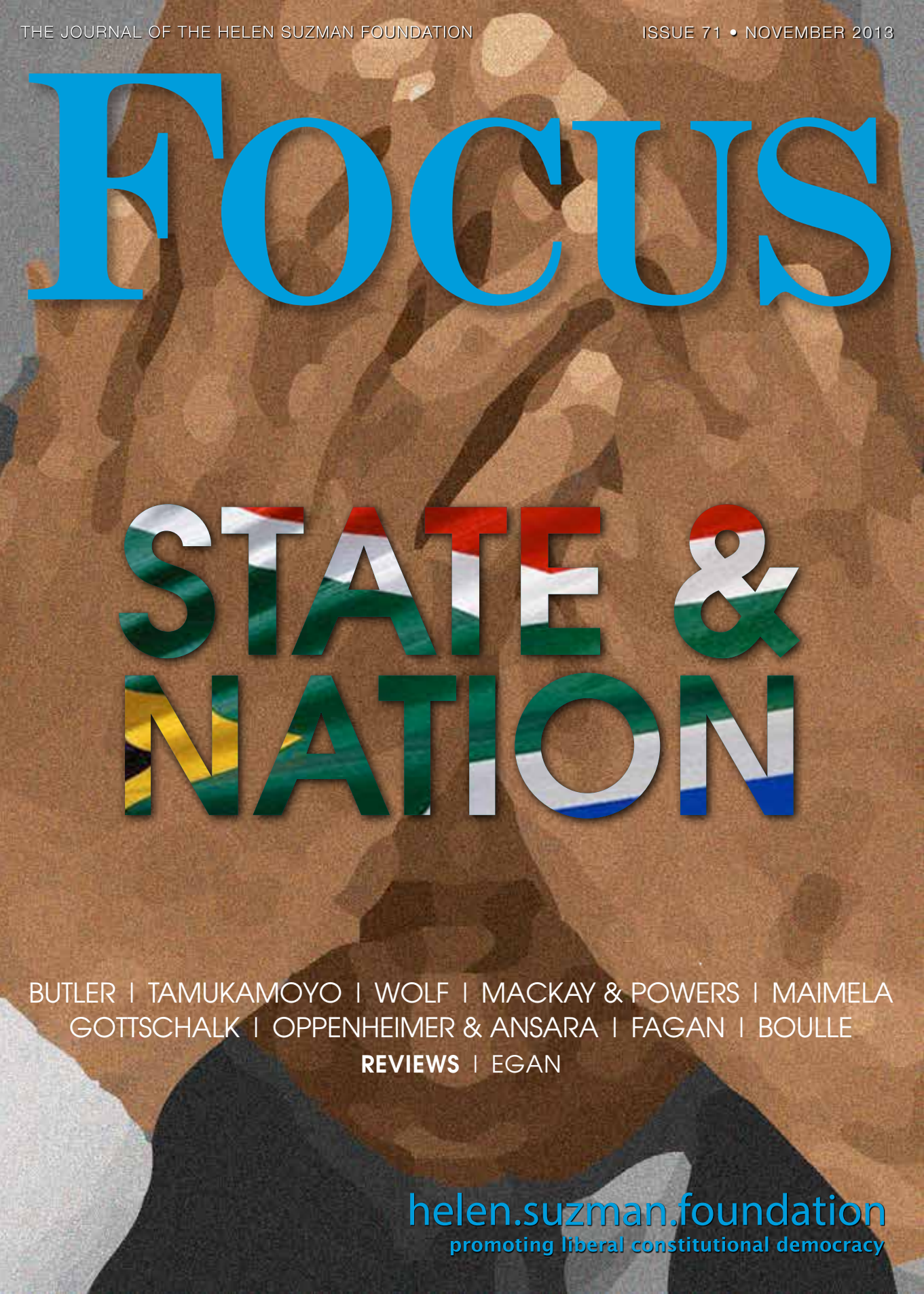
THE JOURNAL OF THE HELEN SUZMAN FOUNDATION ISSUE 71 • NOVEMBER 2013

FOCUS



STATE & NATION

BUTLER | TAMUKAMOYO | WOLF | MACKAY & POWERS | MAIMELA
GOTTSCHALK | OPPENHEIMER & ANSARA | FAGAN | BOULLE
REVIEWS | EGAN

helen.suzman.foundation
promoting liberal constitutional democracy

Focus is published by The Helen Suzman Foundation,
Postnet Suite 130
Private Bag X2600
Houghton, 2041
No 2 Sherborne Road
Parktown, 2193

Email: eythan@hsf.org.za
Website: www.hsf.org.za

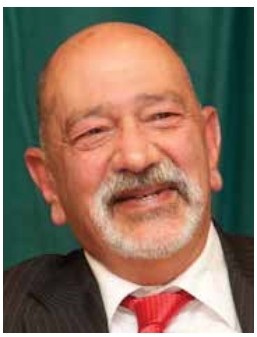
ISSN 1680-9822

The publication of *Focus* is made possible through generous funding provided by the Friedrich Naumann Foundation

CONTENTS

BOOK REVIEWS

Overview and welcome



Francis Antonie is the Director of the Helen Suzman Foundation. He is a graduate of Wits, Leicester and Exeter Universities. He was awarded the Helen Suzman Chevening Fellowship by the UK Foreign Office in 1994. From 1996 to 2006 he was senior economist at Standard Bank; thereafter he was director of the Graduate School of Public Development and Management at Wits University. He is the founding managing director of Strauss & Co.

*This edition of **Focus** is devoted to exploring some of the issues which confront state and society in South Africa. Three distinct themes emerge, namely, the Executive and the state apparatus dealing with prosecution and security; foreign policy in relation to Africa; and, lastly, the challenges facing South African universities (including their admission policies).*

Anthony Butler investigates the current state of the South African Presidency. He argues that despite the outward appearance of an executive president in a presidential system of government, the presidency contained in what is a parliamentary system. Butler begins by discussing the international trend to a more powerful executive, and its responsibilities in the international arena. He considers the importance of the cabinet office which brings together all relevant actors engaged in decision making; and he reviews the role of planning and evaluation which is now focused on the NDP. Butler develops a comprehensive picture of the presidency. The article concludes by posing the question what kind of presidency South Africa would have in an ideal world and concludes that, comparatively, Zuma's presidency is by no means floundering, but sadly it is still lacking vigorous and coherent presidential leadership.

Hamadziripi Tamukamoyo reflects on and considers whether two South African anti-corruption agencies, the National Prosecuting Authority (NPA) and the Special Investigating Unit (SIU) are, in reality, sufficiently independent and equipped to transparently combat corruption. He reviews the legal instruments governing their operation and the process of appointing top leadership in these institutions. He also considers the security of tenure, financial and human resources and the issue of interference with the work of the agencies. Tamukamoyo introduces a comparative dimension by reviewing other countries that have been reasonably successful in creating autonomous corruption-busting agencies. The article considers the steps that could be taken to ensure that South Africa's existing anti-corruption architecture is fortified.

Loammi Wolf writes on models of prosecuting authorities and their relation to state power. She compares the Constitutional State model and the Westminister model in an overview of prosecurial functions in the modern state. She argues that only the Constitutional State ensures a separation of powers. Wolf discusses South Africa's National Prosecuting Authority and examines its status with reference to these two models. She argues that the NPA, currently, does not have a sufficient degree of independence and that the current prosecuting model fails to ensure the separation of powers.

Mitchell Mackay and **Michael Power** aim to unpack and appraise existing security legislation. They review the measures currently being taken by the government to protect the State, its assets and its key actors. The authors argue that state security has become more than an issue of practical protection. This is because of an underlying lack of trust that has permeated the relationship between the State and the citizenry. This distrust is exacerbated by a lack of transparency and civic engagement and is compounded by the questionable reliance on security

legislation by the State in instances where it may not be justified.

David Maimela examines "The 21st century Africa" being one of promise and doubt. Maimela argues that if Africa is truly going to claim the 21st century as its own, it needs to reassert pan-Africanism as the basis of its agenda. He begins by discussing the concept of pan-Africanism as a tool to reclaim African history and personality. Maimela considers the achievements of pan-Africanism thus far, such as correcting historical injustices and promoting African unity. For pan-Africanism to be successful, and the article argues it must, it needs to develop through innovation, sustainable development and growth. Maimela concludes that, in order to advance, the pan-African agenda, we need to understand how the 21st century world works – how it includes and exclude others, how it presents opportunities whilst simultaneously avoiding the recolonisation of the African continent.

Keith Gottschalk suggests that there are at least four sound reasons why liberal democrats ought to support the vision, principles, and norms of the AU and, more controversially, why they should consider supporting AU disenchantment with the ICC. First, ever since the era of the League of Nations, liberal democrats have been the biggest supporters of the concept of an international order based on the rule of law. Second, the bulk of actual operations on the ground by the AU and its affiliates have been central to peacekeeping operations to end civil wars, with all their accompanying atrocities and war crimes. Third, ideals and values enshrined in the founding treaties and protocols of the AU and its associated organisations, marks, to date, the biggest acceptance and victory of liberal democratic principles on the continent. Fourth, those treaties and protocols commit the signatory states to schedules to phase out protectionism in favour of a continental free trade area. Gottschalk argument will, no doubt, puzzle or even possibly annoy liberal democrats; but they should be considered.

Mark Oppenheimer and **David Ansara** outline the different forms that affirmative action policies can take. The authors argue that race-based policies do not yield the positive results that are claimed. They offer four reasons for this view. First, these policies do not properly compensate individuals for past injustices. Secondly, they create social burdens on those they purport to benefit. Thirdly, they entrench the importance of race and require (repugnant) systems of racial classification. Lastly, the authors point out that non-racial affirmative action policies are a desirable way of redressing past injustices, while ensuring that all students are provided with an equal opportunity to succeed. Their focus is UCT's admission policy. We understand the university is currently reviewing its policy.

Anton Fagan reviews UCT's admission policy which seeks to undo inequality. However the race aspect of it troubles him. He points out that division based on race is not merely a social construct, but comes from our history. Fagan refers to the book *Racecraft* for key ideas on slavery, witchcraft, and racism to introduce his argument. By using race as part of the application process it leads to naturalisation of race division. He proposes, stating it is an idealistic view, that any racial classification as a requirement be removed from the admission policy and argues that what matters is not racial inequality and racial injustice, but inequality and injustice.

Lawrence Boulle uses the narrative of storytelling and the theme of adaptability to discuss South African (Private) Universities. The article considers the importance of adaptability in Universities by looking at four different "pulses". The first is the normative pulse, embracing values, principles and standards. The second is the teaching and learning pulse - the conveyors of knowledge, discernment and wisdom - which is at the core of universities, both ancient and modern. The third is the business, management and financial pulse. The fourth is the community engagement pulse which relates to those whom the university reaches out to serve, whether local, national or international, and which in turn impacts on universities. Boulle's article is a welcome re-visiting of the idea of the university and belongs to the tradition first articulated in the nineteenth century by John Newman's great article.

We conclude with a review article by **Anthony Egan** of two books. These are *Choosing to be free: The Life Story of Rick Turner*, by Billy Kenniston and *Death of an idealist: In Search of Neil Aggett*, by Beverley Naidoo.

The State of the South African Presidency

Anthony Butler
is Professor of Political Studies at the University of Cape Town. He is the author of a number of books including *The Idea of the ANC* (Athens, Ohio University Press, 2013) and the biography *Cyril Ramaphosa* (Oxford, James Currey, 2008). His research focuses on politics and public policy in South Africa. He also writes a weekly column for *Business Day*.

The Presidency

The office of the president in South Africa is a constitutional and political hybrid. The incumbent, in certain respects at least, outwardly resembles an executive president in a presidential system of government. This, however, is largely an illusion: presidential delusions of grandeur are sharply contained by what remains essentially a parliamentary system.[1]

On the one hand, the presidency is undoubtedly at the apex of the system of government. The incumbent is head of the national executive and he is therefore at the heart of the sometimes grubby business of politics. He chairs cabinet and forms a bridge between the governing party and national public sector institutions.

The president is also the head of state: he is a symbolic national leader who is expected to embody the values of aspirations of his people. He enjoys grand official accommodation at the Union Buildings in Pretoria and at Tuynhuys in Cape Town.

The incumbent possesses an array of formal powers. He appoints ministers and influences the appointment of senior officials. He chairs the cabinet, steers some cabinet committees, and appoints the chairs of others. He can dominate foreign policy. And he can adopt any other policy area and make it his own. In addition, he can bypass full cabinet and terrify his ministers with the threat of dismissal. A president also appoints members of public bodies, giving him a huge realm of patronage. And he has access to state intelligence and communications resources.

The president is also (usually) the head of the largest party in parliament. This provides him with a unique opportunity to combine state and party instruments in the exercise of power. Those who cross swords with him do not merely face eviction from government: they risk exclusion from public office and from the prospect of gainful employment in the private sector.

So evident is a president's power that we tend to overlook the significant institutional and political constraints that bind the nation's leader. South Africa's system of government is essentially parliamentary rather than presidential. The President is elected by National Assembly rather than directly by the people and so he does not possess a personal mandate. He is vulnerable to impeachment, or to a vote of no confidence by the majority of the assembly which would trigger a general election. As the fate of former president Thabo Mbeki demonstrates, his leadership of the governing party is a double-edged sword: the state president is subject to "recall".[2]

The three 'powers of government' (legislation, execution, and adjudication) are each assigned to a separate branch: to parliament, to president and cabinet together, and to the courts. This separation of powers, regulated by a supreme constitution, hinders the concentration of too much authority in the presidency.

professional staff) are not sufficient to trump those of the public service. Presidents lack the time, knowledge, and resources required to dominate government to the extent permitted by the office. They must rely on the willing compliance of officials and ministers.

The presidency can quickly become the loneliest job in politics.

Ministers, meanwhile, possess high level political skills of their own, and they typically nurture both personal ambitions and grievances against a president and his confidants. Powerful institutions with greater capabilities – including the Treasury – share the space at the top of the executive. In addition, he is never politically invulnerable, and he must balance cabinet by faction, region, ethnicity, race and gender, while respecting powerful colleagues with major constituencies.

Above all, however, it is events themselves – the unending stream of exhausting challenges that confront a president day in day out – that deplete the political resources of any incumbent who tries to dominate the system of government. The presidency can quickly become the loneliest job in politics.

Within the broad opportunities and constraints that define the state presidency, any particular incumbent can enhance or deplete his authority. Here we will consider five important factors behind the growth of presidential power in recent years and explore how Jacob Zuma has exploited the opportunities that have been available to him.

The growing power of leaders

Over the past two decades, presidents, premiers, and prime ministers around the world have accumulated larger budgets, bigger personal offices, and more powerful policy making and communications staffs. This is part of a longer range historical trend.[3] The executive is the dominant branch of government almost everywhere in the modern world[4] and its power has relentlessly grown.

The technical complexity of economic and public policy excludes legislators and citizens from effective power. Corporatist relations that link the executive branch to business and labour, and the emergence of welfare states, have further contributed to this trend. The role of national leaders as brokers between big business and public authorities has further enhanced the power of those at the summit of the executive.

Foreign and defence policy have also played a major role in expanding the influence of national leaders and those who surround them. The executive branch negotiates and signs international agreements. In recent years, the South African presidency has taken up numerous mediation responsibilities in conflict areas, expanded its engagements in the region, developed new partnerships such as BRICS[5] and IBSA[6], and taken up significant positions in the Group of 20 and the United Nations Security Council.

In countries such as South Africa, the role of party-to-party relationships in international diplomatic and commercial affairs increases the brokering power of a head of the executive when he is also head of the governing party. Under Jacob Zuma, stronger relationships with China and the Russian Federation, for example, have sharply increased the personal power of the state president.

The Cabinet Office

The "coordination" and "integration" functions performed by the head of the executive branch have also encouraged greater presidential assertion. In South Africa, as a result of reforms introduced at the start of Thabo Mbeki's presidency,[7] the executive branch is organised around an integrated cabinet system; and the cabinet system is managed by the state presidency.

The high turnover and uneven quality of DGs is for this reason one of the major challenges confronting the national government.

This power goes beyond the President hiring and firing of cabinet ministers (where Zuma has been more ruthless than his predecessors) and his chairing of full cabinet meetings. It is, after all, in the cabinet committee system that much real power lies. A cabinet system is designed to manage government business by ensuring that all relevant actors are included in decision-making. The departments in a 'cluster' need to plan their activities together mindful of the impacts one department may have on others. Clusters include Justice, Crime Prevention and Security; Economic Sectors and Employment; Social Protection; Community and Human Development; and International Cooperation, Trade and Security.

The committee system therefore relieves pressure on cabinet itself by defining points of disagreement and excluding irrelevant actors. Only if disputes are intractable, or a policy is highly significant politically or in terms of resource implications, is a dispute likely to make its way to Cabinet. This procedure gives recognition to the fact the full Cabinet is not a good decision-making body, being overloaded, unwieldy, and comprised of non-specialists.

The Cabinet Office which provides administrative support to Cabinet is located in the presidency. Its officials conceive of it as a neutral machinery rather than as the servant of particular ministers. At its centre is the Forum of Directors General (Fosad) whose monthly management committee meetings are one engine room of government. DGs often do not overburden ministers with complex issues; most potential conflicts and synergies are identified by officials without the involvement of their political principals. The high turnover and uneven quality of DGs is for this reason one of the major challenges confronting the national government.

The FOSAD secretariat is presided over by the DG in The Presidency, currently Dr Cassius Lubisi. This position was held in the late Mandela and Mbeki administrations by Frank Chikane who has recently explained some of the troubles

the office endures.[8] Lubisi is a career civil servant brought to Pretoria from the provincial government in KwaZulu-Natal and his role, although inherently political, has been confined to the administration of government business. The location of the cabinet office within the presidency confers informal powers upon the president. When conflicts over resources or departmental turf do occur, the president's people are on hand to act as moderators and enforcers.

Planning and Evaluating

The National Development Plan (NDP) has recently become a lightning rod for those disenchanted with Zuma's government.

Since 1999, the Presidency has convened various policy co-ordination bodies. Under Mbeki, the central institution was the Policy Coordination and Advisory Services (PCAS) unit under Joel Netshitenzhe. PCAS looked both forward and back. Looking forwards, it engaged in scenario planning, vetted policy proposals, and tried to encourage their mutual compatibility. Looking backwards, it engaged in episodic monitoring of the implementation of policy within clusters, with a special concentration on hard and "transversal" issues that cut across departments and tiers of governments.[9]

PCAS has recently been replaced by two new institutions that perform the same basic functions but on a more ambitious level. The Minister of the National Planning Commission (NPC), Trevor Manuel, and the Minister of Performance, Monitoring and Evaluation, Collins Chabane, are the political principals for these activities.

The National Development Plan (NDP) has recently become a lightning rod for those disenchanted with Zuma's government.[10] The NPC seems likely to adopt an advisory role, and a new institution will be set up within the presidency to implement the plan's less politically sensitive recommendations. After backing the NDP at Mangaung, however, Zuma has failed to take action against those within his own cabinet who have undermined it.

The Department of Performance Monitoring and Evaluation (DPME), established in 2010, incorporates old PCAS functions such as the evaluation of government's priorities, the development of performance indicators, and the assessment of the quality of management practices across the public service. It has also inherited efforts to build a government-wide monitoring and information system. As with many other states, the South African public service is plagued by "state-istics": data that are collected to generate a favourable image of public servants rather than to reflect the true state of affairs in the country.

Some commentators have speculated that the NPC and the DPME are unwieldy and in some respects perform less well than their PCAS predecessor.[11] This judgement is probably premature: both departments operate with long time horizons and they are designed to institutionalise good practices across the public service as a whole. It is likely, however, that President Zuma has less immediate access than Mbeki to a "kitchen cabinet" of official advisors who can combine strong political instincts with a secure grasp of public policy.

Important Cross Cutting Institutions

The presidency is the home for institutions that are inherently "cross cutting" and therefore possess no natural lead department (although some cross-cutting issues have now been transferred to a stand-alone Ministry of Women, Children and People with Disabilities).

The country's response to HIV/AIDS is coordinated by the South African National Aids Council, which is hosted by the presidency. A temporary Job Creation Commission, chaired by deputy president Kgalema Motlanthe, has tried to coordinate employment protection responses following the post-2007 economic downturn. A presidential review of state-owned enterprises has recently (and rather inconclusively) reported.

The president is entitled to set up Presidential commissions of enquiry – ad hoc investigations initiated by the head of state. An inquiry can help a president to evade responsibility for a tough decision.

In 2011, Zuma set up a Presidential Infrastructure Coordinating Commission (PICC). Its goal is to accelerate government's ambitious infrastructure programme using the resources and political capital of the presidency. It is chaired by the President himself, and its members include the Deputy President, economy cluster ministers, premiers, and the mayors of metropolitan municipalities. At its heart are 18 Strategic Integrate Projects (SIPs), including the development of the mineral belt in Limpopo and Mpumalanga, a logistics corridor linking KwaZulu-Natal, Free State and Gauteng, and the Saldanha Northern Cape development corridor.

