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Separation of Powers, Accountability and the role of independent constitutional institutions

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Introduction

South Africa's post-apartheid constitutional order is characterized by an abiding tension, between a popular, democratically elected ruling party – the political system may best be described as a unipolar democracy – and a constitutional promise of democratic accountability. Structurally the question of accountability is straddled between parliament, which bears the traditional legislative role of overseeing the executive in addition to law-making, and 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. 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 does it fragment power to the 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 to both be heard and to protect their interests or achieve their often irreconcilable goals.

The goal of establishing a constitutional design 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" (Constitutional Principle VI, Schedule 4, Constitution of the Republic of South Africa 200 of 1993) 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. As in most other constitutional systems that provide for constitutional review, the issue of the separation of powers soon emerges in constitutional jurisprudence as the different branches and institutions of government begin to exercise power and challenges are brought to test the extent of these powers in different contexts. Although tradition approaches to the political idea and legal doctrine of the separation of powers 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 and 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.

While these new institutions have proliferated since the late 20th century in new and amended constitutions, their development and role in the achievement of good governance raise important questions about their institutional authority and place in the constitutional system, and particularly 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 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. Even if we try to maintain a very formal conception of the separation of powers, as a system of checks and balances between the three traditional branches of government - the legislature, executive and judiciary - or attempt to limit our conception of the separation of powers to a functionalist approach in which we distinguish between the making, implementing and interpreting of laws, our task will be impossibly complicated by the fact that in addition to the different coordinate branches of government, modern constitutions and even older constitutional orders, such as the United States, are laden with institutions of governance - such as the Federal Reserve in the United States and 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.

Instead of addressing all the different semi-autonomous and autonomous institutional forms that cohabit all levels of governance in the global era, this paper will explore the relationship between the new constitutionally enshrined institutions that are designed to secure greater accountability of those exercising public power and the traditional form of the *tres politica* - the legislative, executive and judicial branches of government. Using the example of the Chapter Nine institutions in South Africa's 1996 post-apartheid Constitution, and the institution of the Public Protector in particular, the paper will situate this institution within the broader constitutional and political struggles over accountability and argue that both its formal constitutional and legal status as well as any structural understanding of the constitutional order requires us to recognize that this institution, and the other Chapter Nine institutions are in effect a fourth branch of government. From this perspective the best understanding of their role in the structure and functioning of the constitutional order requires a recognition of how the separation of powers applies to these institutions. Just as the traditional branches are interlinked and thus serve to check and balance each other's powers, so this fourth branch, dedicated to the task of enhancing public accountability, is interlinked with the other branches in different ways and is

itself part of the structure of checks and balances within the constitutional order.

Origins

As South Africa prepared for its first democratic elections in the early 1990s questions arose about the management of the forthcoming elections. Up until 1990, the government had organised and managed all elections. But many people raised serious concerns 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. The liberation movement sought to resolve this problem by calling for the installation of an interim government, as called for in the internationally sanctioned Harare Declaration. However, the incumbent regime argued that there could be no handover of power until a negotiated solution, insisting on legal continuity between the existing state and any future legal order. Faced with an irresolvable tension, 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 establishing three independent institutions: the Independent Electoral Commission, the Independent Media Commission and the Independent Broadcasting Authority (See, Heinz Klug, *Constitution-making, Democracy and the 'Civilizing' of Unreconcilable Conflict: What Might we Learn from the South African Miracle?* 25(2) *Wisconsin International Law Journal* 269 (2007)).

The embrace of this idea and the legal institutions it spawned fit well in this period with the global emphasis on expanding democratic constitutionalism. And it set the stage for a significant embrace of the idea of 'state institutions supporting constitutional democracy' that became an important innovation in the final Constitution. Chapter 9 of the 1996 Constitution establishes six separate institutions: the Public Protector; 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. The Constitution establishes these institutions as 'independent, and subject only to the Constitution and the law', and requires them to be 'impartial' and to 'exercise their powers and perform their functions without fear, favour or prejudice' (1996 Constitution Section 181(2)). However, the translation of this promise into the reality of functioning institutions has been more difficult. From internal personnel conflicts to external challenges to their functioning, legitimacy and financial independence, these institutions have remained embroiled in controversy. Apart from the Electoral Commission- which has now successfully managed four electoral cycles in addition to local government elections- and the Auditor-General, which, as a pre-existing institution, had an institutional culture and staff in place, the remaining Chapter 9 institutions have struggled to define their constitutional roles. Issues of adequate financing and accountability -- as well as the political careerism and resulting caution of some of the office-holders in these institutions -- have led to questions about the degree of independence these institutions really enjoy or exercise.

Separation of Powers

The goal of establishing a constitutional design 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” (Constitutional Principle VI, Schedule 4, Constitution of the Republic of South Africa 200 of 1993) 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. As in most other constitutional systems that provide for constitutional review, the issue of the separation of powers soon emerges in constitutional jurisprudence as the different branches and institutions of government begin to exercise power and challenges are brought to test the extent of these powers in different contexts. Although tradition approaches to the political idea and legal doctrine of the separation of powers 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 and 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.

While these new institutions have proliferated in new and amended constitutions since the late 20th century, their development and role in the achievement of good governance raise important questions about their institutional authority and place in the constitutional system, and particularly 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 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. Even if we try to maintain a very formal conception of the separation of powers, as a system of checks and balances between the three traditional branches of government – the legislature, executive and judiciary – or attempt to limit our conception of the separation of powers to a functionalist approach in which we distinguish between the making, implementing and interpreting of laws, our task will be impossibly complicated by the fact that in addition to the different coordinate branches of government, modern constitutions and even older constitutional orders, such as the United States, are laden with institutions of governance – such as the Federal Reserve in the United States and the Chapter 9 institutions in South Africa – which do not fit neatly into either a purely formalistic 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.

