



Why the Institutions are Under Attack

1. Introduction

In recent weeks and months the editorial and opinion columns of newspapers and internet news sites have been replete with comment to the effect that some of our most important democratic and constitutional institutions, and the Constitution itself, are under attack. The attacks, it is argued, come from the higher parts of government and the governing ANC.

The disturbing goings-on in Parliament during the last few weeks are but the latest example of what appears to be a willingness on the part of the ANC to sacrifice hard-won standards of good governance and to threaten important democratic traditions.

The real question, though, is not so much *whether* such attacks are taking place, but *why*. It is usually suggested that they are linked, with varying degrees of directness, to the ANC's apparent need to protect or defend President Zuma. *Business Day*, for example, put it as follows:

*"The [ANC] has supported its leader through thick and thin, to the point of deliberately undermining institutions such as the intelligence services, the National Prosecuting Authority and the Office of the Public Protector to defend the apparently indefensible. But some among its leadership must surely now be questioning the wisdom of staking so much on the character of one man."*¹

This briefing paper argues that it is not just a simple matter of trying to protect Mr Zuma. That is no doubt part of the explanation for what has been happening, but the real reasons reach considerably deeper. What follows is not intended simply as a generalised criticism of the governing party, although in assessing the current tensions between it and the institutions it is impossible to avoid criticising it. The fact that the ANC has

adopted a stance at variance with some of our key constitutional values relating to good governance does not erase its significant achievements over the last 20 years. But it does mean that we need to get to grips with these developments and attempt to understand why the party is behaving as it is.

2. Attacking the Institutions

There are various ways in which the effectiveness of the institutions can be weakened. One way is to ensure that pliable people, sympathetic to the political leadership, are appointed. Another is to try to reduce the authority of the institutions, either by ignoring their findings or by pretending that a Chapter 9 institution, such as the Public Protector, has no more authority than, for example, the Special Investigating Unit or a committee of cabinet ministers. Yet another is to undermine the credibility of an institution by suggesting, for example, that it has a political agenda of its own. All of these methods, and there are more, have been employed recently by the governing party.

2.1. The Public Protector

Of all the Chapter 9 institutions charged with upholding our constitutional democracy, the Public Protector (PP) has tended to clash most often and most directly with government (and thus with the governing party). This is not surprising, since it is precisely the PP's mandate to investigate abuses of power by government agencies and officials. Lately, though, the PP has attracted particularly vitriolic criticism from senior ANC figures. Secretary-General Gwede Mantashe and his deputy, Jesse Duarte, both suggested in the wake of the PP's report on Nkandla, that she was in league with the opposition, specifically the EFF.

Both President Zuma and his communications minister, Faith Muthambi, have acted to undermine the PP's authority. In the former case, Mr Zuma has tried to suggest that her report into the Nkandla matter was of no greater authority than that of his own security ministers, or of the Special Investigating Unit which acts under his instructions. He has also ignored her finding that he should pay back certain of the Nkandla expenses, and instead directed the police minister to determine what, if anything, he should repay. This is tantamount to setting aside the PP's findings, something that only a court of law is empowered to do. In the latter case, the communications minister ignored the PP's finding that the acting head of the SABC, Hlaudi Motsoaneng, was unfit for such office, and referred the matter to a firm attorneys for investigation, thus elevating a private law practice to a position of parity with a constitutional body. On the basis of this firm's somewhat superficial report, the minister confirmed Mr Motsoaneng's permanent appointment.

