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Accountability and the Role of Independent Constitutional Institutions in South Africa's Post-Apartheid Constitutions

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Accountability and the Role of Independent Constitutional Institutions in South Africa's Post-Apartheid Constitutions

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I. INTRODUCTION

South Africa's post-apartheid constitutional order, now celebrating its twentieth anniversary, is characterized by an abiding tension between a popular, democratically elected ruling party—the political system might best be described as a unipolar democracy¹—and a constitutional promise of democratic accountability. Structurally, the responsibility for ensuring this accountability is straddled between Parliament, which bears the traditional legislative role of overseeing the executive in addition to lawmaking, and a range of independent institutions that emerged from the particular history of South Africa's democratic transition. Furthermore, in South Africa's constitutional democracy, the courts, and the Constitutional Court in particular, are charged with determining the allocation of constitutional authority and resolving conflicts brought to them as different institutions struggle to ensure that there is legal accountability for governmental failures as well as individual malfeasance. The goal of this article is to explore the relationship between democracy and accountability in this particular context and to argue that what is significant here is the attempt to institutionalize a system of checks and balances that neither relies on a strict or formal separation of powers nor fragments power to an extent that paralyzes governance. Instead, it seeks to provide a constitutional system of governance in which there are multiple sites of power and authority to which political and social groups in conflict may repeatedly turn in their attempts both to be heard and to protect their interests or achieve their often irreconcilable goals.

Designing a constitution that includes the separation of powers is often described as a means to avoid the concentration of power and to “ensure accountability, responsiveness and openness”² in the practice of governance. While the separation of powers cannot be found explicitly enshrined in any single provision of the South African Constitution—or for that matter in most other constitutions—it is a core element in the structural design of the Constitution and is expressed in the multiple provisions that create specific checks and balances between the different branches and institutions of government.³ Although traditional approaches to the separation of powers doctrine focus on the checks and balances between the legislature, executive, and judiciary, the problem of political and legal accountability is no longer contained within these institutional parameters. Increasingly, constitutional designers have created additional mechanisms and institutions in their efforts to ensure the achievement of their desired goals of accountability, responsiveness, and openness in the exercise of governmental authority. Since the late twentieth century, these new institutions have proliferated in new and amended constitutions.

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1. I use the term “unipolar” rather than “dominant party” democracy because it is more descriptive of a politics in which the democratic majority remains loyal to a broad liberation politics but the main party—here, the African National Congress (ANC)—in fact represents a number of different political tendencies.
 2. S. AFR. (INTERIM) CONST., 1993, sched. 4 (VI).
 3. *See, e.g.*, S. AFR. CONST., 1996, § 174 (providing that, when appointing judicial officers, the President must consult the Judicial Service Commission and leaders of the parties in the National Assembly); *id.* § 102(2) (empowering the National Assembly, upon majority approval for a vote of no confidence, to require the President's resignation).

The inclusion of a plethora of new constitutional institutions to address governmental accountability has direct implications for a conception of the separation of powers.⁴ On the one hand, the existence of these new institutions makes it difficult to maintain a very formal conception of the separation of powers as a trilateral system of checks and balances between the three traditional branches of government: the legislature, the executive, and the judiciary. On the other hand, it also complicates a simple functionalist approach in which we distinguish between the making, implementing, and interpreting of laws. The task is further complicated by the fact that in addition to the different coordinate branches of government, modern constitutions, and even some older constitutional orders such as the United States, are laden with institutions of governance—such as the Federal Reserve in the United States or the Chapter 9 institutions in South Africa—which do not fit neatly into either a formalist or functionalist conception of the separation of powers. Instead, these different institutions exercise public power relatively independent of the three traditional branches, or at least have a degree of constitutionally protected decisional autonomy and independence that is at odds with our traditional notions of the trilateral structure of government.

At the same time, the proliferation of new institutions raises important questions about their institutional authority and place in the constitutional system. How are these institutions supposed to act in the achievement of good governance, and how do they fit within the realm of the separation of powers? Whether it is a question of appropriate investigative capacities, reporting and prosecutorial functions, or the appointment and institutional independence of officials within these institutions, their constitutional status and relationship with the other branches or institutions of government implicate the allocation and separation of powers within the constitutional system. Nowhere has this question been more salient than in South Africa, where the implementation of the post-apartheid constitutional order has been marked by the foibles of a dominant political party, a complex institutional structure, and an active civil society that has sought to use the constitutional framework to hold the government accountable.

A key structural feature of the Constitution is the way in which power is both distributed and integrated in a system of governance that is designed not only to avoid the paralysis of a rigid separation of powers but also to ensure that there are multiple avenues for democratic and legal contestation. This combination of distributed and integrated power extends from the system of cooperative government to the allocation of constitutional authority between distinct institutions whose task is to ensure that essential elements of good governance—clean elections, fiscal integrity, transparent procurement, and just administration—are maintained at all levels of government as it grapples with the enormous task of addressing the crippling legacies of colonialism and

4. See Stephen Gardbaum, *Separation of Powers and the Growth of Judicial Review in Established Democracies (or Why Has the Model of Legislative Supremacy Mostly Been Withdrawn from Sale?)*, 62 AM. J. COMP. L. 613, 618 (2014). See generally Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000).

apartheid. In fact, the Constitutional Assembly⁵ understood the role of these institutional features of the Constitution as key to the commitment to constitutional democracy, bringing them together in an innovative and unique fashion in Chapter 9 as “State Institutions Supporting Constitutional Democracy.”⁶ This is not to say that the Constitution is perfect or that these institutions have always played an effective role in this young democracy, but it is important to recognize that they do have a distinct role in ensuring that the promises of human rights and good governance reach down into the daily administration of the country and are not merely the subject of high-profile legal disputes or of electoral contests held every five years.

This article will explore the new constitutionally-enshrined institutions that are designed to secure greater accountability from those exercising public power. Using the example of the Chapter 9 institutions in South Africa’s 1996 post-apartheid Constitution, and the institution of the Public Protector in particular, this article situates the Public Protector within the broader constitutional and political struggles over accountability that have marked the first twenty years of democracy in South Africa. In order to explore the role of the Public Protector in particular, Part II of this article first surveys the short history of struggles over accountability in the post-apartheid era as well as the role of the traditional institutions responsible for accountability in the democratic constitutional order created by the Constitution. Part III of this article examines the origins of the Chapter 9 institutions. Part IV of this article explores a seminal case in which the constitutional role of the Public Protector is being tested and argues that only an understanding of this institution’s structural location within the realm of the separation of powers enables us to understand its role as well as secure its potential as an essential part of the system of accountability established by the Constitution. Finally, the article concludes that given both the Public Protector’s formal constitutional and legal status as well as a structural understanding of the constitutional order, it is important to recognize that this institution, and the other Chapter 9 institutions, are in effect an additional branch of government.

II. ACCOUNTABILITY AND THE ADOPTION OF INDEPENDENT CONSTITUTIONAL INSTITUTIONS

From early on in the negotiations towards a democratic transition in South Africa, the idea of creating an “ombudsman”⁷ to provide an avenue for public complaints and

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5. The Constitutional Assembly, guided by the Interim Constitution’s Constitutional Principles, was responsible for drafting the final Constitution. *See generally* Cyril Ramaphosa, *Negotiating a New Nation: Reflections on the Development of South Africa’s Constitution*, in *THE POST-APARTHEID CONSTITUTIONS: PERSPECTIVES ON SOUTH AFRICA’S BASIC LAW* 71, 80–84 (Penelope Andrews & Stephen Ellmann eds., 2001) [hereinafter *THE POST-APARTHEID CONSTITUTIONS*].
 6. S. AFR. CONST., 1996, §§ 181–194; *see also* Karthy Govender, *The South African Human Rights Commission*, in *THE POST-APARTHEID CONSTITUTIONS*, *supra* note 5, at 571, 572–81, 593.
 7. Merriam-Webster defines “ombudsman” as “a person (such as a government official or employee) who investigates complaints and tries to deal with problems fairly.” *Ombudsman*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/ombudsman> (last visited Feb. 15, 2016).

for the investigation of malfeasance and maladministration in the state and its bureaucracy, and even to protect fundamental rights, was shared by the parties.⁸ The scope and nature of such an office, however, remained a matter of debate.⁹ Furthermore, the idea of creating independent governance institutions to address the high level of distrust between the parties and to enable specific aspects of the transition—such as conducting a free and fair election—was also being discussed.¹⁰ The African National Congress (ANC) Legal and Constitutional Committee’s working document, “A Bill of Rights for a New South Africa,” published in 1990, specifically included the establishment of an independent ombudsman “[w]ith a view to ensuring that all functions and duties under the Constitution are carried out in a fair way with due respect for the rights and sentiments of those affected.”¹¹ As the transition proceeded, however, the ANC also recognized the importance of creating transitional mechanisms, independent of F.W. de Klerk’s government,¹² as a means of ensuring the democratic transition.¹³ It is out of this legacy that the idea was born to incorporate independent institutions for accountability within the post-apartheid constitutional order.¹⁴

A. Origins of the Chapter 9 Institutions

In the post-1990 negotiations, the parties debated both the nature of the electoral system as well as how the first democratic elections would be managed. The government of the day had traditionally managed the elections, but there was deep concern that the legitimacy of the first democratic election would be questioned if it were to be managed by the apartheid regime.¹⁵ At first, the ANC demanded that an interim government be installed, as outlined in the Harare Declaration¹⁶ and United

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8. ANC Constitutional Comm., A Bill of Rights for a New South Africa 36–37 (1990) (working document) (on file with author) [hereinafter A Bill of Rights for a New South Africa]; *see also* Press Statement, Dep’t of Info. & Publicity, African Nat’l Cong., South African Law Commission’s Report on Group and Human Rights (Nov. 15, 1991), <http://www.anc.org.za/show.php?id=8563> (discussing the South African Law Commission’s acceptance of the need for establishing an ombudsman).
 9. *See generally* South African Law Commission, Rep. on Constitutional Models (Oct. 1991) (on file with author).
 10. *See* Ramaphosa, *supra* note 5, at 76–78. *See generally* HEINZ KLUG, CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA’S POLITICAL RECONSTRUCTION 118–21 (2000).
 11. A Bill of Rights for a New South Africa, *supra* note 8, at 36. *See generally* Nicholas Haysom, *Democracy, Constitutionalism and the ANC’s Bill of Rights for a New South Africa*, 7 SAJHR 102 (1991).
 12. F.W. de Klerk served as the last President of apartheid South Africa from 1989 to 1994. He negotiated the political opening that resulted in the adoption of the Interim Constitution. *FW de Klerk*, FW DE KLERK FOUND., <http://www.fwdeklerk.org/index.php/en/aboutus/fw-de-klerk> (last visited Feb. 15, 2016).
 13. *See generally* *Negotiations – A Strategic Perspective*, AFR. NAT’L CONGRESS (Nov. 18, 1992), <http://www.anc.org.za/show.php?id=4208>.
 14. *See generally* Ramaphosa, *supra* note 5.
 15. *See* PETER HARRIS, BIRTH: THE CONSPIRACY TO STOP THE ’94 ELECTION 56–57 (2010).
 16. *Harare Declaration: Declaration of the OAU Ad-hoc Committee on Southern Africa on the question of South Africa*, AFR. NAT’L CONGRESS, § 5(c) (Aug. 21, 1989), <http://www.anc.org.za/show.php?id=3856>.