Instead of addressing all the different semi-autonomous and autonomous institutional forms that cohabit all levels of governance in the global era, this paper will explore the relationship between the new constitutionally enshrined institutions that are designed to secure greater accountability of those exercising public power and the traditional form of the *tres politica* – the legislative, executive and judicial branches of government. Using the example of the Chapter Nine institutions in South Africa's 1996 post-apartheid Constitution, and the institution of the Public Protector in particular, the paper will situate this institution within the broader constitutional and political struggles over accountability and argue that both its formal constitutional and legal status as well as any structural understanding of the constitutional order requires us to recognize that this institution, and the other Chapter Nine institutions are in effect a fourth branch of government. From this perspective the best understanding of their role in the structure and functioning of the constitutional order requires a recognition of how the separation of powers applies to these institutions. Just as the traditional branches are interlinked and thus serve to check and balance each others powers, so this fourth branch, dedicated to the task of enhancing public accountability, is interlinked with the other branches in different ways and is itself part of the structure of checks and balances within the constitutional order.

After a brief discussion of the idea of the separation of powers and the doctrines particular application in the jurisprudence of South Africa's Constitutional Court in the post-apartheid era, the paper will focus on the issue of government accountability. In order to explore the role of the Public Protector in particular the paper will first survey 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 1996 Constitution. Having explored the limits of these traditional institutions, including Parliament, the formal democratic process, the executive and the courts, the paper will focus on the Public Protector as a particular example of the constitutional institutions provided for in Chapter Nine of the Constitution. The paper will describe the development and history of the office of the Public Protector as well as the constitutional and legislative framework that dictates its function. Finally, the paper will explore a number of seminal cases in which the constitutional role of the Public Protector is being tested and demonstrate how only an understanding of the structural location of this institution within the realm of the separation of powers enables us to both understand its role as well as secure its potential as an essential part of a constitutional system of accountability established by the 1996 Constitution. In concluding that the Chapter Nine institutions are structurally and functionally a fourth branch of democratic government this paper calls for an explicit recognition of their independence and a need to understand how the system of checks and balances within which they are placed is both constitutionally protected and needs to be ensured in order to fulfill the constitutions promise of accountable government.

The Constitutional Court and the Separation of Powers

(To be added)

Accountability and the traditional institutions in practice

While there has been widespread agreement that South Africa's Constitution is a progressive blueprint for addressing the legacies of apartheid, there seems at times to be less clarity about how this promise is to be achieved. On the one hand it may be argued that the Constitution represents a vision of what might be – not unlike the 2030 National Development Plan, but on the other hand, the Constitution is the Supreme Law of the land, and by its own terms it declares that all “law or conduct inconsistent with it is invalid” (1996 Const. s2). The same section in the Founding Provisions of Chapter 1 also states that “the obligations imposed by it must be fulfilled.” It is to this distinction, between the Constitution as a guarantee of minimum standards of governance and rights, and as the blueprint of a future that imposes obligations on our institutions of governance, that we must look, to understand both the frustrations of those who feel the Constitution stands in the way of transformation and those who believe that the country is failing to achieve the promise of the post-apartheid rainbow. Law provides the basic mechanism through which government implements its policies, through which markets are created, and regulated, as well as a basis for claims against those who abuse power or fail to meet their legally defined obligations. In many cases this means that it is those with access to resources – the haves – who generally come out ahead, since they are able to most effectively mobilize legal resources, yet the legacy of mobilization, non-government organizations as well as progressive lawyering has meant that the Constitution has been repeatedly invoked to protect not only the well-to-do but also the more marginal sections of post-apartheid society, and to this extent it has gained a reputation around the world as an example of how constitutions might serve as instruments of transformation.

When it comes to the statute book and regulatory framework, the post-1994 era has seen a raft of progressive policies and legislation from the very first statute on the Restitution of Land to legal reform across a wide scope of law effecting both government and private interests. While there is legitimate debate over the policies and laws that have been adopted since the end of apartheid, the greatest area of concern, and an important focus of this conference, is on the problem of effective governance – how are these progressive policies and the rhetoric of development and delivery being translated into reality. Governance from this perspective focuses on the institutions that are needed – from government agencies to the courts, from legal frameworks (including legislation and related regulations) to the elements of a functional market place – to implement these policies and achieve their goals. Within this context the question of institutionalization becomes central to the question of good governance, since it lies at the heart of the matter. It is only through effective institutions that governance is possible. It is when institutions are undermined, lack capacity or are unable to function effectively that frustration leads to irregular methods, to shortcuts and ultimately to a level of maladministration and

corruption that will undermine the sustainability of these institutions. At the same time, a persistent pattern of legal challenges, in which political conflict is conducted through legal claims, draws all institutions into what has been described by some as “lawfare” the pursuit of political goals through the abuse of legal processes, effectively paralyzing and frustrating regular processes of governance.

If what I have described reflects the conditions under which these institutions are laboring, what role is there for the Constitution and especially the unique institutional framework created by the 1996 Constitution. One popular conception of the Constitution seems to be that it belongs in the Courts, particularly in the Constitutional Court, and that its purpose there is to be used as a tool to either claim rights or to challenge government conduct. While this is of course an important dimension of the Constitution, and the Constitutional Court is indeed empowered to provide the defining interpretation of the Constitution's meaning, in fact the Constitution plays a much broader role in governance, a role that is essential to good governance. It is the Constitution that empowers all the institutions of government, providing an institutional framework through which power is to be exercised and controlled. While most constitutions today provide an institutional framework for the exercise of power within the nation state, it is a fairly unique feature of the South African Constitution that it provides for a range of interacting institutions, beyond the traditional three-way division of executive, legislature and courts, as a means to secure good governance. The revolutionary nature of the Constitution lies thus not only in the expansive framework of rights it guarantees, or the unique system of co-operative government to manage the relationship between regional, local and national levels of government, but also in the constitutionalizing of a set of independent institutions whose role it is to uphold the progressive vision of the Constitution in the face of the ordinary pressures of political horse-trading and interest group politics. While it is these pressures that often tend to dominate the daily life of democracies, in which the voices heard are most often those who have the resources to command media, legal and other forms of attention, the design of the 1996 Constitution and its specific institutional framework is meant to provide a form of governance more responsive to the needs of those who have been historically excluded.

