza (HC urgent)*, both overturned on appeal – and *Cabinet Reshuffle* became moot. Whether cases achieved their objectives is more complex, as reflected in the Rosenberg/Feeley debate about stated and actual objectives and objectives stated contemporaneously or retrospectively.[1737] That debate highlights how objectives, like impact, can be viewed at more immediate or abstract levels – for example, the removal of

[1735] Antonie (n 1258).

[1736] Steinberg (n 1390).

[1737] See Chapter 5.8.2.

an official or the strengthening of an institution. Taking the most immediate objectives of removing compromised incumbents, the litigation was successful in removing Simelane, Jiba, Nxasana, Abrahams (NPA); Ntlemeza (Hawks); Mdluli (SAPS); and Zuma himself. It was generally *unsuccessful* in trying to keep incumbents in office, including Dramat, Sibiya, Booysen (Hawks); McBride (IPID); and Gordhan and Jonas (Cabinet). In terms of broader objectives of strengthening accountability and the integrity of institutions and fighting corruption, the litigation can broadly be seen as partially successful but the process is far from complete.[1738]

7.10.2. Normative evaluation

I turn to evaluating impact against the SDR framework – the values of social justice, democracy and the rule of law – alongside a heuristic of risks.

7.10.2.1. Social justice

The social justice benefits of the litigation lie in the longer-term effects that strengthening the criminal justice sector will have on fighting corruption, with the potential to secure greater resources for development. The extent to which bolstering the criminal justice sector will have these effects in South Africa remains to be investigated empirically, though it is already *perceived* to be contributing. The short-term, direct benefits to the fiscus were limited to the recoveries from Zuma and Nxasana and ending wastage from paying the suspended Mdluli and on legal fees.

The litigation generally did not bear out the 'hollow hope' risk, as the direct and indirect removal orders were effectively implemented and new appointments are widely

[1738] See Section 7.8.2.2.

seen as credible and clean. However, the litigation seeking to retain incumbents who were confronting corruption and state capture did result in some partially hollow victories (*Dramat*, *Sibiya*, *Booysen*, *Cabinet Reshuffle*). There is also little indication that the effect of the litigation was to benefit elites. The effective functioning of the institutions benefits all in South Africa, as *Ntlemeza (SCA)* emphasised.

7.10.2.2. Democracy

The litigation's contribution to participatory democracy may be analysed from different perspectives. Activists from the two movements parallel to the litigation confirmed that it provided opportunities for organising and protest.[1739] However, Achmat considered the fact that litigation was necessary to remove compromised officials a 'failure of citizenship', as 'the courts did what Parliament and the people should have been doing'.[1740] This relates to one of the risks highlighted in my heuristic, that litigation debilitates democratic politics. However, as emerges from all five streams, Parliament had ceased to fulfil its oversight function effectively during the Zuma presidency. Most graphically, the *Nkandla* line of cases followed serious breakdowns in the functioning of parliamentary oversight of the executive, culminating in violent incidents and the ejection of EFF MPs. The litigation is better understood as *responding to* a breakdown in democratic politics than contributing to it. State capture itself subverts democracy because it removes the control of the electorate

[1739] Achmat (n 1281); Heywood (n 1280).

[1740] Achmat (n 1281).

and their representatives over the political process.[1741] To the extent that the litigation contributed to reversing that process, it reinforced democracy.[1742]

Regarding the risk that litigation will disempower, deradicalise or demobilise political efforts, my interviewees from movements, NGOs and opposition parties agreed that, although these strategies ran in parallel without much direct interaction, unlike in Chapter 6, they bolstered rather than undermined each other. It is possible that if litigation had been *unsuccessful*, #SaveSA, #UniteBehind and others would have scaled up mobilisation efforts against problematic appointments, but successful litigation buoyed mobilisation, and was buoyed by it in turn. The same is true of the effect on opposition political parties. Their turn to litigation did not weaken them politically or distract them from parliamentary activity, but strengthened their position.

7.10.2.3. Rule of law

There were discernible positive contributions to the rule of law, though these too are still unfolding. The courts' interventions powerfully vindicated the rule of law, by holding the executive to the legal requirements for appointments, suspensions and removals, and remedying constitutional defects in legislation. However, they went further, strengthening the independence of key institutions in the criminal justice sector. Indeed, the litigation developed the rule of law doctrinally to include the integrity of constitutional institutions.[1743] The litigation raised the bar on the criteria for appointment and strengthened appointment processes in ways that are likely to mitigate, though not

[1741] Cachalia (n 564) 51.

