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Heinz Klug

*University of Wisconsin and University of the Witwatersrand*

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## **Transformative Constitutions and the Role of Integrity Institutions in Tempering Power: The Case of Resistance to State Capture in Post-Apartheid South Africa**

HEINZ KLUG†

### INTRODUCTION

Post-conflict or post-colonial constitutions are increasingly understood to be “transformative” constitutions. While initially a term used to describe South Africa’s post-apartheid constitutional order,<sup>1</sup> the idea of a transformative constitution may be best described as the adoption of a constitutional order which is expected to “transform” the existing pre-constitutional order. To this extent, these constitutions are aspirational and are meant to empower the newly democratized state to make significant changes to the existing social and economic order. This perceived need for a powerful state, to overcome the legacies of conflict and the social conditions that divided the society, is in direct tension with the liberal constitutional notion of limited government. While constitutions establish and empower government, constitutionalism is thought to ensure that government continues to represent and respect the rights of the people in

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† University of Wisconsin and University of the Witwatersrand.

1. See generally Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. ON HUM. RTS. 146 (1998).

whose name most constitutions are now created.

Limited government is often presented as a goal of constitutionalism. While the organization of power has been described as the “engine room” of the constitution,<sup>2</sup> constitutionalism implies that this power is managed by distributing it among different institutions. Traditionally this division of power is described as the separation of powers, yet there is little consistency in the constitutional manifestation of this institutional form. If some authoritarian states, such as South Africa’s apartheid regime, claimed adherence to the rule of law by focusing simply on the formal procedural requirements for the adoption of legislation regardless of its content, then constitutionalists have looked to the separate allocation of power as a means of ensuring that the different branches of government are able to check one another and thus ensure a more substantive version of the rule of law. These checks and balances are seen as both the product and means of ensuring a separation of the *tres politica*—the legislative, executive and judicial branches—yet in practice, there is rarely a strict formal separation. More often there is a close political connection between the legislature and the executive, especially when a single political party, by institutional design or political fortune, spans or controls both branches. The judiciary, by comparison is, in most cases, institutionally more separate and judicial independence is held up as the ideal.

This tension, between the organization and separation of power, is at the heart of South Africa’s post-apartheid constitutional order in which a popular, democratically elected ruling party coexists with a constitutional promise of democratic accountability. Structurally, the duty to ensure accountability is constitutionally allocated to Parliament, which bears the traditional legislative role of overseeing the

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2. See ROBERTO GARGARELLA, *LATIN AMERICAN CONSTITUTIONALISM* 1810–2010 185–87 (2013).

executive in addition to law-making, and to a range of independent institutions that emerged from the particular history of South Africa's democratic transition. Furthermore, as a constitutional democracy, the courts, and the Constitutional Court in particular, are charged with determining the allocation of constitutional authority and resolving conflicts that might be brought to the courts as different institutions struggle to ensure that there is legal accountability for governmental failures as well as individual malfeasance. This structure reflects an attempt to institutionalize a system of checks and balances that relies neither on a strict or formal separation of powers, nor does it fragment power to the extent that it paralyzes governance. Instead, it seeks to provide a constitutional system of governance in which the government is empowered to address the legacies of apartheid while also creating multiple sites of power and authority to which political and social groups in conflict may repeatedly turn in their attempts to both be heard and to protect their interests or achieve, at times, irreconcilable goals.

It is this creation of a constitutional order of multiple independent institutions beyond the traditional *tres publica* that provides the context in which this Paper seeks to explore Martin Krygier's idea of tempering power.<sup>3</sup> Focusing on the struggles over corruption and "state capture" that have dominated South African political life for the last decade, this Paper seeks to demonstrate that the existence of a combination of "integrity institutions" and the Constitutional Courts development of a doctrine of separation of powers that recognized the unique role of these institutions were major factors in the ability of individuals, non-government organizations, and opposition political parties to "temper" the abuse of power that had begun to undermine the post-apartheid democracy. Before

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3. See Martin Krygier, *Tempering Power*, in CONSTITUTIONALISM AND RULE OF LAW 34 (Maurice Adams et al., eds., 2017).

considering the legal struggles that have marked this process, this Paper explores the relationship between the separation of powers as an idea, as well as constitutional doctrine and the creation of integrity institutions in South Africa's post-apartheid constitutional order. This Paper then discusses how the traditional forms of democratic accountability were undermined by corruption and how the integrity institutions and the courts were confronted by the struggle over corruption in state institutions. Finally, this Paper explores how the appellate courts, including the Supreme Court of Appeal and the Constitutional Court interpreted the constitutional provisions creating the "integrity institutions" and the Public Protector in particular, as well as their separation of powers doctrine to protect the role of these institutions against the political branches attempts to shield the president from charges of corruption. In conclusion, this Paper suggests that the idea of tempering power is a productive framing to understand the role of integrity institutions in South Africa's constitutional democracy.

#### SEPARATION OF POWERS AND INTEGRITY INSTITUTIONS

The goal of constitution makers in adopting the separation of powers is often described as a means to avoid the concentration of power and to "ensure accountability, responsiveness and openness"<sup>4</sup> 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 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. Although traditional approaches to the political idea and legal doctrine of the separation of powers focus on the checks and balances between the

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4. S. AFR. (INTERM) CONST., 1993, Schedule 4, Constitutional Principle VI.

legislature, executive, and judiciary, the problem of political and legal accountability is no longer contained solely within these institutional parameters. Increasingly, constitutional designers have created additional mechanisms and institutions in their efforts to ensure the desired goals of accountability, responsiveness and openness in the exercise of governmental authority. These new institutions have proliferated in new and amended constitutions since the late 20th century.

The inclusion of a plethora of new constitutional institutions to address governmental accountability has direct implications for any conception of the separation of powers.<sup>5</sup> 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, executive, and judiciary. On the other hand, it also complicates a simple functionalist approach which distinguishes between the making, implementing, and interpreting of laws. Instead, 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—are laden with institutions of governance that 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 they have a degree of constitutionally protected decisional autonomy and independence that is at odds with our traditional notions of the trilateral structure of government.

### *The Origins of the Chapter Nine Institutions*

The idea of creating independent institutions outside of

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5. See generally Bruce Ackermann, *The New Separation of Powers* 113 HARV. L. REV. 633 (2000).

the traditional three branches of government in South Africa had its origins in the democratic transition. Early on in the negotiations towards a democratic transition, the idea of creating an “ombudsman” to provide an avenue for complaints and for the investigation of malfeasance and maladministration in the state and its bureaucracy, and even to protect fundamental rights, was reflected in the proposals being made by the different parties. The scope and nature of such an office remained, however, a matter of debate.<sup>6</sup> Furthermore, the idea of creating independent governance institutions as a means of addressing the high level of distrust between the parties and to enable specific aspects of the transition was also being discussed.<sup>7</sup> The African National Congress (ANC) Constitutional Committee’s working document on “A bill of rights for a new South Africa,” published in 1990 specifically included the establishment of an independent ombudsperson as part of the section on the enforcement of rights “[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.”<sup>8</sup>

As the country prepared for its first democratic elections, questions arose about the management of the elections. Up until 1990, the government had organized and managed all elections. However, serious concerns were raised about the legitimacy of the first democratic election if the apartheid regime was to conduct it, especially if conflict were to arise over the results. On the one hand, the liberation movement sought to resolve this problem by calling for the installation of an Interim Government, as proposed in the internationally sanctioned Harare Declaration. On the other hand, the

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6. See S. AFR. LAW COMM’N, REPORT ON CONSTITUTIONAL MODELS Ch. 23 (1991).

