



Briefing Paper 325

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Institutional Leadership

South Africa's Trias Politica and Independent Institutions

1. Introduction

Do the recent demise of IDASA and the diminished funding for similar non-governmental organisations indicate that our democracy has flourished; and that our democratic institutions are established, well-resourced and doing their intended job?¹ If so, our state institutions would be executing their tasks effectively, enjoying sound leadership, and holding themselves accountable to the nation. However, the reality in South Africa does not quite reflect this 'flourished' democracy, especially when it pertains to the high-quality leadership which is needed, and to the question of accountability. The democratic institutions in question – for purposes of this paper – are Parliament, the Chapter 9 Institutions (Ch9s)², and the courts.

This paper aims to evaluate the role of these institutions, and in particular to assess whether or not they are providing leadership and direction to the nation as a whole. It is partly based on the inputs and discussion at a roundtable meeting on the topic of 'Institutional Leadership', addressed by UCT's Professor Richard Calland and Dr Wilmot James MP, and hosted by the CPLO, the Hanns Seidel Foundation and the Goedgedacht Forum³.

2. Parliament

2.1. The separation of powers

On paper, SA has a fully-fledged democracy where a clear separation of power exists⁴. However, in reality this separation, and the autonomy of the various powers, is not so clear. The executive has considerable influence over the

legislature due to the existence of a dominant party, and the 'party list' system, under which Members of Parliament (MPs) owe their positions to their party leadership⁵. Too often, Parliament's presiding officers and others in leadership positions appear to be responding to pressure or instructions from ANC headquarters, rather than carrying out their duties dispassionately. And although there are a number of effective and independent-minded ANC MPs, most of them see their mandate as coming solely from the party. At the very least, this sets up a tension between their loyalty to the party and their legal duty, as set out in the Constitution: "[T]he National Assembly is elected to represent the people and to ensure government by the people under the Constitution"⁶. A clearer separation of power between executive and legislature, brought about by a change to the electoral system, would help to ensure that Parliament was less subservient and more able to provide leadership in the development of public policy and legislation. (A change in the electoral system would also, as Dr James pointed out, reduce the power of *all* political party bosses; it is not only the ANC that keeps a tight rein on its representatives in Parliament.)

2.2. Behind the scenes

It was noted at the roundtable that good institutional leadership can be witnessed in the "engine room" of parliament – the portfolio committees which deal in detail with legislation. Some committee chairpersons (all of whom are members of the majority party) are fiercely independent and try to produce the best possible legislation, even if that means going against the wishes of party headquarters. They are also the ones most likely to take Parliament's oversight

role seriously, holding government officials, and even Ministers, to account.

Sound institutional leadership is also provided by some of Parliament's content advisors and researchers. These individuals have real influence and predominantly act in accordance with the vision embodied in the Constitution. This is an aspect of Parliament's functioning that is hidden from the public, who tend to see only the negative picture. Strong committee chairs and reliable researchers and advisors are seldom in the public domain or media, but they are leaders who are engaged, knowledgeable and effective.⁷

The model followed by most portfolio committees – respectfully critiquing opposing views, effective communication and constant feedback – should be applied to the broader debates and fora in Parliament, thus allowing MPs to engage in both structured and effective dialogue, as opposed to the constant criticism and personal attacks which often divert attention away from important matters, namely the needs of citizens.

2.3. Parliament's Capacity

Participants at the roundtable observed that 'capacity' is a problem in Parliament; many current MPs do not seem to have the skills necessary to do their jobs effectively. This is not just a matter of academic qualifications; many leading MPs in the 1994 Parliament had little formal education, but were able to use their experience and expertise to the nation's advantage. More importantly, they realised that holding public office brings with it great responsibility. Twenty years ago there was also a clearer common vision among MPs, engaged as they were with drafting the Constitution and dismantling apartheid legislation. If this vision could be re-established, where MPs work towards the common good of the people as the ultimate goal, Parliament might once again offer better leadership to the nation.

Some Ministers manage to balance party loyalty with their responsibility to run their ministries effectively; they also use parliamentary processes correctly, and are willing to submit to scrutiny. Ultimately, they abide by the Constitution and serve the people, not their own ambitions or party interests. Such an attitude promotes the effectiveness of Parliament and allows MPs to carry out their oversight role properly.