The Role of Parliament and Democratic Accountability

The greatest source of controversy over the South African Parliament's role is its weak performance in serving as watchdog over the policies and practices of 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 in part to the parliamentary tradition in which government-appointed Commissions of Enquiry have always served 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' (D O'Meara, *Forty Lost Years: The apartheid state and the politics of the National Party, 1948-1994* (Athens, Ohio University Press, 1996) 231). 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—this continued in the immediate post-1994 period, when MPs had access to cost-price wines...These were all subtle forms of influence buying that could be compared with contemporary private sector-subsidized golf days for politicians and public sector officials' (HV Vuuren, 'Apartheid Grand Corruption: Assessing the scale of crime of profit in South Africa from 1976-1994, A report prepared by civil society at the request of the Second Annual Anti-Corruption Summit, May 2006' (Institute for Security Studies, Cape Town: 2006)). Furthermore, the increasing secrecy of the apartheid regime and the expansion of covert operations after 1976—as well as the 'history of routinised corruption' (T Lodge, *South African Politics Since 1994* (Cape Town, David Philip, 1999) 60) in central government departments and the 'homeland' administrations—provide ample evidence for the following claim by Speaker of Parliament Frene Ginwala:

[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. (F. Ginwala, 'Speaker of Parliament, Remarks to the opening session, Global Forum II, The Hague', cited in *Apartheid Grand Corruption*, (21 May 2001) footnote 18, at 5-6).

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.

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 miles 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 centralised and concerned with protecting the image of the government rather than raising questions about the implementation of policy or the integrity of government programmes and officials.

'Sarafina II'

Parliament's first major oversight challenge arose 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. Commissioned from world-class South African playwright Mbongeni Ngema in 1995, the budget for the show represented a significant portion of the health department's HIV/AIDS prevention efforts. The musical itself, 'Sarafina II' was criticised 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 asked the Minister of Health, Dr Nkosazama Zuma, to justify this expenditure, she purportedly refused to attend the hearing. Zuma's appearance before the committee, after government realised that her refusal to attend would be politically embarrassing, merely demonstrated how new the concept of oversight was for the legislature. First, the 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' (R. Calland, 'The First 5

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Years: A Review of South Africa's Democratic Parliament', Political Information Monitoring Service, IDASA (Cape Town 1999), at 36). 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 (id., p.35).

In contrast to the 'Sarafina II' affair, there were numerous cases in which parliamentary committees began to show their potential, in both their legislative and oversight functions. A dramatic example of legislative intervention was the fight over the introduction of a State Maintenance Grant for children between the ages of 0-6 years. Minister of Welfare Gereldine Fraser-Moleketi had gone directly to Cabinet with a proposal to adopt a flat-rate per-child grant of R75 per month. This proposal was the culmination of a process initiated by an intergovernmental coordinating group or MINMEC, ad-hoc bodies established in 1995 to bring together the provincial and national officials who shared responsibility for particular areas of governance. In this case, the Minister of Health initiated a MINMEC that brought together the health and social welfare departments at national and provincial levels. This body then appointed a Committee (later named for its chairperson, Francie Lund, as the Lund Committee) to produce a critical appraisal of the existing system of state support and to report on possible policy options aimed at providing effective support to families and children. Reacting to the Minister's announcement and the outrage of civil society groups who felt that 'an important and far-reaching policy [was] being implemented without consultation', the Portfolio Committee called public hearings in April 1997. The Minister attended the hearings, but publicly insisted that "[t]here is no turning back", noting that the 'department had already printed leaflets setting out details of the new benefit before the hearings took place' (id. p.38). These actions demonstrated a form of executive decision-making that stood at odds with the new Constitution. Persuaded by civil society submissions, which pointed out that the Lund Committee itself had suggested R125 per child, per month, the ANC-chaired Portfolio Committee opposed the government's announced policy and unanimously proposed that the benefit be set at R135 per month. This was the first time a parliamentary committee, with support from civil society and the ANC caucus 'took on an ANC Minister and successfully challenged and changed government policy' (id. p.39).

Travelgate and the Arms Deal

Parliament's ability to act as an effective watchdog was further undermined by its own dalliance in addressing a pattern of systematic abuse by Members of Parliament (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 the House Frene Ginwala publicly rebuked two Members of Parliament for abusing travel vouchers, granted annually in a checkbook type format, so that MPs could travel between Parliament in Cape Town and their constituencies or homes around the country. When the issue was later raised in the ANC caucus, Essop Pahad, a close associate of President Mbeki, attacked the Speaker, objecting to the public reprimand on the grounds that the ANC MP involved had used the travel vouchers for ANC Party business that

the ANC leadership considered legitimate (A Feinstein, *After the Party: A Personal and Political Journey inside the ANC*, (Cape Town, Jonathan Ball, 2007) 241-42). But this was only the tip of the iceberg, and by the time the scandal unravelled 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' (id. p.242). As a result the integrity of the institution was severely compromised.

However, the most egregious and consequential failure of oversight occurred at the dawn of the new century when Parliament's attempt to assert its oversight over a major arms-procurement process led to repeated interventions by the executive, and the ANC's highest officials in the legislature, which effectively undermined the ability of the legislature to perform its constitutional role. The 'arms deal', as it has been christened, involved a simple—if extremely expensive—government procurement process. But it was also a complex policy of military modernisation and hoped-for economic investment for the country coupled with possible kickback funding for the ruling party and a plethora of secondary contracts providing multiple opportunities for simple old fashioned graft. Deputy-President Thabo Mbeki chaired the Cabinet sub-committee from 1996 to 1999, and headed the official procurement process that oversaw and 'commissioned the purchase of R30 billion worth of armaments—specifically, submarines and frigates—from a French-German consortium and fighter-jets from a British-Swedish one' (M Gevisser, *A Legacy of Liberation*, (New York: Palgrave MacMillan, 2009) 256). The government justified such vast expenditures on armaments by arguing that they provided an opportunity for industrial investment and job creation, since the bidders promised that the deal would lead to investments in the South African economy worth approximately R104 billion and would create around 65,000 jobs. In the end, the arms deal cost twice the amount originally agreed upon, produced only 13,000 jobs by 1996, and become what Mark Gevisser has described as the 'poisoned well of post-apartheid South African politics' (id). It led to the demise of some institutions, massive legal battles and the eventual ousting of Thabo Mbeki from the presidency.