Nations Declaration on Apartheid.¹⁷ The regime, however, took the position that they would not transfer power before a negotiated solution had been reached. Key to the regime's argument was the claim that there needed to be legal continuity in the relationship between the existing legal order and a new democratic order.¹⁸ To overcome this irreconcilable difference between the parties, the ANC embraced the idea of creating independent bodies to manage the transition to democracy, including an independent electoral commission to oversee the first democratic election.¹⁹ The transition to democracy was thus enabled by the establishment of three independent institutions: the Independent Electoral Commission, the Independent Media Commission, and the Independent Broadcasting Authority.²⁰ This idea of creating independent bodies was consistent with the global post-Cold War emphasis on democratic constitutionalism,²¹ and it created the conditions for the adoption of "State Institutions Supporting Constitutional Democracy" in the final Constitution. This innovation eventually produced six separate constitutional institutions that are now often referred to as the Chapter 9 institutions: the Public Protector; the South African Human Rights Commission; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Commission for Gender Equality; the Auditor-General; and the Independent Electoral Commission.²²

B. Traditional Forms of Accountability

In parliamentary systems, as in other constitutional orders, the legislature has historically served as both lawgiver and watchdog over the executive branch of government. As with other fused systems, in which the separation of powers is not enabled by an institutional separation of participants and members of the executive are also members of the legislature, the Parliament in South Africa was historically never an effective watchdog. Rather, the apartheid Parliament served to rubber-stamp the ruling party's decisions, and the system of government served to maintain an "entire social edifice . . . structured to enrich a powerful few at the expense of the majority."²³

17. G.A. Res. S-16/1, U.N. Doc. A/RES/S-16/1, annex, Declaration on Apartheid and its Destructive Consequences in Southern Africa (Dec. 14, 1989) (supporting the Harare Declaration).

18. See HEINZ KLUG, *THE CONSTITUTION OF SOUTH AFRICA: A CONTEXTUAL ANALYSIS* 13–17 (2010).

19. See Statement of the Nat'l Exec. Comm. on the Occasion of the 81st Anniversary of the ANC, African Nat'l Cong. (Jan. 8, 1993), <http://www.anc.org.za/show.php?id=67#sthash.t0N54Ede.dpuf> (outlining five key steps to be taken, including the creation of an independent electoral commission).

20. See Heinz Klug, *Constitution-Making, Democracy and the "Civilizing" of Irreconcilable Conflict: What Might We Learn from the South African Miracle?*, 25 *WIS. INT'L L.J.* 269, 277–81 (2007).

21. See KLUG, *supra* note 10, at 23–27.

22. See S. AFR. CONST., 1996, § 181.

23. DAN O'MEARA, *FORTY LOST YEARS: THE APARTHEID STATE AND THE POLITICS OF THE NATIONAL PARTY 1948–1994*, at 231 (1996).

Instead of a tradition of oversight, the apartheid Parliament was open to the influence of:

[M]any pressure groups, such as . . . wine farmers . . . who used their close proximity to Parliament to “take people to parties” and provide them with a quota of wine annually—this continued in the immediate post-1994 period, when [members of Parliament] had access to cost-price wines. . . . These were all subtle forms of influence buying that could be compared with contemporary private sector-subsidised golf days for politicians and public sector officials.²⁴

Combining the secrecy of the apartheid regime and its covert operations aimed at avoiding international sanctions with a “history of routinised corruption”²⁵ in government departments and the bantustan²⁶ administrations, the system produced what the Speaker of South Africa’s first democratic Parliament, Frene Ginwala, described as “an intrinsically corrupt system of governance . . . [and] a legal framework that was based on and facilitated corruption.”²⁷ Explaining the new Parliament’s attempts to address this situation, Ginwala said:

It has taken years in Parliament to repeal old laws and introduce even the basic legal framework that would enable us to deal with corrupt bureaucrats, politicians and police. The private sector also operated in a closed society and profited by it. There were partnerships with international criminals, and the corruption that was built into the system is very difficult to overcome.²⁸

In its early years, South Africa’s new Parliament seemed committed to exercising its duty to serve as a public watchdog. Despite a lack of resources, parliamentary committees often asked probing questions of senior civil servants and even took government ministers to task.²⁹ While this early robust exercise of oversight might be attributed to the caliber of the membership of the first democratically-elected Parliament, which served simultaneously as the national legislature and constitution-making body, the tendency of members to seek advancement in their political careers,

24. HENNIE VAN VUUREN, INST. FOR SEC. STUDIES, *APARTHEID GRAND CORRUPTION: ASSESSING THE SCALE OF CRIMES OF PROFIT IN SOUTH AFRICA FROM 1976 TO 1994*, at 25 (2006).

25. TOM LODGE, *SOUTH AFRICAN POLITICS SINCE 1994*, at 60 (1999).

26. The “bantustans” were those areas of South Africa reserved for black occupation, and in which the apartheid regime tried to create self-governing territories in an attempt to simulate decolonization while continuing to deny the black majority political rights. *See* ENCYCLOPEDIA OF SOUTH AFRICA 166–68 (Krista Johnson & Sean Jacobs eds., 2011); Alan Mabin, *South African Capital Cities*, in *CAPITAL CITIES IN AFRICA: POWER AND POWERLESSNESS* 168, 172–75 (Simon Bekker & Goran Therborn eds., 2012). *See generally* LAND DIVIDED, LAND RESTORED: LAND REFORM IN SOUTH AFRICA FOR THE 21ST CENTURY (Ben Cousins & Cheryl Walker eds., 2015).

27. VAN VUUREN, *supra* note 24, at 5 & 97 n.13 (quoting former Speaker of Parliament Frene Ginwala’s remarks at the opening session of the Global Forum II of The Hague on May 28, 2001).

28. *Id.* at 5–6 & 97 n.13 (quoting former Speaker of Parliament Frene Ginwala’s remarks at the opening session of the Global Forum II of The Hague on May 28, 2001).

29. *See, e.g.*, ANDREW FEINSTEIN, *AFTER THE PARTY: A PERSONAL AND POLITICAL JOURNEY INSIDE THE ANC 70–75* (2007).

as well as the defensiveness of the ruling party, soon led to an increasing passivity.³⁰ The physical distance between the legislature in Cape Town and the executive and administrative departments located more than 1,000 kilometers away in Pretoria exacerbated the problem.³¹ The Parliament's traditional oversight role was further compromised by a scandal over the abuse of benefits enjoyed by its members and its handling of the arms deal scandal,³² which has been described as the "poisoned well of post-apartheid South African politics."³³

The new Mandela government's initial commitment to accountability saw the ANC in Parliament giving the Chair of the National Assembly's Standing Committee on Public Accounts (SCOPA) to an opposition member of Parliament, Gavin Woods of the Inkatha Freedom Party.³⁴ However, when SCOPA was presented with the Auditor-General's report indicating that there were problems with the government's procurement of a major arms package for the military and agreed that further investigation was necessary, the ANC's Chief Whip in Parliament, Tony Yengeni, argued that a public hearing was not a good idea.³⁵ As tensions developed between members of SCOPA, including with the leading ANC member on the Committee, the ANC leadership in Parliament moved against the Committee, stacking it with loyalists who would be sure to cooperate.³⁶ As Yengeni told a press conference, "there was no committee in respect of the ANC which is above party political discipline."³⁷

While Yengeni would later be convicted of taking a bribe related to the arms deal,³⁸ this scandal has now been overshadowed by a new scandal involving the upgrading of President Jacob Zuma's private home in the small rural village of Nkandla.³⁹ Despite repeated media exposés of the large amounts of money being spent on the security

30. See, e.g., KLUG, *supra* note 18, at 176–81.

31. As a result of a compromise between delegates to the all-white National Convention of 1909, the Union Constitution of 1910 recognized three formal capitals: Pretoria (administrative), Cape Town (legislative) and Bloemfontein (judicial). The 1996 Constitution does not specify a capital, but today the legislature (Parliament) remains in Cape Town while the executive is based in Pretoria. The Constitutional Court is in Johannesburg while the Supreme Court of Appeal remains in Bloemfontein. See generally Mabin, *supra* note 26.

32. See generally PAUL HOLDEN, *THE ARMS DEAL IN YOUR POCKET* (2008).

33. MARK GEVISSER, *A LEGACY OF LIBERATION: THABO MBEKI AND THE FUTURE OF THE SOUTH AFRICAN DREAM* 256 (2009).

34. See, e.g., Robert Brand, *Committee Chair Faces Tough Test*, IOL NEWS (Jan. 23, 2001), <http://www.iol.co.za/news/politics/committee-chair-faces-tough-test-1.58883#Vj5QVLerSM8> (discussing Woods's appointment to Chairperson of SCOPA and his non-partisan leadership).

35. FEINSTEIN, *supra* note 29, at 158–62.

36. See *id.* at 160–62.

37. KLUG, *supra* note 18, at 180 (quoting Tony Yengeni's remarks at a press conference in 2001 as reported by *Business Day*) (citing FEINSTEIN, *supra* note 29, at 195 & 274 n.38).