2.2. The National Director of Public Prosecutions (NDPP)

The history of politically-inspired, and thus tainted, appointments and decisions involving the NDPP predates the Zuma administration. For example, the decision by Mokededi Mpshe, acting NDPP in 2009, not to prosecute President Zuma for corruption, is widely regarded as having been politically influenced. (Mr Mpshe's own appointment came after the suspension by President Mbeki of Vusi Pikoli, whose determination to prosecute the then police commissioner, Jackie Selebi, sat ill with Mr Mbeki.) After Mr Zuma came to power Mr Mpshe was sent to the Bench and a former director-general of the justice department, Menzi Simelane, was appointed. Mr Simelane had earlier been found 'dishonest, conniving and arrogant' by the government's own Ginwhala commission of enquiry, due to his role in trying to prevent the prosecution of Mr Selebi by Mr Pikoli. Subsequently, Mr Simelane had to be dismissed following a court decision that his appointment had been irrational; he was replaced by an acting NDPP, Nomgcobo Jiba, who took various questionable decisions, including declining to prosecute the former head of police intelligence Richard Mdluli, and refusing to hand over the infamous 'spy tapes' relating to Mr Zuma's corruption charges, despite a court order to do so.

It is not possible fully to unpack the convoluted history of political machinations regarding the NDPP in a short paper. Suffice it to say that the agency, which the Constitution demands must "exercise its functions without fear, favour or prejudice"² has been subject to gross political interference and manipulation by at least the last three administrations.³

2.3. Parliament

There is a strong tradition in Westminster-style democracies that the Speaker of Parliament should be an experienced MP, well-versed in the rules of debate and parliamentary procedure, who enjoys the respect of the House as a whole and – above all – who is able to put aside his or her own party affiliation in order to conduct parliamentary business objectively and without favour. It is self-evident that the national chairperson of a political party (any party) is entirely unsuited to such a role. The ANC's deployment of its chairperson, Baleka Mbete, to be Speaker of the National Assembly, and of one of its former deputy secretaries-general, Thandi Modise, to the Chair of the National Council of Provinces, cannot reasonably be seen as anything other than the placement of loyalists in what should be non-partisan positions.

Ms Mbete's conduct in the face of the recent disruption of President's question time by the EFF is illustrative of the problem. In the words of the political analyst Dumisani Hlophe,

"... as Speaker of Parliament, [she] battled to balance between being a parliamentary chair and her party political role to protect Zuma as the ANC's president, and distantly the state president. [She was] officially the chairwoman of the National Assembly, while actively being the chairwoman of the ANC. Faced with these two roles, Mbete chose the ANC role, protecting her party president and the ANC."⁴

The decision by the Police minister, on the same occasion, to call in the police to 'restore order' in the National Assembly is another example, albeit not a calculated one, of how the independence of Parliament, and the separation of powers that underpins that independence, has been violated. This situation was exacerbated subsequently when the so-called 'security cluster' ministers announced that they had arranged for enhanced security measures at Parliament. As Business Day noted, Parliament is the legislature's 'turf' under the Constitution, and "the government's so-called

security cluster has no business getting involved in its disciplinary issues.”⁵

2.4. Other examples

The above three instances may constitute the most far-reaching examples of attempts by the executive, or by senior ANC leaders, to influence the direction of, or to exert control over, important constitutional and ‘independent’ institutions, but there are many others. To mention a few:

The passing-over of the highly experienced and universally respected Justice Dikgang Moseneke for the post of Chief Justice, in favour of the relatively unknown Justice Mogoeng Mogoeng;

The appointment of a former ANC MP, Lawrence Mushwana, as Public Protector in 2001, followed by his appointment to head the Human Rights Commission on 2008. Mr Mushwana was not highly regarded for his independence.⁶

The appointment of the former Umkhonto we Sizwe soldier, Robert McBride, as head of the police’s Independent Complaints Directorate earlier this year. The requirement that the occupant of this post should hold a law degree was waived, allegedly to accommodate Mr McBride;

The appointment of a close ally of Mr Zuma, Bheki Cele, to take over from Jackie Selebi as national police commissioner, despite Mr Cele having had no police background or experience.

