

Constitutionalism and Chapter 9 institutions

1 Introduction

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.- James Madison ([1788] n.d., 337) *The Federalist No. 51*.

The relationship between constitutionalism and Chapter 9 institutions is one founded on a key principle of constitutionalism, the limitation of government power, and to some extent, enforcing the limitation. Further, bearing in mind the history of South Africa and that 20 years has since passed since the establishment of a constitutional democracy, now is the appropriate time to assess whether Chapter 9 institutions are fulfilling their constitutional mandate: strengthening constitutional democracy.¹

In this paper, I strive to define constitutionalism and the justification for Chapter 9 institutions within the constitutionalism paradigm. And given the recent report by the Public Protector on security upgrades to the President's private residence, Nkandla, I will also highlight how this report is contributing to South Africa's jurisprudence on accountability and the rule of law.

African countries have had a poor track record when it comes to the implementation of the letter constitution. This is often the case a result of a lack of appreciation for the separation of powers principle; inheriting often compromised structures of government; and a lack of understanding of constitutional governance² and the interplay with democracy and the rule of law³ - generally a characteristic of any developing jurisprudence.⁴ The continent's understanding of the constitution was limited to it being a document agreed upon as a move away from one form of government to another.

The constitution is a source of legitimacy for the government and laws, and is important for the regulation of power for all branches of government.⁵ According to Jackson, constitutions are the foundation which the use, interpretation, application and enforcement of rules is

¹ Section 181(1) of the Constitution of the Republic of South Africa.

² A An-Na'im *African constitutionalism and the role of Islam* (2006) University of Pennsylvania Press: Philadelphia 1 and 2; and C Fombad 'Challenges to constitutionalism and constitutional rights in Africa and the enabling role of political parties: lessons and perspectives from Southern Africa' 55 *The American Journal of Comparative Law* (2007) 3 and 6.

³ *C.f.* M Rosenfeld 'The rule of law and the legitimacy of constitutional democracy' 74 *Southern California Law Review* (2000) 1308 and footnote 5.

⁴ An-Na'im (n 2) 1 and Fombad (n 2) 3.

⁵ Fombad (n 2) 6.

premised.⁶ However, with the advent and the close proximity of constitutionalism and Chapter 9 institutions, it is submitted that the disregard afforded to Chapter 9 institutions is no different from that directed at the constitution as these institutions are created by constitution. Even though this might not be the case in the strict sense, given the hostile reception institutions modelled to address corruption and maladministration, to better appreciate the status and role of Chapter 9 institutions in a constitutional setting, it is important to understand constitutionalism.

2 Constitutionalism: traditional and progressive approach

Constitutionalism enables the promotion of fundamental rights and adherence to the letter law by curbing the abuse of power.⁷ According to Kolawole, constitutionalism means:

“the practice and acceptance of government by means of constitution. [However, beyond the mere] adoption of a document or fundamental principles as the guiding rules by which a given country is governed, but a widespread willingness and readiness on the part of those who govern and those who are governed to abide by both the letter and the spirit of fundamental laws.

Constitutionalism therefore describes both a political and reality of government limited by law, a psychological and social disposition on the part of individual citizens to be limited and bound by law. Constitutionalism can therefore be said to be the foundation of democracy and good governance, which are basically the tangible results of the working of a constitution and the respect for the constitution and law.”⁸

Fombad adds to this narrative by stating that the purpose of constitutionalism is to see constitutions being realised and not merely be treated as decorative documents which could easily be manipulated by politicians. These submissions are a positive (progressive) step to the traditional and narrow understanding of constitutionalism as a mechanism that seeks to limit the abuse of power, without addressing the enforcement of these limitations on the government or doing so in a separate platform as a distant paradigm.⁹ Authors such as Schedler (and Reif) discuss enforceability within the ambits of political accountability, and

⁶ V Jackson ‘What’s in a name? Reflections on timing, naming and constitution-making’ 49 *William and Mary Law Review* (2008) 1250.

