

A Politics of Accountability: How South Africa's Judicial Recognition of the Binding Legal Effect of the Public Protector's Recommendations Had a Catalysing Effect that Brought Down a President

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One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason, public office-bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck.¹

I CONSPIRACY IS THE POOR MAN'S CAUSALITY

Nothing thrills the citizens of a country more than watching venal politicians fall from grace. US President Richard Nixon finally ran out of dirty tricks when investigative journalists 'followed the money' and discovered a slush fund and an entire team of miscreants picked to do his dirty work. After investigation by a special prosecutor, and on the verge of impeachment, 'Tricky Dick' departed in disgrace.

Post-apartheid South Africa recently witnessed the ignominious end of its third elected President, Jacob Zuma. After being exposed and pilloried by the press, the Public Protector revealed the degree of his corruption in two scathing

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¹ *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* [2016] ZACC 11, 2016 (3) SA 580 (CC) ('*Economic Freedom Fighters*' or 'EFF') at para 1.

reports. The Constitutional Court reinforced the findings of the press and recommendations of the Public Protector in two watershed judgments of its own. Meanwhile, rank and file members of the African National Congress (‘ANC’) withdrew their support for the Zuma-led regime, first in municipal elections, and, a year later, at the ANC’s national conference. After being recalled by the ANC’s National Executive Committee and facing an imminent vote of no confidence, the ever-defiant President resigned in shame.

The events that led to these two watershed political moments followed roughly the same path. A major news outlet first broke a story about a limited abuse of power that ultimately revealed a more widespread breach of public trust. Citizen outrage reached a fever pitch. State institutions revealed graft that not only penetrated the most important sectors of the public realm, but exposed equally degenerate behaviour in the private sector. With nowhere to run, no plausible explanation and the loss of virtually all necessary political support, both Presidents renounced their office.

In both instances, ‘a politics of accountability’ overcame an imperial Presidency. A politics of accountability also reflects what some might be inclined to call a substantive embrace of the rule of law. However, this commitment goes beyond decisions by courts of law. The fourth estate, an invigorated electorate, civil society organisations, other state institutions, non-governmental organisations and both the majority party and minority parties have played a role in creating a culture in which the governors must follow the same rules as the governed, and fellow citizens must abide by the same rules that apply to other citizens. As I have argued at length elsewhere,² ongoing polycentric exchanges between political institutions and social actors that build mutual trust, concern, care and loyalty in discrete relationships and within informal networks and formal institutions can, cumulatively, create a society and a state identified with a deep commitment to the rule of law. If these vertical, horizontal and polycentric relationships, networks and institutions are constantly reaffirmed, then we might witness two developments. First, state actors and structures should enjoy greater legitimacy. Second, the various associations, communities, networks, and sub-publics that constitute civil society should be strengthened.³ On this account, it is clearly false to say that the more formal, purely vertical, conception of the rule of law comes first. The relationship is one of reciprocal effect. As Martin Krygier writes:

At a bare minimum, ... the rule of law ... requires that there be no privileged groups or institutions exempt from the scope of the law; that in general the law be of a particular character, such that ‘people will be able to be guided by it’; ... and that rule of law expectations and values pervade social expectations, to a considerable extent ... [A]t the horizontal level of relations among citizens, the rule of law enables and facilitates confident interaction and co-ordination among non-intimates, which are central conditions of a modern civil society in good shape ... It establishes fixed and knowable points in the landscape, on the basis of which the strangers who routinely interact in modern societies

² S Woolman ‘On the Reciprocal Relationship between the Rule of Law and Civil Society’ (2015) *Acta Juridica* 374.

³ This thesis is fleshed out in S Woolman *The Selfless Constitution: Experimentalism & Flourishing as Foundations of South Africa’s Basic Law* (2013).

can do so with some security, autonomy, and ability to choose. And so it provides a foundation and scaffolding for the building of ‘civil’ relations between state and citizens and among citizens themselves. They can begin to rely upon, rather than merely fear, the state and law. Apart from causal relationships, there is ... a real affinity between the rule of law and civil society. *Causal links are sometimes hard to trace*, but a polity in which the rule of law has a deep hold is one in which restraint [and respect are] ... cultural norm[s]... [C]ivil society and the rule of law go well together ... *with pylons firmly planted on both sides of the divide and input moving in both directions.*⁴

The dots in South Africa’s development of such reciprocal relationships, which ultimately add up to a ‘politics of accountability’, can be clearly connected over the eight-year period from 2009 through 2017.

Parts II, III and IV of this article assess a narrower set of interlocking events whose catalytic effects facilitated this profound shift in the South African political landscape. The fulcrum for this turnabout encompasses a series of reports by the Public Protector, and judgments by the Supreme Court of Appeal and the Constitutional Court. After revelations in the press, the Public Protector produced a report in which the President and other members of government were found to have illegally used public funds to enhance the facilities at the President’s private estate – Nkandla. In addition to various findings of illegal and unconstitutional behaviour, the Public Protector recommended the recoupment of those ill-gotten gains from the President. The initial status of those recommendations remained unclear for roughly a year. Ultimately, both the Supreme Court of Appeal and the Constitutional Court found that the recommendations and the remedies set out by the Public Protector may have legally binding effect.⁵

⁴ M Krygier ‘The Quality of Civility: Post-Anti-Communist Thoughts on Civil Society and the Rule of Law’ in A Sajó (ed) *Out of and into Authoritarian Law* (2002) 221 (emphasis added). Krygier’s methodology – and the methodology upon which the non-doctrinal portion of this article relies – flows from an established body of institutional legal sociology. Krygier’s work follows in the footsteps of Phillip Selznick. See P Selznick *The Moral Commonwealth* (1992); M Krygier *Phillip Selznick: Ideals in the World* (2012); M Krygier ‘Four Puzzles about the Rule of Law: Why, What, Where? And Who Cares?’ in JE Fleming (ed) *Getting to the Rule of Law* (2011). See, eg, S Woolman ‘Humility, Michelman’s Method and the Constitutional Court: Rereading the *First Certification Judgment* and Reaffirming the Distinction between Law and Politics’ (2013) 24 *Stellenbosch Law Review* 242; Woolman (note 2 above); S Woolman ‘Understanding South Africa’s Aspirational Constitution as Scaffolding’ (2016) 60 *New York Law School Law Review* 283; S Woolman ‘South Africa’s Aspirational Constitution and Our Problems of Collective Action’ (2016) 32 *South African Journal on Human Rights* 156. Theunis Roux also anticipated the possibility of catalytic events that flowed from the reciprocal relationships between the judiciary, other state actors and private actors. T Roux *The Politics of Principle: The First South African Constitutional Court, 1995 to 2005* (2013) 392 (‘Is a ... conversion to a more populist strategy ... now both desirable and possible? ... As much as the ANC’s descent into factionalism threatens the Court, it also provides an opportunity to distinguish itself from the governing party.’) This article’s methodology also has obvious roots in one of the most prescient works written on South African constitutional law: S Choudhry ‘He Had a Mandate: The South African Constitutional Court and the African National Congress in a Dominant Party Democracy’ (2009) 2 *Constitutional Court Review* 1–86. Choudhry’s analysis of the ‘Hlophe Affair’ offers an accurate forecast of the cronyism and corruption that would become synonymous with the Zuma regime.

⁵ This piece reflects a volte-face from an earlier, plausible construction. I no longer adhere to the ‘name and shame approach’ articulated by Michael Bishop and myself in Bishop & Woolman (note 1 above) and which later found brief support in Judge Schipper’s opinion in *Democratic Alliance v South African Broadcasting Corporation Limited* [2014] ZAWCHC 161, 2015 (1) SA 551 (WWC) at para 57.

Part II considers the role generally played by an Ombudsperson, and then narrows its focus to characteristics peculiar to South Africa's Office of the Public Protector. Part III looks at how this Office has generally operated in its first two decades. It begins with a comprehensive survey of its investigatory powers. It then asks and answers two distinct questions raised by the appellate court decisions in *SABC v DA*⁶ and *Economic Freedom Fighters*.⁷ First, to what extent has the Office's jurisdiction fallen prey to scope creep? Second, to what extent, if at all, does the clear enlargement of its investigatory, adjudicatory and remedial powers constitute a troubling separation of powers problem? Part IV further engages the cognisable expansion of the Public Protector's powers beyond the authority that some had previously thought it to possess. To what extent is the extended competence a problem with which we ought to be concerned? Part IV acknowledges that concerns over the expansion of the Public Protector's powers possess some merit. The critical bite of difference between myself and Michael Bishop turns on the onus. By recognising that the Public Protector's remedies may be legally binding, the burden shifts to each and every state actor found wanting in an adverse assessment to demonstrate to a court that the remedies imposed are irrational. (And that is so, only *if* a party wishes to have the remedies set aside.) It could have gone the other way. As the High Court held in *DA v SABC*, the onus could have remained with the Public Protector.⁸ The Public Protector would then have had to approach a court to demonstrate that a failure to follow the Office's findings, recommendations and remedies was irrational. While Michael Bishop and I share many concerns about the party who must bear the onus, this article

⁶ *South African Broadcasting Corporation v Democratic Alliance* [2015] ZASCA 156, 2016 (2) SA 522 (SCA) ('*SABC v DA*') at paras 47 and 54. The Supreme Court of Appeal held that organs of state must view adverse findings, as well as recommendations and remedies, in reports by the Public Protector as having binding legal effect. What truly exercised the court was the obdurate refusal by the Minister of Communications, the SABC and others to recognise that the Public Protector exists in order to ensure that the governors are held as accountable to the law as the governed.

⁷ *Economic Freedom Fighters* (note 1 above). The Constitutional Court held that the President had failed to uphold, defend and respect the Constitution as the supreme law of the land and ordered that he must honour the Public Protector's findings that he had used public money to improve his private residence at Nkandla and must repay such funds as the National Treasury deems appropriate. See Office of the Public Protector, South Africa *Secure in Comfort: Public Protector's Report on Nkandla: Report by the Public Protector on an Investigation into Allegations of Impropriety relating to the Installation and Implementation of Security Measures by the Department of Public Works at and in respect of the Private Residence of President Jacob Zuma at Nkandla in the Kwa-Zulu Province* Report No: 25 of 2013/4 (19 March 2014) ('*Secure in Comfort Report*').

⁸ *Democratic Alliance v South African Broadcasting Corporation Limited* [2014] ZAWCHC 161, 2015 (1) SA 551 (WCC) ('*DA v SABC*'). The High Court adopts a 'name and shame approach'. Within a year, the Western Cape High Court recognised the sea-change in the law. *Democratic Alliance v South African Broadcasting Corporation; Democratic Alliance v Motsoeneng* [2016] ZAWCHC 188, 2017 (2) BLLR 153 (WCC), [2017] 1 All SA 530 (WCC) at para 103. The High Court held that the Constitutional Court's judgment in *Economic Freedom Fighters* (citing para 68) had endorsed the Supreme Court of Appeal's position in *SABC v DA* (citing para 52) that 'the Public Protector could not realise the constitutional purpose of her office if other organs of state were entitled to second-guess her findings and ignore her recommendations'. The High Court notes that although the Constitutional Court concluded that the legal effect of the remedial action may vary (citing para 69 of *Economic Freedom Fighters*) '[i]t is within the power of the Public Protector to provide for remedial action with binding effect ... compliance is not optional ... [and that] the rule of law dictates that in such circumstances the aggrieved party must comply with the remedial action unless and until it is set aside by a court'. (Citing paras 73–75 of *Economic Freedom Fighters*, emphasis added.)

concludes that fears about the potential for overreach can be, *and already have been*, cabined by effective judicial oversight.

This article does not limit itself to answering rather arid, doctrinal questions of law. It contends that actions taken by the courts, the Public Protector, the fourth estate, civil society, small and large political parties, a reluctant Speaker, a Deputy President with a founding father's awareness of term limits and the electorate itself, have precipitated meaningful changes in the political landscape. Consistent with theories of reciprocal effect between the rule of law and civil society in institutional legal sociology, one can trace a wide range of the most significant political and social events over the past nine years back, *only in part*, to the catalytic effects of appellate court decisions that reinforced the powers of the Public Protector. Part V opens up a related, but distinct, line of analysis regarding the contributions of other political institutions, parties and officials and civil society actors – in addition to the impetus provided by the Public Protector and our appellate courts – to the creation of a 'politics of accountability'.

At this juncture, it's worth setting out what a 'politics of accountability' is, and how it took shape from 2009 through 2017. One reason to describe the thesis adumbrated in Part V as 'a politics of accountability' rather than 'a judicial theory of accountability' turns on a narrative sequence in which a concatenation of events instigated by civil society actors and public actors has allowed us to hit the reset button on the rule of law. For any democratic project to work, constant collective (political) action beyond the narrow confines of the courtroom must occur. Where it does not occur – as the dominant narrative of the Zuma years reflects – the democratic project and the most basic, uncontested constitutional precommitments are imperilled. We've experienced a decade or more of long knives and kleptocracy, and with it the abuse and the destruction of public institutions by state actors and by private actors. However, the Zuma years will continue to be of interest not solely for their decadence, but because various political actors and non-political actors operated, over the same period, in a manner that has kept South Africa's flawed democratic project from turning into a full-blown authoritarian kleptocracy.

The narrative canvassed in Parts V and VI imbues the term 'a politics of accountability' with greater clarity. A significant number of officials and citizens have retained their faith in the post-1994 democratic project. We don't yet have meaningful agreement about how best to move forward. Not even close. What we do have is a very rough, still embryonic, agreement on what we ought to expect from those state officials who make and enforce the law, from our bosses at private institutions and from our fellow citizens in everyday life. Thus, when this article employs the turn of phrase 'a politics of accountability', it embraces 'politics' in its broadest sense. The word 'politics' is not exhausted by a particular party's platform, the intentions behind specific pieces of legislation, or the kind of struggle that led to the ouster of the apartheid regime. The struggle for full, substantive emancipation continues. We remain a protest nation.⁹ Beyond our

⁹ J Duncan *Protest Nation: The Right to Protest in South Africa* (2016); S Woolman 'My Tea Party, Your Mob, Our Social Contract: Freedom of Assembly & the Constitutional Right to Rebellion in *Garriss & Others v Satavu (Minister for Safety and Security, Third Party)*' (2011) 27 *South African Journal on Human Rights* 346.

