

The Appointment of Constitutional Watchdog Leaders in Africa: The Case of South Africa's Public Protector

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Abstract

This article examines the appointment of constitutional watchdog leaders through the lens of the South African saga involving the former Public Protector, Busisiwe Mkhwebane. Democratic Alliance and Another v Public Protector of South Africa and Others (2023) serves as a point of departure to excavate the deeper fault lines that run through the bedrock of African constitutionalism. In the wake of South Africa's state capture scandal – a grotesque manifestation of the privatisation of the state – there was drama and the demise of Busisiwe Mkhwebane's tenure. This spectacle laid bare both the impossibility of the guardian role and the tensions inherent in the postcolonial state's efforts to reconcile the imperatives of democratic accountability with the lingering legacies of colonial governmentality. Against this backdrop, this article interrogates the efficacy of parliamentary processes in selecting watchdog leaders, questioning whether these mechanisms, steeped in traditions of Western liberal democracies, can truly produce guardians of constitutional integrity in the African context. It also probes the possibility of 'depoliticising' these appointments – a notion that is itself a political act imbued with its own set of power dynamics. Drawing on comparative law, institutional analysis and Foucauldian-decolonial thought, this study unravels the complex web of relations that govern the selection and performance of these sentinels. Methodologically, this qualitative and desktop study relies on the doctrinal reading of constitutional texts and case law, philosophical critique, and a purposive comparison of appointment modalities in South Africa, India, Kenya and Canada. The article's structure mirrors the labyrinthine nature of postcolonial statecraft, moving from historical background to theoretical framing, then dissecting the South African legal framework for investing the so-called 'Chapter 9 Institutions' before comparing it with its counterparts in India, Kenya and Canada. The article's key finding is that appointment procedures cannot escape the politics that envelop them; the quest for depoliticisation amounts to procedural fetishism. The article thus culminates in a thesis that challenges 'the best constitution' narrative in South Africa and conventional wisdom on institutional design and breaks with Western liberal models in favour of hybrid accountability mechanisms, such as a non-partisan council of elders, rooted in African relationality.

Keywords:

Appointment procedures, constitutional watchdogs, decoloniality, depoliticisation, elders' council, procedural fetishism, Public Protector, South Africa, *Ubuntu*.

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1. Introduction

To speak of constitutional guardianship in Africa is to enter the lion's den of postcolonial politics – a realm where the noble ideals of constitutionalism often find themselves ensnared in the brambles of partisan interests and the thorny legacies of colonialism. The opening equation is irreducibly philosophical: can an institution designed to embody a universalist, Enlightenment ideal of rational oversight thrive in a political reality shaped by the particularistic, usually violent, logics of sovereignty? The question that haunts us is, above all, existential: How do we appoint watchdogs who will not simply bark at the master's command but will truly guard the constitutional homestead against all intruders, including those who feed them? South Africa, with its much-lauded constitution, celebrated as 'the best in the world'¹ – reveals the impossibility of the guardian function. The saga involving Public Protector Advocate Busisiwe Mkhwebane² has shattered the complacent narrative of South African exceptionalism, exposing the Achilles' heel of even 'the best constitution' – the human element that animates its organs. Like detectives arriving after a crime has been committed, we must examine the footprints, fingerprints, and bloodstains left behind by this drama to understand the deeper pathologies at work.

This article interrogates a fundamentally political problem that masquerades as a technical one: the appointment of constitutional watchdogs in African postcolonies, homing in on South Africa's Public Protector. This problem crystallises a tension between two competing ideals: the Weberian notion of a rational-legal bureaucracy insulated from partisan whims,³ and the democratic principle of popular sovereignty that demands political control over all state apparatuses. The key research question is: To what extent can policymakers depoliticise parliamentary processes for appointing watchdogs in Africa, and is depoliticisation even desirable? The problem transcends mere mechanics of procedures; it cuts to the marrow of postcolonial sovereignty itself.

When we ask who should appoint the guardians, we are really asking: Who guards the guardians (*quis custodiet ipsos custodes*)? Though this is not a novel inquiry, it takes on a radical new intensity in the postcolony, where the lines between public and private, state

1 The South African Constitution of 1996 is frequently heralded as one of the most progressive constitutions globally, largely due to its foundational commitment to human rights and its distinct approach to socio-economic justice. The Constitution emerged from the country's tumultuous transition from apartheid to a democratic society, fostering a legal environment that prioritises the protection of civil rights and the eradication of historical injustices. See Fisher, R 'A Progressive Constitution' *Business Media MAGS* <<https://businessmediamags.co.za/xtrending/a-progressive-constitution/>> accessed 3 March 2025; Rustin, C 'What Gender Legislative Reforms Have Meant for Women in South Africa' (2021) 25 *Law, Democracy and Development* 47.

2 *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) ('PP v SARB'); *Commissioner of the South African Revenue Service v Public Protector and Others* 2020 (4) SA 133 (GP) ('SARS Commissioner v PP'); *Speaker of the National Assembly v Public Protector and Others*; *Democratic Alliance v Public Protector and Others* 2022 (3) SA 1 (CC) ('Speaker of the National Assembly v PP'); *Democratic Alliance and Another v Public Protector of South Africa and Others* 2024 (3) SA 1 (CC) ('DA v PP'); and *Public Protector of South Africa v Chairperson of the Section 194(1) Committee and Others* 2025 (4) SA 428 (SCA) ('PP v Sec 194(1) Committee Chairperson').

3 See Sager, F & Rosser, F 'Weberian Bureaucracy' in *Oxford Research Encyclopedia of Politics* (29 September 2021) <<https://boris-portal.unibe.ch/server/api/core/bitstreams/15e6f4e6-10de-4cd1-88fa-e87493012e06/content>> accessed 29 October 2025.

and market, sovereignty and capture perpetually blur.⁴ Moreover, when we ponder how to 'depoliticise' these appointments, we carry out what is itself an eminently political act – one that reinforces deeply-rooted configurations of power and knowledge that stem from their imperial genealogies.⁵ This article's central thesis, defended in section 5, is that the pursuit of 'depoliticisation' is a misguided procedural fetishism that obscures embedded dynamics; a more authentic path lies in devising nomination mechanisms that lay bare their underlying politics. Such mechanisms embrace a deliberative and participatory ethos that confers a deeper, more resilient form of legitimacy. They dwell on values flowing from democracy rather than ape Western liberal models that presume a mythical space beyond politics.⁶

Decoloniality requires that we engage affirmatively with African traditions, reimagining guardianship as an ombud not appointed by politicians but authorised by a non-partisan, extra-parliamentary council of elders grounded in a relational ontology such as *ubuntu*. The authority of such a council would derive from demonstrated care for communal well-being rather than partisan procedure. Far from a nostalgic return to a pre-colonial past, this reimagining treats African relationality as a living resource for designing its institutions. It asks what appointment processes would look like if legitimacy flowed not from parliamentary arithmetic but from a candidate's tested commitment to the community that he or she must serve. Section 5.4 elaborates the proposal in detail – its composition, its selection criteria, its gender safeguards, and the ways in which it redistributes, rather than denies, the politics of guardianship.

To probe the efficacy problem in recruiting watchdog leaders, this article weaves together three analytical strands: Foucauldian thought on power and knowledge,⁷ postcolonial theory (chiefly Achille Mbembe's work)⁸ and decoloniality.⁹ This tripartite framework allows us to see through the procedural veil to the command that inhabits constitutional design and praxis in Africa. Foucault supplies the diagnostics of power and knowledge that expose appointment procedures as techniques of government; Mbembe locates those techniques within the postcolony's distinctive regime of command; and decoloniality furnishes the normative impulse to imagine alternatives beyond inherited templates.

4 Mbembe, A *On the Postcolony* (University of California Press 2001) 51.

5 See Foucault, M *Discipline and Punish: The Birth of the Prison* (Vintage 1995).

6 See Habermas, J *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press, 1996); Santos, B de S *Epistemologies of the South: Justice Against Epistemicide* (Paradigm Publishers 2014).

7 Foucault *Discipline and Punish* (note 5); Foucault, M *The Archaeology of Knowledge and the Discourse on Language* (Vintage, 1982); Foucault, M *The History of Sexuality* (Pantheon Books, 1978); Foucault, M *The Order of Things: An Archeology of the Human Sciences* (Routledge 2002).

8 Mbembe *Postcolony* (note 4); Mbembe, A 'Provisional Notes on the Postcolony' (1992) 62 *Africa* 3.

9 Leading texts on decoloniality include Mignolo, WD & Walsh, CE *On Decoloniality: Concepts, Analytics, Praxis* (Duke University Press 2018); Ndlovu-Gatsheni, SJ 'Decoloniality as the Future of Africa' (2015) 10 *History Compass* 485; Ndlovu-Gatsheni, SJ 'Why Decoloniality in the 21st Century?' (2013) 48 *The Thinker* 10; Grosfoguel, R 'Decolonizing Post-Colonial Studies and Paradigms of Political-Economy: Transmodernity, Decolonial Thinking, and Global Coloniality' (2011) 1 *Transmodernity* 1; and Mignolo, WD 'Introduction: Coloniality of Thinking and De-Colonial Thinking' in Mignolo, WD & Escobar, A (eds) *Globalization and the Decolonial Option* (Routledge 2010).

The significance of this inquiry extends beyond South Africa's borders. As African nations grapple with the imperatives of democracy in environments marked by deep inequality, ethnic divisions and the lingering shadows of colonialism, the crucible of how to set up truly independent oversight bodies becomes paramount. This article enriches ongoing debates about constitutional design in the postcolony and dismantles universalist assumptions about best practices. In so doing, it fills a gap in the literature on Chapter 9 institutions, which has scrutinised the powers, performance and removal of watchdogs while largely taking for granted the appointment procedures themselves – and their sinister genealogies. The article's original contribution is accordingly twofold: a diagnosis of the 'procedural fetishism' that afflicts watchdog recruitments, and a model – the elders' council – that regrounds the sources of a guardian's legitimacy.

