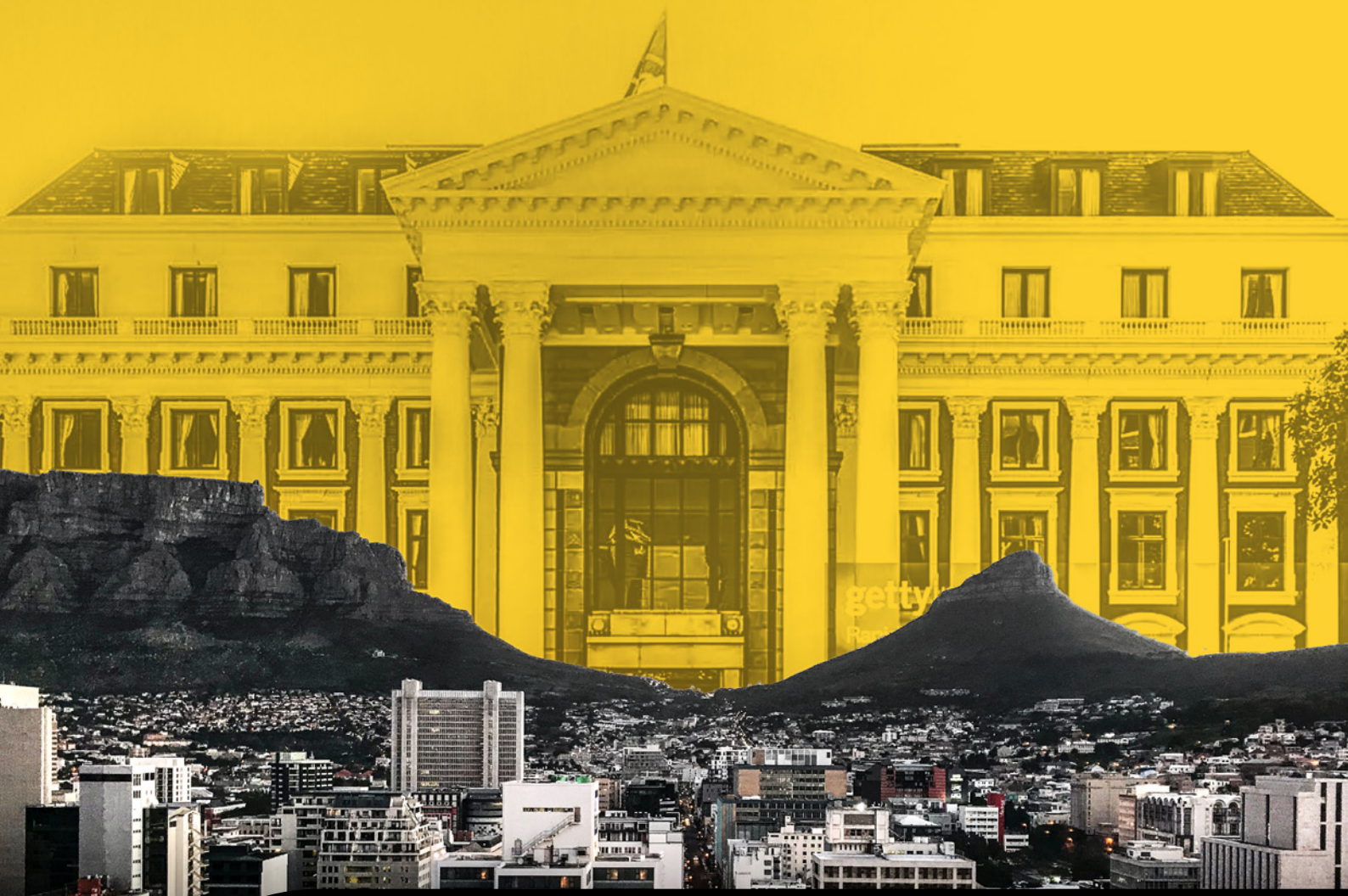
PERSONALISING AND DE-PERSONALISING POWER

The Appointment of Executive Officers in Key State Institutions



GOVERNMENT AND PUBLIC POLICY

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Executive summary

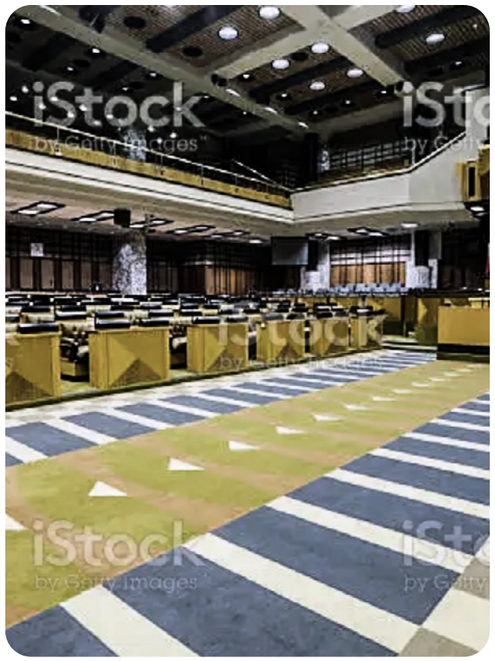
In order to overcome the legacy of Apartheid and build a non-racial, non-sexist society based on democratic values and respect for human rights, South Africa's Constitution granted broad powers to the incumbent administration to transform the state apparatus. In seeking to reshape the civil service and make it more responsive to the racial and gender composition of South African society, the separation between the spheres of politics and administration was not clearly delineated - potentially rendering the vast majority of public offices open to be filled on exclusively political criteria.

However, due to this same legacy associated with the denial of civil and political rights, the Constitution also established a set of principles to guide the appointment of high-level administrative positions, with a view to curbing abuses. The Constitution also established a set of institutions with a counter-majoritarian nature (named Chapter 9 Institutions, the section of the Constitution that lists them) to protect the functioning of the political and administrative system (the polity) from decisions taken by circumstantial political majorities. The Constitution also described the adoption of specific procedures to select the executive officers of these institutions with a view to applying the principles of checks and balances when staffing them .

Influenced by the mechanisms for the appointment of executives in chapter 9 institutions, legislators and courts replicated and adapted them in other government agencies, especially those responsible for finance and revenue, and those in charge of internal security issues (law and order). Different pieces of legislation have introduced conditions for the appointment of public executives, and jurisprudence has moved towards strengthening the need for such appointments to be justified on the basis of objective criteria, and not exclusively by political discretion, even when the latter prevails in personnel appointment processes. In other words, it is a move towards instituting conditions that limit the discretion of politicians - but without extinguishing it.

These are important achievements towards establishing an administrative arena with greater autonomy vis-à-vis the world of politics, strengthening an important foundation for the proper functioning of the South African public administration. The construction of an autonomous administration is fundamental to strengthening the functioning of democratic institutions and avoiding episodes of abuse of power. In this report, we describe the progress of this process in different key institutions of the South African state, pointing to a promising trend. It is, however, an incipient and incomplete endeavour.

Incipient because it can only be observed in a restricted set of public institutions (it is not a wider phenomenon), and incomplete because although the introduction of conditions for the appointment of executive officers to command these entities is positive, the conditions do not always point in the direction of guaranteeing their professionalisation.



Drawing on a typology of conditions for the appointment of public officials created by the authors of this report based on the literature, we assess that there is a legislative and jurisprudential move towards strengthening **polity conditions** for the appointment of public officials in South Africa in addition to the existing **political conditions.** However, there is a need to strengthen the policy implementation dimension of the appointment process, which we refer to as **policy conditions.**

In this regard, we recommend the institutionalisation of policy conditions that consistently promote the assessment of managerial competencies as a pre-condition for the appointment of executive officers in the public service, thereby ensuring that the restriction on political discretion is also translated into improved public service delivery.

Introduction

If knowledge is the art of making differences, then knowledge of the South African state is made difficult by the lack of them.

In particular, we will see that the distinction between the 'political' and the 'administrative' in the organisation of government is barely present. In South Africa until recently all positions in the public service as well as in key state institutions are potentially political appointments where considerations of policy implementation, competency and even ethics are secondary to criteria determined by executive authorities.

This state of affairs began to change as restrictions were introduced on the discretion of executive authorities in the appointment of executive officers in key state institutions. These restrictions were incorporated into the South African legal system by the adoption of new legislation, which imposed conditions on the appointment of certain posts, or by the evolution of the courts' understanding of the limits of executive discretion, generating changes in national legal doctrine. These restrictions have begun to impose on the South African executive the need to devise increasingly sophisticated strategies for appointing senior public officials. However, this does not necessarily mean that South Africa is making progress in introducing merit-based criteria in the civil service.

The specialized literature points out that, faced with the multiple conditions that shape the decision-making processes on the appointment of senior executives, politicians will be inclined to professionalize the civil service only when these conditions favour the adoption of merit criteria such as the evaluation of candidates' competencies and the analysis of their suitability to the institutional mission of each government agency. In order for this to occur, it is necessary that the limitations on the discretion of politicians that emerge from policy implementation struggles to be translated into an institutional architecture that introduces incentives for the professionalization of senior management. In advanced democracies, this kind of system of incentives is organised around Senior Executive Systems (SES), Public Service Leadership Systems (PSLS), Independent Public Appointments Committees, Professional Appointments Systems, amongst other nomenclatures.

Building on this evidence, the purpose of this report is to describe and assess the processes of appointment of executive officers in key institutions of the South African state, as well as to describe their evolution in recent years. **Based on the descriptive analysis, we formulate proposals to strengthen the conditions that limit the discretion of executive authorities in the appointment of senior officers, and propose that progress be made towards the adoption of competency criteria, as a way of encouraging the professionalisation of the public service to be the main outcome of pushing forward the separation between the spheres of politics and administration - and not only a reduction in the risk of abuse of power.**

Literature review

As a rule of thumb, the degree to which incumbent politicians get to determine who staffs government administrations determines the degree of patrimonialism in a given administration. On the other hand, the creation of meritocratic constraints on the exercise of policy discretion over personnel policy in the civil service is empirically associated with improved governance, with positive effects on economic growth (Evans and Rauch, 1999), poverty alleviation (Henderson, Hulme, Jalilian, and Phillips, 2007), and reduced corruption (Dahlstrom, Lapuente, and Teorell, 2011).