7. See HEINZ KLUG, CONSTITUTING DEMOCRACY: LAW, GLOBALIZATION AND SOUTH AFRICA’S POLITICAL RECONSTRUCTION 119–21 (2000).

8. ANC CONSTITUTIONAL COMMITTEE, A BILL OF RIGHTS FOR A NEW SOUTH AFRICA 36–37 (1990).

incumbent regime argued that there could be no handover of power before a negotiated solution, insisting on legal continuity between the existing state and any future legal order. Faced with this irresolvable conflict, the ANC embraced the option of creating a number of independent bodies to oversee the transition to democracy, including an independent electoral commission to manage the election itself.

The democratic transition was thus facilitated in the period leading up to the first democratic election by the establishment of three independent institutions: the Independent Electoral Commission, the Independent Media Commission, and the Independent Broadcasting Authority.<sup>9</sup> The embrace of the concept of transitional mechanisms and the legal institutions it spawned fit well in this period with the global emphasis on expanding democratic constitutionalism. It also set the stage for the subsequent embrace of the idea of “state institutions supporting constitutional democracy” that became an important innovation in South Africa’s 1996 ‘final’ Constitution. Chapter Nine of the Constitution establishes six separate 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 Electoral Commission. These institutions are part of a constitutional scheme that includes structural and institutional elements designed to fulfill the goals of effective democratic governance. Most significant to the problem of accountability, however, are the three “integrity institutions”: the Public Protector, the Auditor General, and the Electoral Commission.

While a key structural feature of the Constitution is the

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9. 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, 279 (2007).

way in which power is both distributed and integrated in a system of governance that is designed to both avoid the paralysis of a rigid separation of powers and ensure accountability by providing multiple avenues for democratic and legal contestation, it is the “integrity institutions” that have come to play a central role, together with the Constitutional Court, in these processes. In addition to the distribution and integration of power in South Africa’s “federal” system of cooperative government, it has been the integrity institutions that have been central to struggles over accountability. Ensuring clean elections, fiscal integrity, transparent procurement, and just administration are constant sources of conflict at all levels of government as the country grapples with the enormous task of addressing the crippling legacies of colonialism and apartheid. The Constitutional Assembly 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 Nine as “State Institutions Supporting Constitutional Democracy.” At one end of the institutional spectrum, the Electoral Commission, the Auditor General, and the Public Protector are institutions primarily designed to ensure good governance today, while on the other end, the Human Rights Commission and the Commissions for Gender Equality and for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities look both to the present, yet also have an aspirational mandate in that they are tasked with furthering the constitutional promise of achieving a more equitable and sustainable society.

While these institutions have not always been effective in performing their mandates during the first quarter century of democracy in South Africa, 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 five-yearly electoral contests or high-

profile legal disputes. 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.”<sup>10</sup> Despite internal conflicts and complaints about limited resources, the Chapter Nine 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.

At the same time, the proliferation of new institutions raises important questions about their institutional authority and place in the constitutional system. What exactly is the role of each of these institutions in the achievement of democratic constitutionalism and how does it fit within the realm of the separation of powers? Whether it is questions of appropriate investigative capacities, reporting and prosecutorial functions, or the appointment and institutional independence of officials within these institutions, the question of their constitutional status and relationship with the other branches or institutions of government quickly implicates the allocation and separation of powers within the constitutional system. Nowhere has this question been more salient than in cases challenging malfeasance within the dominant political party. Along with a complex institutional structure and an active civil society, contestation over the scope of the constitutional powers of these institutions, and especially that of the Public Protector, has brought these questions to the center of the struggle over the separation of powers and accountable government.

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10. S. AFR. CONST., 1996 ch. 9, § 181(2).

*The Constitutional Court's interpretation of the Separation of powers*

The Constitutional Court has repeatedly stated that the history of the country and the Constitution requires a particularly South African understanding of the separation of powers. In October 2005, then Constitutional Court Justice Kate O'Regan delivered the F W de Klerk Memorial Lecture; she took the opportunity to discuss the Court's emerging separation of powers doctrine, concluding that a variety of principles could be identified and "while clearly not absolute, the doctrine . . . rests on a functional understanding of the powers and requires that each institution's character and competence to perform these powers be protected."<sup>11</sup> In applying the doctrine, Justice O'Regan argued, the courts "must remain sensible to the legitimate constitutional interests of the other arms of government and seek to ensure that the manner of their intrusion, while protecting fundamental rights, intrudes as little as possible in the terrain of the executive and legislature." Recognizing that there is no "absolute separation of powers" the Constitutional Court's doctrine holds that "within the separation of powers each branch [of government] has a specific mandate"<sup>12</sup> and that the nub of the separation of powers issue remains the interaction between these distinct institutions, functions and powers.

Five years later, Justice Dikgang Moseneke noted in a Constitutional Court judgment that the "Constitution makes no express provision for separation of powers"<sup>13</sup> but argued

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11. Kate O'Regan Checks and Balances: Reflections on the Development of the Doctrine of Separation of Powers Under the South African Constitution, F W De Klerk Memorial Lecture (Oct. 10, 2005), in 8 POTCHEFSTROOM ELECTRONIC L.J., no. 1, 2005, at 120, 145.

12. Sebastian Seedorf & Sanele Sibanda, *Separation of Powers*, in 1 CONSTITUTIONAL LAW OF SOUTH AFRICA § 12-3 (Stu Woolman et al., eds., 2d ed. 2013).

13. *Int'l Trade Admin. Comm'n v. SCAW S. Afr. (Pty) Ltd.* (4) SA 618 (CC) para. 90 (S. Afr.).

that “[i]t is now clear from a steady trickle of judgments that the doctrine of separation of powers is part of our constitutional architecture” and that the “Courts are carving out a distinctively South African design of separation of powers.”<sup>14</sup> This design, he argued, “must sit comfortably with the democratic system of government we have chosen” and “must find the careful equilibrium that is imposed on our constitutional arrangements by our peculiar history.”<sup>15</sup> Describing the design, Justice Moseneke noted that it must both “give due recognition to the popular will as expressed legislatively” and “ensure effective executive government to minister to the endemic deprivation of the poor and marginalized” but at the same time, “all public power must be under constitutional control.”<sup>16</sup> This requires that while “[e]ach arm of the state must act within the boundaries set[,]” it is for the courts to “determine whether unauthorized trespassing by one arm of the state into the terrain of another has occurred.”<sup>17</sup>

The effect of this “constitutional obligation” is that the courts will regularly “confront the question of whether to venture into the domain of other branches of government and the extent of such intervention[,]” thus requiring the courts to “observe the limits of their own power.”<sup>18</sup> As a result, Justice Moseneke argued “[t]he primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution.”<sup>19</sup> Furthermore, in performing this function the courts are restrained to the extent that “specific powers and functions

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14. *Id.* para. 91.

15. *Id.*

16. *Id.*

17. *Id.* para. 92.

18. *Id.* para. 93.

19. *Id.* para. 95.

[are entrusted] to a particular branch of government” by the Constitution or by valid legislation.<sup>20</sup> Justice Moseneke goes on to warn that if the courts were to “usurp that power or function by making a decision of their preference” they would in effect “frustrate the balance of power implied in the principle of separation of powers”.<sup>21</sup>

As South African academic commentators Sibastian Seedorf and Sanele Sibanda argue, “understanding the nature of each branch’s separate (or pre-eminent) domain is as important for the theoretical and practical elaboration of the separation of powers principle as the acknowledgement of mutual checks and balances.”<sup>22</sup> From this perspective, they argue that “the principle of pre-eminent domain protects the core functions and powers of each branch of government against intrusions from outside, while other intrusions are treated as checks and balances.”<sup>23</sup> Even if the notion that “there are certain matters that are pre-eminently within the domain of one or other of the arms of government”<sup>24</sup> provides a useful guideline in the allocation of constitutional authority among different institutions, this does not resolve the more delicate question: what is the extent of the constitutional powers of the courts who are called upon to police these boundaries?