The structure of this article mirrors the labyrinthine complexity of its subject. Section 2 excavates the history and theory, situating the appointment of watchdogs within broader debates about postcolonial governance. Section 3 dissects the South African legal edifice for installing Chapter 9 institutions, focusing on the Public Protector. Section 4 compares and contrasts modalities for appointing sentinels in India, Kenya and Canada. Section 5 canvasses and upsets conventional wisdom about depoliticisation and proposes alternatives – especially the elders' council – for conceptualising watchdog appointments in Africa. The article concludes with thoughts on what its findings imply for constitutional worldmaking in the African postcolony.

2. The sovereign's shadow: Historical, theoretical and methodological foundations

2.1 From colonial surveillance to constitutional watchdogs

The genealogy of watchdogs in Africa cannot be divorced from the colonial technologies of surveillance and control that preceded them. From the late 19th century through the mid-20th century, the colonial state, with its panoptic gaze, sought to render native populations legible, countable and governable.¹⁰ This enacted a project of governmentality in the purest Foucauldian sense:¹¹ the 'conduct of conduct',¹² shaping subjects not through overt

10 Scholars like Foucault have documented the colonial state's surveillance mechanisms well. See Foucault *Discipline and Punish* (note 5) for a theoretical framework on surveillance and governance.

11 Taylor, D *Michel Foucault: Key Concepts* (Routledge, 2014) 179; Foucault, M 'Governmentality' in Burchell, G et al (eds) *The Foucault Effect: Studies in Governmentality* (University of Chicago Press 1991) 87–104. In essence, Foucault defines 'governmentality' as:

- a) *The ensemble formed by institutions, procedures, analyses, and reflections* – that is, the complex of knowledge and techniques that constitute 'the art of government'.
- b) *The historical process* by which the state assumes this art and becomes 'governmentalised'.
- c) *A specific form of power* that targets the population as its object, employs political economy as its major form of knowledge, and relies on apparatuses of security as its essential technical means.

Thus, governmentality does not merely denote the government, narrowly defined; it is the rationality of governing, a diffuse logic of control that extends to *all spheres of life* – from the management of states to the conduct of individuals.

12 Foucault defines 'conduct' as the most general sense of what he means by 'government': 'a form of activity aiming to shape, guide or affect the conduct of some person or persons'. See Burchell et al

force alone but through administrative routines, categorisation and the production of knowledge. Today's oversight bodies – ostensibly built to check power rather than amplify it – nonetheless inherit this surveillant logic,¹³ albeit reconfigured for democratic ends.

The emergence of constitutional watchdogs in postcolonial Africa represents a complex reconfiguration rather than a complete rupture with this past.¹⁴ The surveillant genealogy of these guardians is evident in South Africa's Public Protectors. Advocate Mkhwebane's tenure as Public Protector (2016–2023) was shadowed by her prior career in the State Security Agency (SSA)¹⁵ – that organ of intelligence-gathering that once furthered apartheid's morbid goals and later metamorphosed into a post-apartheid surveillance apparatus.¹⁶ Some loyalists and senior government officers of President Jacob Zuma accused Mkhwebane's predecessor, Advocate Thuli Madonsela, of espionage, after she sent a letter to President Zuma in August 2014 requesting that he give details on when he would respond to the recommendations in her report on his Nkandla homestead.¹⁷ They claimed that Madonsela operated as an agent of the United States Central Intelligence Agency (CIA).¹⁸ Ironically, Madonsela found herself watched, surveilled, threatened with death,¹⁹ and discursively transformed from constitutional sentinel into suspected agent of neo-imperialism.

(eds) *The Foucault Effect* (note 11) 2. Foucault's concept of the 'conduct of conduct' encompasses a set of techniques, institutions and discourses that shape how individuals regulate themselves and others. It links knowledge, power and subject formation, revealing how political rationalities organise life.

- 13 See, for example, Roberts T et al *Mapping the Supply of Surveillance Technologies to Africa: Case Studies From Nigeria, Ghana, Morocco, Malawi, and Zambia* (2023); Ogasawara, M 'Mainstreaming Colonial Experiences in Surveillance Studies' (2019) 17(5) *Surveillance and Society* 726; Birhane, A 'Algorithmic Colonization of Africa' (2020) 17(2) *SCRIPTed* 389, 389–395 and 398 (showing how artificial intelligence has invaded Africa in a manner that echoes colonial-era exploitation and that collecting, analysing and manipulating data potentially entails surveilling people).
- 14 Mbembe *Postcolony* (note 4) 14–16; see also Ogasawara (note 13).
- 15 News24 'Public Protector Nominee Mkhwebane on State Security Payroll, DA Claims' *Mail & Guardian* (7 September 2016) <<https://mg.co.za/article/2016-09-07-public-protector-nominee-mkhwebane-on-state-security-payroll-da-claims/>> accessed 1 November 2025; Viljoen, F 'Op-Ed: New Public Protector has to Allay Apprehensions' (Centre for Human Rights, University of Pretoria, 20 October 2016) <<https://www.chr.up.ac.za/opinion-pieces/1055-op-ed-new-public-protector-has-to-allay-apprehensions>> accessed 1 November 2025.
- 16 See Africa, S 'The South African Intelligence Services: A Historical Perspective' in Africa, S & Kwadjo, J (eds) *Changing Intelligence Dynamics in Africa* (GFN-SSR / ASSN 2009).
- 17 Sapa 'Madonsela Accused of Being a CIA Spy' *Mail & Guardian* (8 September 2014) <<https://mg.co.za/article/2014-09-08-madonsela-accused-of-being-a-cia-spy/>> accessed 2 November 2025; and Sapa & De Wet, P 'ANC: Madonsela-CIA Accusations "Unfortunate"' *Mail & Guardian* (8 September 2014) <<https://mg.co.za/article/2014-09-08-anc-madonsela-cia-accusations-unfortunate/>> accessed 2 November 2025.
- 18 Ibid.
- 19 Reuters 'Thuli Madonsela: There Is a Hit on My Life' *Al Jazeera* (9 May 2016) <<https://www.aljazeera.com/news/2016/5/9/thuli-madonsela-there-is-a-hit-on-my-life>> accessed 2 November 2025.

Much of the mainstream literature on African constitutionalism suffers from a severe amnesia, treating these sentinels as if they were novel imports with no historical baggage.²⁰ This treatment fails to critique the underlying ideological premises of the liberal state, which is taken as a universal norm. It ignores how these vigils, despite their democratic branding, perpetuate colonial-era governmentality by centralising oversight in elite-driven, often inaccessible, state bodies.

African constitutions have arranged their oversight institutions in approximate rows – creating semblances of order that we must nonetheless scrutinise closely.²¹ The Public Protector, the Human Rights Commission, the Auditor-General stand as citadels of the postcolonial landscape, intended to tame the Leviathan²² of state power. Yet we must ask: To what extent do these vigils express the authentic aspirations of African peoples for accountability, and to what extent do they reflect the institutional fetishism of international donors and constitutional consultants? Do they offer genuine avenues for recourse, or are they a new iteration of what Spivak called ‘epistemic violence’,²³ silencing indigenous and local forms of accountability by rendering them illegitimate? For instance, pre-colonial societies across Africa had sophisticated, if uncodified, mechanisms for holding power to account, rooted in communal councils, spiritual authority or kinship obligations. The modern watchdog, with its formalistic procedures and legalistic language, typically manifests an epistemology that is unintelligible to the majority of the population it is meant to serve.²⁴ The answer lies somewhere in the fissures of the postcolonial condition itself.

2.2 The state and the impossible guardian mission

The postcolony is characterised by a peculiar temporality – a time of entanglement

20 Scholars highlighting the absence of historical contextualisation from the mainstream literature include Dladla, N ‘Contested Memory’ (2017) 64(153) *Theoria* 101; Heleta, S ‘Decolonisation of Higher Education: Dismantling Epistemic Violence and Eurocentrism in South Africa’ (2016) 1(1) *Transformation in Higher Education* 1; Klug, H ‘Transformative Constitutionalism as a Model for Africa?’ in Dann, P et al (eds) *The Global South and Comparative Constitutional Law* (Oxford University Press 2020) 141–164; Modiri, JM ‘Race, History, Irresolution: Reflections on *City of Tshwane Metropolitan Municipality v Afriforum* and the Limits of “Post”-Apartheid Constitutionalism’ (2019) *De Jure* 52(1) 27–46; Muma, EC ‘Transformative Constitutionalism in Post-Colonial Africa: A Framework for Democracy and Human Rights Protection’ (2018) 3(1) *International Journal of Emerging Trends in Social Sciences* 29; and Niemand, L ‘Moving Beyond the Abyssal Line: The Possibility of Epistemic Justice in the “Post”-Apartheid Constitutionalism’ (2023) 16(1) *Pretoria Student Law Review* 216.

21 See also Murphy, J & De Vrieze, F *Independent Oversight Institutions: Guide for Parliaments* (WFD 2020).

22 Central to Thomas Hobbes’ argument in *Leviathan* is the premise that a strong sovereign authority – referred to as the Leviathan – is essential for maintaining social order and ensuring peace among individuals in a state characterised by inherent competition and conflict. See Hobbes, T *Leviathan* (1985). See also Finholt, HC ‘International Human Rights Protections Find Support in Hobbes’ *Leviathan*’ (2022) 7(3) *Philosophies* 47.

23 Spivak, GC ‘Can the Subaltern Speak?’ in Nelson, C & Grossberg, L (eds) *Marxism and the Interpretation of Culture* (University of Illinois Press 1988) 76–77, 82 and 90.

