

When Politics and Law Collide: Combatting Corruption in South Africa

Reflections on the Work of the Helen Suzman Foundation in Creating Independent Institutions

Introduction

The Helen Suzman Foundation (HSF) has maintained an active public-interest litigation 'practice' since its original foray into the courtroom some five years ago.² Since then, what was originally an ad hoc decision has become a regular and useful mechanism of intervention within the suite of operations that the HSF uses to protect and promote the rule of law. As a policy think-tank, first and foremost, our hesitancy to rely on litigation to influence governance is understandable. We would prefer that 'bad' decisions are not made in the first place. But, where they are, it is still preferable that the policy process is susceptible to reasoned discourse and influence. Regrettably, that is not the case and, too often, policy issues have to be settled in court. As such, it would be remiss of the HSF to let its recalcitrance contribute to the erosion of our hard-won constitutionalism.

Accordingly, the HSF has sought to intervene where the independence of constitutionally-protected institutions has been threatened by political interests. These institutions are a necessary check and balance on the exercise of power. Given our political context, where the ruling party enjoys an impregnable majority, the work of those institutions takes on special meaning. At the heart of protecting them and, by extension, the public, is whether we uphold the high degree of transparency and accountability we opted for in 1994.

The ANC's History and what that means Today

The African National Congress (ANC) National General Council (NGC) is always worth paying attention to. Apart from allowing hotheads within the party to let off steam, it can also, sometimes, provide a useful insight into the country's policy trajectory for the next few years. The recent gathering at Gallagher Estate, where President Jacob Zuma flatly refused to seek a third term, was no different. Curtailing media freedoms, reducing the number of provinces, and withdrawing from the International Criminal Court all speak to a common theme: the ANC is hellbent on shutting down sites of opposition. Whether this, as DA National Spokesperson Phumzile Van Damme, MP, suggests, is evidence of an "ANC in decline"³ is debatable. What many fail to give proper account to is the ANC's history.

The ANC's attempts to centralise power should come as no surprise. Its supposed reaction to declining political fortunes may coincide with its ideological mission – as encapsulated by the National Democratic Revolution – but, it does not explain it.



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As Dr James Myburgh, writing for Politicsweb,⁴ puts it:

“One of the key themes in racially-minded Western commentary on Nelson Mandela’s passing has been the United Kingdom and United States governments were wrong to believe, in the 1980s and before, that the ANC was not a Marxist-Leninist organisation ... (suggesting) that the Western powers had been hoodwinked by Pretoria into believing that the ANC was a communist organisation.

Essentially what these authors are doing is taking the results of the largely liberal democratic negotiated settlement in the mid-1990s, which took place after the fall of the Soviet Union, and then projecting it back in time ... This despite the fact that there is no serious scholar of the ANC-in-exile (or of today for that matter) who would argue that the liberation movement was not profoundly influenced by Marxist-Leninist ideology or that the fall of the Berlin wall did not come as a huge shock to its cadres. ANC and SACP leaders of that period are themselves quite open about this.

To say this influence was important, and is enduring, opens the door to (understanding) a number of other misconceptions”

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Chief among those is the mischaracterisation of corruption. Contrary to popular belief, it is not merely about wealth accumulation. While greed may partially explain it, the systematised use of corruption as a political tool by the ruling party points to something more. Arguably, given Myburgh’s characterisation of the ANC’s origins, the ANC may be predisposed to corruption. Corruption blurs the lines between party and state, and attacking independent institutions serves to centralise power. Holding onto power is essential to achieving the ultimate goals of the revolution.

The Meaning of Independence

While the Constitution of the Republic of South Africa acknowledges independence, it does not explicitly define it. At best, our understanding has been derived from combining specific concepts (such as the “separation of powers” and “checks and balances”) to come up with a substantive meaning.

From these, independence is considered to have two components:

- First, personal independence, referring to the individual and their personal conditions of service, remuneration, etc. The focus of this is whether these enable the individual to carry out their duties with more or less independence.
- Secondly, structural independence, referring to the design of institutions and the systems they operate in. The focus of this is whether the system allows the institution to be more or less independent.

Even with these guidelines, independence remains loosely defined. Within the context of the HSF’s work, independence refers to the ability of an individual or an institution to conduct its constitutionally-mandated work with no undue political interference. Independence, then, is an understanding that despite politicians’ popular mandate, individuals and institutions will need protecting from potential victimisation. Independence, in this sense, is a constraint on the untrammelled exercise of power by the Executive.

Further, independence is not absolute. While it is highly valued, it is unrealistic that any individual or institution could be so independent that it answers to no one. Implicit in independence is the spirit of accountability. Independent institutions hold others accountable and they, in turn, answer to someone else. Independence operates with a system of separation, checks, and balance of power.