12 000 annual demonstrations, we possess a pesky media, the electorate writ large, a thin majority of ANC members, some minority parties, the courts, a former public protector – amongst others – who have not forsaken the goals of full emancipation. These groups have drawn strength from one another and *may*, just *may*, enable a change of course to occur. We'll just have to wait and see whether this thin, attenuated instance of collective action reflects a deeper commitment to make good on the aspirations of the Constitution.

However, the rule of law doctrine and its twin, the principle of accountability, cannot function solely as constitutional values. They must form part of the daily lived experience of most citizens and public officials. If anything keeps a flawed democracy alive, then it's citizens and institutional actors dead set on rooting out corruption and criminal activity at the highest level of elected office.

The rule of law is juridical, political and foundational. Countless critics say it is not enough, or more damningly, that it is a reflection of false consciousness. This author steadfastly maintains that a rule of law culture married to a robust civil society is a precondition for the realisation of a just and fair social order. Again, it's necessary but not sufficient. The narrative adumbrated here emphasises the following concern. The rule of law is not born ab initio. It requires constant reaffirmation by the body politic. That's politics. A politics of accountability also locates the Public Protector's new powers within a good governance framework.¹⁰ This approach – consistent with my own theory of catalytic effect and reciprocal relationships – concerns itself with interlocking actions and causal connections that improve self-governance in developmental states.

Although it is fair to begin an account of the development of a politics of accountability some eight years ago, it's essential to acknowledge the legal foundation and the political capital that allowed more recent events to transpire. First, the Constitutional Court spent the better part of its first ten years securing the groundwork for its own legitimacy and that of the Constitution.¹¹ Second, the ANC, for a time, also remained committed to the aspirations of the Constitution: a roughly egalitarian polity in which each individual possesses that basket of material and immaterial goods necessary to pursue her own comprehensive vision of the good.¹²

With that foundation still in place, the fourth estate could break a story in 2009 about malfeasance at the highest level of government: the President's use of public funds to build a private estate. An independent institution designed to support constitutional democracy, the Public Protector, could then initiate an investigation. At roughly the same time, the rampant corruption at and dysfunctional governance of the South African Broadcasting Corporation

¹⁰ B Levy *Working with the Grain: Integrating Governance and Growth in Development Strategies* (2014).

¹¹ Roux *The Politics of Principle* (note 4 above) (This groundwork took the form of a principled limitation of its own powers and an equally principled creation of a rule of law jurisprudence that established a baseline for irrational or unjust behaviour by state actors and non-state actors.)

¹² F Cachalia 'Democratic Constitutionalism in the Time of the Post-Colony: Beyond Triumph and Betrayal' (2018) 34 *South African Journal on Human Rights* – (forthcoming) (The Constitution provides a framework within which political decisions occur, but neither hinders nor hastens the delivery of a just polity. The proper response to a politics that has strayed from its emancipatory project is invariably and unavoidably political.)

(SABC) became a matter of inquiry for the Public Protector and subsequent review by the Supreme Court of Appeal. The Supreme Court of Appeal held that the Public Protector's recommendations and remedies *may* have legally binding effect. The Supreme Court of Appeal's holding in *SABC v DA* lit the path for the Constitutional Court's assessment and reinforcement of the Public Protector's powers in *Economic Freedom Fighters*: '[T]he Supreme Court of Appeal is correct in noting that the Public Protector's remedial action *might at times* have a binding effect.'¹³ The two rulings confirmed for many citizens what they had already heard. Although neither the President nor his immediate circle found themselves in immediate jeopardy, the reputation of the ANC as a whole had been besmirched. The severity of the damage can be measured by the results of the 2016 municipal elections – just months after *EFF*. The ANC, for the first time, lost control of virtually all of South Africa's major metropolises. The persistent damage of revelations of corruption led to a mass stay-away of black South African voters.

The electorate's judgment had a reciprocal effect on an array of actors. The Constitutional Court felt increasingly confident in wielding its limited powers in matters that turned on accountability and the rule of law. In *Black Sash Trust*, it held that a Minister could be held directly accountable for court costs associated with litigation regarding adverse findings of maladministration.¹⁴ In *United Democratic Movement*, the Court, relying heavily upon an array of constitutional commitments to accountability, decided that the Speaker of the National Assembly had the power to decide whether a motion of no confidence could be determined by secret ballot.¹⁵ Accountability also drives the most recent iteration of *EFF*. The *EFF II* Court found the National Assembly accountable to the public in terms of its constitutional obligations to promulgate rules regulating the removal of a President.¹⁶ The electorate surely emboldened the Public Protector. The Public Protector broadened her investigations into the depravity of the President, his patronage system and the non-political actors who benefitted immensely from a blurring of the lines between the public domain and the private realm. The *State of Capture Report* of 2016 set the wheels in motion for a full-scale independent investigation into various forms of corruption: Zuma himself created the recommended judge-led commission in January 2018.¹⁷ The *State of Capture Report* expanded the scope of public discourse

¹³ *Economic Freedom Fighters* (note 1 above) at paras 73–74 (emphasis added).

¹⁴ *Black Sash Trust v Minister of Social Development* [2017] ZACC 8, 2017 (3) SA 335 (CC) ('*Black Sash Trust*') at para 3.

¹⁵ *United Democratic Movement v Speaker of the National Assembly* [2017] ZACC 21, 2017 (5) SA 300 (CC) ('*United Democratic Movement*') at paras 92–94.

¹⁶ *Economic Freedom Fighters, United Democratic Movement, Congress of the People & Democratic Alliance v Speaker of the National Assembly & President Jacob Zuma (Corruption Watch as Amicus Curiae)* [2017] ZACC 47, 2018 (2) SA 571 (CC), 2018 (3) BCLR 259 (CC) ('*EFF II*') (This article briefly engages the Court's incursion into legislative rule-making at note 134 below.)

¹⁷ Office of the Public Protector, South Africa *State of Capture: Report on an Investigation into Alleged Improper and Unethical Conduct by the President and Other State Functionaries relating to Alleged Improper Relationships and Involvement of the Gupta Family in the Removal and Appointment of Ministers and Directors of State Owned Enterprises resulting in Improper and Possibly Corrupt Award of State Contracts and Benefits to the Gupta Family Businesses* (14 February 2016) ('*State of Capture Report*'). *Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State* (*Government Gazette* 41403 (9 February 2018)).

surrounding cronyism, clientalism and corruption to embrace private actors. Brazen malfeasance, lack of accountability, Ponzi schemes and illicit social media campaigns have led to the collapse or withdrawal from sovereign soil of major multinational firms. Buried in this narrative is a provision not often mentioned: s 88 of the Constitution – *Term of Office of the President*. Two five-year term limits meant that Zuma himself could not run again. In December 2017, ANC members chose Cyril Ramaphosa as its new party President, and subsequently, President of the nation.

Catalytic events and reciprocal relationships require ongoing catalysis and reflexivity. They gain traction slowly – mostly through the workings of non-deliberative processes that rely upon trial and error feedback mechanisms that occasionally create constructive forward-looking loops.¹⁸ In this narrative, a largely non-deliberative process did, in fact, create a positively charged feedback loop between the fourth estate, the judiciary, the Public Protector, NGOs, populist pressure, a wily politician who helped draft the Constitution and an electorate that has only just begun to rediscover the power citizens wield at the ballot box and within political party structures. Parts V and VI will revisit this narrative in a more expansive manner.

II THE ROLE OF SOUTH AFRICA’S PUBLIC PROTECTOR¹⁹

A Form and Function of Ombudspersons²⁰

Ombuds around the globe monitor the conduct of state actors with the aim of ensuring an effective and ethical public service.²¹ The Constitution creates a Public Protector that serves those very same ends:

Functions of the Public Protector

182 (1) The Public Protector has the power as regulated by national legislation—

¹⁸ For a more detailed explanation, see note 134 below, and more generally, Woolman *The Selfless Constitution* (note 3 above).

¹⁹ This section relies, in part, on material found in Bishop & Woolman (note 1 above).

²⁰ See T Buck & R Kirkham *The Ombudsman Enterprise and Administrative Justice* (2016); M Fenster ‘The Informational Ombudsman: Fixing Open Government by Institutional Design’ (2017) available at SSRN: <https://ssrn.com/abstract=3022914> (‘The ombudsman has gradually emerged in the US as a key tool among the various legal doctrines, institutions, and technologies used to reveal the government to the public.’)

²¹ However, a sizeable number of ombudspersons provide alternative dispute resolution structures in what one might generally consider to be traditionally private domains. South Africa has a long list of highly specialised private sector ombudspersons. For a fairly representative list of our diverse ombuds, see <http://www.legalquestions.co.za/complaints.php>. The United Kingdom has also passed a significant body of legislation that creates ombudspersons in different domains. See Law Society of the United Kingdom ‘The Role of the Legal Ombudsman’ (2014) available at <http://www.lawsociety.org.uk/support-services/risk-compliance/regulation/legal-ombudsman>; The Office of the Financial Ombudsman ‘The Meaning of Final Decisions’ available at http://www.financial-ombudsman.org.uk/publications/factsheets/final_decision.pdf (‘What does a “binding” decision mean? ... If the consumer accepts the ombudsman’s final decision before the deadline we give them, the decision becomes legally “binding”... [T]he business is required by law to do whatever the ombudsman tells it to do to put things right for the consumer.’)

- (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
- (b) to report on that conduct; and
- (c) to take appropriate remedial action.

The constitutionally-mandated Office of the Public Protector reflects a profound improvement in design upon its precursor: the Advocate-General. The Advocate-General's brief was limited to investigations into the unlawful or improper use of public money.²² In addition to the text of the Final Constitution, the Public Protector's jurisdiction is also determined by the Public Protector Act ('PPA'),²³ the Executive Members' Ethics Act ('EEA'),²⁴ the Prevention and Combating of Corrupt Activities Act²⁵ and the Executive Ethics Code.²⁶ As a matter of constitutional design, the Public Protector exists – as do most Chapter 9 Institutions – to create the conditions under which individual citizens can effectively engage the mandarins who govern them and to act as a buffer between state and subject (in a manner that democratic polities with rather deep civil societies *once unreflectively* did).²⁷ That's no small brief. The vast majority of denizens within the geographical boundaries of colonial and apartheid South Africa had no meaningfully positive engagement with the state nor anyone to protect them from its depredations. In theory, these institutions (designed to support constitutional democracy) would hold down the fort while the majority of South Africans went about creating intermediate associations to represent the civil and political concerns of a variety of groups, sub-publics and networks. In theory, these institutions would ensure that a democratically-elected government, a freshly populated bureaucracy, would create and enforce new laws, regulations and rules, in a relatively neutral fashion. In theory, these institutions would enable South Africa's re-nationalised citizens to become sufficiently well-versed with the new state's rules so that they could navigate a new and untested bureaucracy effectively. In practice, several of these novel 'institutions that support constitutional democracy' have served these imperatives quite well. The Public Protector has always been more than just a bridging institution. The Public Protector continues to serve as a mechanism to resolve conflicts between ordinary citizens (who remain unfamiliar with the procedures to follow in order to secure assistance) and a bureaucracy that must attend to the needs of all and not just a privileged few. The need to ensure that the state serves the many and not the few goes some distance in explaining how

²² Ombudsman Act 118 of 1979. The Advocate-General could not investigate maladministration.

²³ Act 23 of 1994. The Act has been amended four times. See Public Service Laws Amendment Act 47 of 1997; Public Protector Amendment Act 113 of 1998; Promotion of Access to Information Act 2 of 2000; Public Protector Amendment Act 22 of 2003. Of note is that s 14 of the PPA repeals the Ombudsman Act.

²⁴ Act 82 of 1998.

²⁵ Act 12 of 2004.

²⁶ *Government Gazette* 21399, Notice Number 41 (28 July 2000) in terms of s 2(1) of the EEA.

²⁷ On a similar role played by ombuds in the European Union, see P Magnatte 'Between Parliamentary Control and the Rule of Law: The Political Role of the Ombudsman in the European Union' (2003) 10 *Journal of European Public Policy* 503. On ombuds in the United States, see L Meltzer 'Can a Federal Ombuds Help You?' (2001) *Federal Administration Dispute Resolution Deskbook* 525.

the Public Protector came to take on briefs designed to hold our most powerful governors accountable to the governed.

The Public Protector's purpose is profitably compared with the role of the judiciary.²⁸ Courts handle discrete disputes about law and conduct. They rely on correct procedure and solid, sometimes intricate, legal argument. Courts are not designed to handle the large number of complaints that arise from simple misunderstandings or red-tape, nor do they lend themselves to the resolution of injustices that turn more on bureaucratic incompetence than illegality.²⁹

B The Independence of the Public Protector: Appointment and Removal

The Public Protector occupies a middle space in the politico-bureaucratic-socio-constitutional landscape. It serves the public and assists the courts and the legislature. It assists the courts by addressing those complaints about the administration of justice that fall beyond the courts' purview. It assists the legislature by monitoring the performance of the executive and answering those complaints that elected representatives are unable to address. The Public Protector should perform these functions free from substantial political pressure.³⁰ However, the Constitution says very little about the daily grind of politics. It neither hinders nor dictates most legislative or executive decisions. Thus, a legislature and an executive that wishes to blunt criticism need only curtail the budget of the Public Protector.³¹ Likewise, an executive or a legislature

²⁸ Consistent with most ombuds around the globe, the Public Protector cannot review the findings of a court of law. See T Christian 'Why No Ombudsman to Supervise the Courts in Canada?' in Reif *Anthology* (note 29 below) at 539. (Contends that the supervision of the judiciary by an ombudsman in Canada would mix up 'constitutional fundamentals ... The effect of such a move would be to make the judiciary accountable to an agent of the legislator. At a conceptual level, this ... recipe ... [invites] serious confusion and conflict.' Unlike Canada's ombudsperson, the Public Protector is not an agent of the legislature but an independent institution designed to promote constitutional democracy.)

²⁹ See S Owen 'The Ombudsman: Essential Elements and Common Challenges' in L Reif (ed) *The International Ombudsman Anthology* (1999) 51 at 54–55.