The controversy that would become the arms-deal scandal had its roots in the early years of the democratic transition. Gevisser even suggests that the decision to modernise the military might have been based as much on concerns over a 'disaffected military' and the threat of internal destabilisation it posed, as it was based on concern about external threats to national security. The scandal first hit the headlines when Member of Parliament Patricia de Lille (then of the opposition Pan Africanist Congress) stood up in the National Assembly and announced that she had in her possession a 10-page briefing authored by 'concerned' ANC MPs accusing senior ANC politicians of corruption and questioning whether the promised 'off-sets' would ever become a reality (See, P Holden, *The Arms Deal In Your Pocket*, (Jeppestown, South Africa: Jonathan Ball, 2008) 38). In fact, the Auditor General had already raised questions about the arms deal in November 1998. And while Defence Minister Mosiuoa Lekota derided Lille's

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claims in public, privately he gave approval for the Auditor-General to have access to all relevant documentation for audit purposes. However, within days, the Cabinet sub-committee countermanded the defence Minister's decision, claiming that the Auditor-General first had to clear his terms of reference with the Committee. When the Auditor-General released the first official report on the arms deal on 15 August 2000, questioning the 'off-sets' and arguing that the 'practice of choosing the Hawk [aircraft] did not meet standard regulations on acquisitions' (id. p. 40), the issue was formally placed in the hands of the National Assembly's Standing Committee on Public Accounts (SCOPA).

While there is no constitutional duty to do so, the ANC's initial commitment to open government and accountability led to the practice of giving the chair of SCOPA to an opposition member of the National Assembly. When the Auditor-General's report came before SCOPA in late 2000, the chair, Gavin Woods of the Inkatha Freedom Party—together with the leading ANC member of the Committee, Andrew Feinstein and the remaining members—agreed that further investigation was necessary. When Feinstein reported this decision to senior ANC leaders in the legislature he met with a mixed reaction. Jacob Zuma, then Deputy-President and the leader of Government's Business in Parliament was at first supportive and insisted to Feinstein that the Committee continue with its constitutional role, while the ANC's Chief Whip in Parliament Tony Yengeni argued that a public hearing was not a good idea and that the matter be considered an internal matter (A Feinstein, *After the Party* (Jeppestown, South Africa: Jonathan Ball, 2007) 160-161). The government turned defensive when SCOPA insisted on continuing its investigation and recommended that Judge William Heath, who then headed the Special Investigating Unit (an independent statutory body reporting directly to Parliament and empowered to investigate maladministration and corruption in government at the President's request, See, Special Investigating Units and Special Tribunals Act 74 of 1996) be brought in to investigate the arms deal. In a series of moves, the ruling party and government attacked the recommendation, contained in SCOPA's 14th Report to Parliament, and once President Mbeki rejected Judge Heath's application to investigate the arms deal, the ANC leadership in Parliament moved against SCOPA. First, Feinstein was removed from his role as head of the ANC Study Group in SCOPA; then the Committee was stacked with loyalists who would be sure to follow instructions. As ANC Chief Whip Tony Yengeni told a press conference, 'there was no committee in respect of the ANC which is above party political discipline' (See, A Feinstein, *After the Party* (Jeppestown, South Africa: Jonathan Ball, 2007) 195, quoting Business Day, 7 February 2001).

Despite this initial victory, it was only a matter of months before the revelations of corruption related to the arms deal would bring down some of the very leaders who had acted against SCOPA. The first casualty was Tony Yengeni, who would after long denials eventually plead guilty to fraud and was sentenced to four years in prison for defrauding Parliament by failing to disclose a 47 per cent discount he received from Daimler Benz on a luxury 4x4 Mercedes Benz (P Holden, *The Arms Deal In Your Pocket*, (Jeppestown, South Africa: Jonathan Ball, 2008) 68-86). President Thabo Mbeki dismissed Jacob Zuma from his position as Deputy-

President following the conviction of his financial advisor Shabir Shaik for corruption arising out of one of the arms deal's secondary contracts. However, Zuma refused to serve as the fall guy. In his legal and political fight to avoid accusations of corruption he was eventually elected President of the ANC and had a judge state that the executive had illegally interfered in his prosecution. As a result, President Thabo Mbeki was forced to resign from office (while the Judge's decision and statements, which led to Mbeki's resignation, would be later reversed and severely criticized by the Supreme Court of Appeals, the political momentum had clearly shifted against Thabo Mbeki and his allies in the ANC) and the National Prosecuting Authority dropped all charges against Jacob Zuma (see, M Gevisser, *A Legacy of Liberation*, (New York: Palgrave MacMillan, 2009) 320-339) before he was elected President of South Africa in April 2009. While the arms-deal scandal would prove much more resilient than the Standing Committee on Public Accounts and its oversight function, the removal of Thabo Mbeki as President of the ANC at Polokwane in December 2007 represented a brief revival of legislative authority and a renewed willingness to challenge the executive. Whether the oversight function of the National Assembly will be fully restored any time soon remains a matter of continuing political contestation. However, the entrance into the National Assembly of the Congress of the People (COPE)—a new opposition party that broke away from the ANC and received eight per cent of the votes in its first electoral contest in 2009—at first raised some hopes that this function would be revived.

While the legislature clearly serves as the embodiment of South Africa's representative democracy, the single-party dominance of the ANC within the legislature and the Constitution's guarantee of a 'multi-party system of democratic government, to ensure accountability, responsiveness and openness' have stimulated debate over the exact nature and depth of the country's hard-fought constitutional democracy. Concerns over ANC party dominance of Parliament and executive or party authority over public affairs reached a fever pitch in 2007, when the ANC divided into competing factions. On one side was President Mbeki, and on the other a range of opponents, including Jacob Zuma and others who may not have agreed with Zuma but felt excluded by Mbeki and his supporters. Despite the highly charged politics that led up to Mbeki's defeat at Polokwane—and his subsequent resignation on 24 September 2008—the ousting of President Mbeki and the election of his replacement by Parliament remained within the parameters of the constitutional order. This situation presents a distinct contrast to the many extra-legal outcomes of political conflict that have bedevilled many newly independent and developing countries in the post-colonial era.