3. Why Is This Happening?

As already mentioned, the conventional wisdom is that all this is taking place as part of an overriding desire on the part of government, and the ANC as a party, to protect President Zuma. Certainly, it is to be expected that a party will rally behind its leader. As Professor Steven Friedman has pointed out, “in just about all democracies, when leaders are accused of breaching public trust, the first reaction of their parties is to close ranks behind them.”⁷ But this response is not just about blind loyalty to a leader; whatever its faults, the ANC is not a cult, and no-one in it seriously views Mr Zuma as a guru, incapable of doing wrong or making a mistake. Rather, an attack on the leader is interpreted as a more or less veiled attack on the organisation itself. The Minister of Water and Sanitation, Nomvula Mokonyane, said as much in a speech to launch a water project: “The attack is not on Zuma, but it is on the ANC.”⁸

So, when the ANC goes on the offensive against the Public Protector, when it tries to brush aside criticism of the extravagant expenditure at Nkandla, when it deploys party members to supposedly non-partisan positions, its real reason for doing so is to look after itself; it is only at a superficial level that all this is happening to protect Mr Zuma.

That this is so can be seen all the more clearly if one considers that the tendency to interfere in appointments to ‘independent’ state agencies did not begin with Mr Zuma’s ascendance to the presidency. He did not appoint Jackie Selebi to be police commissioner; neither did he appoint Bulelani Ngcuka as NDPP. (It was Mr Ngcuka who declined to prosecute the then-deputy president Zuma at the time of the Shaik trial, despite conceding that there was a *prima facie* case against Mr Zuma. This was a decision that happened to favour Mr Zuma, but it was taken for the good of the ANC, by avoiding the embarrassment of having the organisation’s deputy-president sent to jail for corruption.) Similarly, the appointment of the party loyalist Mr Mushwana to the post of Public Protector, after the strongly independent Selby Baqwa, took place under the Mbeki administration.

This is not to say, of course, that Mr Zuma himself is not part of the overall effort to sideline criticism and undermine institutions. The ANC veteran, Professor Raymond Suttner, puts it as follows:

“If he is aware of the grave implications for South Africa’s Constitution, democracy and society, President Zuma has decided his personal survival comes first and at the expense of the integrity of the office he holds and of other public institutions.”⁹

Sooner or later, Mr Zuma will step down; most analysts believe this will happen long before the end of his second term. Perhaps – if the infamous ‘spy tapes’ reveal that the decision not to put him on trial for corruption was indeed politically motivated – he will face prosecution; perhaps ill-health and old age will spare him from such a fate, especially if his legal representatives once again use every available tactic to delay, review and appeal every step of a prosecution.¹⁰ But whatever happens with Mr Zuma, there is nothing to suggest that the ANC will suddenly have a change of heart and turn from criticism of the Public Protector to support; or elect a non-partisan Speaker of Parliament; or cease appointing loyalists to sensitive public positions.

Of course, this conclusion simply defers the question asked above, “Why is this happening?” It does not answer the question.

4. Behind the ANC’s Approach

There is a tendency among critics of the ANC (and of the government it controls) to compare the political scene today to a fondly recalled ‘golden era’ in the first years of our democracy, especially the years of the Mandela presidency. Supposedly, all was well then with our institutions and all is rotten now. According to this view, the withdrawal of Mr Mandela from public life brought to an end a brief *glasnost*, a period of openness and accountable government, and allowed the ANC to revert to its true colours. This is a superficial and inaccurate approach to a far more complex problem, a problem that affects governing parties all over the world when they remain in power for unusually long periods; and especially when they have come to power as a result of a liberation struggle of some kind.

Looking below the surface issue – the supposed need to protect Mr Zuma – a number of deeper reasons for the current tensions can be discerned.

4.1. Misunderstanding democracy

On various occasions ANC leaders such as Blade Nzimande and Gwede Mantashe have spoken out against what they call ‘counter-majoritarianism’. They contend that, because the ANC has won every election since 1994 with a large majority, its policies and positions clearly represent the wishes of the great bulk of the population. Opposition to such policies and positions, therefore, is an attempt to frustrate those wishes, and must be rejected. Indeed, there should be few, if any, restrictions on what the government decides to do in order to carry out the (majority) mandate it has received.