³⁰ See *Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26, 1996 (4) SA 744 (CC) ('*First Certification Judgment*') at paras 162–163. During the certification process, the Constitutional Court considered whether a provision permitting removal of the Public Protector by a simple majority vote of the National Assembly was sufficient to ensure its independence: 'The independence and impartiality of ... a Public Protector shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and and a high standard of professional ethics in the public service.' The Court found that the Public Protector would not be able to investigate politically sensitive matters that could embarrass public officials if its removal could be effected by a simple majority.

³¹ Financial dependence has been recognised as the greatest threat to the efficacy of an ombud. See H Corder, S Jagwanth & F Soltau 'Parliamentary Oversight and Accountability' *Report to the Speaker of the National Assembly* (1999) at paras 7.2–7.2.1 ('The very direct control by the executive of constitutional institutions can have a devastating effect on the ... credibility of these offices ... [T]o make institutions dependent on budget allocations received through the very departments that they are required to monitor is not desirable. [T]hese institutions must be seen by the public to be ... free of the possibility of influence ... by the executive branch of the government.') See also *New National Party v Government of the Republic of South Africa* [1999] ZACC 5, 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC) at para 98 (Court identified two desiderata for independence: (1) an institution must have sufficient funding to fulfil its constitutional mandate; (2) the funds must come from Parliament and

that chooses the Public Protector can readily identify the nominees most likely to act as lapdogs and least likely to interrogate cynical abuses of public trust. The Constitution is silent about either abuse of political power.

With regard to insulating the Public Protector from such abuse, some jurisdictions have picked up a mistake made by the Constitutional Court in the *First Certification Judgment*.³² In an article for the American Bar Association, Gottehrer and Hostina note that ‘special majorities reflect best practice for both *the appointment and the removal* of the Ombudsperson’.³³ Had the Constitutional Court been alive to the possibility of a lapdog Public Protector, it could have easily mirrored its finding of the need of a supermajority with respect to removal with a requirement of a supermajority for appointment. The justification would have been the same: ‘[I]n the case of ... the Public Protector, whose functions involve matters of great sensitivity in which there could well be confrontation between the functionaries concerned and members of the Legislature and the Executive, a higher level of protection would certainly not be inappropriate.’³⁴ Before critics cavil about any appointee, the question that they ought to ask is: Have the appropriate appointment *and* removal procedures been put in place? We still have the opportunity to correct this botch in institutional design through a constitutional amendment.

C ‘Naming and Shaming’ or ‘A Binding Finding’

One common criticism levelled against ombudspersons in some jurisdictions is that these institutions lack the power to make binding decisions. That had been notionally true of the Public Protector until the decisions rendered in *SABC v DA* and *Economic Freedom Fighters*. Whether ‘naming or shaming’ is truly sufficient, or whether tougher approaches to illegal activity ought to fall within the Public Protector’s remit will be explored below. For now, it is worth noting that the ability of an ombudsperson to investigate and to report effectively remains a real measure of its strength.³⁵ Stephen Owen explains this virtue as follows:

Through the application of reason, the results are infinitely more powerful than through the application of coercion. While a coercive process may cause a reluctant change in a single decision ... , by definition it creates a loser who will be unlikely to embrace the recommendations in future actions. By contrast, where change results from a reasoning process, it changes a way of thinking and the result endures to the benefit of potential complainants in the future.³⁶

not the executive.)

³² *First Certification Judgment* (note 30 above).

³³ D Gottehrer & M Hostina ‘Essential Characteristics of a Classical Ombudsman’ *American Bar Association Proceedings* (1998) at section 3.

³⁴ *First Certification Judgment* (note 30 above) at paras 163–164.

³⁵ See Owen (note 29 above) at 52.

³⁶ *Ibid.*

D Classical Ombud or Hybrid Ombud?

Another question canvassed by other states, and answered in a variety of ways, is whether an ombud should operate as a ‘classical ombudsperson’ or a so-called ‘hybrid ombudsperson’. The ‘classic ombudsperson’ takes up complaints about low-level bureaucratic maladministration. The ‘hybrid ombudsperson’ not only cuts through red-tape and solves minor snafus, it addresses: (a) allegations of human rights violations and (b) assertions that corruption on a grand scale by high ranking officials constitutes a failure of the state to respect, protect, promote and fulfil both enshrined fundamental human rights *and* the foundational principles of a constitutional democracy.³⁷ Perhaps our appellate courts, in recognising the Public Protector’s powers, had this observation by the *Glenister* Court in mind:

Section 7(2) casts an especial duty upon the state. It requires the state ‘to respect, protect, promote and fulfil the rights in the Bill of Rights.’ It is incontestable that corruption undermines the rights in the Bill of Rights, and imperils democracy. To combat it requires an integrated and comprehensive response. The state’s obligation ... creates a duty to create efficient, anti-corruption mechanisms ... corruption in the polity corrodes the rights to equality, human dignity, freedom and security of the person and various socio-economic rights. ... It makes it unreasonable for the state, in fulfilling its obligations under section 7(2) to create an anti-corruption entity that lacks sufficient independence.³⁸

The state had done nothing to truly satisfy the *Glenister* Court’s concern that the demise of the Scorpions as South Africa’s only truly independent corruption investigation taskforce threatened the most thread-bare conception of a politics of accountability. As the mercenary behaviour of state officials became increasingly visible, the ongoing absence of an efficient, anti-corruption institution up to the task of fighting such widespread corruption became ever more evident. It is, therefore, not surprising that our appellate courts read the basic law in a manner that recognised the binding legal effect of the Public Protector’s recommendations. That the designers of the Office created such a hybrid ombudsperson reflects a similar degree of wisdom.³⁹

III THE EVOLUTION OF THE PUBLIC PROTECTOR’S POWERS

A Scope and Investigatory Powers

In addition to its constitutional mandate, the Public Protector secures its dominion from the Public Protector’s Act. The PPA establishes the Office’s jurisdiction with respect to categories of investigation, entities that it may investigate and conduct it may investigate.

³⁷ See L Reif ‘Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection’ (2000) 13 *Harvard Human Rights Law Journal* 1.

³⁸ *Glenister v President of the Republic of South Africa* [2011] ZACC 6, 2011 (3) SA 347 (CC) at paras 177, 194, 198 and 200 (text reordered by author).

³⁹ A number of ombuds – in Africa, the Antipodes, North America, Europe and the Pacific Rim – had the reach of their recommendations similarly recognised. See Australia ‘Standard Guidelines for Complaints Management in Organizations’ (2014) available at www.standards.com.au; African Ombudsman & Mediators Association *Standards for the Establishment and Operation of Ombudspersons Offices* (Draft, 2016).

The PPA identifies two main categories of investigation: (1) investigations based on the receipt of a complaint; and (2) investigations undertaken at the Public Protector's own initiative.⁴⁰ While the overwhelming majority of investigations conducted are based on actual complaints received, the Public Protector has increased the number of 'own initiative' investigations. In 2005, the Office launched five investigations of its own initiative. By 2015, the number of own initiatives had jumped to 18. Often own initiative investigations are related to, and begin with, individual complaints. When the Office receives a number of complaints regarding a similar constellation of issues, it *may* institute an investigation into the root cause of the problem with the aim of pre-empting future complaints. In other instances, sustained investigative journalism has brought the initial investigation of large-scale abuses of public power to the doorstep of the Public Protector.

At the level of creative constitutional design, that's exactly how the Chapter 9 Institutions are supposed to interact with, and deepen, a still nascent civil society. As I noted at the outset, the Public Protector forms part of a (potentially) powerful feedback mechanism. It tells us what works in government and what does not. For our purposes, the Public Protector's ability to shed light on systemic forms of malfeasance – eg, patronage arrangements – plays a significant role when it comes to purging the body politic of undesirable policies, unnecessary public projects, the rigging of tenders, and the inadequate discharge of constitutional duties by the holders of high office. Its reports have shed light on a dense latticework of corrupt practices that have helped to dispel any notion that we inhabit a nation *fully*, or even *largely*, governed by the rule of law.⁴¹

According to the PPA, the Public Protector will not consider a matter referred to it later than two years after its occurrence, unless special circumstances so warrant.⁴² However, fear of whistleblowing might well result in cases being brought after two years have elapsed. The Public Protector would appear to have understood its 'special circumstances' discretion to embrace ongoing violations. As a result, an investigation will not necessarily end with the publication of a report and initial recommendations and remedies.

The Public Protector possesses sweeping powers of search and seizure.⁴³ That said, a search can only be conducted with a warrant issued by a judge or magistrate convinced by credible information, obtained under oath, that reasonable grounds exist to suspect that objects relevant to an investigation are on the premises.⁴⁴

⁴⁰ PPA ss 6(4)(a) and 6(5).

⁴¹ The term 'corruption' here is to be broadly construed. As Sole notes, '[c]orruption may vary from the clearly illegal – such as fraud – to more subtle forms of unethical rent-seeking, patronage and abuses of power that may be just as damaging to the social fabric of a nation'. S Sole 'The State of Corruption and Accountability' in J Daniel, R Southall & J Lutchman (eds) *State of the Nation: South Africa 2004–2005* (2005) 86.

⁴² PPA s 6(9).

⁴³ PPA s 7A, inserted by Public Protector Amendment Act 113 of 1998. The original PPA contained no powers of search and seizure.

⁴⁴ PPA s 7A(3).

B Scope Creep and Investigation Expansion

As a technical matter, the behaviour of private persons falls outside the Office's jurisdiction. However, private persons may attract the scrutiny of the Public Protector if their conduct relates to (a) state affairs; (b) improper or unlawful enrichment or the receipt or promise of any improper advantage by a person as a result of an act or omission in the public administration or in connection with the affairs of government at any level or that of a public entity; or (c) an improper or dishonest act with respect to public money.⁴⁵ The Office's interpretation of its mandate has shifted over time.

The Public Protector's role in the so-called 'Oilgate' scandal provides an instructive example of how these jurisdictional requirements worked themselves out in practice roughly a decade ago.⁴⁶ The Freedom Front (FF) lodged a complaint about the alleged improper distribution of public funds between parastatal PetroSA and a private company, Imvume Management.⁴⁷ The FF further alleged that Imvume served as a front for the ANC and that the ANC itself was responsible for the improper distribution of public funds. The Public Protector considered its jurisdiction over each of the three bodies separately. It found that PetroSA, as a public entity, fell within its jurisdiction.⁴⁸ The Public Protector refused to investigate Imvume Management because it was a private company and did not perform a public function.⁴⁹ The Public Protector concluded that the ANC was not a 'person performing a public action' and was therefore beyond the reach of the Public Protector's powers.⁵⁰ Although this narrow construction of the PPA's jurisdiction provisions is plausible, the Public Protector could have brought both Imvume and the ANC within its inquisitorial reach for engaging in conduct that relates to state affairs and that involves the improper use of public money.

The Public Protector now clearly embraces a much broader construction of its remit. The *State of Capture Report* concentrates almost entirely on the illicit relationships and innumerable transactions of a host of state actors with the Gupta family and its extensive network of businesses, partnerships and friends. (A sizeable number of such businesses are multinational corporations.) The departure from prior practice flows from the degree of intimacy between public officials and private parties. The Gupta family's access to politicians ultimately morphed into the power to select ministers and public servants. The *State of Capture Report* promises a full investigation into the conduct of private parties in a subsequent report, but notes that the Office could not do so now for want of time and money:

⁴⁵ See Office of the Public Protector *Investigation into the PetroSA/Imvume Transaction* at para 5.1.3.3 ('Oilgate').

⁴⁶ Ibid.

⁴⁷ Ibid at paras 6–7.

⁴⁸ Ibid at para 5.2. The report states that PetroSA is wholly owned subsidiary of the Central Energy Fund. The Central Energy Fund is listed as a major public entity in Schedule 2 of the Public Finance Management Act 1 of 1999.

⁴⁹ Ibid at para 5.3.

⁵⁰ Ibid at para 5.4 citing *Institute for Democracy in South Africa Others v African National Congress & Others* [2005] ZAWCHC 30, 2005 (5) SA 39 (C) (The High Court held that a political party was not a 'public body' for purposes of the Promotion of Access to Information Act 2 of 2000.)

I must also indicate that the investigation has been divided into two phases and that the first phase of the investigation did not touch on the award of licenses to the Gupta family and superficially touched on state financing of the Gupta-Zuma business while only selecting a few state contracts. The division of work was to accommodate *the time and resource limitations* by addressing the pressing questions threatening to erode public trust in the Executive and SOEs *while mapping the process for the second and final phase of the investigation*.⁵¹

The report's self-imposed limitations strongly intimate that the Public Protector will not always employ binding remedial powers. The article returns to the Public Protector's remedial powers and the palpable parameters placed on them by the courts in Parts IV and V below.

C A Separation of Powers Concern Resolved by the Principle of Accountability

The Public Protector's brief as one of a number of independent, constitutionally-created government watchdogs would not, on paper, look to raise concerns about undue interference in the legislative sphere or the executive domain.⁵² However, the effective execution of its brief allows the Public Protector to suggest amendments to existing legislation or regulations,⁵³ and to render recommendations that would, if corrected, have a bearing on the articulation of policy.⁵⁴ Such suggestions or recommendations are not cause for alarm. Where our appellate courts have recently appeared to raise red flags regarding the separation of powers turns on whether recommendations and remedies *may* or *must* have binding effect.

In its pastoral days, the Public Protector had a number of opportunities to consider whether its actions constitute a breach of institutional comity. The Gauteng Department of Education (GDE) challenged the jurisdiction of the Public Protector to act on a complaint by a group of primary and secondary schools regarding the GDE's allocation of educators.⁵⁵ The GDE argued that the matter fell outside the Public Protector's jurisdiction as it concerned policy, not administrative action. The Public Protector responded by acknowledging that although the office could not change law or issue policy directives, 'it was clear that legislative prescripts and governmental policies that result in conduct that is alleged or suspected to be improper or to result in any impropriety or prejudice, could be investigated by the [Public Protector]'.⁵⁶ The Public Protector's own findings in the *GDE Complaint* suggests that the Office's powers of investigation,

⁵¹ *State of Capture Report* (note 17 above) at para xxiii (emphasis added).