It is reassuring to believe that politicians, especially in a democracy, are invested in building and sustaining professional, meritocratic administrations, if only because they are more likely to implement their political programmes with some degree of competence. This, in turn, increases their chance of re-election. Unfortunately, this is only seldom how democracies work. In the first place, electorates do not always vote for candidates based on their instrumental performance in government. In the second place, politicians very rarely attribute their support to the performance of civil servants (Nielsen and Moynihan, 2016). Instead, politicians once in government are frequently inclined to make appointments based on loyalty, family and friendship, that is, on the basis of patrimonialism, depending on the details of the electoral system (Staffan: 2016).

Faced with this puzzle, and in order to better understand the political challenges of instituting professional bureaucracies, in recent years a number of academics have devoted themselves to understanding the multiple modalities of patrimonialism and merit systems, and how they overlap and hybridise in most administrations.

In that respect, Schuster (2017) argues that the existence of statutory regulations or legal frameworks are neither sufficient nor necessary for the adoption of merit protection mechanisms in practice. Gajduschek and Staronova (2021), meanwhile, highlight the potential for informal institutions to act as constraints on politicians' discretion, inducing the adoption of merit criteria in personnel policy making. Toral (2020) argues that patronage can be exercised from different logics, with different rationales and patterns of personnel employment, exerting divergent effects on public service delivery - some of them positive. Krause, Lewis and Douglas (2006), point out that the combination between both discretionary recruitment systems and merit systems are associated with greater institutional capacity of tax collecting authorities in US state governments - greater than in states that adopt more uniform (patrimonial or meritocratic) systems.

We call policy implementation challenges the techno-political dynamics that emerge from the desire of rulers to influence the composition of the civil service in ways that ensure (i) political and/or ideological loyalty, with a view to promoting responsiveness of the administration, and (ii) professionalism or administrative experience, with a view to ensuring organisational competence (Moe, 1985). The combination of both factors would guarantee for politicians or rulers a type of responsive competence - combining loyalty and effectiveness in implementing policy agendas. However, as is to be expected, this is a difficult relationship to get right, since the number of people who exhibit both characteristics (political loyalty and technical competence) is rare, and, frequently, these qualities clash in the cut of decision-making.

The dilemma for politicians, however, lies in the fact that the preference for the loyalty dimension to the detriment of the competence one often translates into a decrease in the performance of the bureaucracy in implementing political agendas. This dilemma becomes even more complex to the extent that in many cases the implementation of public policies depends on negotiations with multiple stakeholders - and in cases in which the dimension of loyalty is favoured over competence, this may generate a reaction from stakeholders that makes the implementation of the policy difficult. In these cases, Bertelli and Feldmann (2007) point out, politicians have incentives to appoint professionals who partially disagree with their political agenda, but from this condition they become capable of conducting negotiations around policy implementation, and thus guarantee a result that is closer to the politicians' preferences.

In other words, in pursuit of the goal of ensuring the implementation of their public policy agenda, politicians are faced with a series of overlapping challenges, such as the existence of legal conditions that reflect the separation of powers, the need to maintain political support through patronage networks (and thus indicate to their base their commitment to the implementation of certain policies), and the trade-off between loyalty and competence, which directly influences the performance of agencies in implementing policy agendas. Faced with this maze of conditions, bargains, vetoes and trade-offs, politicians need to employ sophisticated strategies aimed at reconciling often contrasting objectives, such as ensuring the implementation of their policy agenda and guaranteeing the cohesion of their political support base.

Purpose of this report

Based on the literature review, we devise a typology of conditions that limit politicians' discretion in allocating professionals in the civil service. These are:

Type 1

Polity conditions:

conditions established by institutional arrangements of the political system and related to maintaining checks and balances. In general, they are expressed through legal rules or procedures that limit the discretion of politicians.

Type 2

Political conditions:

Conditions that emerge from political disputes, through which rulers seek to ensure the cohesion of their social and parliamentary coalitions. In general, they are expressed through formal and informal negotiations that express the division of power within a political arena.

Type 3

Policy conditions:

conditions that emerge from the challenges of policy implementation. They are related to the need for politicians to provide government agencies with skilled professionals to implement their agendas.

Based on this simple typology, the purpose of this report is modest. We turn our attention to identifying the nature and type of polity conditions (type 1) that constrain politicians' choice of public executives in the South African government, using a set of key institutions as a benchmark. We find that South African law provides very few constraints on the discretion of politicians and very seldom imposes meritocratic conditions for appointments of officers to key state institutions.

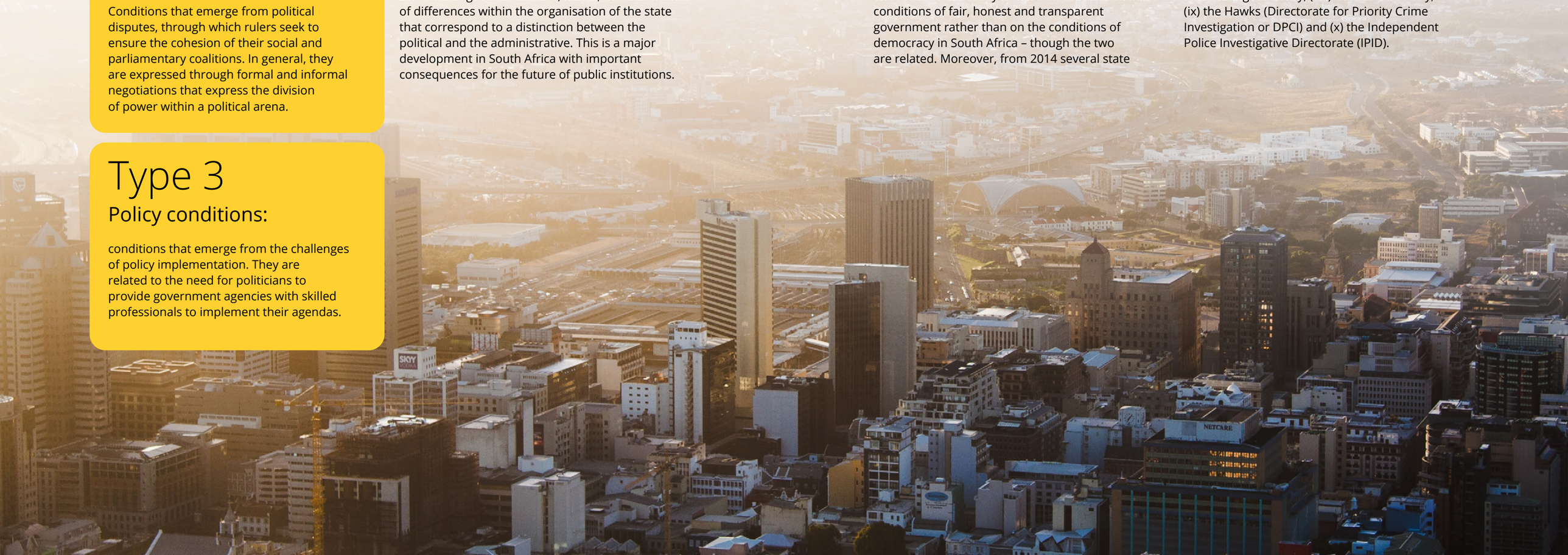
The first part of this report will consist of a technical exposition of the legislation governing the appointment processes in key state institutions.

The second part, will consider the emerging public law jurisprudence in South Africa, suggesting that the courts are beginning to elaborate criteria for appointments based on public administration considerations. In other words, the courts are trying to introduce an original criterion of appointment that elevates 'operational' considerations over political ones. At stake is a nascent administrative zone within government and, hence, the elaboration of differences within the organisation of the state that correspond to a distinction between the political and the administrative. This is a major development in South Africa with important consequences for the future of public institutions.

We will explore the appointment processes in the context of Key State Institutions. These are state entities specifically mentioned in the Constitution of the Republic of South Africa (1996), including the Public Protector and the Auditor-General, the National Treasury, the Reserve Bank, the Constitutional Court itself, the Independent Electoral Commission (IEC), the South African Police Services (SAPS), the National Prosecuting Authority (NPA), the Independent Police Investigative Directorate (IPID) and the State Security Agency. Taken together, from the perspective of the Constitution, a key state institution ensures the well functioning of the South African government in three ways: (i) by establishing the basic conditions of South Africa's constitutional democracy; (ii) by bringing transparency and accountability to the administration of government and by setting standards for good financial conduct (Public Protector, Auditor General, National Treasury); and (iii) by generating consequences (legal and criminal) for abuses of the administration (SAPS, Hawks, NPA).

The focus of this study is more on the institutional conditions of fair, honest and transparent government rather than on the conditions of democracy in South Africa – though the two are related. Moreover, from 2014 several state institutions became sites of major political and administrative contestation, often played out in the courts and the public domain (see Maserumule, 2017). We will consider these departments and agencies as key state institutions because the conflict around them suggests that they are regarded by major political forces as key sites of power in the state. In other words, who governs them is deemed significant for how the government works, irrespective of whether the Constitution specifically mentions them or not. Hence, we will include in this study, the South African Revenue Services (SARS).

Based on these criteria, we will consider selection processes of executive officers for: Chapter 9 Institutions, including (i) the Public Protector and (ii) the Auditor General; Departments dealing with State Finances and Revenue, including (iii) the National Treasury, (iv) the South African Reserve Bank and (v) the South African Revenue Service; and finally Departments and Directorates dealing with Policing and Law &Order, including: (vi) the South African Police Service, (vii) the National Prosecuting Authority, (viii) the State Security, (ix) the Hawks (Directorate for Priority Crime Investigation or DPCI) and (x) the Independent Police Investigative Directorate (IPID).



Towards a General Framework

The South African Constitution aims to create a society based on democratic values, social justice and fundamental human rights. Accordingly, everyone living in South Africa has basic rights, including human dignity, equality, freedom of expression and association, political and property rights, housing, healthcare, education, access to information and access to courts.

The Preamble to the Constitution states that it aims to: (i) heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; (ii) improve the quality of life of all citizens and free the potential of each person; lay the foundations for a democratic and open society in which government is based on the will of the people, and in which every citizen is equally protected by law; and (iii) build a united and democratic South Africa that is able to take its rightful place as a sovereign state in the family of nations.

As frequently stated by the Constitutional Court, the Constitution aims to create a new society that is non-racial, non-sexist and socially inclusive by recognizing and redressing the realities of the past and it is committed to establishing a society[1].