The Constitutional Court’s jurisprudence also demonstrates how the structural features of the constitution and hence the notion of a separation of powers evolves through political and legal contestation for institutional independence and integrity among the different spheres of government. In the case of *Van der Merwe v. Road Accident Fund*, the Court noted that in the “proceedings before the High Court[,]” the relevant government Minister was “[f]or

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20. *Id.*

21. *Id.* para. 95.

22. Seedorf & Sibanda *supra* note 12, § 12–39.

23. *Id.*

24. *Id.*

some obscure reason” not a party before the court<sup>25</sup> and then pointed out that it had repeatedly emphasized that as a matter of fairness in litigation “when the constitutional validity of an act of parliament is impugned, the Minister responsible for its administration must be a party to the proceedings inasmuch as his or her views and evidence tendered ought to be heard and considered.”<sup>26</sup> Placing this in the context of the separation of powers, Justice Moseneke, writing for the Court, stated that “[o]rdinarily courts should not pronounce on the validity of impugned legislation without the benefit of hearing the state organ concerned on the purpose pursued by the legislation, its legitimacy, the factual context, the impact of its application, and the justification, if any, for limiting an entrenched right.”<sup>27</sup> Unlike those who argue that the separation of powers implies the co-equal right of the different coordinate branches of government to determine their specific powers, in the South African context, the Constitutional Court has the constitutional duty to make the final determination. The clear implication is that a court should not pronounce on the decision of another branch of government without first giving the relevant branch an opportunity to justify the decision or action as within its understanding of the constitution.

Respect for the views of state organs is evident too in the rules of the Constitutional Court which require the joinder of the relevant state authorities in confirmation proceedings; Rule 5(2) explicitly provides that the Constitutional Court “shall not make an order of constitutional invalidity of legislation unless the authority concerned is joined as a party to the proceedings.”<sup>28</sup> This concern, that there be respect for the role of other branches of government, takes on even

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25. *Van der Merwe v. Rd. Accident Fund* 2006 (4) SA 230 (CC) para. 6 (S. Afr.).

26. *Id.* para. 7.

27. *Id.*

28. *Id.* para. 8.

greater urgency when dealing with the President of the Republic. In *Masethla v. President of the Republic of South Africa* the former Director-General of Intelligence, Billy Masethla, claimed that his dismissal from his post was done without legal authority and requested that the Constitutional Court reinstate him to his position.<sup>29</sup> While there was some debate on the Constitutional Court about the source of legal authority relied upon by President Thabo Mbeki in dismissing Masethla, the Court's opinion made it clear that given the context of the relationship between the President and the head of the intelligence services, it was appropriate to imply the power to dismiss as a necessary component of the power to appoint since the President's trust and confidence in the head of intelligence is essential to the constitutional structure and executive tasks involved.<sup>30</sup> This case was not explicitly discussed as a separation of powers issue, nor was the focus on the lack of formal legal rules governing the relationship between the President and the Director-General of Intelligence. Instead, the Court focused on the factual context in which the President could not be expected to rely on information coming from a person in whom the President no longer had full confidence.<sup>31</sup>

In *Van Abo v. President of the Republic of South Africa*, the Court was asked to review the government's refusal to take up a claim for diplomatic protection by a South African citizen against the government of Zimbabwe for the violation of his property rights.<sup>32</sup> In this case the government chose not to appeal a High Court order that the government should intervene diplomatically on Mr. Van Abo's behalf but instead objected to the order's determination that the President had failed to perform his constitutional obligations. The

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29. *Masethla v. President of the Republic of South Africa*, 2008 (1) SA 566 (CC) paras. 1–2 (S. Afr.).

30. *Id.* para. 68.

31. *See id.*

32. *Von Abo v. President of South Africa* 2009 (5) SA 345 (CC) paras. 1–2 (S. Afr.).

Constitutional Court's decision in *Van Abo* applied a contextual approach to the question of presidential conduct, holding that while the Department of Foreign Affairs stated it was in fact engaged in diplomatic activities on Van Abo's behalf, there was no relevant Presidential conduct in this case.<sup>33</sup> The Court went on to point out that "[m]any of the powers and obligations in section 84(2) [of the Constitution] vest in the President as Head of State and head of the national executive."<sup>34</sup> However, it continued by stating that, while these are functions the President is constitutionally required to perform, "[o]rdinarily they would be matters that have important political consequences [which calls] for a measure of comity between the judicial and executive branches of the state."<sup>35</sup> Applying this approach to the case, the Court held that the responsibility for foreign affairs is an executive function and therefore the collective responsibility of the executive and not presidential conduct "within the meaning of section 172(2)(a) of the Constitution."<sup>36</sup>

The interaction between appropriate comity and the exercise of the Court's jurisdiction arose again in a case brought by the leader of the opposition in Parliament, Lindiwe Mazibuko, who claimed that the Speaker of the House and the ruling party were preventing the opposition from tabling a motion of no confidence in the President.<sup>37</sup> Noting that "the importance of a motion of no confidence to the proper functioning of our constitutional democracy cannot be gainsaid[,]"<sup>38</sup> the Court argued that "[t]he primary purpose of a motion of no confidence is to ensure that the President and the national executive are accountable to the Assembly made up of elected representatives" and therefore

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33. *See id.* para. 43.

34. *Id.* para. 37.

35. *Id.*

36. *Id.* para. 53.

37. *Mazibuko v. Sisulu* 2013 (6) SA 249 (CC) paras. 1 & 3 (S. Afr.).

38. *Id.* para. 21.

“a motion of no confidence plays an important role in giving effect to the checks and balances element of our separation-of-powers doctrine.”<sup>39</sup> Disagreeing with the argument advanced by the Speaker “that the exercise of jurisdiction would offend the separation of powers doctrine in light of the ongoing negotiations within the Assembly[,]”<sup>40</sup> the Court stated that “[a]n order of constitutional invalidity would not be invasive because it is declaratory in kind” and thus the Constitutional Court “would be properly requiring the Assembly to remedy the constitutional defect that threatens the right of members of the Assembly” rather than “formulating Rules for the Assembly”.<sup>41</sup> In his opinion for the Court, Justice Moseneke made it clear that there is a distinction between a declaration of invalidity, which is a decision clearly within the core function of the Constitutional Court, and the formulation of the rules of parliamentary procedure, which are within the domain of the legislature. A declaration of invalidity in this context respects the separation of powers in that the Constitutional Court is duty bound to declare if any action is in violation of the constitution—however, it does not violate the separation of powers or the comity due to the legislature in that Parliament is left alone to reform its own rules to correct the constitutional defect.<sup>42</sup>

Concern that the judiciary remain cognizant of the limits of its own authority in the context of the separation of powers is especially evident in jurisprudence on the granting of temporary restraining orders (TROs). This issue was centrally addressed in the e-tolling case, *National Treasury v. Opposition to Urban Tolling Alliance* (OUTA), where the impact of the High Court’s interim order was that the

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39. *Id.*

40. *Id.* para. 67.

41. *Id.* para. 71.

42. *Cf.* Firoz Cachalia, *Judicial Review of Parliamentary Rulemaking: A Provisional Case for Restraint* 60 N.Y.L. SCH. L. REV. 379 (2015–16).