⁵² See Owen (note 29 above) at 57 ('Care must be taken to distinguish administrative policy from legislative policy. Developing legislation is a political task which ... involves debating the relative merits of differing social and economic policies. In this, an ombudsman has no business.')

⁵³ 'Complaint 311/03' in *2004–5 Annual Report* (supra) at 32 ('*GDE Complaint*').

⁵⁴ The Constitutional Court has distinguished administrative functions from legislative or executive functions on a number of occasions. See *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC); *Pharmaceutical Manufacturers Association of South Africa: In Re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC).

⁵⁵ Office of the Public Protector 'Complaint 311/03' *Annual Report 2004–5* at 31–32.

⁵⁶ *Ibid* at 32. The Public Protector did not issue a finding in the matter. Instead it counselled patience and preferred to wait until the GDE completed its own internal review.

and investigation alone, extend further than a court's powers of *administrative review* under s 33 of the Constitution and the Promotion of Administrative Justice Act.⁵⁷ However, the Public Protector refused, in a subsequent matter, to offer an opinion as to the constitutionality of legislation on the grounds that such advice fell within the proper purview of the courts.⁵⁸

For almost a decade thereafter, the division of authority between the Public Protector, the executive and the courts appeared rather clear. As recently as 2014, the court in *Tlakula* stated the accepted position on the Public Protector's powers: its reports remain advisory, *not binding*.⁵⁹ The Office neither possessed nor discharged judicial functions. The Office lacked the jurisdiction to investigate the 'performance of any judicial function by a court of law'.⁶⁰ The term 'judicial function' extends the constitutional prohibition on the investigation of 'court decisions'.⁶¹ Yet some incursions into powers of both the executive and the judiciary had already begun to occur.⁶² Today, the traditional cabining of the Public Protector's authority can no longer be maintained.

In 2015, these murky separation of powers issues became transparent. In *SABC v DA*, the Supreme Court of Appeal found that coordinate branches of government and various organs of state were obliged to take cognisance of adverse findings by the Public Protector.⁶³ The Public Protector had produced a detailed report that revealed fraud, deception and gross misconduct on the part of the SABC Board, its Acting Chief Operating Officer (COO) and the Minister of Communications.⁶⁴ The duplicity of the Acting COO took place on such a grand scale that the Public Protector recommended his removal, along with a number of other remedies.⁶⁵ The Minister and the SABC countered that such fraud had not occurred, proceeded to appoint the Acting COO as the permanent COO, and ignored the remainder of the Public Protector's findings and recommendations.⁶⁶

⁵⁷ Act 3 of 2000.

⁵⁸ See Office of the Public Protector *Report on the Investigation into Allegations of Underpayment of Beneficiaries of the Venda Pension Fund* (2002) available at <http://www.publicprotector.org/report18.htm> at para 5.15. This decision was confirmed in *Dabalorivhuwa Patriotic Front v Government of the Republic of South Africa* [2004] JOL 12911 (T) at para 30.3 ('This complaint ... is incapable of being adjudicated by the Public Protector.')

⁵⁹ *United Democratic Movement v Tlakula* [2014] ZAEC 5, 2015 (5) BCLR 597 (Electoral Ct) ('*Tlakula*') at para 35 ('The respondent's counsel submitted that the Public Protector had not conducted a judicial investigation, had not enquired into and did not make findings on whether the respondent was guilty of misconduct warranting her removal as a commissioner. Any opinion expressed or finding made by the Public Protector ... is not binding ... [That said] the Public Protector's Report are sufficiently and materially relevant in order for this court to have regard to it.')

⁶⁰ PPA s 6(6).

⁶¹ Constitution s 182(3).

⁶² As noted in the discussion of *Glenister* above, the demise of the Scorpions left a vacuum with respect to independent investigators who could hold allegedly corrupt officials accountable. An aggressive Public Protector, a high-quality Auditor-General and the Special Investigatory Unit, created a troika of state institutions that began, collaboratively, to reveal abuses of public power. See S Woolman 'Security Services' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd edition, RS3, 2011) Chapter 23B.

⁶³ *SABC v DA* (note 6 above) at paras 52–53.

⁶⁴ *Ibid* at para 5.

⁶⁵ *Ibid* at para 7.

⁶⁶ *Ibid* at paras 9–11.

The Supreme Court of Appeal rejected this response. Indeed, it spent the better part of its judgment recounting the COO's duplicity and the blatant disregard for the law by the Minister and the SABC Board.⁶⁷ What truly galvanised the Court was the refusal by the Minister and an organ of state to recognise that the Public Protector plays a critical role in maintaining the rule of law.⁶⁸ Sustained disregard for the findings of Chapter 9 Institutions would render their constitutionally-mandated role of standing guard over the guardians superfluous.⁶⁹ An agitated Supreme Court of Appeal held that the rule of law required that 'the Public Protector's recommendations and remedies – *in this matter* – must be viewed as binding, unless they are subsequently set aside on review by a court of law.'⁷⁰

Where exactly does *SABC v DA* leave us? A complaint is laid. The Public Protector decides to take up the matter. The Office, as we have seen, has fairly sweeping powers of investigation, powers that we often associate with law enforcement agencies. But it does not stop there. Having initiated an investigation, the Public Protector may decide that it possesses sufficient evidence to warrant further investigation. To fulfil that end, the Public Protector possesses the ability to subpoena any person to provide evidence or submit affidavits.⁷¹ Without this power, the Office's ability to conduct meaningful investigations would be severely limited.

What *seems* troublesome is that the issuance of subpoenas and the concomitant examination of witnesses occurs *in camera*, apparently beyond public scrutiny. Yet the PPA affords the Public Protector such powers. Other commentators appear vexed by apparent breaches of well-entrenched rights to hear the charges laid against one, to be a part of adversarial proceedings and to be presumed innocent unless proven guilty: these rights do not seem to attach to investigations, examinations and judgments conducted by the Office of the Public Protector. But that is also not quite right. Section 7 of the PPA affords parties the opportunity to re-engage the Office to prevent the release of confidential statements made by persons that it has interviewed.

In a much earlier judgment (circa 2002), the High Court in *SABC v Public Protector* refused the application to broadcast proceedings on the grounds that the '[c]onfidentiality is paramount in the mandate of the Public Protector and it is necessary to encourage and preserve the confidence and trust in the [Public Protector]'.⁷² The *SABC v Public Protector* High Court held that the preclusion of the use of cameras constituted a limitation of freedom of expression but was nevertheless justifiable on the following grounds:⁷³ (a) the fighting of crime and other forms of impropriety was a constitutionally valid objective; (b) televised

⁶⁷ Ibid at paras 6–21.

⁶⁸ Ibid at paras 55–60.

⁶⁹ Ibid at paras 47 and 56.

⁷⁰ Ibid at para 53.

⁷¹ PPA s 7(4)(a) read with s 7(5). Any person appearing before the Public Protector is entitled to legal representation. PPA s 7(8).

⁷² *South African Broadcasting Corporation v Public Protector* 2002 (4) BCLR 340, 347 (T) ('*SABC v Public Protector*').

⁷³ Ibid at 354. The *SABC v Public Protector* High Court also noted that 'rationality review' framed its assessment. Ibid at 353.

proceedings would have deleterious effects on witnesses; and (c) public testimony might violate confidentiality clauses.⁷⁴

If the Public Protector's powers had ended there, then all concerned might be satisfied. There's more. The rules of evidence that guide judicial decision-making – including the right to call witnesses and cross-examine them – do not appear to apply to the Public Protector's investigations and fact-finding. Good reasons, however, exist for this distinction. Whistleblowing remains an extraordinarily dangerous undertaking. It shortens careers and life-spans. The Public Protector can protect them.

The Public Protector clearly exercises some powers associated with all three branches of government. Would Montesquieu have approved?⁷⁵ Perhaps, for the Public Protector's exercise of power in each arena has been cabined by both constitutional and statutory provisions and judicial decisions.

By making the Public Protector's recommendations and remedies binding, the courts might appear to have turned the Office into cop, prosecutor, judge and jury. Such an inquisitorial role appears inconsistent with the purpose of the Chapter 9 Institutions. They were designed to mediate relationships between the state and its citizens. That said, the Constitution and various pieces of legislation clearly assign the Public Protector the role of strengthening democracy by ensuring that the governors play by the same rules as the governed.

The above appraisal of the Public Protector's 'broad powers' suggests that certain assumptions about the desirability, applicability, replicability and sustainability of Montesquieu's model may not be warranted across various sovereign states. First, the current size of nation states warrants additional oversight. (Montesquieu believed that democracy only worked effectively in small homogeneous polities.) Second, the standard model has not taken practical hold in many constitutional democracies born just before, during and after the 1990s. In the absence of longstanding practices and traditions required to sustain democracy, a reasonably powerful ombud ensures at least a modicum of respect for the rule of law.⁷⁶

What bearing do these events have on South Africa's constitutional democracy? A growing number of South African citizens, commentators and politicians have expressed their dissatisfaction with the status quo. They neither believe in the aspirations articulated in our founding document, nor in the institutions charged with the creation of an open and democratic society based on dignity, equality and freedom. In a dysfunctional polity, many look for signs of hope, for someone to stand up to the rich and the powerful. That space can be filled by populist politicians. Or it can be filled by a Public Protector. More than anything else, the previous Public Protector successfully held the feet of powerful politicians to

⁷⁴ Ibid at 346–347.

⁷⁵ C Montesquieu *The Spirit of the Laws* (1748).

⁷⁶ L Diamond 'Is Democracy in Decline?' (2015) *Journal of Democracy* 140. See R Wink, K Simmons, B Stokes & J Fetteroff *Globally, Broad Support for Representative and Direct Democracy, But Many Endorse Non-Democratic Alternatives* Pew Research Center – Global Attitudes and Trends (16 October 2017) available at www.pewglobal.org ('[I]n all countries, pro-democracy attitudes co-exist, to varying degrees, with openness to non-democratic forms of governance, including rule by ... a strong leader or the military.')

a fire required by the constitutional manifold commitments to the principle of accountability.

However, the recognition of the Public Protector's powers are not best explained by the exigencies of the historical moment. In fact, they fit the the Constitution's cleverly structured design. In addition to vouchsafing various founding provisions, the Office functions as a mediator between state and subject necessitated by the legacy of a racist, totalitarian state.

The *Economic Freedom Fighters* Court recognised the Public Protector's unique role in the Constitution's somewhat novel separation of powers scheme. Whilst explicitly acknowledging that scheme, the *Economic Freedom Fighters* Court implicitly anticipated that making the Public Protector's recommendations and remedies legally binding (*in this instance*) would not precipitate a constitutional crisis. The Court's Order read, in relevant part:

5. The National Treasury must determine the reasonable costs of those measures implemented by the Department of Public Works at the President's Nkandla homestead that do not relate to security.
6. The National Treasury must determine a reasonable percentage of the costs ... which ought to be paid personally by the President.⁷⁷

The personal costs, after careful determination, came out to a mere R7 million. This assessment by the National Treasury reinforced the conclusion by the Public Protector and the Constitutional Court that the President had used his powers for self-aggrandisement, without painting President Zuma into a corner where he might be inclined to justify refusal to pay on separation of powers grounds.

The Constitutional Court's careful expatiation of the relationship between the principle of accountability and the separation of powers doctrine likewise animates its subsequent decision in *United Democratic Movement*. The Court opens its analysis as follows:

There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure *accountability*, responsiveness and openness. Knowing that it is not practical for all fifty million of us to assume governmental responsibilities ... 'we the people' designated ... servants to run our constitutional errands for the common good. These errands can only be run successfully by people who are unwaveringly loyal to the core constitutional values of *accountability*, responsiveness and openness.⁷⁸

The *United Democratic Movement* Court then ties the accountability of the President, Ministers and their deputies to uphold their constitutional obligations directly to the oversight responsibilities of Parliament laid out in the Constitution. According to ss 92(2), 93(2) and 55(2) of the Constitution:

Members of the Cabinet are *accountable* collectively and individually to Parliament for the exercise of their powers and the performance of their functions ... Deputy Ministers appointed in terms of subsection [93](1)(b) are *accountable* to Parliament ... [and] [t]he National Assembly must provide mechanisms (a) to ensure that all executive organs of

⁷⁷ *Economic Freedom Fighters* (note 1 above), Order of Court.

⁷⁸ *United Democratic Movement* (note 15 above) at paras 2–3 (emphasis added).

state ... are *accountable* to it and (b) to maintain oversight of (i) the national executive authority.⁷⁹

The *United Democratic Movement* Court connects the current conundrum back to its decision in *Mazibuko*: ‘The ever present possibility of a motion of no confidence against the President and the Cabinet is meant to keep the President *accountable* to the National Assembly.’⁸⁰ The Court notes that while the Constitution does not specify whether or when a Speaker must decide to hold a vote of no confidence by an open ballot or a secret ballot, her discretion in this regard must be cabined by her constitutional duty to hold members of the Executive *accountable*. It likewise notes that neighbouring jurisdictions have decided to employ secret ballots because without this arrangement the ‘the effective exercise of Members’ right to vote without outside influence or coercion could render the right an empty one’.⁸¹ The Court thus affords the Speaker of the National Assembly some wiggle room within which to exercise her discretion. However, the reasons for her decision – either way – would have to turn on her responsibility as Speaker to hold the Executive *accountable*. Whilst she could decide to reject the request for a secret ballot, she could neither rely on a lacuna in the Constitution nor arid separation of powers concerns. The Court had done its job. It had reminded both the legislature and the executive that their obligations and their decisions would be assessed in light of their fealty to the Constitution’s foundational (and anti-authoritarian) principle of *accountability*.

Whilst the courts have pushed the boundaries of the separation of powers doctrine,⁸² a politics of accountability does not necessarily lead to a politics of capability. The substantial gap between a government partially committed to the rule of law and a government capable of delivering a just and fair social order remains.

IV THE QUASI-JUDICIAL FUNCTIONS OF THE PUBLIC PROTECTOR

Before we further assess the Public Protector’s powers, the Office’s relationship to other branches of government or organs of state, or its alleged usurpation of executive or judicial authority, let us take accurate stock of what happened in *Economic Freedom Fighters*.