3. The Chapter 9 Institutions (Ch9s)

The Ch9s fulfil a vital function in ensuring that the state remains accountable to its citizenry; they are intended to play a leading role in constitutional governance, providing a non-judicial avenue for citizens' grievances and concerns to be addressed. However, if these institutions themselves lack good leadership, their effectiveness will be diminished. The same applies to the question of resources: if the Ch9s lack sufficient finance and personnel they cannot carry out their functions.

These institutions exist to help enhance democracy and, while this may involve challenging the government, they are not intended to be a 'quasi-opposition'. This implies a delicate balancing act, as some Ch9s are required to tackle sensitive issues involving Ministers and government departments. But it also means that the autonomy of the Ch9s must be respected by MPs and the executive, and there are worrying signs that this is not always the case. For example, the Public Protector has recently clashed with some members of Parliament's portfolio committee on justice, who have taken it upon themselves to question some of her investigations. Likewise, some of the recommendations of the Auditor-General have been ignored by government departments, leading to repeated accountability failures.

Apart from a lack of resources which can bring these institutions' work to a halt, it can also be undermined by a lack of accountability from the side of government. Some ministries and departments tend to be unresponsive and do not take the work of the Ch9s seriously, or treat it with urgency, as in a recent case of the SAHRC⁸ regarding poor service delivery to poverty-ridden communities that did not have access to basic needs such as sanitation⁹. If a true spirit of co-operation and mutual respect existed, it would help to solve at least some of the ills of the citizenry, through the achievement of policies and practices 'congruent with human rights principles'¹⁰.

On the other hand, some Ch9 leaders are regarded as having good intentions to carry out their mandates, but failing to acknowledge that their independence is not absolute, and that they are accountable to Parliament. Once again, there needs to be a delicate balance, and it is perhaps not surprising that MPs on the one hand, and the

leaders of CH9s on the other, both seeking to carry out their constitutional mandates, end up tramping on each other's toes.

4. The Judiciary

The judiciary plays a key role in ensuring that the rule of law is upheld, and it is vital that it remains independent in order to do so; and it is equally vital that properly qualified and experienced people are appointed to judicial office. At the same time, though, the Constitution stipulates that the judiciary must 'reflect broadly the racial and gender composition of South Africa'. Both of these imperatives require that the selection and appointment of judges be conducted with the utmost probity, according to clear and transparent criteria. Once again, the problem is one of balance, with some people arguing that, in the quest for 'equal representation', issues of qualification and merit have been ignored or at least under-emphasised¹¹.

The part played by the Judicial Service Commission looms large in this regard. There have been numerous allegations recently that the JSC has allowed political considerations (over and above the representivity question) to influence its recommendations for judicial office. Certain highly-esteemed lawyers, it is argued, have been overlooked due to their perceived antagonism to some government stances; and instead, more malleable and 'politically acceptable' jurists have been appointed. Perhaps the most striking example of this is the fact that the long-serving Deputy Chief Justice, Dikgang Moseneke, has twice been denied the post of Chief Justice. He is undoubtedly qualified for the job, and obviously meets the representivity criterion, but he made the mistake of publicly criticising certain ANC policies¹². Another worrying decision by the JSC occurred after the retirement of the last four original Constitutional Court judges, when 22 candidates were interviewed, but the decision on the seven shortlisted candidates took only 20 minutes. This suggested, according to Prof Calland, that there was little serious discussion about the relative merits of the candidates, and that there had been a degree of 'pre-selection' according to ulterior considerations.

All of this illustrates the power of the executive in the appointment of judges, through its effective control over the majority of places on the JSC. Ultimately, it is argued, government does not

want judges that will hold it to account¹³. Although our superior courts have up to now guarded their independence, and have provided clear leadership on constitutional issues, it cannot be taken for granted that this state of affairs will prevail indefinitely. Proper judicial leadership goes hand in hand with judicial independence, and if the latter is threatened, albeit indirectly through the appointments process, the former is unlikely to thrive.

On the positive side, the judiciary has identified some of the administrative and budgetary issues which could affect its independence, and has taken steps to enhance its control over these issues. The process began under the previous Chief Justice, and there are indications that it will continue under the present incumbent¹⁴.