It is only a small step from this to the point where institutions, as well as principles and traditions of governance, and laws (including the Constitution) that may get in the way of carrying out that mandate come to be seen as little more than obstacles to be bypassed. Thus, for example, the principle that certain public offices should be kept strictly independent of party political influence can be ignored if it is deemed necessary to do so in order to ensure that the party’s agenda is carried out; to ensure, in other words, that faith is kept with the majority.

This approach completely ignores the essential difference between a democratic system and a majoritarian one – in the former, there are certain safeguards in the form of traditional practices (for example, a non-partisan Speaker); principles governing the separation between public and party-political interests (hence the idea of a professional civil service, rather than one consisting of political appointees); and, above all, a set of laws, under an entrenched Constitution, that apply across the board, regardless of which party has won what degree of support.

It is these safeguards that make a democracy what it is, and that protect the rights of those who find themselves outside the majority of the moment. If a governing party loses sight of this, it moves away from democracy and towards something more akin to dictatorship. That the ANC (or at least its current leadership) has indeed taken a few steps along this road is demonstrated by President Zuma’s patient explanation to an opposition MP that “we are in the majority, therefore we have more rights than you.”¹¹

4.2. Entitlement to rule

It is a common phenomenon that successful liberation movements see themselves as enjoying an almost divine right to rule. They have often fought long and painful struggles and their leaders may have endured decades of exile or imprisonment. They also have a mission to undo the laws, structures and effects of long periods of colonialism or foreign domination. In our case, the ‘legacy of apartheid’ still looms large and has yet to be fully overcome.

All of this means that the movement, far from converting itself into an ordinary political party, persists in seeing itself as entitled, indeed duty-bound, to govern until it has achieved complete and final liberation. It is no coincidence that President Zuma has occasionally used quasi-religious imagery to express the ANC’s ‘right’ to govern – asserting, for example, that it will remain in power ‘until Jesus comes again.’ Once the movement/party has convinced itself of its ‘sacred mission’, it follows that those people or institutions that oppose it or its policies are in fact opposing the mission; they are sacrilegious obstacles to liberation. Perversely, democracy itself, if it appears to jeopardise the movement’s hold on power, can also be seen as an obstacle and, if this happens, the obvious remedy is to subvert it. The only question is whether this is done subtly, for example by the deployment of loyalists to key

positions, or crassly, by such means as election rigging. We have much experience of the former strategy in South Africa, but happily none of the latter.

4.3. Political immaturity

There are all sorts of popular quotes to the effect that it is only when one experiences defeat that one's true character emerges. Put another way, the person who continually wins, and who does so effortlessly, is likely to feel that this is the natural state of affairs, and to be affronted at the suggestion that it will not always be so.

Since 1994 the ANC has won all five general elections handsomely, and all four municipal elections by wide margins. The only real defeats that it has experienced, apart from a few isolated councils here and there, have been the loss of the city of Cape Town and the province of the Western Cape to the Democratic Alliance. Interestingly, the party has tended to ascribe those defeats to a kind of underhand politics – a combination of DA deviousness and coloured fear of the African majority – without the existence of which, it assumes, it would rule as comfortably in the Western Cape as it does elsewhere in the country

Contrast this with the situation in the mature democracies, where parties and politicians accept that they will win and lose from time to time, and that democracy will survive their own temporary departure from the corridors of government. Indeed, some of them would even be prepared to admit that such rotation of office is necessary in order for democracy to flourish.

Until this attitude asserts itself in South Africa, which it can only do when incumbent parties regularly lose and experience periods in opposition, those who become used to governing (be it at national, provincial or local levels) will continue to regard the non-partisan judgements of institutions like the courts and the public protector as politically threatening. Thus, the PP's criticism of President Zuma over the Nkandla expenditure, for example, is recast as an almost treasonous intrusion onto political terrain.