Constitutional commitments and the creation of independent institutions

From 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 shared by the parties, however the scope and nature of such an office remained a matter of debate (see South African Law Commission, Report on Constitutional Models, Ch 23, October 1991). Furthermore, the idea of creating independent governance institutions as means of addressing the

high level of distrust between the parties and enabling specific aspects of the transition – such as the conducting of a free and fair election, was also being discussed (see Klug, 2000:119-121). The 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 ombudsman as part of the section of the enforcement of rights and "[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" (ANC Constitutional Committee, 1990:36). However, as the transition proceeded the ANC also recognized the importance of creating transitional mechanisms, independent of de Klerk's government, as a means of ensuring the democratic transition. It is out of this legacy that the idea was born to incorporate independent institutions for accountability within the post-apartheid constitution order.

Chapter 1 of the 1996 Constitution details a set of founding principles describing the Republic of South Africa as 'one, sovereign, democratic state founded' on a particular set of values. These founding values include: 'human dignity, the achievement of equality and the advancement of human rights and freedoms; non-racialism and non-sexism; supremacy of the constitution and the rule of law; as well as the basic principles of an electoral democracy, universal adult suffrage, a national common voters role, regular elections and a multi-party system of democratic government to ensure accountability, responsiveness and openness' (1996 Constitution, Chapter 1, section 1 (a)-(d)). The entrenched status of these founding provisions lies in the requirement that any amendment to section 1 of the Constitution may only be achieved with a 75 per cent majority in the National Assembly and the support of six of the nine provinces. This requires a degree of electoral support that even the ANC has not come close to reaching. Other constitutional values are explicitly included as sets of principles in different sections of the Constitution. These explicit values include the principles of co-operative government and intergovernmental relations (1996 Const, s41(1)); the principles governing state institutions supporting constitutional democracy (1996 Const, s181(2)-(5)); the basic values and principles governing public administration (1996 Const, s195(1)(a)-(j)); and the principles governing national security in the Republic (1996 Const, 198(a)-(d)). Finally, the Constitutional Court has repeatedly referred to the notion that the Constitution 'embodies ... an objective, normative value system' (See, *Carmichele v Minister of Safety and Security & Another*, 2001 (4) SA 938 (CC), [54]; *S v Thebus & Another*, 2003 (6) SA 505 (CC), [27]-[28]); and reflects cosmopolitan values to the extent that the courts are required by section 39 of the Constitution to 'consider international law' when interpreting the Bill of Rights (1996 Const. s39(1)(b)); 'may consider foreign law' (s39(1)(c)); and 'must promote the spirit, purport and objects of the Bill of Rights' when interpreting any legislation or 'when developing the common law or customary law' (s39(2)). These broadly defined values of the Constitution are thus expected to permeate every aspect of South African law—including the decisions and actions of public officials as well as private parties, when their behavior affects the rights of other individuals.

Apart from this array of principles that define the values of the Constitution, the Constitution includes structural and institutional elements designed to fulfill the goals of good

governance contained in the substance of these principles. 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 to both avoid the paralysis of a rigid separation of powers but is also meant to ensure that there are multiple avenues for democratic and legal contestation. This combination of distributed and integrated power extends from our 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 as all levels of government grapple with the enormous task of addressing the crippling legacies of colonialism and apartheid. In fact the Constitutional Assembly understood the role of these institutional features of the Constitution as key to our commitment to constitutional democracy, bringing them together in an innovative and unique fashion in Chapter 9 as State Institutions Supporting Constitutional Democracy. This is not to say that the Constitution is perfect or that these institutions have always played an effective role in our 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 five yearly electoral contests or high profile legal disputes.

This distinct institutional distribution of power that the Constitution seeks to achieve is further augmented by an attempt to frame the form of governance practiced in these different institutional locations. The technique the Constitution adopts for achieving this common standard of governance is reflected in a series of provisions that prefigure the specific institutional and functional sections of the constitution with a set of principles that are meant to guide those engaged in these different realms of executive authority. While the constitution contains a number of sets of principles, including those guiding intergovernmental relations and establishing the role of the independent institutions supporting constitutional democracy, the most pertinent, to the exercise of executive authority, are the “basic values and principles governing public administration” as well as those governing national security. The principles of public administration include: transparency, responsiveness, representivity, efficiency, participation and the admonishment that “[p]ublic administration must be development-oriented” (s195(1)(c)). In order to institutionalize these principles the 1996 Constitution consolidated the provincial and national public service commissions created under the ‘interim’ Constitution into a single national Public Service Commission. More recently efforts to improve the public service have led to calls for the consolidation of all civil servants into a single national civil service. In addition to these general principles of public administration, the governing principles that preface sections establishing various institutions -- including the state institutions supporting constitutional democracy and the security services – include specific requirements that define the legitimate policy goals of these institutions. Finally, the idea of institutional and practical independence for different governmental institutions is highlighted by the recurrent admonishment that particular institutions and government functionaries are “subject only to the Constitution and the law” and must exercise their authority “impartially and without fear, favour or prejudice.” This mantra is repeated in reference to the judiciary, the national prosecuting

authority, the central bank and the state institutions protecting constitutional democracy.

Just as the Constitution holds the 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 our society may flourish, Chapter 9 establishes institutions that are designed to both secure existing rights and democratic achievements as well as 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 Electoral Commission, the Auditor General and the Public Protector are institutions that are primarily designed to ensure good governance today, while on the other end the Human Rights Commission, and the Commissions for Gender Equality and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities look both to the present, yet 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” (s181(2)). The translation of this promise into the reality of functioning institutions has however not been without difficulty.