Independence, then, goes beyond the traditional executive/judicial/parliamentary triumvirate. These institutions are fairly well balanced, with a certain respect for their independent and legitimate purviews. What has been alarming has been the erosion of independence within other sectors of the state, so as to concentrate power in the hands of the Executive. Notably, the triumvirate balance is not perfect, nor that it is always respected. Rather, independence in this is more obvious. The Constitution is most clear on the nature and content of the relationship, with each of the constituent arms of state enjoying explicitly defined roles. Such is the source of their authority. Given this detail, political actors (involved in the formal and informal political processes) are more readily able to appreciate erosions and act on them.

Single-party dominance means that the ANC enjoys significant political control over institutions that should be holding it accountable. Made worse by proportional representation, the party leadership is able to assert its will over party members and state institutions in order to limit the degree to which it is accountable.

The real difficulty is with respect to how independence is understood in circumstances where branches of state, notably Parliament and the Executive, may ostensibly be exercising their power for legitimate reasons but is aimed at the opposite effect.

This is with specific reference to the entities of state which are crucial to the effective governance of state but which may not enjoy as much protection as those like Parliament.

Two notable factors, namely single-party dominance and cadre deployment, bear special consideration.

Single-party Dominance

In theory, single-party dominance in a competitive electoral system should not be a problem. Notwithstanding institutional checks on a ruling party's power, any party should be able to compete and freely to assert its dominance.

The problem in South Africa is that, even though political competition is theoretically equal, the ruling African National Congress ('ANC') enjoys a huge advantage over its competitors. The ANC has a lock on an impregnable majority in spite of significant inefficacy and incompetence. This is not necessarily the problem, but the certainty of its majority immunises it from the positive effects of such competition. Such a sense of impunity allows it to erroneously believe it is beyond political reproach.

Single-party dominance means that the ANC enjoys significant political control over institutions that should be holding it accountable.⁵ Made worse by proportional representation, the party leadership is able to assert its will over party members and state institutions in order to limit the degree to which it is accountable. Hence, Parliament – which is vested with significant authority – being lacklustre, at best, in its oversight role.

However, a confluence of factors, including internal strife and external competition has meant that the ANC's hegemony is fraying. Combined with an increasingly critical media and frustrated electorate, the ANC is undoubtedly in trouble. Though not yet fatal, this increases the sense that the ANC's weakness has become terminal.

Understanding these changes are essential to contextualise the ANC's behaviour. As the Financial Times noted with respect to Vladimir Putin in Russia,⁶ hegemony is at their most dangerous when they are in decline, not demonstrating strength. To that extent, Van Damme's comments may be correct, however, the 'writing on the wall' may underscore the ANC's eagerness to achieve its revolutionary goals, not replace it.

The ANC's history of Marxist-Leninism is instructive. Even though it may have ostensibly abandoned a Marxist belief in socialism, it maintains its Leninist authoritarian means through which to achieve it. Cadres are crucial because they put the party first.

This nervousness and acute sense of self-preservation may explain why otherwise independent institutions are deliberately manipulated or acted against. The logic is that potential sites of opposition must be limited or shut down.

However, because the Constitution is clear, institutions such as Parliament, the Judiciary, the media, and other spheres of government and Chapter 9 Institutions, are easier to protect.

Cadre Deployment

The threat to the independence of institutions is more relevant with respect to the ANC's policy of cadre deployment, most acutely felt in institutions that do not enjoy explicit protections.

Adopted in 1997, cadre deployment refers to the appointment of loyal ANC members ('cadres') to all institutions of state. The object is to extend and concentrate power within the party. It can be viewed as a mechanism of state capture.

The ANC's history of Marxist-Leninism is instructive. Even though it may have ostensibly abandoned a Marxist belief in socialism, it maintains its Leninist authoritarian means through which to achieve it. Cadres are crucial because they put the party first. So, even though socialism has fallen by the wayside, putting the party at the centre of national life as a means to maintain power has not.

It is clear how this undermines both personal and structural independence:

With respect to the former, deployees are expected to do the ANC's bidding. There is little/no regard to what the duties are imposed by the office they occupy. This means that they either operate with a party bias or submit to the party agenda. They may do both. Where incumbents are already appointed and are unwilling/unable/untrusted to carry out the party agenda, a variety of mechanisms can be used to remove them from office.

With respect to the latter, the effect of cadre deployment is to blur the distinction between party and state where, implicit in the constitutional order is a requirement for the separation of powers. This is also noted where state apparatus is rearranged to adopt mechanisms of control that increase the relative power of political actors who have oversight and management responsibility.