In order to give substance to these Constitutional rights, independent institutions have been established to promote rights and to strengthen constitutional democracy. Other institutions have been set up in order to ensure the effective administration of justice, to promote accountability and responsible public spending and to ensure compliance with the principles of good governance.

CHAPTER 9 INSTITUTIONS

The Public Protector

The Auditor General

The Independent Electoral Commission (IEC)

[1]South African Police Service v Solidarity obo Barnard (CCT 01/14) [2014] ZACC 23; 2014 (6) SA 123 (CC); [2014] 11 BLLR 1025 (CC); 2014 (10) BCLR 1195 (CC); (2014) 35 ILJ 2981 (CC) at para 77.

Chapter 9 Institutions

The Public Protector

The Public Protector is established in terms of section 181 of the Constitution and her functions are contained in section 182 of the Constitution[2]. The appointment and removal from office of the Public Protector are regulated by section 1A of the Public Protector Act[3] and sections 193 & 4 of the Constitution.

Section 1A of the Public Protector Act[4] explains the appointment process and the requirements for holding the office of PP. It provides that:

1. There shall be a Public Protector for the Republic.

2. The President shall, whenever it becomes necessary, appoint a Public Protector in accordance with the provisions of section 193 of the Constitution.

3. The Public Protector shall be a South African citizen who is a fit and proper person to hold such office, and who—

   a. is a Judge of a High Court; or

   b. is admitted as an advocate or an attorney and has, for a cumulative period of at least 10 years after having been so admitted, practised as an advocate or an attorney; or

   c. is qualified to be admitted as an advocate or an attorney and has, for a cumulative period of at least 10 years after having so qualified, lectured in law at a university; or

   d. has specialised knowledge of or experience, for a cumulative period of at least 10 years, in the administration of justice, public administration or public finance; or

   e. has, for a cumulative period of at least 10 years, been a member of Parliament; or

   f. has acquired any combination of experience mentioned in paragraphs (b) to (e), for a cumulative period of at least 10 years."

Section 193 of the Constitution provides further:

1. The Public Protector and the members of any Commission established by this Chapter must be women or men who—

   a. are South African citizens;

   b. are fit and proper persons to hold the particular office; and

   c. comply with any other requirements prescribed by national legislation.

2. The need for a Commission established by this Chapter to reflect broadly the race and gender composition of South Africa must be considered when members are appointed.

3. The Auditor-General must be a woman or a man who is a South African citizen and a fit and proper person to hold that office. Specialised knowledge of, or experience in, auditing, state finances and public administration must be given due regard in appointing the Auditor-General.

4. The President, on the recommendation of the National Assembly, must appoint the Public Protector, the Auditor-General and the members of—

   a. the South African Human Rights Commission;

   b. the Commission for Gender Equality; and

   c. the Electoral Commission.

5. The National Assembly must recommend persons—

   a. nominated by a committee of the Assembly proportionally composed of members of all parties represented in the Assembly; and

   b. approved by the Assembly by a resolution adopted with a supporting vote—

   (i) of at least 60 percent of the members of the Assembly, if the recommendation concerns the appointment of the Public Protector or the Auditor-General; or

   (ii) of a majority of the members of the Assembly, if the recommendation concerns the appointment of a member of a Commission.

6. The involvement of civil society in the recommendation process may be provided for as envisaged in section 59(1)(a).

Section 194 of the Constitution provides for the removal from office of officials. It provides:

1. The Public Protector, the Auditor-General or a member of a Commission established by this Chapter may be removed from office only on—

   a. the ground of misconduct, incapacity or incompetence;

   b. a finding to that effect by a committee of the National Assembly; and

   c. the adoption by the Assembly of a resolution calling for that person's removal from office

2. A resolution of the National Assembly concerning the removal from office of—

   a. the Public Protector or the Auditor-General must be adopted with a supporting vote of at least two thirds of the members of the Assembly; or

   b. a member of a Commission must be adopted with a supporting vote of a majority of the members of the Assembly.

3. The President—

   a. may suspend a person from office at any time after the start of the proceedings of a committee of the National Assembly for the removal of that person; and

   b. must remove a person from office upon adoption by the Assembly of the resolution calling for that person's removal.

What we see in this list of criteria is a combination of two distinct but related measures viz. appointments. The first can be called a 'competency' measure, which sets minimum standards of *qualification* and *skill* and *experience* (being a Judge or an advocate and so on). The other is an 'ethical' standard, being *fit and proper*, which here is related to having integrity, acting with impartiality and being independent-minded. We will see shortly (Chapter 2), however, that the courts have developed the meaning of 'fit and proper' to exceed mere ethical considerations.

[2]182 Functions of Public Protector
(1) The Public Protector has the power, as regulated by national legislation—
(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.
(2) The Public Protector has the additional powers and functions prescribed by national legislation.
(3) The Public Protector may not investigate court decisions.
(4) The Public Protector must be accessible to all persons and communities.
(5) A report issued by the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential.
[3] 23 of 1994.
[4] 23 of 1995.

The Auditor General

The Auditor General is established in terms of section 181 of the Constitution and her functions are contained in section 188 of the Constitution.[5]

The appointment and removal from office of the Auditor General are regulated by section 6 & 8 of the Public Audit Act and sections 193 & 4 of the Constitution.

Section 6 of the Public Audit Act[6] explains the appointment process and states:

1. Whenever it becomes necessary to appoint a person as Auditor-General, the Speaker must initiate the process in the National Assembly for the recommendation of a person to the President for appointment as Auditor-General as set out in section 193 of the Constitution.

2. When making an appointment, the President must determine the term for which the appointment is made, subject to section 189 of the Constitution.

Section 8 of the Public Audit Act regulates the Vacation of office. It states—

1. A person appointed as Auditor-General ceases to be the Auditor-General—

   a. when that person's term of office expires; or

   b. if that person—

   (i) resigns, subject to subsection (2); or

   (ii) is removed from office in terms of section 194 of the Constitution.

2. A person appointed as Auditor-General may resign—

   a. on account of ill health or for any other reason which the President considers sufficient; and

   b. by giving at least three month's written notice to the President, but the President may accept a shorter period.

Surprisingly, the Public Audit Act does not mention any specific competencies that the incumbent should have, either regarding qualifications or skills. Section 6 of the Act merely states that the National Assembly must "initiate a process" resulting in a recommendation to the President. In making the appointment, the President must determine the length of the term that the officer serves (2004, p. 12). The only time that specific skills or experience are mentioned is in relation to his or her remuneration. It should broadly be on par with a judge and will also depend on his or her "knowledge and experience" (S7(2)(a)) (2004, p. 12). There is nothing about what such knowledge or experience might entail.

We will see shortly that the Public Audit Act is far more typical in South Africa than the Public Protector Act regarding competency provisions. In other words, legislation governing the appointment of executive officers to government departments typically sets the competency bar very low or fails to mention one at all.[7]

In contrast to the competency required of the candidate, the Act refers to the ethical standards that he or she must meet - but only indirectly. Referring to the institution of the Auditor-General, the Act notes that it (i) is the supreme audit institution of the Republic, (ii) has full legal capacity, is independent and is subject only to the Constitution of the law, and (iii) must be impartial and must exercise its powers and functions without fear, favour or prejudice (S3 (a-c)).

It follows that the incumbent is someone who will lead the organisation in such a way that it is 'independent', 'subject only to the Constitution', 'impartial' and that does its work without 'fear, favour or prejudice'. In other words, the Act goes some way to define the ethical standards by which the Auditor-General must conduct his or her business.

[5] (1) The Auditor-General must audit and report on the accounts, financial statements and financial management of—
(a) all national and provincial state departments and administrations,
(b) all municipalities; and
(c) any other institution or accounting entity required by national or provincial legislation to be audited by the Auditor-General.
(2) In addition to the duties prescribed in subsection (1), and subject to any legislation, the Auditor-General may audit and report on the accounts, financial statements and financial management of—
(a) any institution funded from the National Revenue Fund or a Provincial Revenue Fund or by a municipality; or
(b) any institution that is authorised in terms of any law to receive money for a public purpose.
(3) The Auditor-General must submit audit reports to any legislature that has a direct interest in the audit, and to any other authority prescribed by national legislation. All reports must be made public.
(4) The Auditor-General has the additional powers and functions prescribed by national legislation.

[6] 25 of 20014.

[7] At the South African Broadcasting Corporation (SABC), for example, the Chief Executive Officer (CEO) is required only to have a matric certificate. In the case of Hlaudi Motsoeneng, the Board under the Chairpersonship of Ben Ngubane even relaxed this low requirement.

The Independent Electoral Commission (IEC)

The Independent Electoral Commission is established in terms of section 181 of the Constitution and its functions are contained in section 190 of the Constitution.[8] The appointment and removal from office of the Head of the Independent Electoral Commission are regulated by section 6 and 7 of the Electoral Commission Act[9] and sections 193 & 4 of the Constitution.

Section 6 of the Electoral Commission Act provides for the appointment and requirements to hold office. It provides:

1. The Commission shall consist of five members, one of whom shall be a judge, appointed by the President in accordance with the provisions of this section.

2. No person shall be appointed as a member of the Commission unless he or she-

   a. is a South African citizen;

   b. does not at that stage have a high party-political profile;

   c. has been recommended by the National Assembly by a resolution adopted by a majority of the members of that Assembly; and

   d. has been nominated by a committee of the National Assembly, proportionally composed of members of all parties represented in that Assembly, from a list of recommended candidates submitted to the committee by the panel referred to in subsection (3).

Section 7 regulates the vacation of office. It states :

1. The term of office of a member of the Commission is seven years unless—

   a. he or she resigns or dies at an earlier date;

   b. he or she is removed from office in terms of subsection (3); or

   c. the President, on the recommendation of the National Assembly, extends the member's term of office for a specified period. [Sub-s.

1 substituted by s. 1 of Act 14 of 2004.]

2. The conditions of service, remuneration, allowances and other benefits of commissioners shall from time to time be determined by the President after consultation with the Commission on Remuneration of Representatives established by section 2 of the Commission on the Remuneration of Representatives Act, 1994 (Act 37 of 1994), and a distinction may be made between commissioners appointed in a full-time and part-time capacity.

3. A commissioner may-

   a. only be removed from office by the President-

   (i) on the grounds of misconduct, incapacity or incompetence;

   (ii) after a finding to that effect by a committee of the National Assembly upon the recommendation of the Electoral Court; and

   (iii) the adoption by a majority of the members of that Assembly of a resolution, calling for that commissioner's removal from office;

   b. be suspended from office by the President at any time after the start of the proceedings of the committee contemplated in paragraph (a) (ii); (c) be reappointed, but only for one further term of office."