From internal personnel conflicts to external challenges to their functioning, legitimacy and financial independence, these institutions have not avoided controversy. Apart from the Electoral Commission -- which has now successfully managed four electoral cycles in addition to local government elections -- and the Auditor-General which, as a pre-existing institution, had an institutional culture and staff in place, the remaining Chapter 9 institutions have struggled to define and establish their institutional capacities and constitutional roles. At the same time, issues of adequate financing and accountability, as well as the political careerism and resulting caution of some of the office holders in these institutions led to debates over the degree of independence these institutions really enjoy or exercise. After the first ten years the government decided to initiate a review of these institutions, however it soon realized that it would not be appropriate for the executive to conduct such a review. Instead, the executive called upon the National Assembly, to which the Constitution makes these institutions accountable, to conduct a review, and in September 2006 the National Assembly adopted a resolution appointing an ad hoc multi-party committee to review the Chapter 9 institutions and the Public Service Commission. In its mandate 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 rationalization of function, role or organization is desirable or will diminish the focus on important areas” (Republic of South Africa, Minutes of Proceedings of National Assembly, No. 46-2006 Third Session, Third Parliament, Thursday, 21 September 2006, 4(2)(a)).

The report of this committee, chaired by ANC stalwart and Member of Parliament, Kadar

Asmal was issued in mid-2007 and called for significant reforms to some of these institutions (Parliament of the Republic of South Africa, Report of the ad hoc committee on the Review of Chapter 9 and Associated Institutions, 2007). Identifying an apparent “lack of consistency and coherence in approach” which the committee argued “is ultimately undermining of . . . [these institutions] individual, and even common, efforts,” the Report called on Parliament to conduct an urgent review “for the purposes of identifying a more systematic approach, particularly those regarding funding and budgets, the appointment of commissioners, collaboration between the institutions, internal governance arrangements and the relationship of the institutions with Parliament” (id. p.19). One recommendation of the Report was that a number of the Chapter 9 and related institutions -- such as the Pan-South African Languages Board and the National Youth Commission -- be consolidated into the Human Rights Commission. Recognizing that the existing plethora of human rights institutions was the product of the particular circumstances of South Africa's democratic transition, the Report argued that “the present institutional framework has created fragmentation, confounding the intention that these institutions would support the seamless application of the Bill of Rights” (id. p37).

However, the Report also notes that despite internal staff conflicts and a failure to amend the Human Rights Commission Act of 1994 -- to make it consistent with the requirements of the 1996 Constitution -- the HRC has continued to expand and develop its activities. Complaints received from the public by the HRC increased from 5762 in 1999/2000 to 11,710 in 2005/6 (id., p179). The Committee also noted the progressive improvement in the six Socio-Economic Rights reports issued by the HRC, culminating in the 2006 report which showed a “vast improvement in the manner in which information is solicited from government departments and the accuracy with which that information is reported” (id. pp 179-80). Despite the Report and concerns that the Chapter 9 institutions continued to suffer internal tensions and overlapping mandates, there was no immediate effort to make reforms and two years later Kader Asmal, deeply distressed by the failure of the government and National Assembly in particular, to take up the Report in a timely fashion, publicly “accused Parliament of having no interest in his review of Chapter 9 institutions charged by the Constitution with protecting democracy, saying that the failure to debate the review was ‘an appalling scandal’” (Mmanaledi Mateboge, Asmal takes on Parliament, Mail and Guardian Online, July 20, 2009). Despite Kader Asmal's disappointment, now, nearly a half-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.

The Chapter Nine Institutions and the role of the Public Protector

We can thus see that in contrast to an idealistic legal and constitutional framework 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 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' 1993 Constitution and brought into existence through legislation – in the Public Protector Act of 1994 (23 of 1994), it was given increased status by its inclusion as one of the independent “State Institutions Supporting Democracy” that marked one of the unique features of the final 1996 Constitution. Once provided for by statute it fell to the first Public Protector, Advocate Selby Baqwa to begin the task of setting up the institution at its inception in 1995. If today the Public Protector has offices in all nine Provinces as well as a National Office in Pretoria, it took nearly ten years to create this institutional infrastructure. By 1999 there was only two regional offices, in the North West Province and in the Eastern Cape and it would only be in 2001 that additional offices were added in KwaZulu-Natal, Mpumalanga and the Western Cape. Two additional provincial offices, in the Northern Cape and Free State were added in 2002 while Limpopo and Gauteng were only established in 2003 and 2004 respectively. This process of institution building is reflected too in the budget which grew steadily over a decade from R15,3 million in 1999 to just over R2.1 billion [or R2,140,486,000] in 2009. Significantly these figures included significant contributions from non-government sources in the form of grants to help the institution develop.

Another way of viewing this developing institution is to consider its role through the number of cases that it took up and resolved over a decade. If we take the decade from 1999 until 2009 when the present Public Protector took office, we can see a pattern in which cases rose from 9,085 in 1999 to a high of 22,323 in 2005 before falling back to 12,674 in 2008/09. On the one hand 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. On the other hand the reason for the decline in cases from 2006 until 2009 is less obvious, although it might reflect the negative media attention that Public Protector Mushwana received and the perception that while the resolution of cases rose dramatically after his appointment in 2002, there was a feeling that the Public Protector was not pursuing its mandate effectively. The throughput of cases of course increased in relation to the increase in cases taken, however there was a dramatic increase in resolutions in 2003, up from 13,234 to 21,704, however the pace of resolution settled into a fairly stable range of between 15,949 in 2004 to 13,949 in 2009. At the same time the jurisdiction of the Public Protector has continued to grow as additional legislation has been passed by Parliament to address issues of corruption and maladministration which fall within the Public Protector's constitutional mandate.

In contrast to the Human Rights institutions, which have had internal problems but have