A The Meaning of *Economic Freedom Fighters*

Consistent with the discussion thus far, the Chief Justice spends a significant amount of time addressing separation of powers concerns and explaining why the

⁷⁹ Ibid at paras 35–39 (emphasis added.)

⁸⁰ *Mazibuko v Sisulu & Another* [2013] ZACC 28, 2013 (6) SA 249 (CC), 2013 (11) BCLR 1297 (CC) (*‘Mazibuko’*) at para 43.

⁸¹ *Botswana Democratic Party v Umbrella for Change* (Case No CACGB-114-14)(2017) at para 76.

⁸² See *EFF II* (note 16 above)(A divided Court held that the failure of the National Assembly to create rules regulating the removal of a President constitutes a breach under s 49 and s 55 of the Constitution. The dissent’s concern regarding the use (and potential abuse) of the courts by minority parties to achieve results that they could not attain in the legislative process possesses genuine merit.) See also F Cachalia ‘Judicial Review of Parliamentary Rulemaking: A Provisional Case For Restraint’ (2016) 60 *New York Law School Law Review* 379.

result does not encroach upon the powers of the coordinate branches. One must also read this judgment as part of the Constitutional Court's ongoing efforts to keep the train on the tracks – by ensuring that the state, specific state actors and 'well-connected' private actors abide by the rule of law and are held accountable to both the Constitution and the people that they serve.⁸³

The *EFF* Court offers roughly the same analysis as the Supreme Court of Appeal in *DA v SABC*. However, it does so for a significantly more important set of players. The difference in the factual matrix of the cases – the mis-en-scene – plays a critical causal role in the 'politics of accountability' narrative that this article adumbrates in Part V.

For now, it's sufficient to note that the *EFF* Court concludes that no state actor can simply ignore the Public Protector's findings, recommendations and remedies. The Court sums up its reasoning as follows:

The obligation to assist and protect the Public Protector so as to ensure her dignity and effectiveness is relevant to the enforcement of her remedial action. The Public Protector would arguably have no dignity and be ineffective if her directives could be ignored willy-nilly. The power to take remedial action that is so inconsequential that anybody, against whom it is taken, is free to ignore or second-guess, is irreconcilable with the need for an independent, impartial and dignified Public Protector and the possibility to effectively strengthen our constitutional democracy.⁸⁴

As noted in the prior discussion of *Glenister*, the Court seems especially interested in an entity that might fill the lacuna left by the Scorpions. The government easily rid itself of the Scorpions. The *Glenister* Court could only remonstrate the executive for failing to create and to maintain, as required by the Constitution read with international law, a truly independent, investigatory, corruption-fighting body. Unlike the Scorpions, the Public Protector, as a constitutionally created institution designed to support democracy, cannot be so readily dispatched.

As matters currently stand, a department or agency or branch of government can hold its own review process subsequent to the recommendations and remedies found in a Public Protector's report. It decides for itself the merit of the Public Protector's verdicts. However, if the state actor's or private actor's conclusions deviate substantially from the conclusions of the Public Protector, then it can approach a High Court for review regarding the rationality or fairness of the Public Protector's conclusions. Such High Court reversals – initiated by state actors and private actors – have already occurred.⁸⁵

That is the law as it stands. While neither the Constitutional Court's nor the Supreme Court of Appeal's decisions were inevitable, since another plausible reading exists, both judgments stay well within the boundaries of the text. What appears evident from the judgments is that the two appellate courts had become increasingly frustrated by the failure of the coordinate branches of government or

⁸³ S Woolman 'Understanding South Africa's Aspirational Constitution as Scaffolding' (note 4 above).

⁸⁴ *Economic Freedom Fighters* (note 1 above) at para 67.

⁸⁵ *South African Reserve Bank v Public Protector & Others* [2017] ZAGPPHC 443, 2017 (6) SA 198 (GP) ('SARB'); *ABSA Bank & Others v Public Protector & Others* [2018] ZAGPPHC 2, [2018] 2 All SA 1 (GP) ('ABSA Bank').

organs of state to abide by even the most de minimus understanding of the rule of law. Their reading of the Public Protector's powers enables that institution to reinforce effectively its role of supporting democracy as well as supporting the courts' commitment to the principle of accountability.

B The Reach of *Economic Freedom Fighters*

As the Chief Justice points out, the Constitutional Court and other courts often hand down decisions that render laws or conduct unconstitutional, even when state actors have had no prior grounds for knowing, with certainty, that the laws that they had passed or the unlawful conduct in which they engaged was inconsistent with the Constitution. In *Premier, Western Cape*, the Constitutional Court found that President Mandela had participated *unintentionally* in unconstitutional behaviour.⁸⁶ The same holds true for Chief Justice's analysis of the specific obligations that bound President Zuma and the National Assembly.

The Court's holding that the relevant provisions of the Constitution and the PPA support the proposition that the Public Protector's remedies may have binding legal effect may, in some instances, create a burden shift. A government entity found by the Public Protector to have engaged in serious misconduct or illegal activity will be obliged to seek review in a High Court to have the recommendations or the remedies set aside. In *EFF*, and subsequent High Court decisions, the threshold appears to be that of rationality. That is not a particularly high threshold. Roughly five offending state actors per annum, usually Ministers or the Departments that they head, will be obliged to decide whether to challenge – at taxpayer expense – the Public Protector's findings. The floodgates of litigation do not appear ready to burst open.⁸⁷

The two-fold result – 'binding effect' and 'onus shift' – in *Economic Freedom Fighters* was not strictly necessary. A counterfactual makes that clear. Rather minor bureaucrats who proved themselves inept would not have exercised the courts. It's the brazen and the persistent flouting of the rule of law by the President, virtually all his Ministers and other bagmen in high office that attracted the investigations of the Public Protector and the dual holdings in *Economic Freedom Fighters*. The courts might, arguably, have taken a 'one case at a time' approach.⁸⁸ Instead of offering a 'grand theory' regarding the Office of the Public Protector's powers, the courts could have decided, on an ad hoc basis, which cases require remedies that will have binding legal effect. That result would have placed the burden of seeking court-enforcement of recommendations and remedies on the Public Protector.

⁸⁶ *Premier, Western Cape v President of the Republic of South Africa* [1999] ZACC 2, 1999 (3) SA 657 (CC) (The Court found that the statutory grant of power that enables the national Minister to order the transfer of functions against the wishes of the provincial government and consent of the Premier reflects overreach and is inconsistent with the Constitution.)

⁸⁷ Moreover, our multi-party democracy places the primary burden on citizens to hold official-bearers *accountable*. Nothing prevents citizens from participating in the legislative process or in extant party politics or forming new parties or using the ballot box to bring about regime change.

⁸⁸ C Sunstein *One Case at a Time* (1996).

However, as another author has argued in these pages,⁸⁹ we are first obliged to credit the Court with having good reasons for its conclusions. It is fair to assume that given the indefatigable work of a largely free press, the numerous investigations of the Public Protector into rampant corruption by major players in the public sector, and the numerous matters in which gross political malfeasance had wound up in the court, the *EFF* Court had seen enough. Given the primacy of the place of the rule of law in the Court's jurisprudence, the Court concluded that an ongoing lack of *accountability* would turn the Constitution into a dead letter. The Court had, in fact, patiently adopted a 'one case at a time' approach for quite some time. Stern warnings issued in numerous cases had been repeatedly ignored.⁹⁰ The *Economic Freedom Fighters* Court decided that the burden had, in fact, shifted to government to prove their bona fides *after* they had been legitimately and repeatedly called into question in a host of very different matters.

C Real and Imagined Problems with the Reach of *Economic Freedom Fighters*

The following 'hypothetical' captures the current state of the law:

1. A government department acts in good faith in carrying out its functions.
2. Irrespective of the department's good faith intentions and actions, the Public Protector finds adversely against the department and decides that its recommendations ought to have binding remedial effect.
3. The department finds itself in the following position. It must implement remedial action that it believes will deleteriously affect its mandate or it can look to have the recommendations or remedies set aside in the High Court as *irrational* or *procedurally unfair* or *ultra vires*.

Both Advocate Bishop and I *shared* a concern about turning an investigatory and problem-solving body – meant to mediate disputes between the state and its 50 million citizens – into an institution that might act, on rare occasion, as detective, prosecutor, judge and jury.⁹¹ It is *possible* that the latter set of powers could be used for malvolent ends against minority parties, government officials or others exercising public power who have fallen out of favour with the governing party. Given the unconstitutional behaviour of the the police and other more covert parts of the state's security apparatus, these concerns are hardly hypothetical.⁹² However, the extant case law demonstrates that solutions exist when the

⁸⁹ F Michelman 'On the Uses of Interpretive Charity' (2008) 1 *Constitutional Court Review* 1.

⁹⁰ See *Black Sash Trust* (note 14 above) at para 3 ('The Minister is called upon to show ... why she should not pay costs of the application from her own pocket.');

AllPay Consolidated Investment Holdings v Chief Executive Order, Social Security Agency [2014] ZACC 12, 2014 (4) SA 179 (CC), 2014 (6) BCLR 641 (CC). Ultimately, the Court could no longer accept the unconscionable delays in creating an adequate mechanism for the delivery of social security grants.

⁹¹ Email correspondence with Michael Bishop (April 2016)(republished with permission of Michael Bishop).

⁹² Woolman (note 62 above). US experience with broad grants of power delegated to special prosecutors sounds a cautionary note. See Ethics in Government Act of 1978, 28 US Code Chapter 40. The Act was passed in response to President Nixon's role in Watergate. The Act restricted the authority of the executive branch to terminate independent counsel. The Act expired in 1999 due to a bipartisan view that the act had undermined the effective operation of the executive.

Public Protector abuses her ‘limited authority’. Two High Courts, in two separate matters, have already found that the most recently appointed Public Protector behaved irrationally, procedurally unfairly and *ultra vires*. They held that the manner in which the Public Protector conducted an investigation reflected bias from beginning to end. In each matter, all of the Office’s recommendations and remedies were set aside. These two judgments come at the end of a period in which still other means of cabining the Public Protector’s untoward use of power have been evinced by a range of non-legal responses (by the electorate and the media) and legal rejoinders (from the Reserve Bank, political parties in Parliament, the courts and private actors.)

Public Protector Mkhwebane’s actions over her first two years might best be described as erratic.⁹³ She did not placate former President Zuma by withdrawing the Office’s *State of Capture Report*. It so appeared, for a brief moment, that she might turn out to be less of a lapdog than expected. However, in November 2016, Public Protector Mkhwebane intimated that charges against former Public Protector Madonsela might be laid for leaking recordings of former President Zuma’s interviews during her state capture investigation. Advocate Madonsela believed the release necessary to rebut President Zuma’s accusations that he had not had an opportunity to tell his side of the ‘state capture’ story. The former Public Protector was well aware of the potentially deleterious consequences that might flow from such a leak. Section 7(2) of the PPA makes specific provision for the maintenance of confidentiality during an investigation by criminalising the disclosure of any document or the record of any evidence, by anyone involved in the investigation, without the Public Protector’s consent.⁹⁴ After the former Public Protector released transcripts of her interviewees with the President, the new incumbent did not stand by her predecessor. Instead she raised the spectre of laying charges against Advocate Madonsela in terms of s 7(2) of the PPA. This threat turned out to be stillborn. Former ANC Member of Parliament Vitjie Mentor intervened by stating that she never laid a complaint against the ex-Public Protector for any breach of confidentiality. Ms Mentor flipped the new Public Protector’s narrative on its head:

‘I was a whistle-blower. I was the first person to be interviewed by Thuli. I have also been defending her on my Facebook wall. Why would I lay complaint against her?’ ... Mentor then accused the new Public Protector of being a liar, stating that she would approach the Bar Council over the matter and planned to lay charges. ‘I will never, ever for the duration of Busisiwe Mkhwebane’s tenure send anything to her office. I will go to the courts. I will go to the Human Rights Commission instead,’ she said. ‘It is worrying that she would be more concerned with protecting the state and not the public as she is mandated to do.’⁹⁵

The politics of accountability created by the courts, the prior Public Protector, the press and the electorate enabled Vitjie Mentor to speak truth to power.

⁹³ ‘Mkhwebane Gets Roasted Over “Legal Nonsense” Report on Zille’ *Huffington Post* (12 June 2018). In addition, the Speaker of the National Assembly asked the committee with oversight over the Public Protector to review her conduct.

⁹⁴ PPA s 7(2) read with s 11(1). The penalty is a fine of R40 000, 12 months imprisonment or both.

⁹⁵ T Madia ‘Critics Correct to Call Mkhwebane the “State Protector”’: Mentor’ *News24* (27 November 2016).

Of greater import for concerns about potential overreach are two recent decisions handed down by the North Gauteng High Court. In *SARB v Public Protector*, the applicant asked to have the Public Protector's remedial actions set aside. In her *Alleged Failure to Recover Misappropriated Funds Report*,⁹⁶ Advocate Mkhwebane had sought to alter s 224 of the Constitution so that the Reserve Bank's purpose shifted from primarily protecting 'the value of the currency in the interest of balanced and sustainable economic growth' to 'ensuring the socio-economic well-being' of South African citizens and pursuing – in consultation with Parliament – 'meaningful socio-economic transformation' of the Republic.⁹⁷ In a section of the decision entitled 'Legality, Ultra Vires and the Separation of Powers' the court held: (a) given that the Public Protector's investigation had as its stated aim a determination as to whether the Reserve Bank had recovered all monies owed to it by BancorpLtd/ABSA, the constitutional alteration of the Reserve Bank's purpose could not possibly be deemed 'appropriate' remedial action in terms of the Public Protector's own powers; (b) given the Public Protector's constitutional and statutory brief, the alteration of the constitutional mandate of the Reserve Bank could not possibly fall within the Office's purview; (c) given that the Constitution expressly grants the legislature alone the power to pass an amendment that alters a provision of the Constitution, the Public Protector's remedy requiring a change in the language of s 224 of the Constitution clearly falls well beyond her constitutional authority and violates the commitment to the separation of powers; and (d) given that the Public Protector widened the scope of the investigation without consulting the parties affected, her inquiry constituted a quintessential case of procedural unfairness.⁹⁸ In sum, the High Court found the proposed remedial action to be irrational, procedurally unfair, and a breach of the separation of powers doctrine. The High Court's setting aside of the proposed remedial action of the Public Protector supports my contention that potential abuses of power by the Public Protector can be readily cabined.