24 See also Santos (note 6) viii, 8, 12–14 and 118–124. Santos contends that modern legal-constitutional institutions embody ‘abyssal thinking’ – a mode of knowledge that legitimises exclusion through formalism and abstraction, and that thus manifests an epistemology incomprehensible and inaccessible to those on the ‘other side of the line’.

where multiple temporalities coexist in creative tension.²⁵ This temporal complexity circumscribes constitutional design. The watchdogs enshrined in African constitutions must steer through not only the formal laws but also the informal networks of power,²⁶ the ancestral authorities²⁷ and the multinational corporations²⁸ that constitute the real architecture of governance. When we speak of appointing watchdogs in this context, we confront a paradox of sovereignty. The postcolonial state, while jealously defending its formal sovereignty on the global stage,²⁹ often discovers this sovereignty internally fractured,³⁰ distributed among various power centres, such as political parties,³¹ traditional authorities, multinationals³² and international donors.³³ This condition of 'government at a distance',³⁴ where key decisions affecting citizens are made outside the state apparatus, poses an impossible mandate for constitutional sentinels. Their mandates oblige them to police a territory where the sovereign is both everywhere and nowhere. These watchdogs must patrol this fractured terrain, where sovereignty itself is a contested commodity rather than a settled fact.

25 Mbembe *Postcolony* (note 4) 14–16.

26 Bovens, M & Wille, A 'Indexing Watchdog Accountability Powers: A Framework for Assessing the Accountability Capacity of Independent Oversight Institutions' (2021) 15(3) *Regulation and Governance* 856, 862 (remarking that, with political appointments, there is a risk that political loyalties may trump professional judgment even if the leader of the oversight body possesses relevant degrees and work experience in similar positions).

27 See, for example, Adera, A 'Ancestral Institutions and the Salience of African Ethnicity: Theory and Evidence' (2024) 20 *Journal of Institutional Economics* 1, 2 (noting how colonialism has increased the salience of ethnicity in present-day Africa).

28 See, for example, Kolk A & Lenfant F 'Multinationals, CSR and Partnerships in Central African Conflict Countries' (2013) 20(1) *Corporate Social Responsibility and Environmental Management* 43.

29 Bonilla, Y 'Unsettling Sovereignty' (2017) 32(3) *Cultural Anthropology* 330; Brahm, E 'Sovereignty' (2004) *Beyond Intractability* <<https://www.beyondintractability.org/essay/sovereignty>> accessed 2 March 2025; Sadiq, K & Tsourapas, G 'The Postcolonial Migration State' (2021) 27(3) *European Journal of International Relations* 884.

30 See, for example, Jaffe, R 'From Maroons to Dons: Sovereignty, Violence and Law in Jamaica' (2015) 35(1) *Critique of Anthropology* 47; Brahm (note 29).

31 Kopecký, P et al 'Party Patronage in Contemporary Democracies: Results From an Expert Survey in 22 Countries From Five Regions' (2016) 55(2) *European Journal of Political Research* 416 (based on a dataset of party patronage in 22 countries from five regions, finding that party patronage – the power of political parties to appoint people in the public and semi-public sectors – is widespread across all regions, albeit at varying degrees); Bilchitz, D et al 'Assessing the Performance of the South African Constitution' International Institute for Democracy and Electoral Assistance (2016) at 11, 68 and 86–87 <<https://constitutionnet.org/sites/default/files/2022-02/assessing-the-performance-of-the-south-african-constitution.pdf>> accessed 3 March 2025.

32 See Bonilla (note 29); Ndlovu-Gatsheni, SJ *Coloniality of Power in Postcolonial Africa: Myths of Decolonization* (2013); Brahm (note 29).

33 Araoye, A 'Hegemonic Agendas, Intermesticity and Conflicts in the Post-Colonial State' (2012) *African Journal on Conflict Resolution* <<https://www.accord.org.za/ajcr-issues/hegemonic-agendas-intermesticity-and-conflicts-in-the-post-colonial-state/>> accessed 2 March 2025; Brahm (note 29).

34 Rose, N & Miller, P 'Political Power Beyond the State: Problematics of Government' (1992) 43(2) *British Journal of Sociology* 173.

The genealogy of the watchdog produces an aporia that unveils the impossibility of the guardian role. The Public Protector should, at the same time, personify the state (as a constitutional body) and stand against the state (as a check on state power).³⁵ This structural double-bind of the guardian function – tasked with shielding citizens from the state while deriving authority from that very state – explains why these sentinels inevitably fail to interrupt state capture, corruption, and misgovernance at the highest level. This impossibility is exemplified by the daunting obstacles Madonsela faced when she encountered state capture linked to the Gupta family under President Zuma, and by what Mkhwebane experienced when she investigated President Cyril Ramaphosa, most notably in the ‘Phala Phala’ matter.³⁶

2.3 Power, knowledge and constitutional design

Scripting appointment mechanisms for watchdogs is never a neutral technicality. It is, rather, a profoundly political act³⁷ that encodes particular epistemologies and ontologies of governance.³⁸ When South Africa’s constitution-makers opted for a parliamentary appointment scheme for the Public Protector, they embedded certain assumptions about democratic legitimacy, partisan balance and public accountability in this choice.³⁹ These assumptions are themselves products of specific regimes of knowledge and power. The notion that a parliamentary committee – composed of partisan actors yet somehow expected to transcend partisanship – can select a truly independent watchdog betrays

35 Constitution of the Republic of South Africa, 1996, ss 181(2)–(3) and 182; see also Mbembe *Postcolony* (note 4).

36 The Phala Phala case involved a group of people who stole a large sum of undeclared foreign currency from President Cyril Ramaphosa’s private Phala Phala game farm in 2020. The stolen money was reported to be hidden inside a couch on the farm. This incident led to allegations of money laundering, kidnapping and a cover-up, with investigations scrutinising whether Ramaphosa had violated laws or ethics by omitting to report the theft and properly declare the cash. Ramaphosa suspended Mkhwebane two days after she wrote him a letter informing him that she had commenced a probe into the theft of foreign currency from his Phala Phala game farm after she received a complaint. The complaint was actually filed by former spymaster, Arthur Fraser, who had headed the SSA from 2016 to 2018. See Ferreira, E ‘Constitutional Court Holds Ramaphosa’s Suspension of Mkhwebane Was Valid’ *Mail & Guardian* (13 July 2023) <<https://mg.co.za/politics/2023-07-13-constitutional-court-holds-ramaphosas-suspension-of-mkhwebane-was-valid/>> accessed 2 November 2025; and Parliament of the Republic of South Africa, Report of the Section 89 Independent Panel Volume 1 (30 November 2022) <<https://www.parliament.gov.za/storage/app/media/Links/2022/november/30-11-2022/33659%20Section%2089%20Independent%20Panel%20Volume%201.pdf>> accessed 2 November 2025.

37 See also Hidalgo, FD, Canello J & Lima-de-Oliveira, R ‘Can Politicians Police Themselves? Natural Experimental Evidence from Brazil’s Audit Courts’ (2016) 49(13) *Comparative Political Studies* 1739 (finding that, even when meritocratic and professional requirements heavily constrain executives in their appointment of auditors, auditors still exhibit a pro-politician bias in decision-making).

38 See generally Dolan, N & Bennett, CJ ‘What is an Ombudsperson? Global Diffusion, International Standardization, and Institutional Diversification’ (2018) 17(4) *Political Studies Review* 370, 373–376.

39 Bazana, S & Reddy, TK ‘A Critical Appraisal of the Recruitment and Selection Process of the Public Protector in South Africa’ (2021) 19 *SA Journal of Human Resource Management* 1.

what one might call the magical thinking⁴⁰ of liberal constitutionalism.⁴¹ This framework advances the thesis that rational procedures can produce apolitical outcomes. However, the postcolonial reality advances an antithesis: Entrenched networks and histories of struggle estrange procedure from neutrality; every appointment is a political contest. The imperative, then, is to forge a synthesis – not a depoliticised utopia, but a mechanism that channels contestation in a transparent and democratically productive way.

This magical thinking presupposes the possibility of a space beyond politics, a neutral ground from which oversight can be exercised. Nonetheless, as Foucault has attuned us to perceive, 'power is everywhere, not because it embraces everything, but because it comes from everywhere.'⁴² To imagine the depoliticisation of watchdog appointments is thus to chase a fantasy – one premised on denying the ubiquity of power dynamics rather than engaging with it critically and creatively. This fantasy has salience in postcolonies, where the professed neutrality of constitutional procedures seamlessly masks their embeddedness in imperial, Western-liberal epistemologies that refuse to account for different conceptions of community, authority, and justice.⁴³

2.4 Philosophy and methodology

This article adopts a post-structuralist, decolonial-Foucauldian philosophy. Ontologically, it maintains that social reality, including legal and constitutional orders, is not a given but is continuously constructed through power and discourse. Epistemologically, it rejects the notion of a neutral, objective vantage point from which to observe these phenomena. Instead, it asserts that all knowledge is situated and partial.⁴⁴ Accordingly, this article does not seek to identify a single 'correct' model for watchdog appointments; it deconstructs the axioms

40 Magical thinking is a cognitive paradigm characterised by the belief that one's thoughts, actions or rituals can directly influence outcomes in ways that defy conventional understanding of causality. This phenomenon occurs when individuals form connections between events that are not grounded in empirical or logical reasoning. For example, a person might believe that wearing a certain pair of socks could influence the outcome of a sporting event, despite no scientific basis for this belief. This type of thinking usually provides a sense of control or agency over unpredictable circumstances, fulfilling psychological needs, especially in stressful situations (see Berle, D & Starcevic, V 'Thought–Action Fusion: Review of the Literature and Future Directions' (2005) 25(3) *Clinical Psychology Review* 263).

41 The concept of 'magical thinking' in the context of liberal constitutionalism refers to the notion that certain ideals, such as the protection of rights, democratic governance and the rule of law, can be upheld in practice simply by being integrated into a legal framework or constitutional document. This can lead to a disconnect between the theoretical principles of liberal constitutionalism and their actual implementation, often resulting in a precarious situation characterised by a sense of optimism that fails to account for real-world complexities and challenges. For another critique of liberal constitutionalism, see Hutchinson, A & Colón-Ríos, JI 'What's Democracy Got to Do With It? A Critique of Liberal Constitutionalism' (2007) *Comparative Research in Law and Political Economy* <<https://digitalcommons.osgoode.yorku.ca/clpe/245/>> accessed 2 March 2025.

