SEPARATION OF POWERS AND STATE INSTITUTIONS SUPPORTING DEMOCRACY: DOES SOUTH AFRICA HAVE A "FOURTH BRANCH" *PAR EXCELLENCE*?

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Abstract

The Constitution of South Africa establishes a cluster of institutions styled "state institutions supporting democracy", also called "Chapter 9 institutions", as they are created under Chapter 9 of the Constitution. These institutions exist alongside the traditional three branches of government – the executive, the legislature and the judiciary. They are independent, and they have powers over the traditional branches of government. There is tension between these "Chapter 9 institutions" and the traditional branches of government in recent times. At the centre of this tension lies a more substantial question about the place occupied by these institutions in the organisation of the state. Put differently, can it be said that South Africa has a constitutional scheme that includes a "fourth branch" of government? This paper sets out to investigate this question. Ultimately, the article contends that these oversight institutions have consolidated themselves into what may be styled the "fourth branch" of the state.

Keywords: *separation of powers, state institutions supporting democracy, fourth branch, constitutionalism, Constitution of South Africa.*

JEL Classification: K10

1. Introduction

The principle of separation of powers continues to be the subject of intense judicial and scholarly engagement in South Africa.[2] Despite its unpleasant history in the pre-democratic era,[3] the separation of powers is not expressly provided for in the Constitution as one of the foundational principles of the democratic dispensation. Other liberal devices, such as the rule of law, equality, and human dignity, which have a similar history of annihilation have been categorically graced with the status of being "values" in the new design,[4] but the separation of powers has not.[5] Notwithstanding this (lack of) status in the Constitution, the doctrine has proven to be integral to the modern constitutional edifice in South Africa.[6] The courts have consistently ruled that separation of powers is part of the Constitution of South African and that any action that violates it will accordingly be

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[2] D. van der Vyver, "The Separation of Powers" (1993) 8 *South African Public Law* 177; D. Moseneke, "Oliver Schreiner Memorial Lecture: Separation of Powers, Democratic Ethos and Judicial Function" (2008) 24 *South African Journal on Human Rights* 341; P Labuschagne "The Doctrine of Separation of Powers and its Application in South Africa" (2004) 23 *Politeia* 84; G. Devenish, "The Doctrine of Separation of Powers with Special Reference to Events in South Africa and Zimbabwe" 2003 *THRHR* 84; S. Seedorf & S. Sibanda "Separation of Powers" in S Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (2012) 12-i.

[3] During the pre-democratic era, the entire constitutional design was animated by the doctrine of parliamentary sovereignty and the courts were very loath to invalidate the acts of the other two political branches. See *R v Ndobe* 1930 AD 484; *Sachs v Minister of Justice* 1934 AD 11; *Ndlwana v Hofmeyer* 1937 AD 229; *Harris v Minister of the Interior* 1952 2 All SA 400 (A); *Minister of the Interior v Harris* 1952 4 All SA 376 (A); *Collins v Minister of Interior* 1957 1 SA 552 (A). For analysis, see EN Griswold "The Demise of the High Court of Parliament in South Africa" (1953) 66 *Harvard Law Review* 864; DV Cowen "Legislature and Judiciary: Reflections on the Constitutional Issues in South Africa: Part I" (1952) 15 *Modern Law Review* 282; E McWhinney "Court versus Legislature in the Union of South Africa: The Assertion of a Right of Judicial Review" (1953) 31 *Canadian Bar Review* 52; S Ellmann "The Separation of Powers in a Post-Apartheid South Africa" (1992) 8 *American University Journal of International Law and Policy* 455.

[4] H. Botha, "The Values and Principles Underlying the 1993 Constitution" (1994) 9 *SA Public Law* 233; C. Albertyn, "Substantive Equality and Transformation in South Africa" (2007) 23 *South African Journal on Human Rights* 253; I. Keevy, "Ubuntu versus the Core Values of the South African Constitution" (2009) 34 *Journal for Juridical Science* 19.

[5] Section 1 of the Constitution of South Africa, 1996 provides that: "*The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms. (b) Non-racialism and non-sexism. (c) Supremacy of the constitution and the rule of law. (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.*"

[6] Z. Motala, "Towards an Appropriate Understanding of the Separation of Powers, and Accountability of the Executive and Public Service under the New South African Order" (1995) 112 *South African Law Journal* 503; N. Parpworth, "The South African Constitutional Court: Upholding the Rule of Law and the Separation of Powers" (2017) 61 *Journal of African Law* 273.

invalidated.[7]

In fact, when the new dispensation was being negotiated, Constitutional Principle VI specifically provided that "there shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness."[8] In line with this injunction, the new design was based upon the traditional demarcation of governmental functions between the executive, the judiciary and the legislature.[9] This demarcation has been cast in general terms, without necessarily imposing the hard and fast lines that Montesquieu drew between these three branches of government.[10] This impure model of separation has been styled "partial" or "functional" separation.[11] While it generally allocates functions to the co-equal branches of government, it also allows for a functional inter-branch relationship.[12] In the majority of cases, it is fairly clear what these three traditional branches do – the legislature makes the law, the executive implements the law, and policy, and the judiciary resolves the disputes.

Alongside this traditional *trias politica*, the Constitution has introduced a cluster of other institutions styled "state institutions supporting democracy", also called Chapter Nine institutions, as they are provided for Chapter 9 of the Constitution. While the Constitution does not necessarily specify the collective mandate of these institutions, it provides that they are "independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice."[13] Initially, these institutions appeared generally harmless to the traditional arrangement of state institutions. It was stated that they would provide oversight without having binding powers over the other three traditional branches.[14] In any event, oversight and accountability institutions are not necessarily unique to South Africa, and they are prevalent in modern-day constitutions worldwide.[15] In the majority of cases, these institutions do not have binding powers akin to the powers of a court of law.[16] Initially, this was the understanding, even in the South African version of these institutions.[17] However, the paradigm has shifted fundamentally, and the judiciary has since ruled that the powers of these institutions, and the Public

[7] The Constitutional Court in *South African Association of Personal Injury Lawyers v Heath* 2001 1 SA 883 (CC) stated as follows (per Chaskalson P at para 18): "In the first certification judgment this Court held that the provisions of our Constitution are structured in a way that makes provision for a separation of powers. ... There can be no doubt that our Constitution provides for such a separation (of powers), and that laws inconsistent with what the Constitution requires in that regard are invalid." See also *Glenister v President of the Republic of South Africa and Others* 2011 3 SA 347 (CC).