Another High Court decision soon followed. In *ABSA Bank v Public Protector*, both ABSA and the Reserve Bank sought to have other remedies in the Public Protector's *Alleged Failure to Recover Misappropriated Funds Report* set aside. In her report, the Public Protector directed the Special Investigations Unit to reopen the state's investigation into the alleged misappropriation of funds by Bankcorp/ABSA and the failure of the Reserve Bank to collect such funds. The High Court traversed many of the same legal issues asked and answered in *SARB v Public Protector*. It found that far from investigating a matter with an open mind, the Public Protector had decided upon its recommendations and remedies prior to its probe. Having carefully demonstrated the dishonesty, illegality, impropriety and wrongfulness of the Public Protector's actions, the Court determined that the proposed remedial action was unlawful and met the standard for a reasonable

⁹⁶ Office of the Public Protector *Alleged Failure to Recover Misappropriated Funds: Report on an Investigation into Allegations of Maladministration, Corruption, Misappropriation of Public Funds and the Failure by the South African Government to Implement the CIEX Report and to Recover Public Funds from ABSA Bank* Report 8 of 2017/2018 (19 June 2017) ('*Alleged Failure to Recover Misappropriated Funds Report*').

⁹⁷ *Ibid* at para 7.2.1.

⁹⁸ *SARB* (note 85 above) at paras 39–52 (my summary).

apprehension of bias. The Court’s conclusion – that the Public Protector conducted an investigation that reaked of predisposition, prejudgment, partisanship and political collusion – constitutes the strongest possible reprimand. This judgment – and the High Court’s exercise of rationality review – provides ample support for the contention that the Public Protector’s star chamber-like constellation of powers ought not to be feared.

V THE POLITICS OF ACCOUNTABILITY

A Naming and Shaming Redux

In the ‘best of all possible worlds’, Michael Bishop and I might continue to remain equally committed to the name and shame method articulated above in Part II.C and in a decade-old co-authored chapter called ‘The Public Protector’.⁹⁹ We still share, to a *limited* degree, Stephen Owen’s preference for reason over coercion, even if we part company on the question of the onus.¹⁰⁰

Since the Public Protector’s recommendations and remedies *may* be legally binding – not *must* – the courts and independent institutions can secure greater political accountability without risking any of the aforementioned pathologies associated with the Office’s wide-ranging powers. The courts remain the final arbiter of whether the rule of law has been breached.

B Accountability and Shared Constitutional Interpretation

In *Economic Freedom Fighters*, the Chief Justice emphasised the constitutional principle of accountability as foundational for its understanding of the Public Protector’s powers:

One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted *accountability*, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason, public office-bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, *accountability* and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck.¹⁰¹

How does the judiciary – the weakest branch – ensure the accountability of other arms of the state? A commitment to a politics of accountability is more deeply entrenched when state institutions share responsibility for determining

⁹⁹ Bishop & Woolman ‘Public Protector’ (note 1 above).

¹⁰⁰ Because the number of major maladministration or corruption cases will remain small, concern about the litigation costs born by government departments remains something of a red herring. The public will bear the litigation costs no matter where the onus lies.

¹⁰¹ *Economic Freedom Fighters* (note 1 above) at para 1 (emphasis added).

their respective obligations to uphold their duties under the Constitution.¹⁰² By consciously sharing responsibility for interpreting the basic law, political institutions improve their decisions and enhance their legitimacy.

C Catalytic Moments and Constitutional Moments

Every republic has ‘constitutional moments’. Such extraordinary moments reshape the body politics’ conception of itself.¹⁰³ However, not only is it far, far too early to classify this particular plotline as culminating in a ‘constitutional moment’, it’s not yet clear whether this sequence of events will have enduring consequences. The last eight years of investigations by the media and the Public Protector, and decisions by our courts and the electorate have had reciprocal and catalytic effects that led to the demise of Jacob Zuma and concomitant rise of Cyril Ramaphosa. The ‘great unravelling’ of South Africa’s kleptocracy – to use Trevor Manuel’s felicitous phrase – remains in its incipient stages. Whether the political will exists to disentrench long-standing patterns of corruption in the public sector and undo suffocating cartelism in our radically unequal private sector remains to be seen. Other crises – from resource scarcity to extreme unemployment – raise serious questions regarding current political (in)capacity and ensuing social implosion. As truly wicked problems, these crises may well go unanswered.¹⁰⁴

A politics of accountability is also not the same as a politics of capability. A majority of South Africans will, for some time, lack the basket of material goods and immaterial goods necessary to transform their capabilities into lives worth valuing.¹⁰⁵ Put different, while a politics of accountability may be a precondition for a politics of capability, its existence does not translate into the ability to deliver those public goods that will enable many South Africans to grasp the very first

¹⁰² S Woolman *The Selfless Constitution* (note 3 above); C Sabel & W Simon ‘Epilogue: Accountability without Sovereignty’ in G de Búrca & J Scott (eds) *Law and New Governance in the EU and the US* (2006) 395, 396, 398 (‘Viewed experimentally, [a]ccountability ... is [no longer] upward-and backward-looking [with] the court looks upward towards the sovereign and backward toward some prior authorisation.’) The virtues of experimental constitutionalism flow from its recognition that a democracy works best when it is able to look ‘forward and sideways: forward to the on-going efforts at implementation, sideways to the efforts and views of peer institutions’. Ibid at 400. It enables different participants within the system to learn from the successful trials and fatal errors of others similarly intent on improving the system. That sounds very much like what our appellate courts have done in *SABC v DA, Economic Freedom Fighters, Black Sash Trust, United Democratic Movement and Economic Freedom Fighters II*. Experimental constitutionalism rests upon another premise: our political institutions work best when all branches of government have a relatively equal stake in giving our law content. A court’s reading of a text does not exhaust all possible readings. Experimental constitutionalism invites state actors and non-state actors to come up with their own gloss on a law or a policy. The Constitutional Court endorsed this shared endeavour 15 years ago in *National Education Health and Allied Workers Union v University of Cape Town & Others* [2002] ZACC 27, 2003 (3) SA 1 (CC) at para 11 (‘Where the Legislature enacts legislation in the effort to meet its constitutional obligations, and does so within constitutional limits, courts must give full effect to the legislative purpose. ... In this way, the courts and the Legislature act in partnership to give life to constitutional rights.’)

¹⁰³ B Ackerman *We the People, Volume 1: Foundations* (1993).

¹⁰⁴ Wicked problems are pressing crises that may be impenetrable (as scientific understanding goes) and insoluble given the limited (political and economic) means at our disposal. H Rittel & M Webber ‘Dilemmas in a General Theory of Planning’ (1973) 4 *Policy Sciences* 155.

¹⁰⁵ See M Nussbaum ‘Constitutions and Capabilities: “Perception” against Lofty Formalism’ (2007) 121 *Harvard Law Review* 4; A Sen *Development as Freedom* (1999).

rung of the ladder of development.¹⁰⁶ Our ‘politics of accountability’ has opened up the space for politics. Whether we possess the political will to take advantage of this ‘reset’ remains unclear.¹⁰⁷

D Reciprocal Relationships and Catalytic Effects

The courts’ textual arguments for understanding the Public Protector’s powers is persuasive. Yet, as the narrative developed in these pages shows, state and non-state actors are more likely to realise the goals of a developmental state when their actions reinforce one another.

The failure of the executive, the legislature and innumerable state actors to abide by the most de minimus conception of the rule of law required a constellation of state actors and non-state actors to stand up and say: ‘If we continue this way, we flirt with the possibility of a failed state.’ A democracy does not come into being merely because a basic law is enacted. As this narrative of a politics of accountability suggests, middle income countries perform best when they work with the grain. Brian Levy explains his neologism ‘working with the grain’ and the methodology for integrating governance and development as follows:

[Nations can be distinguished along] two dimensions of governance: ... whether the rules of the game center around personalized deal-making or the [relatively] impersonal application of the rule of law. [This] approach [concentrates] ... less on distinctive governance patterns of incentive and constraint and more on how governance and growth interact. This longer-run perspective can usefully be framed in terms of three phases of a virtuous circle: initiating change, building momentum, and sustaining momentum ... While virtuous circles unfold differently along each of the dominant and competitive trajectories, the interactions between governance and growth that propel forward movement are akin to a snowball that builds in size as it rolls down a hill. As long as momentum can be sustained, by the time the snowball gets to the bottom of the hill, it will have built up formidable power, irrespective of where it started.¹⁰⁸

This article suggests that the South African snowball has both initiated change and is building momentum. The politics of accountability similarly describes a growing body of jurisprudence and a socio-political landscape in which a reciprocal relationship between the rule of law and civil society has had positive political consequences.¹⁰⁹ Whether the necessary momentum can be maintained – given the unfinished business of substantive redress for our colonial and apartheid

¹⁰⁶ World Bank *The Challenge of Inequality of Opportunity: South Africa* (2012).

¹⁰⁷ Woolman ‘Understanding South Africa’s Aspirational Constitution as Scaffolding’ (note 4 above); Woolman ‘South Africa’s Aspirational Constitution and Our Problems of Collective Action’ (note 4 above).

¹⁰⁸ B Levy *Working with the Grain: Integrating Governance and Growth in Development Strategies* (2014) 9–10.

¹⁰⁹ Woolman ‘On the Reciprocal Relationship’ (note 2 above).

past,¹¹⁰ the kleptocracy of the past decade,¹¹¹ and the exogenous disruptive forces beyond our borders¹¹² – lies beyond the ken of any observer.

It remains easy enough to recount the virtuous circles of snowballing, reciprocal relationships and catalytic effects between state institutions committed to the rule of law and a robust civil society. The *Mail & Guardian's* December 2009 story about Nkandla set off alarm bells.¹¹³ Mandy Rossouw detailed the existing and ongoing expansion of President Zuma's private home – and the estimated cost of R65 million to be borne by the public. The government initially denied any knowledge of such a development. The President's Office then tried to pip the *Mail & Guardian* to the post by explaining that an expansion was indeed in progress: 'No government funding will be utilised for construction work.'¹¹⁴ As the story gained traction, the Public Protector launched its own investigation in January 2012. On 19 March 2014, the Office issued its findings. The *Secure in Comfort* Report reveals breaches of any number of laws, regulations and policy, improper conduct and maladministration by numerous departments, ministers and the President, multiple conflicts of interest, disappearing documents, and a final estimate of R246 million for what 'given the very humble beginnings of this project [ultimately resulted in] nothing short of a full [private] township.'¹¹⁵ The Report's recommendations and remedies stayed well within the Public Protector's brief: (a) hold the President accountable for the costs of the non-security related enhancements to his Nkandla estate; and (b) reprimand the Ministers of the Police, the Department of Public Works and the Department of Defense 'for the appalling manner in which the Nkandla project was handled and state funds abused'.

Exactly one month earlier, the Public Protector had confirmed 'reams of dodgy reports'¹¹⁶ circulating in the press regarding the fraudulent behaviour committed by SABC Acting COO Hlaudi Motsoeneng, irregular salary increases, the utter disarray of the SABC Board as well as undue interference by the Minister of Communications and the Department of Communications. The Public Protector's Report *When Governance and Ethics Fail* proffers recommendations and remedies for systemic failures of corporate governance, to recoup misappropriated funds for salaries, to fill posts properly with qualified candidates and to restore to their

¹¹⁰ See S Terblanche *Lost in Transformation* (2012); T Madlingozi 'On Transitional Justice Entrepreneurs and the Production of Victims' (2010) 2 *Journal of Human Rights Practice* 208 ('The main point of encounter ... should principally be about redistribution of resources and power.')

¹¹¹ *State of Capture Report* (note 17 above).

¹¹² S Woolman & G Abraham 'Wicked Problems and Disruptive Technological Innovation: Automation and Mass Unemployment as an Imminent Threat to South Africa's Constitutional Democracy' (2018) (Draft paper, January 2018, on file with author).

¹¹³ M Roussouw 'Zuma's R65m Nkandla Splurge' *Mail & Guardian* (4 December 2009).

¹¹⁴ *Ibid.*

¹¹⁵ *Secure in Comfort Report* (note 8 above).

¹¹⁶ G Nicholson 'Decoding Hlaudi: The Public Protector's SABC Report' *The Daily Maverick* (4 March 2014).

original position SABC employees and former employees who had suffered materially due to misconduct by SABC executives and the SABC board.¹¹⁷

The Public Protector's reports on Nkandla and the SABC (as well as the *State of Capture Report*) only possess force as a result of support from other state actors. The courts in *SABC v DA* and *Economic Freedom Fighters* gave citizens a palpable sense that a range of state institutions would hold the powerful 'accountable'. In *SABC v DA*, the Supreme Court of Appeal expresses its pique that the rule of law could be so brazenly abused in a cycle of corruption without apparent end:

[P]ublic administrators and state institutions are guardians of the public weal[th]. ... [C]onstitutional states [possess] checks and balances to ensure that when any sphere of government behaves aberrantly, measures can be taken to ensure compliance with constitutional [and other] legal prescripts. ... [T]he Public Protector is one important defense against maladministration and corruption ... 'The Public Protector's brief is to watch the watchers and to guarantee that the government discharges its responsibilities without fear, favour or prejudice.' [I]n order to ensure governmental *accountability*, it has become necessary for the guards to require a guard ... In ... our constitutional scheme, ... the Public Protector ... guards the guards. ... The Public Protector concluded that there were pathological corporate governance deficiencies at the SABC and that Mr Motsoeneng had been allowed 'by successive boards to operate *above the law*'. ... Appointing Motsoeneng in a permanent position would have been unlawful and irrational even if all the correct procedures had been followed. However, not only did the Board and the Minister appoint an admitted fraudster who had single handedly cost the SABC tens of millions ... and completely undermined public confidence and good corporate governance, it completely ignored the relevant provisions when it did so ... [We] tell this sordid tale with reference to all the *media reports* as a source.¹¹⁸

Recall the words of the Chief Justice in *Economic Freedom Fighters*:

One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason, public office-bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck.¹¹⁹

Not so long thereafter, the ugly 'head' of impunity had his stiffened neck chopped off.