42 Foucault *History of Sexuality* (note 7) 93.

43 See also Tully, J *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press 1995).

44 Ndlovu-Gatsheni, SJ *Epistemic Freedom in Africa: Deprovincialization and Decolonization* (Routledge 2018).

of existing models and opens up new possibilities. This philosophy requires a self-aware acknowledgement of the author's own positionality as an African-born scholar navigating theories mainly from the Global North to interpret phenomena in the Global South. The author's positionality as a jurist based in the Global South – having taught full-time at universities in Namibia, South Africa and India – shapes this perspective in crucial ways. The author writes from postcolonial universities in Africa yet participates in cross-border academic networks moulded by Western epistemologies and takes apart constitutional mimicry while necessarily using conceptual categories devised in Euro-American contexts. Still, this reflexive positionality is not a limitation but a tool, allowing for a 'hermeneutics of suspicion' turned not only upon the object of study but upon the tools of analysis themselves.⁴⁵

This philosophy and positionality justify the methodology employed in this article: doctrinal exegesis of the *Democratic Alliance* case and relevant constitutional provisions; philosophical inquiry into the Public Protector saga; and institutional comparisons examining appointment modalities in South Africa, India, Kenya and Canada. The doctrinal method entails reading constitutional texts closely (especially Chapter 9 of South Africa's 1996 Constitution), statutes governing appointments of sentinels, and judgments from 2019–2024 that considered disputes arising from Public Protector Mkhwebane's tenure.⁴⁶ This article selected India, Kenya and Canada through purposive sampling to typify distinct families: India exemplifies postcolonial constitutionalism, which enlists judges in appointments; Kenya epitomises newer African constitutional experimentation with participatory mechanisms; and Canada figures as a Westminster counterpoint lacking a constitutionally entrenched ombudsman but offering enlightening insights into how political culture shapes hiring norms. The philosophical inquiry – perhaps the most distinctive methodological layer – deploys decoloniality and Foucauldian genealogy to excavate the power-knowledge regimes nested within institutional design choices. This qualitative, desktop research does not collect any empirical data; it rests solely on existing sources – constitutional texts, statutes, case law and scholarly literature – which it dissects through the three strands sketched above. The doctrinal strand interprets the primary legal materials; the philosophical strand submits both to genealogical and decolonial critique; and the comparative strand juxtaposes institution design choices across the four jurisdictions.

Admittedly, the methodology of this article evolves within largely Western scholarly traditions – the doctrinal method from European legal formalism, and even Foucauldian genealogy from French critical theory – generating methodological tensions that mirror the substantive ones that this article interrogates. Nevertheless, both the theory of decoloniality and 'the epistemologies of the South'⁴⁷ on which this article heavily relies outweigh its Eurocentric aspects. Moreover, the orthodox methods are deployed with

45 A method of interpretation that Paul Ricoeur coined and that questions surface meanings, the 'hermeneutics of suspicion' attempts to uncover hidden, underlying motives, structures or power dynamics within texts. See Ricoeur, P *Freud and Philosophy: An Essay on Interpretation* (Yale University Press 1977).

46 See Hutchinson, T & Duncan, N 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83.

47 Santos (note 6); see also Ndlovu-Gatsheni 'Decoloniality as the Future of Africa' (2015)' (note 9).

reflexivity, with an alertness to how they might reproduce the very epistemic violence they purport to undo. And to bolster trustworthiness, the article triangulates across the three strands (doctrinal, comparative and philosophical, converging on similar insights about the limits of proceduralism), engages with counterarguments through stress-testing of the 'procedural fetishism' thesis, and grounds abstract theoretical claims in the concrete particulars of the Mkhwebane affair.

This methodological pluralism responds to the multifaceted nature of the problem itself – at once legal, political and cultural. The ethical rationale for this work rests on a fidelity to enhancing democracy and giving voice to the 'subaltern' subjects⁴⁸ of constitutional law – the citizens in whose name these institutions are built but from whose hands their control is often kept. This fidelity reflects the high standard expected of constitutional actors, a standard the Constitutional Court itself articulated when reminding the Public Protector that 'the Public Protector falls into the category of a public litigant. A higher duty is imposed on public litigants, as the Constitution's principal agents, to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights.'⁴⁹

3. The anatomy of appointment: South Africa's legal framework

3.1 Chapter 9 Institutions: The constitutional architecture

South Africa's 1996 Constitution – that much-vaunted document described as 'the best in the world'⁵⁰ – establishes six independent institutions in its ninth chapter, collectively known as the 'Chapter 9 institutions'. These include the Public Protector; the South African Human Rights Commission (SAHRC); the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Rights Commission); the Commission for Gender Equality (CGE); the Auditor-General; and the Electoral Commission.⁵¹ These institutions are 'independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.'⁵²

This architecture envisions these institutions as sentinels standing guard over South Africa's democracy, equipped with the legal weaponry to investigate, report, and remedy misconduct, maladministration and rights violations. In a unanimous judgment penned by Chief Justice Mogoeng, the Constitutional Court described the Public Protector in heroic terms as:

one of the most valuable constitutional gifts to our nation in the fight against corruption ... She is the embodiment of a biblical David, that the public is, who fights the most powerful and very well resourced Goliath, that impropriety and corruption by government officials are.⁵³

48 See Spivak (note 23).

49 *PP v SARB* (note 2) para 155.

50 See note 1; Constitution, s 181(1).

51 Section 181(1) of the Constitution.

52 Section 181(2) of the Constitution.

53 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC).

Yet, as the saga of Public Protector Busisiwe Mkhwebane has revealed,⁵⁴ these architectural features are only as solid as the human materials from which they are constructed.

3.2 Appointing the Public Protector: Process and politics

The appointment of the Public Protector and the members of any commission established by Chapter 9 of the South African Constitution⁵⁵ illustrates the gulf between the ideal of independence and the reality of neopatrimonial meddling.⁵⁶ Section 193 of the Constitution stipulates that the Public Protector must be formally appointed by the President, as Head of the National Executive, on the recommendation of the National Assembly,⁵⁷ following a process that: (a) involves a committee of the Assembly proportionally composed of members of all parties represented in the Assembly;⁵⁸ and (b) requires a resolution of the Assembly supported by at least 60% of the members.⁵⁹ This process, with its supermajority requirement and multi-party committee stage, ostensibly aims to ensure that the Public Protector enjoys broad support and thus stands above factional noise. Yet, as *Democratic Alliance v Public Protector* shows, this procedural superstructure cannot escape the gravitational pull of politics.

3.3 The *DA v PP* Case: Exposing the fault lines

*Democratic Alliance and Another v Public Protector*⁶⁰ serves as a stark reminder that constitutional procedures, however well-designed, cannot transcend the neopatrimonial contexts in which they operate. The case centred on the impeachment proceedings against Public Protector Busisiwe Mkhwebane, whose tenure was marked by controversial reports and court setbacks.⁶¹

The acts and events implicating Public Protector Mkhwebane resulted in five major judgments. First, on 22 July 2019, the Constitutional Court dismissed Mkhwebane's application to set aside a High Court judgment that ordered her to pay 15% of the costs in the Absa/Bankorp case from her own pocket.⁶² This judgment questioned the integrity of

54 See Bazana & Reddy (note 39).

55 See s 193 of the Constitution.

56 Neopatrimonialism is a type of rule in which formal, modern state institutions coexist with – and are often subverted by – informal, patrimonial practices such as patronage, clientelism and the use of public office for personal gain. Shmuel N Eisenstadt introduced 'modern neopatrimonialism' as a distinct concept and term in *Traditional Patrimonialism and Modern Neopatrimonialism* (Sage 1973), building on Max Weber's original notion of patrimonial rule, understood as personal domination by a ruler over administration and resources as if they were his private household. The concept of neopatrimonialism originated in the context of efforts by Eisenstadt and other comparative political sociologists to explain how postcolonial and 'developing' states combined imported, formal bureaucracies with enduring informal networks of personal rule and patronage, particularly in Africa and parts of Asia and Latin America.

57 Section 193(4) of the Constitution.

58 Section 193(5)(a) of the Constitution.

59 Section 193(5)(b)(i) of the Constitution.

60 *DA v PP* (note 2).

61 See Gerber, J & Maughan, K 'IMPEACHED: Seven Years of Busisiwe Mkhwebane' *News24 Special Projects* (13 April 2025) <<https://specialprojects.news24.com/impeached-seven-years-of-busisiwe-mkhwebane/index.html>> accessed 8 November 2025; Bazana & Reddy (note 39).

62 *PP v SARb* (note 2). For a critique of this judgment, see Zongwe, DP 'Public Protector v South African Reserve Bank 2019 (6) SA 253 (CC)' (2020) 3(2) *SAIPAR Case Review* 66.

the Public Protector Mkhwebane's office.⁶³ Second, eight months later, on 23 March 2020, the Pretoria High Court intensified this critique in a separate matter, overturning one of Mkhwebane's reports with a withering rebuke that she 'either misunderstood the law or if she understood it, she simply ignored it' and that she acted 'unreasonably, arbitrarily and in bad faith'.⁶⁴ Third, on 4 February 2022, the Constitutional Court ruled that the state has a duty to provide Mkhwebane with legal representation during the section 194 inquiry⁶⁵ – the process whereby the National Assembly determines whether to remove the leader or a commissioner of a Chapter 9 institution due to misconduct, incapacity or incompetence.⁶⁶ Fourth, on 14 June 2023, the Constitutional Court handed down its ruling in *DA v PP*. The court rejected Mkhwebane's urgent application for direct access, which sought various outcomes, including declarations against the Speaker of the National Assembly and the chairperson of the Section 194 Committee.⁶⁷

Finally, on 1 October 2024, the Supreme Court of Appeal struck Mkhwebane's appeal from the roll with costs, to be paid by her personally.⁶⁸ From the outset, the court noted the curiosity of the situation:

The appeal to this Court was initially brought in the name of 'The Public Protector of South Africa', even though the person whose interests it seeks to advance, the previous Public Protector, Ms Busisiwe Mkhwebane, had by that stage already been removed from office.⁶⁹

Thus, this judgment addressed issues related to her removal from office and her efforts to continue litigation in the name of the Public Protector after her removal. Mkhwebane's ordeal unfolded through a cascade of judicial reprimands from 2019 to 2024, eroding the authority of the office she held. The Constitutional Court's 2019 judgment in *PP v SARB* marked the first major fissure. The majority judgment, by Khampepe J and Theron J, delivered a devastating censure of Mkhwebane's conduct, finding she had 'not [been] honest' about her investigative engagement⁷⁰ and had proffered a 'number of falsehoods' and perjured 'misstatements'.⁷¹

The Public Protector has not been candid about the meetings she had with the Presidency and the State Security Agency before she finalised the report. The Public Protector's conduct in the High Court warranted a *de bonis propriis* (personal) costs order against her because she acted in bad faith and in a grossly unreasonable manner.⁷²

This conclusion – that the Public Protector herself lacked integrity – bears a sharp irony: the guardian appointed to safeguard probity stood accused of its absence. Together,

63 Whereas Mogoeng CJ and Goliath AJ dissented, the majority judgment written by Khampepe J and Theron J held that the Public Protector was 'not honest' about her engagement during the relevant investigation. See *PP v SARB* (note 2) paras 63, 207 and 237.