⁷ C Fombad ‘The separation of powers and constitutionalism in Africa: the case of Botswana’ 25 *Boston College Third World Law Journal* (2005) 301, C Zoethout and P Boon ‘Defining constitutionalism and democracy: an introduction’ in C Zoethout, M Pietermaat-Kros and P Akkermans *Constitutionalism in Africa* (2006) 1, particularly 1-2, An-Na’im (n 2) 3 and 5-6 and B Li ‘Constitutionalism and the rule of law’ *Perspectives* http://www.oycf.org/Perspectives2/7_083100/constitutionalism_and_the_rule_o.htm (21 March 2014) 1, and A Mangu ‘SOP, independence of the judiciary, and good governance in African Union member states’ <http://www.cpahq.org/cpahq/cpadocs/Good%20Governance%20in%20African%20Union%20Member%20States.pdf> (accessed 14 June 2014) 2, 5 and 6. *C.f.* An-mail (n 2) 1 and A Kolawole ‘Good governance, constitutionalism and the rule of law: imperatives for sustainable development in Nigeria’ 130 for the failures and setbacks of constitutionalism on the African continent, and Jackson (n 6) 1257 for sustenance of legal systems (rule of law) in the absence of constitutions, using the United Kingdom and Israel as an examples.

⁸ Kolawole (n 7) 134. See also Fombad (n 2) 6-8.

⁹ Fombad (n 2) 1.

as a second component thereof, devoid of constitutionalism (as a limitation).¹⁰ However, Reif further qualifies enforceability as “only present when the institution is given the power to impose punishment, [which] most ombudsmen ... lack unless ‘soft types of sanctions are included, such as making recommendations to correct poor administration and negative publicity in ombudsman reports’”.¹¹ Fombad reads in enforceability as an inherent component of constitutionalism, save that there needs to be a “clearly defined mechanism for ensuring that limitations on the government are legally enforceable”.¹² Therefore, to overcome the challenges African countries have encountered with constitutions, as mere documents, the progressive narrative on constitutionalism will help adopt constitutional governance and realise accountability and the rule of law.¹³ This is the case because the interests of those who are governed ought to be safeguarded. The right to complain runs parallel with the culture to participate/complaint- in a democracy.¹⁴ It speaks to the exercise of public power and the effects thereof, thus requiring those who stand to be affected by such exercise to check, consider and decide on the use of public power and that those who exercise such power explain and justify their conduct.¹⁵ And participatory governance, as espoused by the Constitution,¹⁶ envisaged accountability; and transparency. A mechanism in which this is done is by holding the governors accountable, in that they act according to the terms of delegation.¹⁷ This is in accordance with enabling the population to make an informed decision about their representatives’ ability to govern. This also, in addition to periodic elections, enables the population to replace representatives who have compromised their mandate.¹⁸ Therefore, constitutional governance seeks to protect and promote individual rights, through accountability.¹⁹

2.1 Accountability, rule of law and transparency

Accountability, as a norm, is concerned with preventing abuses of power and a sense of impunity, and is one of the defining hallmarks of democracy.²⁰ Accountability speaks to the

¹⁰ Zoethout and Boon (n 7) 1 and 4-5.

¹¹ Reif 61.

¹² Fombad (n 2) 7.

¹³ Jackson (n 6) 1254 and H Brunkhorst ‘Constitutionalism and democracy in the world society’ in P Dobner and M Loughlin (eds) *The twilight of constitutionalism?* (2010) Oxford University Press: Oxford 182.

¹⁴ An-Na’im (n 2) 6 and E Mureinik ‘A bridge to where? Introducing the Interim Bill of Rights’ 10 *South African Journal on Human Rights* (1994) 46.

¹⁵ K Govender ‘Appraising the constitutional commitments to accountability, responsive and open governance and to freeing the potential of all: a tribute to Dr Beyers Naude’ 26 *South African Public Law* (2011) 347.

¹⁶ See sections 32 (Access to information), 33 (Just administration action), 34 (Access to courts), 38 (Enforcement of rights), 40(1) (Spheres of government) and 41(1) (Powers of each sphere of government) of the Constitution. See also K Klare ‘Legal culture and transformative constitutionalism’ 14 *South African Journal on Human Rights* (1998) 155 and 159.

¹⁷ An-Na’im (n 2) 4.

¹⁸ An-Na’im (n 2) 5.

¹⁹ An-Na’im (n 2) 5 and 6: “Administrative and financial transparency is unlikely to lead to effective legal and political accountability without competent and independent institutions that can investigate possible violations and adjudicate on disputed issues and questions.”