[1742] ibid 57; Huq (n 1534) 25.

[1743] Section 7.8.1.6.

eliminate, the risk of compromised appointments in future. Greater legal protection against suspension and removal should enable the heads of these institutions to combat high-level corruption more effectively. The litigation also strengthened faith in existing accountability mechanisms such as the courts and the Public Protector.

One contribution to the rule of law was strengthening the Public Protector's powers in *Nkandla*. Views varied on whether this is wholly positive. For some, this serves to bolster the effectiveness of the Public Protector. [1744] Marcus (who represented the previous Public Protector) acknowledged that, under the new Public Protector, there has been a spate of reviews, which is 'draining upon judicial resources [and] diverting the Public Protector', but suggested that this may be 'a phase' relating to the incumbent.[1745] Woolman argues that *Nkandla*'s effects may be mitigated if the Public Protector opts to frame remedial action as non-binding recommendations.[1746] To date, she has not done so, and reviews have mushroomed. This risks allowing recalcitrant officials to delay accountability. It also shifts the focus away from those officials to the procedure and content of the Public Protector's reports. Huq speculated that *Nkandla* might imperil the office because the binding effect of reports increases the 'premium upon appointing captured loyalists to a leadership position in that office… . [E]ven if the Court's intervention limited state control, its effect probably had a shelf-life: its efficacy would evaporate when the hegemonic party captured the Public Protector.'[1747] Events appear to have borne this out with Mkhwebane's

[1744] Marcus (n 1419).

[1745] ibid.

[1746] Woolman, 'A Politics of Accountability' (n 1513).

[1747] Huq (n 1534) 36–37.

term. *Nkandla*'s overall rule of law contribution is mixed and will be better evaluated beyond a single incumbent currently facing impeachment for her performance.

The risks of imperilling courts by leading them into overly 'political' terrain and that litigation is abused to avoid accountability were borne out in significant, though not decisive, ways across streams. Throughout the period, Zuma and allies publicly attacked the judiciary. They also used litigation – especially delay – to avoid accountability. For example, Ntlemeza successfully resisted an interim interdict and, until finally removed, continued to make appointments and control key cases in the Hawks. The final risk in the heuristic is backlash, which manifested significantly in threats, break-ins and general toxicity at key points in the litigation,[1748] especially *Ntlemeza* and *Mdluli*. Overall, however, the litigation contributed positively to consolidating the rule of law when it faced fundamental peril.

7.11. Conclusion

While the phase of 'state recapture' litigation may have subsided with Zuma's resignation and the appointment of new heads of the NPA, Hawks, SAPS Crime Intelligence, broader change processes are incomplete and the impact of the litigation is still unfolding. New struggles, including through litigation, are emerging. Although top-level appointments litigation has receded, the ensuing period is likely to see contestation around second-level and lower tier appointments in the criminal justice sector,[1749] struggles about the leadership

[1748] Sections 7.8.2.5 and 7.9.1.5.

[1749] Naidoo (n 1255); Antonie (n 1258); Fritz (n 1256); Lewis (n 1257); Trengove (n 1301); Jele (n 1500).

and governance of state-owned enterprises,[1750] efforts to recover assets,[1751] and prosecutions.[1752] Central to many of these struggles will be the findings of the State Capture Commission, itself partly a product of litigation. The Commission's mandate includes the events covered in this Chapter. Because of the involvement of courts in disputes close to the heart of political power, increasing attention is likely to be paid to judicial appointments, especially to the Constitutional Court.[1753] There remains risk of further backlash, especially break-ins and intimidation, with courts, judges, lawyers and legal NGOs possible targets if high-level prosecutions transpire. There is even the risk that the law and the courts will be employed for anti-democratic ends.[1754] For now, the litigation contributed to shifting the trajectory of state capture and reviving the embattled institutions.

[1750] Achmat (n 1281); Antonie (n 1258).

[1751] Antonie (n 1258).

[1752] ibid.

[1753] Lewis (n 1257).