Cadre deployment also has another inadvertent consequence. As the normalisation of internal political contestation within the ANC increases, the capture of party/state power becomes more crucial. Cadre deployment, then, is used to appoint political allies into well-paying and powerful positions. The *quid pro quo* is one of mutual interest: the secondary actor (employee) is expected to look after the interests of the primary actor (deployer) in exchange for the primary actor's continued patronage.⁷

Worryingly, the pernicious effects of cadre deployment are hidden behind the need for racial transformation. While demographic change in many institutions may be both desirable and necessary, strict demographic representivity is used as a fig-leaf for installing party deployees into key positions. Notwithstanding the reductionist stigma that attaches to deserving black appointees, the ANC ironically seems to believe it to be true. Appointees are thought to think and

function in a particular way because they happen to be black.⁸ This not only erodes the confidence in black professionals and institutions of state, but also makes opposition to questionable transformation practices easily assailable as being anti-transformation. Indeed, that defence is often used as a smokescreen to escape real accountability. It has often proven successful with devastating effect.

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The Centralisation of Criminal Justice Sector

The most notable impact of all these factors has been in the administration of the criminal justice system, specifically, the Directorate of Priority Crime Investigation (DPCI), Independent Police Investigative Directorate (IPID), and National Prosecuting Authority (NPA).

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- First, President Jacob Zuma faces 783 charges of fraud and corruption. These institutions have, in various ways, sought his prosecution. Undermining their independence for his personal liberty is one consideration; but so is the impact it would have on the ruling party if its leader were to be arrested.
- Secondly, part of President Zuma's strategy has been to appoint people to particular positions who may have knowledge of his culpability, but whose political responsibility it remains to protect him. In doing so, he has effectively co-opted them into his agenda making them less likely to protect the independence of these institutions, as their futures are also potentially at stake; and
- Thirdly, control of these institutions is vital as they have been used as weapons in political disputes between various internal. Eroding their independence means they can be manipulated to do the bidding of their political masters.

The consequence of this is that crime fighting institutions, whose responsibility it is to detect and combat crime, are highly unstable as their mandate, top leadership, and personnel are subject to ad hoc, irregular, and damaging changes. Notable examples include:

- The destabilisation of the Hawks through appointing and suspending Heads of the unit for seemingly political purposes;

- Appointing key figures within the NPA who stymie efforts to prosecute important ANC members and affiliates; and
- Persecuting independent-minded officials, such as Johann Booysen and Robert McBride, who have acted in a way to stop political interference.

Much of the HSF's work, then, relates to litigating on issues of design that affect either the personal or structural independence of our institutions. An understanding of the politics is essential, as it provides background context to many of these legislative manoeuvres. While the HSF does not concern itself with partisan considerations, as it acts in the public interest, the political details take on special meaning when assessing the impact of the HSF's work. The public are entitled to have a criminal justice system that is independent, free and fair. This means that the HSF will act. But, it also means that it must act with restraint, in recognition of the same separation of powers it strongly advocates. It is fair to discipline constitutionally questionable political impulses when they spill over into the conduct of state affairs; it is indefensible to attack legitimate exercises of state power merely because we may disagree with it.

The HSF's main contribution was to argue that the Constitution, when read with the Republic's obligations in terms of international law, required that, regardless of location, an independent corruption fighting agency was necessary.

The HSF's Work

The HSF's ongoing litigation work against the state emphasises challenges to institutional independence, which cannot be divorced from macro-political issues.

*Glenister*⁹

The central issue was whether the DPCI, as an elite and specific corruption fighting unit, was sufficiently protected by being moved under the operational command and control of the South African Police Service (SAPS). The SAPS is a more

politically controlled institution, and the concern was that the DPCI relied on the independence it was previously guaranteed when it operated under the constitutionally independent NPA. The HSF's main contribution was to argue that the Constitution, when read with the Republic's obligations in terms of international law, required that, regardless of location, an independent corruption fighting agency was necessary. In line with the HSF's arguments, the Constitutional Court ('CC') did not object, in principle, to locating the DPCI within the SAPS but rather objected to locating it within an entity that undermined the independence it was expected to have.

*The Hawks and the HSF*¹⁰

This case follows on from the *Glenister* judgment, and examined whether the remedial steps taken by Parliament to create a functionally independent specialised anti-corruption entity was justifiable. The HSF achieved partial success in that certain features of the legislation (mostly relating to personal independence) were invalid. Even though the HSF did not secure the CC's support in all its arguments, that other features (namely, structural independence) were also impacted, the partial victory was enough for the CC to order that the legislation be redrafted.

Lieutenant-General Anwar Dramat

This case follows the HSF's earlier success above, where the unlawful suspension of the Head of the Hawks, in violation of the CC's earlier judgment, was challenged

and set aside. The High Court affirmed the judgment and the SCA refused to hear an appeal. The consequence is that the earlier decision stands. However, the success was qualified in that Dramat was offered a significant payout to drop his challenge (which he accepted).