²⁰ R Caplan ‘Who is guarding the guardians? International accountability in Bosnia and Herzegovina’ <https://www.dur.ac.uk/resources/law/LCD/Caplan--Durhamwebsite.pdf> (accessed 22 September 2014) 1 and

rule of law,²¹ the promotion of human rights and good governance.²² Without accountability, the rule of law will be compromised, especially in transitional or new democracies such as South Africa's.²³ The rule of law forms the cornerstone to a functioning constitutional democracy,²⁴ and symbolises equality before the law.²⁵ The rule of law is premised on the principle that the government is subject to the law, and any conduct outside the realm of what is provided for by law is unlawful, meaning that governments must be transparent about their conduct so as to ensure that such conduct is sanctioned by law.²⁶

Further, the rule of law serves to strengthen justice – countries that are democratic and observe the rule of law are more likely to insist on and ensure justice. Transparency serves the best interests of the public.²⁷ Transparency is the extent to which information is available to the public to enable the public to take an informed decision and /or affirm a decision made by those they elected.²⁸ Transparency enables decision makers to be held accountable.²⁹

2-3; Kolawole (n 7) 133; and Mureinik (n 14) 46 and Reif 59. A Schedler 'Introduction' in A Schedler, L Diamond and M Plattner (eds) *The self-restraining state: power and self-restraining state* (1999) 3 and defines accountability, as administered by state institutions, as horizontal accountability and vertical accountability. Vertical accountability is "the holding of periodical free and fair elections allowing the citizenry to select their leader and eject them from office." Horizontal accountability as "the capacity of state institution to check abuses by other public agencies and branches of the government" via administrative; financial; legal and constitutional accountability. African National Congress (ANC) Secretary General Gwede Mantashe questioned the release of the Public Protector's report on Nkandla before the elections, saying it seeks to disrupt the campaign by the ANC, <http://mg.co.za/article/2014-03-20-zuma-will-be-questioned-says-mantashe> (accessed 03 October 2014)

²¹ J Stromseth 'Introduction: goes and challenges in the pursuit of accountability' in J Stromseth *Accountability for atrocities: national and international responses* (2003) Transnational Publishers: New York 11, B Broomhall *International justice & the International Criminal Court: between sovereignty and the rule of law* (2003) Oxford University Press: Oxford 54. See also Rosenfeld (n 3) 1307.

²² See H Sano 'Good governance, accountability and human rights' in H Sano and G Alfredsson (eds) *Human rights and good governance: building bridges* (2002) Martinus Nijhoff Publishers: The Hague 123 and 124. See also A Nollkaemper *National courts and the international rule of law* (2011) Oxford University Press: New York 5, mentions that accountability is central to the rule of law by virtue of the fact that accountability ensures the limitation of power. See also B Mangu 'Separation of powers, independence of the judiciary, and good governance in African Union member states' <http://www.cpahq.org/cpahq/cpadocs/Good%20Governance%20in%20African%20Union%20Member%20States.pdf> (accessed 14 June 2014) 1, 7-8 and 13. According to Mangu, "good governance implies or requires transparency, equality, justice, promotion of and respect for human rights ..."

²³ Rosenfeld (n 3) 1314. See also Jackson (n 6) 1249.

²⁴ Klare (n 16) 149.

²⁵ Rosenfeld (n 3) 1307. C.f. Rosenfeld (n 3) 1310.

²⁶ B Hager *The rule of law: a lexicon for policy makers* http://www.mansfielddn.org/backup/programs/program_pdfs/lexicon.pdf (accessed 20 September 2014) 4 and Kolawole (n 7) 133.

²⁷ A Florini 'Introduction: the battle over transparency' in A Florini (ed) *The right to know: transparency for an open world* (2007) 1.

²⁸ Kolawole (n 7) 133 and Reif 79.

²⁹ An-Na'im (n 2) 5: "the population at large [to exercise] intelligent, well-informed, and independent judgement about the ability of its representatives and officials to act on its behalf, and to verify that they do in fact act in accordance with the best interest of the population. The public must also have the capacity to challenge and replace those who fail to implement [their] mandate."