¹¹⁷ Office of the Public Protector, South Africa *When Governance and Ethics Fail: A Report on 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* Report No 23 of 2013/4 (14 February 2014).

¹¹⁸ *SABC v DA* (note 6 above) at paras 2, 3, 6 and 13 (emphasis added) quoting Bishop & Woolman 'Public Protector' (note 1 above) Chapter 24A–2 (Court places emphasis on the role of the media in securing accountability. The Court adds: 'The Public Protector cannot realise the constitutional purpose of her office if other organs of state [were entitled to] ... ignore her recommendations. Section 181(2)(c) must ... be taken to mean what it says. The Public Protector may take remedial action herself ... [T]his watchdog should not be muzzled.' Ibid at paras 52–53.)

¹¹⁹ *Economic Freedom Fighters* (note 1 above) at para 1 (emphasis added).

By the beginning of 2016, the media, the Public Protector and our appellate courts had rattled the cage. This rattling had discernible knock-on effects. Public support for a two-term President and the ANC waned. That disenchantment took the form of victories by (coalitions of) minority parties in the 2016 municipal elections. Two international rating institutions lost faith in the current regime's ability to govern effectively and downgraded the country's sovereign credit status from investment grade to junk. Against the background of the President's and the ANC's diminished status, the Constitutional Court continued to hold state actors accountable. In *Black Sash Trust*, the Court found that the repeated failure (after multiple court orders) of the Minister to create a viable social grant payment system was so indefensible that it ordered an investigation into whether she should pay court costs out of her own pocket.¹²⁰ The next significant judicial challenge to the status quo occurred when the Constitutional Court decided that the Speaker of the National Assembly had the power to decide whether or not a motion of no confidence could be determined by secret ballot. Relying heavily upon an array of constitutional commitments to accountability, the Court set fairly stringent criteria as to whether the Speaker's decision would be viewed as rational if taken upon review.¹²¹ So cabined, the Speaker decided to hold the motion of no confidence by secret ballot.¹²² These judgments reflect the catalytic effects of prior decisions made by the Court and the Public Protector. The Court then extended its rule of law doctrine into the legislative rule-making process itself. A very slim majority held that the National Assembly had breached its constitutional obligations – this time in terms of s 89(1) and s 42(3) – by failing to promulgate rules regulating the removal of a President:

The case is about Parliamentary mechanisms for holding the President of the Republic *accountable* and the constitutional obligations of the National Assembly to hold him *to account*. It is ... about the National Assembly holding ... President Jacob Zuma ... *accountable* for his failure to implement the Public Protector's remedial action.¹²³

The expansion of the rule of law doctrine's reach had two medium-term consequences. First, the Public Protector broadened the scope of her inquiries into the illicit activities of President and his vast patronage system. Second, her probes further revealed the private actors who had benefitted immensely from

¹²⁰ *Black Sash Trust* (note 14 above) at para 3 ('The Minister is called upon to show ... why she should not pay costs ... from her own pocket.') Holding individual ministers accountable – piercing 'the political veil' – reflects remarkable institutional confidence and indicates that the Court has grown weary of the contempt that government officials have shown for the law and their constitutional obligations. For the Court, these actions go to the very heart of the legal system's legitimacy. According to Fuller, a legitimate system of law must possess at least the following formal features: (a) laws must be public; (b) laws must be clear, non-contradictory and possible to obey, and prospective; (c) officials must faithfully apply the rules. L Fuller *The Morality of Law* (1969) 46–91. The courts in *SABC v DA* and *EFF* appear to be troubled by the proposition that a time may come when the 'system's failure to observe [these basic] principles of legality' causes us to say that 'it is no longer a system of law at all.' J Waldron 'Positivism and Legality: Hart's Equivocal Response to Fuller' (2008) 83 *New York University Law Review* 1135 at 1141.

¹²¹ *United Democratic Movement* (note 15 above) at paras 92–94.

¹²² The Court must have also felt that holding the Speaker accountable would not precipitate a political crisis.

¹²³ *EFF II* (note 16 above) at para 1.

a blurring of the lines between the public domain and the private realm. In terms of this article's interest in the reciprocal relationship between the rule of law and a more robust and just civil society, the *State of Capture Report's* intense scrutiny of private actors pilfering the public purse is of particular interest. The catalytic effect of prior decisions by courts, independent institutions, the press, members of government, the electorate and individual members of Parliament made possible the exposure of brazen corruption by McKinsey and SAP,¹²⁴ the truly outrageous abuse of accountability by the accounting firm KPMG,¹²⁵ and the Ponzi scheme still known as Steinhoff.¹²⁶ Of course, no firm sunk as low as Bell Pottinger. Thanks to the United Kingdom's regulatory body for advertising, this public relations firm – hired to deflect attention away from the Zuma-Gupta scandal by exacerbating already extreme racial tensions through a furtive social media campaign – no longer exists.¹²⁷ The revelations laid bare the extent to which private parties worked to prop up a corrupt regime (for their own 'criminal' pecuniary ends) and betrayed the constitutional principle of accountability.¹²⁸

By holding the President, the National Assembly, Ministers, organs of state and private parties accountable, the official guardians and the civic protectors of the rule of law created the requisite space for regime change. Of course, the media, the Public Protector and the courts alone could not orchestrate such a transformation.

The citizens of South Africa have had a reciprocal relationship with these actors and ultimately provided the most important catalytic effects. The aforementioned troika did their jobs: they created a more informed electorate. In the municipal elections of 2016, an informed electorate – tired of Zuma's kleptocracy –

¹²⁴ See W Bogdanich & M Forsythe 'How McKinsey Lost Its Way in South Africa' *The New York Times* (26 June 2018); M Marriage & J Cotterill 'McKinsey Unclear How to Repay South Africa Scandal Fees' *Financial Times* (4 March 2018) ('McKinsey is trying to return fees earned from a contract that has been tainted by ties to the country's controversial Gupta family but does not know where to send the money, according to the head of the consultancy. ... McKinsey earned about R1bn (\$85m) from its work with Eskom, the state-owned power utility at the centre of a sprawling corruption scandal, in 2015.')

¹²⁵ T Malaudzi 'ABSA Drops KPMG as External Auditor' *Eyewitness News* (3 May 2018). After being found to have engaged in false reporting to the South African Revenue Service, the South African office of this internationally renowned auditing firm shed most of its senior executives and lost a substantial portion of its clients, including the Auditor-General. This last loss is a first for a big four accounting firm.

¹²⁶ See A Crotty 'Focus Shifts to Steinhoff Austria's Ten-fold Value Hike' *Business Day* (4 May 2018). A company whose value stood at R9 billion managed to secure a place on the Frankfurt Stock Exchange in 2015 with a market capitalization of R198 billion.

¹²⁷ D Segal 'How Bell Pottinger, P.R. Firm for Despots and Rogues, Met Its End in South Africa' *The New York Times* (4 February 2018). See also L Omarjee 'Gupta Leaks May Be Sword that Undoes SA's Gordian Knot – Manuel' *Finance 24* (19 September 2017) (Former finance minister Trevor Manuel said: 'For a while we have seen the weakening of institutions to the point of their destruction,' said Manuel. 'We see the *unravelling* of what has been bad in the country. We see the challenges facing KPMG ... [and] McKinsey. We see all the shenanigans in SARS.')

¹²⁸ H Klug 'Accountability and the Role of Independent Constitutional Institutions in South Africa's Post-Apartheid Constitutions' (2015/2016) 60 *New York Law School Law Review* 153 at 153 (Prior to the Constitutional Court cases canvassed herein, Klug noted that the Court and other state actors had forged a '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 be both heard and to protect their interests [and] goals.')

delivered a stunning blow to the ruling party. The ANC lost South Africa's major metropolises to individual minority parties or coalitions of minority parties. The electorate's 2016 experience of success – a message sent by the stayaway of ANC supporters – had a reciprocal effect on their own behaviour. In December of 2017, members of the ANC had a second opportunity to send a message to the ruling party. In Ramaphosa, ANC branch members had an alternative to the next Zuma, Dlamini-Zuma. Term limits meant that Zuma himself could not run again. On 18 December 2017, members of the ANC attending the party's 54th Elective Conference chose a new party President. The new party President, Cyril Ramaphosa, then managed to ease out his predecessor in less than two months. Moreover, public and party support enabled the new President to do so without a pardon or any promise that criminal charges, that long lay in abeyance, would be ignored by the National Prosecuting Authority. Say what you will about the next President, but it's an informed and engaged citizenry that enabled a significant democratically inflected adjustment to occur.

Buried in this narrative is a provision not often mentioned: s 88 of the Constitution. This provision limits Presidents to two terms of five years. What most readers might not recall is that Cyril Ramaphosa took up his position as Deputy President of the ANC in December 2012. He returned to politics in the quietest possible manner. His service to the party did not prevent him from continuing to amass sizeable wealth in the private sector.¹²⁹ However, his long game – tied to Presidential term limits – continued to bear fruit when President Zuma could no longer tolerate Deputy President Kgalema Motlanthe's criticism. Zuma forced Motlanthe's official exit in May of 2014.¹³⁰ Ramaphosa's boost to the Deputy Presidency offered President Zuma much needed 'credibility' just as things were beginning to fall apart.¹³¹ Given s 88, Ramaphosa need only to wait. However, his knowledge of term limits and ANC politics would have amounted to nothing, but for the work of the media, the Public Protector, minority parties, the courts and the citizens themselves in orchestrating a reset of South African politics through municipal elections in 2016 and internal ANC party politics in 2017.

The unravelling of 'what has been bad in the country'¹³² – Trevor Manuel's words – might well mean losses at the 2019 polls for a ruling party that has clearly used the machinery of the state to advance the pecuniary interests of

¹²⁹ As of February 2018, Ramaphosa held the position of 10th wealthiest person in South Africa, with a net worth of between \$450 million and \$675 million. 'Profile of Cyril Ramaphosa' *Forbes* available at www.forbes.com/profile/Cyril_Ramaphosa.

¹³⁰ South African Press Association 'Motlanthe Bids Adieu to Parliament' *ENCA News* (12 March 2014) available at <http://www.enca.com>.

¹³¹ For the better part of the next three years, he remained quiet, and even apologised to the President and the NEC for briefly speaking out about corruption. M Gallens 'Cyril Ramaphosa, New President of the ANC' *News24* (18 December 2017) available at <http://m.news24.com> ('Ramaphosa became deputy president [of the ANC] ... in 2012. At the time, he was wooed by President Jacob Zuma's camp to give the state 'credibility' when the ANC deputy president contested Zuma for the top spot.') See also R Munusamy 'Dateline Mangaung: The Return of the Chosen One, Cyril Ramaphosa' *The Daily Maverick* (20 December 2012) available at <http://www.dailymaverick.co.za>.

¹³² Omarjee (note 128 above).

party members.¹³³ Ramaphosa's revived party will have a year to reinforce the narrative of a politics of accountability (that enabled his rise to power) by restoring competent Ministers to appropriate posts, cleaning house and addressing big ticket items such as land reform, resource scarcity, a contracting economy and unemployment.

However, while our politics of accountability has opened up the space for politics, the form that our collective political action shall take remains unclear. What should be clear from the narrative above is that catalytic events require ongoing catalysis. Catalytic events gain traction slowly. Changes are slow largely because the reciprocal responses of various state actors and non-state actors to the actions of one another is predominantly non-deliberative.¹³⁴ That is, we don't actually ever have a conversation between some 50 million citizens: rather, we

¹³³ See J Pearson, S Pillay & I Chipkin *Statebuilding in South Africa: The History of the National Treasury* (2016). The ANC-in-waiting and the ANC-in-power, the authors reveal, had two distinct policy drivers. It would use extant state institutions such as the National Treasury to try to stitch together a geographical space that had never served 87 per cent of its population. At the same time, it would use the same state institutions to advance the interests of the party. This compelling narrative does a lot of heavy lifting in explaining how and why South Africa is where it is now.