[1754] Huq (n 1534) 25.

Appendix I: Chronology of Judgments

Date	Event	Judgment
9 May 2009	Zuma sworn in as President	
10 November 2010	*Simelane (HC)*: Van der Bijl AJ dismisses review	*Democratic Alliance v President of the Republic of South Africa* [2010] ZAGPPHC 194
1 December 2011	*Simelane (SCA)*: appeal upheld, setting aside Simelane's appointment as NDPP	*Democratic Alliance v President of the Republic of South Africa* 2012 (1) SA 417 (SCA)
6 June 2012	*Mdluli (HC urgent)*: High Court (Makgoba J) interdicts Mdluli from performing any functions	*Freedom Under Law v National Director of Public Prosecutions*, case number 26912/2012, unreported judgment of North Gauteng High Court
5 October 2012	*Simelane (CC)*: appeal dismissed, removing Simelane as NDPP	*Democratic Alliance v President of South Africa* 2013 (1) SA 248 (CC)
23 September 2013	*Mdluli (HC)*: High Court (Murphy J) sets aside decisions of NPA to withdraw criminal charges and SAPS to withdraw disciplinary proceedings, reinstates the criminal charges and restores suspension.	*Freedom Under Law v National Director of Public* 2014 (1) SA 254 (GNP)
17 April 2014	*Mdluli (SCA)*: SCA upheld appeal in part, setting aside order to reinstate murder set of charges.	*National Director of Public Prosecutions v Freedom Under Law* 2014 (4) SA 298 (SCA)
20 February 2015	*Sibiya*: High Court (Matojane J) sets aside Sibiya's suspension by Ntlemeza	*Sibiya v Minister of Police* [2015] ZAGPPHC 135
18 November 2015	*Booysen*: High Court (Van Zyl J) sets aside Booysen's suspension by Ntlemeza	*Booysen v National Head of the Directorate for Priority Crime Investigation* [2015] ZAKZDHC
4 December 2015	*McBride (HC)*: High Court (Kathree-Setiloane J) sets aside suspension of McBride and strikes down provisions of IPID Act and related laws	*McBride v Minister of Police* [2016] 1 All SA 811 (GP)
19 April 2016	*Ntlemeza (HC urgent)*: High Court (Tuchten J) refuses urgent relief challenging appointment of Ntlemeza	*Helen Suzman v Minister of Police* [2016] ZAGPPHC 1191
17 March 2016	*Ntlemeza (HC)*: High Court (Mabuse, Kollapen, Baqwa JJ) sets aside appointment of Ntlemeza as National Head of the Hawks	*Helen Suzman Foundation v Minister of Police* 2017 (1) SACR 683 (GP)

31 March 2016	*Nkandla*: Constitutional Court directs Zuma to pay for non-security upgrades to his Nkandla residence	*Economic Freedom Fighters v Speaker, National Assembly* 2016 (3) SA 580 (CC)
5 September 2016	*Ntlemeza (CC)*: Constitutional Court dismisses HSF's application for leave to appeal against Tuchten J decision	Case CCT 100/16 (order only)
6 September 2016	*McBride (CC)*: Constitutional Court sets aside McBride's suspension and upholds constitutional challenge to provisions of SAPS Act	*McBride v Minister of Police* 2016 (2) SACR 585 (CC)
9 May 2017	*Cabinet Reshuffle (HC)*: High Court (Vally J) orders Zuma to deliver reasons and record of decision	*Democratic Alliance v President of the Republic of SA; In re: Democratic Alliance v President of the Republic of SA* 2017 (4) SA 253 (GP)
9 June 2017	*Ntlemeza (SCA interim execution order)*: SCA dismisses Ntlemeza appeal against interim execution order (Navsa J)	*Ntlemeza v Helen Suzman Foundation* 2017 (5) SA 402 (SCA)
14 June 2017	*Ntlemeza (SCA)*: SCA dismisses application for leave to appeal	Case No. 400/17 (order only)
22 June 2017	*Secret Ballot*: Constitutional Court declares that the Speaker of the National Assembly has the power to prescribe that voting in Zuma no confidence motion be by secret ballot	*United Democratic Movement v Speaker of the National Assembly* 2017 (5) SA 300 (CC)
8 December 2017	*Nxasana/Abrahams (HC)*: High Court (Mlambo, Ranchod, Van der Linde JJ) sets aside settlement agreement with Nxasana and appointment of Abrahams and upholds constitutional challenge to NPA Act	*Corruption Watch v President of the Republic of South Africa* 2018 (1) SACR 317 (GP)
18 December 2017	Ramaphosa elected President of ANC	
21 December 2017	*Jiba*: High Court (Motlhe, Tlhapi JJ; Wright J dissenting) sets aside NDPP decision to withdraw criminal charges against Jiba and President's failure to suspend and institute disciplinary proceedings.	*Freedom Under Law v National Director of Public Prosecutions* 2018 (1) SACR 436 (GP)
29 December 2017	*Impeachment Process*: Constitutional Court orders National Assembly to make rules regulating removal of a President	*Economic Freedom Fighters v Speaker of the National Assembly* 2018 (2) SA 571 (CC)
14 February 2018	Zuma resigns as President	
31 May 2018	*Cabinet Reshuffle (SCA)*: SCA dismisses appeal for mootness	*President of the Republic of South Africa v Democratic Alliance* 2018 JDR 0765 (SCA)