It is for these reasons that Chapter 9 institutions exist, and should be celebrated and protected.³⁰ Chapter 9 institutions provide for constitutionally protected checks and balances, to ensure transparency and accountability.³¹

3 Chapter 9 institutions

Constitutionalism remains an important ideal embodied by Chapter 9 institutions, which are a cornerstone to the sustenance of democracy- “[d]emocracy is an essential prerequisite for constitutionalism”³² and the full realisation of democratic principles such as accountability- by holding decision makers accountable for their decisions, they are less likely to abuse their power-,³³ respect for the rule of law- adherence to the law- and the promotion and protection of human rights.³⁴ Chapter 9 institutions are some of the avenues created by the constitution to ensure that the government is accountable and responsible- their role is to strengthen and support democracy.³⁵ Noted by Klare that, the true meaning of a provision in the constitution is determined in conjunction with the aspirations of that provision.³⁶ Therefore, it brings to question: what were the aspirations for the creation of Chapter 9 institutions?

The Constitutional Court, in *In re: Certification of the Constitution of the Republic of South Africa, 1996*,³⁷ provided a very basic understanding of the role of the Public Protector and, by implication, other Chapter 9 institutions: to ensure that government officials carry out their tasks effectively, fairly and without corruption or prejudice; to ensure effective, accountable and responsible government; and to investigate sensitive and potentially embarrassing affairs of the government. Put differently, the role of Chapter 9 institutions is to ensure that governments are *accountable, effective and transparency*.

Chapter 9 institutions serve as a continued reminder to the government to uphold fundamental rights and more so, constitutionalism; and that accountability, effective government and transparency are the norms, not the exceptions.³⁸ These institutions have

³⁰ Caplan (n 20) 14.

³¹ Reif 58-59.

³² Fombad (n 2) 10 and Reif 2. See also J Elster ‘Introduction’ in J Elster and R Slagstad (eds) *Constitutionalism and democracy* (1988) 9.

³³ J Yeh and W Chang ‘The emergence of transitional constitutionalism: its features, challenges and solutions’ *27 Penn State International Law Review* (2008-2009) 112.

³⁴ Rosenfeld (n 3) 1307 and An-Na’im (n 2) 3 and 4.

³⁵ T Madonsela ‘The role of the Public Protector in protecting human rights and deepening democracy’ (2012) *Stellenbosch Law Review* (2012) 6.

³⁶ Klare (n 16) 151.

³⁷ 1996 (10) BCLR 1253 (CC) paras 161 and 163.

³⁸ *B.C. Development Corp. v Friedman* [1985] 1 W.W.R. 193 (S.C.C.) 206 and Reif 2.

an important role to play in promoting democracy and democratic principles.³⁹ As provided for in sections 181(2)-(4), read with section 181(1), of the Constitution:

Section 181:

(2) These institutions are independent, and subject *only to the Constitution and the law*, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

(3) Other organs of state, through legislative and other measures, *must assist and protect these institutions* to ensure the independence, impartiality, dignity and effectiveness of these institutions.

(4) No person or organ of state may interfere with the functioning of these institutions. (Emphasis added.)

Chapter 9 institutions, as *per* section 181(1) of the Constitutions are: (a) The Public Protector; (b) The South African Human Rights Commission;⁴⁰ (c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities;⁴¹ (d) The Commission for Gender Equality;⁴² (e) The Auditor-General;⁴³ and (f) The Electoral Commission.⁴⁴ The mandate of these institutions extends to promoting the Bill of Rights and assisting in the realisation of socio-economic rights- this extension, in other jurisdictions, arises from a history of human rights abuses by the administration and at times, the state's international human rights obligations to realise a certain right.⁴⁵ For purposes of this paper, attention will be paid to the Public Protector.

3.3 The Public Protector, also referred to as the ombudsman in other jurisdictions

The origins of the ombudsman's office are credited to the establishment of the first ombudsman in Sweden in 1713, which was established to investigate government affairs on behalf of citizens.⁴⁶ This phenomenon only caught up with the rest of the Scandinavian countries in second half of the 20th century.⁴⁷ With the advent of democracy and the human realisation of rights, or the need thereof, in many jurisdiction around the world in the past

³⁹ Govender (n 15) 354, J Mubangizi 'The South African Public Prosecutor, the Ugandan Inspector-General of government and the Namibian ombudsman: a comparative review of their roles in good governance and human rights protection' 45 *CILSA* (2012) 308-309 and H Klug 'Constitutional law' *Annual Survey of South African Law* (1995) 11.