“National Executive [was] prevented from fulfilling its statutory and budgetary responsibilities for as long as the interim order [was] in place.”<sup>43</sup> Furthermore, the order compelled the government to re-allocate otherwise budgeted funds thus having “a direct and immediate impact on separation of powers as well as ongoing irreparable financial and budgetary harm.”<sup>44</sup> In its analysis of the question of temporary restraining orders, the Court pointed out that “separation of powers is an even more vital tenet of our constitutional democracy” empowering the courts to ensure that “all branches of government act within the law.”<sup>45</sup> However, in his judgment, Justice Moseneke immediately stated that “courts in turn must refrain from entering the exclusive terrain of the Executive and the Legislative branches of Government unless the intrusion is mandated by the Constitution itself.”<sup>46</sup>

Addressing the specifics of the litigation and the High Court’s decision to grant an interim order, the Court held that it is necessary, when probing the extent that the interim order “will probably intrude into the exclusive terrain of another branch of Government[,]” that the courts consider “what may be called separation of powers harm”<sup>47</sup> and that “a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant’s case may be granted only in the clearest of cases[.]”<sup>48</sup> While the Court did not define the ‘clearest of cases,’ it did note that an important consideration would be if the potential harm involves the breach of fundamental rights protected by the Bill of Rights. Since this case did not involve a fundamental

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43. *Nat’l Treasury v. Opposition to Urban Tolling All.* 2012 (6) SA 223 (CC) para. 27 (S. Afr.).

44. *Id.*

45. *Id.* para. 44.

46. *Id.*

47. *Id.* para. 47.

48. *Id.*

right, the opinion went on to discuss the problem of the separation of powers in the context of an interim order more generally and cited the Constitutional Court's statement in *Doctors for Life* where the Court warned that:

Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric.<sup>49</sup>

Despite this stern warning, the Constitutional Court noted that “this does not mean that an organ of state is immunised from judicial review only on account of separation of powers.”<sup>50</sup> In a situation where a Court finds that the organ of state has acted outside the law, then it would be appropriate to grant an interdict since “[t]he exercise of all public power is subject to constitutional control” and the decisions under review “would in effect be contrary to the law and thus void.”<sup>51</sup> However, the Court later emphasized that despite the difficulty courts might have in making some policy laden and particularly polycentric decisions, when a court considers “the grant of an interim interdict against the exercise of power within the camp of Government [it] must have the separation of powers consideration at the very forefront” of its analysis.<sup>52</sup>

#### CORRUPTION, STATE CAPTURE AND THE UNDERMINING OF THE CONSTITUTIONAL ORDER

Parliament's first major oversight challenge occurred in

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49. *Id.* para. 63.

50. *Id.* para. 64.

51. *Id.*

52. *Id.* para. 68.

early 1996 when it was revealed in the press that the Department of Health was spending R14.2 million on a musical that was to tour the country providing education on the growing HIV/AIDS pandemic, an expenditure that represented a significant portion of the health department's HIV/AIDS prevention efforts. The musical itself, 'Sarafina II' was criticized for failing to impart a clear public health message. But the scandal focused on the high costs of production—including the salaries, luxurious facilities, and, what was seen as, the inappropriate grandeur of the production itself. When the Portfolio Committee first called on the Minister of Health to justify this expenditure, she purportedly refused to attend the hearing. After the government realized the Minister's refusal to attend would be politically embarrassing, her appearance before the committee merely demonstrated how new the concept of oversight was for the legislature. First, the Members of Parliament (MPs) relied mainly on press reports to challenge the Minister, instead of demanding access to the official documentation, which was their right. Second, the ANC members remained extraordinarily passive, caught between the exercise of their parliamentary duty and loyalty to the government. As one ANC member later admitted, "It was still early days. We did not know how to deal with something like this. Perhaps we should be condemned for it, perhaps we should be forgiven, but we were more concerned with damage control than we were with parliamentary accountability."<sup>53</sup> The Committee's failure was further highlighted when the Public Protector issued a report in June 1996 that documented the mismanagement of tender procedures and the "unauthorized expenditure of foreign aid" in this project.<sup>54</sup>

Parliament's ability to act as an effective watchdog was

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53. RICHARD CALLAND, *THE FIRST 5 YEARS: A REVIEW OF SOUTH AFRICA'S DEMOCRATIC PARLIAMENT* 36 (1999).

54. *Id.* at 35.

further undermined by its own dalliance in addressing a pattern of systematic abuse by MPs from across the political spectrum. The first inklings of what would come to be known as “travelgate” surfaced in the year 2000, when Speaker of Parliament, Frene Ginwala, publicly rebuked two MPs for abusing travel vouchers granted annually in a check-book type format to allow MPs to travel between Parliament in Cape Town and their constituencies or homes around the country.<sup>55</sup> By the time the scandal unraveled in 2007 it embroiled more than 100 MPs who were forced to resign, plead guilty and enter into plea-bargains to repay millions of Rands to Parliament for fraudulent claims; or were brought to trial and convicted as a result of their misuse or even the sale of their parliamentary travel allocations for private benefit. Even more damaging has been the fact that “senior ANC leaders and Cabinet members involved have, in most instances, quietly paid back the money that was defrauded from Parliament.”<sup>56</sup> As a result, the integrity of the institution was severely compromised since the toleration of corrupt practices within Parliament made it harder to claim the high ground when policing similar practices in the Executive.

While Parliament has always been the primary source of formal law-making in South Africa, it has historically never managed to serve very effectively as a watchdog. This may, of course, be attributed to a number of both structural and conventional conditions. First, as a fused-system, in which the executive is part of a legislature dominated by the ruling party, it would be a surprise if it really was able to hold the government accountable in the face of party solidarity. Second, the parliamentary tradition has long seen major problems of accountability or disaster channelled into government-appointed Commissions of Enquiry that are

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55. ANDREW FEINSTEIN, *AFTER THE PARTY: A PERSONAL AND POLITICAL JOURNEY INSIDE THE ANC* 241–42 (2007).

56. *Id.* at 242.

called upon to investigate and address questions of government failure and malfeasance. At Westminster, the parliamentary custom of ministerial responsibility—and quick, quiet resignation at the slightest hint of impropriety—has historically narrowed the institutional space for robust investigation or confrontation of a ruling party and its conduct in government. Instead, a government may fall or call an early election, but even in London, there is an increasing tendency for the executive to brave its way through by actively attempting to “spin” public opinion while abandoning the custom of taking formal responsibility and accepting the resignation of those identified as culprits. Instead, governments are increasingly leaving the process of managing political and public service malfeasance to the courts through various processes of judicial review—either administrative law or, where appropriate, constitutional review.

Even if parliamentary systems have never served as effective watchdogs, given the dominance of the ruling party and members of government within the institution, this does not mean that parliamentarians do not at times take up this role with some forcefulness. South Africa’s pre-1994 apartheid Parliament did not, however, have such a tradition. Instead, the colonial and apartheid regimes that governed until 1994 maintained an “entire social edifice . . . structured to enrich a powerful few at the expense of the majority.”<sup>57</sup> In the period between 1948 and 1994, Parliament served as a rubber stamp for the decisions of the National Party and executive. There were “many pressure groups, such as the wine farmers . . . who used their close proximity to Parliament to ‘take people to parties’ and provide them with a quota of wine annually[.]”<sup>58</sup> Furthermore, the increasing secrecy of the apartheid regime

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57. DAN O’MEARA, *FORTY LOST YEARS* 231 (1996).

58. HENNIE VAN VUUREN, *INST. FOR SEC. STUDIES, APARTHEID GRAND CORRUPTION* 25 (2006).

and the expansion of covert operations after 1976—as well as the “history of routinised corruption”<sup>59</sup> in central government departments and the “homeland” administrations—provide ample evidence for the following claim by Frene Ginwala, the Speaker of South Africa’s first democratic Parliament:

[I]n South Africa we inherited an intrinsically corrupt system of governance . . . To survive, it created a legal framework that was based on and facilitated corruption. 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.<sup>60</sup>

In contrast to this history, South Africa’s first truly democratic legislature seemed in its early years to be committed to diligently exercising its duty to act as a public watchdog. The relative strength of the legislature during these early years may be attributed to two factors. First, the initial post-apartheid Parliament, established under the interim Constitution, served simultaneously as the national legislature and as the Constitutional Assembly responsible for writing South Africa’s final Constitution. Given this historic Constitution-making responsibility, it is no surprise that many of the most prominent politicians and anti-apartheid activists, from across three generations, were nominated and elected to serve in this first Parliament. Second, these individuals were held in high esteem and wielded enormous political authority within the ANC, which meant that there was a *de facto* as well as formal distribution of power between the legislature and the executive. This balance was also enabled by Nelson Mandela’s explicit plea that even he, as President, be held accountable by the collective leadership of the ANC.