(It is important to state that this is not something that is at all limited to the ANC. In the early years of our democracy the Inkatha Freedom Party and its leader behaved as if it had some kind of divine right to rule KwaZulu-Natal; as if that province's natural state was as an Inkatha fiefdom. There are also signs that the Democratic Alliance sees itself

as the natural, long-term ruling power in the Western Cape. A certain hubris can be detected in decisions such as granting the freedom of Cape Town to President Obama over the objections of the opposition in council and with no public consultation; and imposing a new city logo, at considerable cost, again without any public consultation. Small matters, perhaps, but symbolic of a larger problem.)

4.4. Defensiveness and loss of direction

There are very few examples of democratic governments which have managed to remain fresh, creative, motivated and dynamic after 20 years in power. (By definition, non-democratic governments are not concerned with these qualities.) Far more commonly, governments stagnate and run out of ideas after too many successive terms in office – they hold on to power without knowing any longer what to do with it. Many would argue that this stage has been reached by the ANC, and that there is in effect a policy vacuum at the heart of government. There are patent ideological tensions within cabinet; verbal commitments to schemes such as the National Development Plan, but little coherent implementation; promises aplenty to deal with corruption and other social pathologies, but very little actual follow-up; lip-service paid to important standards of good governance; and the unending deployment of politically-connected apparatchiks, rather than competent technocrats.

Unemployment remains as high as ever; education is still in a mess; crime continues rampant; service delivery persists in its patchiness; and so on. But to demand accountability for these problems, and to lay them at the door of the political leadership, results only in a prickly and defensive response. You are a racist/a populist/a counter-revolutionary/an agent of a foreign power/a 'madam'/a 'tea-girl'. Once you are categorised in this way your complaint can be dismissed, regardless of its validity. And your critique of the top leadership, no matter how justified, can similarly be attributed to *who you are*, rather than to *what you are saying*. In this way it is not necessary for the target of your criticism actually to deal with the issue at hand; it can be brushed aside on the basis that you were wrong to raise it in the first place.

After two decades in government the ANC has largely run out of ideas when it comes to the key themes of education, unemployment, corruption, crime, landlessness and poverty. So, in all

probability, would any other party have done. But no political party can ever admit this – to do so would be to sacrifice power; neither can any party concede (until the last minute) that its current leader is a less than seminal figure. Hence, when the criticism comes, it must be met with denial, deflection and defiance, even at the cost of great harm to democratic values and structures.

4.5. Patronage and vested interests

Commentators are quick to make a simplistic connection between the ANC's vocal defence of Mr Zuma and the existence of corruption, 'tenderpreneurship', nepotism and other improprieties in and around the party. They argue that Mr Zuma's own unresolved history of involvement in corruption, and his ambivalent attitude to the problem, foster a climate in the ANC that allows many of its members to line their pockets with public money. In addition, they say, there are numerous businesspeople, party benefactors, and influence-peddlers out there who rely on the lax standards of the Zuma presidency in order to cut deals and obtain material advantage. It is thus in the interests of all these shady operators, as well as the corrupt members of the party, to keep Mr Zuma where he is.

No doubt this analysis is partly true, but it is the least of the reasons behind the ANC's loud support of its president. There is in fact very little evidence that senior members of the party – including those whose defence of Mr Zuma is most pronounced – are personally corrupt. On the contrary, there have long been rumours to the effect that some of them are frustrated by Mr Zuma's tendency to associate with the likes of Schabir Shaik and the Gupta family. The Nkandla fiasco has been a major embarrassment to them, even as they have rallied to exonerate the President and to scapegoat virtually everyone else involved in it. Besides, as the arms deal amply demonstrates, corruption and vested interests did not infect the ANC only when Mr Zuma took the reins; neither will they suddenly vanish when he departs the scene.