⁴⁰ The role of the Human Rights Commission is to safeguard human rights and enquire into allegations of abuse.

⁴¹ Section 185 and 186 of the Constitution.

⁴² Section 187 of the Constitution.

⁴³ The function of the office of the auditor general is to regulate the use of public funds.

⁴⁴ The function of the IEC is to oversee and safeguard the elections, and ensure that they are free and fair.

⁴⁵ L Reif 'The promotion of international human rights law by the office of the ombudsman' in L Reif (ed) *The international ombudsman anthology* (1999) 271 and 272-275; and Mubangizi (n 39) 309.

⁴⁶ C Murray 'The human rights commission *et al*: what is the role of South Africa's chapter 9 institutions' 9 *Potchefstroom Electronic Law Journal* (2006) 6/1 and Mubangizi (n 39) 304.

⁴⁷ Reif 1.

century, there arose a need for governments to be checked and the need to address complaints against government's bureaucratic conduct.

Constitutions are written in different, and at times difficult, circumstances and South Africa's circumstances are unique and deserve mention.⁴⁸ The power structure before the 1994 Constitution in South Africa is important for purposes of understanding the circumstances under which the South African Constitution was drafted and Chapter 9 institutions created. The composition of power and government prior to 1994 was one of oppression, discrimination and the total disregard to basic human rights. The apartheid system was law unto itself. Thus there was need for a transitioning constitution that would reflect on the past and future.⁴⁹ A constitution that would embrace accountability, the rule of law, a Bill of Rights and democracy.⁵⁰ The 1994 Constitution was seen a bridge from authoritarianism to a democratic era based on the rule of law, equality and respect for human rights.⁵¹

Although South Africa had an ombudsman, the Public Protector (also referred to as the Advocate-General, established in 1979),⁵² together with an Auditor General prior to the 1994 constitution, the legal system then was one of parliamentary sovereignty-constitutional common law operation only at the authorization of parliament.⁵³ And this position changed with the end to apartheid, the final Constitution guaranteed the supremacy of the Constitution and rule of law as *per* section 1(c) of the Constitution. Principle XXIX of the set 34 Constitutional principles provided that the independence of these institutions was to be safeguarded by the Constitution.

The primary and worldwide recognised function of the 'ombudsman's office' is to monitor the two branches of government, and report on the finding of his/her office to parliament. In terms of section 181(1) and (2) and 182 of the Constitution, read together with the Public Protector Act 23 of 1994, the Public Protector Amendment Act 22 of 2003 and many other legislations,⁵⁴ the Public Protector is empowered to investigate, report and take remedial action in relation to maladministration, improper prejudice and improper conduct, including improper enrichment.⁵⁵ The duties may be exercised at all levels of government, at any public entity and against any person exercising public power, excluding judicial function and private persons. Put differently, and in accordance with the understanding of the incumbent

⁴⁸ K Scheppelle 'A constitution between past and future' 49 *William and Mary Law Review* (2008) 1377-1378.

⁴⁹ Jackson (n 6) 1249, particularly 1267-1270 and 1280. See also Govender (n 15) 352 and Scheppelle 1379 and 1380.

⁵⁰ N Haysom 'Democracy, constitutionalism, and the ANC's bill of rights for a new South Africa' 18 *Social Justice* (1991) 46

⁵¹ E Mureinik 'A bridge to where? Introducing the Interim Bill of Rights' 10 *South African Journal on Human Rights* (1994) 32.

⁵² Mubangizi (n 39) 309.

⁵³ F Michelman 'The rule of law, legality and the supremacy of the constitution' in S Woolman *Constitutional law of South Africa: student edition* 11-1.

⁵⁴ Such as the Prevention and Combating of Corrupt Activities Act 12 of 2004; and Protected Disclosures Act of 26 2006

⁵⁵ Section 6(4) of the Public Protector Act 23 of 1994.