[8] (1) The Electoral Commission must—
(a) manage elections of national, provincial and municipal legislative bodies in accordance with national legislation;
(b) ensure that those elections are free and fair; and
(c) declare the results of those elections within a period that must be prescribed by national legislation and that is as short as reasonably possible.
(2) The Electoral Commission has the additional powers and functions prescribed by national legislation.

[9] 51 of 1996.

Section 193 and 194 of the Constitution insofar as they apply to the Independent Electoral Commission are quoted in full above.

The grounds for removing a commissioner in terms of the Act were tested in United Democratic Movement and Others v Tlakula and Another.[10] The court found that the Chairperson of the Electoral Commission, Pansy Tlakula had violated section 7 of the Electoral Commission Act. It reasoned that the misconduct of the Chairperson had been established on a balance of probabilities and having regard to the provisions of sections 7(3)(ii) as read with 20(7) of the Electoral Commission Act. The Court considered her role in the acquisition of the Riverside Office Park to accommodate the IEC head offices. The Public Protector based its findings on Chairperson's Tlakula's improper conduct and maladministration, in particular the non-compliance with relevant procurement prescripts as well as her undisclosed and unmanaged conflict of interest.

The Court recommended that a committee of the National Assembly adopt the facts, views and conclusions of the court and that it finds that she has committed misconduct warranting her removal from office.

In general, Chapter 9 institutions are required by the constitution to satisfy four conditions:

i. They must be "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" (S181(2)).

ii. "Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions" (S181(3)).

iii. "No person or organ of state may interfere with the functioning of these institutions" (S181(4)).

iv. "These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the National Assembly at least once a year" (S181(5))

These four principles or conditions are what we can call the *ethical persona* of a senior state official.

For example, over and above the particular legal and administrative experience that the Public Protector needs to have, or that is required of the Auditor General or the head of the IEC, the people appointed to these positions must exercise their powers without *fear, favour or prejudice* to safeguard the *independence, impartiality, dignity* and *effectiveness* of their institutions. Further general provisions regarding the persona of the Public Protector and Auditor-General can be gleaned by working backwards, from, that is, the conditions of their removal. They may be removed on the ground of "misconduct, incapacity or incompetence" (194(a)).

There is a further attribute that the Constitution asserts regarding the appointment of the heads of Chapter 9 institutions. Section 193 insists that the race and gender of the candidate "must be considered" so that the Chapter 9 institutions "reflect broadly the race and gender composition of South Africa" (193(2)).

[10] [2014] ZAEC 5; 2015 (5) BCLR 597 (Elect Ct)

In summary, the Constitution together with the relevant pieces of legislation define three broad attributes of the Public Protector and, to a lesser extent, the Auditor General.

Competency, referring to the specific qualifications, skills and experience an official must have in order to discharge his or her powers and functions.

Ethical persona, referring to the attitudes and behaviours that an incumbent needs to display to ensure that the state body in question is run in a way that is compliant with the Constitution and according to the law. Central to such an ethical standard is the notion of being 'fit and proper'.

Representivity, referring to race and gender balance in the appointment of the leadership.

We will use these principles as the scaffolding of a theoretical framework. We can use them (a) to compare the formal aspects of appointment processes in the State generally, and (b) to determine the extent to which actual appointment processes resemble the formal one; and (c) understand the innovations in current public law jurisprudence.

That is, the framework above is useful because it allows us to observe a *major legal development* in South Africa regarding the elaboration of a possible *fourth criterion* of appointment. We will call it a criterion of professionalism. If it is successfully instantiated as a general principle it could have major consequences for the administration of government and the professionalisation of the State. We will discuss this more fully in Section 2.

State Finances and Revenues

The Reserve Bank

The South African Reserve Bank is established by section 223 of the Constitution and section 9 of the Currency and Banking Act. Her primary objective is contained in section 224[11] of the Constitution and section 3[12] of the South African Reserve Bank Act.[13]

The appointment and removal from office of the Governor of the Reserve Bank is determined in section 4 of the SARB Act.

Section 4(1) states the appointment process:

The Bank shall have a board of fifteen directors, consisting of

a. a Governor and three Deputy Governors (of whom one shall be designated by the President of the Republic as Senior Deputy Governor) who shall be appointed by the President of the Republic, after consultation with the Minister and the Board, as well as four other directors appointed by the President, after consultation with the Minister.

Section 4(2) states the requirements for office:

a. The Governor shall be a person of tested banking experience.

aA. Each director of the Bank shall be a fit and proper person with appropriate skills and experience, who shall at all relevant times—

i. act bona fide for the benefit of and in the interest of the Bank;

ii. avoid any conflict of interest between his or her interests and the interests of the Bank;

iii. possess and maintain the knowledge and skill that may reasonably be expected of a person holding the same appointment and carrying out the same functions as are carried out by the director in question in relation to the Bank; and

iv. exercise such care in the carrying out of his or her functions in relation to the Bank as may be reasonably expected of a diligent person holding the same appointment under similar circumstances and who possesses both the knowledge and skill mentioned in subparagraph (iii), and any such additional knowledge and skill as the director in question may have

Section 4(4) amplifies the requirements:

4. No person shall be appointed or elected as or remain a director, if that person—

aA. is not resident in the Republic; or

b. is a director, officer or employee of a bank, bank controlling company, mutual bank; or cooperative bank; or

bA. is a Minister or a Deputy Minister in the Government of the Republic; or

c. is a member of Parliament, a provincial legislature or a Municipal Council; or

d. is an unrehabilitated insolvent; or

e. was dismissed from a position of trust as a result of his or her misconduct or has been disqualified or suspended from practising any profession on the grounds of his or her professional misconduct; or

[11] (1) The primary object of the South African Reserve Bank is to protect the value of the currency in the interest of balanced and sustainable economic growth in the Republic.
[12] The primary objective of the Bank shall be to protect the value of the currency of the Republic in the interest of balanced and sustainable economic growth in the Republic
[13] 90 of 1989.

f. was convicted of an offence listed in Part 1 or 2 of Schedule 1 to the Criminal Procedure Act, 1977 (Act No. 51 of 1977), an offence under this Act, the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004), the Prevention of Organised Crime Act, 1998 (Act No. 121 of 1998), the Prevention of Counterfeiting of Currency Act, 1965 (Act No. 16 of 1965), perjury, or any other offence involving an element of dishonesty in respect of which he or she has been sentenced to imprisonment without the option of a fine or to a fine exceeding R1 000; or

g. is mentally or physically incapable of performing the duties of a director; or

h. is contractually incapacitated; or

i. is an employee of the Government.

Section 4(5) of the Act regulates the vacation of office, it states:

5. The tenure of a director shall, unless otherwise indicated or agreed by the Board, automatically terminate forthwith—

a. if the director gives notice in writing to the secretary of the Bank of his or her resignation as a director;

b. if the director, without reasonable cause, absents himself or herself from three consecutive meetings of the Board without leave of absence granted by the chairperson: Provided that the chairperson may not grant leave of absence from more than three consecutive meetings of the Board;

c. if the director fails to declare to the Bank any direct or indirect interest in any agreement or proposed agreement with the Bank;

d. if the director unlawfully discloses to any person any information described in section 33 of this Act; or

e. if the director is disqualified on the grounds described in subsection (4).

Section 36(b) empowers the Ministers to make regulations relating to the conditions (other than those relating to remuneration) of appointment of directors, and the circumstances in which a director shall vacate his office.

[14] Recently the Public Protector called for a constitutional amendment regarding the bank's mandate – away from protecting the currency as its core role. The claim is that "The South African Reserve Bank (SARB) has a mandate to "protect the value of the currency" and that it interprets this mandate to mean that it must keep consumer price inflation within a range of 3-6%. As Tania Ajam notes: "Actually, the SARB does not set the 3-6% inflation target. This is actually done by the Minister of Finance, after consultation with the SARB". The SARB does not have goal independence, it only has instrument independence (i.e. setting the policy interest rate). So if anybody is of the view that the inflation target is inimical to employment, take that up with the Minister. If you disagree with inflation targeting - ditto. If you'd like to change the mandate of the SARB - ditto. In fact, the Minister already changed the mandate of the Reserve Bank a few years ago, to be formalised in the Financial Sector Regulation Bill.

National Treasury

Using the framework above, we will see that for key financial and security institutions there is great unevenness in the mix of appointment criteria. Generally, the competencies for each role are poorly defined as are the ethical requirements of incumbents. Indeed, we will see in section 2 that it has been left to the courts to give meaning to terms like 'fit and proper'.

The National Treasury is established in terms of section 216 of the Constitution and section 5 of the Public Finance Management Act (PFMA).[15] It is the only government department specifically mentioned in the constitution. Its functions are set out in section 6 of the PFMA.[16] The Head of treasury is the Minister of Finance who is ordinarily a cabinet member.[17]

The appointment and removal of members of cabinet is regulated by section 92 of the Constitution.

Section 92 provides:

1. The Cabinet consists of the President, as head of the Cabinet, a Deputy President and Ministers.
2. The President appoints the Deputy President and Ministers, assigns their powers and functions, and may dismiss them.
3. The President—
   - a. must select the Deputy President from among the members of the National Assembly;
   - b. may select any number of Ministers from among the members of the National Assembly; and
   - c. may select no more than two Ministers from outside the Assembly.
4. The President must appoint a member of the Cabinet to be the leader of government business in the National Assembly.
5. The Deputy President must assist the President in the execution of the functions of government.

In President of the Republic of South Africa and Others v SARFU and Others[18] the Constitutional Court held that the President is not entitled "to abdicate the powers conferred upon him by the Constitution" via delegation of his powers in this regard to anyone else. This decision read with the powers of the President in terms of section 9(2) of the Constitution illustrates that the powers to appoint and remove cabinet ministers rests entirely and solely in the President.

[15] 1 of 1999.