38. See Anne Kriegler, *Arms Deal: Seven Facts That Aren't Going Away*, MAIL & GUARDIAN (July 30, 2014), <http://mg.co.za/article/2014-07-30-arms-deal-seven-facts-that-arent-going-away>.

39. See generally PHILLIP DE WET, MAIL & GUARDIAN, *NKANDLA: THE GREAT UNRAVELLING* (2014) (ebook), https://laura-7.atavist.com/mg_nkandla-the-great-unravelling.

upgrade at Nkandla, Parliament seemed determined to ignore the concerns of those who questioned the amount of state resources being spent.⁴⁰ It was only after opposition parties complained to the Public Protector that the issue of Nkandla began to receive serious government attention through the appointment of various executive branch-controlled investigations.⁴¹ At the same time, there was a concerted effort to suggest that these alternative investigations meant that the Public Protector should not take up the case.⁴² When the Office of the Public Protector issued its report, *Secure in Comfort*, indicating that the President and his family had “unduly benefited” from the upgrade,⁴³ the response was to question the Public Protector’s suggested remedy: that the President pay back some of the money expended.⁴⁴

III. THE CHAPTER 9 INSTITUTIONS

Just as the Constitution holds a twin promise, on the one hand empowering government and protecting existing rights, while on the other hand providing a vision of a nonracial, nonsexist future in which all communities and members of South African society may flourish, Chapter 9 establishes institutions that are designed to both secure existing rights and democratic achievements and provide an institutional mechanism for establishing the norms and capacities for moving towards the vision of a brighter future. At one end of the institutional spectrum, the Independent Electoral Commission, the Auditor-General, and the Public Protector are institutions that are primarily designed to ensure good governance today. On the other end, the South African Human Rights Commission, the Commission for Gender Equality, and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities not only look to the present but are also designed to advance and extend these interests towards the achievement of the vision of a more equitable and sustainable society. In order to achieve these goals, the Constitution establishes all these institutions as “independent, and subject only to the Constitution and the law,” requiring them to be “impartial” and to “exercise their powers and perform their functions without fear, favour or prejudice.”⁴⁵ The translation of this promise into the reality of functioning institutions has, however, not been without difficulty.

40. *See id.* § 4.

41. *See id.*

42. PUB. PROTECTOR S. AFR., *SECURE IN COMFORT: REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPRIETY AND UNETHICAL CONDUCT RELATING TO THE INSTALLATION AND IMPLEMENTATION OF SECURITY MEASURES BY THE DEPARTMENT OF PUBLIC WORKS AT AND IN RESPECT OF THE PRIVATE RESIDENCE OF PRESIDENT JACOB ZUMA AT NKANDLA IN THE KWAZULU-NATAL PROVINCE: REPORT No. 25 OF 2013/14*, at 96–103 (2014) [hereinafter *SECURE IN COMFORT*].

43. *Id.* at 63.

44. *See Justice Minister Criticises Public Protector*, POLITY (July 15, 2014), <http://www.polity.org.za/article/justice-minister-criticises-public-protector-2014-07-15>; *Nkandla: Thuli Madonsela's Tough Letter to Jacob Zuma*, NEWS24: CITY PRESS (Aug. 24, 2014), <http://www.news24.com/Archives/City-Press/Nkandla-Thuli-Madonselas-tough-letter-to-Jacob-Zuma-20150429>.

45. S. AFR. CONST., 1996, § 181(2).

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These new institutions have not avoided controversy. As they have progressed, from their initial creation or redirection, they have experienced internal personnel conflicts and debates over their goals and missions as well as external challenges to their legitimacy and financial independence.⁴⁶ While the Independent Electoral Commission has successfully managed four electoral cycles in addition to local government elections and the long established Auditor-General had a pre-existing institutional culture and staff, the remaining Chapter 9 institutions have had a struggle defining and establishing their respective institutional capacities and constitutional roles. At the same time, there have been increasing questions about their degrees of independence. With debates over adequate financing and accountability, as well as the resulting caution of some of these institutions, there have been increasing concerns over the political careerism of their office-holders and questions about their willingness to exercise the formal independence they enjoy.⁴⁷ In response to these concerns, the government decided to initiate a review of these institutions.⁴⁸

The decision to review the Chapter 9 institutions immediately ran into a separation of powers problem. How appropriate would it be for the executive, the main institution to be held accountable by the Chapter 9 bodies, to conduct the review?⁴⁹ Realizing that this would be a problem, the executive called upon the National Assembly, to which the Constitution makes these institutions formally accountable, to do a review.⁵⁰ As a result, the National Assembly adopted a resolution in September 2006 appointing an *ad hoc* multi-party committee to review the Chapter 9 institutions (the “Committee”).⁵¹ The Committee was asked “to assess in broad terms whether the current and intended legal mandates of the institutions are suitable for the South African environment, whether their consumption of resources is justified in relation to their outputs and contribution to democracy,” and most significantly, “whether a rationalisation of function, role or organization is desirable or will diminish the focus on important areas.”⁵²

46. See, e.g., PARLIAMENT OF THE REPUBLIC OF S. AFR., REPORT OF THE *AD HOC* COMMITTEE ON THE REVIEW OF CHAPTER 9 AND ASSOCIATED INSTITUTIONS (2007) [hereinafter *AD HOC* COMMITTEE REPORT].

47. See Pierre de Vos, *Balancing Independence and Accountability: The Role of Chapter 9 Institutions in South Africa's Constitutional Democracy*, in ACCOUNTABLE GOVERNMENT IN AFRICA: PERSPECTIVES FROM PUBLIC LAW AND POLITICAL STUDIES 160 (Danwood M. Chirwa & Lia Nijzink eds., 2012); see also *AD HOC* COMMITTEE REPORT, *supra* note 46, at ix–x.

48. Press Statement, Parliament of the Republic of S. Afr., The Ad Hoc Committee on Review of State Institutions Supporting Constitutional Democracy (Oct. 10, 2006), http://www.parliament.gov.za/live/contentpopup.php?Item_ID=419&Category_ID=; see also *AD HOC* COMMITTEE REPORT, *supra* note 46, at ix–x.

49. *AD HOC* COMMITTEE REPORT, *supra* note 46, at ix.

50. See *id.*

51. *Id.*

52. *Id.* at xi.

The Report of the Committee, chaired by Kader Asmal and issued in mid-2007, called for significant reforms to some of these institutions.⁵³ Identifying an apparent “lack of consistency and coherence in approach” which the Committee argued is “ultimately undermining . . . [these institutions’] individual, and even common, efforts,” the Committee called on Parliament to conduct an “urgent review for the purposes of identifying a more systematic approach, particularly [for] funding and budgets, the appointment of commissioners, collaboration between the institutions, internal governance arrangements and the relationship of the institutions with Parliament.”⁵⁴ One recommendation of the Committee was that a number of the Chapter 9 and related institutions, such as the Pan South African Language Board and the National Youth Commission, be consolidated into an “umbrella human rights body called the South African Commission on Human Rights and Equality.”⁵⁵ The Committee recognized that the number of human rights institutions created by Chapter 9 was the product of the particular history of South Africa’s democratic transition and argued “the present institutional framework has created fragmentation, confounding the intention that these institutions would support the seamless application of the Bill of Rights.”⁵⁶

However, the Committee also noted that despite internal challenges, the South African Human Rights Commission⁵⁷ had continued to expand and develop its activities.⁵⁸ This was reflected in the number of complaints received, which increased from 5,763 in 1999–2000 to 11,710 in 2005–2006.⁵⁹ The Committee further recognized the progressive improvement in the six Socio-Economic Rights Reports issued by the South African Human Rights Commission, which showed a “vast improvement in the manner in which information is solicited from government

53. *See id.* at ix–xiv.

54. *Id.* at 19.

55. *Id.* at xii.

56. *Id.* at 37.

57. The South African Human Rights Commission, a Chapter 9 institution, is charged with the duty to promote, protect, and monitor the achievement of human rights in South Africa. For this purpose, the Commission is required to “develop and conduct information programmes,” Human Rights Commission Act 54 of 1994 § 7(1)(a), and is given broad investigative powers to determine if there are violations or threats to fundamental rights. In addition, the statute empowers the Commission to resolve violations of any fundamental human right through mediation, conciliation, and negotiation. In practice, the Commission has been most active in promoting human rights through education, intervening as an amicus in court cases, and on occasion establishing high-profile investigations into particular areas of human rights concern. In addition to these activities, the Commission has issued regular reports on the status and implementation of human rights in South Africa, including socioeconomic rights. *See AD HOC COMMITTEE REPORT*, *supra* note 46, at 167–86 (outlining the Commission’s mandates, duties, achievements, and challenges, and providing recommendations); *see also* S. AFR. CONST., 1996, § 184; Human Rights Commission Act 54 of 1994 §§ 7–9.

58. *See AD HOC COMMITTEE REPORT*, *supra* note 46, at 179, 182.

59. *Id.* at 179.

departments and the accuracy with which that information is reported.”⁶⁰ Having received the Committee’s Report, Parliament made no effort to take up the challenge of the internal tensions and overlapping mandates identified by the Committee. Two years later, Kader Asmal, deeply distressed by the failure of the government, and the National Assembly in particular, to take up the Committee’s Report in a timely fashion, publicly “accused Parliament of having no interest in his review of Chapter 9 institutions . . . saying that the failure to debate the review was ‘an appalling scandal.’”⁶¹ Despite Asmal’s disappointment, now, nearly a decade later, the Chapter 9 institutions have become an unquestioned part of the institutional landscape, and despite the unique constitutional character of this “fourth branch” of government, it has proven to be a valuable addition in what has become, from a global perspective, a vibrant and contentious young democracy.

A. The Limits of Good Governance: Legal Technologies, Sophisticated Systems, and the Capacity to Govern

South Africa’s first democratic government came into being at a moment when the technologies of governance and expectations about how government may more readily reflect the imagined efficiency of the market became dominant themes around the globe. Responding to the collapse of state socialism and the emergence of the United States as the sole superpower, the new South African government embraced the latest technologies of governance, from the Internet to negotiated rulemaking, recognizing as well an extensive range of procedural obligations and rights in the administrative and procurement processes of the state.⁶² As a result, the South African legal framework establishing the rules and processes of good governance is among the most sophisticated in the world, from the unique structure of the Constitution to the adoption of a plethora of new statutes such as the Public Finance Management Act;⁶³ the Promotion of Administrative Justice Act;⁶⁴ the Promotion of Access to Information Act;⁶⁵ the Preferential Procurement Policy Framework Act;⁶⁶ and at the local level, the Local Government: Municipal Systems Act.⁶⁷ The difficulty, however, is to ensure that this elaborate legal framework functions.