5. Looking to the Future

5.1. Parliament

As Dr James put it, society should not 'give up' on Parliament; instead the focus should be on trying to improve the current situation¹⁵. Parliament is South Africa's key democratic institution, but society does not trust MPs, who are widely considered to be inherently corrupt. This serious 'image problem' must be addressed. One way would be for MPs to become more accountable to the citizens they represent, but doing this will require electoral reform to lessen the concentration of power in party hierarchies, and transfer it to lower levels such as constituency committees. Some form of proportional representation remains essential to ensure that minorities are represented, but it can easily be blended with a constituency system which would allow voters to engage directly with their representatives¹⁶.

Parliament also needs to be more focused on its work, and MPs need to take their responsibilities of developing legislation and conducting oversight more seriously. The quality of debate must improve, and for this to happen MPs must be better prepared; those who fail to study the legislation before them, or who are habitually absent, must be reprimanded. While this is partly within the competence of the Speaker, political parties must also take firm steps against their own ill-disciplined or under-performing members. A lack of such consequences indicates that MPs, and their parties, are not taking their

parliamentary duties seriously¹⁷.

In terms of Parliament's oversight role, it would be useful if sessions for unprepared oral responses were allowed. This would help to hold the executive to account, as spontaneous answers would disclose incompetence and maladministration in a way that prepared answers do not. Ministers would not be able to get away so easily with dismissive answers, and then simply make speeches in answer to 'sweetheart' questions from their own supporter.

The private members Bill was identified as an effective tool to help Parliament do its job, and as one way of initiating effective debate. Until recently, Bills introduced by MPs (as opposed to Ministers) were routinely refused a hearing, since the committee dealing with them had no interest in entertaining Bills put forward by opposition members. However, there has now been a High Court ruling to the effect that such Bills must be given a proper hearing, including an opportunity for public submissions. While these Bills might still be defeated by the majority party, the fact that they will be seriously considered is a positive step that can only enhance Parliament's effectiveness, and thus its leadership.

5.2. Empowering the Ch9s

Some of the Ch9 institutions carry a heavy workload. The Public Protector, in particular, receives a large number of complaints and has frequently noted that she lacks sufficient staff to attend to them all as quickly as she would like to. The Human Rights Commission, too, could be far more effective than it is if it were better resourced.

However, it seems that it is not so much a lack of funds and other resources that compromises the work of the Ch9s, but instead two other problems. Firstly, their role is not always clearly appreciated in political circles, which in turn leads to their status being undermined. The Public Protector has spoken out about the way in which her reports are too often simply acknowledged by the relevant government office or department, but not acted upon. Similarly, numerous state entities receive qualified audits year after year from the Auditor-General without ever seeming to implement his recommendations.

Secondly, it must be said that some of the Ch9s

have not marketed themselves very effectively; and that others have fallen prey to internal divisions and poor management. The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, for example, has achieved very little of significance, other than speculating about the need to change certain religious public holidays. The Commission for Gender Equality has been beset by internal problems, and has in the past gone for long periods without the proper number of commissioners.¹⁸

One way of strengthening Ch9s would be for NGOs to find ways of working with them, sharing expertise and analysis, and passing on information and grievances. This would effectively increase the Ch9s' capacity and impact.

Finally, it must be noted that some Ch9s perform extremely well. One such is the Independent Electoral Commission, which routinely runs efficient and credible elections and by-elections. The Auditor-General and the Public Protector also enjoy high levels of public confidence.

5.3. The judiciary

There are strong indications that some recent judicial appointments have been influenced by extraneous considerations; that is, factors beyond merit on the one hand, and the need for representivity on the other. High court judges and senior lawyers with a reputation for taking an 'activist' stance on rights issues have been overlooked for promotion in favour of others who are perceived to be more 'moderate'. At the same time, it is a commonly held view that, in the name of transformation, too many inexperienced candidates have been appointed to the bench. A further problem, often noted by the JSC, is that the most experienced and best-qualified black lawyers decline nomination; often, it is said, because judicial salaries lag far behind what they can earn as practitioners.