[8] *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC).

[9] Chapters 4, 5 and 8 specifically allocate powers to the three traditional branches of government, namely parliament, the executive and the judiciary.

[10] Montesquieu advocated a clear separation of powers institutionally, functionally and in terms of personnel. See Montesquieu *The Spirit of the Laws* (first published 1748; 1902).

[11] P.L. Strauss, "Formal and Functional Approaches to Separation of Powers Questions: A Foolish Inconsistency" (1986) 72 *Cornell Law Review* 488; M Redish & E Cisar "'If Angels Were to Govern': The Need for Pragmatic Formalism in Separation of Powers Theory" (1991) 41 *Duke Law Journal* 449.

[12] According to the functionalist theory of separation of powers, "separation of powers problems cannot be resolved solely by examining textual constraints in the Constitution. Functionalists are concerned with whether one branch's action disturbs the balance of power among the branches. If the action of one branch does not interfere with another's core functions, functionalists will generally find no separation of powers violation." See also SW Cooper "Considering 'Power' in Separation of Powers" (1994) 46 *Stanford Law Review* 361 368.

[13] See s 181(2) of the Constitution of South Africa, 1996.

[14] S. Woolman, *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (2013). At 271 the author contends: "[I]n point of fact, the ability of the Public Protector to investigate and report effectively – *without making binding decisions* – is the real measure of its strength." (Emphasis supplied.)

[15] D.C., Rowat, *Ombudsman Plan: Essays on the Worldwide Spread of an Idea* (1973); L.C. Reif, *The Ombudsman, Good Governance, and the International Human Rights System* (2004); R. Kirkham, M.B. Thompson & T. Buck, *The Ombudsman Enterprise and Administrative Justice* (2016); D. Pearce, "The Ombudsman: Review and Preview – The Importance of Being Different" (1993) *The Ombudsman Journal* 45. The author states that the ombudsman is "undoubtedly the most valuable institution from the viewpoint of both citizen and bureaucrat that has evolved during this century … there has been broad public demand for the establishment of an Ombudsman to resolve problems in a very large number of countries and institutions. This astonishing growth of an institution is not and has not been emulated by any other body."

[16] D.C. Rowat, "An Ombudsman Scheme for Canada" (1962) 28 *The Canadian Journal of Economics and Political Science* 543.

[17] Woolman, *The Selfless Constitution* 271.

Protector in particular, are binding on both the executive and the legislature.[18]

This new trajectory has placed these institutions in a very strong position where they can even invalidate the decisions of the other two political branches. Consequently, tension is smouldering between the political branches and these institutions. As usual, the increased power of oversight institutions is criticised on the grounds that they are anti-majoritarian.[19] Their defence is that oversight institutions are indispensable in a constitutional democracy; they ensure accountability and openness. In terms of classical liberal constitutionalism, the oversight and accountability functions repose conjointly in the judiciary and the legislature, as against the executive.[20] It has been shown, in modern day positive constitutionalism,[21] that there is a need for another cluster of institutions whose remit is to hold the political branches accountable.[22]

At the centre of this tension between the traditional branches of government and oversight institutions lies a more substantial question about the place occupied by these institutions in the organisation of the state. Put differently, can it be said that South Africa has a constitutional scheme that includes a "fourth branch" of government? This paper sets out to investigate this question. Ultimately, the paper contends that these oversight institutions have consolidated themselves into what may be styled a "fourth branch" of the state.[23] The extent and the reach of their powers, individually and collectively, seem to be evolving on a case-by-case basis. However, it is now settled that these institutions occupy a unique place in the South African model of separation of powers, and constitutionalism in general.[24]

This paper is divided into two parts. The first part revisits the South African model of separation of powers, and the second part problematises the place occupied by Chapter Nine institutions in the South African model of separation of powers.

2. Revisiting the South African model of separation of powers: its philosophical origins and distinctness

The principle of separation of powers is a well-trodden subject in scholarly literature and judicial pronouncements in South Africa,[25] and beyond.[26] However, there is some trepidation to locate the newly emerging, albeit soft, power of Chapter Nine institutions within the South African model of separation of powers. It is imperative to recall that while the South African model of separation of powers is increasingly showing some signs of being distinctive,[27] it is still trapped in the classical philosophical origins of the doctrine.[28] It is therefore necessary to briefly locate the model within its

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[18] K. Govender & P Swanepoel, "The Powers of the Office of the Public Protector and the South African Human Rights Commission: A Critical Analysis of *SABC v DA* and *EFF v Speaker of the National Assembly*" (2020) 23 *PER/PELJ* 1.

[19] F. Vibert, *The Rise of the Unelected: Democracy and the New Separation of Powers* (2007).

[20] This form of accountability is called "horizontal accountability". It is distinguished from "vertical accountability" wherein the electorate uses the process of regular elections to hold government accountable. See GA O'Donnell "Horizontal Accountability in New Democracies" (1998) 9 *Journal of Democracy* 112.

[21] J.M. Farinacci-Fernós, "Post-Liberal Constitutionalism" (2018) 54 *Tulsa Law Review* 1.

[22] K.L. Scheppele, "Parliamentary Supplements (or Why Democracies Need More than Parliaments)" (2009) 89 *Boston University Law Review* 795; V. Ayeni, "The Ombudsman around the World: Essential Elements, Evolution and Contemporary Issues" in V. Ayeni, L. Reif & H. Thomas (eds), *Strengthening Ombudsman and Human Rights Institutions in Commonwealth Small and Island States: The Caribbean Experience* (2000).