60. *Id.* at 179–80.

61. Mmanaledi Mataboge, *Asmal Takes on Parliament*, MAIL & GUARDIAN (July 20, 2009) (quoting Kader Asmal), <http://mg.co.za/article/2009-07-20-asmal-takes-on-parliament>.

62. See POLICY COORDINATION AND ADVISORY SERVICES, TOWARDS A TEN YEAR REVIEW: SYNTHESIS REPORT ON IMPLEMENTATION OF GOVERNMENT PROGRAMMES 10–16 (2003). See generally GOVERNANCE IN THE NEW SOUTH AFRICA: THE CHALLENGES OF GLOBALISATION (Guy Mhone & Omano Edigheji eds., 2003); PROTECTING THE INHERITANCE: GOVERNANCE AND PUBLIC ACCOUNTABILITY IN DEMOCRATIC SOUTH AFRICA (Daniel Platjies ed., 2013).

63. Act 1 of 1999.

64. Act 3 of 2000.

65. Act 2 of 2000.

66. Act 5 of 2000.

67. Act 32 of 2000.

While the Constitution may attempt to distribute executive authority among a variety of institutions so as to mediate the effects of concentrated power, particularly within a polity in which the dominance of a single political party seems relatively secure for the foreseeable future, the emergence of a unipolar democracy has placed limits on the relative independence of these institutions.⁶⁸ Furthermore, the sophistication of these systems of governance requires a high degree of legal capacity, yet the legal field in South Africa, from the profession to academia, has also been faced with the necessity and obvious strains of transformation. Given recent history, in which administrative law was creatively used to oppose the arbitrary use of power by the old regime,⁶⁹ and the common law lawyer's pride in the sources of administrative law principles, it is not a surprise that many continue to see these principles as in some way underlying or informing the new constitutional and statutory framework.⁷⁰ Thus, despite the fact that the Constitutional Court has clearly indicated that the practice of governance is based solely on the new framework,⁷¹ the understanding of the new framework remains deeply influenced by both common law conceptions of administrative law as well as a conception of the separation of powers that is at odds with the more fluid distribution of power that characterizes the structure and institutional provisions of the Constitution.

These impediments and limitations on the transformation of law do not, however, fully explain the tensions within the government, which has come under increasing stress since the latter years of President Thabo Mbeki's term in office. Issues of governance in this context became embroiled in the political struggles being waged between different political factions within the ANC at all levels of government. Most significant was the accusation of corruption that led to the dismissal of then-Deputy President Jacob Zuma⁷² and the subsequent claim that President Mbeki improperly

68. C. Murray, *The Human Rights Commission et al: What is the Role of South Africa's Chapter 9 Institutions?*, 9 POTCHEFSTROOM ELECTRONIC L.J., 2006, at 122, 124, http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/per/issuepages/2006Volume9no2/2006x2x_Murray_art.pdf.

69. See Arthur Chaskalson, *Legal Control of the Administrative Process*, 102 SALJ 419 (1985) (reviewing judicial control and review of administrative law during apartheid). For further detailed accounts on the use of administrative law to oppose apartheid's arbitrary use of power, see generally RICHARD L. ABEL, *POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID, 1980-1994*, at 23-65 (1995) and STEPHEN ELLMANN, *IN A TIME OF TROUBLE: LAW AND LIBERTY IN SOUTH AFRICA'S STATE OF EMERGENCY* (1992).

70. See Hugh Corder, *Administrative Justice, in RIGHTS AND CONSTITUTIONALISM: THE NEW SOUTH AFRICAN LEGAL ORDER* 387, 390 (Dawid van Wyk et al. eds., 1994) (acknowledging that every participant in the constitutional debate "accepts without question that administrative justice is a goal worth constitutionalizing, both in the form of a right to some degree of judicial review, as well as in providing for freedom of information and the office of [the] ombudsman"). For a thorough account of the relationships between administrative law and the final Constitution, see YVONNE BURNS, *ADMINISTRATIVE LAW UNDER THE 1996 CONSTITUTION* (rev. reprinted 1999).

71. See *Pharm. Mfrs. Ass'n of S. Afr.* 2000 (2) SA 674 (CC) at para. 44 ("There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.").

72. *South African Leader Sacks Deputy*, BBC NEWS, <http://news.bbc.co.uk/2/hi/africa/4092064.stm> (last updated June 14, 2005).

influenced the National Prosecuting Authority in his conflict with Zuma.⁷³ This latter accusation ultimately led to Mbeki's resignation as President after a High Court judge endorsed the claims of political interference.⁷⁴ While the High Court's decision was severely criticized and overruled by the Supreme Court of Appeal,⁷⁵ this did not change the political outcome.⁷⁶

Apart from this case, in which law and legal process was used to wage and resolve political struggles for power within the ruling party, there are also countless examples of cases in which government officials, high and low, are accused of corruption or other wrongdoing.⁷⁷ In response to these accusations, the use of legal and administrative process allows different factions to gain access to positions of power and authority while those accused are "suspended" with full pay from their government positions. Among the most notorious cases over the last twenty years were the suspension⁷⁸ and later trial for rape of then-Deputy President Zuma;⁷⁹ the corruption trial of former-National Commissioner of the South African Police Service Jackie Selebi;⁸⁰ the accusations of fraud and the withholding of information levelled against the former-Director-General of the National Intelligence Agency, Billy Masetlha;⁸¹ the official commissions of enquiry into accusations that Bulelani Ngcuka, former head of the

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73. *NPA: Mbeki Not Behind Zuma Charges*, MAIL & GUARDIAN (Dec. 30, 2007), <http://mg.co.za/article/2007-12-30-npa-mbeki-not-behind-zuma-charges>. While Mbeki and Zuma worked closely together in exile, accusations that Zuma was implicated in the arms deal corruption, and the political conflict over Mbeki's HIV/AIDS denialism and economic policies, led to increasing tensions between the two. See WILLIAM MERVIN GUMEDE, THABO MBEKI AND THE BATTLE FOR THE SOUL OF THE ANC 310–12 (Marléne Burger ed., 2005). After Mbeki dismissed Zuma as Deputy President, the tension between them broke into direct conflict as Zuma challenged Mbeki for leadership of the ANC. *Id.*
74. See Jonathan Klaaren & Theunis Roux, *The Nicholson Judgment: An Exercise in Law and Politics*, 54 J. AFR. L. 143 (2010) (discussing Judge Nicholson's ruling in *Zuma v. Nat'l Dir. of Pub. Prosecutions* 2009 (1) BCLR 62 (N)).
75. *Nat'l Dir. of Pub. Prosecutions v. Zuma* 2009 (2) SA 277 (SCA).
76. In any event, by the time of the Supreme Court of Appeal's decision overturning Nicholson's decision, Mbeki had already resigned. See generally Megan Lindow, *Why South Africa's Mbeki Resigned*, TIME (Sept. 20, 2008), <http://content.time.com/time/world/article/0,8599,1843112,00.html>.
77. For a history of political corruption in South Africa, see Tom Lodge, *Political Corruption in South Africa*, 97 AFR. AFF. 157 (1998).
78. See *supra* notes 73–74 and accompanying text.
79. Michael Wines, *A Highly Charged Rape Trial Tests South Africa's Ideals*, N.Y. TIMES (Apr. 10, 2006), http://www.nytimes.com/2006/04/10/world/africa/10africa.html?pagewanted=all&_r=0; Michael Wines, *South Africa Acquits Zuma in Rape Trial*, N.Y. TIMES (May 8, 2006), <http://www.nytimes.com/2006/05/08/world/africa/08cnd-africa.html>.
80. Barry Bearak, *South African Ex-Official Guilty of Graft*, N.Y. TIMES, July 3, 2010, at A7; see also PAULUS ZULU, A NATION IN CRISIS: AN APPEAL FOR MORALITY 187–91 (2013) (reviewing the events and allegations leading up to Selebi's corruption trial).
81. See MARTIN PLAUT & PAUL HOLDEN, WHO RULES SOUTH AFRICA?: PULLING THE STRINGS IN THE BATTLE FOR POWER 135–38 (2012) (recounting the hoax email saga involving Masetlha).

National Prosecuting Authority, had been an apartheid spy;⁸² and the finding by the Ginwala Commission of Enquiry that despite then-President Mbeki's suspending of Vusumzi "Vusi" Pikoli, who succeeded Ngcuka as head of the National Prosecuting Authority, Pikoli was fit to hold office.⁸³ The result is that although some officials are suspended, they continue to receive their government salaries and benefits while they contest the claims against them.⁸⁴ Furthermore, the fact that government feels legally obliged to cover legal costs for those accused of wrongdoing in their official capacities fuels a continuing process of political struggle through law within the executive branches of the post-apartheid state.⁸⁵

These conflicts play out within a formal legal framework that is clear on paper yet ambiguously suspended between legal duties and ethical standards. Although the President is duty-bound to "uphold, defend and respect" the Constitution⁸⁶ and members of Cabinet are also formally responsible "collectively and individually to Parliament,"⁸⁷ the task of achieving accountability of the executive remains daunting. Apart from these constitutional imperatives, Cabinet members are also bound by a code of ethics (the "Ethics Code") published in 2000⁸⁸ pursuant to section 2 of the Executive Members' Ethics Act.⁸⁹ The Constitution and the Ethics Code dictate that Cabinet members must refrain from undertaking other paid work, using their positions to enrich themselves or others, acting in ways that are inconsistent with their office, or involving themselves in situations which might give rise to conflicts of interest between their official responsibilities and private interests.⁹⁰ The Ethics Code also requires Cabinet members to "declare any personal or private financial or business interest" they might have in matters that are before the executive body,⁹¹ and in the case of a conflict of interest, to either withdraw from the decisionmaking

82. See Andrew Meldrum, *Apartheid Spy Clears Prosecutor*, THE GUARDIAN (Oct. 21, 2003), <http://www.theguardian.com/world/2003/oct/22/southafrica.andrewmeldrum>.