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

60. Frene Ginwala, Speaker of Parliament, Remarks to the Opening Session at Global Forum II, The Hague (May 21, 2001), *as reprinted in* VAN VUUREN, *supra* note 58, at 5–6.

The confidence of these parliamentarians was evident in the early practice of the parliamentary committees, which would ask probing questions of high-ranking civil servants and Ministers and, at times, take them to task. At the same time, however, the committees lacked the resources to adequately research and investigate issues. This problem was exacerbated by the historic physical separation of government: the executive and administrative departments were located in Pretoria, while the legislature was situated more than one thousand kilometers away in Cape Town. In a short time, however, the tendency of the executive to recruit many of the most effective politicians into the Cabinet and the tendency of Committee Chairs to use their positions to promote their political careers meant that those members who were within the government increasingly dominated Parliament. The ruling party became correspondingly more centralized and concerned with protecting the image of the government rather than raising questions about the implementation of policy or the integrity of government programs and officials.

Apart from Parliament, there are a number of legal and constitutional institutions that have the duty and authority to provide accountability for individuals and government offices engaged in corruption and maladministration.<sup>61</sup> First among these is the criminal law which, aside from a range of anti-corruption statutes, includes specialized institutions whose task it is to address organized crime and corruption. The disbandment of the original Directorate of Special Operations (known as the “scorpions”) sparked a series of court cases challenging the government’s anti-corruption efforts; this saw the Constitutional Court recognize that the government has an obligation “arising out of the Constitution . . . to establish effective mechanisms for

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61. See generally Heinz Klug, *Accountability and the Role of Independent Constitutional Institutions in South Africa’s Post-Apartheid Constitutions*, 60 N.Y.L. SCH. L. REV. 153 (2015–2016).

battling corruption.”<sup>62</sup> In addition to the criminal law, the post-apartheid constitutional order creates a number of “integrity institutions” to ensure transparency and public accountability for government spending and maladministration. It was after the Public Protector, Thuli Madonsela, issued her report on the “security upgrade” at President Zuma’s rural home at Nkandla in March 2014, that the question of that institution’s constitutional role and independence headed to the courts.

#### RESISTING STATE CAPTURE

As far as some in the ruling party were concerned, the Public Protector was responsible to Parliament, which they felt had the right to both question the activities of the institution as well as decide whether the decisions of the Public Protector should be implemented. In support of their claim they pointed to section 181(5) of the Constitution which states that the Public Protector, along with the other Chapter Nine institutions is “accountable to the National Assembly.” In contrast to this broad claim of parliamentary authority, the Public Protector has, in each annual report since its founding, pointed out that section 182(1) empowers the institution to investigate, report, and “take appropriate remedial action.” Finally, the Public Protector has pointed to section 181(2) of the Constitution which states that the Chapter Nine “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, favor or prejudice.”<sup>63</sup>

The first opportunity for the courts to address this question came when the official political opposition, the Democratic Alliance, brought a suit demanding a court order that Hlaudi Motsoeneng, the Chief Operations Officer (COO)

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62. *Glenister v. President of the Republic of South Africa (Glenister II)* 2011 (3) SA 347 (CC) para. 84 (S. Afr.).

63. S. AFR. CONST., 1996, § 181(2).

of the South African Broadcasting Corporation (SABC)—the government broadcaster—be immediately suspended.<sup>64</sup> Their claim was based on the Report of the Public Protector into allegations of maladministration, systemic corporate governance deficiencies, and abuse of power by the COO as well as a claim that his appointment by the Board of the SABC was irregular.<sup>65</sup> While the Western Cape High Court ordered that Motsoeneng be suspended and that the SABC Board institute disciplinary proceedings against him,<sup>66</sup> the court's decision on the powers of the Public Protector led to some confusion. 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.<sup>67</sup> On the other hand, Judge Alvin 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.<sup>68</sup> Using the Supreme Court of Appeals and Constitutional Court's earlier decisions analogizing the Public Protector to the position of an ombudsman in other jurisdictions,<sup>69</sup> Judge Schippers argued 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.<sup>70</sup> This decision, an exercise of public power in its own right, would be subject to review by the Courts as would any decision by the Public

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64. *Democratic All. v. S. Afr. Broad. Corp.*, 2015 (1) SA 551 (WCC) para. 1 (S. Afr.).

65. *Id.* paras. 4–5.

66. *Id.* paras. 88, 97.

67. *Id.* para. 82.

68. *Id.* para. 51.

69. *Id.* paras. 50–74.

70. *Id.* para. 74.

Protector that may be challenged by those affected by the Public Protectors findings or recommendations.<sup>71</sup>

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,”<sup>72</sup> and the seeming inability of the Public Protector to ensure that the institutions findings and recommendations were addressed by the government lay at the heart of the separation of powers question that the High court’s judgment in *Democratic Alliance v. South African Broadcasting Corporation* did not effectively resolve. While the court did 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,”<sup>73</sup> its decision to equate the Public Protector with the British ombudsman failed to acknowledge that the legislative authority of the ombudsman in the United Kingdom is legally distinct from the constitutional status enjoyed by the Chapter Nine institutions and the Public Protector in particular. Even if the Supreme Court of Appeal and the Constitutional Court analogized the Public Protector to similar ombudsmen institutions in other jurisdictions, these courts had not yet directly addressed the question of how the constitution imagines the role of the Chapter Nine bodies as “state institutions supporting constitutional democracy.”<sup>74</sup> The difficulty in managing the relationship between the Public Protector and the government became acutely obvious when the Public Protector sought clarity over to whom she should submit her report on the expenditures on the President’s home at Nkandla, since the Report was in part

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71. *See id.* para 71.

72. S. AFR. CONST., 1996, § 181(3).

73. *Democratic All.*, (1) SA 551, para. 99.

74. S. AFR. CONST., 1996, ch. 9.

an investigation into benefits received by the President.<sup>75</sup> 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 Nine institutions. Even if we conceive of Chapter Nine 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 first the Supreme Court of Appeal and then the Constitutional Court took up in both the *SABC* appeal and the *Economic Freedom Fighters* case.

When the case reached the Supreme Court of Appeal, (SCA) the Constitutional Court upheld the decision of the High Court requiring the SABC to subject its Chief Operating Officer to a disciplinary hearing and noted that “[i]n modern democratic constitutional States, in order to ensure governmental accountability, it has become necessary for the guards to require a guard. And in terms of our constitutional scheme, it is the Public Protector who guards the guards.”<sup>76</sup> The SCA then rejected the High Court’s analogizing of the public protector to the British Parliamentary ombudsperson, noting that “the powers conferred on the Public Protector in terms of § 182(1)(c) of the Constitution far exceeded those of similar institutions in comparable jurisdictions.”<sup>77</sup> Responding to the government counsel’s suggestion that the powers of the Public Protector are defined by legislation rather than the Constitution, the SCA argued that “[t]he problem with that suggestion is that the Constitution is the primary source and it stipulates and refers to ‘additional’ powers to be prescribed by national

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75. PUBLIC PROTECTOR, SECURE IN COMFORT 426 (2014).

76. *S. Afr. Broad. Corp. v. Democratic All.* 2015 (4) All SA 719 (SCA) para. 3 (S. Afr.).