[23] The expression is not novel; it has been used by several other authors in the context of South Africa. See for instance F Mahomed "The Fourth Branch: Challenges and Opportunities for a Robust and Meaningful Role for South Africa's State Institutions Supporting Democracy" in D. Bilchitz & D. Landau (eds), *The Evolution of the Separation of Powers*: *Between the Global North and the Global South* (2018).

[24] D. Bilchitz & D. Landau, "Introduction: The Evolution of the Separation of Powers in the Global South and Global North" in D. Bilchitz & D. Landau (eds) *The Evolution of the Separation of Powers*: *Between the Global North and the Global South* (2018).

[25] See for instance Van der Vyver (1993), *South African Public Law* 177; C. Rautenbach & R. Malherbe *Constitutional Law* (2004) 79.

[26] M.J.C. Vile, *Constitutionalism and the Separation of Powers* (2012).

[27] Seedorf & Sibanda, "Separation of Powers" in *CLOSA* 12-36. The idea of a distinctively South African model that would be developed over time was emphasised by Ackermann J. in *De Lange v Smuts* 1998 3 SA 785 (CC) para 60.

[28] P. Mojapelo, "The Doctrine of Separation of Powers" (2013) 26 *Advocate* 37; P. Langa, "The Separation of Powers in the South African Constitution" (2006) 2 *South African Journal on Human Rights* 8; G. Devenish, "The Doctrine of Separation of Powers with Special Reference to Events in South Africa and Zimbabwe" (2003) 66 *Journal for Contemporary Roman-Dutch Law* 84.

classical philosophical framework.

The classical notion of separation of powers is rooted in the political philosophy of John Locke, who observed that "[i]t may be too great a temptation for the humane frailty" if the main functions of government were to repose in one person.[29] It is interesting to note that Locke still divided the powers of government into three, but in a manner slightly different from the way the division is understood today. According to Locke, government power must be divided into three functions – the legislative function, the executive function, and the "federative" function.[30] In the Lockean formulation, the modern-day judicial function was subsumed under the executive function.[31] In this trilogy of functions, the executive function mainly implements the municipal laws made by the legislature. In Locke's formulation, the "federative" function involves the power of government to deal with other states.[32] The development of the doctrine was given impetus by the French philosopher Montesquieu, whose main addition to the Lockean formulation was the "judicature".[33] In his trilogy, the state functions were to be divided into the legislature, the executive and the judicature. His formulation was more purist as he divided not only the branches, but also the functions and the personnel. Although Montesquieu seemingly departed from the Lockean formulation, he subscribed to – and was in fact inspired by – the broader philosophical justification for the doctrine that "all would be in vain if the same person, or the same body of officials, be it the nobility or the people, were to exercise these three powers."[34] He further observed that "when the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty."[35]

The development and spread of the doctrine worldwide also depended on the emergence of liberalism in general, and liberal constitutionalism in particular.[36] The principle of separation of powers developed together with other liberal devices, such as the rule of law, constitutionality, the independence of the judiciary and many others, whose intention is to limit the absolute power of the state.[37] Hence, they all fall under the concept of "constitutionalism". The purpose of liberal constitutionalism is to ensure that the state generally refrains from interference in private life, because certain values are regarded as sacrosanct, such as property, liberty, equality and freedom.[38] As Sartori contends, "[h]istorically, the creation of a free people was the accomplishment of liberalism … and this element is generally singled out by the notions of constitutional democracy and/or liberal constitutionalism."[39] Thus, the state is largely organised based on the separation of powers that is cast upon liberal constitutionalism.[40] This model of constitutionalism – whose main purpose is to limit the power of the state – is styled "negative constitutionalism".[41] In modern day constitutional scholarship, negative constitutionalism has come under immense criticism.[42] According to Barber, "this model of

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[29] J. Locke, *Two Treatises of Government* (first published 1689; 1988).
[30] T.S. Langston & M.E. Lind "John Locke and the Limits of Presidential Prerogative" (1991) 24 *Polity* 49.
[31] The formulation of the modern-day *trias politica* of executive, legislative and judicial functions is credited to a French philosopher, Montesquieu. See Montesquieu, *The Spirit of the Laws*; J.N. Rakove, "The Original Justifications for Judicial Independence" (2007) 95 *Georgetown Law Journal* 1061.
[32] L. Arnhart "The 'God-Like Prince': John Locke, Executive Prerogative and the American Presidency" (1979) 9 *Presidential Studies Quarterly* 12.
[33] S.J. Ervin "Separation of Powers: Judicial Independence" (1970) 35 *Law and Contemporary Problems* 108.
[34] Montesquieu *The Spirit of the Laws*.
[35] Ibid.
[36] M. Tushnet, "The Dilemmas of Liberal Constitutionalism" (1981) 42 *Ohio State Law Journal* 411; J. Elster, R. Slagstad & G Hernes (eds) *Constitutionalism and Democracy* (1988).
[37] Vile, *Constitutionalism* 1.
[38] G. Sartori "How Far Can Free Government Travel?" (1995) 6 *Journal of Democracy* 101.
[39] Ibid, 102.
[40] E. Barendt, "Separation of Powers and Constitutional Government" (1995) *Public Law* 599 605; S.G. Calabresi & K.H. Rhodes "The Structural Constitution: Unitary Executive, Plural Judiciary" (1992) 105 *Harvard Law Review* 1153.
[41] N.W. Barber "Constitutionalism: Negative and Positive" (2015) 38 *Dublin University Law Journal* 249. The author observes that "[t]he negative model of constitutionalism then, in its turn, shapes our understandings of the principles of constitutionalism, providing a frame within which these principles are understood as limitations on the actions of the state. Many accounts of constitutional principles present them in negative terms. For instance, it is commonly argued that the purpose of separation of powers is to protect the liberty of the individual by making tyrannical and arbitrary state action more difficult."
[42] J. Waldron "Constitutionalism - A Skeptical View" in T. Christiano & J. Christman, *Contemporary Debates in Political Philosophy* (2009) 267; N.W. Barber, *The Constitutional State* (2010).

constitutionalism, enforced by the judges and protected some level of entrenchment, is allied with a narrow ideology; a form of minimal-state liberalism."[43] This led to the emergence of "positive constitutionalism", a model of constitutionalism that not only limits the powers of government but also imposes positive obligations on the state.[44]