13 August 2018	*Nxasana/Abrahams*: Constitutional Court dismisses appeal, confirming the removal of Abrahams and that Nxasana will not be restored as NDPP, and ordering a new appointment be made	*Corruption Watch v President of the Republic of South Africa* 2018 (2) SACR 442 (CC)
18 September 2019	*Cabinet Reshuffle (CC)*: Constitutional Court dismisses application for leave to appeal because moot	*President of the Republic of South Africa v Democratic Alliance* 2020 (10 SA 428 (CC)

Appendix II: Interviews

Interviewee	Institutional affiliation	Cases personally involved	Date and location of interview(s)
1. **Achmat**, Zackie	A leader of #UniteBehind campaign	No direct involvement	5 September 2019, Cape Town
2. **Antonie,** Francis	Director of Helen Suzman Foundation	Glenister II, Ntlemeza, McBride	27 September 2019, Johannesburg
3. **Budlender,** Steven	Advocate, Johannesburg Bar	EFF II, Cabinet Reshuffle Challenge, McBride	26 September 2019, Johannesburg
4. **Du Plessis,** Max	Advocate, Durban Bar	Glenister II, Glenister III/HSF, Nxasana/Abrahams, Jiba	30 April 2020, Durban (online)
5. **Fritz,** Nicole	Director of FUL	Nxasana/Abrahams, Ntlemeza, Mdluli	20 December 2020, Johannesburg
6. **Heywood,** Mark	A leader of #Save South Africa campaign	No direct involvement	3 December 2019, Oxford
7. **Holomisa,** Bantubonke	President of United Democratic Movement	Secret Ballot, Impeachment Process	7 February 2021, Mqanduli
8. **Jele,** Nokukhanya	Special Advisor to the President	NPA, Presidency generally	27 January 2021, Johannesburg
9. **Jonker,** Elzanne	Attorney, Minde Schapiro & Smith	Nkandla, Secret Ballot, Impeachment Process, Cabinet Reshuffle	3 June 2020, Cape Town (online)
10. **Lewis,** David	Director of Corruption Watch	Nxasana/Abrahams, EFF II	25 September 2019, Johannesburg
11. **Marcus,** Gilbert	Advocate, Johannesburg Bar	Nkandla	3 March 2020, Johannesburg
12. **Mpofu,** Dali	Former Chairman, EFF; advocate, Johannesburg Bar	Nkandla, Secret Ballot, Impeachment Process	30 April 2020, Johannesburg (online)

13. **Naidoo,** Lawson	Director of CASAC	Nxasana/Abrahams, UDM (secret ballot)	5 September 2019, Cape Town
14. **Ngcukaitobi,** Tembeka	Advocate, Johannesburg Bar and Pan African Bar Association of South Africa; former Director of Constitutional Litigation Unit, LRC	Nkandla, EFF II, UDM (secret ballot), McBride	18 June 2019, Oxford
15. **Selfe,** James	Federal Council Chairperson, Democratic Alliance	Nkandla, Secret Ballot, Impeachment Process, Cabinet Reshuffle	3 June 2020, Cape Town (online)
16. **Steinberg,** Carol	Advocate, Johannesburg Bar	Ntlemeza, Nkandla, McBride	5 March 2020, Johannesburg
17. **Stone,** Chris	Professor of Public Integrity, Blavatnik School of Government, University of Oxford;	No direct involvement	30 November 2020, Oxford
18. **Trengove,** Wim	Advocate, Johannesburg Bar	Simelane, Nkandla, Nxasana/Abrahams	30 September 2019, Johannesburg