Public Protector, the office of the Public Protector was designed to ensure good administration by investigating allegations of improper conduct or maladministration at the hands of public officials. This is done in conjunction with the protection and protection of human rights, although not pronounces as such.⁵⁶

In *The Public Protector v Mail & Guardian Ltd and Others*, the Supreme Court of Appeal noted that the office of the Public Protector plays an important role in preventing the misuse of public power by officials to the prejudice of the nation. The Supreme Court of Appeal further cautioned that undermining this office compromise's "an indispensable constitutional guarantee".⁵⁷

Therefore, given the experience from various African countries, including South Africa's experience with apartheid, on constitutions devoid of constitutionalism, it can be said that Chapter 9 institutions were established with constitutionalism in mind. Section 181 of the Constitution is clear that Chapter 9 institutions are entrusted with strengthening democracy, as a prerequisite to constitutionalism.

Now, having established that the South African constitution envisages constitutionalism, the question whether this Constitution should be given the progressive or tradition interpretation stands to be see and will be answered below.

3.3.1 Case study: *Secure in comfort* (Nkandla)⁵⁸

Secure in comfort was the title of a report compiled by the Public Protector following an investigation into allegations of impropriety and unethical conduct relating to the installation of security measures at the private residence of the President, Jacob Zuma. The Nkandla report detailed how a project, initially estimated to cost only R145 million (\$14 million) subsequently cost the South African taxpayers R246 million (\$22 million).

This investigation was instituted as a result of complaints lodged following media reports that a Presidential mansion was constructed, in flagrant violation of both financial and procedural laws. Some of the complaints questioned the source of funds used for this project, and whether public funds were used, and, if so, why. The investigation covered, *inter alia*,: whether there was any legal authority for the security upgrades and if so, whether such authority was violated or exceeded; (2) whether the President and his family unduly benefited from these upgrades; and (3) should blame be apportioned to the President for the costs incurred?

⁵⁶ Madonsela (n 35) 6 and Reif (n 45) 271.

⁵⁷ 2011 (4) SA 420 (SCA) [4]. This case concerned the refusal by the Public Protector's office to investigate allegations of corruption against a . See also Murray (n 46) 6/7.

⁵⁸ Public Protector Report 25 of 2013/2014 http://www.publicprotector.org/library%5Cinvestigation_report%5C2013-14%5CFinal%20Report%2019%20March%202014%20.pdf- also referred to as the Nkandla report. Our Nkandla situation is not unique to the continent. In 2013 Nigeria minister of aviation purchased two bullet proof sedans to the tune of \$1.6 million. These instances serve to highlights the need for accountability mechanism such as those of the Public Protector.

Although the Public Protector encountered some objections (“limitations”)⁵⁹ to the investigation, it is important to note that all these objections were at no stage translated to intimidation or the use of unlawful means.

The Public Protector found that the President, like other members of his cabinet, is entitled to security upgrades. Further, that given the location and terrain (deep rural area) in which the President’s private residence is situated, security was a need and the accompanying costs would be inherently high. That said, the Public Protector found that the authority to request such an upgrade was questionable. The Minister of Safety and Security enlisted the resident of the President under a piece legislation that actually requested the President to bear the costs for the resident’s safety and sustenance, the National Key Point Act.⁶⁰

Further, the Public Protector found that the President’s private architect was instrumental in selecting material for the security upgrades, this despite the fact that the architect did not have any experience on security matters. At the conclusion of the report, the architect had pocketed a total of R16,5 million. The President has since distanced himself from the architect, and claimed that he did not insist that the architect play a role in the upgrades.

Further, the report indicated a number of community based projects were shelved as a result of the upgrades, mindful of the fact that none of the upgrades would later revert to the surrounding communities. As the project advanced, it became a looting stage due to the lack of a clear mandate from any legislation or document from parliament regulating the funding of security upgrades to the President’s private residence.

The Public Protector also found that the use of public funds in this project was “unconscionable, excessive” and amounted to opulence at a grand scale, misappropriation and violation of section 195(1)(b) of the Constitution and Public Finance Management Act.⁶¹ Further, that the President, together with his family, unduly benefited from the upgrades, and therefore, should bare costs for installations that cannot be deemed to be security upgrades. This is also taking into consideration that the President, as custodian to state resources and having taken an oath of office and sworn allegiance to the constitution,⁶² failed to protect state resources.

Whether accurate or not, the Public Protector’s report goes a long way in fulfilling its constitutional mandate- strengthen democracy.

⁵⁹ Namely, questioning the authority and mandate of the Public Protector and limiting access to evidence on security grounds.