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largely remained outside of intense political controversy -- except maybe for the Human Rights Commissions' investigation into racism in the media -- the Auditor General and the Public Protector have both been directly involved in the intense conflicts over allegations of corruption in the 'arms deal' and 'oilgate,' questions that implicate both the ANC as a party and senior members of government. While it was the Auditor General who first raised concerns about the 'arms deal' by declaring it a 'high risk' and requesting permission to investigate it, the Auditor General has also avoided direct confrontation with the government agencies and institutions they are required to monitor by developing the practice of providing 'qualified audits' that are neither followed up upon nor seen to be as serious as those cases in which the Auditor General declares that 'severe problems have been detected' (See, Report of the Auditor General on the audit outcomes of Departments, Constitutional Institutions, Public Entities and other entities for the financial year 2007-08, RP 06/2009). The Public Protector was however a lightning-rod of criticism by the media and non-government organizations in that period, both for the institutions unwillingness to confront government but most specifically for the 2005 Report that the Public Protector issued in response to complaints about the misappropriation of public funds by the Petroleum Gas and Oil Company of South Africa (PetroSA), a state oil company which was accused of advancing R15 million in public funds to a private company -- Invume Investments -- which in turn donated R11-million to the ANC (The Report of the Public Protector on an investigation into an allegation of misappropriation of public funds by the Petroleum, Oil and Gas Corporation of South Africa, trading as PetroSA, (the PetroSA Report) submitted to Parliament as Report No. 30 on 29 July 2005). Concerns about the unwillingness of the Public Protector to investigate some of these allegations and the report's perceived 'whitewash' of other allegations were only heightened when the North Gauteng High Court set aside the Report in a ruling on July 30, 2009. Concerns about the Public Protector were further heightened following strong public reaction to the news in early October 2009 that the outgoing Public Protector, Lawrence Mushwana, had received a golden handshake of R6.8 million in addition to the luxury car that he was entitled to purchase from the government at the end of his seven year non-renewable term. President Zuma's appointment on 19 October 2009 of Thulisile Madonsela, a well respected human rights advocate and constitutional lawyer, as the new Public Protector, produced public speculation that this institution might yet fulfill the constitutional role it was envisioned to play. If the daily newspaper reports are anything to judge by, this institution is now a central part of the ongoing struggle to achieve good governance in South Africa.

The limits of good governance – legal technologies 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 become dominant themes around the globe. Responding to the collapse of state socialism and the emergence of the United States as the sole super power, the new South African government embraced the latest technologies of governance, from the internet to negotiated rule-making as well as recognizing an extensive range of procedural obligations and rights in the administrative and procurement processes of the state. As a result the South

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African legal framework establishing the rules and processes of good governance is among one of the most sophisticated in the world. From the unique structure of the Constitution to the adoption of a plethora of new statutes, including: The Public Finance and Management Act (1 of 1999); the Promotion of Administrative Justice Act (3 of 2000); the Promotion of Access to information Act (2 of 2000); the Preferential Procurement Policy Framework Act (5 of 2000); and at the local level, the Local Government: Municipal Systems Act (32 of 2000). The difficulty however it is ensure that this elaborate legal framework functions.

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. Furthermore, the sophistication of our systems of governance require 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 of and obvious strains of transformation. In the case of legal doctrine, in field of administrative law itself there is still a degree of ambiguity and lack of clarity among legal academics and lawyers when it comes to understanding the relationship between the concepts and principles of administrative law that were part of the common law, and articulated by the courts prior to the new constitutional era and the adoption of the Promotion of Administrative Justice Act in 2000. Given our history, in which administrative law was creatively used by some progressive lawyers to oppose the arbitrary use of power by the old regime, and the common 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. Despite the fact that the Constitutional Court has clearly indicated that the practice of governance is based solely on the new framework, our 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 our governance system 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 every level of government. Most dramatic were the accusations of corruption that led to the dismissal of the Deputy President Jacob Zuma and the counter-accusation that President Mbeki improperly influenced the National Prosecuting Authority in that case, an accusation that ultimately led to his resignation as President. The fact that a High Court judge endorsed these claims of political interference hastened Mbeki's departure and thus had powerful political consequences despite the fact that the High Court's decision was subsequently overruled and severely criticized by the Supreme Court of Appeals. Aside from this dramatic example of the way in which law and legal process was used to wage and resolve political struggles for

power within the ruling party, there are also myriad examples of cases in which government officials, high and low, are accused of corruption or other wrong doing. In response to these accusations the assertion of legal and administrative process allows different factions to gain access to positions of power and authority while those accused are 'suspended' on full-pay from their government positions. Among the most notorious cases during this period was the suspension and later trial of then Deputy-President Jacob Zuma (for rape) the Commissioner of Police, Jackie Selebi (for corruption), the director-general of the National Intelligence Agency, Billy Masetlha (accused of withholding information from the inspector-general of intelligence and fraud), as well as official Commissions of Enquiry into accusations against the former head of the National Prosecuting Authority (NPA), Bulelani Ngcuka (accused of being an apartheid spy) and the Commission of Enquiry into whether Vusumzi 'Vusi' Pikoli, Ngcuka's successor as head of the NPA, was fit to hold office despite his firing by President Mbeki. The net effect is that while some officials are excluded from processes of procurement and authority that have become the lifeblood of patronage and power, they continue to receive their government salaries and benefits, thus allowing them to continue to engage in the political struggles which led to their unmasking or possibly malicious denouement. Add to this the fact that the government has in many cases felt legally obliged to cover the legal costs of those accused of wrongdoing in their official capacities and the result is a new process of political struggle through law within the executive branches of the post-apartheid state.

The formal legal framework within which these conflicts have played out is both clearly stated yet also ambiguously suspended between legal duties and ethical standards. While the President is duty bound to 'uphold, defend and respect' the Constitution (s83(b)), and Members of Cabinet are also formally responsible, 'collectively and individually to Parliament' (s92(2)), the task of achieving executive accountability remains a constant source of tension within the political and legal sphere. In addition to these general constitutional forms of accountability, Cabinet members are also required to abide by a code of ethics that the President published on 28 July 2000 as stipulated by section 2 of the Executive Members Ethics Act adopted by Parliament in 1998. The Constitution specifies and the Executive Ethics Code reemphasizes that members of Cabinet must individually refrain from undertaking other paid work; use their positions to enrich themselves or others; or, act in ways that are inconsistent with their office or involve themselves in situations which might give rise to conflict of interests between their 'official responsibilities and private interests' (See, 1996 Constitution, Section 96(2) and Paragraph 2.3 of the Executive Ethics Code). The Ethics Code furthermore requires Cabinet members to declare any "personal or private financial interest" they might have in matters that are before the executive body, and in the case of a conflict of interests either withdraw from the decision-making process or ask the relevant Premier or President for permission to participate. In addition, there is a duty to report these interests to the Secretary of Cabinet. Nevertheless, accusations over violations of the Code of Ethics have led to a series of investigations by the Public Protector including a general investigation into reporting failures where the Public Protector concluded in 2006 that there had been no violation of the Code because the data bases 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

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and Deputy-Ministers are obliged to disclose” (See, 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 of the Public Protector, No. 2/2006, p. 4.). Thus, despite an elaborate constitutional and legislative framework for ensuring executive accountability the implementation of these processes is a continuing source of controversy which led President Zuma to create a new anti-corruption Cabinet team in late November 2009.