*Independent Police Investigative Directorate (IPID)*¹¹

This case follows on from both *Glenister* and *Helen Suzman* above, and effectively argues that the attempt by the Minister of Police to suspend the Executive Director of IPID, Robert McBride, the police ombudsman that cleared Dramat whom the Minister was found to have unlawfully suspended, violates the independence afforded to it by the Constitution and existing interpretations.

Judicial Service Commission (JSC)¹²

The central issue was whether the JSC's interpretation of section 174(2) of the Constitution, which calls for the judiciary to be transformed so as to generally reflect the racial and gender demographics of South Africa, is reconcilable with the requirement in section 174(1) to only appoint the best candidates. The JSC, in effect, applied a soft quota by stating that it would be impermissible to appoint more than two white men to the Bench in a single round as it would "do violence to the Constitution". The value of the HSF's work is threefold:

- First, to test the validity of this interpretation (the HSF fully supports transformation; a soft quota is manifestly unlawful);
- Second, to establish important precedent with respect to access to information (as a result of preliminary proceedings which focus on whether confidentiality attaches to *prima facie* unlawful decisions); and
- Third, to discipline the tactic of stacking the bench with candidates who may simply be very susceptible to being Executive-minded it judges to be more susceptible to be Executive-minded.

This is aimed to strengthen the independence of the judiciary which carries the ultimate responsibility for protecting our constitutional order.

The HSF is also keeping a watching brief on the following cases:

Hawks

This litigation centres on whether the newly appointed Head of the DPCI, Maj-Gen Ntlemeza, is a fit and proper person. This is required by the legislation governing appointments (which was part of the subject matter of *Glenister* and *Helen Suzman Foundation* above). This is after several adverse findings were made against Ntlemeza in a separate matter where a High Court Judge questioned his trustworthiness and honesty. It is obvious that the Head of the DPCI's credibility needs to be beyond reproach. Ntlemeza, who seems to be favoured by the Minister for his political deference, is, thus, a concerning appointment.

National Prosecuting Authority (NPA)

This centres on the extent of the right to interfere in the dismissal of the Head of the NPA. This goes to the heart of the independence and trustworthiness of

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the prosecutions service to not show political favour. Additionally, the new tactic of using significant pay-outs to get troublesome appointees out of office is also worth noting.

Conclusion

The HSF does important work to ensure the protection of our independent institutions that are, regrettably, under attack. In a constitutional state where the law is supreme but the ruling party has an impregnable majority, creating tension between public and political interest, this work takes on particular significance. Many of these institutions are deliberately targeted because of their power to bring the ruling party to heel. This is especially the case under the Zuma presidency. President Zuma and his allies who now control the police, the prosecutions service, and the independent authorities that are supposed to monitor them, are all motivated by personal and partisan interest. Personnel are appointed for political purposes, incumbents are forced out, golden handshakes are given, and sometimes even controversies are manufactured. One conclusion which is difficult not to draw is that they are being used to protect the President and those who support him. The HSF has no personal enmity against President Zuma or the ANC for that matter. Rather, we take seriously our defence of the rule of law to ensure that our Constitution is supreme and applies equally to all. The HSF will to develop the understanding of functional independence as its work is increasingly important in combatting political interference that threatens the entire edifice of our constitutional order.

NOTES

- 1 This article is based, in part, on a speech by the author entitled "When Politics and Law Collide: Combatting Corruption in South Africa Creating Independent Institutions" delivered to the Pan-African Conference on Public Service Accountability & Policy Advocacy in Centurion on 15 October 2015.
- 2 *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC)
- 3 <http://www.politicsweb.co.za/news-and-analysis/anc-resolutions-will-close-down-the-democratic-spa>
- 4 <http://www.politicsweb.co.za/news-and-analysis/the-anc-before-the-collapse-of-communism>
- 5 <http://hsf.org.za/resource-centre/focus/focus-72-democracy-and-its-discontents/where-have-all-the-independent-politicians-gone-k-premhid/view>
- 6 <http://www.ft.com/intl/cms/s/0/c8b034ac-44ca-11e5-b3b2-1672f710807b.html#axzz3oeyBwmu7>
- 7 Although the nomenclature used here is particularistic to the ANC, it is not unlikely that a similar power relationship will develop with other political parties too.
- 8 The ANC makes a fundamentally illiberal mistake in thinking that any (black) deployee is naturally beholden to it. It denies that deployees, and black people generally, have any agency at all.
- 9 <http://www.saflii.org/za/cases/ZACC/2011/6.html>
- 10 <http://ewn.co.za/2015/07/24/About-Court-grants-interdict-to-Robert-McBride>
- 11 Ongoing. <http://hsf.org.za/projects/justice/litigation/helen-suzman-foundation-takes-judicial-service-commission-to-court>