The South African model of separation of powers is, by and large, located within these broader philosophical contours. But, ever since the adoption of the interim Constitution in 1993,[45] the doctrine has shown some innovation and departure from the classical model in three fundamental respects. Firstly, it is based on a partial rather than a purist model of separation of powers. This view was expressed early during the certification process. In *Certification of the Constitution of the Republic of South Africa*[46] the Constitutional Court confirmed that the South African model still subscribes to the notion of separate branches and functions of government, but warned that there is no universal or absolute model of separation of powers.[47] Instead, the principle of separation of powers "recognises the functional independence of branches of government."[48] Based on this injunction, the court rejected the objection that was made about members of the executive also being members of the legislature.[49] The view of the court in this case became the trailblazer for the approach that the courts would later adopt in relation to the model of separation of powers in South Africa.[50] An early case in which the court reiterated its approach to separation of powers is *De Lange v Smuts.*[51] The court affirmed its commitment to a functional model of separation of powers thus: *"[O]ver time our courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances, and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest."*[52]

The court did not then commit to developing the guidelines for a "distinctively South African" model of separation of powers. Instead, the court stated that "[t]his is a complex matter which will be developed more fully as cases involving separation of powers issues are decided."[53] Since then attempts have been made – both in academic literature and in the courts – albeit without much success, to develop the notion of a distinctively South African model. The courts have oscillated between being too strict and being too liberal about the separation of powers.[54] But amidst all this uncertainty, consensus seems to be emerging – that South Africa does not subscribe to purist Montesquieuan and

[43] N.W. Barber, *The Principles of Constitutionalism* (2018) 5.
[44] O. Gerstenberg "Negative/Positive Constitutionalism, 'Fair Balance', and the Problem of Justiciability" (2012) 10 *International Journal of Constitutional Law* 904; N.W. Barber "Fallacies of Negative Constitutionalism" (2006) 75 *Fordham Law Review* 651.
[45] The Constitution of the Republic of South Africa, Act 200 of 1993.
[46] 1996 4 SA 744 (CC).
[47] Para 108.
[48] Para 109.
[49] Para 110.
[50] *S v Dodo* 2001 3 SA 382 (CC); *South African Association of Personal Injury Lawyers v Heath* 2001 1 SA 883 (CC); *Van Rooyen and Others v S and Others* 2002 5 SA 246 (CC); *Speaker of the National Assembly v De Lille and Another* 1999 4 SA 863 (CC); *President of the RSA and Another v Hugo* 1997 4 SA 1 (CC); *President of the RSA and Others v South African Rugby Football Union and Others* 1999 10 BCLR 1059 (CC); *Pharmaceutical Manufacturers' Association of SA and Others: in re Ex parte Application of the President of the RSA and Others* 2000 3 SA 241 (CC); *Executive Council, Western Cape Legislature and Others v President of the RSA and Others* 1995 4 SA 877 (CC); *Glenister v President of the Republic of South Africa and Others* 2011 3 SA 347 (CC).
[51] 1998 3 SA 785 (CC).
[52] Para 60.
[53] Para 62.
[54] There is an emerging concern that the courts' power in South Africa is expanding dangerously into the provinces of other branches – a phenomenon that has been called "judicial overreach". The flagbearer of this concern is Chief Justice Mokgoeng. In *Economic Freedom Fighters v Speaker of the National Assembly* 2018 3 BCLR 259 (CC) at para 223, he criticised the majority judgment, which had allowed the court to inquire into the internal processes of Parliament and called it "a textbook case of judicial overreach – a constitutionally impermissible intrusion by the Judiciary into the exclusive domain of Parliament". At para 218 Jafta J retorted that "what is unprecedented is the suggestion that the construction of the section embraced by the majority here constitutes 'a textbook case of judicial overreach'. The suggestion is misplaced and unfortunate."

Madisonian models of separation of powers.[55] The country is sensitively nurturing a functional model of separation that is guided, in the main, by its commitment to transformation.[56] O'Regan perceptively observes that, in South Africa, the doctrine of separation of powers "plays a role [of enhancing] … human rights, and of a particular vision of democracy, based on the key democratic founding values of our Constitution – accountability, responsiveness and openness."[57]

The second way in which the South African model departs from the classical model is that it is based on positive constitutionalism. Section 7(2) of the Constitution places both negative and positive obligations on the state "to respect, protect, promote and fulfil the rights in the Bill of Rights." The positive obligations are more pronounced in the state's obligation to fulfil socio-economic rights. There is arguably no part of the Constitution that has challenged the South African model of separation of powers more than the duty to fulfil socio-economic rights. The Constitution imposes a duty on the state to take reasonable measures to implement socio-economic rights. The adjudication of the reasonableness or otherwise of government (executive) measures has been always a tumultuous aspect of separation of powers in South Africa. Sometimes the courts use reasonableness as conduit through which to direct the conduct of other branches, while at other times it is used as a basis for judicial deference.

The third, and the most critical, way in which the South African model of separation of powers breaks ranks with its classical origins is by establishing a very strong cluster of independent institutions that exist alongside the traditional *trias politica*.[58] In this way, the Constitution is post-liberal.[59] This cluster has the collective mandate to ensure accountability.[60] As McMillan convincingly contends, "society now relies on a range of independent institutions and mechanisms to perform the same scrutiny and accountability role as courts. Sometimes they do this more effectively than courts."[61] These institutions have defied the traditional organisation of state power to such an extent that some authors have called them the "fourth estate", together with "an invigorated electorate, civil society organisations, other state institutions, non-governmental organisations and both the majority party and minority parties."[62]

3. The space occupied by Chapter Nine institutions in the Constitution: is accountability emerging as the "fourth function"?