Despite his public commitment to eliminating corruption President Zuma and his family have remained at the center of a series of scandals from the arms deal through to the present controversy over government spending on his family homestead at Nkandla, a small village in rural KwaZulu-Natal which is the subject of a recent investigation and 400 page report by the Public Protector who concluded that he and his family have received benefits well beyond what was required by the necessary security upgrade that was initiated after Zuma was elected President. (More detail to be added)

Conclusion

Executive authority lies at the heart of effective government, yet the control of executive power remains one of the most difficult problems in any constitutional framework. The 1996 Constitution takes up this challenge by both empowering the President and seeking to fragment executive authority by creating a range of independent institutions to both exercise particular aspects of executive power but also to serve as checks on the abuse of executive authority. While the more traditional checks on the executive have proven rather anemic in the context of South Africa's unipolar democracy, the creation of specialized institutions to protect constitutional democracy and the fragmentation of authority among more or less relatively independent institutions has proven no less vulnerable. In the case of Parliament, major oversight committees were effectively neutered by party bosses while questions time, that mainstay of the Westminster system was undermined by changing the rules to shorten the time devoted to questions and answers and by the tendency of Cabinet Ministers to either avoid attending the relevant sessions of the National Assembly or simply refusing to provide adequate responses. Again the dominance of a single party makes it very difficult for accountability to be established in the face of party solidarity or outside of the party caucus. Despite these limitations the executive structure provided by the Constitution has survived intense political conflict and managed to sustain stable governance over the first two decades of democracy.

This repeated framing of the law as a neutral arbiter of power came under increasing stress during the latter years of the Mbeki presidency. The Constitution attempts to distribute executive authority among a variety of institutions 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. However, the emergence of a unipolar democracy effectively limits the relative independence of these institutions. These effects were most evident in the political struggles among different factions of the ANC at every level of government. Most

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dramatic were the accusations of corruption that led to the dismissal of Jacob Zuma from the post of Deputy President and the counter-accusation that President Mbeki improperly influenced the National Prosecuting Authority in that case, an accusation that ultimately led to Mbeki's resignation as President. The fact that a High Court judge endorsed these claims of political interference hastened Mbeki's departure and thus had powerful political consequences, despite the fact that the High Court's decision was subsequently overruled and severely criticised by the Supreme Court of Appeals.

Aside from this dramatic example of the way in which law and legal process are being used to wage and resolve political struggles for power within the ruling party, there are also myriad examples where government officials, high and low, have been accused of corruption or other wrongdoing while the legal and administrative process has allowed different factions to gain access to positions of power and authority as those accused are suspended with full pay from their government positions. The most notorious cases during this period included the suspension and later trial of Deputy-President Jacob Zuma (for rape); the Commissioner of Police Jackie Selebi (for corruption); the Director-General of the National Intelligence Agency Billy Masetlha (accused of withholding information from the Inspector-General of intelligence and fraud). There were also official Commissions of Enquiry into accusations against the former head of the National Prosecuting Authority (NPA) Bulelani Ngcuka (accused of being an apartheid spy) and into whether Vusumzi 'Vusi' Pikoli (Ngcuka's successor as head of the NPA) was fit to hold office despite his firing by President Mbeki. The net effect is that while some officials are excluded from processes of procurement and authority that have become the lifeblood of patronage and power, they continue to receive their government salaries and benefits, thus allowing them to continue to engage in the political struggles that led to their unmasking or possibly malicious denouement. Add to this the fact that the government has, in many cases, covered the legal costs of those accused of wrongdoing in their official capacities, and the result is a new process of political struggle through law within the executive branches of the post-apartheid South African state.

The President is duty-bound to 'uphold, defend and respect' the Constitution (1996 Constitution, Section 83(b)), and members of Cabinet are also formally responsible 'collectively and individually to Parliament' (1996 Constitution, Section 92(2)). However, the task of achieving executive accountability remains a constant source of tension within the political and legal spheres in South Africa. In addition to these general constitutional forms of accountability, Cabinet members are required to abide by a code of ethics that the President published on 28 July 2000 as required by section 2 of the Executive Members Ethics Act adopted by Parliament in 1998. The Constitution specifies—and the Executive Ethics Code re-emphasises—that members of Cabinet must individually refrain from undertaking other paid work; they cannot use their positions to enrich themselves or others; or act in ways that are inconsistent with their offices or involve themselves in situations that might give rise to conflicts of interest between their 'official responsibilities and private interests' (see, 1996 Constitution, Section 96(2) and Paragraph 2.3 of the Executive Ethics Code). The Ethics Code furthermore requires Cabinet members to declare

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any 'personal or private financial interest' they might have in matters that are before the executive body, and in the case of a conflict of interests either withdraw from the decision-making process or ask the relevant Premier or President for permission to participate. In addition, Cabinet members have a duty to report these interests to the Secretary of Cabinet. Nevertheless, accusations over violations of the Code of Ethics have led to a series of investigations by the Public Protector, including a general investigation into reporting failures where the Public Protector concluded that there had been no violation of the Code because the databases the Auditor General relied upon were not always up-to-date and there was a 'misunderstanding in regard to the interests that Ministers and Deputy-Ministers are obliged to disclose' (see, 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 of the Public Protector, No. 2/2006, p. 4). Thus, despite an elaborate constitutional and legislative framework for ensuring executive accountability, the implementation of these processes is a continuing source of controversy.

It is in this context that it is important to recognize that the Public Protector and the other constitutionally mandated Chapter 9 institutions do form a fourth branch of government. This recognition is implied by the structure of the 1996 Constitution and is essential to the development and function of these institutions. To serve their constitutionally defined role they must be recognized as having the same degree of independence and autonomous capacity to function as the doctrine of the separation of powers defines for the traditional *tres politica*.