More controversially, and also since 2011, a National Nuclear Energy Executive Coordination Committee (NNEECC) oversees government's proposed six-plant nuclear reactor procurement programme (itself first announced in August 2006). Zuma also chairs this body. The Fukushima disaster has transformed nuclear risk appraisal, the fiscus can no longer easily absorb the expected R400bn to R1-trillion bill, and the ongoing Medupi saga has thrown into question the country's readiness for an engineering project of this scale and complexity. Specialists from the NPC have questioned the need for such an investment. The role of the presidency in this case seems to be to provide a screen that hampers public accountability.

Presidential commissions of enquiry

The president is entitled to set up Presidential commissions of enquiry – ad hoc investigations initiated by the head of state. An inquiry can help a president to evade responsibility for a tough decision. It can also, like the Farlam Enquiry into Marikana, protect a government from popular outrage and dissipate blame for tragic events. We ordinarily ascribe responsibility for a crime or disaster by imagining a chain of causes and effects that led to it.[12] We search for those informed and voluntary actions without which the event in question would not have occurred. What citizens want to know about Marikana is, broadly speaking, who took the free, informed, and voluntary decisions that led to the massacre. A commission of inquiry, however, is designed to bring general background conditions to the fore and so to turn a hunt for culpable actors into a general sociological investigation. It is therefore primarily an instrument of political "spin" in the hands of the President. The Seriti Commission of Inquiry into Allegations of Fraud, Corruption, Impropriety or Irregularity in the Strategic Defence Procurement Packages likewise seems designed to divert public attention to relatively trivial matters or to transfer blame to the president's political enemies.

Conclusions

In an ideal world, what kind of state presidency would South Africa possess? It would be 'comprehensive', in that it would embrace all relevant facts; it would be strategic; it would be 'governmental' rather than swayed by sectoral or departmental interests; it would be proactive; it would resist immediate political and electoral pressures; it would take decisions consistent and compatible with each other; and it would be counter-intuitive and radical.

The presidency under Jacob Zuma does not realise any such ideal. But neither is it hopelessly floundering. Government is always a bit of a shambles; nevertheless, the presidency has become more of a machine than it was in the Mbeki years, with a less politicized DG, better grounded policy and planning systems, and more objective mechanisms for the evaluation of government performance. Under Zuma, it has placed its weight behind important initiatives such as the development of national planning systems and infrastructure. There are reasonably coherent processes for arbitrating between conflicting ministers, for monitoring policy implementation, for providing legal and specialist analysis to officials, and more broadly for managing the machinery of government.

Zuma, then, has an institutional platform from which to lead. And, in the NDP, he has a broad framework for public policy. But he has underwhelmed rather than overwhelmed his society. The potential strength of presidential power is regulated by the behaviour and personality of the incumbent. In the memorable phrase of one student of the American presidency, a successful president must mobilise the "power to persuade".[13]

At a personal level, Zuma is open and refreshingly un-dogmatic. His chequered past, however, has tarnished the reputation of his office. His pattern of ministerial and other appointments has sometimes reflected the demands of self-preservation rather than those of national leadership. Zuma also lacks the intellectual energy to create and communicate a sense of coherence in government, to elaborate an overall framework of priorities, and to relate the government's broader vision to the political ideology of the ruling political party. In these difficult times, leadership is a resource too important to be squandered. Under Zuma, the machinery of the presidency has been maintained and even expanded; but the country is still waiting for vigorous and coherent presidential leadership.

NOTES

1 A. Lijphart, 'Introduction' to A. Lijphart (ed.), Parliamentary Versus Presidential Government (Oxford, Oxford University Press, 1992) 1-27.
2 For an excessively breathless account of these events, see Frank Chikane, Eight Days in September: The Removal of Thabo Mbeki (Johannesburg, Picador Africa, 2012).
3 B. Guy Peters and Ludger Helms, 'Executive Leadership in Comparative Perspective: Politicians, Bureaucrats and Public Governance', in Ludger Helms (ed.) Comparative Political Leadership (New York, Palgrave Macmillan, 2012) 25-54.
4 Only the United States, as a result of unique historical, constitutional and geographical legacies, has a powerful policy making legislature at federal level, a political culture hostile to untrammelled executive power, and a powerful judicial system. Even here the growth of executive power has been striking. See, for example, William P. Marshall, 'Eleven reasons why presidential power inevitably expands and why it matters', Boston Law Review 88 (2008) 505-22.
5 Brazil, Russia, India, China, South Africa grouping.
6 India, Brazil, South Africa forum.
7 Republic of South Africa, Presidential Review Commission on the Reform and Transformation of the Public Service (Pretoria, Government Printers, 1998).
8 Frank Chikane, The Things That Could Not be Said (Johannesburg, Picador Africa, 2013).
9 See, for example, Policy Coordination and Advisory Services, A Nation in the Making (Pretoria, The Presidency, 2006).
10 South African Institute for Race Relations, 'National Development Plan: Best Laid Schemes', Fast Facts, 7 (Johannesburg, SAIRR, 2013).
11 Richard Calland, 'Why Zuma is no Mbeki', City Press, 4 August 2013.
12 HLA Hart and M Honore, Causation in the Law (Oxford, Clarendon Press, 1959).
13 Richard Neustadt, Presidential Power (New York: John Wiley and Sons, 1960).

Independence in South Africa's Anti-corruption Architecture: Failures and Prospects

Hamadziripi Tamukamoyo (PhD) is based in the Governance, Crime and Justice Division at the Institute for Security Studies (ISS) in Pretoria. He has research interests in governance, crime and criminal justice, health and development, and work and globalisation. Currently he is leading a project to assess the efficacy of South Africa's anti-corruption architecture.

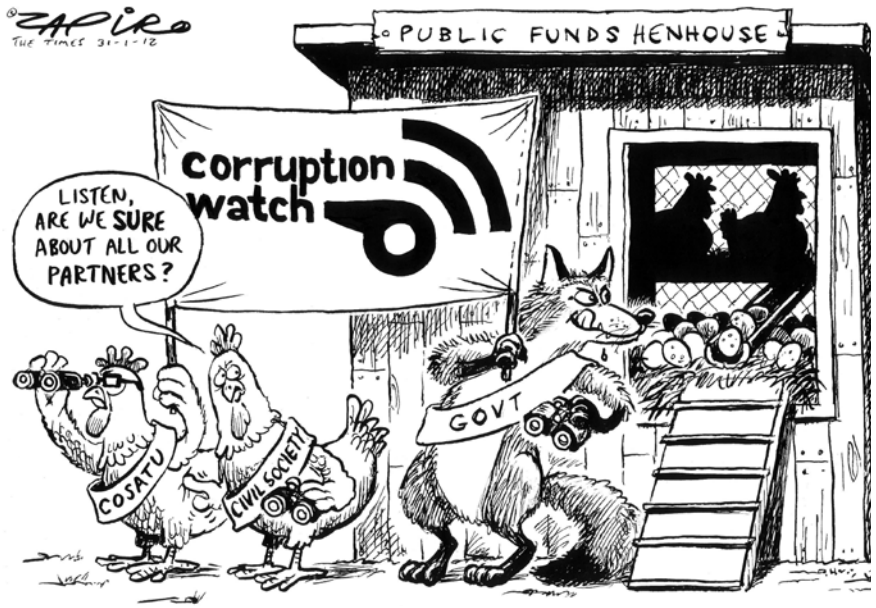
Corruption

There is a widespread belief that the level of corruption in South Africa has worsened significantly over the past few years. For example, on Transparency International's Corruption Perceptions Index, the country dropped 31 places from a ranking of 38 in 2001 to 69 in 2012.[1] Public concern around the need for government to prioritise tackling corruption has increased in recent years. The March 2012 Afrobarometer survey results rate the figure at an all time high of 26%.[2] Moreover, according to the survey, the proportion of people who thought that most or all national, provincial and local politicians were corrupt has more than doubled since 2002.[3] Only 33% of respondents thought that government was doing a good job in fighting corruption, a decrease from the 45% who thought so in 2006.[4]

It is not merely that perceptions of corruption worsening have increased; there is hard evidence that actual levels of corruption have increased. For instance, the law firm Edward Nathan Sonnenbergs (ENS) in a report based on parliamentary documents and data from the Public Service Commission (PSC) concluded that in the 2011-2012 financial year, public sector fraud and malfeasance cost taxpayers close to R1 billion.[5] This was a considerable increase from a loss of R130.6 million in the 2006-2007 financial year.[6] A primary reason as to why corruption has worsened in South Africa is that there is little accountability for those who perpetrate it. The ENS report, for example, found that even though 88% of the public officials who were facing charges of financial misconduct were found guilty, only 19% lost their jobs. The vast majority (81%) continued with their employment in the public sector.

Corruption is not just a phenomenon that affects the public sector. As was well publicised, in June 2013 South Africa's Competition Commission fined 15 influential construction companies a total of R1.46 billion for bid rigging.[7] Clearly, South Africa is threatened by growing levels of corruption, which diverts substantial resources away from addressing key challenges into the pockets of highly unethical individuals.

Nevertheless, the South African government continues to speak out regularly against corruption and attempts to convince the public that the issue is being taken seriously. For example, Justice and Constitutional Development Minister, Jeff Radebe, publicly named and shamed 42 people, the majority of them civil



servants who were convicted of fraud and corruption.[8] Of course this was largely political showmanship as naming a few people who had already been publicly convicted in a court of law is hardly going to deter the vast majority of those that continue to commit acts of corruption and escape justice. However, this initiative was meant to convey the sentiment that government is willing to take new steps to stem the tide of corruption. During the same speech, the justice minister sought to assure the public that the country's architecture for combating corruption adhered to international practices as stipulated in various international protocols and conventions. These include the United Nations Convention Against Corruption (UNCAC), the African Union Convention on Preventing and Combating Corruption and the Southern African Development Community (SADC) Protocol against Corruption. In signing these documents, the South African government signalled that it will enact laws and policies designed to prevent corruption and that it will establish and resource agencies that are at least partly, if not completely, dedicated to tackling corruption. In an effort to demonstrate that the government is taking its international commitments seriously, the Minister highlighted that some 758 persons were under investigation for committing acts of corruption and that the Asset Forfeiture Unit (AFU) had successfully obtained 'freezing orders' valued at R1.07 billion.[9]

On paper at least, South Africa looks to be doing relatively well in terms of adhering to the various anti-corruption conventions and protocols. For example, the country shows a strong performance in the 2012 country report on its adherence to the UNCAC articles.

On paper at least, South Africa looks to be doing relatively well in terms of adhering to the various anti-corruption conventions and protocols. For example, the country shows a strong performance in the 2012 country report on its adherence to the UNCAC articles.[10] This being the case, South Africa chose to make its full report publicly available to the Implementation Review Group of the UNCAC during its fourth session held in Vienna, Austria in May 2013. This

shows that the South African government is proud of its assessment. In fact, the country can point to at least 13 different state agencies that have some mandated role to play in tackling corruption.

The Organisation for Economic Co-operation and Development (OECD) notes that for an anti-corruption agency to be truly independent it has to be shielded from political interference and therefore should have structural and operational autonomy.

The primary question that must be asked is why, given our signature onto international commitments and apparent adherence to them, is corruption getting worse? And why is so little of the amount stolen by corrupt officials ever recovered? For example, while the Minister highlighted the amount of R1.07 billion that the AFU prevented from going missing, it pales into significance when one compares it to the R30 billion that the Treasury conservatively estimates is lost to the governments procurement fund, annually, due to fraud and corruption.[11]

The UNCAC, and other protocols, typically state that signatories should have at least one independent agency to prevent and combat corruption. South Africa will therefore point to the Directorate for Priority Crime Investigation (DPCI)–the Hawks–as such an agency. The country will also point to the constitution, which declares that the National Prosecuting Authority (NPA) is an independent entity.[12] The Organisation for Economic Co-operation and Development (OECD) notes that for an anti-corruption agency to be truly independent it has to be shielded from political interference and therefore should have structural and operational autonomy.[13] Furthermore, the OECD indicates that when the procedures for appointing and removing the head of such an agency are transparent, the possibility of undue interference in the entity's work is removed.[14]

A close examination of the case of the three most important agencies responsible for tackling corruption, namely the DPCI, the NPA and the Special Investigating Unit (SIU) reveals that a fundamental shortcoming has been a failure to entrench their independence. So, while South Africa ticks the boxes in respect of having the agencies in place, the very characteristic that allows them to be successful, namely independence, is sorely missing.

Failure to entrench the independence of anti-corruption agencies

Hawks or doves?

In March 2012, the Constitutional Court, in the case of *Hugh Glenister v President of the Republic of South Africa and Others*, in which the Helen Suzman Foundation appeared as amicus curiae, found that the national legislation that created the DPCI, and disbanded the largely successful Directorate of Special Operations (the Scorpions), did not adequately insulate the DPCI from political interference and ordered that Parliament should 'remedy' this situation by enacting rectifying legislation.[15] The ruling made several references to the OECD's work on the vital importance of independence for anti-corruption agencies, for example, that the head of such an entity should be appointed in a transparent manner to ensure that this person is not be beholden to the demands or manipulations of political leaders.[16] However, the amended legislation that was introduced by the Minister of Police, Nathi Mthethwa, was deeply flawed and clearly revealed that there was no real intention to protect the Hawks from political interference.

A vast majority of the submissions to parliament rejected the draft legislation and it had to go through substantial changes by the Portfolio Committee on Police before being enacted into law. Nevertheless, the new Act still fails to protect the Hawks from political interference considering that the Minister of Police appoints the Hawks' leadership. Moreover, that the Hawks remain within the South Africa Police Service (SAPS) gives the National Commissioner immense influence over its members, who in terms of the new law remain members of the police and are bound by the SAPS Act.[17]

What is worrying is that it was the Auditor General (AG), an institution not invested with any arresting or prosecutorial powers, rather than the Hawks, that was tasked by the minister to investigate the matter.

Already, there have been several public allegations of interference in the operations of the Hawks in the past, for instance in allegations that the Minister of Police halted corruption investigations into former SAPS Crime Intelligence Head Lt-General Richard Mdluli. It later emerged that Richard Mdluli had been directly involved in signing off the illegal appropriation of close to R200 000 from the police's Secret Service Account for construction of a security wall at the police minister's private residence. This was gross misuse of funds that should be utilised for tackling organised crime. What is worrying is that it was the Auditor General (AG), an institution not invested with any arresting or prosecutorial powers, rather than the Hawks, that was tasked by the minister to investigate the matter. The AG concluded that although the security wall had indeed been constructed using funds from the Secret Service Account there was no evidence to prove that the minister knew what was happening. Of course the AG is not capacitated to undertake corruption investigations and therefore did not subpoena the minister's cellular phone records nor did it question him under oath as to what he knew or did not know. It appears as if simple email correspondence was sufficient to clear him in this debacle.

The case of the Hawks, just like that of the NPA, succinctly demonstrates a failure to entrench independence in South Africa's anti-corruption architecture.

Despite clear evidence of widespread malfeasance and fraud uncovered by the Hawks in the Richard Mdluli case, the Minister of Police protected him until a non-profit organisation, Freedom Under Law, won an application in the Pretoria High Court to prevent the minister from issuing him instructions. The then acting National Commissioner of the SAPS, Nhlanhla Mkhwanazi, used this as the basis for suspending Richard Mdluli from the police, a move that many argue cost him a permanent appointment to the post.

Most recently there have been reports of conflict between the head of the Hawks and the National Commissioner of the SAPS. This does not bode well for a unit that is supposed to be the premier agency in ensuring that corruption investigations are meticulously conducted, and that where there is prima facie evidence of illegal activities the alleged perpetrators are indicted and the evidence tested in a court of law. The case of the Hawks, just like that of the NPA, succinctly demonstrates a failure to entrench independence in South Africa's anti-corruption architecture.

Failure to prosecute

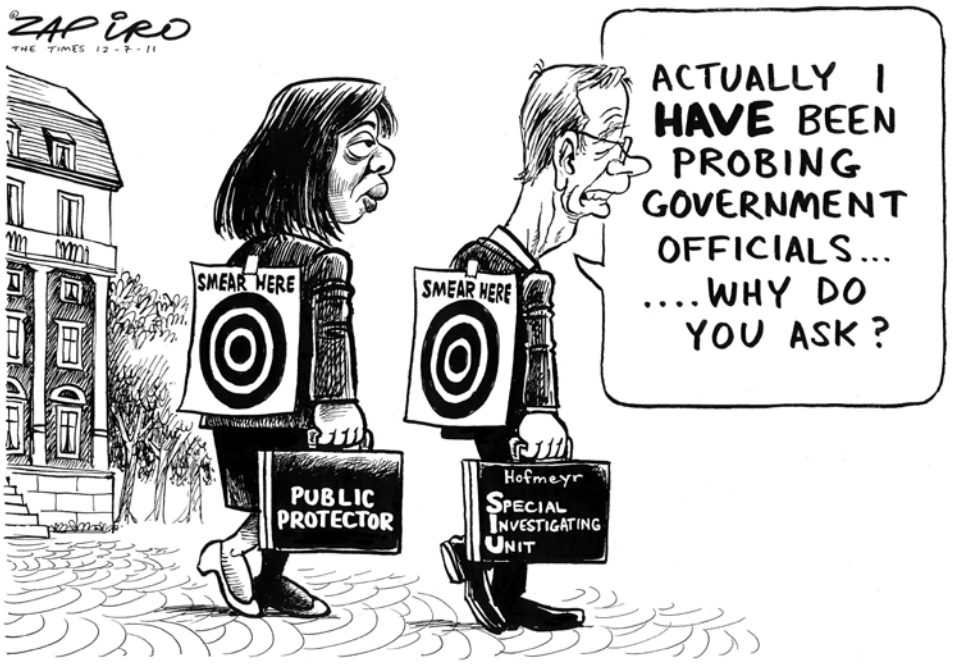
Probably the most worrying development in the criminal justice system is the blatant disregard by President Thabo Mbeki and by the incumbent, Jacob Zuma, to protect the integrity and independence of the NPA. In the first few years of existence, the NPA was lauded as a model of a robust and independent prosecuting authority. However, its credibility as an independent agency has been severely eroded in recent years.

The situation took a particularly bad turn for this critical criminal justice agency with Advocate Vusi Pikoli's removal from the position of National Director of Public Prosecutions (NDPP) by Thabo Mbeki in a desperate bid to protect his loyal but corrupt, then National Commissioner of the SAPS, Jackie Selebi, from criminal prosecution. This transpired despite the Ginwala Commission's findings that Advocate Pikoli was indeed a person of integrity who acted independently and was fit for office.[18] In a surprise turn of events, President Zuma appointed Advocate Menzi Simelane to the position of NDPP, even though the Ginwala Commission took serious umbrage with his dishonesty in giving evidence and his lack of understanding of the role of the NPA as an independent agency.[19] Furthermore, the PSC's recommendations for disciplinary action to be taken against Advocate Simelane, and the existence of direct evidence that he was unsuitable for such a post fell on deaf ears as demonstrated by his subsequent appointment.

The opposition Democratic Alliance took Advocate Simelane's appointment before the courts and eventually, in December 2011, the Supreme Court of Appeal unanimously ruled that his appointment was 'irrational', forcing him to step down.[20] In his place, President Zuma then made a second controversial decision and appointed Advocate Nomgcobo Jiba as acting NDPP despite the fact that Advocate Jiba had previously been suspended from the NPA after it emerged that she had abused her prosecutorial powers in an effort to assist with the illegal arrest of her colleague Advocate Gerrie Nel. Advocate Nel was the lead prosecutor in the case against Jackie Selebi, and Advocate Jiba had allowed herself to become embroiled in political attempts to shield the commissioner from justice. Jackie Selebi was eventually found guilty and sentenced to 15 years in prison for his crimes. It emerged during her attempt to challenge her suspension that Advocate Jiba blamed Advocate Nel for Booker Nhantsi's–her husband–criminal conviction for theft to which he was sentenced to imprisonment for five years. Interestingly, it was Richard Mdluli who submitted an affidavit as a character witness in Advocate Jiba's favour. Advocate Jiba's ability to act independently was further damaged when it later emerged that President Zuma expunged Booker Nhantsi's criminal conviction allowing him to continue to act as an attorney.

More worryingly has been the decision to withdraw criminal cases against politically connected individuals despite prima facie evidence of criminal activity. A good example of this includes the case against Richard Mdluli where different independent legal experts, including that of the Inspector General of Intelligence, insisted that the NPA should forge ahead with his prosecution on corruption charges.