The Constitution establishes six institutions that are styled "institutions supporting democracy."[63] Although they are clustered together, the Constitution provides for their shared remit as being to "strengthen constitutional democracy in the Republic". The Constitution also provides that they "are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice."[64] These two features – strengthening constitutional democracy and independence – are discernible from the Constitution.[65] Clearly, these features are couched in very generalised terms;

[55] For an analysis of the Madisonian model, see GW Carey "Separation of Powers and the Madisonian Model: A Reply to the Critics" (1978) 72 *American Political Science Review* 151.
[56] S. Ngcobo, "South Africa's Transformative Constitution: Towards an Appropriate Doctrine of Separation of Powers" (2011) 22 *Stellenbosch Law Review* 1.
[57] K. O'Regan, "Checks and Balances: Reflections on the Development of the Doctrine of Separation of Powers under the South African Constitution" (2005) 8 *Potchefstroom Electronic Law Journal* 1.
[58] Chapter 9 of the Constitution of South Africa, 1996.
[59] See Farinacci-Fernós (2018) *Tulsa Law Review* 1. See also J McMillan "Re-thinking the Separation of Powers" (2010) 38 *Federal Law Review* 423.
[60] P. de Vos, "Balancing Independence and Accountability: The Role of Chapter 9 Institutions in South Africa's Constitutional Democracy" in D Chirwa & L Nijzink (eds) *Accountable Government in Africa: Perspectives from Public Law and Political Studies* (2012) 160.
[61] McMillan (2010) *Federal Law Review* 423.
[62] S. Woolman, "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" (2016) 8 *Constitutional Court Review* 155.
[63] Section 181 of the Constitution.
[64] Section 181(2) of the Constitution.
[65] See s 181(1) and (2) of the Constitution.

they hardly provide a complete picture of the real nature and role of these institutions. The extrapolation of this role, it would seem, is left to legislation,[66] academic scholarship and judicial pronouncements. Indeed, much scholarly work as well as judicial activity on the role played by these institutions in the constitutional design in South Africa has been conducted.[67] One leading scholar, Murray, has attempted to locate these institutions within the constitutional design thus: *"Under the traditional framework of separation of powers, government is divided into three 'branches' within which all government institutions fall. However, the Chapter 9 institutions are not legislative, judicial or executive organs – they are not 'a branch of government'. And they do not exercise power in the same way as the executive, legislature or Parliament do. Although they all have some form of investigatory power and certain administrative powers, they do not 'govern'."*[68]

This view is in synch with the orthodox scholarship about the role of these institutions in the constitutional design. While the role played by these institutions is always regarded as "important", there has been a reluctance to accept that they have disrupted the traditional balance of power.[69] The orthodox view regards these institutions as "constitutional misfits"[70] that are the antithesis of the dominant and liberal theory of separation of powers.[71] However, there is a discernible shift from the orthodox view that regarded these institutions as sheer "advisors" to the three traditional branches of government, without binding powers similar to those of a court of law.[72] At the very least, these institutions were regarded as having the powers of "naming and shaming".[73] This shift is discernible both in the scholarship and in the "new" judicial approach in South Africa. These institutions have come to wield virtually the same powers as the other three traditional branches, and they can balance them. They no longer wield "soft power". As McMillan instructively puts it: *"The growth of non-judicial accountability bodies has not been constrained by the doctrine of the separation of powers, but equally this new system of government accountability does not fit easily within that doctrine. In a functional sense, the new bodies are not part of the legislative, executive or judicial branch."*[74]

This shift is clearly radical, and it accords more with the post-liberal nature of the Constitution than with the orthodox position. Fortunately, the judiciary in South Africa is appreciative of this seismic shift. In *New National Party of South Africa v Government of the Republic of South Africa*,[75] the Constitutional Court said that these institutions are a product of the new dispensation and *"their advent inevitably has important implications for other organs of state who [sic] must understand and recognise their respective roles in the new constitutional arrangement."*[76] In this way, the Chapter Nine institutions are both transformative and disruptive to the orthodox conception of the power map,

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[66] See s 182 of the Constitution.

[67] For instance, see M Bishop & S Woolman "Public Protector" in S .Woolman et al (eds), *Constitutional Law of South Africa* 2 ed (2014); J. Klaaren, "South African Human Rights Commission" in S. Woolman et al (eds), *Constitutional Law of South Africa* 2 ed (2014); D.J. Brynard, "South African Public Protector (Ombudsman) Institution" in R. Gregory & P.J. Giddings (eds) *Righting Wrongs: The Ombudsman in Six Continents* (2000) 299; G. Pienaar, "The Role of the Public Protector in Fighting Corruption" (2000) 9 *African Security Studies* 52; F. Venter, "Enforcement of Decisions of Ombudsmen and the South African Public Protector: Muzzling the Watchdogs" (2016) 10 *International Journal of Law and Political Sciences* 2051; F. Venter, "The Executive, the Public Protector and the Legislature: The Lion, the Witch and the Wardrobe" (2017) *Journal of South African Law* 176.

[68] C. Murray, "The Human Rights Commission et al: What is the Role of South Africa's Chapter 9 Institutions?" (2006) 9 *Potchefstroom Electronic Law Journal* 1.

[69] See also Woolman *The Selfless Constitution*. At 271 the author contends: "[I]n point of fact, the ability of the Public Protector to investigate and report effectively – *without making binding decisions* – is the real measure of its strength". See also OS Sibanda "The Public Protector's Call to be accorded the Status of a Judge is Nonsensical - to a Certain Degree" (7-08-2019) <https://www.dailymaverick.co.za/article/2019-08-07-the-public-protectors-call-to-be-accorded-the-status-of-a-judge-is-nonsensical-to-a-certain-degree/> (accessed 12-01-2020).

[70] R. Snell, "Towards an Understanding of a Constitutional Misfit: Four Snapshots of the Ombudsman Enigma" in C.J. Finn (ed) *Sunrise or Sunset? Administrative Law for the New Millennium* (2000) 188.

[71] G. Sartori, *The Theory of Democracy Revisited* (1987); W.F. Murphy *Constitutions, Constitutionalism, and Democracy* (1988).

[72] S. Owen, "The Ombudsman: Essential Elements and Common Challenges in L.C. Reif (ed) *The International Ombudsman Anthology: Selected Writings from the International Ombudsman Institute* (1999) 51.