¹³⁴ This article places limited stock in the deliberative democratic literature that dominates political philosophy, though not political science. A. In *Infotopia*, Cass Sunstein develops a powerful critique of deliberative democracy. He identifies four basic forms of information pooling – (1) statistical averages; (2) deliberation; (3) price or market systems; (4) Internet wikis – and demonstrates that deliberation frequently finishes dead last in terms of accuracy and efficacy. C Sunstein *Infotopia* (2007) 11. See also M Walzer 'Deliberation, and What Else?' in S Macedo (ed) *Deliberative Politics: Essays on Democracy and Disagreement* (1999) 58; R Thaler & C Sunstein *Nudge: Improving Decisions about Health, Wealth and Happiness* (2008). B. Richard Thaler notes that we are often 'baffled' by the failure of our own ostensibly 'well-reasoned', deliberative choices. That's so because because we fail to acknowledge that our practices are radically determined natural and social endowments, and that constructive change occurs predominantly through trial and error and more rough and tumble forms of contestation. See R Thaler *Misbehaving: The Making of Behavioural Economics* (2015); D Dennett *Sweet Dreams* (2005) 139–140 ('Multiple competitions ... leave not only winners, but lots of powerful semi-finalists ... whose influence' may dictate subsequent experiments); Woolman *The Selfless Constitution* (note 3 above) at 52–59; S Woolman 'My Tea Party, Your Mob, Our Social Contract: Freedom of Assembly and the Constitutional Right to Rebellion in *Garvis v S.ATAWU*' (2011) 27 *South African Journal on Human Rights* 346. C. Many desirable public goods that rely on deliberation for their creation never come into existence because they fail to overcome: (a) significant transaction costs, (b) over-valorization of individual contributions, (c) limited appreciation for successful collective endeavors, (d) heterogeneity of interests, and (e) cognitive and attributive biases. See S Woolman et al 'Patent Thickets in Complex Biopharmaceutical Technologies' (2013) 53 *IDEA: The International Journal of Intellectual Property* 1. D. As for deliberation as the prime mover in the public square, a 60-year-old body of social science literature tells a different tale. For example, only 50 per cent of American voters turn out for elections. Of this 50 per cent turnout, 25% lack the most rudimentary understanding of the most salient facts, alternative policies or governing laws. In addition 50 per cent of the turnout possess limited appreciation of laws that govern their lives. This cohort guesses. Only the remaining 25 per cent of voters enjoy a basic comprehension of their polity's politics. As a result, only 12.5 per cent of the citizenry cast a meaningful ballot. 1:8. That can't possibly qualify as *deliberative* democracy, even if a commitment to a universal franchise has become the sine qua non of modern, post-World War II democracy. See I Somin *Democracy and Political Ignorance: Why Smaller Government is Better* (2016); J Brennan *Against Democracy* (2016). On the general rollback of the democratic nation-state, see L Diamond & M Plattner (eds) *Democracy in Decline?* (2015); Freedom House *Democracy in Crisis* (2017) (reveals that the number of setbacks in democracy outpaced gains for the 12th straight year); Pew Research Centre *By the People* (2018) (24 per cent of global participants favoured rule by the military; 26 per cent favoured a strong leader unconstrained by a legislature or a judiciary); R Cohen 'How Democracy Became the Enemy' *The New York Times* (6 August 2018); 'After Decades of Triumph, Democracy is Losing Ground: What's Behind the Reversal' *The Economist* (14 June 2018).

take our cues from the constructive actions of other actors, who respond, one hopes, in a reciprocal and catalytic manner to our own constructive behaviour.¹³⁵

¹³⁵ Michael Tsele and I share a stable of concerns surrounding the rule of law and the extent to which law should be demarcated from politics. See, eg, M Tsele “‘Coercing Virtue’ in the Constitutional Court: Neutral Principles, Rationality and the *Nkandla* Problem’ (2018) 8 *Constitutional Court Review* 113. But sharing the same stable doesn’t mean running the same race. In his analysis of *Economic Freedom Fighters*, Tsele argues that courts exercising powers of judicial review can only justifiably do so if, as in Herbert Wechsler’s words, cases are decided on grounds of ‘neutrality and generality’. H Wechsler ‘Towards Neutral Principles of Constitutional Law’ (1959) 73 *Harvard Law Review* 1 at 15. Written in the aftermath of *Brown v Board of Education of Topeka* 347 US 483 (1954) and other politically charged cases, Wechsler accused the US Supreme Court of nothing less than ad hoc, outcome-based reasoning in putting an end to racial segregation in American public schools. This accusation flies in the face of 20 years of carefully crafted Supreme Court precedent, shaped and litigated in large part by the NAACP, that slowly developed the foundation for reversing the pernicious doctrine of ‘separate but equal’. *Second*. In the absence of a clear commitment to judicial review in the US Constitution, many academics thought it necessary to identify a justification, once the Court actually started to exercise such powers. Such theories proliferated for roughly 30 years. Once accepted as a given in this particular constitutional democracy, most influential legal scholars turned their backs on this endeavor. See L Tribe ‘The Pointless Flight from Substance’ in *Constitutional Choices* (1986). Cass Sunstein demonstrates, empirically, that different outcomes often turn not on neutral deliberations but on the predispositions of the judges and the tendency of personal biases (a) to be reinforced by like-minded judges or (b) to be diminished by judges of different political stripes. See C Sunstein, D Schkade, & L Ellman ‘Ideological Voting on the Federal Courts of Appeals’ (2004) 90 *University of Virginia Law Review* 304. *Third*. To the limited extent that meta-theories regarding the legitimacy of judicial review in the world’s oldest constitutional democracy still animate debate, most authors have settled on two basic propositions. From the fiercest defender of majoritarian (constitutional) democracy (Waldron) to the most ardent advocate of rights-based discourse in a democracy (Dworkin), a majority of constitutional law scholars find common cause in the following two justifications for judicial review: (a) courts must protect clearly articulated provisions of the basic law; and (b) courts must ensure that democratic institutions function as intended and reinforce democratic processes where they fail to embrace discrete and insular minorities. Both commitments, combined, make more than adequate sense of *Brown v Board of Education*. The *Brown* Court effectively held that all persons are entitled to equal protection of the law *and* that segregation in education masked an obdurate, racist, white majority’s refusal to acknowledge a substantively unemancipated black minorities’ entitlement to the predicate conditions for equal participation in the country’s democratically determined decision-making institutions. That outcome has underwritten, implicitly, virtually every instance in which other second-class citizens have had their rights to equal protection vindicated. *Brown*, 65 years on, is no one-trick pony. *Fourth*. Tsele’s arguments are bedeviled by a modern, democratically constructed South African Constitution (with express powers of judicial review) that presses for non-neutral outcomes designed to effect adequate redress for centuries of depredation, degradation, dispossession and dehumanisation experienced under colonial rule and the apartheid regime. Tsele acknowledges, grudgingly, this palpable distinction with a difference. Our decidedly non-neutral Constitution contains a hodgepodge of deep precommitments – to ‘an open and democratic society based upon human dignity, equality and freedom’ – that defy any attempt to adumbrate a neutral ‘objective normative value order’. S Woolman ‘Application’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, 2008) Chapter 31. *Fifth*. Unless this article’s analysis is entirely wrong, the courts have articulated a textually grounded jurisprudence that turns on a deep commitment to the principle of accountability, the rule of law and other more specific constitutional provisions. As Froneman J rather acerbically notes in the majority judgment in *Tasima*: ‘Is it seriously intended [by the minority] to state or imply that if the President did not make the concession then this Court’s decision would have been different? And that this Court would have concluded that the President was entitled to ignore the Public Protector’s report without approaching a court of law to have it set aside? Surely not.’ *Department of Transport v Tasima (Pty) Limited* [2016] ZACC 39, 2017 (2) SA 622 (CC) at para 230. Two entirely plausible readings – Tsele’s or my own – do not an outcomes-based jurisprudence make. *Sixth*. Subsequent cases relying on the same twin pillars of the rule of law and accountability will invariably address different factual matrices. Some judges will continue to see a ‘duck’ and extend extant precedent. Other judges see a ‘rabbit’ and distinguish the instant matter from a long line of ‘ducks’. Tsele flirts with the proposition that working by analogy leads

VI CONCLUSION

At first glance, the courts' conclusion that the Public Protector's recommendations and remedies *may* have binding legal effect looks as if it places too much executive and judicial power in the hands of a single state actor. However, the first operative word is 'may'. The decision-making authority as to whether the Public Protector's recommendations and remedies possess binding legal effect is shared. The Public Protector need not make them so. The courts have reserved for themselves the final say as to whether proposed remedies are themselves irrational, materially or procedurally flawed or ultra vires. Once one recognises that the courts rely on the permissive 'may' rather than the imperative 'must', the critical bite of difference between commentators who support the courts' conclusions and those who would hold fast to the 'name and shame' approach becomes evident. The critique loses most of its bite because (a) the permissive 'may' means that Public Protector need not exercise both investigatory and adjudicative functions that would raise separation of powers concerns; and (b) on those handful of occasions per annum in which the Public Protector does conclude that its remedies ought to have legally binding effect, the dangerous qualities said to flow from its mix of investigatory and adjudicative functions lose their traction because the courts retain the ability to set aside its findings on the basis of of rationality review. As we saw above, two High Courts have not been shy about overturning every single proposed remedy in a report by the current Public Protector on the basis of irrationality, illegality, procedural unfairness and bias. The final potential flaw – costs – falls away when one realises that (a) litigation fees are almost never borne by a state official acting in her private, as opposed to departmental, capacity; (b) the number of truly

ineluctably to outcomes-based reasoning. If so, then Tsele thus finds himself in bed with critical legal scholars who charge that the judiciary's preferred mode of reasoning leads to radical indeterminacy in virtually all cases. See RM Unger *The Critical Legal Studies Movement* (1986). As Frank Michelman has argued, one must take extreme care about laying such a charge without first crediting the Court as operating with a reasonably coherent set of reasons for its conclusions. See Michelman 'On the Uses of Interpretive Charity' (note 89 above). Perhaps the Court did not say enough, for Tsele's liking, in *EFF I*. If so, then the best response might be a theory regarding judicial intervention with respect to the legislature's rule-making powers. In some instances, the rule of law and the principle of accountability may justify such judicial intervention. In other instances, democratically elected bodies must be allowed to act – unfettered by lofty court-driven archetypes of a perfect political process. *Seventh*. It's rather sobering to discover that Tsele's conception of 'neutrality' leans so very heavily on Robert Bork's 'originalism'. R Bork *Coercing Virtue: The World-Wide Rule of Judges* (2003). Bork's 'originalist' theory of constitutional interpretation can hardly be described as neutral. Bork, during his failed Senate confirmation hearings for a spot on the Supreme Court, steadfastly maintained that if confirmed, he would (a) seek a reversal of civil rights decisions that had played a role in ending racial segregation; (b) deny women's entitlement to reproductive choice; (c) restrict freedom of speech; (d) disentrench entrenched federal protection for voting rights; and (e) promote a form of executive power largely unchecked by other branches. As Richard Nixon's henchman in the firing of Watergate prosecutor Archibald Cox, Bork's actions can at least be said to cohere with his beliefs about largely unencumbered executive power. What we should learn from Borkian claims about 'neutrality', 'originalism' or 'virtue' is exactly how Bork himself, in word and deed, cashed them out. A Borkean conceit about a juristocracy, emanating from an apex court that hears but 40 cases a year, strikes this reader as overheated. The courts' embrace of the principle of accountability in a handful of cases seems a far cry from 'coercing virtue' from other state actors. What may be troubling the Court is the absence of a viable, grounded, pluralistic and competitive conception of democratic self-governance. See eg, R Pildes, S Issacharoff & P Anderson *The Law of Democracy: Legal Structure of the Political Process* (4th Edition, 2012).

serious reports of maladministration or illegal behaviour are, per annum, few in number; and (c) the public bears the costs of this inter-governmental litigation no matter where the onus falls.

The catalytic actions of various state institutions – and the positive public reaction to those signals – have hit the reset button on this country’s democratic project.¹³⁶ State and society can respond constructively to the pathologies within our democracy, because at least one South African institution worried about such eventualities 22 years ago: the Constitutional Court.

The *First Certification Judgment* Court foresaw the potential for challenges to the democratic project as initially conceived by the Constitutional Assembly.¹³⁷ In rejecting the first draft of the new constitutional text, the Constitutional Court limited its gentle rebuff to a mere handful of objections. It quietly insisted on the presence of special procedures *and* special majorities for amendments to the Bill of Rights and special majorities for the removal of the Public Protector and the Auditor-General. These apparently minor objections to the first new text passed by the Constitutional Assembly meant that the new state about to take shape would have to ensure that those who govern are (a) subject to the same strictures as those they govern; and (b) subject to a degree of accountability that goes significantly beyond the intermittent exercise of the franchise by the electorate.¹³⁸ If one wants precedent for the conclusions reached by the Supreme Court of Appeal in *SABC v DA* or the Constitutional Court in *Economic Freedom Fighters*, it’s all there in the Constitutional Court’s ur-text. The emphasis placed on safeguarding

¹³⁶ There’s no guarantee that hitting the reset button will have the desired effect. It could have untoward results. At the time of press, former President Zuma seems committed to breaking the ANC’s hold in Kwa-Zulu Natal, and then pressing on to do so nationally. See S Shoba & R Munusamy ‘How the Jacob Zuma Factor Derailed Cyril Ramaphosa’s KZN Pact’ *The Sunday Times* (10 June 2018); I Chipkin ‘The Decline of African Nationalism and the State of South Africa’ (2016) 42 *Journal of Southern African Studies* 215. Chipkin anticipates a general decline of ANC as a national party and the shift of its power to specific provinces, in particular KZN. His analysis correctly forecasts losses at the polls (eg, the municipal elections of 2016) and the party’s partial fragmentation (eg, 2017 elective conference). Zuma’s original base, KZN, once catapulted him to the Deputy Presidency. That same province now enables him to remain politically relevant in several other provinces while destabilising the ANC as a whole. The ‘great unravelling’ might well usher in a state of affairs comparable to that in Brazil. See M Fisher & A Taub ‘Why Uprooting Corruption Has Plunged Brazil into Chaos’ *The New York Times* (14 July 2017). An aggressive judicial commitment to accountability has seen the last two Presidents impeached, and one on the way to prison. The economy contracted by 8 per cent over 2015 and 2016, and the current President enjoys a popularity rating in the single digits. Disrupting the standard way of doing business is clearly not an unalloyed good. Brazil’s travails offer a cautionary note.

¹³⁷ *First Certification Judgment* (note 30 above).

¹³⁸ The relationship between our commitment to accountability and to the rule of law, and our ability to avert social, economic, political and constitutional crises is a recurring motif in the Court’s jurisprudence. See *Nyathi v Member of the Executive Council for the Department of Health Gauteng & Another* [2008] ZACC 8, 2008 (5) SA 94 (CC) at para 80 (emphasis added) (‘Certain values in the Constitution have been designated as foundational to our democracy. This in turn means that as pillar-stones of this democracy, they must be observed scrupulously. If these values are not observed and their precepts not carried out conscientiously, *we have a recipe for a constitutional crisis of great magnitude*. In a state predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our democracy.’) See also *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5, 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC) at para 42 (emphasis added) (‘[T]he Constitution requires that the state take ‘reasonable steps ... to ensure that *large-scale disruptions in the social fabric* do not occur.’)

two independent institutions – the Public Protector and the Auditor-General – suggests that the Court anticipated the manner in which institutions committed to the rule of law could be easily undermined by simple political majorities determined to avoid meaningful oversight. In this foundational judgment, the Constitutional Court embeds *accountability* in our politics, and ensures that the judiciary might find allies elsewhere in government.

Just as the *First Certification Judgment* Court in 1996 demonstrated a sharp break with an authoritarian past and enabled this democratic project to get off the ground, this narrative of relatively recent re-commitments to accountability and to the rule of law by the courts, the Public Protector and a panoply of other actors create the space for a thicker political project. However, space is just that, space. This reset of our political precommitments – all the way back to 1994 – will only take South Africa so far. Writing a truly just social democratic narrative to which the Constitution aspires remains the responsibility of the 50 million people who are, ultimately, the guardians of the basic law.