8. CONCLUSION

In Part I of this Thesis, I developed a framework to understand, analyse and evaluate the impact of strategic litigation as one form of legal mobilisation. I set out the dynamic interplay between the litigation environment, resources and decisions as the key drivers of strategic litigation on the one hand, and the factors that best explain impact on the other. Central to my approach is the typology of legal, material and political impact. In what I call the impact feedback loop, those forms of impact may themselves seep into the litigation environment, generate resources for litigation and influence future litigation decisions. An important contribution of Part I was to distinguish the analysis of impact from its evaluation and to develop an original framework for evaluation consisting of 'success' (as against litigation objectives) coupled with a deeper normative evaluation against the constitutional values of social justice, democracy and the rule of law (the 'SDR' framework). The latter evaluation is also guided by a heuristic of the major risks (and benefits) associated with strategic litigation.

In Part II, I conducted two case studies. They illustrated the key role played by the litigation environment, resources and decisions in litigation over basic education provisioning (Chapter 6) and 'state capture' appointments to senior positions in the criminal justice sector and the executive itself (Chapter 7). Though the case studies concerned contrasting areas of law and governance, and generated very different effects, the typology of legal, material and political impact comprehensively captured the main contributions of the litigation in both case studies, offering important analytic insights. The case studies supported the argument developed in Chapter 2 that the litigation environment in South Africa is broadly favourable for strategic litigation, all other things being equal and, in particular, subject to the availability of litigation resources and taking

appropriate litigation decisions. Importantly, both case studies confirmed that the litigation contributed to significant legal, material and political impact that generally advanced social justice, democracy and the rule of law.

8.1. Findings across case studies

In Chapter 6, regarding legal impact, I found that the litigation across the six streams contributed to developing the content of the right to a basic education, consolidating its 'immediately realisable' character and developing a range of remedial innovations. As to material impact, the litigation contributed to the construction of approximately 250 new schools to replace mud schools; provision of hundreds of thousands of textbooks; approximately 400,000 items of school furniture at a cost of over R700 million (US$46.1 million); the appointment of over 500 teachers to vacant posts at 139 schools, and payment of over R129 million (US$9 million) in unpaid teacher salaries; and the provision of scholar transport to almost 4,000 learners at 4 Eastern Cape and 12 KZN schools. These services were provided to over a million learners, predominantly poor black learners attending the country's poorest schools, with expenditure on these services exceeding R10 billion (US$670 million). The knock-on effect on improving educational outcomes remains unclear. The litigation contributed to creating employment and business, bureaucratic changes, making data available, and to increased funding and resources for education litigation. However, it also contributed to some wastage of resources and created opportunities for corruption by generating pressure to expedite procurement processes. Finally, concerning political impact, I found that the litigation contributed to reshaping the national discourse to give greater prominence to education rights and specifically school infrastructure, shifting government priorities, building social movements, mobilising communities and strengthening civil society collaboration.

In Chapter 7, regarding legal impact, I found that the litigation contributed to developing legality review; consolidating the institutional independence of the relevant institutions; clarifying the status and powers of the Public Protector; developing the law on removal of the President and Cabinet reshuffles; advancing constitutional conceptions of the rule of law, constitutional democracy and separation of powers; shifting legal culture; and developing legal remedies in the context of appointment challenges. Regarding material impact, I found that the litigation contributed to the removal of compromised officials from leadership positions in the NPA, Hawks and SAPS, and to the removal of Zuma as President, as well as the retention in office of the head of IPID, who was targeted for removal by the Zuma government. However, the litigation generally failed at keeping incumbents in office when out of favour with the Zuma government, despite court victories. The litigation also contributed to reducing some state expenditure; securing information; prompting unlawful break-ins, threats, surveillance and violence; and to the establishment of a commission of inquiry into State Capture. Regarding political impact, the litigation contributed to loosening Zuma's hold on power; shifting the public discourse on corruption, appointments and State Capture, and to generating some tensions in the courts. This has cumulatively gone some way to improving perceived and actual independence and performance of the relevant institutions, though that remains an ongoing process.