[73] Woolman, *The Selfless Constitution*; N. Manyathi-Jele "Public Protector's Findings Not Legally Binding" (2016) *De Rebus* 2.

[74] McMillan, (2010) *Federal Law Review* 423.

[75] 1999 5 BCLR 489 (CC).

[76] Para 78.

and are consolidating themselves into a self-standing "fourth force".[77]

Although the Constitution makes the Chapter Nine institutions answerable to Parliament,[78] they are not the subsidiaries of Parliament or any other organ of state. This view was expressed by the Constitutional Court in *Independent Electoral Commission v Langeberg Municipality.*[79] The court was confronted with the question of whether the Independent Electoral Commission (IEC) – one of the six Chapter Nine institutions – is an organ of state within the three spheres of government. An objection had been raised to the IEC approaching the court without complying with the requirements of section 41(3) of the Constitution.[80] The section embodies one of the principles of cooperate governance that are binding on all organs of state involved in intergovernmental relations.[81] The court ruled that while the IEC may be an organ of state because it discharges public functions, "that does not mean, however, that the Commission falls within the national sphere of government as contemplated by chapter 3 of the Constitution."[82] The court emphatically stated that the Constitution created the Chapter Nine institutions "so that they should be and [are] manifestly … seen to be outside government."[83]

The importance of the *New National Party* and *Langeberg Municipality* cases is two-fold. Firstly, it has been established that the Chapter Nine institutions have a transformative role in the Constitution. They contribute to the bigger project of transformative constitutionalism.[84] Secondly, they are self-standing: they do not form part of either the cooperative governance framework or the tripartite model of separation of powers. In *Langeberg Municipality,* the court specifically stated that "[o]ur Constitution has created institutions like the Commission that perform their functions in terms of the national legislation but are not subject to national executive control."[85]

The current wave of decisions of the superior courts in South Africa on the longstanding question regarding the powers of the Public Protector – one of the six Chapter Nine institutions – is more illuminating on the direction that is being taken by the South African model of separation of powers. These decisions have overtly regarded the Chapter Nine institutions as a "fourth branch" *par excellence*.[86] They attest that these institutions wield unique and sufficiently strong powers to counterbalance the other traditional branches.[87] Initially there was a reluctance to regard the decisions of the Public Protector as equal to those of a court of law. This reluctance was based on the orthodox view about separation of powers in general – that there are only three co-equal branches of government. This reluctance reached it height in the Western Cape High Court's decision in *Democratic Alliance v South African Broadcasting Corporation.*[88] The case concerned the remedial action that the Public Protector had adopted in relation to the South African Broadcasting

[77] P.L. Strauss, "The Place of Agencies in Government: Separation of Powers and the Fourth Branch" (1984) 84 *Columbia Law Review* 573; C. Field, "The Fourth Branch of Government: The Evolution of Integrity Agencies and Enhanced Government Accountability" (2012) 71 *AIAL Forum* 24.
[78] Section 181(5) of the Constitution.
[79] 2001 3 SA 925 (CC).
[80] Section 41(3) provides that: "An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose and must exhaust all other remedies before it approaches a court to resolve the dispute."
[81] W. du Plessis "Legal Mechanisms for Cooperative Governance in South Africa: Successes and Failures" (2008) 23 *SA Public Law* 87.
[82] *Langeberg Municipality* 2001 3 SA 925 (CC) para 24.
[83] Para 31.
[84] Murray (2006) *Potchefstroom Electronic Law Journal* 1 at 13 captures their nature aptly thus: "The … shared constitutional mandate of the Chapter 9s is to contribute to the project of transformation that the Constitution embraces. Its commitment to transformation sets the South African Constitution apart from many, if not most, other constitutions."
[85] *Langeberg Municipality* 2001 3 SA 925 (CC) para 31.
[86] *South African Broadcasting Corporation v Democratic Alliance and Others* 2016 2 SA 522 (SCA); *Economic Freedom Fighters v Speaker of the National Assembly and Another; Democratic Alliance v Speaker of the National Assembly* 2016 3 SA 580 (CC); *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* 2018 2 SA 571 (CC).
[87] M.E. Magill "The Real Separation in Separation of Powers Law" (2000) 86 *Virginia Law Review* 1127.
[88] 2015 1 SA 551 (WCC).

Corporation.[89] The High Court, after relying heavily on scholarly work existing at the time,[90] and the UK Supreme Court's approach in the *Bradley* case,[91] held that: *"In contrast to their investigatory powers, ombudsmen ordinarily do not possess any powers of legal enforcement. Indeed, the power to make binding decisions is considered antithetical to the institution - the key technique of the ombudsman is one of intellectual authority (making logically consistent and defensible findings) and powers of persuasion. It seems to me that in principle, the position of the Public Protector is no different."*[92]

Even though the court held that the decision of the Public Protector was not binding, it still held that the public authority's rejection of the Public Protector's remedial action cannot be irrational. The public authority must still comply with the minimum threshold of rationality.[93]

The decision was taken on appeal to the Supreme Court of Appeal.[94] The Supreme Court of Appeal rejected both the approach taken by the High Court and its reliance on the jurisprudence of the UK, exemplified by *Bradley.*[95] The Supreme Court of Appeal insisted that the South African model is distinctive.[96] The court was more radical in two fundamental respects. Firstly, it boldly extended to the decisions of the Public Protector, and by implication to all other Chapter Nine institutions, the well-settled administrative law principle, expressed in *Oudekraal Estates (Pty) Ltd v City of Cape Town,*[97] that until a "decision is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked."[98] In any event, the rationale for the *Oudekraal* principle is that the functioning of the state will be compromised if an administrative decision can simply be ignored willy-nilly. The same rationale "would at least apply as much to the institution of the Public Protector and to the conclusions contained in her published reports."[99] Secondly, the court adverted to the high constitutional injunction that "the office of the Public Protector, like all 'chapter 9 institutions', is a venerable one. Our constitutional compact demands that remedial action taken by the Public Protector should not be ignored."[100] The court emphatically held that no public authority "may second-guess her findings and ignore her recommendations."[101]

The Supreme Court of Appeal decision in *South African Broadcasting Corporation v Democratic Alliance*[102] became the trailblazer of what may be called a "roller-coaster" of decisions of the superior courts – the High Court, the Supreme Court of Appeal and the Constitutional Court – asserting that the remedial actions of the Public Protector, and arguably of the other Chapter Nine institutions, are binding. The most prominent case is *Economic Freedom Fighters v Speaker of the*

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[89] There were allegations of wanton maladministration at the SABC. See Public Protector South Africa "Report No 23 of 2013/2014 – '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 (SABC)" (17-02-2014) <https://www.gov.za/sites/default/files/gcis_document/201409/when-governance-fails-report-exec-summary17feb2014.pdf> (accessed 8-06-2020).