Still, in the face of this insurmountable evidence, that cast serious aspersions on Advocate Jiba's character and her suitability to hold the position of NDPP, she was appointed as acting head of the NPA. Under her leadership the agency suffered an unparalleled string of high-profile failures such as the inability to secure a conviction in the killing of Andries Tatane and the slap on the wrist for financial fraudster Arthur Brown. More worryingly has been the decision to withdraw criminal cases against politically connected individuals despite prima facie evidence of criminal activity. A good example of this includes the case against Richard Mdluli where different independent legal experts, including that of the Inspector General of Intelligence, insisted that the NPA should forge ahead with



The twin variables of leadership and independence are key to the success of all anti-corruption agencies in South Africa including the SIU, an entity that has had considerable leadership challenges since the departure of Advocate Willie Hofmeyr as its head.

his prosecution on corruption charges. Connected to this is also the disciplinary case of Glynnis Breytenbach, who was instrumental in prosecuting Richard Mdluli, in which all of the 15 disciplinary charges brought against her were dismissed for lack of evidence. This lends considerable credence to the argument that Advocate Jiba was intent on removing her from the NPA in an attempt to torpedo Richard Mdluli's prosecution on corruption charges.

All of this has severely dented the NPA's credibility in the eyes of the South African public. Recently, Mxolisi Nxasana was appointed as the permanent NDPP. This followed legal action by the Council for the Advancement of the South African Constitution to compel the President to fill this vacancy. Whether the new NDPP will successfully lead the NPA out of its credibility crisis is an unknown.

Leadership and independence

The twin variables of leadership and independence are key to the success of all anti-corruption agencies in South Africa including the SIU, an entity that has had considerable leadership challenges since the departure of Advocate Willie Hofmeyr as its head. The SIU Act requires that the country's President should give due 'regard' to the 'experience, conscientiousness and integrity' of a prospective appointee to the position and that the person should be a 'fit and proper person' who can be 'entrusted with the responsibilities of that office.'[21] Still, the act does not clearly articulate what is meant by fit and proper' and this endows the President with immense discretion in making an appointment. Given

his past appointments, there is little faith among many analysts that President Zuma has serious regard for principles of independence, conscientiousness and integrity when making key (criminal justice) appointments.

Judge Willem Heath headed the SIU at its inception in 1996 but had to resign in June 2001 following a Constitutional Court ruling barring a judge from heading the unit.[22] At that stage the SIU ceased to exist, at least formally.[23] A July 2001 proclamation by President Thabo Mbeki re-established the SIU with Advocate Willie Hofmeyr as the head.[24] In November 2011 Advocate Hofmeyr, who had been heading both the SIU and AFU relinquished his role in the SIU and was replaced by Judge Heath who at that stage had retired.[25] It was reported that the decision was meant to 'strengthen the institutional capacity to fight crime and corruption.'[26] However, in a shocking turn of events, Judge Heath resigned as head of SIU on 15 December 2011, barely a month into his tenure. This followed statements he made, which he could not substantiate, alleging that President Thabo Mbeki had instigated the rape and corruption charges against his then deputy, Jacob Zuma, and blocked some investigations into corrupt practices, thus compromising the justice system.[27]

Advocate Nomgcobo Jiba was appointed SIU acting head following Judge Heath's resignation, only to be replaced less than a week later by Advocate Nomvula Mokhatla – another acting appointment.[28] Spokesperson for the Presidency, Mac Maharaj, noted that there were no 'profound' reasons for the change in appointment and that there 'is nothing in the law that stops the president from making temporary appointments.'[29]

Indeed, a transparent and independent process of appointing the head and other key officials of the SIU ensures that those who are eventually appointed are credible in the eyes of the public.

The constitution expects transparency in government decision making. Indeed, leadership instability in an institution such as the SIU can weaken and thus hamper its effectiveness. The key issue is that when criminal justice institutions, including anti-corruption entities such as the Hawks, NPA and the SIU, are headed by temporary appointments, this corrodes their efficacy as such appointees are more likely to be cautious in making critical decisions.

With reference to the DPCI legislation, civil society groups raised a compelling argument that the permanent head of the entity should be nominated, selected and appointed through a transparent process; that a special parliamentary subcommittee should be established to manage this process; and that parliament should approve, through a special majority, the candidates recommended to the executive for appointment.[30] These recommendations are equally appropriate for the head of the SIU. Indeed, a transparent and independent process of appointing the head and other key officials of the SIU ensures that those who are eventually appointed are credible in the eyes of the public. This also strengthens the credibility of the institutions in which they serve. There is also the issue of security of tenure, which is relevant to the heads of all anti-corruption agencies.

Indeed, the dismissal of the head of any anti-corruption agency should be based on clearly defined grounds and it should be preceded by a transparent and independent inquiry that produces clear findings and recommends such a

dismissal.[31] The current SIU legislation states that the head 'must stand down' if the President, following consultation with the Judicial Service Commission (JSC), requests so.[32] This is just a consultation and there is no requirement for the President to furnish rational and coherent reasons as to why the SIU head should stand down.

This essentially means that regardless of the existence of robust prima facie evidence of wrongdoing, if the President neglects to sign a proclamation, or has an intention to protect individuals involved in corruption, some cases will not be investigated by the SIU, thereby weakening the unit's corruption-busting capability.

Budgetary independence is also critical to the functioning and overall autonomy of the SIU. The OECD recognises that it is vital for all anti corruption entities to have sufficient financial and human resources to effectively execute their mandates.[33] The SIU receives its budget through the Ministry of Justice and Constitutional Development. Currently, there are no legislative mechanisms that protect the fiscal independence of the SIU and indeed may have negative ramifications as investigations could be stymied through political interference to slow or cease the flow of funding. It is critical for the head of the SIU to be empowered, legislatively, to have fiscal independence. Indeed, legal measures to ensure that political functionaries do not have broad discretionary powers to determine funding is key to the success of anti-corruption agencies.[34]

Operational independence, considering that the SIU can only commence proceedings once a case has been referred to it via a presidential proclamation, is key to the success of the unit.[35] While private persons, companies, newspapers, and other entities can refer allegations of corruption to the SIU, [36] this does not place an obligation on it to investigate their concerns since the President must first authorise investigations. This essentially means that regardless of the existence of robust prima facie evidence of wrongdoing, if the President neglects to sign a proclamation, or has an intention to protect individuals involved in corruption, some cases will not be investigated by the SIU, thereby weakening the unit's corruption- busting capability. Recently, the Presidency announced that Advocate Vasantrai Soni SC would, with effect from 1 October, head the SIU. Only time will tell if this was a considered appointment.

Concluding observations: prospects

The National Development Plan makes some cogent recommendations on the appointment of the National Commissioner of the SAPS and the deputies, to the effect that the President should appoint these individuals following a publicly transparent and competitive process.[37] This can be achieved if an independent panel is tasked with vetting and interviewing candidates against objective criteria.[38] Such a precedent is already in place with regards to Chapter Nine institutions such as the Public Protector and with the appointment of judges. These recommendations should be equally applicable to the appointments of heads of the Hawks, the NPA and the SIU. Indeed, the transparent appointment of heads of key criminal justice institutions is vital to building credibility and trust in their leadership and the institutions they serve in and lead.

Having anti-corruption agencies and legislation is but superficial compliance with international conventions and protocols. South Africa has a laudable anti-corruption framework and the prospects are positive if the country builds on this. But this can only be realised if anti-corruption agencies are insulated from political interference and when independent people of unquestionable character are appointed to head such agencies.

Robust political will is required to run an honest government. While naming and shaming convicted public servants or fining construction companies for bid rigging may send a signal that corruption is unacceptable, the country's political leadership has to build on this by ensuring that political and business elites and those who are connected to them are transparently and fairly held accountable for any alleged acts of fraud and corruption. Furthermore, top leadership in all anti-corruption agencies has to be appointed following a transparent vetting and interviewing process. Only then will these institutions be able to act against corruption no matter how well connected or powerful the perpetrators. This will in turn build public trust and effectiveness of South Africa's implementation of the many international anti-corruption conventions and protocols the country has ratified.

NOTES

1 Transparency International, Corruption Perception Index 2012, http://www.transparency.org/cpi2012/
2 Afrobarometer Public Agenda and Evaluation of Government. March 2012 results for South Africa. p.
3 Ibid, p. 15
4 Ibid, p 10
5 Peter Allwright, Senior Forensics Manager at ENS (Edward Nathan Sonnenbergs), The real state of the nation, http://www.corruptionwatch.org.za/sites/default/files/the%2Breal%2Bstate%2Bof%2Bthe%2Bnation-1.pdf (Accessed 31 August 2013)
6 Ibid
7 The Competition Commission, Construction firms settle collusive tendering cases with R1.5 billion in penalties, Media release, 24 June 2013, http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/Construction-Fast-Track-Settlement-Process-Media-Release.pdf (Accessed 31 August 2013)
8 Department of Justice and Constitutional Development, Media statement on progress made by the Justice, Crime Prevention & Security Cluster in the fight against corruption, Media Statement – 2013, http://www.justice.gov.za/m_statements/2013/20130609-jcps-corruption.html (Accessed 31 August 2013)
9 Ibid
10 United Nations, UN Convention against Corruption (UNCAC), Executive summary, South Africa, 13 November 2012, http://www.uncaccoalition.org/images/PDF/Executive-Summary-South-Africa-Year2.pdf. (Accessed 31 August 2013)
11 Ibid
12 Ibid
13 Organisation for Economic Corporation and Development Anti-Corruption Network for Eastern Europe and Central Asia, Specialised Anti-Corruption Institutions: Review Of Models, 2008, http://www.oecd.org/corruption/acn/library/39971975.pdf (Accessed 31 August 2013)
14 Ibid
15 Constitutional Court Of South Africa, Glenister v President of the Republic of South Africa and Others, 14 June 2013, http://www.constitutionalcourt.org.za/Archimages/20965.PDF (Accessed 31 August 2013)
16 Ibid
17 Government of South Africa, South Africa Police Service Ammendment Act, Act 10 of 2012, http://www.info.gov.za/view/DownloadFileAction?id=174498 (Accessed 31 August 2013)
18 Report Of Enquiry Into NDPP, Ginwala Commission Report, http://www.info.gov.za/view/DownloadFileAction?id=93423 (Accessed 31 August 2013)
19 Ibid
20 The Supreme Court Of Appeal Of South Africa Judgment, Democratic Alliance v The President of the RSA & others, 1 December 2011, http://www.saflii.org/za/cases/ZASCA/2011/241.pdf (Accessed 31 August 2013)
21 The Special Investigating Unit Act 74 of 1996, http://www.siu.org.za/index.asp?include=legislation/actmain.html, (Accessed 3 April 2013)
22 The Special Investigating Unit (SIU), General information; Fact sheet, 2 http://www.siu.org.za/index.asp?include=about/background.html (Accessed 3 April 2013)
23 Ibid
24 The Special Investigating Unit, Frequently asked questions, http://www.siu.org.za/index.asp?include=about/faq.html (Accessed 3 April 2013)
25 Adrian Basson and Carien du Plessis, City Press; Zuma fires Hofmeyr, 2011-21-29, http://www.news24.com/SouthAfrica/Politics/Zuma-fires-Hofmeyr-20111129-2 (Accessed 12 April 2013)
26 South African Government Information; Special Investigating Unit, South Africa Yearbook 2010/11, Editor: D Burger. Government Communication and Information System http://www.info.gov.za/aboutgovt/justice/siu.htm (Accessed on 5th April 2013)
27 Carien du Plessis, City Press; SIU gets yet another boss, 2011-12-21, http://www.news24.com/SouthAfrica/News/Acting-SIU-boss-fired-after-less-than-a-week-20111221 (Accessed 12 April 2013)
28 Ibid
29 Ibid
30 Institute for Security Studies et al, 24 April 2012 Joint media statement: SAPS Amendment Bill
31 Ibid.
32 The Special Investigating Unit and Special Tribunals Ammendment Act No 2 of 2001, http://www.justice.gov.za/legislation/acts/1996-074.pdf (Accessed 31 August 2013)
33 Organisation for Economic Co-operation and Development (OECD), Specialised Anti-Corruption Institutions: Review of Models, Paris, OECD, 2008, http://www.oecd.org/corruption/acn/39971975.pdf (Accessed 31 August 31)
34 Ibid.
35 The Special Investigating Unit and Special Tribunals Act 11 of 2012, http://www.siu.org.za/index.asp?include=legislation/actmain.html (Accessed 12 April 2013)
36 The Special Investigating Units and Special Tribunals Act, No 74 of 1996, http://www.siu.org.za/index.asp?include=legislation/actmain.html (Accessed 12 April 2013)
37 National Planning Commission, National Development Plan Vision for 2030, http://www.npconline.co.za/medialib/downloads/home/NPC%20National%20Development%20Plan%20Vision%202030%20-lo-res.pdf (Accessed 12 April 2013)
38 Ibid

The unsuccesful constitutional transition of the NPA

Loammi Wolf
specialises in constitutional and related public law. She has a master's degree from the University of Virginia and completed her doctoral research in Germany. She was a member of the Wits law school before she emigrated to Germany. Today she runs the independent research organisation 'Democracy for Peace'.

In practice, the Westminster model's criminal justice system has been perpetuated once the new Constitution was adopted although there are major differences between the Westminster and the constitutional state model. Historically the prosecuting authorities in each of these two systems developed in different contexts and that affected their constitutional status.

The Westminster model is characterised by an uneven distribution of state power due to the doctrine of parliamentary sovereignty, no clear separation of powers as a result of class-based power-sharing constructs, little constraints to limit an abuse of power and no bill of rights guaranteeing fundamental rights.

The constitutional state concept stands for the opposite: the three branches of state power hold each other in equilibrium of power; there is a clear and definite separation of powers; and these powers must be exercised within the parameters set by the Constitution.

The establishment of prosecuting authorities

The constant evolutionary evolvement of constitutional practice is often ahead of theoretical precepts that are inadequately formulated or updated in constitutions.

The ideal of democracy that crystallised in the 18th century initially foresaw a separation of powers between the judiciary (courts), legislature, and executive. This is still the way most constitutions refer to it, although another important state organ had meanwhile developed.

The unsatisfactory outcome is that state prosecutors are often treated as a useful state organ –yet, as one that occupies an undefined space somewhere between the executive and the judiciary.

The Anglo-American prosecuting model

The attorney-general, whose office dates back to the 15th century in Great Britain, acted as law officer of the Crown and was a member of cabinet. Sir William Blackstone recorded that the attorney-general was 'the king's immediate officer and the king's nominal prosecutor'.

The office of director of public prosecutions was first established in 1879. He was appointed by the attorney-general to oversee prosecutions by the police. Criminal investigations and prosecutions developed as an accusatory function of the police

in 19th century England. Prosecutors were introduced only in more recent history to split those police functions into criminal investigations (police) and taking the matter to court (legally trained prosecutors).

The dominant model in the Anglo-American tradition is that prosecutors are part of the justice department. Prosecuting authorities in these systems have varying degrees of functional independence, but are subject to oversight of the justice minister.

Conflict between prosecutors and political office bearers relating to the instigating of criminal proceedings arose early on. The doctrine of independent aloofness took root in the UK during the 1920s to counter that. Yet, political interference in the domain of state prosecution is no rarity even today.

The disadvantage of this model is that the boundaries of executive state administration and the administration of justice are blurred. It makes it easy for politicians to exercise undue influence on prosecutors to shield politicians or executive office-bearers from criminal prosecution.

In 1985, the British prosecution system was reformed by the Prosecution of Offences Act in an attempt to strengthen the independence of prosecutors. However, until today the decision lies initially with the police to decide if evidence justifies a prosecution. Only once they do so decide, do the police refer the case to the Crown Prosecution Service. The Act also did not abolish the right of the police to prosecute.

This might explain why prosecutors tend to be regarded as the extended arm of the executive in Great Britain and many Commonwealth countries, where a similar system was implemented during colonial times.

The disadvantage of this model is that the boundaries of executive state administration and the administration of justice are blurred. It makes it easy for politicians to exercise undue influence on prosecutors to shield politicians or executive office-bearers from criminal prosecution.

Continental European models

In criminal justice, the path taken by Continental European states over the last 200 years is very different from that in Anglo-American countries. Despite the slow evolutionary process, prosecutors are, for all practical purposes, regarded as the second organ of the third branch of state power next to the judiciary. In other words, they are structurally independent and do not merely have some degree of functional independence from the executive branch.

The different constitutional status of prosecutors has legal-historical grounds. The judiciary was split into two to separate inquisitory adjudication from criminal investigations and prosecution. This development started in France and was subsequently endorsed by most European states in the aftermath of the Napoleonic conquests.

The French model with its emphasis on inquisitory procedures is no longer predominant. Most European countries now tend to follow the so-called German model, which has incorporated many accusatory elements. What all these systems have in common, though, is a distinct separation from the executive branch.

Another difference, compared to Anglo-American criminal justice systems, concerns the organs conducting criminal investigations. In England, Wales

and Ireland the police conduct criminal investigations, whereas prosecutors lead criminal investigations in Germany, France, Italy, Sweden, Finland, Scotland, and the Netherlands.

Although prosecutors may make use of police assistance to investigate criminal offences, they always lead criminal investigations. The rationale behind this arrangement is twofold: first, it underscores that criminal investigations and prosecutions are not executive functions, and secondly, it ensures procedural fairness and respect for fundamental rights by trained lawyers in pre-trial criminal investigations.

The police are not the only civil servants of the executive branch who function as the helping hand of prosecutors. Prosecutors may also require tax, customs, and intelligence officers or civil servants from other state departments as the case may be, to assist them. It is the responsibility of the justice minister to keep these channels for assistance open. The oversight responsibilities of the justice minister are different in nature from the Anglo-American systems.

In Germany, prosecutors are regarded as guardians of the rule of law and have the duty to exercise their powers benevolently, in the service of justice and not as pawns of the executive.

The primary function of the police is to secure public safety and order. These functions are administrative in nature and must be distinguished from prosecuting functions that focus on the investigation and prosecution of crime. The latter is regulated by criminal law, not administrative law.

In specialised and complex areas of corruption and commercial criminality, prosecuting authorities usually have their own forensic teams, which – apart from prosecutors – include chartered accountants, commercial and financial experts, and IT specialists, who help to investigate such offences. Such units are comparable to the now defunct Scorpions.

In Germany, prosecutors are regarded as guardians of the rule of law and have the duty to exercise their powers benevolently, in the service of justice and not as pawns of the executive. Unlike accusatory systems, prosecutors are obliged to be neutral in their search for the truth and must conduct criminal investigations objectively. They have to consider both incriminating and exculpatory evidence, honour the binding force of statutes (the principle of legality), and prosecute all cases with sufficient evidence in order to secure equal treatment in criminal justice.

This explains why corruption allegations in high profile cases such as former Chancellor Helmut Kohl and former Federal President Christian Wulff were not spared from criminal investigations. It also explains the strong position of prosecutors in Italy, who fearlessly prosecuted former Prime Minister Berlusconi.

On the balance

In a comparative study, Yale law professor James Whitman has come to the conclusion that procedural fairness and equal treatment under US and UK criminal law lag far behind European counterparts. Two major factors that influence this outcome are how the ideal of equality before the law is understood, and the location of the prosecuting authority in the separation of powers.

Whereas Anglo-American law generally requires that all people should face an equal threat of punishment, Continental European law additionally demands that all

people face an equal threat of criminal investigation and prosecution. The normative quality of pre-conviction equality is therefore much higher in the constitutional states of Europe.

Furthermore, the structural independence of a prosecuting authority, as state organ in its own right in the third branch of state power, is better suited to secure quality criminal justice than mere functional independence of prosecutors who are located in the executive branch.

The awkward transition in South Africa

The status of the National Prosecuting Authority (NPA) is regulated ambivalently by section 179 of the Constitution. It hovers somewhere between the constitutional state and the Westminster model.

One would therefore presume that their institutional independence should be guaranteed – not merely some degree of functional independence where the prosecutors can still be pressured or manipulated by the executive.

The prosecutors and the judiciary have been classified in Chapter 8 of the Constitution as the state organs responsible for the administration of justice, thus following the model of two state organs in the third branch of state power. Three provisions of section 179 unquestionably favour the constitutional state model:

> Section 179(2) confers the power 'to institute criminal proceedings on behalf of the state' and 'to carry out any necessary functions incidental to instituting criminal proceedings' upon the prosecuting authority – not upon the department of justice or the police.
>
> Section 179(5) further indicates that the national director of public prosecutions is on a par with the justice minister because he determines prosecuting policy 'in concurrence' with the minister. It does not signal a relationship of subordination typical of an internal executive hierarchy. In that case, the wording of the provision would have determined that the minister should determine prosecuting policy 'in consultation with' or 'on advice of' the national director. The liaising of the national director with the justice minister is on a horizontal level, similar to the relation of the justice minister vis-á-vis the judiciary.