64 *SARS Commissioner v PP* (note 2) para 24.

65 *Speaker of the National Assembly v PP* (note 2).

66 Section 194 of the Constitution.

67 *DA v PP* (note 2).

68 *PP v Section 194(1) Committee Chairperson* (note 2).

69 *Ibid.*

70 *PP v SARB* (note 2) para 207.

71 *Ibid* para 237.

72 *Ibid* para 205.

these judgments established a pattern of judges' exasperation with the Public Protector's methodology and motivations, suggesting either fundamental incompetence or wilful disregard for legal norms – neither of which could sustain the office's legitimacy. Yet, though judges dismantled her substantive work, the Constitutional Court in *Speaker of the National Assembly v PP* conceded a safeguard. The law obliged the state to provide Mkhwebane with representation during the section 194 inquiry into her fitness for office. The apex court invalidated a parliamentary rule that limited the Public Protector's right to counsel during the impeachment. The court's invalidation of that rule consecrated the paramountcy of procedural fairness. Justice Mhlantla, writing for a unanimous court, asserted: 'A reasonable and fair procedure requires full legal representation. It does not rationally follow that full legal representation detracts from accountability.'⁷³ This assertion recognised that even a failing watchdog deserved procedural fairness in her own reckoning.

The denouement arrived through two decisive judgments that sealed Mkhwebane's fate, and that illuminated wider rifts between institutional design and political accountability. In 2023, the Constitutional Court in *DA v PP* rejected Mkhwebane's urgent application for direct access and declined to issue declarations against the Speaker of the National Assembly and the section 194 committee chairperson – effectively refusing to interrupt the parliamentary process that would culminate in her removal three months later. The judges' restraint embodied a delicate constitutional calculus: Courts would scrutinise parliamentary procedures for legality but would not supplant parliamentary sovereignty in matters quintessentially political. The Supreme Court of Appeal's 2024 judgment – delivered a year after Mkhwebane's removal – tackled her efforts to continue litigation in the Public Protector's name after losing office. This final judgment carried symbolism beyond its immediate procedural resolution: it signalled that a former occupant cannot weaponise the office for personal vindication once their tenure ends, drawing a clear boundary between the office as a vessel and the individual who temporarily inhabits it.

These five judgments narrate how the judiciary, the legislature, and the executive struggled to police constitutional boundaries when political appointments produced officeholders whose conduct undermined the very independence their positions were designed to preserve. This struggle unmasks the impossibility – if not the fragility – of the guardian role when procedural correctness in appointment fails to ensure substantive fitness for office. These judgments collectively paint a picture of Mkhwebane's embattled tenure as Public Protector, peaking with her removal from office on 11 September 2023. On that date, the National Assembly adopted the section 194 committee's report, voting in favour of removing Mkhwebane from office for 'misconduct' and 'incompetence'.⁷⁴ A total of 318 members of Parliament (more than the required two-thirds) voted to unseat Mkhwebane, 43 voted against, and one abstained.⁷⁵ Therefore, President Ramaphosa fired

⁷³ *Speaker of the National Assembly v PP* (note 2) para 47.

⁷⁴ See also Gerber & Maughan (note 63).

⁷⁵ Parliament of South Africa 'National Assembly Resolves to Remove Advocate Busisiwe Mkhwebane from the Office of the Public Protector' (8 September 2023) <<https://www.parliament.gov.za/press-releases/national-assembly-resolves-remove-advocate-busisiwe-mkhwebane-office-public-protector>> accessed 2 March 2025.

Mkhwebane on 12 September 2023, two days before her term expired.⁷⁶ Mkhwebane made history in South Africa as the first head of a Chapter 9 institution to be ousted from office.

The impeachment exposed several fault lines in South Africa's constitutional architecture. To begin, it revealed the friction between parliamentary sovereignty and judicial review, as courts were asked to adjudicate what was essentially a political manoeuvre. Second, it highlighted the difficulty of distinguishing between bona fide criticism of a watchdog's performance and partisan attacks motivated by malice or opportunism. For example, when President Ramaphosa suspended Mkhwebane shortly after she initiated a probe into the Phala Phala farm scandal, the High Court initially found that the timing evinced an improper motive. The court inferred that:

[T]he hurried nature of the suspension of the [Public Protector] in the circumstances, notwithstanding that a judgment was looming on the same subject matter, leads this court to an ineluctable conclusion that the suspension may have been retaliatory and, hence, unlawful. It was certainly tainted by bias of a disqualifying kind and perhaps an improper motive.⁷⁷

Although the Constitutional Court later overturned this finding on appeal, the initial ruling nonetheless underlines the judiciary's role in evaluating executive actions that people may perceive as interfering with a watchdog's autonomy. Third, the Mkhwebane affair underscored the obstacle to maintaining institutional independence in a context where partisan identities often override constitutional obligations. Crucially, through this affair, we should see more than a political failure; we should see a failure of a certain kind of legal imagination. The dominant interpretation, reflected in court judgments and media commentary, frames Mkhwebane as a flawed individual who failed a sound system.

A 'hermeneutics of suspicion', however, invites an alternative reading. Could it be that Mkhwebane's fraught tenure was not an aberration, but an inevitable symptom of a system that places someone in an impossible position? The Constitution expects the Public Protector to be an impartial referee hired by the players themselves. This creates a paradox in which any action is immediately interpreted through a political prism, making genuine impartiality not just incredibly hard to achieve but a mirage in a hyper-partisan environment. Focused on rules and procedures, black-letter law cannot grasp this underlying paradox. It defines the problem as one of individual misconduct rather than structural contradiction, demonstrating once again that doctrine itself is never value-neutral but conceals an unstated commitment to a formalist view of law that brackets out political reality.⁷⁸

⁷⁶ See also Gerber & Maughan (note 63).

⁷⁷ *DA v PP* (note 2) para 130 (quoting paras 155 and 157 of the High Court decision).

⁷⁸ See also Derrida, J 'Force of Law: The "Mystical Foundation of Authority"' in Cornell, D et al (eds) *Deconstruction and the Possibility of Justice* (Routledge, 1992) 3–67 (deconstructing the presentation of the law as a neutral and rational system to show that it is a 'legitimate fiction' that brackets out or, in his terms, 'represses' and 'dissimulates' its own non-neutral, political, and violent origin).

4. Comparative perspectives: Global patterns, local variations

4.1 India: Judicial dominance in watchdog appointments

India, like South Africa, has grappled with the dilemma of designing appointment regimes that balance political legitimacy with institutional independence.⁷⁹ The appointment of the Indian Lokpal (Ombudsman) involves the President and a selection committee comprising the Prime Minister (as Chairperson), the Speaker of the House of the People, the Leader of the Opposition, the Chief Justice of India and an eminent jurist nominated by the President.⁸⁰ The committee recommends candidates to the President, who then appoints the chairperson and members of the Lokpal based on that recommendation.⁸¹

This schema differs from South Africa's in its explicit inclusion of lawyers (ie the Chief Justice and the eminent jurist) and its more compact committee structure. This schema translates a different outlook, reposing greater faith in judges' wisdom to temper politicians' excesses. It seeks to resolve the tension by creating a 'guardianship of the wise', which presumes that legal elites are the best custodians of constitutional values. However, this raises its own set of normative contradictions, namely the counter-majoritarian difficulty and the risk of entrenching an unaccountable 'juristocracy'.⁸²

Furthermore, this model has also faced criticism for political interference and appointment delays.⁸³ The Indian record indicates that enlisting figures from the legal profession in designating sentinels does not necessarily insulate these processes from neopatrimonial pressures.⁸⁴ For South Africa, the Indian experience carries a pointed lesson. Judicialising the appointment of the Public Protector – say, by adding the Chief Justice to the section 193 committee – would merely relocate, not resolve, the politics that this article traces through parliament. Where the Lokpal wagers on a 'guardianship of the wise', the elders' council developed in section 5.4 of this article disperses guardianship across constituencies whose authority rests on communal standing rather than legal office, sidestepping both the counter-majoritarian difficulty and the mirage of expert neutrality. The Indian counterexample thus strengthens the case for grounding a watchdog's legitimacy in sources beyond both parliament and the bench.

4.2 Kenya: Technocratic-political model

Kenya's 2010 Constitution established a more participatory paradigm for installing oversight

79 The Lokpal and Lokayuktas Act, 2013 (India), ss 3-4; see generally Dolan & Bennett (note 38).

80 Section 4(1) of the Lokpal and Lokayuktas Act, 2013 (Act 1 of 2014, India) ('the Lokpal Act').

81 Section 4(1) and (3) of the Lokpal Act.

82 See Hirschl, R *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004).

83 Sadashivam, T & Tabassum, S 'India's Anti-Corruption Ombudsman-Lokpal: An Analysis' (2023) 70(1) *Indian Journal of Public Administration* 55; NEXT IAS 'Anti-Corruption Institutions in India' (NEXT IAS, 2024) <<https://www.nextias.com/blog/anti-corruption-institutions-in-india/>> accessed 3 March 2025; Jha, RR 'India's Anti-Corruption Authorities: Lokpal and Lokayukta' (2018) 64(3) *Indian Journal of Public Administration* 502.