This combination of challenges, together with the fact that the JSC's composition gives the governing party an effective majority of its members, adds up to a worrying situation. Although it cannot be claimed that the judiciary has yet been overtly politicised, the way in which judges are appointed means that this remains a distinct possibility. And if it is indeed allowed to happen, judicial independence – and thus the rule

of law – will not survive for very long.

To avoid this, the JSC must be held accountable for its decisions. Civil society and political parties should monitor the interviews of candidates for the bench (a process which is, very commendably, conducted in public) and should speak out if it appears that questionable criteria are being applied or unsuitable appointments made.

6. Conclusion

There is no doubt that the various institutions discussed in this paper have the ability to provide

the country with solid democratic leadership. Most of them do so, but not with the consistency and clarity of purpose that is needed. The separation of powers is in some instances too blurred, and the mutual respect and support that should exist between these institutions is sometimes lacking. There will always be those who are prepared to misuse vital institutions for short-term political gain, and it is up to all of us, whether in political parties or civil society, to be alert to the long-term damage that this can cause to democracy.

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- ¹ Calland, R. (2013). Presentation at a roundtable discussion entitled *Institutional Leadership*, jointly hosted by CPLO, the Hanns Seidel Foundation, and the Goedgedacht Forum, May 31st 2013.
- ² Chapter 9 of the South African Constitution deals with 'Institutions Supporting Democracy', among which are the Public Protector, the Human Rights Commission, the Gender Equality Commission, the Auditor General, the Independent Electoral Commission, and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic and Communities.
- ³ A full report of the roundtable can be found at http://www.goedgedachtforum.co.za/site/index.php?option=com_docman&task=cat_view&gid=68&Itemid=56
- ⁴ CPLO's briefing paper 252, published in December 2010 discussed the role of Parliament and the separation of powers. Available at www.cplo.org.za
- ⁵ *Ibid*
- ⁶ PMG. (n.d). The Structure of Government. Accessed June 5th 2013, from <http://www.pmg.org.za/parlinfo/sectiona2>
- ⁷ *Ibid*.
- ⁸ The SAHRC is the South African Human Rights Commission. See more on the SAHRC at <http://www.sahrc.org.za/home/index.php?ipkContentID=1&ipkMenuID=28>
- ⁹ News24. SAHRC: Depts to address complaints speedily. Accessed June 14th 2013, from <http://www.news24.com/SouthAfrica/News/SAHRC-Depts-to-address-complaints-speedily-20130614>
- ¹⁰ Mangena, I. (2013). Government departments agree with substantive findings and recommendations of the SAHRC's Water and Sanitation Report In *South African Human Rights Commission online*. Accessed June 14th 2013, from <http://www.sahrc.org.za/home/index.php?ipkMenuID=&ipkArticleID=221>
- ¹¹ EISA. (2009). *South Africa: Women's representation quota's*. Accessed June 14th 2013, from <http://www.eisa.org.za/WEP/souquotas.htm>. See also Kruger, J. (2013). *Appointment of Judges NOT a Black and White Issue*. Accessed June 14th 2013, from <http://gosouthonline.co.za/51427/appointment-of-judges-not-a-black-and-white-issue/>
- ¹² Calland, *ibid*. See also LegalBrief Today. (2009). *Moseneke 'snubbed' for Chief Justice post*. Accessed June 14th 2013, from <http://www.legalbrief.co.za/article.php?story=2009080708521372>
- ¹³ Tolsi, N. (2012). Few takers for empty seat on the Bench in *Mail and Guardian*. Accessed June 05th 2013, from <http://mg.co.za/article/2012-03-09-few-takers-for-empty-seat-on-the-bench>
- ¹⁴ Calland, *ibid*.
- ¹⁵ James, W. (2013). Presentation at a roundtable discussion entitled *Institutional Leadership*, jointly hosted by CPLO, the Hanns Seidel Foundation, and the Goedgedacht Forum, May 31st 2013.
- ¹⁶ Diamond, L., and Morlino, L. (2005). *Assessing the quality of democracy*. Baltimore: John Hopkins University Press.
- ¹⁷ James, *ibid*.
- ¹⁸ For a more in-depth assessment of the challenges facing CH9s, see CPLO Briefing Paper 287, *Chapter 9 Institutions in South Africa*, April 2012, available at www.cplo.org.za

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