83. VUSI PIKOLI & MANDY WIENER, *MY SECOND INITIATION: THE MEMOIR OF VUSI PIKOLI* 290, 303–04 (2013).

84. See, e.g., Letter from then-President Thabo Mbeki to Advocate Vusi Pikoli, in PIKOLI & WIENER, *supra* note 83, at 272–73 (informing Pikoli of his suspension as National Director of Public Prosecutions and of his continued receipt of full government benefits during his suspension).

85. See, e.g., Karl Gernetzky, *SABC Footing Motsoeneng's Legal Bills*, BUS. DAY (Sept. 21, 2015), <http://www.bdlive.co.za/national/media/2015/09/21/sabc-footing-motsoenengs-legal-bills>.

86. S. AFR. CONST., 1996, § 83(b).

87. *Id.* § 92(2).

88. Executive Ethics Code, GN 41 of GG 21399 (20 July 2000) [hereinafter Executive Ethics Code].

89. Act 82 of 1998 § 2.

90. S. AFR. CONST., 1996, § 96(2); see also Executive Ethics Code, *supra* note 88, § 2.3(c)–(f).

91. Executive Ethics Code, *supra* note 88, § 3.1.

process or ask the relevant Premier or President for permission to participate.⁹² There is also a duty to report these interests to the Secretary of the Cabinet.⁹³

In 2006, however, when the Public Protector investigated accusations over violations of the Ethics Code, including failures to report financial interests, the Public Protector concluded that there had been no violation of the Code because the databases relied upon by the Auditor-General were not always up to date and that there was a “misunderstanding in regard to the interests that Ministers and Deputy Ministers are obliged to disclose.”⁹⁴ Even though the country can boast about having a sophisticated constitutional and legislative framework to ensure executive accountability, the enforcement of these provisions remains at issue and has led to repeated efforts to address corruption, including the creation of a new anti-corruption Cabinet team in 2009.⁹⁵ Appointing Thulisile “Thuli” Madonsela as South Africa’s Public Protector that same year, President Jacob Zuma stated that “[s]he will need to ensure that this office continues to be accessible to ordinary citizens and undertakes its work without fear or favour.”⁹⁶

B. The Institution of the Public Protector

In contrast to this idealistic legal and constitutional framework, it is clear that the work of ensuring accountability is much more complicated. In practice, then, the repeated framing of the law as a neutral arbiter of power must be understood in the context of the politics and institutions that are established and serve to bring life to the law. In order to understand the place of specific institutions in this process, we must recognize that institutions do not exist because they are named in the Constitution but rather that institutions have histories, processes, and individual participants that together shape their capacity to fulfill the roles assigned to them. If we take the Public Protector as a key example of one of the constitutional institutions for protecting democracy and achieving good governance, we will be able to reflect on the process of establishing the necessary institutional capacity as well as the resources, time, and leadership that is necessary to achieve the goal of accountability.

While the Public Protector was first established by the Interim Constitution in 1994⁹⁷ and brought into existence through legislation via the Public Protector Act

92. *Id.* § 3.2–3.3.

93. *Id.* § 5.

94. PUB. PROTECTOR S. AFR., REPORT ON AN INVESTIGATION IN CONNECTION WITH COMPLIANCE BY MINISTERS AND DEPUTY MINISTERS WITH THE PROVISIONS OF THE EXECUTIVE ETHICS CODE RELATING TO THE DISCLOSURE OF FINANCIAL INTERESTS: REPORT NO. 2 OF 2006, at 4 (2006).

95. *See, e.g., New Anti-Corruption Team Established*, MAIL & GUARDIAN (Nov. 19, 2009), <http://mg.co.za/article/2009-11-19-new-anticorruption-team-established>.

96. *Meet the New Public Protector*, IOL NEWS (Oct. 18, 2009) (quoting President Jacob Zuma), <http://beta.iol.co.za/news/politics/meet-the-new-public-protector-461858>.

97. S. AFR. (INTERIM) CONST., 1993, § 110(1).

that same year,⁹⁸ the institution was given increased status by its inclusion as one of the independent Chapter 9 institutions that marked one of the unique features of the final Constitution. Once provided for by statute, it fell to the first Public Protector, Advocate⁹⁹ Selby Baqwa, to begin the task of setting up the institution at its inception in 1995.¹⁰⁰ By 1999, there were only two regional offices, one in the North West province and one in the Eastern Cape.¹⁰¹ Only in 2001 were additional offices added in KwaZulu-Natal, Mpumalanga, and the Western Cape.¹⁰² Two additional provincial offices, in the Northern Cape and Free State, were added in 2002,¹⁰³ while the Limpopo and Gauteng offices were only established in 2003¹⁰⁴ and 2004,¹⁰⁵ respectively. While it took nearly ten years to create this institutional infrastructure, today the Public Protector has regional offices in all nine provinces as well as a national office in Pretoria.¹⁰⁶ Additionally, there are twenty walk-in offices around the country as well as a toll-free line and other mechanisms aimed at making the institution accessible to the public.¹⁰⁷

98. Act 23 of 1994 § 1A(1).

99. The term “Advocate” refers to the professional status of the individual—that they are an advocate in the split bar structure of the South African legal profession. The statuses of advocates and attorneys in South Africa are similar to those of barristers and solicitors in the United Kingdom. For more on the status of legal practitioners in South Africa, see generally François du Bois, *Introduction: History, System and Sources*, in *INTRODUCTION TO THE LAW OF SOUTH AFRICA* 1, 32–35 (C.G. van der Merwe et al. eds., 2004).

100. See David McQuoid-Mason, *The Role of Human Rights Institutions in South Africa*, in *HUMAN RIGHTS COMMISSIONS AND OMBUDSMAN OFFICES: NATIONAL EXPERIENCES THROUGHOUT THE WORLD* 16, 16 (Kamal Hossain et al. eds., 2000); see also Public Protector Act 23 of 1994 § 3 (laying out the procedures for establishing staffing and remuneration levels within the Office of the Public Protector).

101. PUB. PROTECTOR S. AFR., ANNUAL REPORT 1999, at 45 (1999) (on file with author) [hereinafter PUB. PROTECTOR ANNUAL REPORT 1999]. The Public Protector Annual Reports are based on a fiscal year that runs between April 1 of one year until March 31 of the following year.

102. *Id.*

103. PUB. PROTECTOR S. AFR., ANNUAL REPORT 2003/2004, at 16–17 (2004) [hereinafter PUB. PROTECTOR ANNUAL REPORT 2003/2004].

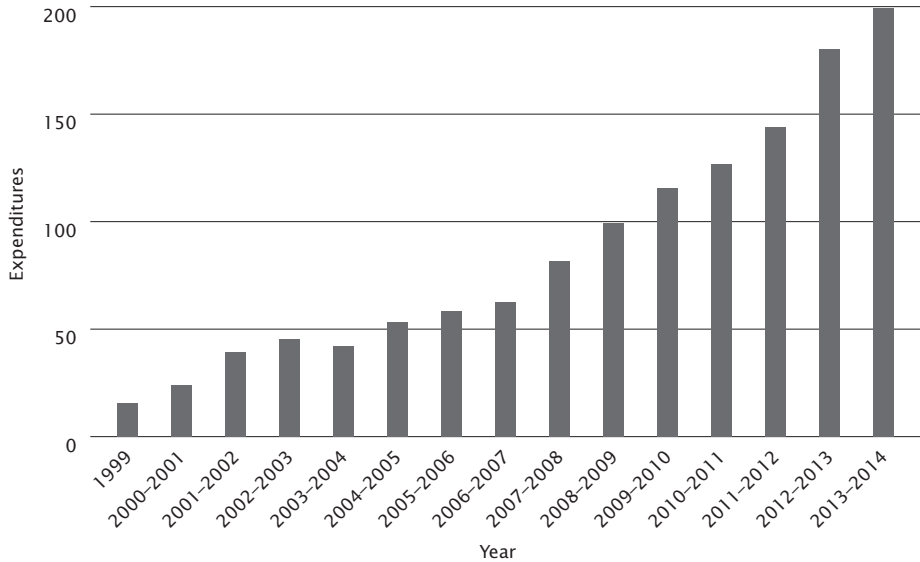
104. The Limpopo office started operating in 2002 but only officially launched in April 2003. *Id.* at 19.

105. Media Release, Pub. Protector S. Afr., Pub. Protector: Provincial Office in Gauteng (Nov. 22, 2004), http://www.publicprotector.org/media_gallery/2004/22112004.asp.

106. For information on the location of the Public Protector’s provincial and regional offices, see *Contact the Offices of the Public Protector*, PUB. PROTECTOR S. AFR., http://www.pprotect.org/contact_us/provincial_regional_offices.asp (last visited Feb. 15, 2016). For information on their national office, see *National Office*, PUB. PROTECTOR, http://www.pprotect.org/contact_us/national_office.asp (last visited Feb. 15, 2016).

107. PUB. PROTECTOR S. AFR., PUBLIC PROTECTOR VISION 2020 AND STRATEGIC PLAN: 2011–2014, at 8 (2011) [hereinafter PUB. PROTECTOR STRATEGIC PLAN 2011–2014].

Figure 1: Expenditures [in millions of Rand]¹⁰⁸



This process of institution building is also reflected in the budget, which grew steadily over its first decade, with expenditures increasing from approximately ZAR15.4 million in 1999¹⁰⁹ to just over ZAR99 million in 2009.¹¹⁰ As the Public Protector’s office has become institutionalized, its budget and workload have continued to expand. In the last five years, expenditures have doubled to just under ZAR200 million in 2013–2014¹¹¹ and the staff has grown from an initial ninety-one members at its founding in 1999¹¹² to 314 in 2013–2014.¹¹³ In addition to investigating and resolving complaints, the staff is actively involved in public “outreach, education and communication activities, including clinics and information sessions,” in an effort “to

108. The graphs presented in this article are based upon the research and information contained within the Public Protector’s Annual Reports for the years covering 1999–2014. Beginning with the Public Protector Annual Report of 2003–2004, these reports are available on the Public Protector’s web site. See *Annual Reports*, PUB. PROTECTOR S. AFR., http://www.publicprotector.org/library/annual_report/annual_report.asp (last visited Feb. 15, 2016). Annual Reports published between 1999 and 2002 are on file with the author.