84 See also Sadashivam & Tabassum (note 85); Jha (note 85).

bodies such as the Commission on Administrative Justice (CAJ),⁸⁵ the Kenyan equivalent of the Public Protector. The recruitment proceeds through public advertisement,⁸⁶ selection by a multi-stakeholder panel,⁸⁷ nomination by the President,⁸⁸ parliamentary approval⁸⁹ and presidential appointment.⁹⁰ Despite shortcomings in its ability to investigate cases,⁹¹ Kenya's model is noteworthy for its emphasis on professional vetting before political approval. This aligns with the Habermasian concept of a deliberative public sphere.⁹² In other words, it seeks to ground the legitimacy of the appointment not solely in parliamentary representation but also in public reason – that is, in justifications that citizens, civil society and professional bodies can scrutinise and accept – by enlisting those actors in the initial selection forum. This model recognises that, in divided societies, parliament itself may not be seen as a neutral arbiter. It commits to the idea that technical expertise and public participation should precede and mould political choice, rather than being subject to it.

Kenya's experience speaks most directly to this article's proposal. Its sequenced choreography – professional vetting before electoral choice – prefigures the professional-popular-political formula elaborated upon in section 5.4, whereas its shortcomings, from presidential influence at the nomination stage to capacity deficits in investigation, chart the pitfalls that any South African adaptation must avoid. What the Kenyan CAJ still lacks, and what the elders' council provides, is an extra-parliamentary source of authority rooted in African relationality rather than in technocratic proceduralism alone.

4.3 Canada: Parliamentary officers and executive appointments

Canada does not have a direct equivalent to South Africa's Public Protector. Unlike South Africa, which has a national Ombudsman or Public Protector with extensive powers enshrined in its Constitution, Canada displays a more decentralised system of ombudsman institutions.⁹³ At the federal level, Canada does not have a general ombudsman, though some stakeholders have called for the creation of one.⁹⁴ Instead, Canada opted for

85 Section 59(4) of the Kenyan Constitution, 2010, empowers Parliament to restructure the Kenya National Human Rights and Equality Commission 'into two or more separate commissions'. Section 3 of the Commission on Administrative Justice Act 23 of 2011 (Kenya) establishes the CAJ.

86 Section 11(4) of the Commission on Administrative Justice Act 23 of 2011 (Kenya) ('the CAJ Act').

87 Section 11(1)–(5), read with s 11(13), of the CAJ Act.

88 Section 11(5)–(6), read with s 11(10)–(11) and (13), of the CAJ Act.

89 Section 11(6)–(8), read with s 11(10)–(13), of the CAJ Act.

90 Section 11(8)–(9), read with s 11(13), of the CAJ Act.

91 See Msengeti, M & Kipchumba HW 'Examining the Investigative Capacity of the Ombudsman in Addressing Administrative Justice in Kenya' (2023) 7(1) *Journal of Public Policy and Governance* 114.

92 Habermas, J *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press 1996).

93 On the history of ombuds in Canada, see Johns, D & Epperson B 'On Being an Ombudsman: Protecting the Public Interest While Navigating the Minefield of Policy Networks' (2022) 5(3) *Canadian Journal of Bioethics* 21, 22–25.

94 See, for example, Rowat, DC 'Federal Ombudsman Would Reduce Democratic Deficit' (2004) *Policy Options* <<https://policyoptions.irpp.org/magazines/governance-and-scandal/federal-ombudsman-would-reduce-democratic-deficit/>> accessed 3 March 2025.

specialised ombudsmen at the federal level to deal with specific areas such as the public sector, corrections, language rights, and access to information.⁹⁵ At the provincial level, most Canadian provinces have classical ombudsman institutions that work independently from the government.⁹⁶ These provincial ombudsmen primarily handle questions of administrative fairness.⁹⁷ Their roles and powers resemble, in some ways, those of South Africa's Public Protector, but generally with a more limited scope and authority.

Since Canada lacks a single equivalent to South Africa's constitutionally mandated Public Protector with its extensive powers and broad mandate, this section focuses on how Canada appoints parliamentary officers at the federal level, including the Public Sector Integrity (PSI) Commissioner, the Auditor General and the Information Commissioner, though these oversight bodies are not enacted by the Constitution, but by federal statutes. In particular, the PSI Commissioner and the Information Commissioner are officially treated as ombudsmen, albeit specialised ones.⁹⁸ Canada's approach to appointing parliamentary officers, including notably the PSI Commissioner, typically features consultation between the prime minister and the leaders of recognised opposition parties before the Governor-General (representing the British Crown) makes a formal appointment.

This system, with its emphasis on inter-party consultation rather than formal votes, bespeaks a culture with stronger norms of cooperation between the government and the opposition. It hinges less on formal rules and more on unwritten constitutional conventions. From the perspective of legal philosophy, it highlights the limits of textualism and formalism. It serves as a powerful counterargument to the procedural fetishism that this article denaturalises. It tells us that a culture of compromise and mutual respect can buttress the independence of oversight bodies more effectively than any set of written rules. It teaches us that the efficacy of appointment scaffolding depends not only on its formal design but also on the political culture in which it dwells. For South Africa, the Canadian counterpoint underscores that reforming section 193 will fail unless accompanied by cultivating a supportive constitutional culture – precisely the horizontal, community-rooted culture that the elders' council proposed in section 5.4 seeks to institutionalise.

4.4 Lessons from comparative analysis

Drawing parallels between India, Kenya and Canada yields several insights. First, no appointment mechanism can completely escape the political context in which it evolves.⁹⁹

95 Canada.ca 'Ombuds Day' <<https://www.canada.ca/en/taxpayers-ombudsperson/programs/ombuds-day.html>> accessed 1 March 2025.

96 Jamieson, R 'Ombudsman Institutions Around the World: Analysis and Comparison of a Plurality and Practice' (1997) Occasional Paper No. 59, International Ombudsman Institute <https://www.theioi.org/downloads/cbhdl/ioi-canada_occasional-paper-59_roberta-jamieson_om-institutions-around-the-world-analysis-and-comparision_1997-1.pdf> accessed 3 March 2025; Office of the National Defence and Canadian Armed Forces Ombudsman 'The Way Forward: Ombudsman Models' (2010) <<https://www.canada.ca/en/ombudsman-national-defence-forces/reports-news-statistics/ombudsman-reports/archives/way-forward/ombudsman-models.html>> accessed 3 March 2025.

97 See Johns & Epperson (note 9) 21, 22, 24–25 and 26.

98 See Canada.ca (note 97).

99 Bilchitz et al (note 31) 11, 12, 68, 86–89 and 95–97 (observing that the South African Constitution has failed to insulate many democratic institutions from 'heavily political appointments').

Whether appointments involve parliament, the judiciary, independent commissions, political parties or some hybrid, they remain fundamentally political acts. Second, the formal aspects of appointment procedures matter less than the pneumatic¹⁰⁰ culture and constitutional norms that animate them.¹⁰¹ Third, the legitimacy of sentinels depends not only on who appoints them but also on how they perform once appointed. Fourth, and most crucially for this article's purposes, the three jurisdictions delimit the design space within which South Africa must choose: India exposes the limits of judicial guardianship, Kenya displays both the promise and the fragility of participatory vetting, and Canada attests to the primacy of political culture over formal rules. The elders' council proposed in section 5.4 of this article synthesises these lessons – dispersing the sources of legitimacy beyond parliament and the bench, sequencing professional vetting before deliberative choice, and cultivating, rather than presupposing, a culture of accountability. These insights unsettle the technocratic axiom that constitutional design basically consists in importing 'best practices' from established democracies. On the contrary, they suggest that policymakers must design effective watchdogs with careful attention to local circumstances and constitutional cultures.

5. Beyond procedural fetishism: Reimagining constitutional guardianship

5.1 The myth of depoliticisation

One of the most persistent myths in discussions of watchdog appointments is the notion that these processes can or should be 'depoliticised'.¹⁰² This myth reflects what this article calls 'procedural fetishism' – the belief that, with the right procedural alchemy, we can transcend the messiness of political life. This belief is hopelessly naive; it is itself a political position that advances vested interests.¹⁰³ By framing certain arrangements as 'neutral' or 'apolitical', procedural fetishism obscures the power relations embedded in them.

The parliamentary supermajority needed for installing South Africa's Public Protector, for instance, is not a neutral choice but a political one that encodes contestable assumptions about consensus, representation and legitimacy.¹⁰⁴ Sooner than pursuing the chimaera of

100 From the Greek *pneuma*, the adjective 'pneumatic' relates to breath, spirit, and animating principle.

101 See also Dahlvik J, Pohn-Weidinger, A & Kollegger, M 'Independence Despite Political Appointment? The Curious Case of the Austrian Ombudsman Board' (2020) 13(2) *Nispacee Journal of Public Administration and Policy* 181, 204 (concluding that informal aspects may matter equally as formal aspects when assessing an institution's political independence).

102 See, for example, Robert, C 'Depoliticization at the European Level: Delegitimization and Circumvention of Representative Democracy in Europe's Governance' in Wiesner C (ed) *Rethinking Politicisation in Politics, Sociology and International Relations* (Springer 2021) 201; Matthews, F & Flinders, M 'The Watchdogs of "Washminster" – Parliamentary Scrutiny of Executive Patronage in the UK' (2015) 53(2) *Commonwealth and Comparative Politics* 153, 159 (observing that, by transferring key competencies to independent appointments commissions, successive governments in the UK had actively sought to 'depoliticise' public appointments).

103 See Williamson, S & Magaloni, B 'Legislatures and Policy Making in Authoritarian Regimes' (2020) 53(9) *Comparative Political Studies* 1525.