8.2. Factors influencing impact across case studies

In both case studies, I identified the factors – the litigation environment, resources and decisions – that most influenced the litigation impact. Despite the discrete subject-matter, I observed commonalities. The litigation environment was generally conducive to the litigation in both case studies. Features of the procedural law identified in Chapter 2 –

broad standing (including scope for *amici curiae*), flexible remedial powers and a protective costs regime – played an important role in enabling a range of litigants to institute proceedings (and intervene as *amici curiae*), to seek increasingly sophisticated and expansive relief, and to litigate without the threat of an adverse costs order. The substantive law was similarly facilitative, with the immediately realisable character of the education right and the increasingly substantive and justiciable content of the rule of law and principle of legality enabling litigants to seek far-reaching relief. In both case studies, the litigation itself considerably strengthened the substantive legal bases for later cases in the streams. In this respect, early legal impact fed into creating a conducive litigation environment for later cases, demonstrating the impact feedback loop.

Further, I found that litigation resources were necessary conditions common to both case studies. The availability of suitable litigants, lawyers and funding were key, though these conditions were met in different ways by the two sets of protagonists. Suitable litigants included a combination of directly affected schools and NGOs in Chapter 6, and of a different set of NGOs and opposition political parties in Chapter 7, alongside incumbents in institutions. While Chapter 6 saw litigation driven by public interest law centres, the condition of well-qualified lawyers was met in Chapter 7 instead by a combination of private attorneys acting pro bono and advocates with experience in strategic litigation. The litigation in both case studies received necessary financial support from institutional donors that I identify, with some donor overlap across the two case studies. Relevant socio-economic and delivery data was also a crucial resource in Chapter 6.

Perhaps the most significant finding concerned the role of litigation decisions, so often neglected in the literature or reduced to the simplistic binary of whether or not to

litigate.[1755] My case studies illustrated that litigation decisions, especially the model and form of litigation and the relief sought, play a major role regarding impact. Decisions about litigation model heavily conditioned impact, though not in the simplistic way suggested in the literature[1756] – that movement lawyering is necessarily the most effective way to litigate for social change, without comparison to other models. Rather, I argued that the case studies reflect an association between the model of litigation and type of impact. I observed that movement lawyering and campaign-based litigation, unsurprisingly, are strongly linked with greater political impact. However, my study complicates the claim, often repeated in the literature and embraced by several interviewees, that movement lawyering is necessarily the *most* effective way to secure material impact at scale. My case studies demonstrated that other litigation decisions – especially the form of litigation (such as test case or class action) and the relief (especially structural interdicts and the technical capacity to monitor and enforce compliance) – are more significant factors relating to the extent of material impact. I demonstrated that, where a shift in the public discourse and government priorities is necessary to achieve material impact, movement lawyering is indeed most effective.

Further, Chapter 7 demonstrated the fluid nature of litigation models, where client-based and research-based litigation were transformed by the activities of unrelated social movements actively mobilising and campaigning and high levels of media attention on the issues being litigated, in effect creating the same dynamics as movement lawyering or campaign-based lawyering despite protagonists adopting different models. For a jurisdiction such as South Africa where almost all the models of litigation that I identify (except court-driven litigation) are widely used, the implication is that there is not an

[1755] See Chapter 2.5.

[1756] See Chapter 2.5.3.

abstract 'best' model, but different models are likely to play differently across litigation contexts and may complement each other when deployed in parallel. These findings lay a foundation for similar case studies in future to continue to enrich our understanding of the implications of choosing a model of litigation for a particular case.