109. PUB. PROTECTOR ANNUAL REPORT 1999, *supra* note 101, at 45. ZAR refers to Rand, South Africa’s currency.

110. PUB. PROTECTOR S. AFR., ANNUAL REPORT 2009/2010, at 98 (2010) [hereinafter PUB. PROTECTOR ANNUAL REPORT 2009/2010]. These figures are based on the expenditures which reflect the increase in the budget but are a more accurate measure of actual growth.

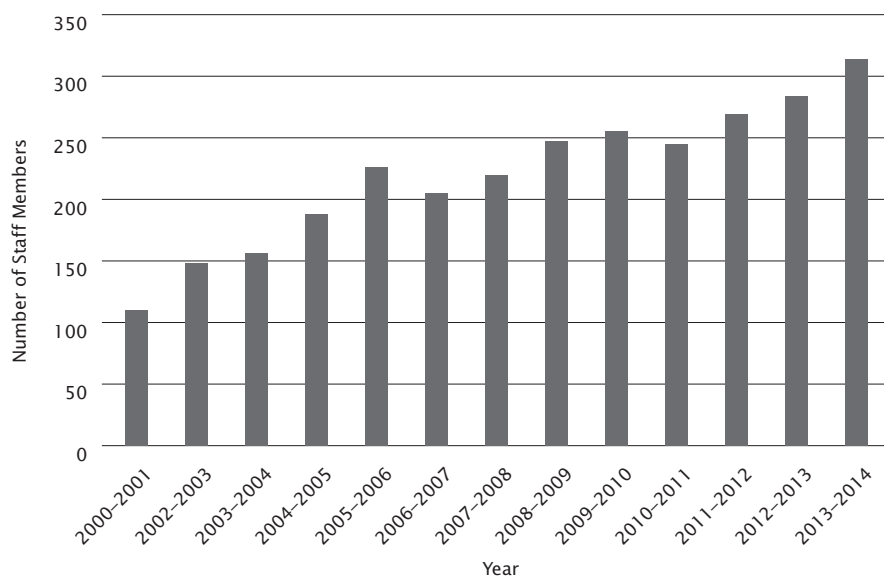
111. PUB. PROTECTOR S. AFR., ANNUAL REPORT 2013/2014, at 14 (2014) [hereinafter PUB. PROTECTOR ANNUAL REPORT 2013/2014].

112. PUB. PROTECTOR ANNUAL REPORT 1999, *supra* note 101, at 44–45.

113. PUB. PROTECTOR ANNUAL REPORT 2013/2014, *supra* note 111, at 14.

bring [the Public Protector’s] services closer to communities.”¹¹⁴ Most of the complaints received by the Public Protector “involve service and conduct failure, including abuse of resources,” and the institution sees one of its key challenges as “positioning the office as a buffer between the state and ordinary people as opposed to an agency that primarily deals with high profile cases as often [focused on] by the media.”¹¹⁵

Figure 2: Staff¹¹⁶



Another way of viewing this developing institution is to consider its role through the number of cases that it has taken up and resolved since its creation. If we take the decade from 1999 until 2009, we can see a pattern in which complaints rose from 9,085 in 1999¹¹⁷ to a high of 22,350 in 2004–2005¹¹⁸ before falling to 16,136 in 2009–2010.¹¹⁹ The steady increase in cases until 2005 probably reflects the growing infrastructure and capacity of the Public Protector as it opened offices around the country. By contrast, the reason for the decline in cases between 2005 and 2009 is less obvious, although it might reflect the negative media attention that then-Public Protector Lawrence Mushwana received and the perception that while the resolution

114. PUB. PROTECTOR STRATEGIC PLAN 2011–2014, *supra* note 107, at 8.

115. *Id.* at 9.

116. *See supra* note 108.

117. PUB. PROTECTOR ANNUAL REPORT 1999, *supra* note 101, at 14 (referring to “[n]ew cases received”).

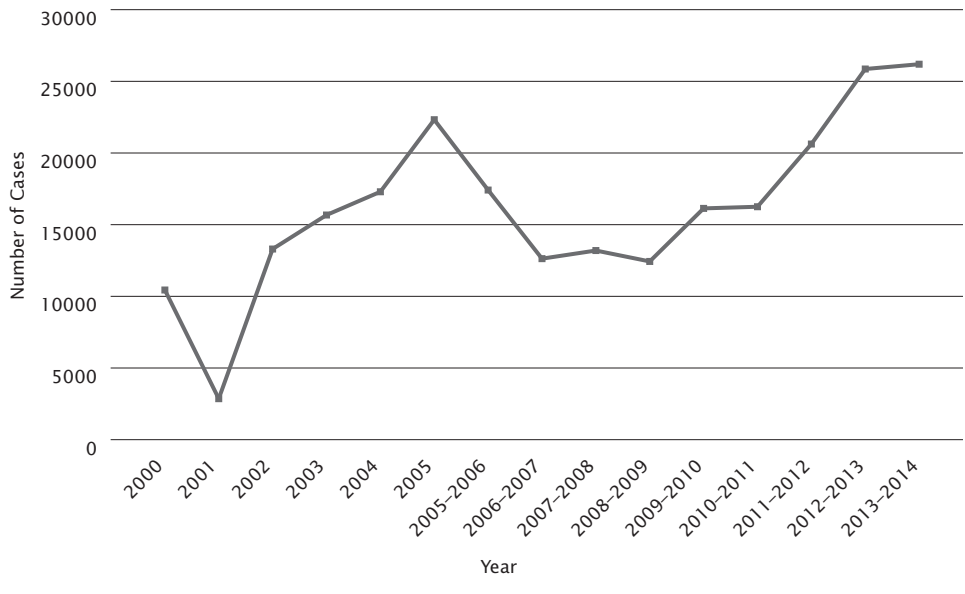
118. PUB. PROTECTOR S. AFR., ANNUAL REPORT 2004/2005, at 20 (2005) [hereinafter PUB. PROTECTOR ANNUAL REPORT 2004/2005].

119. PUB. PROTECTOR ANNUAL REPORT 2009/2010, *supra* note 110, at 11.

ACCOUNTABILITY AND THE ROLE OF INDEPENDENT CONSTITUTIONAL INSTITUTIONS

of cases rose dramatically after his appointment in 2002, the Public Protector’s office was not pursuing its mandate effectively.¹²⁰ The throughput of cases of course increased in relation to the increase in complaints, but there was a dramatic increase in resolutions in 2002–2003 to 21,705.¹²¹ The pace of resolution did, however, settle into a fairly stable range from 15,946 in 2003–2004¹²² to 14,738 in 2009–2010.¹²³ At the same time, the jurisdiction of the Public Protector has continued to grow as additional legislation enacted by Parliament has granted it expanded authority to address issues of corruption and maladministration, consistent with the Public Protector’s constitutional mandate.¹²⁴

Figure 3: Number of Cases¹²⁵



120. Advocate Lawrence Mushwana served as Public Protector from 2002 to 2009. He regularly came under severe criticism during his tenure, including from the leader of the political opposition, Helen Zille. *See, e.g.,* Michael Hamlyn, *Zille Accuses Public Protector of Abuse of Office*, MAIL & GUARDIAN (Feb. 22, 2008), <http://mg.co.za/article/2008-02-22-zille-accuses-public-protector-of-abuse-office>.

121. PUB. PROTECTOR S. AFR., ANNUAL REPORT 2002/2003, at 14 (2003).

122. PUB. PROTECTOR ANNUAL REPORT 2003/2004, *supra* note 103, at 10.

123. PUB. PROTECTOR ANNUAL REPORT 2009/2010, *supra* note 110, at 11.

124. *See* National Energy Regulator Act 40 of 2004; Prevention and Combating of Corrupt Activities Act 12 of 2004; Protected Disclosures Act 26 of 2000; Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000; Promotion of Access to Information Act 2 of 2000; Public Finance Management Act 1 of 1999; National Environmental Management Act 107 of 1998; Housing Consumers Protection Measures Act 95 of 1998; Lotteries Act 57 of 1997; Special Investigating Units and Special Tribunals Act 74 of 1996; National Archives and Records Service of South Africa Act 43 of 1996; Electoral Commission Act 51 of 1996.

125. *See supra* note 108.

President Zuma's 2009 appointment of Advocate Thuli Madonsela, a well-respected human rights advocate, led to hope that the Office of the Public Protector "might yet fulfil the constitutional role it was envisioned to play."¹²⁶ Indeed, during the first six years of her seven-year term, Public Protector Madonsela has dramatically increased the capacity and profile of the institution. During this period, the Public Protector adopted a number of strategies to both strengthen the institution and ensure a more effective response to growing public concerns over maladministration and corruption. Among a range of new initiatives, the Public Protector has sought to increase the capacity of staff through training (often through partnerships and links to ombudsman institutions around the globe)¹²⁷ as well as through the reorganization of the office to improve the institution's functioning.¹²⁸

One of the first innovations introduced was the creation of an Early Resolution Unit designed to employ the tools of alternative dispute resolution—conciliation, mediation, and negotiation—to resolve complaints of "state maladministration and other forms of improper conduct."¹²⁹ At the same time, investigations were separated into three categories: National Investigations, Provincial Investigations, and Special Investigations.¹³⁰ In addition, the Public Protector faced an ever-expanding mandate as Parliament passed additional legislation aimed at addressing the growing problem of corruption, including: the earlier-mentioned Executive Members' Ethics Act,¹³¹ the Protected Disclosures Act,¹³² the Promotion of Access to Information Act,¹³³ and the Prevention and Combating of Corrupt Activities Act.¹³⁴ In addition to these mandates, the Public Protector has also initiated her own investigations based on newspaper reports or concerns about systematic failures in specific government departments.¹³⁵

The success of the institution in this period is reflected most simply in the growing demand for its services. While the media and political process are most closely focused on the high-profile special investigations being conducted by the Public Protector, it is the dramatic growth in everyday complaints—from 16,136 in

126. KLUG, *supra* note 18, at 216; *see also* Chris Bathembu, *Zuma Appoints New Public Protector*, SOUTH AFRICA INFO (Oct. 19, 2009), <http://www.southafrica.info/about/democracy/pubprotector-190909.htm#Vj0WFrerSM9>.