104 About those liberal assumptions, see Landes, X 'Consensus and Liberal Legitimacy: From First to Second Best?' (2017) 12(1) *Les Ateliers De L'Éthique* 84.

depoliticisation, we should instead ask: What kind of politics do we want our appointment processes to embody? Whose interests are served by particular institutional designs? How can we fashion mechanisms that acknowledge their contested nature, while still advancing the broader constitutional values of accountability and transparency? This shift requires moving beyond a purely technical discussion to a normative and ethical one, evaluating mechanisms not just on their efficiency, but on the values they promote – be they the human(e)ness of *ubuntu*¹⁰⁵ or Sen's maximisation of public trust.¹⁰⁶

5.2 Upsetting South Africa's 'best constitution' narrative

South Africa's Constitution has long been celebrated – both domestically and internationally – as 'the best in the world'.¹⁰⁷ Although it affirms the document's progressive features and aspirational character, this narrative has obscured the gaps between foundational text and lived reality.¹⁰⁸ The Mkhwebane saga marks a sobering counterpoint to this celebratory narrative, forcing a confrontation with the shortcomings of even the most perfectly crafted constitutional text. This article's findings challenge the dominant paradigm of constitutionalism itself. Referencing Kuhn's philosophy of science,¹⁰⁹ we can see the Mkhwebane imbroglio as an 'anomaly' that the prevailing paradigm – of South African constitutional exceptionalism – can no longer explain away. We now need to paradigm-shift how we understand constitutional efficacy: away from a focus on textual perfection and towards a deep dive into the complex interplay of institutions, civic culture and socio-economic forces.

The 'best constitution' narrative is itself a political project – one that legitimises an entrenched and skewed configuration of power in post-apartheid South Africa¹¹⁰ and that deflects attention from the unyielding inequalities and injustices that characterise South African society. By concentrating on the text rather than its implementation, this idea has contributed to a kind of constitutional idolatry that fetishises the document and its

105 Shanyanana, RN & Zongwe DP 'From Cheerleaders to Team Leaders: Employing OmUuntu for Women's Meaningful Participation in Leadership in Namibia' in Zongwe, DP & Dausab, Y (eds) *The Law Reform and Development Commission of Namibia at 25: A Quarter Century of Social Carpentry* (Namibia Law Reform and Development Commission 2017).

106 For a diatribe against the utilitarian conception of public trust, and for a sustained advocacy for a non-utilitarian maximisation of public trust, see Sen, A *The Idea of Justice* (Harvard University Press 2009) 80–81.

107 Fisher (note 1); Modiri, J 'Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence' (2018) 34(3) *South African Journal on Human Rights* 300, 305 and 306–308 (deploring the conventions in legal academia that 'idolise' and treat the South African Constitution as 'faultless').

108 See Bond, P 'Fatal Flaws in South Africa's Constitution, Uncovered through Socio-Economic, Environmental and Intergenerational Rights Activism' (2026) 6 *Turf Law Journal* 1; Ngqulunga, B 'Political Inclusion Without Social Justice: South Africa and the Pitfalls of Partial Decolonisation' (2023) 23(4) *Anthropological Theory* 404.

109 Kuhn, TS *The Structure of Scientific Revolutions* (2nd ed, University of Chicago Press, 1970).

110 Modiri (note 109) 305.

procedures but neglects the social conditions necessary for its realisation.¹¹¹ This neglect of the socio-economic – especially private accumulation and violent dispossession – attests to the impossibility of the guardian mission. Accumulation disguises itself as economic rationality and distracts us through theatrics. In much of Africa, accumulation endures, as land, resources and public goods are continually enclosed and privatised. The Constitution mandates watchdogs to regulate this process – to ensure it follows proper procedures and to prevent the most flagrant abuses – while leaving the fundamental logic of dispossession untouched and sanctified.

The elaborate theatrics of accumulation succeed precisely when constitutional accountability and its guardian fail. The machinery must appear to function – investigations conducted, reports issued, officials occasionally removed – while the underlying relations of power, accumulation and dispossession continue undisturbed. Mkhwebane's impeachment reveals the hollowness of the 'best constitution' narrative. A constitution is only as good as the individuals and institutions that give it life. When these individuals and institutions are captured by partisan interests or ideological agendas, the most beautifully crafted text becomes mere parchment. Ethically, praising a document in the face of persistent injustice is a form of moral evasion, especially in countries like South Africa and Namibia, which rank among the world's most unequal societies. Nevertheless, such an attitude connects to the existential condition of the postcolony, where the promise of liberation inscribed in law coexists with the lived experience of alienation and disempowerment.

5.3 Stress-testing the procedural fetishism thesis

The argument put forth in this article confronts at least three major antitheses. First, one might object that the critique of procedural fetishism leads to cynical fatalism, implying that all appointment modalities are equally political and thus equally flawed. This objection misconceives the article's position. This article does not argue that all procedures are equally freighted, but rather that we should admit the political nature of procedural choices and assess them based on the values they embody and enact.¹¹² Second, critics might contend that the alternative to procedural safeguards is a sort of unconstrained politics where might makes right. They posit a false dichotomy. The alternative to procedural fetishism is not procedural nihilism but a greater reflexivity towards institutional design – one that both accepts the limitations of procedures and attends to questions of architecture.

Third, one might object that, by emphasising local political cultures, the article engages in a kind of relativism that undermines universal constitutional values. This

111 See Modiri (note 109) 301, 304–305 and 306–308; Madlingozi, T 'Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution' (2017) 28 *Stellenbosch Law Review* 123, 123–126 (maintaining that the socially excluded and racially discriminated against black majority in South Africa do not enjoy the benefits of the Constitution and its underlying constitutionalism, unlike the dominant society made up of white people and black elites).

112 This rebuttal draws on Foucauldian thought and the vistas of Critical Legal Studies, which acknowledge the political nature of law while still tackling matters of institutional design. See Foucault *Discipline and Punish* (note 5) and Sciaraffa, S 'Critical Legal Studies: A Marxist Rejoinder' (1999) 5(2) *Legal Theory* 201.

misunderstands how universal values relate to local circumstances. Universal values like accountability and transparency must be realised through institutions that respond to local conditions and histories. This is not relativism but pragmatism – a recognition that constitutional principles gain meaning only through their embodiment in specific societies and polities.

5.4 Regrounding guardianship: From ombudsman to elders' council

The critique of procedural fetishism and Eurocentric mimicry demands more than procedural tinkering; it necessitates an affirmative reimagining of accountability rooted in African philosophies. If parliamentary processes, supermajority rules and even professional vetting panels simply recombine Western institutional forms, a genuine decolonial path must risk more. This article proposes a shift toward hybrid forms of accountability centred on concepts such as *ubuntu* – a relational ontology in which 'I am because we are'.¹¹³ Instead of a singular ombudsman emplaced by partisan politicians, this proposal vests guardianship in a non-partisan 'council of elders'. Such a council, critically adapted for contemporary Africa, would embody a different logic of accountability: not the vertical (individual-to-state) logic of liberal proceduralism, but a horizontal (person-to-community) logic of accountability. In this vision, authority stems not from office but from tested commitment to community, offering a mechanism grounded in African relationality, shunning imported proceduralism.

This proposal does not naively romanticise tradition; these indigenous systems had their vices – patriarchy and exclusion – that we must denounce. This proposal advocates, rather, for a hybrid model that adapts these relationalities to generate genuinely plural constitutional forms adequate for the postcolony. Four design questions determine whether the elders' council can escape the pathologies it is meant to cure: who selects the elders, by what criteria, with what guarantees of gender representation, and how the council avoids reproducing the very politicisation it displaces. On selection, no single authority should compose the council. Its members would instead be nominated by multiple, mutually independent constituencies – accredited civil society coalitions; professional bodies in law, auditing and human rights; traditional leaders, faith communities and universities – with each constituency electing its nominees through published procedures. A standing secretariat, housed, for instance, within an existing Chapter 9 institution, would verify eligibility but have no discretion over choice. This polycentric mode of constitution denies any president, party or parliamentary majority the power to stack the council and thus denies capture a single point of entry.

On criteria, eligibility would turn on markers of tested commitment to communal well-being instead of partisan service: a demonstrable record of integrity and public-

113 On *ubuntu* in general, see Ramose, MB *African Philosophy Through Ubuntu* (Mond Books, 1999); Mokgoro, JY 'Ubuntu and the Law in South Africa' (1998) 1 *Potchefstroom Electronic Law Journal* 1; Mangaliso, PM & Damane, MB 'Building Competitive Advantage From "Ubuntu": Management Lessons From South Africa [and Executive Summary]' (2001) 15 *Academy of Management* 23; Shutte, A *Ubuntu: An Ethic for a New South Africa* (Cluster Publications, 2001); and Metz, T 'Ubuntu as a Moral Theory and Human Rights in South Africa' (2011) 11(2) *African Human Rights Law Journal* 532.

interest work; recognised standing in one's community or profession; and a substantial cooling-off period – say, ten years – since holding party office or elected position. Members would serve single, non-renewable terms, staggered so that no cohort could be timed to coincide with a particular appointment, and remunerated modestly to deter careerism. These safeguards answer the objection that 'elder' is merely a euphemism for a differently chosen elite: the council's authority would be earned, temporary, dispersed and publicly accounted for.

On gender, the objection has real force: indigenous gerontocracies were often patriarchal, and any uncritical revival would betray the constitutional commitment to equality. The Constitutional Court's jurisprudence on customary law both names this danger and points past it. In *Bhe v Khayelitsha Magistrate*,¹¹⁴ the court struck down the male-primogeniture rule of customary succession as unfairly discriminatory but affirmed that living customary law can develop in step with the Constitution. More recent decisions – *Bwanya v Master of the High Court*,¹¹⁵ on the exclusion of permanent life partners from intestate succession, and *Women's Legal Centre Trust v President of the Republic of South Africa*,¹¹⁶ on the non-recognition of Muslim marriages – bear witness that the gendered exclusions embedded in tradition and religion remain contemporary injustices, not relics.