[16] (1) The National Treasury must—
(a) promote the national government's fiscal policy framework and the co-ordination of macro-economic policy;
(b) coordinate inter-governmental financial and fiscal relations;
(c) manage the budget preparation process;
(d) exercise control over the implementation of the annual national budget, including any adjustments budgets;
(e) facilitate the implementation of the annual Division of Revenue Act;
(f) monitor the implementation of provincial budgets;
(g) promote and enforce transparency and effective management in respect of revenue, expenditure, assets and liabilities of departments, public entities and constitutional institutions; and
(h) perform the other functions assigned to the National Treasury in terms of this Act.
(2) To the extent necessary to perform the functions mentioned in subsection (1), the National Treasury—
(a) must prescribe uniform treasury norms and standards;
(b) must enforce this Act and any prescribed norms and standards, including any prescribed standards of generally recognised accounting practice and uniform classification systems, in national departments;
(c) must monitor and assess the implementation of this Act, including any prescribed norms and standards, in provincial departments, in public entities and in constitutional institutions;
(d) may assist departments and constitutional institutions in building their capacity for efficient, effective and transparent financial management;
(e) may investigate any system of financial management and internal control in any department, public entity or constitutional institution;
(f) must intervene by taking appropriate steps, which may include steps in terms of section 100 of the Constitution or the withholding of funds in terms of section 216 (2) of the Constitution, to address a serious or persistent material breach of this Act by a department, public entity or constitutional institution; and
(g) may do anything further that is necessary to fulfil its responsibilities effectively.

[17] It is required by section 92 of the Constitution that all members of cabinet – 2 are from the National Assembly.

[18] [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059.

In the recent judgement of Democratic Alliance v President of the Republic of SA; In re: Democratic Alliance v President of the Republic of S A and Others[19] The President conceded that the decision to dismiss Mr Gordhan as Finance Minister, despite constituting an executive decision, still had to be rational and therefore subject to judicial scrutiny.

The Court emphasised that it is now settled law that these decisions must comply with the "doctrine of legality."[20] The doctrine is fundamental to our constitutional order. In instances where an executive decision not comply with this doctrine – the decision would be unlawful.[21]

The National Treasury (NT) is the only government *department* that is specifically mentioned by the South African constitution. It is not difficult to understand why. In terms of the constitution all money received by the national government, including that raised from taxation and customs and excise by the South African Revenue Service is paid into the National Revenue Fund (S213). The Public Finance Management Act No. 1 (1999) (PFMA), the law that established the National Treasury in South Africa, gives the NT responsibility for managing this fund.

PARI has written about the history of this department exploring how this role has made it the target of regional forces, state-owned enterprises and powerful national ministers seeking more money and greater autonomy from financial protocols (see Pearson, Pillay and Chipkin: 2016). Since the firing of Minister Nene in December 2015, the National Treasury has seen multiple efforts to bring it under the more direct control of the President and, arguably some of his immediate associates – a process widely discussed in the media as one of 'state capture'.

There is nothing in the PFMA that stipulates criteria for the appointment of the Minister or the Director-General in terms of the framework developed above, that is, in terms of competency, ethics and representivity. Instead, the Act merely stipulates that "a National Treasury is hereby established, consisting of a) the Minister, who is head of the Treasury and b) the national department or departments responsible for financial and fiscal matters" (S5(1)). A democratic principle is at stake here. In a democracy, it is appropriate that an elected government is not fundamentally restricted in allocating money according to its policies. After all, it has been elected precisely to pursue its political programme. In this spirit, the Minister of Finance is appointed by the President as the head of government and serves at his or her discretion. In other words, the head of the National Treasury is, appropriately, a political appointment.

What is less clear, is the criteria for the appointment of departmental officials, including the Director-General. In the first place, DGs are not appointed by the ministers to whom they are ostensibly accountable. They are appointed by the President in consultation with his (in principle and her) cabinet. To whom is the DG thus responsible? The National Development Plan notes "[f]ollowing the end of apartheid, there was good reason to give political principals wide-ranging influence over the public service to promote rapid transformation of a public service that had become closely associated with the apartheid regime" (NDP, Chapter 13, p. 367). Yet Presidential discretion in the appointment of DGs makes even the lines of political authority tortuous.

Compounding this tension is that in terms of the PFMA operational decision-making lies with the Minister. Administrative heads of department, responsible for the *implementation* of policies, only have delegated, as opposed to original powers and functions. In other words, they can only take relevant decisions to the extent that this authority has formally been granted to them by the responsible Minister. What makes an already confusing situation properly schizophrenic is that the PFMA designates Director-Generals as Accounting Officers. They hold the department purse strings, that is, thereby constraining Ministerial power over anything that needs money.

[19] [2017] ZAGPPHC 148

[20] Albutt v Centre for the Study of Violence and Reconciliation and Others 2010 (3) SA 293 (CC) at 4]; Minister of Military Veterans v Motau 2014 (5) SA 69 (CC) at [69]

[21] Democratic Alliance v Ethekwini Municipality 2012 (2) SA 151 (SCA) at [21]

In the case of Finance, the PFMA notes in Section 10 that "the Minister *may* [...] delegate any of the powers entrusted to the National Treasury in terms of this Act, to the head of a department forming part of the National Treasury, or instruct that head of department to perform any of the duties assigned to the National Treasury in terms of this Act (S10(1)(a). Moreover, the Act continues, "a delegation, instruction or request [...] to the head of a department or to a provincial treasury [...] is "subject to any limitations or conditions that the Minister may impose" (S10(2)(a)). In other words, even when heads of departments have been delegated authority, the minister may still intervene directly in day-to-day operations.

Note that in terms of this definition, responsibility for recruitment and human resources management is a Ministerial function, unless otherwise delegated. What is more is that Heads of Departments must be approved by cabinet (NDP, 367). Departmental appointments happen through selection panels composed of officials nominated by the Minister him or herself. The rules of the game are designed, that is, to maximise political control of the administration. It is striking, for example, that the PFMA does not specify any minimum competencies for a Director-General or a Head of Department, nor does it set what we have called ethical standards for these roles. The Department of Public Service and Administration (DPSA) requires that senior officials undergo a 'competency assessment', though its results may or may not be considered by a selection panel (DPSA, s11.2(1-3)).

Also, the NDP continues: "where the Minister makes appointments below the level of director-general, it becomes unclear whether these officials report to the director-general or to the minister" (NDP, 367). As much as this confusion entangles lines of accountability, so too are the appointment criteria. There is no compulsion to appoint people on the basis of competence or on the basis of ethics. Generally, though, appointments have favoured Africans so that, today, the public service and municipalities are largely 'transformed'. There has also been some progress with regard to gender equity.

With this in mind, we can understand better the political stakes surrounding Pravin Gordhan. The constitution and legislation give the Minister of Finance enormous powers over the strategy and the day-to-day running of the Department of Finance. We might say that it personalises the power in the figure of the Minister, so that political struggles over the political direction of the treasury necessarily focus on this position.

South African Revenue Service (SARS)

Likewise, in the case of the South African Revenue Service (SARS), the appointment of the Commissioner is a political consideration. The South African Revenue Service Act 34 of 1997 merely states that "the President must appoint a person as Commissioner" (S6(1)) for a renewable term not exceeding five years (S6(2)). There is neither mention of minimum competencies for the job, nor of any ethical requirements, nor of any considerations of representivity.

Like cabinet ministers, the Commissioner of SARS is appointed solely at the discretion of the State President. Indeed, the definition of the Commissioner's role resembles that of a Minister *vis-a-vis* his or her department. Section 9 of the Act, for example, distinguishes between the role of the Commissioner and the role of the Chief Executive Officer – but in appearance only, or, at least, only in potential. The Act, for example, provides for a Chief Executive Officer, responsible for: (a) the formation and development of an efficient administration; (b) the organisation and control of the staff; (c) the maintenance of discipline, and (d) the effective deployment and utilisation of staff to achieve maximum operational results (S9(2)(a-d)).

At the same time, the Commissioner of SARS is: (a) responsible for the performance of SARS and its functions; (b) takes all decisions in the exercise of SARS of its powers, and (c) performs any function and exercises any power assigned in terms of any legislation or agreement

At the moment when the Act appears to distinguish between a leadership and strategic role, an operational role and a financial one, it conflates them in the role of the Commissioner. Clause Section 1(d) states the following: "The Commissioner is the chief executive officer and also the accounting authority for SARS" (S9(1)(d)). These roles only really exist to the extent that the Commissioner assigns the relevant powers to designated persons (see S10(1-3)).

Like the President has the discretion to appoint Ministers, who are then legally invested with the full range of departmental powers, from leadership, to operations, to finance, so too is the Commissioner of SARS a political appointment. Nowhere does the legislation specify the competencies or the ethics required to perform either the role of the Commissioner or even of the Chief Executive Officer or Accounting Officer. The Act, moreover, does not even mention that he or she must be a 'fit and proper' person. The significance of this will become apparent shortly.

What is more, the South African Revenue Service (SARS) is established as an agency, such that it must report to the Minister of Finance, though is not subject to the Public Service Act of 1994. In other words, it is both of the public services but not in it. This is relevant to the extent that the competency provisions that apply to Senior Managers in the Public Service do not necessarily cover those in the employment of SARS.

More generally, we have to wonder if it is appropriate that the head of SARS is a political appointment, for the honest and efficient administration of the tax system and customs system is an operational function. Indeed, given that the agency must tax politically connected individuals and companies, it seems appropriate that the commissioner and his or her staff be insulated from political considerations. The same question applies to other State institutions, especially the police, the prosecuting authority and the Hawks.

Policing and Law & Order

We can move through the security cluster quickly now as the broad principles have already been established and appointments to the police, the Hawks and State Security follow similar processes to those discussed above in the financial cluster.

South African Police Service (SAPS)

The appointment process for the National Commissioner of Police, as well as for Provincial Commissioners is defined in Section 207 of the Constitution. It states as follows: "The President as head of the national executive must appoint a woman or a man as the National Commissioner of the Police Service, to control and manage the police service" (S207(1)). Matters are more complicated for provincial commissioners who are appointed by the National Commissioner him or herself, with the concurrence of the provincial executive (S207(3)). The Constitution further states that should there be disagreement between the national commissioner and the provincial executive, the minister of police must "mediate between the parties" (S207(3)).

Note that the head of the police is not appointed by the Minister of Police, though he or she is accountable to the Minister. That is, the commissioner is required to "exercise control over and manage the police *in accordance* with national policing policy and the *directions* of the Cabinet member responsible for policing" (S207(2)) (emphasis added). The legislation, in other words, confuses lines of accountability between the commissioner, the minister and the President. What makes matters worse is that the commissioner only has powers to manage and control the department to the extent that they are delegated to him or her (S15 of SAPS Act(1-3)).