In addition, subsection (4) obliges the legislature to ensure that the prosecuting authority can exercise its functions 'without fear, favour or prejudice'. It implies that the prosecutors are not subject to ministerial orders and that this should be ensured statutorily. One would therefore presume that their institutional independence should be guaranteed – not merely some degree of functional independence where the prosecutors can still be pressured or manipulated by the executive.

If the drafters of the Constitution intended the NPA to fall under the control of the executive branch, its status would have been regulated in Chapter 5. There are two provisions of section 179, however, which create difficulties.

Subsection (6) states that the minister of justice is 'responsible for the administration of justice' and 'must exercise final responsibility over the prosecuting authority'. This provision could be interpreted to favour the Westminster model of functional independence of prosecutors where they form part of the executive branch. That would be in conflict, however, with the rest of the Constitution which endorses the constitutional state paradigm. The Constitutional Court has consistently applied the rule of harmonious interpretation of constitutional provisions and it could

therefore be expected that the Court will interpret this provision to be in line with the constitutional state paradigm.

In Germany a similar provision has been interpreted restrictively. The courts held that ministerial responsibility for the prosecuting authority cannot be equated with ordinary executive ministerial responsibility. It is a sui generis power which implies that 'responsibility' must be interpreted to mean that the justice minister has oversight to ensure that the channels for executive assistance in prosecutor-led criminal investigations are open and function properly.

Although concerns were raised during the certification procedures of the Constitutional Court that the head of the prosecuting authority should not be a political appointee of the executive if the independence of the NPA should be guaranteed, they were brushed aside.

The real difficult nut to crack is section 179(1)(a). It provides that the national director of the prosecuting authority should be appointed by the president in his capacity as 'head of the executive'. The wording of the provision has cast this exercise of power as a straightforward act of executive power. It was taken over directly from section 2(1) of the Attorney-General Act of 1992 which was tailored to suit the Westminster model's articulation of the separation of powers.

This provision clearly constitutes an anachronism in the separation of powers typical for a constitutional state. One could have understood it if it were merely an official act of inauguration by the president acting in his or her capacity as head of state. Although concerns were raised during the certification procedures of the Constitutional Court that the head of the prosecuting authority should not be a political appointee of the executive if the independence of the NPA should be guaranteed, they were brushed aside.

The Constitutional Court reasoned that the separation of powers only distinguishes between the legislature, the executive, and judiciary. Without considering the logical option that the prosecuting authority is a state organ in its own right in the third branch of state power, the Court rather bluntly argued that the prosecutors were not part of the judiciary, and consequently, they must be part of the executive branch. The Court continued that '…even if it were part of the judiciary, the mere fact that the appointment of the head of the national prosecuting authority is made by the president does not in itself contravene the doctrine of separation of powers'.

In fairness it must be said that there was hardly any research available in South Africa at the time about the differences in state organisation between the constitutional state and the Westminster model. The Court was clearly unaware of it.

Despite this drawback, it is hard to overlook that the Court basically negated the fact that one state organ can indirectly control another with such appointments and compromise the independence of such appointees. A factor that probably cannot be ruled out is that the judges were influenced at a subconscious level by the imposing stature of former President Mandela. Unfortunately his successors have not shown the same kind of executive restraint and respect for the independence of the state prosecutors.

Catch 22 position of the NPA

Although section 179(1)(a) only foresees that the president can appoint the national director, the legislature has interpreted this as a carte blanche for the executive to have an input in every single appointment to the prosecuting authority. Such

appointments ought to be made by an independent personnel department in the prosecuting authority and not by the justice department.

The NPA has, therefore, effectively been turned into an executive pawn. This explains why presidents in the past construed the prosecuting authority as a part of the executive and subject to orders of the cabinet. The outcome has been most unsatisfactory. It has politicised the prosecuting authority and has undermined the rule of law and the neutrality of criminal justice.

Just how perilous the position of the national director of public prosecution (NDPP) is, has been illustrated in recent history. President Mbeki subjected two NDPPs on spurious grounds to commissions of inquiry to consider their fitness to hold office.

It appears that the Constitutional Court has meanwhile realised what serious repercussions the endorsement of section 179(1)(a) has had for the independence of the prosecuting authority and is doing some damage control.

One could have expected that the Court would come out strongly to protect the integrity and independence of the NPA when a clash escalated with parliamentarians and the executive. Many of them no doubt feared criminal prosecutions and tried to avoid that by snipping the tail of the Scorpions.

In the case where the Democratic Alliance contested the propriety of President Zuma's appointment of Menzi Simelane as NDPP, the Court ruled that the President does not have an unrestrained discretionary power to make such an appointment and must appoint a fit and proper person to hold this important office.

Since then President Zuma procrastinated appointing a successor for Simelane for almost a year. At about the same time a court ruled that Advocate Jiba, then the acting NDPP, must hand over the records on which the nolle prosequi in the corruption trial of Zuma was based. Zuma is therefore in the bizarre position that he could appoint the next NDPP who should then 'without fear, favour and prejudice' institute criminal proceedings against him if his umpteenth appeal to avoid prosecution fails.

Zuma's quest to avoid criminal prosecution has carried on for more than a decade and has seriously damaged criminal justice. Selective prosecutions in prima facie cases that would have merited a prosecution are obviously not in the spirit of the Constitution and undermine the rule of law. Unwarranted nolle prosequis also infringe upon judicial power because it has the effect of non-judicial acquittals.

The judgment of the Constitutional Court in the Glenister case which originally contested the abolition of the 'Scorpions' has further exacerbated the NPA's already besieged position. One could have expected that the Court would come out strongly to protect the integrity and independence of the NPA when a clash escalated with parliamentarians and the executive. Many of them no doubt feared criminal prosecutions and tried to avoid that by snipping the tail of the Scorpions.

Instead of endorsing the necessity of the NPA to have a specialised anti-corruption forensic unit to enforce the rule of law and secure a fair criminal justice system, the Court merely insisted on sufficient distance of such a unit from executive control. Since the 'Scorpions' have been abolished, corruption just snowballed out of control.

The constitutional dilemma that faces the location of the successor anti-corruption unit (the 'Hawks'), which is located in the SAPS, is that it is part of the police and is seen to exercise executive power. A criminal justice power to investigate and

prosecute criminal offences has therefore unconstitutionally been turned into an executive power. Criminal law is thus invoked as a form of administrative action. This blurs the boundaries between criminal law and administrative law completely.

It is of the utmost importance that these powers should be delineated properly if the constitutional state should not break down completely. The decay of justice is at a much deeper level. When state prosecution does not function properly, justice suffers because the prosecutors usurp judicial power with selective prosecutions that filter out cases that ought to have been prosecuted. This might lead to grand scale inequality in pre-trial criminal justice, which directly impacts on the capacity of the judiciary to deliver on their constitutional obligations.

If the carving away of the powers of the third branch of state power is not halted, South Africa might end up like the Weimar Republic. During the National Socialist dictatorship in Germany, one of the most modern constitutions of the time broke down because judicial and prosecuting independence was hollowed out.

It is not too late to change course yet. But then the Constitutional Court must set out to save important institutions of the constitutional state such as an independent anti-corruption unit of the NPA more deliberately.

As we have seen, the current appointment procedure of the NDPP is highly problematic in ensuring prosecuting independence from the executive branch. Former President Motlanthe made the worthwhile suggestion that the head of the prosecuting authority ought to be appointed in a similar fashion than judges. One can improve on this idea if the appointment of the NDPP is rather done by a panel consisting of senior judges, senior prosecutors and members of the justice committee of parliament that represent all major political parties in equal numbers, but execluding any members of the executive.

Moving on from Mistrust: Balancing State Security Concerns with the Right to an Open and Democratic Government

Michael Powers holds B.A., LL.B. and LL.M. degrees from the Law School of the University of the Witwatersrand. He is currently employed as a candidate attorney in the Constitutional Litigation Unit of the Legal Resources Centre. He writes in his personal capacity.

Mitchell Mackay holds B.A. (Hons) and M.A. degrees from the Faculty of Humanities of the University of the Witwatersrand. He is currently employed as a Senior Analyst at Pasco Risk Management. He writes in his personal capacity.

Introduction

The protection of state security, and the requisite secrecy often associated therewith, has become an increasingly contentious issue for South Africa's citizenry and civil society. It is an issue that has come to represent a battle for the country's consciousness as it raises questions related to corruption, the abuse of power, transparency, the right to open and democratic government, and to the growing mistrust between the people and their state. This paper examines the application of existing security legislation and how the levels of secrecy related to its application may derogate, in certain instances, from the constitutional rights to access to information and freedom of expression and the constitutional principle of open and democratic government. In doing so, the authors submit that state security, and the regulation thereof, has now become more than an issue of practical protection owing to the underlying mistrust that has permeated into the relationship between the state and the citizenry. This mistrust is inflamed by a lack of transparency and civic engagement by the state as to why, how, and for whom, security legislation is implemented. It is further compounded by the absence of a legitimate security threat. In order to counteract this mistrust, it is submitted that the state should commit itself to substantive, open and meaningful engagement with the citizenry.

State Security and the Constitutional principles outlining open and Democratic Government

The South African state currently relies on, inter alia, two pieces of legislation, enacted before the installation of democracy in 1994, in maintaining state security. The first is the National Key Points Act ("NKPA").[1] The second is the Protection of Information Act ("PIA").[2] A third piece of legislation relating to state security, although not yet enacted, is the Protection of State Information Bill ("POSIB")[3] which, supposedly, has been drafted to 'protect the people from fear'.[4] The first two pieces of legislation, the NKPA and the PIA, were enacted by the apartheid regime and are increasingly invoked by the ANC-led government – the former more so than the latter. The third piece of legislation, the POSIB, is a creation of the ANC-led government to repeal apartheid era legislation in "heeding the clarion call of the Freedom Charter that: 'All apartheid laws and practices shall be set aside.'"[5] However, the application of the NKPA and the proposed enactment of the POSIB have garnered widespread condemnation due the perceived lack of accountability and transparency resulting from the secrecy incumbent on their application.[6]

Security legislation therefore, unchecked, has the ability to severely limit human rights and, in doing so, it should be treated with the utmost caution and care.

The preamble of the Constitution of the Republic of South Africa ("Constitution")[7] states that "[w]e the people of South Africa … adopt this Constitution as the supreme law of the Republic so as to [l]ay the foundations for a democratic and open society in which government is based upon the will of the people and every citizen is equally protected by the law …" Section 39(1)(a) further states that "when interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom." The use of the words "open and democratic" occur a further four times within the text of the Constitution.[8] The word "reasonable" appears twenty nine times. It is therefore within this constitutional framework that legislation which may inhibit fundamental rights and freedoms must be interpreted – whether enacted before or after the installation of democracy. Accordingly, the Constitution requires both the state and the citizenry to act in an open and democratic manner, and with reason.

Affected rights and the limitations clause

Within the text of the Bill of Rights, security legislation such as the NKPA and the POSIB may have the effect of directly limiting the fundamental rights to freedom of expression[9] and access to information.[10] Indirectly, security legislation may have the effect of limiting the rights to equality,[11] human dignity,[12] freedom and security of the person,[13] privacy,[14] freedom of association,[15] political rights,[16] just administrative action,[17] access to courts[18] and the rights of arrested, detained and accused persons,[19] amongst others. Security legislation therefore, unchecked, has the ability to severely limit human rights and, in doing so, it should be treated with the utmost caution and care. Mill expresses the fundamental nature of rights best: "[i]f all mankind minus one were of one opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be in silencing mankind."[20]

However, constitutional rights such as the rights to access to information and freedom of expression are not absolute; they can be limited in certain circumstances.[21] According to Charles Herrick:

> '…what does it mean to say that an individual has a right to access specific types of information? Rights are powerful assertions of claims that demand respect and sociopolitical status... If an individual appeals to rights, a response is warranted. As Ronald Dworkin puts it, rights are "trumps"… However, it is not the case that rights are nonderogable. "The assertion that rights are powerful normative considerations does not imply that their weight is absolute or that exceptions cannot be built into their scope"... Rights can conflict with one another, some rights are more important than others, and there are cases where the exercise of one right may necessitate the temporary suspension of another right. In other words, there are occasions in which it is appropriate to recognize and act upon trade-offs among different rights.'[22]

Rather, it is that this limitation, or perceived limitation, of constitutional rights is perceived as illegitimate, given that the limitation does not appear to be "reasonable and justifiable in an open and democratic society" as it does not appear to 'reinforce the values that animate our constitutional project.'

In light of the aforegoing, the Constitution does allow for the limitation of certain rights in terms of section 36, the "limitations clause". In terms of the provisions of the limitations clause, "[t]he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors…" Factors which must be taken into consideration include: the nature of the right, the importance and purpose of its limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and whether or not there are less restrictive means to achieve the purpose of limitation. Ultimately, 'the limitations clause tells us that rights may only be limited where and when the stated objective behind the restriction is designed to reinforce the values that animate our constitutional project.'[23] Dworkin would refer to this limitation analysis as indicative of the fact that rights are indeed "trumps"[24] that require adequate justification before they can be limited. Therefore, security legislation, that may limit fundamental rights, can be invoked only if it satisfies the criteria outlined in section 36, as determined by the courts. In other words, the requisite response must be given by the state in order to limit the "trumps" held by the citizenry.

However, the current controversy surrounding the application of the NKPA and the proposed enactment of the POSIB is not that through their application certain constitutional rights, such as the right to access information, may be limited. Rather, it is that this limitation, or perceived limitation, of constitutional rights is perceived as illegitimate, given that the limitation does not appear to be "reasonable and justifiable in an open and democratic society" as it does not appear to 'reinforce the values that animate our constitutional project.' This is to say that the justification by the state to the people exercising their "trumps" has been inadequate, and there is therefore a perceived illegitimacy in the purported state need to exercise the level of secrecy it currently employs in the application of security legislation.

A Hard Sell: The Right to Secrecy and the Notion of a Legitimate Security Threat

Given the constitutional provisions outlined above, it becomes necessary to explore whether or not the South African state is proportionally enacting, or relying upon, state security legislation and secrecy measures in line with legitimate and reasonable threats against the state, its assets, and its people. In doing so, it becomes clear that the state's maintenance and enhancement of security measures, so long as there is neither a discernible threat to the state or a requisite level of trust between the state and the citizenry, will continue to face vehement opposition for the foreseeable future.

Two key questions arise when assessing the necessity and credibility of our state security regime. The first question relates to the need for state security legislation in current times. The second question relates to who the security legislation is intended to protect. In the South African context, the latter question is perhaps the more important, based on the presupposition that South Africa faces no legitimate security threat.

A state that subscribes to the principle of open and democratic government would therefore, presumably, have to identify, analyse and defend against credible threats whilst ensuring that that threat identification, analysis and defence would pass constitutional muster by allowing for a legitimate limitation of rights.

What for?

In order to protect the security of the state and its people, degrees of secrecy need to be maintained and enforced by states – occasionally through the limitation of the rights of access to information and freedom of expression, amongst others. This is justified through the basic link that is drawn by a state between security, secrecy and the mandate to protect.[25] The onus or response to "trumps", therefore, should presumably be on the state itself to put forward a credible and reasonable argument as to why such rights should be infringed or, in the extreme, completely limited, in accordance with the provisions of the limitations clause. This is particularly the case where states insist on adherence to the broader principles of liberal democracy contained within a written constitution. A state that subscribes to the principle of open and democratic government would therefore, presumably, have to identify, analyse and defend against credible threats whilst ensuring that that threat identification, analysis and defence would pass constitutional muster by allowing for a legitimate limitation of rights. Falling short of this, a state's actions may be perceived as unjustifiable or even arbitrary. It is logical to accept South Africa, at face value, as a robust liberal democracy that has enacted a constitution based on the ideals of the social contract. From this basis, it becomes appropriate to assess how other states which subscribe to the same democratic ideology, at least in principle, have come to orientate their own approach to the use of secrecy in upholding state security.

The United States ("US"), by way of example, has arguably the most entrenched, monitored and enforced state security infrastructure in the world. Both the Bush and Obama administrations have theoretically positioned democracy and security in so far as the "limitation of the former as a necessary precondition for the achievement of latter."[26] Secrecy, therefore, is one of the practical tools through which security is achieved. Whilst the voting public of the US may disagree on

many things, the perceived threats against their security are an apparent unifying scourge that stimulates a greater sense of patriotic virtue amongst the citizenry. This unified stance has ostensibly created an enabling environment for the state to propose and institutionalise security and thus secrecy measures on a national and, in some instances, international scale. As a matter of course, there may be millions of Americans who do not support a hardening of secrecy measures - but the position from which they argue is ultimately weakened by the very real threats to security that face the US state and its people.

However, whilst the "element of threat" exists far more predominantly in the US than in South Africa, it is necessary to examine a more opaque distinction, in that the US state has "earned" a greater degree of trust from its citizenry to carry out security and thus the requisite secrecy measures for their protection. This is opposed to a perceived distortion and manipulation of this infrastructure for ulterior motives by the South African state. This trust in the US state by the citizenry is evidenced by the recent Edward Snowden scandal, whereby the age and maturity of the US democracy coupled with more robust institutional checks and balances, has ostensibly created a more enabling environment in which security legislation, and the requisite secrecy associated therewith, can take effect, even amongst public outcry.

However, the question as to who is controlling state security apparatus and for what purpose raises issues more relevant to the current South African context.

On reflection, the intentions of the South African state to use security legislation to protect what it deems state secrets when there exists no substantial domestic or foreign threat to our country must be questioned. Siyabonga Cwele, the Minster responsible for State Security, has previously declared that there exist no "discernible" threats to the country and the government has not since put forward any form of coherent justification for the strengthening of, and continued reliance on, state security measures.[27] However, the question as to who is controlling state security apparatus and for what purpose raises issues more relevant to the current South African context.

Who for?

As a former director of the US Central Intelligence Agency, William E. Colby, conceded: "[a] problem inherent in any system of secrecy arises over who is to decide what is to remain secret".[28] The discretionary nature of the dissemination and classification of information is irrepressible in the context of an open and democratic government. This susceptibility of state security to be manipulated stems from what Sagar terms the "asymmetry"[29] of information flows and the executive branch of government's ability to manipulate information for its own ends. Unsurprisingly then, the POSIB has become the most debated piece of legislation in the post-Apartheid era[30] as South Africa has become gripped by a particularly vehement debate around state security that is, in the shared opinion of the authors, most succinctly characterised by a single word: mistrust. Compounding this mistrust is the continued reliance on the NKPA by the state which, in and of itself, it characterised by an ability to declare secret any security upgrades on any premises declared by the Minster of Defence as a national key point.[31] This piece of security legislation has most recently been invoked in relation to the Presidents' private residence at Nkandla, KwaZulu-Natal, causing widespread civic condemnation.

This underlying sense of suspicion exists most tangibly between the state and those outspoken elements of civil society who believe that the pursuit of increasingly restrictive security measures is a means of cloaking the true intentions of the state, which may be defined as securing on-going political control and sustaining a cycle of enrichment for and control by the country's political elite. Indeed, these elements would argue that it may not be disputed that South Africa's security apparatus has, or perhaps always has been, used for partisan gain in light of growing factionalism within the ruling party via an intentional misallocation of state authority and purpose-driven abuses of state "secrecy apparatus". The Matthews Commission Report of 2006,[32] which intended to shed light on state intelligence structures, made it clear that our intelligence infrastructure had become "politicised", only to be suppressed by the very structures it was meant to review.[33] Thus, a circle of deceit has been created. As succinctly pointed out by Earl Warren, "[w]hen secrecy surrounds government and the activities of public servants, corruption has a breeding place."[34]

In instances where security legislation may legitimately necessitate secrecy, an onus resides on the state to take the citizenry into its confidence and justify the need for the limitation of constitutional rights through substantive, open and meaningful engagement.

As issues of corruption and a lack of government accountability continue to play out within the South African discourse, the unfortunate reality is that little has been done to prove to the people of South Africa that, rather than serving partisan interests, our state genuinely requires these measures to carry out its democratically defined mandate. The application of the NKPA to security upgrades at the President's private residence at Nkandla, the Morris "KGB" Tshabalala scandal, the Zuma spy tapes scandal, and others, are inescapably linked to the misallocation of secrecy disguised as state security. As we weigh-up the reality, little has been done on the part of government to convincingly state their case for the further reliance upon, or enactment of, state security legislation. In light of the aforegoing, the authors proffer that the citizenry still retains its "trumps" with the insufficient state response unable to support the need for a limitation of their rights to access to information and freedom of expression.