⁶⁰ Section 3(1) of the National Key Points Act 102 of 1980: “...the owner of the National Key Point concerned shall after consultation with the Minister at his *own expense* take steps to the satisfaction of the Minister in respect of the security of the said Key Point.” (Emphasis added.)

⁶¹ Section 195(1)(b) of the Constitution: Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles: (b) Efficient, economic and effective use of resources must be promoted.

⁶² Section 96, read with section 91, of the Constitution.

3.3.2 Analysis

By merely instituting an investigation into government's conduct regarding upgrades to the President's private residence, the Public Protector was seeking to hold the government accountable, and subsequently inform the electorate of the governor's conduct and whether such conduct complies with law and the constitution.

The Public Protector ensured that South Africans are in the know about how their taxes are spent by asking that the head of the executive account for the use of public funds. Therefore, this report goes a long way in highlighting that the executive has to account for its actions. What is key with the Public Protector's report is how it sought to establish the genesis of the authority to undertake the security upgrades. The report did not assume that the President has or does not require authorisation for security upgrades. This speaks to equality before the law. The President, like all public officials, is required to have authority to use public funds, and in this respect, the President was found wanting.

As showed above, although the Public Protector had encountered some objections to the investigation, the government was transparent in that they submitted documents and all other relevant material which enabled the public prosecutor to carry out the investigation. By making available such information, including sensitive security information, the government was being transparent and observing section 181(4) of the Constitution.

As to whether the Public Protector and other chapter 9 institutions are under threat, I am of the view that this is not the case. Firstly, in every constitutional democracy, disagreement and conflict of opinion is an ever present feature, and to some extent indicate a healthy democracy. If anything, such disagreement, I would submit, indicates that South Africa's democracy is alive and the rule of law respected.⁶³

Secondly, the active role played by the Constitutional Court in pronouncing on democracy, accountability and human rights when asked to do by civil society and individuals is motivation enough to believe that this court will not hesitate to protect means to undermine these institutions.⁶⁴

⁶³ It has correctly submitted by various authors including An-Na'im, that disagreement is normal and will always be a permanent feature to the human race, and that constitutionalism is mediation forum. This is indeed the case.

⁶⁴ See *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC). The *Democratic Alliance* (DA) matter concerned the President's decision to appoint Menzi Simelani as National Director of Public Prosecutions, despite the fact the latter's credibility was questionable and had on a previous occasion been dishonest. The Constitutional Court found that the President acted irrationally in appointed Simelani, a requirement for the legality of an appointment of this nature. The Court held that the appointment was invalid and set aside. And *Justice Alliance of South Africa v President of Republic of South Africa and Other* 2011 (5) SA 388 (CC). This matter concerned the extension of the term of office of the Chief Justice by the President. In both matters, the Constitutional Court emphasised, more so in the latter, adherence to the rule of law and the importance thereof to constitutional democracy. In Both cases, the Constitutional Court ruled against the

In addition, these institutions are also at liberty to litigate, request specific remedies and ward off threats to their existence, through the existing vigorous court structures. This submission was supported by a recent judgement by the Western Cape High Court, *Democratic Alliance v The South African Broadcasting Corporation Limited and Others*.⁶⁵ This matter concerned an application by the DA to have the Chief Operations Officer (COO) of the South African Broadcasting Corporation Limited (SABC) suspended from his position following the finalisation of disciplinary proceedings to be brought against him by the Board of the SABC.⁶⁶ The DA had based this application on the findings as the Public Protector's report on allegations of, *inter alia*, maladministration and abuse of power.⁶⁷ The report by the Public Protector was thorough and contained damning findings, including the fact that the COO gave himself a salary increment of 63% after assuming the position as Acting COO. Despite these findings by the Public Protector, the Board and the Minister endorsed his appointment as COO.

The Western Cape High Court, as far as the effects of recommendations of the Public Protector have on an individual or organ of state, held that "a finding by the Public Protector is *not* binding on persons and organs of state".⁶⁸ (Emphasis added.) However, the Court went further and said:

"the fact that the findings of and remedial action taken by the Public Protector are no binding decisions does not mean that these findings and remedial actions are mere recommendations, which an organ of state may accept or reject."