There is no mention in the Constitution of the competencies required of the National Commissioner, nor of Provincial Commissioners. The South African Police Service Act 68 of 1995, however, defines a process that can, ultimately, see the removal of the Commissioner of Police (S8(1-9)). Section 9 states that a board of enquiry may find that there has been "misconduct" by the commissioner and/ or that he or she is "unfit" for office or "incapable" of executing his or her duties "efficiently". It makes sense, therefore, that the law requires the President that a 'fit and capable' person be appointed as National Commissioner and as Provincial Commissioners. We can wonder whether a requirement of 'fit and capable' amounts to the same thing as 'fit and proper'.

National Prosecuting Authority (NPA)

The National Prosecuting is established in terms of section 179 of the Constitution and her functions are contained in section 179(2)[22] of the Constitution read with the Chapter of the National Prosecuting Authority Act.[23]

The appointment and removal of the National Director of Public Prosecutions is regulated by section 179(3) of the Constitution, section 9 & 10 and 12 of the National Prosecuting Authority Act.

Section 179(3) of the Constitution requires that:

3. National legislation must ensure that the Directors of Public Prosecutions—
   - a. are appropriately qualified; and
   - b. are responsible for prosecutions in specific jurisdictions, subject to subsection (5)."

Section 9 of the National Prosecuting Authority Act sets out the requirements for holding office. It states:

1. Any person to be appointed as National Director, Deputy National Director or Director must—
   - a. possess legal qualifications that would entitle him or her to practise in all courts in the Republic; and
   - b. be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned.
2. Any person to be appointed as the National Director must be a South African citizen.

Section 10 of the National Prosecuting Authority Act states:

"The President must, in accordance with section 179 of the Constitution, appoint the National Director."

Section 12 of the National Prosecuting Authority Act provides grounds for vacating office:

(5) The National Director or a Deputy National Director shall not be suspended or removed from office except in accordance with the provisions of subsections (6), (7) and (8).

6. a. The President may provisionally suspend the National Director or a Deputy National Director from his or her office, pending such enquiry into his or her fitness to hold such office as the President deems fit and, subject to the provisions of this subsection, may thereupon remove him or her from office—

(i) for misconduct;

(ii) on account of continued ill-health;

(iii) on account of incapacity to carry out his or her duties of office efficiently; or
(iv) on account thereof that he or she is no longer a fit and proper person to hold the office concerned.

b. The removal of the National Director or a Deputy National Director, the reason therefor and the representations of the National Director or Deputy National Director (if any) shall be communicated by message to Parliament within 14 days after such removal if Parliament is then in session or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.

[22] (2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.
[23] 32 of 1998.

c Parliament shall, within 30 days after the message referred to in paragraph

b has been tabled in Parliament, or as soon thereafter as is reasonably possible, pass a resolution as to whether or not the restoration to his or her office of the National Director or Deputy National Director so removed, is recommended.

d The President shall restore the National Director or Deputy National Director to his or her office if Parliament so resolves.

e The National Director or a Deputy National Director provisionally suspended from office shall receive, for the duration of such suspension, no salary or such salary as may be determined by the President.

7 The President shall also remove the National Director or a Deputy National Director from office if an address from each of the respective Houses of Parliament in the same session praying for such removal on any of the grounds referred to in subsection (6) (a), is presented to the President.

8 a The President may allow the National Director or a Deputy National Director at his or her request, to vacate his or her office—

(i) on account of continued ill-health; or

(ii) for any other reason which the President deems sufficient.

b The request in terms of paragraph (a)

(ii) shall be addressed to the President at least six calendar months prior to the date on which he or she wishes to vacate his or her office, unless the President grants a shorter period in a specific case.

The National Director of Public Prosecutions is appointed directly by the President, in accordance with Section 179 of the Constitution. In addition, the National Prosecuting Act 32 of 1998 empowers the President to appoint up to four Deputy National Directors of Public Prosecutions, after consulting with the Minister of Justice and the National Director.

The Act also clarifies the Constitution's requirement in Section 179(3)(a) that the National Director be "appropriately qualified". It states that:

1 Any person appointed as National Director, Deputy National Director or Director must

a possess legal qualifications that would entitle him or her to practice law in all courts in the Republic; and

b be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity (S9(1)(a-b)).

c must be a South African citizen (S9(2)).

In other words, the National Prosecuting Authority Act goes some way to define the competency and the ethics of the National Director, Deputy Director and Directors of the NPA and in this way, places a limit on the discretion of the State President. Furthermore, in discussing the circumstances around which the persons filling these positions can be suspended or dismissed the Act mentions, *inter alia*, "misconduct", "incapacity to carry out his or her duties" and "no longer [being] a fit and proper person" (S12(6)(a). It is fair to conclude, therefore, that a measure of capacity to do the job is implied here that is more than simply a qualification and a moral disposition.

An important case in determining the meaning of the term "fit and proper" in the NPA Act is Democratic Alliance v President of the Republic of South Africa and others[24] In which the court per Yacoob J distilled the following principles in relation to appointments and the fit and proper standard:

[24] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC).

- The requirement that the National Director of Public Prosecutions must be a fit and proper person for appointment with due regard to his conscientiousness and integrity was not a matter to be determined according to the subjective opinion of the President. It was rather a jurisdictional prerequisite to be determined objectively;

- The requirement of rationality obliges courts to engage in an evaluation of the relationship between the means employed to reach a decision on the one hand, and the purpose for which the power to make the decision was conferred, on the other;

- Each and every step in the process of reaching the decision must be rationally related to the outcome;

- A failure to take into account relevant material that colours the entire process with irrationality will render the decision irrational. The rationality test is the least invasive form of legal scrutiny and its applicability in respect of Executive decisions flows from an acceptance and recognition of the separation of powers, not the converse;

- The purpose of the conferral of the power to appoint the National Director of Public Prosecutions on the President was to ensure that the appointee was sufficiently conscientious and had the integrity required to be entrusted with the responsibilities of the office and

- Dishonesty is inconsistent with the conscientiousness and integrity required for the proper execution of the responsibilities of a National Director of Public Prosecutions.

In Pikoli v President and Others[25], the Court stated that a person who is "fit and proper" to be the NDPP will be able to live out, and will live out in practice, the requirements of prosecutorial independence. That he or she must exercise their functions without fear, favour or prejudice.

In the Report of Inquiry into the National Director of Public Prosecutions[26], Dr Frene Ginwala stated that fit and proper for purposes of the NDPP involves the following principles:

- Whilst the notion of fit and proper has been judicially defined, it remains a notion that is fact-specific. Whether one is fit and proper to practice as a lawyer or any other discipline will depend on the context in which that notion is used;

- It is evident from the reading of the NPA Act, that legal qualification is not the only criterion for fitness to hold office as an NDPP. What the Act also envisages is that the incumbent must be a person of experience, integrity and conscientiousness to be entrusted with the responsibilities of the office of the NDPP;

- The notion of integrity relates to the character of a person – honesty, reliability, truthfulness and uprightness. It relates to the manner of application to one's task or duty – thoroughness, care, meticulousness, diligence and assiduousness; and

- "Conscientiousness can be said to mean professionalism – the willingness and ability to perform with the required skill and the necessary diligence. Integrity is remaining honest – not lying, stealing or otherwise acting corruptly".

These limitations on the President's discretion have been used to challenge the appointment of the National Director and that of two directors. We will consider this more fully in section 2 of this report. For the moment what we can say is that the courts have started to develop a measure of rationality that consists of more than considering whether the appropriate process of appointment was followed and/or whether the candidate has appropriate personal qualities.

[25] (8550/09) [2009] ZAGPPHC 99; 2010 (1) SA 400 (GNP).
[26] Page 51 -53

State Security Agency (SSA)

Regarding the Intelligence Services Act 65 of 2002, the Minister of Intelligence is tasked with the establishment of the state security agency. He or she must create branches, chief directorates and directorates for the agency, as well as determine the post functions and structures for these divisions and components (S4(1)(a-c)). This has to be done in consultation with the President (S4(2)). In other words, the Intelligence Act, like legislation governing all government departments, makes staff recruitment a ministerial function. Giving the President a hand in the selection process further strengthens this political imperative. No doubt related to the covert nature of intelligence work, the Act does not set out any minimum competencies for officials, nor does it set an ethical norm to which they must conform.

We might wonder, however, given that intelligence officers feature frequently as protagonists in ongoing political crises and disputes, whether such ministerial discretion is advisable in this regard. Would it not be better to devise a more independent recruitment process for spies, especially given that their responsibility is to the Republic and not to any political party? This is doubly so given that once employed, the head of the state security agency has some structural autonomy, that is, original powers.

Section 10 of the Intelligence Services Act discusses the Head of the State Security Agency. He or she is appointed at the level of a Director-General (DG) in the public service. His or her role is to "exercise command and control of the agency" (S10(1)). This is usually a role defined for ministers. In this regard, the DG is charged with the responsibility to (1) determine the conditions of service and human resources, and (2) decide on any other matters deemed expedient for the efficient running of the agency (S10(2)(a,b).

Section 10 goes some way in giving the Director-General discretionary powers, including over physical security, computer security, communication security and the security of classified information (S10(3)(a-f)). Unlike in the National Treasury and elsewhere, where senior officials derive their powers and functions from the Minister, sometimes creating what the National Development Plans calls tension in the 'political-administrative interface', the DG of the SSA is given legislative discretion to go about their work. It is worth pointing out the anomaly of this situation. The DG must manage the staff that he or she is not involved in appointing – though, as we have seen, this is a problem of the South African public service as a whole. The managerial discretion of the Director General is limited to the extent that he or she must seek approval from the Minister for any directives issued.

The Hawks (Directorate for Priority Crime Investigation or DPCI)

In the aftermath of the dissolution of the Directorate of Special Operations (DSO) (the "Scorpions") in 2008, a new unit was established in the South African Police Services, the Directorate for Priority Crime Investigation (DPCI) (the "Hawks"). The Scorpions was a multidisciplinary agency (consisting of investigators and prosecutors) constituted as a directorate in the National Prosecuting Authority and charged with the investigation and criminal prosecution of 'organised crime' (Act 61 of 200, S71(aa)).

The Directorate for Priority Crime Investigation (Hawks) is established as an independent directorate within the South African Police Service in terms of Chapter 17 of the South African Police Service Act, 1995 as amended by the South African Police Service Amendment Act, 2008 (Act 57 of 2008). Her functions are set out in section 17D[27] of the SAPS Act.