[90] In particular, the court relied on Bishop & Woolman "Public Protector" in *CLOSA.* At 24A-3, the authors contend that "[o]ne of the most common criticisms levelled against the Public Protector, and ombudsmen generally, is that the institution lacks the power to make binding decisions. In truth, however, the ability of the Public Protector to investigate and to report effectively - without making binding decisions - is the real measure of its strength".

[91] *R (on the application of Bradley) v Secretary of State for Work and Pensions* 2008 3 All ER 1116 (CA).

[92] *Democratic Alliance v South African Broadcasting Corporation* 2016 3 SA 580 (CC) para 57.

[93] At para 74 the court said: "For these reasons I have come to the conclusion that the findings of the Public Protector are not binding and enforceable. However, when an organ of State rejects those findings or the remedial action, that decision itself must not be irrational."

[94] *South African Broadcasting Corporation v Democratic Alliance and Others* 2016 2 SA 522 (SCA).

[95] *Bradley* 2008 3 All ER 1116 (CA) para 91.

[96] At para 46 the court said: "*Bradley* does not in any way assist in the interpretation of our Public Protector's constitutional power 'to take appropriate remedial action'. It concerned a different institution with different powers, namely, the powers of the Parliamentary Commissioner under the Parliamentary Commissioner Act, 1967 … The Parliamentary Commissioner does not have any equivalent of our Public Protector's power to 'take appropriate remedial action'. *Bradley* is consequently not of any assistance in the interpretation and understanding of our Public Protector's remedial powers. Schippers J's reliance on *Bradley* was therefore misplaced."

[97] 2004 6 SA 222 (SCA).

[98] Para 26.

[99] *South African Broadcasting Corporation v Democratic Alliance* 2016 2 SA 522 (SCA) para 45.

[100] Para 52.

[101] Ibid.

[102] Ibid.

National Assembly.[103] The case is even more significant because it was based on the powers of the Public Protector in relation not only to the Office of the President but also to the National Assembly. The President is both the head of state and the head of the national executive.[104] His office is the epitome of the executive branch of government.[105] Besides, the Constitution obliges the office to uphold, defend and respect the Constitution.[106] The National Assembly is one of the two houses of parliament.[107] These two powerful political branches – the legislature and the executive – were working together to ensure that the President would not be held to account. The Public Protector had investigated the security upgrades that were done at the President's private residence in Nkandla. The Public Protector found that several improvements made to the President's private residence were non-security features. As a result, she recommended that any installation that had nothing to do with the President's security amounted to an undue benefit to him and his family and therefore had to be paid for by him.[108] After she submitted her report to the National Assembly, the National Assembly set up two ad hoc committees, comprising its members, to examine the Public Protector's report as well as other reports, including the one compiled, also at its instance, by the Minister of Police. After endorsing the report by the Minister exonerating the President from liability and a report to the same effect by its last ad hoc committee, the National Assembly resolved to absolve the President of all liability. Consequently, the President did not comply with the remedial action proposed by the Public Protector.[109] The gravamen of the National Assembly's argument was that it was not required to act upon or facilitate compliance with the report since the Public Protector cannot prescribe to it what to do or what not to do.[110] This argument was based on the principle of separation of powers: the Public Protector cannot prescribe to both the executive and the legislature what to do. The court adverted to accountability as a critical factor in the separation of powers inquiry, and arguably put it on par with the traditional functions of "law-making", "law-implementation" and "adjudication". The court held that "the National Assembly was duty-bound to hold the President accountable by facilitating and ensuring compliance with the decision of the Public Protector."[111] Any deviation from this principle would be justified "where the findings and remedial action are challenged and set aside by a court, which was of course not done in this case."[112]

The powers of the Public Protector in relation to the powers of the executive, and the President in particular, were consolidated even further in the recent decision of the North Gauteng High Court in *President of the Republic of South Africa v Office of the Public Protector*.[113] This case has far-reaching implications not in respect of the powers of the President but also at a political level.[114] As with the *EFF* case, it was concerned with the unethical conduct of the President. The Public Protector had issued a report that found that the President had allowed members of a certain influential "Gupta family" to be involved in the appointment and removal of state functionaries, including ministers and heads of state-owned enterprises.[115] The Public Protector imposed very drastic and bold remedial action that the President must appoint, within 30 days, a commission of inquiry headed by a judge

[103] 2016 3 SA 580 (CC).
[104] Section 83*(a)* of the Constitution.
[105] Section 85(1) of the Constitution provides: "The executive authority of the Republic is vested in the President."
[106] Section 83*(b)* of the Constitution.
[107] Section 42(1) of the Constitution provides: "Parliament consists of—*(a)* the National Assembly; and *(b)* the National Council of Provinces."
[108] Public Protector South Africa "Secure in Comfort: Report on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal Province: Report No 25 of 2013/14" (2014).
[109] *Democratic Alliance v Speaker of the National* 2016 3 SA 580 (CC) para 12.
[110] Para 85.
[111] Para 97.
[112] Para 97.
[113] 2018 2 SA 100 (GP).
[114] H. Klug, "Transformative Constitutions and the Role of Integrity Institutions in Tempering Power: The Case of Resistance to State Capture in Post-Apartheid South Africa" (2019) 67 *Buffalo Law Review* 701; M.O. Dassah, "Theoretical Analysis of State Capture and its Manifestation as a Governance Problem in South Africa" (2018) 14 *The Journal for Transdisciplinary Research in Southern Africa* 1.
[115] Public Protector South Africa "State of Capture Report No 6 of 2016/17" (14-10-2016) <https://cdn.24.co.za/files/Cms/General/d/4666/3f63a8b78d2b495d88f10ed060997f76.pdf> (accessed 5-05-2020).