Recommendations: Moving on from the mistrust

Due to the current conduct of the state, an impasse has been created whereby the application of security legislation is associated with secret, nefarious and self-serving activity. The authors therefore recommend, in general terms, that the state should act in a more open and democratic manner by making reasonable concessions when engaging with the citizenry on matters of security and secrecy but, equally, this engagement should be based on the acceptance by the citizenry that certain matters of state security rely substantively on secrecy in order to be effective. In instances where security legislation may legitimately necessitate secrecy, an onus resides on the state to take the citizenry into its confidence and justify the need for the limitation of constitutional rights through substantive, open and meaningful engagement. However, in instances where security legislation illegitimately invokes secrecy, civil society should remain steadfast in its opposition to such conduct. More specifically, the authors take the view that the proposed amendments to the NKPA should occur without undue delay and that in the interim, reliance upon the NKPA by the state should cease. In relation to the POSIB, the authors contend

that, if signed into law, the POSIB should be tested for constitutional validity by the Constitutional Court and that civil society should work together to ensure that effective legal argument is placed before that court.

Conclusion

We have our "trumps" and we should use them. The limitation of the constitutional rights to access to information and freedom of expression through the application of current and proposed security legislation does not 'animate our constitutional project' but takes us away from it. As opposed to being 'protected from fear', we should fear, above all, that we do not possess the requisite knowledge to regulate our state. For without knowledge, we are unable to make informed and reasonable decisions regarding the future of our country. As we should respect the decisions of our duly appointed representatives, if they are made in an open and democratic manner, our duly appointed representatives too should respect the people that they govern and engage with the people so that we can begin to move on from mistrust.

NOTES
1 102 of 1980.
2 84 of 1982.
3 B6-2010.
4 Government Communications Advertorial "Information Bill: Government Explains the Protection of State Information Bill", accessed at http://www.info.gov.za/faq/information-bill.pdf, accessed on 22 August 2013.
5 Ibid.
6 See Chandre Gould & Louise Flanagan 'The trouble with South Africa's national key points' (12 June 2013) Institute for Security Studies, accessed at http://www.issafrica.org/iss-today/the-trouble-with-south-africas-national-key-points, accessed on 22 August 2013 and Right2Know Secret State of the Nation Report (2013).
7 108 of 1996.
8 Sections 36, 59(2), 72(2), and 118(2). Section 1(d), a founding provision of the Constitution, states that "[t]he Republic of South Africa is one, sovereign, democratic state founded on the following values: Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic governance, to ensure accountability, responsiveness and openness."
9 Section 16.
10 Section 32.
11 Section 9.
12 Section 10.
13 Section 12.
14 Section 14.
15 Section 18.
16 Section 19.
17 Section 33.
18 Section 34.
19 Section 35.
20 J. Mill On Liberty (1859), in J. Mill & S. Collini (ed) On Liberty and Other Essays (1989) Cambridge: Cambridge University Press.
21 Dawood and another v Minster of Home Affairs and others 2000 (3) SA 930 (CC) at paragraph 57.
22 Charles Herrick "Homeland security and citizen response to emergency situations: a perspective on the need for a policy approach to information access" (2009) Policy Sci. at page 195.
23 Woolman et al. Constitutional Law of South Africa 2nd ed. (2011), 34-2.
24 J. Waldron (ed.) Theories of Rights (1984) Oxford: Oxford University Press.
25 Right2Know op cit note vi above.
26 Silvina M. Romano 'Liberal Democracy and National Security: Continuities in the Bush and Obama Administrations (2012) Crit. Sociol. at page 150.
27 Dale T. McKinley 'State Security and Civil-Political Rights in South Africa' (2013, Volume 35, Number 1) Strategic Review for Southern Africa at page 129.
28 William E. Colby 'Intelligence Secrecy and Security in a Free Society' (1976, Volume 1, Number 2) International Security at page 11.
29 Rahul Sagar 'Who Holds the Balance? A Missing Detail in the Debate over Balancing Security and Liberty' (April 2009, Volume 41, Number 2) Polity.
30 McKinley op cit note xxvii above.
31 Op cit note i above, section 2.
32 McKinley op cit note xxvii above at 127.
33 Ibid.
34 Earl Warren 'Governmental Secrecy: Corruption's Ally' (1974) 60 American Bar Association Journal at page 550.

Pan-Africanism of the 21st Century – Challenges and Prospects

David Maimela
holds a degree in Political Science majoring in International Relations, an honours degree in the same field and is currently pursuing a Masters programme in International Relations focusing on SA's Foreign Policy. Among other honours, he holds the Mandela Rhodes Scholarship from the Mandela Rhodes Foundation for the class of 2007. David is currently Researcher at the Mapungubwe Institute for Strategic Reflections (MISTRA) in the Political Economy Faculty

Introduction

At the beginning of the second decade of the 21st century, various encouraging storylines on Africa are beginning to emerge. At an economic level, there seem to be positive signs and numerous reports point to Africa as a 'new growth frontier'. At a political level, peace and stability are increasingly becoming a trend, although challenges remain and new conflicts do still emerge. More than 60% of the African population is youth – a demographic dividend which is a double edge sword. In terms of class formation, the 'middle class' seems to be on the rise.

These storylines and emerging trends are indeed telling a story of promise – Africa reawakening – but can Africa claim the 21st century and what must constitute the agenda to claim the 21st century as an 'African century'?

If the 21st century is really to be an 'African century', the promise must be met with clear intent, reassertion of pan-Africanism as a liberating concept and agenda, and a serious leadership renewal programme. But most importantly, what must a 21st century pan-Africanism look like in practice and who can be the champions and to what end? In the end, if this is not done, the promising decades ahead may return Africa to the 'lost decades' and spell déjà vu and re-marginalisation of the continent.

The discussion follows an analytical framework which helps us understand what is happening, where we are and what Africa needs to do. The framework is three dimensional: structure, leadership and social agency. Before we go further, there is a need to define what is meant by 'pan-Africanism' as a concept and practice.

What is Pan-Africanism?

Pan-Africanism emerged at the end of nineteenth century as an idea and later an action programme by Africans in colonial territories – a response to slavery, imperialism, colonialism and racism. From the onset, pan-Africanism became an anti-thesis to European imperialism, domination and racism. As Thompson explains, 'the idea of pan-Africanism was intended to challenge the main activities of European imperialists, namely, the slave trade, European colonisation of Africa and racism'. Basically this was an ideological response to the 1884/85 Berlin Conference.

As Tondi argues, four themes are discernible through the evolution of pan-Africanist thought and practice in the 20th century (i) Pan-Africanism: a universal expression of black pride and achievement; (ii) pan-Africanism: a return to Africa by the people of African descent living in the diaspora; (iii) pan-Africanism: a harbinger of liberation; and (iv) pan-Africanism: the political unification of the continent.

For 20th century African struggles, pan-Africanism meant a 'vehicle that was used to reclaim African history and rediscover the African Personality that had been subjugated under European cultural domination'.

Achievements of pan-Africanism thus far

Pan-Africanism had twin tasks in relation to correcting the historical injustices of slavery, colonialism and racism: free Africa and unite Africa and her people. It is deliberate that the phrase her people is included in the quest for unity. It is a conscious acknowledgement of the fact that ultimately, the unity of officialdom (states) is incomplete without the unity of the people, the defeat of tribalism and of narrow territorial African nationalism, free movement of the people, and the restoration of the African Personality.

So far, there has been African cooperation, mostly at official state and economic sector level, but no real unity and integration has taken place yet in a manner that realises the pan-African dream of one continent, one people and one destiny.

Remember that the centuries' long subjugation of the black race meant the suppression, belittlement and destruction of Africa and the African. Necessarily, the rebuilding of Africa requires the restoration of African humanity in all facets of life and the elevation of Africa back onto the global stage as an equal people, culture (human civilisation) and geographic space.

In essence, when the so-called developed societies (developed on the basis of the underdevelopment of Africa) focus on 21st century crises of environmental degradation, cyclical global capitalist crises, biogenetic revolution and consequent social upheavals, Africa has a double burden of simultaneously confronting these and the challenges of neo-colonialism in all its manifestations.

The year 1994 signalled the end of official colonialism in Africa and Apartheid in South Africa, bar Western Sahara. The end of colonialism naturally meant that the process of decolonisation would follow. So far, there has been African cooperation, mostly at official state and economic sector level, but no real unity and integration has taken place yet in a manner that realises the pan-African dream of one continent, one people and one destiny.

Challenges from within and without the continent

The advancement of a pan-African agenda will depend on two cardinal realisations: that we need to reclaim, revive and reassert pan-Africanism and defeat neo-colonialism; secondly, that no society has ever made history or progress without relying on its own resources – financial, human, technological, ideational or leadership.

The evidence of a 21st century scramble for Africa suggests that the pan-African agenda is off course, if by pan-Africanism we mean the undoing of nineteenth century colonialism, imperialism and racism.

The tension between promise and real change

In the 21st century, as in previous centuries, African reality is shaped by local and domestic forces that reproduce power structures which also extend to knowledge. In other words, whereas there are signs of great potential for the regeneration and restoration of the continent, new forms of domination and exclusion exert enormous pressure in a continuous struggle between hope and despair, restoration and marginalisation.

For Rowden, development means 'the transition of economies based on primary agriculture and extractive industries to economies focused on manufacturing and value-added services'.

Necessarily, African development and the integration of the continent in the global economy should translate into progress in human development, without which regeneration and restoration cannot be achieved. For some, development means the development of productive capacity of the economy as well as social development in the form of education, health and other social infrastructure.

In recent years, there has been optimism about Africa's development prospects buoyed by the decade long commodities boom and positive developments in human development indicators such as per capita incomes.

For instance, Wolfgang Fengler argues that 'Since 2000, GDP growth rates have averaged and often exceeded 5% per year and this is not limited to a subset of –poorly governed–resource-rich states. Coastal (Senegal, Mozambique) and land-locked (Burkina Faso) countries, commodity exporters (Zambia, Nigeria) and importers (Ethiopia, Rwanda), low-income (Uganda) and middle income economies (Mauritius, Botswana) have all experienced high levels of growth'.

Fengler goes further to report that 'economic growth has translated into significant human development outcomes. Poverty rates are falling fast and key social indicators are improving even more rapidly. Between 1999 and 2012, Africa's poverty rate fell from 58% to 43%, about 1 percentage point per year. Despite war and infectious diseases, Africans are now living longer than ever before – 55 years on average, which is seven years more than a decade ago. This trend is set to continue. Ten years from now, life expectancy is expected to reach 60 years, thanks to sharp anticipated reductions in child mortality. In Kenya, child mortality has declined by 38% since 2000, which is faster than the target aimed for under the Millennium Development Goals (MDGs)'.

Progress notwithstanding, development consultant Rick Rowden presents a different picture in response to the 'Africa Rising' narrative. For Rowden, development means 'the transition of economies based on primary agriculture and extractive industries to economies focused on manufacturing and value-added services'. This effectively refers to the industrialisation of Africa, something which the Africa Mining Vision (AMV) refers to very strongly.

Elsewhere advancing the same argument, Rowden argues that '[F]rom late 15th century England all the way up to the East Asian Tigers of recent renown, development has generally been taken as a synonym for "industrialization"… For example, even if an African country like Malawi achieves higher GDP growth rates

and increased trade volumes, this doesn't mean that manufacturing and services as a percent of GDP have increased over time. Malawi may have earned higher export earnings for tea, tobacco, and coffee on world markets and increased exports, but it is still largely a primary agricultural economy with little movement towards the increased manufacturing or labor-intensive job creation that is needed for Africa to "rise" .

Beyond the legitimate concern about Africa's development is the need to ensure that the 21st century ends the marginalisation of the continent from the global economy. Margaret Lee makes the point more aptly in a research paper that formed part of the research project called "The New Scramble for Africa" project. Lee's conclusions are instructive: '… it has become evident that additional official development assistance will not help Africa from sliding into abyss. If they are serious, the Western powers need to (i) map out a strategy for forgiving Africa's debt; (ii) remove protectionist barriers against African exports; (iii) eliminate welfare payments to their farmers that have resulted in the destruction of African economic sectors; (v) ensure that a significant percentage of the profits arising from exploitation of Africa's natural resources are used to enhance Africa's development' .

However, growth must be accompanied by development and in the 21st century Africa cannot afford a similar 'brown' European industrialisation process of the 19th century that has been harmful to the natural environment and human life.

The foregoing arguments on the 'Africa rising narrative' naturally raise the two important questions: are the changes taking place on the continent transformative and sustainable? No doubt, a positive trend of growth is welcome. However, growth must be accompanied by development and in the 21st century Africa cannot afford a similar 'brown' European industrialisation process of the 19th century that has been harmful to the natural environment and human life.

The positive trend of an improving human development index cannot be built upon through aid. Rather, it will require that African economies be built on innovation and new foundations that accord with the realities of the 21st centuries, and are better to enable sustainable development and growth. These can only be achieved if systemic changes are effected in the economic structures of the continent, including the manner in which the African economy relates with the global economic structures.

A pan-African agenda has to contend with these and many other challenges and tense changes taking place within the political economy of the African and indeed global economy.

What of ideational and political leadership?

Whereas the trend of peace, stability, regular elections, rule of law et cetera is on the rise, the same cannot be said about ideational and visionary political leadership. For instance, the African university which is supposed to produce a critical-thinking class and a competent leadership is, in most instances, in disarray. For instance, as Mamdani argues, 'Today, the market-driven model is dominant in African universities. The consultancy culture it has nurtured has had negative consequences for postgraduate education and research. Consultants presume that research is

all about finding answers to problems defined by a client. They think of research as finding answers, not as formulating a problem. The consultancy culture is institutionalized through short courses in research methodology, courses that teach students a set of tools to gather and process quantitative information, from which to cull answers.

Today, intellectual life in universities has been reduced to bare-bones classroom activity. Extra-curricular seminars and workshops have migrated to hotels. Workshop attendance goes with transport allowances and per diem. All this is part of a larger process, the NGO-ization of the university. Academic papers have turned into corporate-style power point presentations. Academics read less and less. A chorus of buzz words have taken the place of lively debates' .

The combination of questionable leadership and the struggle for a return to a just and fair battle of ideas (the struggle for the restoration of Africa as a knowledge space), makes the pan-African agenda a worthy and yet challenging struggle to wage in the 21st century.

Both global power and knowledge production is anchored on definite political economic systems and power structures. The fact of decolonisation of Africa does not immediately translate into the end of Africa's marginalisation in the area of knowledge production. In fact, colonial legacy points to the fact that the African space is not seen as a knowledge space and therefore most of the knowledge produced on the continent does not fit the universalising Eurocentric criteria of knowledge. The African academy therefore remains marginalised, impoverished and is regarded as the youth of the world.

We cannot rethink the West and modernity outside of rethinking the place and role of Africa, in restoring the humanity of humanity, as a whole.

In terms of leadership, the late Prime Minister of Ethiopia Meles Zenawi puts it more aptly, '[T]he underlying fact is that African states are systems of patronage and are closely associated with rent-seeking activities. Their external relationship is designed to generate funds that oil this network of patronage. Their trading system is designed to collect revenue to oil the system. Much of productive activity is mired in a system of irrational licenses and protection that is designed to augment the possibilities of rent collection' .

The combination of questionable leadership and the struggle for a return to a just and fair battle of ideas (the struggle for the restoration of Africa as a knowledge space), makes the pan-African agenda a worthy and yet challenging struggle to wage in the 21st century.

The limitations of a statist pan-Africanism

A lot of work has gone into promoting pan-Africanism and the political unity of the continent, and this has not gone without contestation and controversy from within the continent itself. So far, the pan-African agenda for African unity, progress and restoration has been state-led.

Muchie, Habib and Padayachee argue for a shift from a statist pan-Africanism to a 'democratisation of African integration'. They argue that '[T]he advantage of civil society participation is bringing integration and its potential benefits down to

grassroots. In the process there will be public education, public debate, public participation and open and transparent process that lead to accountability and legitimacy of the African project of integration'.

In the end, the pan-African project is aimed at uniting the African people, economies and states in a manner that restores Africa to its former position before the 1884/85 Berlin Conference. Therefore, there must be a simultaneous process to unite the people, the economy and the states. However emphasis must be placed on the role of the people. In the 21st century, the accelerated tempo for African unity must come from below.

Pan-African agenda in the 21st century?

The recent spate of uprisings in North Africa is quite encouraging. These uprisings are about people reclaiming their space as makers of history, demanding political and economic reform that promotes inclusivity – although neither loud nor conscious at times, these struggles also speak to African unity. However, disunity such as the experience in the Sudan recently is quite a blow to African unity.

In addition, allowing the kind of military intervention as experienced in Ivory Coast and Libya , has set pan-Africanism backwards.

Whereas there is a lot to celebrate about the achievements of Africa in the past 50 years, with the last 20 years having seen increased stability, economic growth and favourable demographic profiling, there is another parallel story that casts doubts as to the transformation and sustainability of an 'Africa rising'.

Yes positive changes abound. To the extent that these positive changes are happening parallel to the rise of inequality and continued marginalisation of the continent in the global political economy, the possibility of unsustainability and therefore regress looms large. In this instance, economic growth must be accompanied by economic development, social justice and social inclusivity.

Africa needs to recognise opportunities and threats that exist within and outside of the continent. In order to advance, the pan-African agenda we need to understand how the 21st century world works – how it includes and exclude others, how it presents opportunities whilst simultaneously threatening to recolonize the African continent. In order for this to happen we need, from across society, leading universities, leaders, countries and vibrant social movements that will provide critical and visionary leadership. All of this must be organised consciously into a formidable pan-African network that includes the African diaspora to reclaim pan-Africanism and Africa.

Time is running out. Everywhere the toiling masses of our people are leading brave local and national struggles that require a spiritual and intellectual connection to the pan-African agenda but one that is informed by the realities, opportunities and visions of the 21st century and beyond.

NOTES

1. The term 'middle class' is used loosely to mean the rising consumer class, people who have greater purchasing power to consume intermediate to high-end luxury goods. It is not applied in a classical Marxist sense. The term merely refers to the middle strata.
2. Thompson, V.B. 1969. Africa and Unity: The Evolution of Pan-Africanism. London. Longmans, Green & Co. Ltd, p3 – as quoted in Tondi, PT. Pan-African Thought and Practice. Alternation Special Edition 2 (2005), p303.
3. Tondi, P.T. 2005. Pan-African Thought and Practice, Alternation Special Edition 2, p326.
4. Article by Wolfgang Fengler on The Economist online. Africa's Rise: How real is the rise of Africa? Published on 12 March 2013.
5. Ibid.
6. Response article by Rick Rowden to Wolfgang Fengler on The Economist online. Africa's Rise: How real is the rise of Africa? Published on 12 March 2013.
7. Article by Rick Rowden on The Foreign Policy Magazine online. The Myth of Africa's Rise, with sub-title: Why the rumors of Africa's explosive growth have been greatly exaggerated, published on 4 January 2013.
8. Lee, M. 2007. The 21st Century Scramble for Africa. Journal of Contemporary African Studies, 24:3, p324 & 325.
9. Mamdani, M. 2011. The importance of research in a university. Pambazuka News online. Issue 526. Published on 21 April 2011.
10. Zenawi, M as quoted in Mbeki, T. 2013. Africa must unite! An imperative of our time. The Thinker, May 2013, Vol. 51, p18.
11. Muchie, M, Habib, A & Padayachee, V. 2006. African integration and civil society: the case of the African Union, Transformation, No 61, p23.

REFERENCES

Fengler, W. 2013. Africa's Rise: How real is the rise of Africa? The Economist. http://www.economist.com/debate/days/view/954 Access date: 20 August 2013.
Lee, M. 2007. The 21st Century Scramble for Africa. Journal of Contemporary African Studies, 24:3, 303-330.
Mamdani, M. 2011. The importance of research in a university. Pambazuka News. Issue No. 526. http://www.pambazuka.org/en/category/features/72782 Access date 23 February 2013.
Muchie, M, Habib, A & Padayachee, V. 2006. African integration and civil society: the case of the African Union, Transformation, No 61, p3-23.
Rowden, R. 2013. Africa's Rise: How real is the rise of Africa? The Economist. http://www.economist.com/debate/days/view/954 Access date: 20 August 2013
Rowden, R. 2013. The Myth of Africa's Rise. Foreign Policy Magazine.
http://www.foreignpolicy.com/articles/2013/01/04/the_myth_of_africa_s_rise#.UQfoBY2VAV0.mailto Access date: 20 August 2013
Thompson, V.B. 1969. Africa and Unity: The Evolution of Pan-Africanism. London. Longmans, Green & Co. Ltd.
Tondi, P.T. 2005. Pan-African Thought and Practice, Alternation Special Edition 2, p301-328.
Zenawi, M as quoted in Mbeki, T. 2013. Africa must unite! An imperative of our time. The Thinker, May 2013, Vol. 51, p12-18.

Why Liberal Democrats should support the African Union

Keith Gottschalk

Keith Gottschalk is a Fulbright scholar, and a political scientist at the University of the Western Cape.