5. Conclusion

When President Thabo Mbeki's AIDS denialism was at its height he was stoutly defended by ANC spokespeople, cabinet ministers and loyal MPs. Opposition calls for the dismissal of the then health minister, Dr Manto Tshabalala-Msimang,

were routinely shouted down, no matter how absurd her utterances became. Non-government organisations that campaigned against her views and those of Mr Mbeki were accused by the ANC of trying to undermine the fight against poverty and even of being in league with malicious multinational pharmaceutical companies.

Soon enough, though, and well before the expiry of his second term, the tide within the ANC turned against Mr Mbeki. His stance on AIDS became an embarrassment and, when added to some of his other unpopular tendencies (over-centralising; micro-managing his ministers; sidelining ideological and intellectual rivals; ignoring powerful constituencies within the alliance) the pendulum swung quickly and unstoppably against him.

Those who attacked the critics of Mr Mbeki were in fact trying to defend the ANC; or at least their idea of the ANC. Loyal members of an organisation naturally spring to its leader's defence. But when the leader disappointed them one time too many, they abandoned him, once again – in their view – in defence of their idea of the ANC. There is no reason to think that anything different will happen with Mr Zuma. What may appear to be an irrational attachment to a very fallible leader is in reality nothing more than an expression of loyalty to a party. If and when Mr Zuma is perceived to have gone too far (and Nkandla may yet prove to be such a step), to have reached the point where he might cost the party a significant share of the vote, or where he has alienated important constituencies – in other words, if a divergence arises between his interests and those of the ANC – he will be dropped just as quickly and finally as Mr Mbeki was.

There is nothing at all unusual about this. In mature democracies parties tend to drop damaging leaders more quickly, but that is simply because experience has taught them to fear electoral defeat if they don't. Where parties have safe majorities they will be less concerned about a troublesome or embarrassing leader. What matters to the party faithful, here and elsewhere, is the short-term interests of the party. Sadly, what does not seem to matter very much to them is the long-term interest of their country.

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¹ *Delaying tactics reach sell-by date*, 26th August 2014.

² Section 179(4).

³ President Mbeki suspended Mr Pikoli; he may also have influenced the decision by an earlier NDPP, Bulelani Ngcuka, not to join Mr Zuma (then Deputy President of the Republic) in the prosecution of Schabir Shaik, on numerous corruption charges relating to the arms deal. Mr Ngcuka's defence of this decision – that there was a *prima facie* case against Mr Zuma, but that the NDPP was not sure that it was a winnable case – was legally nonsensical: a *prima facie* case is by definition a winnable case. President Kgalema Motlanthe dismissed Mr Pikoli and appointed Mr Mpshe in his place. No convincing reason has ever been provided for the suspension or the dismissal of Mr Pikoli, other than that he had a 'poor relationship' with the then Minister of Justice – an indication, for many people, of his unwillingness to compromise the independence of his office.

⁴ *ANC's battle in dealing with new political monster*, Sunday Independent, 24th August 2014.

⁵ *Executive does not govern legislature*, 27th August 2014.

⁶ <http://www.dailymaverick.co.za/article/2009-10-19-analysis-president-zuma-appoints-a-new-public-protector-will-this-one-have-teeth-/#.VFojZRB4XRw> <http://www.bdlive.co.za/opinion/editorials/2014/10/28/editorial-clarity-needed-on-public-protector>

see also CPLO Briefing Paper 287, April 2012, *The Chapter 9 Institutions in South Africa*, by Veleska Langeveldt (www.cplo.org.za)

⁷ *ANC politics on Nkandla could be good news*, Business Day, 27th August 2014.

⁸ <http://www.news24.com/SouthAfrica/News/Use-buttocks-to-defend-Zuma-Mokonyane-20140915>

⁹ 11th September 2014, www.polity.org.za

¹⁰ And there is no doubt that they will. It is in their client's interests to do so and, for reasons that are unclear, they are paid out of the public purse, not by Mr Zuma himself, despite the fact that the charges relate to a time long before he became President. There is thus no shortage of money to fund endless legal battles.

¹¹ <http://www.citypress.co.za/politics/zuma-the-majority-has-more-rights-20120913/>