127. *See Public Protector Investigators Sharpen Their Teeth*, S. AFR. GOV'T NEWS AGENCY (Aug. 24, 2011), <http://www.sanews.gov.za/south-africa/public-protector-investigators-sharpen-their-teeth>.

128. *See* PUB. PROTECTOR STRATEGIC PLAN 2011–2014, *supra* note 107.

129. PUB. PROTECTOR ANNUAL REPORT 2009/2010, *supra* note 110, at 40.

130. *Id.* at 42.

131. Act 82 of 1998.

132. Act 26 of 2000.

133. Act 2 of 2000.

134. Act 12 of 2004.

135. *See generally Investigation Reports*, PUB. PROTECTOR S. AFR., http://www.pprotect.org/library/investigation_report/investigation_report.asp (last visited Feb. 15, 2016).

2009–2010,¹³⁶ to handling nearly 40,000 in 2014–2015¹³⁷—that demonstrates the impact of this institution. One explanation for this explosive growth may be that in a political process based on proportional representation among political parties, members of the public feel that they do not have an elected representative to whom they can turn and that the political parties have been unable to provide this level of assistance to members of the public who feel mistreated by the bureaucracy or other official actors. Another possible explanation is that the high-profile cases against senior politicians and officials, including the Commissioner of the South African Police Service,¹³⁸ Cabinet members,¹³⁹ and even the President,¹⁴⁰ have produced a level of media and public exposure that has given the public confidence in this institution. As expressed in the Public Protector’s 2011–2014 Strategic Plan, there is a “value of having this office as a buffer between citizens and government [in] that [it] seeks to strengthen constitutional democracy by promptly and impartially redressing administrative wrongs of the state.”¹⁴¹

From the perspective of the Public Protector, the main focus of the office, as evident in the institution’s publications and annual reports to Parliament, is on serving the public by “bring[ing] much-needed relief to the ‘Gogo Dlamini’¹⁴² wronged by the state.”¹⁴³ While this self-image of helping resolve the bureaucratic frustrations experienced by the prototype figure of “Grandmother Dlamini” may in fact represent the vast bulk of service delivery, social grant, and pension complaints resolved by the Public Protector around the country, it is the Public Protector’s direct engagement through self-initiated investigations that may have the broadest impact, especially in the context of increasingly violent service delivery protests.¹⁴⁴ Speaking after initiating an investigation into conditions in Braamfischerville, Soweto, Public Protector Madonsela thanked the local community leadership for “embracing the [C]onstitution and working within its mechanisms to hold government accountable

136. PUB. PROTECTOR ANNUAL REPORT 2009/2010, *supra* note 110, at 11.

137. PUB. PROTECTOR S. AFR., ANNUAL REPORT 2014/2015 (2015) (on file with author).

138. See Sarah Evans, *Police Commissioner Rejects SAIRR Report on SAPS Criminality*, MAIL & GUARDIAN (Jan. 28, 2015), <http://mg.co.za/article/2015-01-28-police-commissioner-rejects-sairr-report-on-saps-as-malicious>.

139. See *Zuma’s Cabinet: Cronyism Over Good Governance, Says DA*, MAIL & GUARDIAN (May 26, 2014), <http://mg.co.za/article/2014-05-26-zuma-cares-about-cronyism-instead-of-good-governance-says-da>.

140. See Philip de Wet, *Jacob Zuma’s R11-Million Problem*, MAIL & GUARDIAN (July 31, 2015), <http://mg.co.za/article/2015-07-30-jacob-zumas-r11-million-problem>.

141. PUB. PROTECTOR STRATEGIC PLAN 2011–2014, *supra* note 107, at 11.

142. “Gogo” is the isiZulu word for grandmother and “Dlamini” is a very common Nguni surname. As used by the Public Protector, this is a reference to the regular folk who are frustrated by bureaucratic maladministration and who turn to the Public Protector for assistance.

143. PUB. PROTECTOR S. AFR., ANNUAL REPORT 2012/2013, at 4 (2013).

144. See, e.g., Laura Grant, *Research Shows Sharp Increase in Service Delivery Protests*, MAIL & GUARDIAN (Feb. 12, 2014), <http://mg.co.za/article/2014-02-12-research-shows-sharp-increase-in-service-delivery-protests>.

for service delivery, instead of rioting.”¹⁴⁵ Urging other communities to follow this example, the Public Protector added further that “in giving the people a voice and serving as the conscience of the state, her office would seek answers from the City, with a view to holding those responsible for the situation to account.”¹⁴⁶ The response to the institution’s new proactive stance was a surge in public confidence matched by increasing criticism by the legislature and a reluctance to meet the institution’s budget and staffing demands.¹⁴⁷

While the Public Protector may see its role as impartial, the political parties, and particularly the governing party and its senior officials, often express concern that other parties and interests use the institution as part of continuing inter-party political conflict.¹⁴⁸ While it is hardly a surprise that opposing parties would attempt to discredit their political opponents by pointing out their failures or initiating investigations, the Public Protector has sought to retain a balance between high-profile, media-driven cases and the daily work of the institution.¹⁴⁹ Despite these efforts, there has been increasing tension with the ruling party and government officials, leading the Public Protector to acknowledge that “[u]nfortunately, a number of organs of state are increasingly becoming adversarial in their dealings with the Public Protector.”¹⁵⁰ Responding to this problem, the Public Protector has attempted to increase communication “with the government, highlighting the role of the Public Protector in reconciling the state and its people by giving . . . the state a conscience.”¹⁵¹ Despite these efforts, tensions reached a climax in 2014 as the Public Protector conducted an investigation into allegations that excessive state resources had been used in an upgrade of President Zuma’s private Nkandla home.¹⁵²

C. Constitutional Mandates and the Separation of Powers

The institutional consequences of this unavoidable tension between the Public Protector and the government officials the institution investigates have been

145. Media Release, Pub. Protector S. Afr., Public Protector Inspects Sewerage-flooded Braamfischerville (Mar. 27, 2012), http://www.publicprotector.org/media_gallery/2012/27032012.asp.

146. *Id.*

147. See Thabo Mokone, *Madonsela: No Funds, No Public Protector*, TIMES LIVE (Oct. 23, 2014), <http://www.timeslive.co.za/thetimes/2014/10/23/madonsela-no-funds-no-public-protector>.

148. See, e.g., Emsie Ferreira, *Another Nkandla Deadlock Looms*, IOL NEWS (July 30, 2015), <http://beta.iol.co.za/news/politics/another-nkandla-deadlock-looms-1893229>.

149. See generally Alexis Okeowo, *Can Thulisile Madonsela Save South Africa From Itself?*, N.Y. TIMES MAG. (June 16, 2015), http://www.nytimes.com/2015/06/21/magazine/can-thulisile-madonsela-save-south-africa-from-itself.html?_r=0.

150. PUB. PROTECTOR STRATEGIC PLAN 2011–2014, *supra* note 107, at 10.

151. *Id.*

152. See, e.g., Matuma Letsoalo, *Thuli Madonsela Snubbed by ANC Brass*, MAIL & GUARDIAN (Mar. 14, 2014), <http://mg.co.za/article/2014-03-13-thuli-madonsela-snubbed-by-anc-brass>. See generally SECURE IN COMFORT, *supra* note 42, at 14–17 (revealing issues faced by the Public Protector in pursuing the investigation).

threefold. First, it has brought increased media and even international attention to the high-profile work of the Public Protector.¹⁵³ Second, it has led to increased hostility from the ruling party, particularly from elements that refuse to accept criticism of President Zuma.¹⁵⁴ Finally, it has led to an increasingly heated debate over the formal authority of the Public Protector, particularly in relation to the institution's constitutional mandate to provide a remedy.¹⁵⁵ It is this last issue that goes to the heart of the constitutional authority of the Public Protector as one of the institutions created to promote constitutional democracy.

As far as some in the ruling party are concerned, the Public Protector is responsible to Parliament, which they feel has the right to question the institution's activities and decide whether the Public Protector's decisions need to be implemented.¹⁵⁶ In support of their claim, they may point to section 181(5) of the Constitution, which states that the Public Protector, along with the other Chapter 9 institutions, is "accountable to the National Assembly."¹⁵⁷ In contrast to this broad claim of parliamentary authority, the Public Protector has often pointed out¹⁵⁸ that section 182(1) empowers the institution to investigate, report, and "take appropriate remedial action."¹⁵⁹ The Public Protector has also pointed to section 181(2) of the Constitution,¹⁶⁰ which states that the Chapter 9 institutions are "independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice."¹⁶¹ It is the confluence of these mandates and tensions over high-profile cases, such as the security upgrades to President Zuma's home at Nkandla, that have brought the problem of the separation of powers to the fore.

153. Public Protector Thuli Madonsela has received a number of national and international awards and was named in *Time* magazine's annual list of the 100 most influential people in the world in 2014. See *Madonsela Listed Among Time's 100 Most Influential People*, MAIL & GUARDIAN (Apr. 24, 2014), <http://mg.co.za/article/2014-04-24-madonsela-listed-among-times-100-most-influential-people>; *Madonsela Wins Global Award for Integrity*, MAIL & GUARDIAN (Oct. 17, 2014), <http://mg.co.za/article/2014-10-17-madonsela-wins-integrity-award/>; Samuel Mungadze, *Madonsela Wins Woman of Substance Award*, BUS. DAY (Aug. 7, 2015), <http://www.bdlive.co.za/national/2015/08/07/madonsela-wins-woman-of-substance-award>.

154. See, e.g., *Public Protector Needs Support in Face of Harsh Criticism: Cope*, TIMES LIVE (Aug. 5, 2015), <http://www.timeslive.co.za/politics/2015/08/05/Public-protector-needs-support-in-face-of-harsh-criticism-Cope>.

155. See, e.g., Mtende Mhango, *Public Protector's Powers: What Law Says*, THE SUNDAY INDEP. (Sept. 21, 2014), <http://www.iol.co.za/sundayindependent/public-protector-s-powers-what-law-says-1.1753981#Vkgow9ap3wx>.