The elders' council must therefore be anchored under, and not alongside, the equality clause: gender parity in membership would be compulsory, mandating the nominating constituencies to put forward women candidates; and the council's published assessments would be reviewable for compliance with section 9 of the Constitution. So constrained, the council would instantiate what *Bhe* promised – tradition developed by, and answerable to, constitutional values – rather than what *Bhe* condemned. On politicisation, the council's claim is emphatically not that it stands outside politics – that would merely reinstate the fetishism that this article dislodges. The claim is that the council redistributes politics. Where section 193 concentrates the appointment in a single, party-disciplined site, the elders' council multiplies the sites of legitimacy and forces each to justify itself in the open: nominations, criteria, evaluations and rankings would all be published and contestable. Politicising manoeuvres would remain possible, but they would have to succeed across several mutually independent constituencies at once, and in public view. Understood in this way, the elders' council is not only a normative aspiration; it is a counterpoint that dethrones liberal constitutionalism's premise that legitimacy must flow through representative institutions alone, offering the postcolony a format in which horizontal, community-derived authority disciplines – without displacing – vertical, state-derived authority.

The elders' council recommended in this article markedly departs from South Africa's current framework for hiring the Public Protector in at least five respects. First, whereas the Constitution's 60% supermajority requirement presumes that broad parliamentary consensus can insulate the appointee from partisan influence and create a genuinely

114 *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC).

115 *Bwanya v Master of the High Court, Cape Town and Others* 2022 (3) SA 250 (CC).

116 *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2022 (5) SA 323 (CC).

apolitical sentinel, this article shows that such architecture cannot escape the political field in which it plays out. Second, section 193 of the Constitution confines legitimacy to the legislature (ie the multi-party committee and the Assembly vote). The elders' council is preferable because parliament itself, as a bastion of partisanship, cannot serve as the sole source of legitimacy for a watchdog meant to oversee that very institution and its members.¹¹⁷ Third, the current position views the selection of the watchdog leader as a technical-procedural issue soluble through institution design – what this article dubs 'procedural fetishism'. This article insists that selecting the office-holder is an eminently political act whose legitimacy flows less from procedural correctness than from the constitutional culture and power dynamics animating those procedures.

In addition, South Africa's stance implicitly embraces constitutional universalism by adopting the Westminster-parliamentary template, which is often cited as embodying 'best practices'. However, this article takes down this mimetism and demands that we attend to the idiosyncrasies of specific postcolonies – fractured sovereignty, persistent inequalities, and state-capture vulnerabilities.¹¹⁸ Last but not least, the existing provisions offer no avenue for popular participation beyond parliament, treating 'the people' as passive subjects whose agency exhausts itself in electing lawmakers. This article proposes direct popular involvement through the elders' council.

Blending the elders' council with the Kenyan schema, South African lawmakers should reconceptualise section 193 to establish a hybrid appointment mechanism that sequences public participation, professional evaluation and political decision-making. This sequence would proceed through five steps: (a) public advertisement of the vacancy with transparent qualification criteria highlighting credentials and demonstrated commitment to constitutional values and independence from partisan or factional interests; (b) evaluation by the elders' council, comprising civil society representatives and constitutional law experts (preferring, but not requiring, academics as well as retired and skilled civil servants), who would assess technical competence, ethical integrity and capacity for independence, and shortlist three to five qualified candidates, with published assessments explaining each candidate's strengths and shortcomings; (c) deliberative forums in which shortlisted candidates engage with randomly selected citizens representing South Africa's diverse constituencies (stratified by province, race, class and gender to ensure representativeness), allowing ordinary South Africans – particularly those from marginalised communities most dependent on the Public Protector's effectiveness – to evaluate candidates' responsiveness, accessibility and allegiance to protecting vulnerable populations; (d) a public poll among these citizen-delegates that produces ranked choices, which, while not binding on Parliament, creates a documented record of popular sentiment that parliamentarians must publicly engage with; and (e) selection by the National Assembly through a reformed process requiring not merely 60% approval but also public justification when parliamentary choice diverges from popular preference, thus maintaining parliamentary sovereignty while subjecting it to popular scrutiny.

117 Constitution, s 193; Bazana & Reddy (note 39).

118 Mbembe *Postcolony* (note 4); Mignolo & Walsh (note 9).

Furthermore, lawmakers should entrench the Public Protector's operational independence beyond the appointment stage, notably through: (a) security of tenure, with removal only by a two-thirds majority and proof of serious misconduct or incapacity; (b) budgetary autonomy, with funding determined by an independent commission rather than by executive discretion; and (c) mandatory parliamentary consideration of the Public Protector's reports within specified timeframes, with the government required to provide written reasons for any rejection of remedial actions.

These reforms would not eliminate politics from appointments – an unfeasible and undesirable goal – but would instead democratise the politics of guardianship, making visible the power relations that current procedures obscure.

5.5 Lessons for Africa

For Africa, policymakers should resist the temptation to universalise any single appointment template, including South Africa's; they should craft context-responsive mechanisms that grapple honestly with each nation's histories, economies and governance quandaries. However, certain principles emerge from this article that can guide constitutional designers across diverse African contexts: Recruitment processes must acknowledge their political character and establish multiple sites of legitimacy beyond ruling parties or parliamentary majorities, incorporating traditional authorities (where legitimate and representative), civil society, professional bodies and direct citizen participation to create overlapping and competing sources of authority that prevent capture by any single faction.

African constitutions should abandon the fiction of apolitical guardianship and establish oversight bodies that operate within – not outside – politics and embody pluralistic representation. They should maintain independence through diversified accountability to multiple constituencies, and not through illusory isolation from political life. Appointment provisions should underline technical qualifications and constitutional temperament – demonstrated capacity for independent judgment, proven resistance to capture, prior advocacy for marginalised communities, and willingness to challenge power regardless of partisan identity – with these qualities gauged through the public process outlined above.

African nations must resist donor-driven constitutional convergence around Western formulas and experiment boldly with hybrid forms that draw on both imported institutional templates and indigenous traditions. Crucially, they must incorporate elements of elders' councils alongside (not instead of) formal ombudsman offices. Finally, policymakers must accept that no hiring liturgy can alone guarantee effective guardianship. What ultimately matters is constitutional culture – the informal norms, civic commitments and vernacular practices that vivify formal institutions. Building such a culture requires not only well-crafted procedures but also civic education, protection of media freedom and civil society space, and cultivation of loyalty to big-picture values among political elites and the general public.

6. Conclusion: Towards a new constitutional imagination

This article has traversed the complex terrain of constitutional watchdog appointments in postcolonial Africa, using South Africa's Public Protector saga as a primary case study.

Several key findings emerge from it. First, we cannot divorce appointments of watchdogs from the larger politics that envelop them. The formal procedures outlined in constitutional texts are necessary but insufficient to ensure the independence and effectiveness of oversight watchdogs. Second, the notion of ‘depoliticising’ watchdog recruitment mirrors a procedural fetishism that flattens the nature of politics itself. It pursues the runaway chimaera of depoliticisation instead of focusing on designing appointment modalities that acknowledge their contested nature while still serving broader constitutional values. Third, the way institutions function in practice belies South Africa’s ‘best constitution’ narrative, exposing the gaps between aspiration and reality. This provokes us to exorcise constitutional idolatry and embrace a more grounded understanding of democracy. Synthesising these insights, the article’s principal philosophical contribution is the recasting of the problem itself. The summons is not to eliminate politics from appointments, but to cultivate a *better politics* – a deliberative, participatory and transparent process that can confer a more durable legitimacy upon these crucial institutions.

Based on these findings, the article’s core thesis – fully rolled out in section 5 – is that reimagining guardianship calls on us to move beyond the mimicry of Western models towards an affirmative engagement with African philosophies. The unravelling of imported models, as unpacked throughout this article, necessitates a paradigm shift toward hybrid forms of accountability centred on concepts such as *ubuntu* and on entrusting candidate selection to the elders’ council. This council opens up a person-to-community horizontal possibility for accountability where authority grows from proven fealty to communal well-being, adapting African ontologies and axiologies for the postcolony.

Specifically, this article puts forth several recommendations for reimagining constitutional guardianship in the postcolony. First, policymakers should tailor appointment mechanisms with a keener eye on local politics, histories and cultures. Crucially, processes should incorporate elements of public participation beyond parliamentary representation. Coupled with public advertisements and professional vetting before parliamentary approval, as happens in Kenya, the *professional-popular-political model* recommended here broadens the base of legitimacy for watchdogs and their leadership. In concrete terms, this recommendation may entail randomly selecting voters representing the country’s different constituencies to choose the sentinel from a panel of candidates shortlisted by the elders’ council and using these popular choices to inform the final decision of elected officials. Under this scheme, public advertisement comes first, ethical and professional vetting by the elders’ council comes second, and popular choices come third, before elected politicians select the sentinel.

Last but not least, this article recommends shifting our minds from procedural design to constitutional culture. Building a culture of constitutionalism requires both well-crafted procedures and loyalty to big-picture values among politicians and the larger public. This article opens several avenues for future research and constitutional practice. Scholars might explore how appointment connects to performance, examining whether certain types of procedures correlate with greater effectiveness or independence. Practitioners should consider how constitutional design can address local politics more seriously while still upholding the universal values of accountability and transparency. Also, future research

might productively integrate participatory methods that more deliberately foreground African voices and epistemologies, moving beyond critiques of Western methods toward developing decolonial constitutional research methodologies grounded in *ubuntu*, oral traditions, and indigenous African ways of knowing.

Perhaps most importantly, this article calls for a new constitutional imagination in Africa – one that abandons mimetism and embraces authenticity in responding to the politics and aspirations of Afric. The postcolony, with its layered temporality and distributed sovereignty, demands constitutional forms that reckon with this complexity. In the final analysis, recruiting people to lead watchdogs is not narrowly a technical problem solved through procedural engineering; it crystallises an enduring tension that goes to the heart of postcolonial statecraft. The puzzle, perhaps, lies not in how to guard the guardians in the absence of entropic forces – any more than we can measure particles in the absence of measurement itself. It truly lies in how to inscribe accountability within the inevitability of political fields, guided by the wisdom of African relationality, which holds that the observer and the observed, the guardian and the guarded, exist not in isolation but in webs of mutual becoming.

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