Introduction

In South Africa, this title will provoke amusement, or bemusement, or sarcasm. Who can deny that even leftists denounced the African Union's former incarnation, the Organisation of African Unity (OAU) as a club of dictators? Who could deny that as recently as October the African Union (AU) summit voted to lobby for legal immunity at the International Criminal Court for sitting AU presidents and prime ministers? How many of the fifty-four AU member states rank honourably on those indexes of Freedom House, Transparency International, and the Mo Ibrahim Foundation?

This article argues that there are at least four sound reasons why liberal democrats ought to support the vision, principles, and norms of the AU and its affiliates, and support many of its actions.

First, ever since the era of the League of Nations, liberal democrats have been vociferous supporters of the concept of an international order based on the rule of law. They have led a century of campaigns to strengthen a variety of multilateral organisations to this end.

Second, the overwhelming bulk of actual operations on the ground by the AU and its affiliates have been complex peacekeeping operations to end civil wars, with all their accompanying atrocities and war crimes.

Third, ideals and values enshrined in the founding treaties and protocols of the AU and its associated organisations, mark, to date, the biggest acceptance and victory of liberal democratic principles on the continent.

Fourth, those treaties and protocols also unequivocally commit the signatory states to schedules to phase out protectionism in favour of a continental free trade area, which in turn should culminate in a continental common market. The creation of a continental free trade area would result in tariff reduction. Most liberal democrats favour tariff reduction as a means of promoting trade and investment.

At this point let me clarify that my references to the AU and its affiliated organisations include institutions such as the African Court of Human and Peoples' Rights, and the Pan-African Parliament, as well as regional organisations such as the Common Market of Eastern & Southern Africa (COMESA), East African Community (EAC), Economic Community of West African States (ECOWAS), and the South African Development Community (SADC).

Double Standards

Every reader of *Focus* will have already read something about the double standards between numerous AU resolutions. One of many examples is, stating in one breath, "unflinching commitment to combating impunity"1, and then immediately following with proposals to protect incumbent presidents from being charged with crimes against humanity. South African media critiques and denigration of the AU family use higher criteria, and double-standards, that they never apply to contemporaries of the OAU and AU.

For example, they criticize the OAU-AU for having dictatorships as members, when they never criticize the United Nations (UN) for the same principle of universal membership. In fact, the AU has suspended the membership of some regimes for usurping power through *coups-de-etat* (such as Egypt) or in other ways (such as the Central African Republic and Madagascar), which is more than the UN has done.

Similarly, the AU family has undertaken peacekeeping operations on a vastly larger scale than the Arab League and the Organization of American States, and which would not even be contemplated by the North American Free Trade Area (NAFTA) nor the Association of South-East Asian Nations (ASEAN).

One principle that both the OAU and then the AU insist upon is that borders on the day of independence must be respected, and border disputes resolved by peaceful means.

Recently, media commentators have condemned the AU and some of its heads of state for rejecting the jurisdiction of the International Criminal Court – yet they never criticize the leader of the free world for doing the same. In fact, AU presidents take a more moderate line than the United States Government. The US Government does not only reject the authority of the ICC over anyone in the USA, it also demands that AU states sign treaties which state that an African state will refuse to enforce any ICC arrest warrant against any US citizen who resides in, or visits their country. When the SA Government refused to sign such a treaty, the US Government cancelled some military aid to South Africa.

It is these double standards which help generate an African nationalist and Pan-Africanist backlash against the ICC and some other Western institutions.

The first principle: the rule of law in international affairs

One principle that both the OAU and then the AU insist upon is that borders on the day of independence must be respected, and border disputes resolved by peaceful means. When the Kingdom of Morocco invaded and annexed the Sahrawi Arab Democratic Republic (SADR), the OAU, after eight years of seeking a diplomatic solution, recognized the SADR. The OAU preferred the withdrawal of Morocco instead of backing down on its principles.

Another example of the AU's belief in the importance of international law is non-interference. The AU believes that solutions can be found by working through multilateral organisations and the peaceful process of treaties, rather than through unilateral attacks and invasions. The long-term vision of the AU, like the European Union, is of the political integration of the continent. In the meanwhile, the AU operates as an inter-governmental organisation, stressing diplomacy as the first resort, and military intervention as the last resort.

Liberal democrats can usually be supportive of the principle behind these endeavours.

The second principle: peace-keeping and peace-building[2]

The end of the Cold War saw the number of civil wars in Africa steadily decline over the next two decades. One reason is that first ECOWAS through the 1990s, and then the AU ever since it was constituted in 2002, have led peacekeeping operations from Liberia in the west to Somalia in the east. AU troops also account for a large proportion of the hybrid forces under UN leadership in Darfur, Sudan, and in the Democratic Republic of the Congo. While the formal launch of the African Standby Force has been postponed to 2015, it *de facto* already has 25 000 boots on the ground, and has been in action continuously for two decades. In essence, the African Standby Force has, even before its ceremonial launch, evolved into a permanent African *Standing* Force.

Obviously, the only way to protect human rights, promote democratic principles, and halt genocide is to interfere in a state's internal affairs. Clearly, what actually happens on the ground is decided on a case-by-case basis by who out-lobbies and outvotes who in the AU.

ECOWAS and the AU may be lauded for going beyond making efforts to keep the peace after a ceasefire between two conventional armies – current operations do not fall under the mandate of traditional peacekeeping. The contemporary usage of the concept "peacekeeping" is in fact a mildly Orwellian euphemism for full-scale fighting against one side in a civil war (as in Liberia and Sierra Leone), or against dozens of constantly mutating[3] splinter rebel militias (as in Darfur and the DRC).

Liberal democrats will certainly support these operations, which include combatting mass rapes and other war crimes. The same applies to AU mediation seeking to build a post-war sustainable order.

The third principle: democratization of Africa[4]

The African Economic Community (AEC) Treaty of 1991 and the Constitutive Act of the African Union of 2000 might be two of the world's most ambitious attempts at norm diffusion. They show a dynamic contestation between the OAU Charter's 1963 African nationalist narrative and a twenty-first century human rights assertiveness. The AEC treaty moves beyond defending national sovereignty to introduce the phraseology of "inter-dependence" (Article 3a) and "harmonisation of policies" (Article 3c).

The Constitutive Act confrontationally juxtaposes "non-interference in internal affairs" (Article 4g) with "promote and protect human rights & peoples' rights" (Article 3h); "promote democratic principles and institutions, popular participation and good governance" (Article 3g); and the "right to intervene in genocide, crimes against humanity, & other grave circumstances" (Article 4h).

Obviously, the only way to protect human rights, promote democratic principles, and halt genocide is to interfere in a state's internal affairs. Clearly, what actually happens on the ground is decided on a case-by-case basis by who out-lobbies and outvotes who in the AU. Nonetheless Article 4(h) is a world first in giving an intergovernmental organization the power override sovereignty. The UN did not intervene in genocide in Rwanda or mass murder in Cambodia.

A key principle of liberalism is the separation of powers. The AU has set up a Pan-African Parliament (PAP) which is indirectly elected. The European Parliament took twenty years to evolve to direct elections, and four decades before it asserted serious authority as a check and balance against the EU Commission. So if the PAP is able to act as a counterweight earlier than that, it will be a considerable Pan-African achievement.

There are other reasons that liberal democrats should support the PAP, and lobby for it to move to direct elections. Since the AU is structured as an inter-governmental organisation, it is inescapably, as some critics complain, a union of presidents and not a union of peoples. Direct elections for the PAP would serve as a democratic way for the AU to broaden out from an elite comprising of heads of state, ambassadors, cabinet ministers, and top civil servants, and rather draw in popular participation and support. The PAP has already made it an early priority to send election observers to national elections in African countries, as a measure of transparency and accountability. The belief is that the presence of election observers will help prevent authoritarian incumbents from rigging the elections.

An unexpected advance in developing human rights norms in Africa has come from courageous judicial activists. Regional courts have been asserting their jurisdiction over a vastly broader range of cases than those specified in their foundational protocols. Traditionally, such courts are founded to settle peacefully border and other disputes between states. Only decades later do governments consent that their own citizens may take cases or appeals above the highest courts of their own country to such international courts. This was the judicial evolution in the EU, for example; and the COMESA Court of Justice similarly confines itself to inter-state disputes.

Indisputably, these judicial rulings, treaties, and protocols have not to date freed any political prisoners from detention, nor unbanned newspapers suppressed by censorship, nor rescued opposition political parties from persecution.

The Zimbabwean Government lobbied the SADC presidents and prime ministers to dismiss all the judges of the SADC Tribunal, and to narrow the court's range of jurisdiction. This took the regional rule of law back to 1898 when President Kruger fired Chief Justice Kotze. But this temporary defeat in the struggle for the rule of law should not blind us to unexpected victories elsewhere in the continent.

By contrast, the ECOWAS Community Court of Justice, and the East African Court of Justice surprised their member states by accepting litigation from citizens against their own governments. The more democratic states within these regional communities have accepted adverse rulings against them. The AU also inherited from the OAU the African Commission on Human and Peoples' Rights, and the African Court on Human and Peoples' Rights (hosted in Arusha). As their titles imply, these authorities are concerned about human rights, and have an extensive list of case rulings accessible on-line.

Indisputably, these judicial rulings, treaties, and protocols have not to date freed any political prisoners from detention, nor unbanned newspapers suppressed by censorship, nor rescued opposition political parties from persecution. Nonetheless, liberal democrats will swiftly grasp their importance for the following reasons:

First, each time African presidential despots and tyrants freely and voluntarily signed all these treaties and protocols, they contradict their beliefs that human

rights are western cultural imperialism, or are imposed by western imperialists on Africa.

Second, these judgements rely on the soft power of naming and shaming. They set norms for the conduct of domestic affairs in African states. If the authoritarian states reject these rulings, there is no reason for the democratic African states to not uphold the rule of law themselves, and consolidate a democratic culture.

Similarly, both the AU and its NEPAD affiliate have organised conventions to combat corruption, supported by significant numbers of states in their struggles to reduce corruption. Liberal democrats will also be supportive of the African Charter on Democracy, Elections and Governance of 2007, which is

> "seeking to entrench in the continent a political culture of change of power based on the holding of regular, free, fair and transparent elections conducted by competent, independent and impartial national electoral bodies".[5]

The fourth principle: towards a continental common market

The African Economic Community Treaty of 1991 proposed importing into Africa lock, stock, and barrel, the norms and institutions of the EU. This treaty lays down a 34 year schedule specifying this in unprecedented detail.

The Southern African Customs Union is the oldest existing customs union in the world, and the East African Community has resurrected – and expanded – the customs union of colonial yore.

So far, most of the countries in SADC and COMESA have signed treaties allowing them to become part of free trade areas for most goods. The current struggle is to get these governments to implement these agreements. The Southern African Customs Union is the oldest existing customs union in the world, and the East African Community has resurrected - and expanded - the customs union of colonial yore. ECOWAS has spent a decade dragging its member states, kicking and screaming, to implement the common external tariff to which they agreed years ago.

Currently, SADC, COMESA, and the EAC have entered a decade of tripartite negotiations to harmonize their trade regimes. This will create a free trade area stretching from the Cape to Cairo, embracing five hundred million people in twenty-seven countries.

Liberal democrats have been the most enthusiastic and sustained campaigners to build the EU, against opposition from both ends of the political spectrum. The same ought to apply to the Pan-African vision of progress towards a continental common market. This would certainly unleash significant economic growth.

Conclusions

"The treaty provisions establishing these African institutions anticipate international organizations charged with discharging the kinds of plenary executive, legislative, and even judicial powers once associated exclusively with national governments."6

The above quotation from a law scholar pithily sums up the Pan-African project, where the more democratic states contemplate a polycentric sovereignty, and where the executive may be subject to judgements from international African courts. In short, there is a serious case for liberal democrats to show, strong support where

it is due for the democratic norms and principles underscoring the Constitutive Act, the Charter on Democracy, Elections and Governance, and the PAP and international African courts.

The Coalition for an Effective African Court on Human and Peoples' Rights is typical of the NGOs that seek to strengthen institutions for democracy and the rule of law on our continent. The UN Association has for generations organised "Model UNs" on campuses and some high schools. It would be good for liberals to invite others to join them to discuss setting up a non-partisan AU Association with national chapters, and to facilitate founding an African Union Association.

NOTES
1 Assembly/AU/Dec.221 (XIII) (2009)
2 Devon Curtis & Gwinyayi Dzinesa (eds). 2013. Peacebuilding, Power, and Politics in Africa. Johannesburg: Wits University Press.
3 I owe this phrase to Adekeye Adebajo. 2011. UN Peacekeeping in Africa. From the Suez Crisis to the Sudan Conflicts. London: Lynne Rienner.
4 Keith Gottschalk. 2012. The African Union and its sub-regional Structures. Journal of African Union Studies. Vol.1, issue 1: 9-41.
5 http://www.au.int/en/sites/default/files/AFRICAN_CHARTER_ON_DEMOCRACY_ELECTIONS_AND_GOVERNANCE.pdf
6 Jose Alvarez. 2005. International Organizations as Law-Makers. Oxford, OUP. 2005: 116

The New Affirmative Action: Abandoning Race as a Proxy for Disadvantage[1]

Introduction

The University of Cape Town (UCT) currently employs an affirmative action admissions policy that gives preference to members of designated racial groups. This policy has been criticized for discriminating against prospective students on the grounds of race. A commission of enquiry has been established to review the admissions policy and to investigate other ways of assisting prospective students who have been previously disadvantaged.

Mark Oppenheimer is a practising advocate and member of the Johannesburg Bar. He graduated from UCT in 2007 with degrees in law and philosophy. He has represented newspapers that are threatened by defamation suits, individuals that were wrongfully arrested by the police and employees that have been unfairly dismissed.

David Ansara is the Coordinator of the African Loan Market Association, a non-profit trade association dedicated to supporting and growing the syndicated loan market in Africa. David holds a master's degree in political science from the University of Cape Town and has a strong interest in economic and social development.

We will examine the arguments in favour of race-based affirmative action and argue that it is an inadequate policy to remedy the injustices of the past and does not create a future grounded in equality. We will demonstrate that the current policy of race-based affirmative action at UCT should be abandoned in favour of an affirmative action admissions policy that promotes equality of opportunity, without relying on race as a proxy for disadvantage.

Justice and Equality

Justice requires us to treat people in accordance with what they deserve. Individuals that work hard deserve to be rewarded for their efforts, while those that perform wrongdoings deserve to be punished. A proper understanding of justice must also be rooted in the value of equality. Paying due regard to equality does not require us to treat all people in exactly the same way, but rather to take the different needs and abilities of people into account when deciding how to treat them equally.

When we treat people differently, we must do so because of morally relevant considerations. For example, we would award a researcher the Nobel Prize for medicine if she discovered a cure for cancer, but somebody who invented a tooth-whitening product might not be as

deserving of the prize. The same applies for punishment. Somebody who has stolen a loaf of bread should not receive the same level of punishment as a murderer.

Sexism is wrong because it arbitrarily discriminates on the morally irrelevant basis of a person's sex. Similarly, treating people unequally because of their language, religion, race or sexual orientation is unjust because none of these features are morally relevant reasons for differential treatment.

Understanding Affirmative Action

Affirmative action (AA) policies are usually concerned with three goals: compensation, correction and diversification. Compensation is backward-looking in that it seeks to remedy past injustices. Correction aims to rectify present discriminatory practices, while diversification attempts to create a multicultural society. AA policies aim to achieve these goals either by being race-neutral or by placing some weight on the basis of race.

Race-based AA policies usually take three forms:

i) Tiebreaker AA
ii) Strong preference AA
iii) Set-asides

Tiebreaker polices apply to situations where two candidates with equal qualifications or ability are contesting for the same position, but the candidate of the preferred race is chosen over the candidate from the non-preferred race.

Set-asides were commonplace in apartheid South Africa where 'whites' were accorded privileged access to elite universities, as well as most skilled jobs and positions of power.

Strong preference AA gives extra weight to candidates of a preferred race by actively selecting them for positions over other races even if these candidates are not as well qualified for the position. In this approach the stronger the preference for a particular race the less qualified the candidate has to be in order to be admitted.

Set-asides designate certain positions for candidates of a particular race and actively bar individuals of another race from winning these positions. Set-asides were commonplace in apartheid South Africa where 'whites' were accorded privileged access to elite universities, as well as most skilled jobs and positions of power.

Arguments for race-based AA in university admissions in South Africa

The racist system of apartheid divided people according to arbitrary criteria of race, ethnicity and linguistic origins and allocated resources and opportunities to 'whites' at the expense of 'blacks'. This has entrenched inequality between South Africans of different races - a legacy that we still live with today.

In order to correct this historical injustice, proponents of race-based AA argue that race should be used as the primary determinant of access to opportunities including jobs, places on national sporting teams and positions at university. They assert that since race was used to discriminate against 'blacks' in the past, that race remains the best proxy for disadvantage that we have.

Proponents of race-based AA also argue that by giving preference to members of specific races we contribute to greater diversity, which leads to a more just society.

Problems with race-based affirmative action

Compensation for past injustice

Race is not an accurate proxy for disadvantage. While this may have been the case immediately after the end of apartheid, redistributive measures and increased access to opportunities have resulted in a number of upwardly mobile 'black' people who can no longer be considered disadvantaged. While poverty is still endemic in South Africa, the income and social status of 'blacks' differs. Since apartheid ended in 1994 a new generation of so-called "born frees" who are of university-entry age may not necessarily be disadvantaged by virtue of their race.

Using race as a blunt instrument to determine who should be treated with preference in university admissions will result in the privileged receiving undeserved preferential treatment, while excluding the genuinely disadvantaged. Since there are a limited number of places available for prospective students, those that matriculated from elite private schools who happen to be 'black' will deprive other less fortunate 'black' students from being admitted.

The stronger the race-preference the less weight is allocated to academic achievement. Stronger candidates from non-preferred groups who might otherwise be eligible for admission may find themselves without a place at university for arbitrary reasons.

It is also unfair that some deserving 'white' candidates are turned away because of a race-preference policy. Born free 'white' South Africans took no part in the unjust practices perpetuated under apartheid. They should not be punished by being forced to forgo their equal right to higher education. Furthermore, not all 'white' people were beneficiaries of apartheid; some resisted the system and were victimized by the Nationalist government because of this. Notable examples include Beyers Naudé, Joe Slovo and Ruth First.

Set-asides and quotas also negatively affect academic standards by reducing admissions criteria on the grounds of race. The stronger the race-preference the less weight is allocated to academic achievement. Stronger candidates from non-preferred groups who might otherwise be eligible for admission may find themselves without a place at university for arbitrary reasons.

Diversity of race

Despite the fact that AA based on racial preference is unjust some argue that it ought to be used because it yields positive consequences. One of the main claims in favour of the policy is that it creates diversity which is either intrinsically good, or good because of the results that it produces.

A racially diverse range of students may be aesthetically appealing, but if we acknowledge that the colour of a person's skin is as irrelevant as their height or hair colour, it becomes evident that there is nothing intrinsically valuable about it.

Others argue that racial diversity is valuable because it leads to a diversity of opinions. Providing room for a multiplicity of beliefs and ideas brings with it immense benefits. It allows for intellectual, cultural, artistic and scientific progress whilst provoking discussion and aiding the search for truth.

However, it is not clear that admitting students that are racially diverse will ensure that those students will hold a diversity of opinions. The assumption that all 'black' people

think in a particular way and that the opinions that they hold are fundamentally different to the opinions held by members of other racial groups is an absurd form of racial stereotyping.

It is possible for people from different racial groups to hold the same opinion on a matter. It is also possible for members of the same racial group to hold radically different views. The old adage that if you put two Jews in a room you will get three opinions illustrates the point that there is no connection between a person's race and what they believe.

If universities genuinely want diversity of opinion then they could admit students on that basis. Instead of focusing on race, universities could ensure that they admit enough Marxists, Libertarians, Feminists, Anarchists, Conservatives, Africanists, and religious fundamentalists to meet the objective of diversity of opinion.

The Burden of Racial Preference

One of the problems with race preferencing is that it assumes a notion of victimhood in the beneficiary of the AA policy, regardless of whether or not that person sees themself as a victim. Moreover, it undermines the actual achievements of those who have excelled academically, but who have to endure the silent judgement of others who presume that they are the beneficiaries of an AA system. It creates the stigma that as a member of a preferred group you are not deserving of your admission, even if you excelled.

"You always want to believe that you were hired because you were the best… But everything around you is telling you you were brought in for one reason: because you were a quota … No matter how hard I worked or how brilliant I was, it wasn't getting me anywhere. It's a hell of a stigma to overcome."

Not only does race-based AA fail to produce the good results that it promises, it can produce results that harm the people that it aims to benefit. The policy undermines the achievements of those who belong to the racial group that the policy prefers. It imposes upon every member of the preferred race the demeaning burden of presumed inferiority.