156. See Pierre de Vos, *Attacks on Madonsela: Blaming the Messenger*, CONSTITUTIONALLY SPEAKING (July 8, 2014), <http://constitutionallyspeaking.co.za/attacks-on-madonsela-blaming-the-messenger/> (responding to criticisms of the Public Protector by the ANC).

157. S. AFR. CONST., 1996, § 181(5).

158. See, e.g., PUB. PROTECTOR ANNUAL REPORT 2004/2005, *supra* note 118, at 28.

159. S. AFR. CONST., 1996, § 182(1).

160. See, e.g., PUB. PROTECTOR ANNUAL REPORT 2003/2004, *supra* note 103, at 6.

161. S. AFR. CONST., 1996, § 181(2).

IV. DEMOCRATIC ALLIANCE V. SOUTH AFRICAN BROADCASTING CORPORATION

The first opportunity for the courts to address this problem with respect to the Public Protector came when the official political opposition party, the Democratic Alliance, brought a suit demanding a court order that Hlaudi Motsoeneng, the Chief Operations Officer (COO) of the South African Broadcasting Corporation (SABC)—the government’s broadcaster—be immediately suspended.¹⁶² The Democratic Alliance based its claim on the Public Protector’s report into allegations of maladministration, systemic corporate governance deficiencies, and abuse of power by the COO, as well as a claim that the COO’s appointment by the Board of the SABC was irregular.¹⁶³ While the Western Cape High Court ordered that Motsoeneng be suspended and that the SABC Board institute disciplinary proceedings against him,¹⁶⁴ the court’s decision on the powers of the Public Protector has led to some confusion.¹⁶⁵

On the one hand, the court ruled that the decisions of the SABC Board and the Minister of Communications to ignore the recommendations of the Public Protector were irrational and therefore unconstitutional.¹⁶⁶ On the other hand, Judge Ashton Schippers also held that the Public Protector’s findings are not directly binding and enforceable since they do not have the same legal status as court orders.¹⁶⁷ Using the Supreme Court of Appeal and Constitutional Court’s earlier decisions analogizing the Public Protector to the position of an ombudsman in other jurisdictions, Judge Schippers held that while the recommendations of the Public Protector are not binding, the government officials to whom they are directed are not free to disregard them based on their own conclusion but rather need to either implement them or provide rational reasons for refusing to do so.¹⁶⁸ This decision, according to Judge Schippers, is an exercise of public power in its own right and would be subject to review by the courts, as would any decision by the Public Protector that may be challenged by those affected by the Public Protector’s findings or recommendations.¹⁶⁹

Both the ruling party and the Public Protector responded to the court’s decision by claiming that their positions had been vindicated.¹⁷⁰ Since Motsoeneng has appealed the judgment, however, the Supreme Court of Appeal and possibly the

162. *Democratic All. v. S. African Broad. Corp.* 2015 (1) SA 551 (WCC) at para. 1.

163. *Id.* at paras. 10, 20.

164. *Id.* at para. 127.

165. See Franny Rabkin, *News Analysis: Why the ANC and DA Claim Victory Over the Same Ruling*, BUS. DAY (Oct. 28, 2014), <http://www.bdlive.co.za/national/media/2014/10/28/news-analysis-why-the-anc-and-da-claim-victory-over-the-same-ruling>.

166. *Democratic All.*, 2015 (1) SA 551 at para. 83.

167. *See id.* at para. 51.

168. *See id.* at paras. 66, 71.

169. *Id.* at paras. 71–73.

170. *See* Rabkin, *supra* note 165.

Constitutional Court may have the chance to address this question.¹⁷¹ While the ruling party's claim that the Public Protector's recommendations are not binding may have been formally vindicated,¹⁷² this is a very narrow view of the court's ruling and the role of the Public Protector in general. First, Judge Schippers made clear that the Public Protector's recommendations may only be challenged before the courts if they are irrational and may only be disregarded by the public authorities subject to the Public Protector's findings and recommendations if the authorities have "cogent reasons for doing so, that is for reasons other than merely a preference for its own view."¹⁷³ Second, the court argued that the decision whether or not to accept the Public Protector's recommendation is an exercise of public power and thus must meet the minimum threshold requirement of rationality and that the principle of legality requires that any such decision "must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary."¹⁷⁴ Finally, the court rejected the government's argument that the Public Protector needs to seek the assistance of Parliament, to which the Public Protector is accountable, to implement the findings and recommendations of her investigations.¹⁷⁵ Noting that it was the government that had refused without rational reasons to accept the findings or recommendations of the Public Protector, the court went on to point out that the intervention of the National Assembly is not an adequate remedy since "[t]he facts of this very case show that the constitutional and statutory provisions upon which they rely are inadequate to ensure that the Public Protector is not undermined."¹⁷⁶

The result has been distinctly different interpretations of the court's decision. Apart from the government and the Public Protector reaching different conclusions, academics and other commentators have also read different implications into the decision. Journalist Franny Rabkin reported on two differing commentators in particular: Mtende Mhango of the University of the Witwatersrand Law School and University of Cape Town law professor Pierre de Vos.¹⁷⁷ According to Rabkin, Mhango relies on Judge Schippers's analysis that the Public Protector is not an adjudicatory body and argues that the court "adopted English law, which distinguishes between the findings and recommendations of an ombudsman [so that] findings may be rejected only if there is a rational basis to do so" and that "recommendations are treated differently . . . and are not binding at all."¹⁷⁸ On the other hand, Rabkin reports that de Vos "interprets the judgment to say that, because of the obligation on

171. See *Motsoeneng Will Appeal Court Order for Suspension*, MAIL & GUARDIAN (Oct. 28, 2014), <http://mg.co.za/article/2014-10-28-motsoeneng-will-appeal-his-suspension/>.

172. See *Democratic All.*, 2015 (1) SA 551 at paras. 51, 59; see also Rabkin, *supra* note 165.

173. *Democratic All.*, 2015 (1) SA 551 at para. 66.

174. *Id.* at para. 71.

175. See *id.* at paras. 59–62.

176. *Id.* at paras. 61–63.

177. See Rabkin, *supra* note 165.

178. *Id.*

organs of state to ‘assist and protect’ the public protector, the threshold for rationality is set higher than usual,” and an organ of state may only legally “reject the view of the public protector . . . for ‘other, cogent reasons’—for example, if implementing the public protector’s remedial action is impossible.”¹⁷⁹ At the same time, neither of these academics agrees with the interpretation put forward by the named litigant, the Democratic Alliance, whose Chairman, James Selfe, argued that the court’s decision means that before an organ of state can reject the recommendations of the Public Protector, it requires the approval of the courts.¹⁸⁰

V. CONCLUSION

It is this tension between the constitutional mandate that “[o]ther organs of state . . . must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions”¹⁸¹ and the seeming inability of the Public Protector to ensure that the government addresses the institution’s findings and recommendations that lies at the heart of the separation of powers question left unresolved by the *SABC* judgment. While the court does note in defense of its own powers that “the rule of separation of powers cannot be used to avoid the obligation of a court to provide appropriate relief that is just and equitable to a litigant who successfully raises a constitutional complaint,”¹⁸² its decision to equate the Public Protector with the British ombudsman fails to acknowledge that the legislative authority of the ombudsman in the United Kingdom is legally distinct from the constitutional status enjoyed by the Chapter 9 institutions and the Public Protector in particular.¹⁸³ Even if the Supreme Court of Appeal and the Constitutional Court

179. *Id.* (quoting Pierre de Vos, *What the High Court Really Said About the Powers of the Public Protector*, CONSTITUTIONALLY SPEAKING (Oct. 26, 2014), <http://constitutionallyspeaking.co.za/what-the-high-court-really-said-about-the-powers-of-the-public-protector/>).

180. *See id.*

181. S. AFR. CONST., 1996, § 181(3).

182. *Democratic All. v. S. African Broad. Corp.* 2015 (1) SA 551 (WCC) at para. 99.

183. The United Kingdom has a range of different ombudspersons whose authority is determined by legislation and limited to resolving complaints. These ombudspersons are essentially an administrative complaints system and function as a form of alternative dispute resolution, have no legal authority to engage in their own investigations, and can only address complaints by investigating and negotiating with the relevant authority. It is thus not a surprise to learn that the English courts have not recognized them as having any power vis-à-vis either the executive or legislative branches of government. *See generally* Roy Gregory & Philip Giddings, *The United Kingdom Parliamentary Ombudsman Scheme*, in RIGHTING WRONGS: THE OMBUDSMAN IN SIX CONTINENTS 21 (Roy Gregory & Philip Giddings eds., 2000). Regardless of their status and even successful track record in tackling administrative blockages, the role of the Public Protector and other Chapter 9 institutions in South Africa is distinctively different. First, the Chapter 9 institutions have a constitutional status, and their status is not at the whim of the legislature even if they report on their activities and are in that sense accountable to the legislature. As independent constitutional institutions, they have a place in the creation and building of democracy in South Africa. While the exact space they work in is not yet clearly defined, and is even contested, the fact remains that they have a distinctive constitutional status. To that degree, they cannot be analogized to the standard form of ombudsperson and it is imperative that their exact place in the system of checks and balances that makes up the separation of powers be resolved.

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have analogized the Public Protector to an ombudsman institution,¹⁸⁴ these courts have not reached a final decision but are now in the process of determining the precise role of the Chapter 9 bodies as “State Institutions Supporting Constitutional Democracy.” The difficulty in managing the relationship between the Public Protector and the government became acutely obvious when the Public Protector sought clarity over the official to whom she should submit her report on the expenditures on the President’s home at Nkandla, since the report was in part an investigation into benefits received by the President.¹⁸⁵ The necessity of asking this question only served to highlight the more general question about the precise constitutional status of the Public Protector and the other Chapter 9 institutions. Even if we conceive of Chapter 9 as creating an additional branch of government, as I have argued, this does not resolve questions about the precise relationship of checks and balances that a separation of powers understanding requires. It is this challenge that remains an ongoing task for all who are committed to the building of a constitutional democracy in South Africa.

184. See *Certification of the Constitution of the Republic of S. Afr.* 1996 (4) SA 744 (CC) at para. 161; *Pub. Protector v. Mail & Guardian Ltd.* 2011 (4) SA 420 (SCA) at para. 9.

185. See *SECURE IN COMFORT*, *supra* note 42, at 426.