8.3. Evaluation of impact in both studies

I found that the litigation across both case studies was generally successful in achieving the contemporaneous objectives of the litigants. On this thin metric, the streams of litigation that I studied were largely 'successful', with the partial exception of the cases in Chapter 7 aiming to retain (rather than remove) incumbents. I evaluated the litigation in both case studies against the SDR framework of constitutional values. My normative evaluation and heuristic of common risks associated with strategic litigation have significant implications for some of the larger debates in the field. In particular, the controversies over whether and to what extent strategic litigation is capable of contributing to social change, whether it tends mainly to benefit elites, and whether it undermines popular democracy – three of the risks in my heuristic – remain deeply contested in the literature.[1757] My findings in no way settle these debates, but feed into them in two significant ways. First, my findings controvert universalist claims that these risks are inevitable consequences of strategic litigation. Secondly, my findings provide some indication of the extent of these risks in contemporary South Africa.

The case studies strongly refute the claim that strategic litigation in South Africa is likely to be 'hollow' and that it is incapable of producing 'structural' change, usually made

[1757] See Chapter 4.5.1.

without empirical evidence.[1758] The material and political impact of both case studies cut across the education and criminal justice sectors in substantial and lasting ways. With few possible exceptions in socio-economic rights litigation to date in South Africa,[1759] the six streams in Chapter 6 are notable for the scale of their material impact. The litigation in Chapter 7 contributed to reconstituting the leadership across the NPA, SAPS, Hawks and IPID, and even to removing President Zuma. On the strength of the six streams in Chapter 6 and the five streams of Chapter 7, litigation in the South African litigation environment, provided that litigation resources (lawyers, suitable litigants and funding) are present and with the right litigation decisions, is capable of contributing to social change – and of doing so at scale. This does not mean that strategic litigation in SA will *always*, *generally* or even *often* produce social change, but confirms its *potential* to do so. There is also no basis to consider these case study findings to be aberrations or outliers.

Notwithstanding this finding, the case studies also highlight important limitations of litigation. In Chapter 6, it remains unclear to what extent the litigation over 'inputs' has contributed to improving educational outcomes and the quality of education. In Chapter 7, despite success in removing compromised incumbents and securing more qualified and independent heads, the overall health and performance of the institutions remains depleted and concerning. In both respects, these are ongoing processes.

While the risk of benefiting primarily elites did not particularly manifest in these case studies, it does remain a concern given inadequate, unequal access to justice in South

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[1758] For examples, see Chapter 4.5.1.1.

[1759] *TAC* (n 88) secured provision of nevirapine to prevent mother-to-child transmission of HIV, and enabled the roll-out of anti-retroviral drugs at a time when government was refusing to provide them, arguably saving hundreds of thousands of lives. South Africa now has the world's largest state antiretroviral programme. See Mark Heywood, 'South Africa's Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health' (2009) 1 JHRP 14.

Africa, similar in this respect to Brazil in which Ferraz exposed this risk.[1760] While public interest law centres, private attorneys, advocates acting pro bono and the substantial support of institutional donors enabled litigation across these case studies, where these litigation resources are absent there is a real risk that strategic litigation in South Africa will tend to benefit those elites able to afford private representation.[1761] Alongside the well-developed and effective public interest law sector observed in the two case studies, the provision of civil legal aid by LASA may mitigate this risk.[1762] However, as the case studies revealed, strategic litigation is highly sophisticated, requiring the expertise and experience of repeat players, and may not be replicable by legal aid services. The risk that strategic litigation will tend to prioritise elite interests may also be mitigated by the fact that, unlike Brazil, strategic litigation in South Africa more often takes the form of systemic, and not individual, cases.[1763] The doctrinal emphasis on the rights of the most vulnerable in areas of the law such as socio-economic rights and equality, and the similar emphasis found in the concept of transformative constitutionalism central to contemporary South African legal culture, may also assist. These possibilities remain an area for future research in case studies where public interest and expert pro bono services are lacking, and only better-off claimants reach court.

The Thesis as a whole and the case studies in particular also shed light on the relationship between strategic litigation and democracy. Both case studies revealed how,

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[1760] Ferraz (n 25).

[1761] See discussion of other education rights cases litigated by better-resourced schools in Chapter 6.1, focusing on a different set of issues and interests.

[1762] See Chapter 2.4.2 and Chapter 4.5.1.2.