77. *Id.* para. 43.

legislation.”<sup>78</sup> Thus the suggestion that the Public Protector’s powers are legislatively defined is “contrary to the constitutional and legislative scheme outlined above and would have the effect of the tail wagging the dog.”<sup>79</sup>

Declaring the government’s establishment of a parallel process to “investigate the veracity of the findings and recommendations of the Public Protector . . . [to be] impermissible,”<sup>80</sup> the SCA argued that the “Public Protector cannot realise the constitutional purpose of her office if other organs of State may second-guess her findings and ignore her recommendations.”<sup>81</sup> Summing up its judgement, the SCA noted that:

the office of the Public Protector, like all Chapter Nine institutions, is a venerable one. Our constitutional compact demands that remedial action taken by the Public Protector should not be ignored. State institutions are obliged to heed the principles of co-operative governance as prescribed by § 41 of the Constitution. Any affected person or institution aggrieved by a finding, decision or action taken by the Public Protector might, in appropriate circumstances, challenge that by way of a review application. Absent a review application, however, such person is not entitled to simply ignore the findings, decision or remedial action taken by the Public Protector.<sup>82</sup>

Referring back to the decision of the High Court, the SCA drew a significant distinction between the status of the Public Protector under the 1993 interim Constitution and the final 1996 Constitution; it argued that the suggestion that the Public Protector had merely the power to recommend “appears to be more consistent with the language of the Interim Constitution and is neither fitting nor effective, denudes the office of the Public Protector of any

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78. *Id.*

79. *Id.*

80. *Id.* para. 47.

81. *Id.* para. 52.

82. *Id.* para. 53.

meaningful content, and defeats its purpose.”<sup>83</sup> Noting that all parties to the litigation found the metaphor of a watchdog “a useful metaphor for the Public Protector” the SCA concluded that “this watchdog should not be muzzled.”<sup>84</sup>

As conflict over the role of President Zuma in the corrupt practices of the Gupta family grew, different political parties, non-government organizations, and the President himself increasingly turned to the courts. First, there were a series of cases challenging the authority of the Public Protector, particularly with respect to that institution’s remedial powers. Second, there was a set of cases in which the opposition parties in Parliament approached the Constitutional Court in an attempt to force the ruling party in Parliament to hold the President accountable. Finally, there was a wave of legal challenges to the legitimacy of executive appointments and actions taken in the appointment, suspension and buying-out of the leadership of those government institutions that have the responsibility to investigate corruption and official malfeasance.

Unlike the *SABC* case, which wound its way up through the lower courts, the conflict over the failure of President Zuma to “pay back the money” as required by the Public Protector’s report on the public money spent on his Nkandla residence and Parliament’s decision that he owed nothing brought the question of the Public Protector’s powers directly to the Constitutional Court.<sup>85</sup> In its dramatic decision—read out on national television by Chief Justice Mogoeng Mogoeng—the Constitutional Court linked the response to the Public Protector’s report to the Constitution’s foundational commitment to the rule of law, arguing that:

One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and

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83. *Id.*

84. *Id.*

85. *Econ. Freedom Fighters v. Speaker of the Nat’l Assembly* 2016 (3) SA 580 (CC) para. 2 (S. Afr.).

resources that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason, public office-bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck.<sup>86</sup>

Discussing the institution of the Public Protector, the Court noted that to achieve its objectives, “it is required to be independent and subject only to the Constitution and the law.”<sup>87</sup> This requirement, the Court stated, “would not ordinarily be required of an institution whose powers or decisions are by constitutional design always supposed to be ineffectual. Whether it is impartial or not would be irrelevant if the implementation of the decisions it takes is at the mercy of those against whom they are made.”<sup>88</sup> The Court concluded that that the “constitutional safeguards in section 181 would also be meaningless if institutions purportedly established to strengthen our constitutional democracy lacked even the remotest possibility to do so.”<sup>89</sup>

Detailing the constitutional place of the Public Protector, the Court argued that “[i]n the execution of her investigative, reporting or remedial powers, she is not to be inhibited, undermined or sabotaged”<sup>90</sup> and “[w]hen all other essential requirements for the proper exercise of her power are met, she is to take appropriate remedial action.”<sup>91</sup> Justifying its conclusions in the name of strengthening constitutional democracy and “breathing life into the remedial powers of the Public Protector,” the court held that “she must have the resources and capacities necessary to effectively execute her

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86. *Id.* para. 1.

87. *Id.* para. 49.

88. *Id.* para. 49.

89. *Id.*

90. *Id.* para. 54.

91. *Id.*

mandate[.]”<sup>92</sup> Rooting the Public Protector’s powers within the Constitution, the Court made clear that legislation is not able to “eviscerate” the powers provided by the Constitution as the “power to take remedial action is primarily sourced from the supreme law itself. And the powers and functions conferred on the Public Protector by the Act owe their very existence or significance to the Constitution.”<sup>93</sup>

At the same time, the Constitutional Court recognized that the “Public Protector’s power to take appropriate remedial action is wide but certainly not unfettered” and that the “remedial action is always open to judicial scrutiny.”<sup>94</sup> Furthermore, “[w]hen remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.”<sup>95</sup> The reason for this conclusion the Court argued is because “our constitutional order hinges also on the rule of law. No decision grounded on the Constitution or law may be disregarded without recourse to a court of law. To do otherwise would ‘amount to a licence to self-help.’”<sup>96</sup> According to the Court:

The rule of law requires that no power be exercised unless it is sanctioned by law and no decision or step sanctioned by law may be ignored based purely on a contrary view we hold. It is not open to any of us to pick and choose which of the otherwise effectual consequences of the exercise of constitutional or statutory power will be disregarded and which given heed to. Our foundational value of the rule of law demands of us, as a law-abiding people, to obey decisions made by those clothed with the legal authority to make them or else approach courts of law to set them aside, so we may

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92. *Id.*

93. *Id.* para. 64.

94. *Id.* para. 71.

95. *Id.* para. 73.

96. *Id.* para. 74.

validly escape their binding force.”<sup>97</sup>

In conclusion the Court held that due to his manifest failure in disregarding the “remedial action taken against him by the Public Protector in terms of her constitutional powers” as well as his failure to “assist and protect the Public Protector so as to ensure her independence, impartiality, dignity and effectiveness by complying with her remedial action” the President has “failed to uphold, defend and respect the Constitution as the supreme law of the land.”<sup>98</sup>

Addressing the actions of the national legislature, the Court was careful to explain its own role within the checks and balances implicit in the constitutional structure. Noting that it “falls outside the parameters of judicial authority to prescribe to the National Assembly how to scrutinise executive action,”<sup>99</sup> the Court argued that the “mechanics of how to go about fulfilling these constitutional obligations is a discretionary matter best left to the National Assembly.”<sup>100</sup> By comparison, the role of the Court, Chief Justice Mogoeng argued, “is a much broader and less intrusive role. And that is to determine whether what the National Assembly did does in substance and in reality amount to fulfilment of its constitutional obligations. That is the sum-total of the constitutionally permissible judicial enquiry to be embarked upon.”<sup>101</sup> Describing these as “some of the ‘vital limits on judicial authority and the Constitution’s design to leave certain matters to other branches of government[,]”<sup>102</sup> he concluded that “[c]ourts should not interfere in the processes of other branches of government unless otherwise authorised

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97. *Id.* para. 75.

98. *Id.* para. 83.

99. *Id.* para. 93.