'Black' candidates that are admitted to universities because they are the best qualified, are still forced to carry the stigma that were only chosen to fulfil a quota. Instead of being recognized for their genuine talents and abilities, they are viewed suspiciously by their colleagues, who are lead to believe that they were only appointed because they are 'black'.

The following quote testifies to the anguish that many highly qualified 'blacks' feel as a result of racial preference.

> "You always want to believe that you were hired because you were the best … But everything around you is telling you you were brought in for one reason: because you were a quota … No matter how hard I worked or how brilliant I was, it wasn't getting me anywhere. It's a hell of a stigma to overcome."

In the realm of education, the policy acts as a disincentive for preferred candidates to do their best. The more that they are rewarded for their race as opposed to their merits, the less reason they are given to develop their talents and strive for excellence when they are studying.

The preceding arguments should not be misconstrued to imply that members of particular racial groups are inherently less qualified or capable than members of other

racial groups. Such a claim is racist and obviously false. The claim is simply that the more emphasis that a preference policy places on race, the less weight it places on merit. The same would apply if preference were placed on some other feature like height or hair colour.

Racial Classification

In order to adopt a policy that takes account of race, some form of racial classification must be used in order to determine who counts as 'black' or 'white'. Every person would have to be identified as being part of a particular racial group. Such a system would be undesirable since it would reinstitute the humiliating classificatory processes that were used in Nazi Germany and Apartheid South Africa. The classifications would often be arbitrary since people of mixed racial descent cannot be easily classified.

Race preference does this terrible thing to our community and ourselves; it compels us to do what the Nazis urged – to think with our blood.

Race preference requires us to ask a series of repulsive questions. In order to determine how benefits are to be allocated it must be decided how much "blood" from a particular race is required to be considered a part of that race. Is one 'black' parent, grandparent or great grandparent enough to be considered 'black'? Would the same test be used to determine who is 'white'?

A clear line would have to be draw between those who would benefit from the preference and those who would not. But on what basis would such a line be drawn? In Nazi Germany a person's status as a Jew was determined by how much Jewish blood they had. Having one Jewish grandparent was enough to be sent to a concentration camp. In South Africa would having one 'black' grandparent be enough to secure a favorable position in a university?

Who gets to decide what racial group people belong to? If people were given the power to assign themselves to a race of their choosing the results would be inconsistent. Preferential policies would incentivise people to categorize themselves as being members of the preferred racial group. Given that the stakes will be high for people to prove that they belong to a preferred group, there will be much contestation among those who fall into ambiguous racial categories.

The system would require administrators to engage in the same kinds of repugnant classification tests that were used in the past. Race preference does this terrible thing to our community and ourselves; it compels us to do what the Nazis urged - to think with our blood.

Race preference is at odds with the aim of non-racialism, since racial identity would be deemed to be as important today as it was under the apartheid regime. Instead of seeing each other as fellow human beings, people would be inclined to think of each other in terms of their race identity.

This would hinder the noble goal of racial integration and encourage people to separate themselves into racial groups. Instead of creating a pluralist society where everyone can feel proud of their heritage, racial preference makes some citizens feel less worthy. Those who are not given preference are deprived of an equal opportunity on the basis of the race that they were born into. In other words, "preference by race yields disharmony, distrust and disintegration."

Alternatives to race-based AA in university admissions

Given the history of discriminatory practices in South Africa there is a cogent need for measures that enhance equality of opportunity, without introducing new forms of discrimination.

As an alternative to race-preferencing we would support the proposed policy revisions made to the UCT council by the Commission into Student Admissions. The commission recommends that a basket of socio-economic indicators be used to evaluate varying levels of disadvantage. These criteria could take into account the particular circumstances of applicants; such as their financial situations, their educational backgrounds and those of their parents. For example, a prospective student who is not a mother-tongue English speaker would be at a disadvantage at UCT, where the language of instruction is English. UCT could help those students overcome this disadvantage by providing bridging courses in English.

The notion of what constitutes the best candidate must also be overhauled to eliminate bias against people with different racial and cultural backgrounds. In addition to academic ability, qualities like the ability to overcome disadvantageous obstacles should be taken into account. This means that if two candidates both achieved the same qualifications at similar institutions but the first did so while aided by privileged surroundings while the second did so despite the presence of discrimination and lack of opportunity, the second ought to be preferred on the basis of merit since she has the added ability of determination in the face of impediment.

It is important to acknowledge that because of its past, the South African educational system is by no means an even playing field. In this regard, grades should not be the sole criterion for evaluating academic potential.

Measures that could be put in place to assist disadvantaged students could include a sliding scale of financial aid, which takes into account the income of the student's family and the student's living and studying expenses. For example, a poor student from a distant rural area could benefit from a housing stipend.

Conclusion

Our conclusion is that race-based AA seeks to correct past injustices, but creates present and future injustice by enforcing discriminatory practices. When seeking to compensate those who are disadvantaged by discrimination, it is important to address the disadvantage itself, rather than introducing set-asides or quotas that enforce racial preferences.

Our recommendation is that UCT should abandon race as a proxy for disadvantage and pursue an equal opportunity affirmative action that takes into account the social and financial circumstances of individuals on a case-by-case basis.

Bibliography
David Benatar, Justice, Diversity and Racial Preference: A Critique of Affirmative Action, in South African Law Journal, Vol 125, Issue 2, 2008.
David Benatar, Affirmative Action Not the Way to Tackle Injustice, in Monday Paper (April 23-May 6, 2007, Volume 26 #05)
Carl Cohen, Naked Racial Preference: The Case Against Affirmative Action
Michelle Jones, UCT to revise admissions, IOL News
Michelle Jones, Revise race-based policy but retain affirmative action, UCT told in Cape Times, 15 Feb 2013
Gwen Ngwenya, DASO Submission to the Commission into UCT Students Admission on the UCT Admissions Policy
Mark Oppenheimer, Race Preferences in Academia, in Politicsweb, 29 March 2012.
George Sher, "Diversity", Philosophy and Public Affairs 28, no 2 1999
Celia Wolf-Devine, "Proportional Representation of Women and Minorities" in The Affirmative Action Debate
Admissions policy for undergraduate admission to the university in 2013 (as determined by the council in Consultation with Senate) University of Cape Town.

UCT's new admission policy

Anton Fagan is the WP Schreiner Professor of Law in the University of Cape Town's Faculty of Law. He has degrees from the Universities of Cape Town and Oxford. He teaches the law of delict and jurisprudence and has written on these as well as on constitutional law.

UCT's new admission policy has much to recommend it. In so far as it seeks to undo inequality, by looking at home and educational circumstances, it represents a major step forward. However, the criteria by which the 'Faculty Discretion' is to be exercised, especially 'racial diversity', are troubling.

In 1987, I was an LLB student here at UCT. In an evidence class, the lecturer discussed a 1957 Appellate Division decision called *R v Vilbro*. It concerned the admissibility of a witness's opinion as to whether the accused were 'white' or 'coloured' for the purposes of the Group Areas Act. The Court held that such an opinion was admissible. For, it said:

> 'There may be people who have had a reason to apply their minds specially to the question of distinguishing the races. Such a witness was, in the present case, the Chief Inspector of Indian and Coloured Education . . . .'
>
> '[T]here may be people who, in respect of the persons whose race is in issue, may have had more opportunities of observing them than the magistrate. The latter only sees them in court, dressed up for the occasion, a woman probably with make-up . . . Other people may have seen them more frequently and in different circumstances, and have had more opportunities and more time of forming a definite impression about them.'

Upon hearing these passages, a student in the class, Zehir Omar, shouted out angrily: 'Who was the judge?' I sat forward expectantly, like everyone else, keen to hear who this racist was. The lecturer answered: 'Fagan CJ.'

The effect of this view of admissibility was that the accused's conviction under the Act was upheld. But that was not the main reason for Mr Omar's outrage and my shame. Indeed, I am not sure that the lecturer even mentioned this outcome. Our outrage and shame were grounded, primarily, on something that Mr Omar, and I, and many others in the class took for granted: racial classification, in itself, is morally repugnant. We knew that the division of persons into 'coloureds', 'whites' and 'natives' had no biological basis. We knew that this division was not merely a social, but a political and ideological, construct. We knew that it took its life from, and was inextricably linked to, the practice of racism under apartheid.

You may know the book *Racecraft*, written by Karen Fields and Barbara Fields, and published last year. The Fields are sisters. One is Professor of History at Columbia University. The other is a sociologist, based at the Center for African and African American Research at Duke University. They have written a great deal on slavery, witch craft, and racism. The following extracts from their book show some of its key ideas:

'Anyone who continues to believe in race as a physical attribute of individuals, despite the now commonplace disclaimers of biologists and geneticists, might as well also believe that Santa Claus, the Easter Bunny and the tooth fairy are real, and that the earth stands still while the sun moves.'

'Race is not an element of human biology . . . nor is it even an idea that can be plausibly imagined to live an eternal life of its own. Race is not an idea but an ideology. It came into existence at a discernible historical moment for rationally understandable historical reasons .... Thus we ought to begin by restoring to race . . . its proper history.'

The current UCT application form requires applicants to identify their 'population group', the choice being between 'black', 'coloured', 'Indian', 'Chinese' or 'white'. An applicant may refuse to choose any of these, in which case he or she will be assigned to the open category.

'[R]ace is neither biology nor an idea absorbed into biology . . . It is ideology, and ideologies do not have lives of their own … If race lives on today, it [is] because we continue to create it today.'

'[T]he first principle of racism is belief in race, even if the believer does not deduce from that belief that the member of the race should be enslaved or disfranchised or shot on sight by trigger-happy police officers . . .'

'[W]hat "race" is' 'is a neutral-sounding word with racism hidden inside'.

The current UCT application form requires applicants to identify their 'population group', the choice being between 'black', 'coloured', 'Indian', 'Chinese' or 'white'. An applicant may refuse to choose any of these, in which case he or she will be assigned to the open category. It is fair to assume that UCT's new admission policy will be implemented with an application form that requires more or less the same.

The effect of this will be a continued naturalisation of race. The division of persons into 'black', 'coloured', 'Indian', 'Chinese' or 'white' is presented as part of the natural ordering of the world, rather than as what it really is, namely an historically-

contingent, politically-constructed and ideologically-driven ordering. The historical, political and ideological connection between these categories and the racism of the apartheid state is simply swept from view. Rather than that categorisation being presented as being deeply-embedded in a particular history, politics and ideology, it is presented as a free-floating categorisation with a logic and reality all of its own.

Worse than that, the categorisation into 'black', 'coloured', 'Indian', 'Chinese' or 'white' is supposed to be insensitive to distinctions of social standing or class. Being the son of a billionaire entrepreneur, or the daughter of an unemployed domestic worker, will neither qualify nor disqualify an applicant for any of the categories. It follows that the primary basis for categorisation must be biological difference. The effect, therefore, is not merely to continue the naturalisation of race. It is to entrench a form of bio-racism.

To get what she deserves, as a matter of justice, an applicant is compelled to validate one of the foundational principles of the racist apartheid order – the principle that everyone falls, naturally and in a way that can be read off one's biologically-determined features in a mirror, or can be determined by inspecting one's nails or one's genitals, into one of the following groups: black, coloured, Indian, Chinese, and white.

The Fields sisters gave their book the title *Racecraft*, because they see the idea that a person has a particular race as analogous to the idea that a person is a witch. Just as there are not really witches, and never have been, so there are not really races, and never have been. Neither 'witch' nor 'race' has, as they put it, 'material existence'. Both the idea that a person is of some race and the idea that a person is a witch are merely 'illusions' or 'fictions' created and sustained by social practices. Now imagine that a university has decided to provide redress for those who were victimised on the ground that they were witches. It would be odd for the university to pursue that redress by asking every applicant to the university this question: 'Are you a witch or are you not?', and then to make the provision of the redress conditional upon the person answering: 'Yes, I am a witch.'

There undoubtedly are many applicants to UCT who, because of inequality, deserve preferential admission. However, to make an applicant's preferential admission conditional upon her having identified herself as 'black', 'coloured', 'Indian' or 'Chinese' is to make the receipt of something that is deserved, unconditionally, conditional upon a Faustian bargain. To get what she deserves, as a matter of justice, an applicant is compelled to validate one of the foundational principles of the racist apartheid order – the principle that everyone falls, naturally and in a way that can be read off one's biologically-determined features in a mirror, or can be determined by inspecting one's nails or one's genitals, into one of the following groups: black, coloured, Indian, Chinese, and white.

Getting what one unconditionally deserves is made conditional upon one's willingness to treat as real, as essential, as natural, and as morally-neutral, an ordering of the world created by the apartheid state in order to pursue its racist objectives. If you do not admit to being a witch, you will get no justice. If you do not admit to being what D F Malan and H F Verwoerd decided you are, namely a coloured, a black, a member of the other, you will not get the justice you are entitled to. Writing about the American context, the Fields sisters make a similar point:

> 'Like a criminal suspect required to confess guilt before receiving probation, or a drunk required to intone "I am an alcoholic" as a prerequisite to obtaining help,

> persons of African descent must accept race, the badge that racism assigns to them, to earn remission of the attendant penalties. Not justice or equality but racial justice or racial equality must be their portion.'

The continued requirement of racial identification in UCT's application form reveals a failure of imagination on our part. Damaged as we are by the experience of apartheid, we find it hard to envisage a future in which South Africans do not see each other through the spectacles which Dr Malan and Dr Verwoerd welded onto our noses. And because we find it so hard to envisage this future, we do not recognise that one of the first steps we must take to secure it is to remove the distorting lenses of our racist apartheid past. We must refuse, collectively, to continue seeing the world, and each other, in the way which the racist apartheid project required.

It is possible to do so. We have a policy in my family that none of us refers to race. As a result, my six year old, Lihle, does not see race – at any rate, not yet. Of course he sees skin colour, and hair colour, and so on. But he does not see race. A few months back, my daughter's boyfriend was having supper with us. Lihle turned to him and said: 'Rahul, you and I are both brown.' But that was not a case of Lihle seeing race, and certainly not race as constructed by the racist apartheid state. For then he would have said: 'Rahul, you are Indian but I am black.' – which he did not say.

And I would argue, as they do, that a continued focus on race, on the one hand, is not necessary to achieve equality and justice and, on the other, is likely to blind us to, and therefore also to leave uncorrected, many of the inequalities and injustices that plague our society.

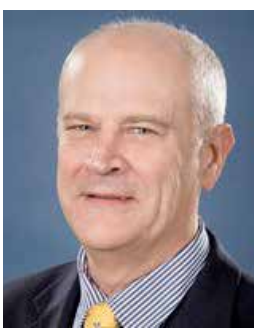
Were I an idealist, I would now propose that all reference to race or population groups, as well as any requirement of racial classification, be removed from UCT's application forms. Like the Fields sisters, I would argue that what matters is not racial inequality and racial injustice, but inequality and injustice full stop. And I would argue, as they do, that a continued focus on race, on the one hand, is not necessary to achieve equality and justice and, on the other, is likely to blind us to, and therefore also to leave uncorrected, many of the inequalities and injustices that plague our society.

But I am enough of a realist to curb my ambition a little. I therefore propose, as a compromise, the following:

> No applicant should be asked to state whether he or she actually is 'black', 'coloured', 'Indian', 'Chinese' or 'white', or is a member of a population group so described. Instead, applicants should be asked to which of these groups the racist apartheid state most probably would have assigned them.

This way of posing the question makes visible the historical contingency of this racial classification and its connection with the racist programme of the apartheid state. It therefore helps to guard against the naturalisation of these racial categories, and against the entrenchment of the belief that they are an inevitable biological or cultural fact. It also avoids the Faustian compact spoken of earlier: an applicant entitled to redress would not be required, as the price for getting it, to treat as true one of the racist apartheid state's great falsehoods, namely the claim that there are black persons, and coloured persons, and Indian persons, and Chinese persons, and white persons, and that each of these are a kind of person essentially different from every other.

Flourishing through Adaptability: Reflections on the challenges facing South African Universities



Laurence Boulle, is a research fellow at the Helen Suzman Foundation. He is an advocate of the High Court of South Africa and is an accredited mediator in Australia. He chaired the advisory council to the Australian government on dispute resolution policy and practice. He was awarded the Order of Australia in 2008. Laurence has published extensively in several areas, including constitutional law, mediation and dispute resolution. Laurence has worked as an academic at several Universities. He held the immediate post of Director of the Mandela Institute and Issy Wolfson Professor of Law at the University of the Witwatersrand, Johannesburg.

Story-Telling – Individual and Collective

Any form of social reality can be approached from a number of perspectives. One of these is the stories the reality embodies. Stories can relate to individuals, to families and groups, and to institutions and nation states. Stories have three characteristic elements: the first is the ***plot****, involving sequences of events, developments and flashbacks; the second is the* ***characters****, in terms of archetypal good and evil, heroes and villains, and the third is* ***themes or morals****, namely of hope and triumph, fear and tragedy. There is another dimension to stories, namely the 'beat' which I shall refer to later. Each narrative, whether raw or refined, has important turning points, moments of change for individuals, institutions and societies.*

As with any institution the story of private universities is a serial novel, with different authors writing different chapters, paragraphs and footnotes, and it would be nice to think that there will be full attribution of these sources in compliance with assignment plagiarism requirements!

One of the themes in all stories is that of *adaptability* - sometimes depicted as resilience or responsiveness to change, but I prefer the adaptability concept. In his first book, the great West African novelist, Chinua Achebe, who died recently, wrote the equivalent of what might, in the visual arts, be called a naïve painting. He drew his title from Yeats, namely 'Things Fall Apart', and showed the way in which remote villagers differed in their capacity to adapt to the changes reaching their isolated localities and modest lives through the forces of colonialism and the imperatives of technology and modernisation. Needless to say the novel points to adaptability as a key ingredient to survival and its absence as a contributor to adversity. I would like to touch on this theme in relation to South African Universities and the future, hence the title 'Towards Flourishing through Adaptability'.

Another dimension of all stories concerns their pulse or their beat, the rather indeterminate life force that sustains them. I would like to focus on four such pulses relating to the past and future stories of South African Universities. The

first is the normative pulse, embracing values, principles and standards. The second is the teaching and learning pulse, the conveyors of knowledge, discernment and wisdom, which are at the core of universities, both ancient and modern. The third is the business, management and financial pulse which need to be beating strongly for all the others to survive. The fourth is the community engagement pulse which relates to those whom the university reaches out to serve, whether local, national or international, and which in turn impact on universities. These pulses, arguably, all need to beat strongly, but they are not always in harmony with one another and thus 'pulse correction' is required.

The Normative Pulse

The first pulse in any institutional story is the normative one. It provides a centre of gravity, a guiding light and anchor. Just as there is no such thing as a regulatory vacuum, there is no such thing as value-free teaching and learning. Values can be explicitly articulated in founding documents, strategic reviews and marketing collateral, they can also be interstitial and unarticulated, despite being ubiquitously present. In an institutional context values can derive from multiple sources and can come into conflict with one another, requiring resolution, refinement and reformulation.

While it is not possible to provide certainty on all social and professional issues involved in human progress, it is possible to develop a wisdom based on value traditions.

This tradition involves the University facilitating the integration of norms and standards into student's learning and their preparation for post-study work situations and relationships. Thus notions of individual ethical choices, public service and altruistic ideals, and ultimately the search for meaning itself, can be fundamental parts of the normative mission of universities.

Dialogue with local culture is also a critical part of this value orientation. In a context such as South Africa the diversity of cultures, languages and faith traditions, all represented in the student body, bring with them diverse value systems. In addition, one of the most sophisticated constitutions in the world mandates personal values and social norms, including societal transformation and the enforcement of socio-economic rights. Likewise, different professional codes of conduct and ethics are part of the social context in which teaching and learning have to inculcate a sense of capacity to reconcile contesting assumptions and prescriptions. Moreover, there needs to be accommodation with the market values which dominate the public discourse on growth and distribution, and funding public goods and costing externalities, all of which have deep but complex value assumptions. Finally there has to be an accommodation with developments in technology and the sciences which have made possible social and personal developments inconceivable even a decade ago, such as surrogate motherhood as a major new economic sector, such as the increasing neuro-awareness as to how the brain operates, and the ability to dump loved ones by Twitter. Many of these developments require the adaptation of policy and law after the event, which in turn would benefit from the value-based education of students who will have to determine their worth and validity in their future careers. While it is not possible to provide certainty on all social and professional issues involved in human progress, it is possible to develop a wisdom based on value traditions. This wisdom should be founded in neutrality, investigation and rationality, in a context of autonomy for researchers, students and the institution as a whole.

Teaching and Learning (Second Pulse)

The second pulse is that of teaching and learning, and the associated endeavours of research, investigation and knowledge dissemination, exchange and application. In terms of its original conception, a university it is the place for self and world discovery, for development through and for refining the findings through discussion, debate, analysis and synthesis.