selected by the Chief Justice.[116] The President took the remedial action on review. On this occasion, the contention was not that the decision of the Public Protector was not binding, as that issue had been settled in *EFF*. Rather, the President mainly pleaded separation of powers – that the power to appoint commissions of inquiry is the prerogative of the President as head of state, exercisable at his discretion. The Public Protector's directive that he must appoint a commission was tantamount to dictation. The court rejected this line of argument, and held that the powers of the Public Protector "are of the widest character".[117] The Constitution gives the Public Protector the power to take effective remedies for state misconduct committed by "any sphere of government that could result in any impropriety or prejudice."[118] The court said: *"In order to fulfil this role, the Public Protector is empowered to take binding remedial action that is capable of remedying the wrong in the particular circumstances. This must include directing or instructing members of the Executive, including the President, to exercise powers entrusted to them under the Constitution where that is required to remedy the harm in question."*[119]

Although the courts are prepared to grant the Public Protector the "widest powers", even powers that disrupt the traditional balance of power, they have readily set aside the remedial actions of the Public Protector on other grounds, such as jurisdiction and legality.[120]

4. Conclusion

The South African model of separation of powers is indisputably still developing.[121] However, it may be safely observed that while it is still firmly based on the classical conceptions of the separation of the main functions and branches of government, it is distinctive.[122] Like most devices of the new constitutional design, separation of powers operates in such a way that it must facilitate the transformation of the country from the past, which was based on authority, to the present, based on justification and accountability.[123] It does not only depend on the liberal design of the state to attain this end. Its readiness to allow for the positive obligations of the state and the power that the Constitution has given to the oversight institutions are emblematic of the country's intention to outgrow the trappings of liberal constitutionalism. Thus, the Chapter Nine institutions have disrupted the conventional understanding of separation of powers.[124] A careful examination of the key decisions of the superior courts lends credence to this observation.[125] Although the courts are not yet prepared to accept these institutions as the "fourth branch", they have given them far-reaching powers. They are firm participants in the checks and balance scheme. Unlike in the past, when their powers were limited to only "recommending", today their powers are binding. The justification for the strong

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[116] The report further directed that: "8.7 The commission of inquiry to be given powers of evidence collection no less than that of the Public Protector. 8.8 The commission of inquiry to complete its task and to present the report and findings and recommendations to the President within 180 days. The President shall submit a copy with an indication of his/her intentions regarding the implementation to Parliament within 14 days of releasing the report."

[117] *President of the Republic of South Africa v Office of the Public Protector* 2018 2 SA 100 (GP) para 82.

[118] Ibid.

[119] Ibid.

[120] *Public Protector v Mail & Guardian* 2011 4 SA 420 (SCA). See also C Theophilopoulos & C de Matos "An Analysis of the Public Protector's Investigatory and Decision-Making Procedural Powers" (2019) 22 *PER/PELJ* 1.

[121] *De Lange v Smuts* 1998 3 SA 785 (CC).

[122] Para 60. The court stated: "I have no doubt that over time our courts will develop a distinctively South African model of separation of powers, one that fits the particular system of government provided for in the Constitution and that reflects a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances … "

[123] E Mureinik "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10 *South African Journal on Human Rights* 31; Ngcobo (2011) *Stellenbosch Law Review* 37.

[124] Bilchitz & Landau "The Evolution of the Separation of Powers" in *The Evolution of the Separation of Powers*. At 10 the authors contend that "new constitutional texts tend to go well beyond the traditional tripartite division into the executive, legislative and judicial branches ... [they] also seem to depart from the premise that for the oversight of the modern state, courts are not sufficient. Thus, constitutions tend to include a number of other specialized accountability institutions."

[125] *South African Broadcasting Corporation v Democratic Alliance and Others* 2016 2 SA 522 (SCA); *Economic Freedom Fighters v Speaker of the National Assembly and Another; Democratic Alliance v Speaker of the National Assembly* 2016 3 SA 580 (CC); *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* 2018 2 SA 571 (CC).

powers of these institutions is accountability.[126] While accountability is not yet firmly established, like the other traditional functions, it has the features that qualify it to be a self-standing function of state. In South Africa, and arguably in Africa as a whole,[127] accountability is more important than it may be in other parts of the world.[128] The country has an uncontested history of abuse of state power.[129] As Mogoeng CJ instructively observes: *"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."*[130]

While the classical model of separation of powers was intended to contain the abuse of power, it has not proven successful. As such, it is justifiable that a new function and a new branch are now emerging in post-liberal constitutionalism to fill the void. As Ackerman observes, "a separate 'integrity branch' should be a top priority for drafters of modern constitutions."[131] The consolidation of this new branch of government is certainly still in its infancy and it is not as developed as the other three classical branches, and it will take time to mellow. However, it is submitted that the jurisprudence of the Constitutional Court is developing this branch superbly and is headed in a direction where it will soon be accepted that these institutions are a "fourth branch" of government *par excellence*.[132] According to Montesquieu, the key features that characterise the traditional branches are that they have institutions, functions and personnel. Their functions allow them to limit and balance the powers of the other branches. The Chapter Nine institutions have these features. As Thipanyane observes, "[t]he strength and quality of South Africa's constitutional democracy will depend to a large extent on the effectiveness of many of its Chapter 9 institutions."[133]

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[130] *Economic Freedom Fighters v Speaker of the National Assembly and Another; Democratic Alliance v Speaker of the National Assembly* 2016 3 SA 580 (CC) para 1.

[131] B. Ackerman, "The New Separation of Powers" (2000) 113 *Harvard Law Review* 633 696; see also J. Spigelman "The Integrity Branch of Government" (2004) 78 *Australian Law Journal* 724.

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