100. *Id.*

101. *Id.*

102. *Id.* (quoting *Doctors for Life Int’l v. Speaker of the Nat’l Assembly* 2006 (6) SA 416 (CC) para. 37 (S. Afr.)).

by the Constitution.”<sup>103</sup> However he went on to state that

[c]ourts ought not to blink at the thought of asserting their authority, whenever it is constitutionally permissible to do so, irrespective of the issues or who is involved. At the same time, and mindful of the vital strictures of their powers, they must be on high alert against impermissible encroachment on the powers of the other arms of government.”<sup>104</sup>

Despite these caveats the Constitutional Court found that “there was everything wrong with the National Assembly stepping into the shoes of the Public Protector” and that “by passing a resolution that purported effectively to nullify the findings made and remedial action taken by the Public Protector and replacing them with its own findings and ‘remedial action,’ the National Assembly’s action was “inconsistent with the Constitution and unlawful.”<sup>105</sup> This, the Court stated, “the rule of law is dead against. It is another way of taking the law into one’s hands and thus constitutes self-help.”<sup>106</sup>

While challenges to the nature of the remedial powers of the Public Protector were thus resolved by the Constitutional Court in the *Nkandla* case, the most recent challenge saw President Zuma attempt to prevent the release by the outgoing Public Protector of a report on state capture. Bringing an urgent application on October 13, 2016, the President argued that the Public Protector should be prevented “from finalizing and releasing that report”.<sup>107</sup> After the President learned that the Report was in fact already finalized and would be released, his lawyers continued to bring urgent applications to the courts; however once the court was ready to hear arguments the President’s

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103. *Id.*

104. *Id.*

105. *Id.* paras. 98–99.

106. *Id.* para. 98.

107. *President of the Republic of South Africa v. Office of the Public Protector* 2017 (1) All SA 576 (GP) para. 1 (S. Afr.).

lawyers simply withdrew the application and offered to pay the costs of the other parties who had challenged the initial attempt to prevent the release of the Report. As a result, a number of the other parties brought an application demanding that the President pay for these legal costs himself since he had claimed his challenge to the report was to protect his own dignity and interests. In an opinion on the same day, also written on behalf of a full bench by Judge President Mlambo, the head judge of the Gauteng Division of the High Court of South Africa, the High Court found President Zuma personally responsible for all the legal costs from the day that he was informed that the Report had in fact been finalized.

In his substantive challenge to the Public Protector's Report on state capture, the President objected to the decision by the Public Protector that called upon the President to establish a judicial Commission of Inquiry into state capture but required the head of the commission to be nominated by the Chief Justice of South Africa rather than the President as provided for in the Constitution.<sup>108</sup> In its decision on this question, the High Court argued that while the "power to appoint a commission of inquiry vests in the President alone and only he can exercise that power[.]" it does not follow "that there are no constraints upon the exercise" of this power.<sup>109</sup> The High Court went on to argue that "even though the Constitution vests in the President the power to appoint a commission of inquiry, this power is not an untrammelled one; it must be exercised within the constraints that the Constitution imposes. The President's power to appoint a commission of inquiry will necessarily be curtailed where his ability to conduct himself without constraint brings him into conflict with his obligations under

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108. *President of the Republic of South Africa v. Office of the Public Protector* 2017 (1) All SA 800 (GP) (S. Afr.).

109. *Id.* para. 62.

the Constitution.”<sup>110</sup>

Faced with a refusal by the ANC majority in Parliament to hold President Zuma and his government accountable for a pattern of corruption that was being openly discussed in the country’s print and electronic media, the opposition parties also turned to the Courts. The focus of these cases was an attempt to force the leadership in Parliament, and particularly the Speaker of Parliament, to bring a vote of no confidence to the floor of the National Assembly for debate and vote. First, the Constitutional Court issued a decision that required the dominant party to allow the opposition parties to bring a vote of no confidence to the floor.<sup>111</sup> A year later, the Court issued another ruling indicating that although the decision lay with the Speaker of Parliament, any decision made by the Speaker must be rational; and while it was not for the Court to decide, it would seem most rational if the Speaker decided to allow a secret vote on the motion.<sup>112</sup> Despite the Speaker of Parliament’s subsequent decision to hold a vote of no confidence in secret as well as massive countrywide demonstrations calling for action against corruption, President Zuma survived his seventh no confidence vote on August 8, 2017. The significance of this vote however was the fact that when the vote was tallied, it became clear that members of the President’s own party had, for the first time, voted against him, highlighting the growing rift in the ANC.<sup>113</sup>

In another case brought by the parliamentary opposition, a majority on the Constitutional Court found that Parliament had failed in its constitutional duty to hold the President accountable for failing to implement the Public

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110. *Id.* para. 71.

111. *Mazibuko v. Sisulu* 2013 (6) SA 249 (CC) (S. Afr.).

112. *United Democratic Movement v. Speaker of the Nat’l Assembly* 2017 (5) SA 300 (CC) paras. 93–94 (S. Afr.).

113. Niren Tolsi, *Zuma Survives No-confidence Vote Despite ANC Dissenters*, MAIL & GUARDIAN (Aug. 8, 2017, 5:11 PM), <https://mg.co.za/article/2017-08-08-no-confidence-vote-the-people-versus-jacob-zuma>.

Protector's Nkandla Report.<sup>114</sup> Accountability in this context is separate from a motion of no confidence since the Constitution provides a separate standard and consequences for impeachment of the President. The opposition parties pointed out that Parliament had not established any procedures for an impeachment process and a majority of the Court held that Parliament had a constitutional duty to create a regulatory structure for the implementation of section 89 of the Constitution which provides for the impeachment of the President by two-thirds of the National Assembly if the President is in "serious violation of the Constitution" has engaged in "serious misconduct" or is unable to perform the functions of the office.<sup>115</sup>

The final set of cases involve those challenging the hiring and firing of government officials, often involving very large settlements. Among these, an extraordinary decision, *Corruption Watch v. President of the Republic of South Africa*, was handed down by a full bench of the High Court of South Africa (Gauteng Division) on December 8, 2017.<sup>116</sup> In this case, the High Court invalidated the termination of the appointment of yet another Director of Public Prosecutions, Mxolisi Nxasana, as well as the settlement reached between him, the President, and the Minister of Justice which awarded him R17,3 million while declaring that he was a fit and proper person to hold the office.<sup>117</sup> As a consequence of this holding, the High Court also declared the appointment of then sitting Director of Public Prosecutions, Shaun Abrahams, invalid.<sup>118</sup> Furthermore, given the sustained criticism of Abrahams for failing to bring charges of corruption against the President, or even to investigate the

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114. *Econ. Freedom Fighters v. Speaker of the Nat'l Assembly* 2018 (2) SA 571 (CC) para. 276 (S. Afr.).

115. *Id.* para. 212; S. AFR. CONST., 1996, § 89.

116. *Corruption Watch v. President of the Republic of South Africa* 2017 ZAGPPHC 742 (S. Afr.).

117. *Id.* paras. 3, 77.

118. *Id.* para. 128.

claims against the Guptas, the Court held that the President had a conflict of interest and therefore a new Director of Public Prosecutions must be appointed by the then Deputy President of the country—Cyril Ramaphosa—who was also given the constitutional authority, normally exercised by the President, to make all decisions involving the appointment, suspension or removal of the Director of Public Prosecutions so long as the incumbent President remains in office.<sup>119</sup> This reallocation of the President’s constitutional authority was an extraordinary remedy but one designed to preserve the integrity of the prosecuting authority which many argued had been “captured” and was no longer performing its functions without fear or favor as required by the Constitution.

These decisions, announced within the same period as the ANC’s National Elective Conference, during which the party elected a new president, Cyril Ramaphosa, set the stage for the next round of political conflict. After Jacob Zuma was no longer the leader of the ANC and his own preferred candidate had failed to be elected, the possibility of the ruling party “recalling” him from the Presidency of the country was placed on the political agenda. Faced with this threat, President Zuma finally complied with the remedy imposed by the Public Protector in her “State of Capture” report, by announcing in January of 2018 that he would appoint a Commission of Enquiry into State Capture to be headed by the Deputy Chief Justice who was nominated by the Chief Justice as required by the Public Protector. However, the senior leadership of the ANC remained split and the possibility of President Zuma resigning under threat of impeachment in Parliament—which would deny him all pension and other benefits—was floated as a possibility. While the ANC survived the 2019 election, it remains true that this was the first time they were concerned they might lose the majority, and, in fact, they still suffered significant

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119. *Id.*

losses despite forcing Zuma to resign.