[1763] See Chapter 4.5.2.

rather than subverting participatory and representative democracy, litigation may bolster it. Chapter 6 demonstrated how strategic litigation, especially where coupled with mobilisation by social movements or local communities, enhances the opportunities for rural school communities to be heard by government and to hold it accountable. Chapter 7 was concerned with litigation responses to the profoundly undemocratic phenomenon of state capture. The litigation not only helped to remove 'captured' appointees, but also to improve parliamentary oversight and to prompt greater responsiveness by the executive. In almost all the cases considered, the courts' orders served to compel government to discharge its constitutional or statutory obligations. In this regard, the court orders are not self-implementing and their impact, past and potential, depends on Parliament and the executive taking up the mantle to ensure adequate provisioning of basic education inputs and to make suitable appointments and build institutional strength and independence in the criminal justice sector, respectively. The Thesis thus highlights the role of the judiciary as enabling and safeguarding the political branches to perform their functions in a constitutional democracy.

There were rare instances where courts went further to recalibrate the balance among branches of government in the context of specific powers. In *Teachers II* in Chapter 6, the High Court granted an order deeming teachers recommended for appointment by the schools to have been appointed if the provincial government failed to act. In *Nxasana/Abrahams* in Chapter 7, the High Court shifted the power to appoint the next NDPP from the President to the Deputy President on the basis that the President was conflicted. This order fell away on appeal as the President had changed. Even these instances, at the outer limits of how courts approached the powers of the political branches, do not sustain the claims that South African courts are 'usurping' the powers of the executive or overreaching. These claims – frequently made without evidence or

substantiation by politicians[1764] – find little support in the case study findings. Of course, the risk of subverting democracy remains (as it does with *any* constitutional functionary and not merely courts), but it is a contingent risk, to be established empirically.

While the Thesis does not purport to cover the field or make strongly generalisable or predictive claims about strategic litigation in South Africa, it offers insights into its potential – subject to a favourable litigation environment, resources and decisions. This is likely to be relevant for potential litigants and litigators engaged in strategic litigation, for courts and indeed for all those with an interest in debates about the effectiveness and legitimacy of strategic litigation.

For prospective litigants, whether NGOs, political parties, or individuals, knowledge of impact in similar past cases can shed light on, and influence, decision-making. My analysis of the litigation environment, resources and decisions and how they relate to different types of impact has the potential to inform processes of meaning-making and decision-taking associated with litigation. For judges, the impact of the cases that are the subject of this study – as represented by my research – may feed into legal culture and influence judicial attitudes in future cases, again reflecting the impact feedback loop.

My overall argument has important implications for scholarly debates over the legitimacy of litigation pursuing social change and the role of courts in that context. First, my argument and findings reinforce the position that these questions should be approached, at least in part, based on empirical evidence of the effects of judicial review. As Ferraz observes, 'whether and how courts should enforce social rights (or interfere with any other matter) is much better seen as a dynamic and empirical question of comparative

[1764] See politicians' statements quoted in le Roux and Davis (n 58) 297–298.

institutional performance.'[1765] My Thesis extends that argument *beyond* social rights, to all strategic litigation, including litigation involving state institutions and the functioning of a constitutional democracy. The complexity of the impact of such litigation and its normative evaluation exposes the limitations of reductive and abstract debates about its legitimacy. Litigation impact should be analysed comprehensively and evaluated contextually, against real-world alternatives, not an imagined ideal of instantaneous popular revolution or immaculately functioning political institutions. In South Africa, I argue that social justice, democracy and the rule of law offer a compelling evaluative framework.

Vital debates about the potential of the Constitution, the effectiveness of courts, whether courts are pro- or anti-poor, and so on, need to start from a common understanding of the core facts, especially of the litigation process and its actual effects, and an expressly articulated evaluative framework. I have sought to offer a grounded foundation for such debates, both at the general level of my account of strategic litigation in Part I and in the two detailed case studies in Part II.

The Thesis identifies several paths for future research. The analytic and evaluative framework developed in Part I would benefit from further theoretical development and refinement. The conceptions of social justice, democracy and the rule of law that I offer as evaluative norms are working conceptions of values that are themselves contested and evolving, offering rich terrain for study. The case studies in Chapters 6 and 7 are necessarily ring-fenced, especially temporally, and the longer-term legal, material and political impact in both case studies may invite investigation. The overall analytic and evaluative

[1765] Ferraz (n 25) 298.

framework, which applies to all strategic litigation, invites application to other detailed case studies, and South Africa is rich with bodies of litigation that call for careful exploration.

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