The appointment and removal from office of the national head of the directorate is regulated by section 17CA and section 17DA of the SAPS Act.

Section 17CA of the SAPS Act provides for the appointment process:

1. The Minister, with the concurrence of Cabinet, shall appoint a person who is—
   - a. a South African citizen; and
   - b. a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned, as the National Head of the Directorate for a non-renewable fixed term of not shorter than seven years and not exceeding 10 years.
2. The period referred to in subsection (1) is to be determined at the time of appointment.
3. The Minister shall report to Parliament on the appointment of the National Head of the Directorate within 14 days of the appointment if Parliament is then in session or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.

Section 17DA of the SAPS Act provides for the removal process:

1. The National Head of the Directorate shall not be suspended or removed from office except in accordance with the provisions of subsections (2), (3) and (4).
2. a. The Minister may provisionally suspend the National Head of the Directorate from his or her office, pending an inquiry into his or her fitness to hold such office as the Minister deems fit and, subject to the provisions of this subsection, may thereupon remove him or her from office—

   (i) for misconduct;

   (ii) on account of continued ill-health;

   (iii) on account of incapacity to carry out his or her duties of office efficiently; or

   (iv) on account thereof that he or she is no longer a fit and proper person to hold the office concerned.

   b. The removal of the National Head of the Directorate, the reason therefor and the representations of the National Head of the Directorate, if any, shall be communicated in writing to Parliament within 14 days after such removal if Parliament is then in session or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.

[27] (1) The functions of the Directorate are to prevent, combat and investigate-
(a) national priority offences, which in the opinion of the National Head of the Directorate need to be addressed by the Directorate, subject to any policy guidelines issued by the Minister and approved by Parliament;
(aA) selected offences not limited to offences referred to in Chapter 2 and section 34 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act 12 of 2004); and
(b) any other offence or category of offences referred to it from time to time by the National Commissioner, subject to any policy guidelines issued by the Minister and
approved by Parliament.

c The National Head of the Directorate provisionally suspended from office shall during the period of such suspension be entitled to such salary, allowance, privilege or benefit to which he or she is otherwise entitled, unless the Minister determines otherwise.

d An inquiry referred to in this subsection-

(i) shall perform its functions subject to the provisions of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000), in particular to ensure procedurally fair administrative action; and

(ii) shall be led by a judge or retired judge: Provided that the Minister shall make the appointment after consultation with the Minister of Justice and Constitutional Development and the Chief Justice.

c The National Head of the Directorate shall be informed of any allegations against him or her and shall be granted an opportunity to make submissions to the inquiry upon being informed of such allegations.

3 a The National Head of the Directorate may be removed from office on the ground of misconduct, incapacity or incompetence on a finding to that effect by a Committee of the National Assembly.

b The adoption by the National Assembly of a resolution calling for that person's removal from office.

4 A resolution of the National Assembly concerning the removal from office of the National Head of the Directorate shall be adopted with a supporting vote of at least two thirds of the members of the National Assembly.

5 The Minister- (a) may suspend the National Head of the Directorate from office at any time after the start of the proceedings of a Committee of the National Assembly for the removal of that person; and

b shall remove the National Head of the Directorate from office upon adoption by the National Assembly of the resolution calling for the National Head of the Directorate's removal.

6 The Minister may allow the National Head of the Directorate, at his or her request, to vacate his or her office—

a on account of continued ill-health; or

b for any other reason which the Minister deems sufficient.

7 The request in terms of subsection (6) shall be addressed to the Minister at least six calendar months prior to the date on which the National Head of the Directorate wishes to vacate his or her office, unless the Minister grants a shorter period in a specific case.

In Helen Suzman Foundation v President of the Republic of South Africa and Others;[28] Glenister v President of the Republic of South Africa and Others, the entire removal process for the National Head in terms of section 17(DA)(2)was declared constitutionally invalid and deleted from the date of order.

The Court set aside the provisions of section 17DA(2) on the basis that the DPCI performs a very important societal function, namely it is an anti-corruption agency. The Court further held that provisions of the Act do not provide adequate job security to enable the incumbent to exercise their duties. In fact the section enables the Minister to exercise almost untrammelled power to axe the National Head of the anti-corruption entity.[29]

[28] [2014] ZACC 32; 2015 (1) BCLR 1 (CC); 2015 (2) SA 1 (CC).
[29] At para 89.

In 2015, following the suspension of DPCI Head Anwa Dramat by the Minister, the Helen Suzman Foundation[30] was granted relief declaring the Minister's decision to suspend Lieutenant General Anwa Dramat, the National Head of the Directorate for Priority Crime Investigation ("the DPCI") as unlawful and the decision was set aside.

The Court held that following the striking down of section 17DA(2), the Minister is not empowered to suspend the National Head of the DPCI other than in accordance with sections 17DA(3) and (4), read with section 17DA(5), of the South African Police Service Act, 1995

It is worth noting that the law does not require the head or the deputy head to be a law enforcement officer or a lawyer. Instead, the barest minimum competence is set, mere 'experience'. Again, like other departments and agencies, apart from Chapter 9 institutions, wide discretion is given to the Minister over operational matters, including appointments, suspensions and dismissals.

In 2011 Section 6A of the police act was challenged in the Constitutional Court. At stake was not so much the criteria governing appointments and suspensions, but the limits of the minister. In the landmark *Glenister v President of the Republic of South Africa and Others 2011 (3) SA 347 (CC)*, the court ruled that the provisions above were inconsistent with the constitution because they did not give the Hawks adequate *structural and operational autonomy* (Constitutional Court of South Africa, 2011).

The police were given 18 months to change these provisions, which they did with the SAPS Amendment Act. The Helen Suzman Foundation (HSF), a liberal think-tank that has increasingly turned to litigation on constitutional matters, subsequently challenged this amendment in the High Court. They were concerned that it did not give substance to the earlier Glenister judgement.

In 2014 the court found in the HSF's favour. In particular, it ruled that the Act still gave unfettered power to the executive in the appointment of the national head of the Hawks and in terms of the renewal of his or her tenure. It also failed to sufficiently insulate the head from political interference by giving discretion to the political executive to suspend him or her. What is more, the Act allowed the Minister to determine what cases the unit should and should not pursue. That is, the Act did not safeguard the exclusive jurisdiction of the Directorate.

The police subsequently appealed this judgement, and the case is still pending. Nonetheless, even if the new amendment to the Hawks act is deemed sufficiently protective of its independence, the Glenister case has established in South African law the limits of the executive regarding some state institutions. More shall be said about this in Section 2 of this report.

[30] Helen Suzman Foundation v Minister of Police and Others (1054/2015) [2015] ZAGPPHC 4 (23 January 2015).

Independent Police Investigative Directorate (IPID)

In the meantime, the Constitutional Court has given further clarity to the meaning of "structural and operational autonomy". It has done so in a ruling in favour of the then suspended head of the Independent Police Investigative Directorate (IPID), Robert McBride against the minister of police.

The Independent Police Investigative Directorate (IPID) is established in terms of section 206(6) of the Constitution and section 3 of the Independent Police Investigative Directorate Act[31] and her functions are contained in section 9, 13 and 17 of the IPID Act.

The appointment and removal from office of the executive director are regulated by section 6 of the IPID Act.

Section 6 provides:

1. The Minister must nominate a suitably qualified person for appointment to the office of Executive Director to head the Directorate in accordance with a procedure to be determined by the Minister.

2. The relevant Parliamentary Committee must, within a period of 30 parliamentary working days of the nomination in terms of subsection (1), confirm or reject such nomination.

3. In the event of an appointment being confirmed-(a) the successful candidate is appointed to the office of Executive Director subject to the laws governing the public service with effect from a date agreed upon by such person and the Minister; and (b) such appointment is for a term of five years, which is renewable for one additional term only.

6. The Minister may, remove the Executive Director from office on account of—

   a. misconduct;

   b. ill health; or

   c. inability to perform the duties of that office effectively.

It must be noted that the appointment and dismissal processes for the head of IPID is going to change in the near future. In McBride v Minister of Police and Another[32] the Constitutional Court declared sections 6(3) and 6(6) of the IPID Act inconsistent with the Constitution. Mr McBride, The Executive Director of IPID, challenged his suspension by the Minister and pending inquiry against him on the basis that the IPID does not have sufficient safeguards to ensure that its Executive Director and IPID, as an institution, are able to act with sufficient independence.

The Constitutional Court confirmed the High Court order on the basis that the impugned sections do not provide for parliamentary oversight in relation to the suspension, discipline or removal of the Executive Director and that they afford the Minister unilateral powers and the sole discretion to terminate the Executive Director's tenure. Furthermore, the Minister is entitled to discipline the Executive Director on the same basis as any head of department in the public service, without any special oversight or protection. It was found that this amounts to inadequate security of tenure for a national head of an independent body investigating police misconduct, including corruption.

The declaration of invalidity was suspended for 12 months to allow Parliament to remedy the defects.

In March 2015 Minister Nhleko suspended McBride on suspicion that he had tampered with a report exonerating Anwar Dramat, then the National Head of the Directorate for Priority Crime Investigation (the "Hawks"), of illegality. Dramat has been accused of the illegal rendition of several Zimbabweans to their home country, where they were wanted and where they faced execution. Some of them were subsequently killed. McBride fought his suspension by arguing that those Sections of the law that the Minister had acted on the basis of, were, in fact, invalid.

[28] [2014] ZACC 32; 2015 (1) BCLR 1 (CC); 2015 (2) SA 1 (CC).
[29] At para 89.
[30] Helen Suzman Foundation v Minister of Police and Others (1054/2015) [2015] ZAGPPHC 4 (23 January 2015).

The IPID Act 1 of 2011 provides for a directorate, independent of the police ((4(1)), to oversee both the South African Police Services (SAPS) and municipal police and to investigate offences committed by their officers (2(a-g)). For this purpose, it establishes a national office, with provincial branches, headed by an Executive Director (5). The latter is appointed in a two-step process.

Firstly, the Minister of Police nominates a "suitably qualified" candidate to the relevant parliamentary committee, who must, secondly, confirm or reject the nomination within 30 days. In addition, clause 6(6) gives the Minister the power to "remove the Executive Director on account of a) misconduct, b) ill health or c) inability to perform the duties of the office effectively". It was this clause that was the chief bone of contention for it was on the basis of this clause that the Minister had suspended Robert McBride.