While the struggle for political power and against corruption continues in the ANC, the narrow defeat of Jacob Zuma's political faction by Cyril Ramaphosa's anti-corruption platform at the end of 2017, produced the chance for political change both within the dominant party and the state. The overarching importance of these internal party conflicts to South Africa's constitutional democracy reflects the unipolar structure of South African politics. So long as the ANC remains a dominant party at the national level—despite losing major metropolitan areas in the 2016 local government elections—there exists a form of dual state in which the party and state are deeply entwined. Under Jacob Zuma, this relationship led to the emergence of a form of “shadow state” in which corrupt private interests seem to have gained ascendancy over even formal party structures by attaching themselves to a network of corrupt regional and national government leaders within the party. While the existence of networks, corrupt or otherwise, within politics is not unique to South Africa, or even dominant party democracies, the relative weakness of opposition parties and the remote chance of electoral punishment makes combating these systems of political relations and patronage more difficult. It is, however, just such a network, including former President Zuma himself, that has been increasingly challenged from both within the party and through constitutional means.

A marked feature of the struggle between different factions within the ruling party and South Africa's political-economy more generally has been the use of law and the impact on different constitutional and governmental institutions. While President Thabo Mbeki was forced to resign on the claim that he interfered in the corruption prosecution of Jacob Zuma, the ascendance of the Zuma faction led to the hollowing out of key state institutions—such as the elite police anti-corruption unit, the prosecution authorities, the widely respected tax authorities, as well as

the intelligence services—and their increasing deployment to protect Zuma from accusations of corruption. “State capture” added a further dimension as private interests began to directly dictate significant decisions, including cabinet positions and executive appointments to the boards of state-owned entities, producing grossly corrupt decisions that benefitted the first family and their private collaborators. Even as the executive used its appointment powers to undermine each constitutional institution—including the Public Protector—a political backlash gathered ground from civil society, the political opposition, and from within the ruling party itself. Resistance from within state and constitutional institutions received increasing support from the courts and the dramatic decrease in electoral support for the ANC which led to the loss of major metropolitan areas to opposition parties in the 2016 local government elections finally produced a political revolt from within the ruling party which forced Zuma’s resignation from the Presidency and saw the election by Parliament of Cyril Ramaphosa as President in January 2018.

In addition to the integrity institutions, the question of institutional independence arises more broadly when the constitution imposes an obligation on the state to address particular problems, such as corruption and organized crime. In *Glenister v. President of the Republic of South Africa*, the Constitutional Court addressed the “validity of national legislation that brought into being the Directorate for Priority Crime Investigation . . . [the Hawks] and disbanded the Directorate of Special Operations . . . [the Scorpions].”<sup>120</sup> Noting that “[e]ndemic corruption threatens the injunction that government must be accountable, responsive and open; that public administration must not only be held to account but must also be governed by high standards of ethics, efficiency and must use public resources in an economic and

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120. *Glenister v. President of the Republic of South Africa* 2011 (3) SA 347 (CC) para. 160 (S. Afr.).

effective manner[,]"<sup>121</sup> the Court asked two questions. First, whether the South African Constitution "imposes an obligation on the state to establish and maintain an independent body to combat corruption and organised crime"; and second, "whether the specialised unit which the impugned legislation has established . . . meets the requirement of independence."<sup>122</sup>

Recognizing that the Constitution and the Bill of Rights "enshrine rights of all people in South Africa" and that "Section 7(2) . . . requires the state to 'respect, protect, promote and fulfil the rights in the Bill of Rights'"<sup>123</sup> the Court found that there is "a duty to create efficient anti-corruption mechanisms."<sup>124</sup> Furthermore, the majority of the Court held that "to fulfil its duty to ensure that the rights in the Bill of Rights are protected and fulfilled, the state must create an anti-corruption entity with the necessary independence, and that this obligation is constitutionally enforceable."<sup>125</sup>

#### CONCLUSION: INTEGRITY INSTITUTIONS AND THE TEMPERING OF POWER

The existence of a constitutional duty to create an independent anti-corruption entity as well as the constitutional independence for entities outside of the control of any of the traditional *tres politica* has become a central feature of a distinctly South African conception of the separation of powers. This conception of multiple independent entities within the overall system of checks and balances that forms a distinctly South African separation of powers was central to the *Nkandla* case<sup>126</sup> and was reflected

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121. *Id.* para. 176.

122. *Id.* para. 163.

123. *Id.* para. 177.

124. *Id.*

125. *Id.* para. 197.

126. *Econ. Freedom Fighters v. Speaker of the Nat'l Assembly* 2016 (3) SA 580

in the whole set of cases that flowed from the struggle against state capture. While the separation of powers is often understood to be a means to protect human rights, the history of integrity institutions in the South African constitutional order demonstrates that the distribution of power beyond the *tres publica* may serve an additional purpose, that is, to temper power. A focus on institutional integrity has served in this context to ensure that the separation of powers serves to both set the limits on the power that might be exercised by different public institutions but also guarantees their power so as to ensure the effective implementation of the Constitution. To this extent, the outcome is to further the overall constitutional vision of social transformation by empowering each sphere of government to exercise the power necessary to affect the goals of the Constitution. At the same time, concern with the institutional integrity of each sphere of government requires that power be neither corrupted nor abused.

This reading of the Constitutional Court's separation of powers jurisprudence argues that the doctrine functions first and foremost as an inducement to each branch of the state to make its optimum positive contribution (in view of its special capacities or competence) toward the goal of achieving the Constitution's social-transformative aims—a goal that includes but is by no means limited to the protection of individual rights, and that is equally concerned with how democratic constitutionalism might really work under current South African conditions as with any theoretical model. Now, if optimal positive contribution from each branch is the guiding aim, then contributions from the different branches and independent institutions would, of course, include provocations from each to the others to give due consideration to certain actions or policies that lie within those others' domains; it would also include also resistance from each against overstepping by the others that unduly

infringes on their own work. But then the system has boundaries, however supple and context-dependent these may be, and who polices the boundaries?

With that question comes something distinctive about the South African conception of the separation of powers. By comparison with most other constitutions, South Africa's is especially outspoken and explicit about assigning to the judicial branch, and particularly the Constitutional Court, two specific responsibilities. First, by designating the Constitutional Court as the final arbiter of constitutional interpretation the Constitution allocates to this institution a special and supreme responsibility and authority to set the inter-branch boundaries of due and undue cross-branch provocation so as to protect the working spaces of the different branches of government. Second, the judiciary, and the Constitutional Court in particular, has a responsibility to act against internal breakdowns within the branches (itself included) by way of inattention or corruption. But that then creates a special challenge to the Constitutional Court—to carry out these missions with full commitment, while at the same time restraining itself against undue invasion of the provinces of the others. This dynamic was in evidence when the Constitutional Court was called upon to decide whether the government's disbandment of an effective anti-corruption unit—the scorpions—was constitutional. In an unusually divided opinion, the Constitutional Court split five to four on the question of whether the legislation was unconstitutional. Furthermore, while the majority found that the legislation did not provide adequate independence for the anti-corruption body created by the law, it granted the legislature eighteen months to remedy the constitutional infirmity. The tempering of power in this context emerged from the institutional dialogue between the court and the legislature provided for by the availability of a specific form of constitutional remedy—the ability of the Court to suspend a declaration of constitutional invalidity so as to give the legislature time to act.