Sourcing mainly from *R (on the application of Bradley and Others) v Secretary of State for Work and Pensions*,⁶⁹ and reverting back to the principle as held in the earlier *DA* matter,⁷⁰

President is what seemingly looked like a clear prerogative of the President, to appoint and extend a term of office, as provided by both the Constitution and national legislation. See also *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC). An independent judiciary goes a long way in fostering the rule of law- which is a system whereby equality before the law and effective constraints on government arbitrariness is present- and other democratic values such as human rights and accountability, see G Gumede 'Human rights and the rule of law in Swaziland' 2 *African Human Rights Law Journal* (2005) 276 and 277, Fombad (n 7) 307 and M Marshall 'Symposium: the judiciary in a constitutional democracy' 22 *South African Journal on Human Rights* (2006) 10. And Mangu (n 7) 2 and S O'Connor 'Judicial accountability must safeguard, not threaten, judicial independence: an introduction' 86 *Denver University Law Review* (2008) 1-2.

⁶⁵ Case No.: 12497/2014 (24 October 2014) <http://www.saflii.org/za/cases/ZAWCHC/2014/161.pdf> (accessed 01 November 2014).

⁶⁶ *Ibid* [1].

⁶⁷ *Ibid* [4]. See the report titled: "A report in an investigation into allegations of maladministration, systemic corporate governance deficiencies, abuse of power and the irregular appointment of Mr Hlaudi Motsoeneng by the South African Broadcasting Corporation (SABC)", dated 17 February 2014 http://www.pprotect.org/library/investigation_report/2013-14/WHEN%20GOVERNANCE%20FAILS%20REPORT%20EXEC%20SUMMARY.pdf (accessed 1 November 2014).

⁶⁸ *Democratic Alliance v The SABC and Others* (n 65) [51]. Reif says that the Public Protector typically has no power to enforce his or her recommendation, and can only rely on "persuasion and publicity as means to the realisation of her recommendations", see L Reif 'The promotion of international human rights law by the office of the ombudsman' in L Reif (ed) *The international ombudsman anthology* (1999) Kluwer Law International: The Hague 271.

⁶⁹ [2008] 3 All ER 1116, CA.

⁷⁰ n 64.

the Court held that “rationality is a minimum threshold requirement applicable to the exercise of all public power”.⁷¹

“It goes without saying that a decision by an organ of state rejecting the findings and remedial action of the Public Protector is itself, capable of judicial review on conventional public law grounds.”⁷²

Thirdly, with the ANC losing majority in Parliament, committees aimed at supporting Chapter 9 institutions will better represent the diverse views that exist and that support these institutions.⁷³

4 Conclusion

Governments, by their nature, wield great power, and at times limitations to this power are not well defined. Constitutions are one of those mechanism used to set the parameters on the use of this power. However, as witnessed in many jurisdictions around the world, having a constitution is at times insufficient to protect fundamental rights and ensure accountability. In many of these instances, the constitution has failed to ensure that the limitations on the government are enforced, if not observed. This speaks to the core principle of constitutionalism.

A narrative favouring the traditional interpretation of constitutionalism, as concerned with only the observation of the limitation of power, creates a vacuum and is exploitable by those in power. Rather a progressive interpretation of constitutionalism, which speaks to both the observation and enforcement of limitations on power, is the best model to confront bad governance and foster a culture of accountability. Accountability is an important phenomenon that comes with the exercise of (public) power, and where there is accountability; the rule of law thrives, which is an important component of any constitutional democracy.

Chapter 9 institutions are an embodiment of constitutionalism, for they are mandated to check government conduct regarding maladministration, observation of human rights, the administration of elections, and the use of public funds, in turn, strengthening democracy. South Africa’s Chapter 9 institutions were carved out of intense negotiations mindful of the past and anticipating a prospective future, centred on a constitution that protects human rights, espouses equality and freedom. This this effect, Chapter 9 institutions were provided for in the Constitution.

⁷¹ See also *Pharmaceutical Manufacturer Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) [90].

⁷² *Democratic Alliance v The SABC and Others* (n 65) [73].

⁷³ *C.f.* Serious concerns have been raised about the Public Protectors inability to make binding findings, and the fact that the office bearer is appointed by the President. See Mubangizi (n 39) 312 and Murray (n 46) 6/26.