It is useful to briefly follow the court's thinking in coming to a decision. "Central to this application," the judges noted, is the crisp question: whether, in the light of the applicable statutory framework, IPID enjoys adequate *structural and operational independence*, as envisaged by [...] the Constitution, to ensure that it is effectively insulated from undue political interference (McBride v Minister of Police, S8) (emphasis added) (Bosielo, 2016). What made things difficult was that the executive director was deemed a public servant subject to the provisions of the Public Service Act. In the language of the court, this made him or her "beholden to government" (s30).

"It is axiomatic," the judges commented, "that public servants are government employees. [T]hey operate under government instructions and control. The authority to discipline and dismiss them vests in the relevant executive authority [i.e. Minister or MEC]. This does not require parliamentary oversight" (s30).

Is this compatible with IPID's independence, the court asked? "Certainly not," it replied (s38). For the IPID Act gives the minister "enormous political powers and control" over the executive director, that is tantamount to "impermissible political management" and which, moreover, makes it possible for the Minister to invoke "partisan political influence" to appoint someone "sympathetic" to his "political orientation" (s38) (Bosielo , 2016).

What this and the Glenister judgement do is establish the "operational autonomy" of those state bodies that the Constitution explicitly requires to be independent of the political executive. It is not clear if the reasoning in these decisions can be extended to those institutions not so mentioned. That is, the Hawks and IPID judgments go some way in establishing the 'structural autonomy' of the mentioned institutions. That may be insufficient for establishing their 'operational autonomy', which implies, surely a measure of the competence and the ethics of those holding senior office – something the court said almost nothing about. This is what this report now turns to.

Fit and Proper

In Section 1 of the report we developed an appointment framework that rested on three pillars:

Competency, referring to the specific qualifications, skills and experience an official must have in order to discharge his or her powers and functions.

Ethical persona, referring to the attitudes and behaviours that an incumbent needs to display to ensure that the state body in question is run in a way that is compliant with the Constitution and according to the law. Central to such an ethical standard is the notion of being 'fit and proper'.

Representivity, referring to race and gender balance in the appointment of the leadership.

These measures were implicit in the constitutional discussion of Chapter 9 institutions, which this report has generalised as a model to compare and evaluate appointment processes across key state institutions. One of the *major findings* of the section above is that legislation governing the appointment of executive officers to state bodies (government departments, agencies) touches very lightly on competency and ethics in defining minimum standards for candidates and for determining a corresponding selection process. Instead, what we have seen is that, apart from Chapter 9 institutions, appointments, suspensions and disciplinary processes are at the discretion of politicians, who are likely to use political criteria.

The problem is that the South African Constitution does not adequately distinguish between those appointments that are appropriately political and those that are not. This is not simply a limit of local jurisprudence. It reflects a major limitation in broader thinking about the limits of the State and the structure of government. The Constitution insists on the independence of some state institutions from the political executive (the judiciary, Chapter 9 institutions, some of the law enforcement bodies) from the perspective of the *separation of powers*. In this regard, it has gone far recently to protect their 'structural and operational autonomy'.

What also needs protection is a different kind of autonomy: administrative autonomy. Let us return to the McBride judgement discussed earlier. There the judges made the point that it was "axiomatic" that public servants (and municipal officials too, one presumes) are "beholden to government". Why is this a truism? They must implement the policies of the government of the day and must, therefore, be subject to the relevant, elected politicians. Yet the term 'beholden' is a very blunt one.

In the way that cabinet ministers are given all powers of 'command and control' over their respective departments and the President has similar such authority over a very vast range of agencies and organisations an important distinction is erased. It is the difference between the 'what' of policy and the 'how' of implementation. In other words, in South Africa there is a failure adequately to recognise that implementation is a field in its own right, necessitating special competencies and a unique ethic. This is precisely what Max Weber was arguing when he wrote about bureaucracy. It is also the insight that drove the development of the field of public administration as a discipline in its own right. Politically, this distinction between policy and implementation drove the modernisation of European states in the nineteenth century, the United States in the twentieth and China since the Cultural Revolution. The majority of the so-called 'developmental states', ranging from Singapore to South Korea, to Malaysia, structured their government on the basis of this distinction in the period after the Second World War. At stake was the development of professional administrations given varying degrees of *operational autonomy from the executive authority.*

In South Africa, the development of such administrative autonomy has been checked by a nationalist instinct, seeking direct (party-) political control over the state administration. Hence, the appointment arrangements discussed in section 1 above, where the President and cabinet ministers have such wide discretion.

Even so, the courts in South Africa have begun to carve out a space of administrative autonomy, especially for those bodies granted 'independence' in the Constitution but potentially for the rest of government too. They are doing so by elaborating on the meaning of 'fit and proper' as it relates to executive appointments. In this way, an embryonic fourth criterion for appointments is being elaborated. We will call it a standard of *professionalism*.

What are the limits to Presidential and Ministerial discretion? Can the State President, like the Roman Emperor Caligula, appoint anybody to these positions, even a horse? This is the question that Paul Hoffman asks. He is confident that the "doctrine of legality" applies to the President's decision-making in respect of Ministers and to other senior state officials whom the Constitution and legislation give the President the power to appoint. This means, argues Hoffman, that decisions have to be rational, else they would amount to conduct inconsistent with the Constitution (Hoffman, 2017).

He invites us to imagine the following 'hypothetical' situation. Would the President be entitled to dismiss a "senior and well-respected" finance minister whose "international reputation" and record of service is "impeccable" in favour of someone of "dubious repute, questionable ethics" and who has violated S96 of the Constitution or the Code of Ethics applicable to cabinet ministers? Hoffman is worrying that the Finance Minister Pravin Gordhan will be fired soon and replaced by Ben Ngubane, the current CEO of Eskom, the state-owned enterprise responsible for the supply of electricity in South Africa.

Hoffman thinks that such a decision would not pass the test of 'legality' based on his reading of the Constitutional Court judgement in the Simelane case. It is unlikely that he is correct. In the first place, Ministerial appointments are necessarily political, and a court qualification would, surely, come into conflict with the principle of separation of powers. In the second place and as we have seen, the NPA has special Constitutional protection, which most government entities do not. In other words, the 'doctrine of legality' that the Simelane case establishes may only apply to those that do. If so, then departments, like the National Treasury, would be beyond the reach of this precedent.

Let us assume, for argument's sake, that such a doctrine has been established for all government entities. It is plausible that it has, for 'fit and proper' is a criterion for appointments in state organs beyond those specifically mentioned in the Constitution. To whom might it apply?

If we accept the distinction between political roles (covering the 'what' of government) and administrative roles (covering the 'how' of government) then the 'doctrine of legality' might apply to the latter; that is, to administrative-operational roles. What is important about the Simelane case is that, arguably, it begins to draw such a distinction. After all, it elaborates on the measure of a 'fit and proper' person in relation to the notion of 'operational autonomy'.

It is worth following the court's reasoning briefly.

In 2011 President Jacob Zuma appointed Menzi Simelane as the National Director of the National Prosecuting Authority. The Democratic Alliance challenged his appointment as irrational because, they argued, Simelane was not a 'fit and proper' person. In response, the Minister and Simelane argued that the President had wide discretion, including the right to determine the meaning of 'fit and proper'. In other words, they claimed that 'fit and proper' was a subjective criterion. The DA argued that 'fit and proper' was an objective assessment of competence and ethics. The court agreed with the DA, and its reasoning is instructive. It considered the notion of 'fit and proper' in relation to the notion of *'rationality'*.

> *"The conclusion that the process must [...] be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends" (s36).*

Hence, the executive can be challenged "if a step in the process bears no rational relation to the purpose for which it is conferred" (s37). In the case of the NPA, the power conferred on the President was to appoint someone trustworthy and with integrity who was suitably qualified to do the job. That Simelane had been found elsewhere to lack such qualities, meant that the President had made a misstep in the process and had, therefore, acted irrationally. If this definition of 'fit and proper' applies beyond the National Prosecuting Authority, then we have, in South Africa, a potentially very useful constraint on the politicisation of the state. Three important consequences follow from this: (i) Given that such a definition cannot and should not apply to political appointments, it must apply exclusively to administrative positions; (ii) In this way the court is confirming or even making an important distinction in South Africa, between political and administrative-operational appointments, aiii) the court has generated an objective test for senior appointments in government that rests on a test of rationality.

In the example of the National Treasury, the discretion of the President to appoint a minister of finance might not be so constrained, but the discretion of a Minister to appoint a Director-General or any other staff may be. In other words, if this did apply, then the courts could review whether a public service appointment was rational, that is, whether it supported the achievement of a departmental purpose. This would also go a long way to strengthen the Department of Public Service and Administration's (DPSA) 'competency framework, which is currently a non-binding criterion for evaluating the suitability of public servants.

In this way, the court has introduced a new principle of appointment: whether an appointment serves the purpose of the institution concerned. This is nothing less than a measure of **professionalism**. If this is so, it could be a tipping point in the struggle to build a capable state in South Africa.

Conclusion

In this report we have proposed a typology of appointment conditions based on three selection criteria: polity, political and policy conditions.

Type 1

Polity conditions:

conditions established by institutional arrangements of the political system and related to maintaining checks and balances. In general, they are expressed through legal rules or procedures that limit the discretion of politicians.

Type 2

Political conditions:

Conditions that emerge from political disputes, through which rulers seek to ensure the cohesion of their social and parliamentary coalitions. In general, they are expressed through formal and informal negotiations that express the division of power within a political arena.

Type 3

Policy conditions:

conditions that emerge from the challenges of policy implementation. They are related to the need for politicians to provide government agencies with skilled professionals to implement their agendas.

Based on this typology, we have shown that apart from the Chapter 9 institutions, appointments to key state institutions in South Africa are largely at the discretion of the President and/or of Cabinet Ministers. This arrangement lends itself to the privileging of political considerations over policy ones.

We have seen too that the courts have begun carving out a distinction between political and administrative positions in the name of securing the "structural and operational autonomy" of those bodies specifically protected in the Constitution. If the definition of 'fit and proper' elaborated in the context of the Simelane case (discussed above) applies to the government as a whole, then considerations of *professionalism* must take a privileged place in the appointment process.

In other words, the courts are beginning to expand polity conditions to include policy considerations. Despite scepticism that public service reform can be achieved through legislative reform, it would be a welcome development if the legal conditions of appointments in the South African civil service better balanced political conditions with policy criteria, that is, if the appointment process for heads of key state institutions calibrated political considerations with that of merit and the organisation's fundamental purpose.

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