It has often been observed that education is not well served by the use of different terms in the English language for teaching and learning, whereas other languages have only single term for both, symbolising that good teaching is intrinsically linked to good learning. It explains the paradox of professors who contend that they are teaching well but cannot understand why their students are not learning anything. Perhaps, after all, we should be saying that our aim as educators is 'to learn our students good', so as to close the gap between the two concepts.

Today we all acknowledge three dimensions of education. The first is cognitive in nature. Here the knowledge base of any discipline is important to master, sometimes without the assistance of the great gods Google or WikiLeaks. For a long time there was a shift in emphasis from learning through rote to the mastery of understanding. This is still a pillar of educational orthodoxy. However, I now insist that in subjects I teach there is repetition of key concepts, say on the law of foreign direct investment, so that it is retained in long term-memory. This is facilitated in one subject I presently teach on the law of globalisation where the second component of teaching and learning is the *practical*. While the plea from employers for work-ready graduates is considerably over-stated, and indeed rather naïve, there is still a contemporary reality of needing to connect all teaching and learning to the skills required for their application. Here I use application in the broadest sense to include not only the design of new apps but also the interpretation of a political event, the analysis of an economic report or the appropriate ethical response to corruption in sport.

Here I use application in the broadest sense to include not only the design of new apps but also the interpretation of a political event, the analysis of an economic report or the appropriate ethical response to corruption in sport.

A recent survey of employers of law graduates in Australia revealed surprisingly little insistence on core substantive knowledge of any detailed nature, apart from obvious areas such as contract and torts. Instead the emphasis was on knowledge of concepts and principles within the field and, more apposite to this pulse, a wide range of generic and specific skills and attributes. In my own interpretation of this survey it involves an entirely appropriate shift from transitive substantive knowledge, which answers the 'What' question, to more enduring process knowledge, which answers the 'Where' and 'How' questions. Among the skills these employers sought from prospective employees were communication and presentation skills, research and investigation capabilities, relationship building and, the theme of this piece, adaptability. While it would be an attractive, but altogether too radical a step, to build degrees, subjects and substantive knowledge around these skills and capacities, it is quite possible for them to be taught in an integrated fashion in the foundation knowledge of the disciplines in question, with reference to their applications in different occupations and professional contexts. In my own current institution it involves a heavy emphasis on communication,

interviewing, negotiating, problem-solving and advocacy, all integrated into substantive subjects. The communication element, written, verbal and digital, cannot be too strongly emphasised, and even teaching the skill of using whole sentences to current students has much to commend itself!

The third component is the *formative* element, involving values, attitudes, ethics, awareness and other attributes. Importantly, the formative dimension operates both directly in the classroom and also more discretely within education institutions. The former dimension includes the explicit exposure to ethical, moral and professional standards relevant to life and work. Here I recall how unprepared I was from my own education having been quite lacking in this explicit formation only to find myself operating in a criminal justice system in which the death penalty was still operative. The University of Stellenbosch has improved greatly since those unpractical doctrinal days. In the second, more discrete, formative dimension are the relationships between students and academics and between students and the professional staff at a university. This is where more nuanced lessons of respect, reciprocity, commitment and other attitudes can be learned. These university-based relationships can be seen as formative apprenticeships for the many other relationships which graduates will encounter during their working lives – relationships with supervisors, colleagues, clients, those from other cultures, and ultimately with their own employees.

It has long been the reality of university professors that their identity and professional satisfaction derive from their research and scholarly activities, and that their teaching persona is not regarded as a professional one.

Here I would like to introduce two potentially dangerous 'isms' to the discussion, namely 'educationalism' and 'pedagogicalism'. It has long been the reality of university professors that their identity and professional satisfaction derive from their research and scholarly activities, and that their teaching persona is not regarded as a professional one. The fact remains that research, empiricism and theory within the discipline of pedagogicalism has much to offer contemporary educators. It reminds us of the need to identify teaching and learning outcomes

Whatever the contributory causes, the stress factor is accentuated by the fact that many students are under financial pressure and work part-time or full-time whilst they study as full-time students.

in advance, to accommodate different learning styles in the classroom, to align assessment with teaching objectives, to minimise student anxiety and monitor how students are experiencing their education, to encourage student dialogue with teachers and collaboration among themselves, to demonstrate a love of their subject and a love of learning - and to get assignments back to students on time. These may seem self-evident bullet points but the discipline involved has developed sophisticated theoretical frameworks and evidence-based knowledge of the subject-matter of teaching and learning. It also reminds us in its student-focussed approach that we are not just teaching subjects rather we are teaching students. Students have goals and aspirations, fears and vulnerabilities, and like so many other activities, teaching and learning is ultimately a social human activity. In short, academics at institutions have at least two professions, one in their discipline of speciality and the other as educators.

This leads to another dimension of student formation. In the legal profession, studies in several jurisdictions reveal that practising lawyers have much higher rates of stress and depression than the population at large. More to the point, law students in these countries suffer more from these maladies than their counterparts in medicine, business and information technology. This may of course be a function of the kind of personalities that are attracted to law in the first place, or it may be a kind of pre-emptive pay-back for the stress these students will cause others after becoming practising lawyers. More seriously, stress and anxiety among law students is sometimes attributed to negative community perceptions of their intended profession and to the analytical and-adversarial style of teaching these students encounter in a highly competitive environment. Whatever the contributory causes, the stress factor is accentuated by the fact that many students are under financial pressure and work part-time or full-time whilst they study as full-time students. The appropriate response to this difficult conundrum is initially to recognise that student well-being is, in part, a function of how a university operates. In respect of that part it is the responsibility of the institution to address wellness factors through appropriate support programs. In my own institution there is an attempt to change the focus and identity of legal training from that of

adversarial advocate to collaborative problem-solver, though not all colleagues are convinced of the need. Such is the cost of academic freedom.

Needless to say, like any other –ism, educationalism has its critics. They come in two kinds. The first comprises those who are quite ignorant about the concept and who find their professional identity in research and scholarship, regarding teaching as an inopportune extra duty. The second comprises of those who are conversant with the discipline but challenge its theory, methodology and prescriptive advice, as is normal with any academic discipline. Personally, albeit from a limited knowledge base, I am interested in how this discipline can challenge educators and provide potential benefits to learners.

Unfortunately the emergence of educationalism has coincided with other unstoppable forces in tertiary education around the world, namely university managerialism and corporatisation. With the best of intentions these developments have muddied the waters of pedagogicalism by latching onto its well-intended instruments for measuring teaching performance and learning outcomes. Quantitative measurement is much loved by managers and regulators, despite its overlooking important but unquantifiable 'stuff' that occurs in university life. The way it is applied by administrators in relation to research performance, teaching evaluations and service contributions has alienated many academics. Their resultant frustration is vented not on powerful university managers but on the innocuous purveyors of educationalism, although they might really have chosen another term to assuage their critics. In my own institution it has resulted in compulsory attendance at two annual compliance courses, involving the regulatory framework of education, but no requirements for professional development in teaching and learning. This is not to denigrate compliance training in the contemporary risk society, but just to argue for balance in its requirements. This, however, is a larger issue for another discussion.

Thus communication and information dissemination takes place through many channels, both formal and informal, within organisations and, to the consternation of boards and managers, it affects attitudes and changes behaviours in unexpected ways.

Business, Leadership and Management (Third pulse)

The third pulse is that of business, leadership and management which requires some reference to organisational framework.

Complexity theory informs us that institutions such as universities are complex adaptive systems in which the whole is greater than the sum of the individual parts. In this context *complexity* has a different connotation to that of *complicated*. Piloting an Airbus A 340 is a complicated task for pilots, but each intervention has a predictable outcome on speed, altitude, stabilisation and response. Complex systems, by contrast, lack this mechanical predictability. In complex institutions individuals and groups always act with some degree of adaptive individuality, regardless of carefully drafted organisational policies and procedures, and their activities have indeterminate outcomes. Neat descriptors in mission statements, position descriptions and professional reviews do not reflect the realities of organisational life, which are in part fluid and uncertain, with individuals sometimes responding more predictability to what colleagues do or say than to managerial directives. Thus communication and information dissemination takes place through many channels, both formal and informal, within organisations

and, to the consternation of boards and managers, it affects attitudes and changes behaviours in unexpected ways. A little like high frequency trading on stock exchanges, its influence can be instantaneous in effect, albeit sometimes only temporary in duration. The question arises as to how managers should cope with this organisational phenomenon.

I recently experienced an example of short-sighted responses to complexity theory. I was an external reviewer of an academic department in a large university in Melbourne. We were questioning managers from senior administration about the centralisation of all professional staff in a 'shared-services' model, with only minor delegations of personnel to profit-centres such as Faculties and Colleges. The project was based on the financial need for redundancies caused by global shifts in the educational market and it was undertaken on the basis of information in time-sheets completed by relevant professional staff. The information revealed a significant amount of 'excess capacity' in administrative services, thereby allowing the creation of 'an optimal allocation of resources'. Our rather unanalytical discomfort about this approach was captured succinctly by the project officer assisting the review. As she put it, in technical terms, what they were removing was *stuff*, the interstitial activities and services of staff which could not be neatly captured in time-sheets and which probably equated to the student experience – one of the most important features of contemporary universities. While *stuff* had no place in the organisational charts, performance indicators and balanced scorecards of upper echelon managers, it involved the lecturers, receptionists, advisers and tutors communicating information, values, and a little rumour and innuendo, throughout a system which adapted accordingly along complexity theory lines. Lost *stuff* is lost adaptability. At this point in the story Darwin is often quoted, and I shall not disappoint: what Charles observed was that it was not the strongest or the fittest that survived but the most adaptable. Complexity theory requires acceptance of and responses to the non- measurable stuff within complex organisations such as universities.

As indicated previously, surveys indicate high levels of stress and depression among students as a result of various pressures operating on, both within and outside universities.

The Business Plan

It goes without saying that the pulse of a business plan needs to beat strongly. On the revenue side private universities are dependent on tuition fees, donations and philanthropic commitments, and on the outgoings it is subject to good fiscal husbandry. Here I would like to comment on only two issues relating to business survival.

The first is the centrality of the student experience to the business of the contemporary university. The student experience has many dimensions, including the learning and formative elements referred to previously. It is also about student wellness. As indicated previously, surveys indicate high levels of stress and depression among students as a result of various pressures operating on, both within and outside universities. Regardless of the causes it has led my own institution to re-examine not only the pedagogical aspects of students' lives but also the pastoral, communitarian, social and sporting dimensions of their university experiences.

Whatever the loftier ideals regarding tertiary education and the values it can instil in contemporary South Africa, the reality is that there is also an exchange relationship between students and the university, and therefore between students and all members of staff. Far from contaminating an idealised notion of the proper role and virtues of education this relationship can enhance it positively. It does so by bringing consumer-like pressures from those paying good money for their education and vendor-like responsibilities to those providing it. Modern imperatives of consumerism and client-centred professional service bring important values to these relationships, including the need for responsiveness and adaptation.

Chief Executives are expected to be super-heroes, skilled in all facets of organisational need, from budgeting to human resources; they rarely perform at this level and the gap between expectation and reality always serves to disappoint.

Management and Leadership

Much has been written about management and leadership in contemporary organisations and we live in an age of high expectations in this regard. Chief Executives are expected to be super-heroes, skilled in all facets of organisational need, from budgeting to human resources; they rarely perform at this level and the gap between expectation and reality always serves to disappoint. Airport stores are packed with books on the one-minute manager and change leadership strategies, rivalling only the self-help and 50 shades of everything industries.

My own management style is not manual-based but comes from experiences at the head of the table in bodies both within universities and without, and from some reflection thereon. It has a 'mediation' basis. This involves facilitative communication and negotiation skills designed to empower parties in conflict to make their own decisions in terms of a self-determination principle. Consultation

and facilitation along these lines is partially suited to a CE management position and acknowledges that management and leadership are collective and not individual responsibilities within the firm. However in these contexts more is needed than consultation and facilitation, namely rendering of authoritative decisions and 'selling' those to stakeholders. Here what I call 'managing to yes' is relatively easy since affected parties receive what they were asking for, but 'managing to no' is considerably more difficult. Here my approach is to provide three things: a courteous and respectful hearing, the acknowledgment of underlying concerns and feelings of the person involved, and the provision of reasons for the negative decision. Organisational life should be about accepting the reality of decisions made, and moving on, but not all academics have heard this mantra.

Finally on this pulse: a university is not only an institution of teaching and learning but also a learning institution. This is an important subject which entails responsibilities for all institutional staff.

Engaging with Communities

The final pulse relates to a university's engagement with its several communities. While the circles are hardly concentric, these communities include the immediate South African community, the continental African community, and the geographically remote but virtually near global community.

*About 12 years ago **The Economist** magazine referred to Africa as the 'failed continent', but it now refers to it in hyperbolic terms, replete with references to its economic opportunities, growing markets, human potential and, without any sense of irony, its exploitable resources.*

Firstly, as an outsider I am not best placed to comment on the current and prospective engagements at the local level. Secondly, there is almost no limit to the needs for education, training, capacity-building and knowledge dissemination and sharing with the continent. About 12 years ago *The Economist* magazine referred to Africa as the 'failed continent', but it now refers to it in hyperbolic terms, replete with references to its economic opportunities, growing markets, human potential and, without any sense of irony, its exploitable resources. The world, in particular Asia, has not required this kind of belated advertising because it is already operating in Africa. South Africa has also not been sluggish in this regard, with over 1200 local companies operating in the rest of the continent and many educational institutions having ambitious African-themed and African-populated programs.

Recently I undertook a marketing trip to China and visited cities of 20 million people about which I had never previously heard. Leaving aside, for a moment, issues of rural poverty, urban exploitation and political repression, I was highly impressed by the mass transport systems, the residential and business arrangements were breathtaking, architecture and design were of the highest quality, English in the services sector was of an impressive standard, and the sense of industry was thriving. This is not to celebrate all that the Sino-pulse has on offer, but to underline the fact that it is part of the global reality in which Africa and South Africa will have to survive and thrive. For all hands to be on deck there is need for well-educated economics, sociologists, accountants, political scientists and lawyers, dealing inter-actively on matters of trade, investment, finance and competition. Ideally this will not be always a subservient situation of striving only to be included in global activities in terms of rules and institutions already

established, but to have some future influence on those rules and institutional processes through the AU, the G-20 and the BRICS group of countries, and with local expertise.

This invites the final comment on engagement with globalisation itself. How do South African universities position themselves in an increasingly fast-paced, competitive and changing world? One might also puzzle over the conundrum that while communication and computer technologies now allow South African universities to provide their services to the furthest parts of the globe, the same technologies allow rival institutions to penetrate into South African markets. Perhaps one consideration is more a factor of orientation and perspective than market development. This requires at least an awareness of the powerful imperatives of economic globalisation, of current affairs in politically important capitals of the world, and some degree of cultural awareness – if not learning Mandarin, Korean and Portuguese themselves. This might involve some international-specific knowledge in key subjects, but also the inculcation of a method of observing and evaluating global issues and actors.

Conclusion

I have ranged, at least half seriously, through a wide range of topics, with more breadth than depth – as we tell our students. Vision and missions can be grand and ambitious, as can KPIs, performance reviews and strategic plans. Beneath it all are simple truths. It would be nice for South African universities to be institutions with a waiting-list for student places because they provide value for money in their services, where staff, both academic and professional, had a sense of excitement coming to work on Mondays, and where students were still talking about their subjects after classes had ended. From this modest vantage they might become part of the international community of scholarship and inquiry.

In all stories there are turning points and choices. And as the old saying goes, when an institution comes to a fork in the road it should take it.

BOOK REVIEW

Remembering Heroes on the 'Fringe'

Dr Anthony Egan, a Catholic priest and Jesuit, is a member of the Jesuit Institute – South Africa in Johannesburg. He is Research Fellow at the Helen Suzman Foundation. Trained in history and politics at UCT (MA) and Wits (PhD) he is also a moral theologian, who has lectured at Wits University (Political Studies), St John Vianney Seminary (moral theology) and St Augustine College of South Africa (moral theology and applied ethics). He is completing a book on just war theory.

Choosing to be Free: The Life Story of Rick Turner by Billy Kenniston

Death of an Idealist: In search of Neil Aggett by Beverley Naidoo

A sign of the resilience of South African historiography, often in the face of attempts to create (consciously or unconsciously) a new 'patriotic' consensus, is the fact that we still find the publication of what might be called marginal narratives, accounts of fringe movements, minority groups and biographies of relatively minor characters in our history. The publication of two new biographies – of the philosopher-activist Richard Turner and the trade unionist Dr Neil Aggett – highlights this important tendency, which has, I shall argue, significance beyond the discipline of history extending towards positive new South African democratic self-perceptions.

Both Richard Turner (known to all his friends as Rick) and Neil Aggett share certain common features: they were white activists in the anti-apartheid struggle who cannot easily be fitted into any political tradition; they were both very young when they died (Turner was 36, Aggett 28) in 'unusual' circumstances almost certainly at the hands, directly or indirectly, of the State (Turner was assassinated in 1978 near the end of his five-year banning order[1]; Aggett probably committed suicide while detained without trial in 1981[2]).

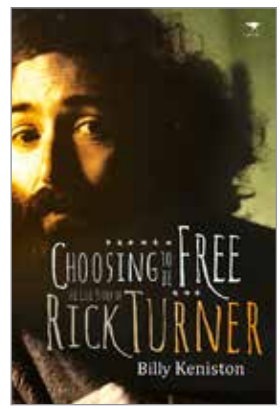
The parallels in their backgrounds are also remarkable. Turner's parents came out to Africa from England, settling first in the Gold Coast (now Ghana) before moving to Cape Town, where Turner was born. Aggett's grandfather, of English stock, grew up in the Eastern Cape before moving to Kenya. Aggett himself was born in Kenya during the Mau Mau insurrection and moved to South Africa after Kenya's independence. Both went to exclusive private schools and then to the University of Cape Town. Turner became an academic philosopher; Aggett became a doctor. Both were radicalised by what they experienced and studied. Ultimately they also became political martyrs.

Rick Turner (born 25 September 1941) grew up in Stellenbosch, on his

parents' farm, went to the elite St George's Grammar School in Cape Town before starting a degree in engineering at the University of Cape Town. Within a year at UCT he changed direction, graduating with an honours degree in philosophy before leaving, having married his girlfriend Barbara Hubbard[3], to do a doctorate in Paris. Rejecting the normal English South African graduate options of Britain or the United States, he chose France because of his interest in Sartre and Existentialism.

Paris' milieu of continental philosophy and what would later be called New Left Marxism shifted Turner's liberal thinking, but unlike previous generations of white radicals it did not lead him into the ANC political camp. His thinking would always be a combination of libertarian humanistic Marxism and liberal values of freedom and responsibility.

Helped in his French by Barbara, he completed his doctorate in 1966 and returned, not initially to a university, but to manage the family farm. This turned out to be a disaster, as his interests were focused more on philosophical debates with the National Union of South African Students (NUSAS) than fruit production. His marriage also broke down during this time.



CHOOSING TO BE FREE: THE LIFE STORY OF RICK TURNER by Billy Kenniston
ISBN: 978-1-4314-0831-3
Publisher: Jacana, 2013

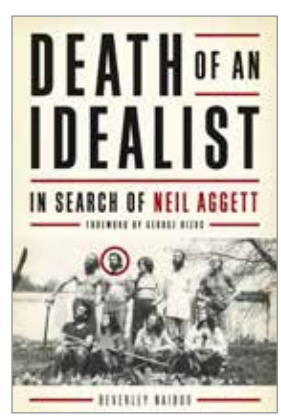
Having done temporary lecturing at various universities, he finally got a permanent job at the University of Natal and moved to Durban in 1970. There, until his banning in 1973, he rapidly became a prominent and popular, if highly controversial, academic. Using Socratic methods in teaching, influenced by Sixties counterculture gurus Paulo Freire and Ivan Illich, he gained a serious following among students, became an advisor to NUSAS and forged excellent personal ties with Steve Biko and the Black Consciousness movement[4]. He also married Foszia Fisher, in violation of the law prohibiting racially-mixed marriage, according to Muslim rites for which he formally converted to Islam. (Turner was by conviction an atheist, though not unsympathetic to progressive forms of religion, as we shall see below).

In an environment where the ANC presence was virtually nonexistent, he also saw the need for a revived trade union movement that would, at very least, mitigate the conditions of black workers.

Turner's public engagement as an intellectual was focused in two areas. Drawing on his ties to NUSAS and liberal Christian movements like the Christian Institute, he set about creating a progressive white consciousness that would complement the BC movement. In an environment where the ANC presence was virtually nonexistent, he also saw the need for a revived trade union movement that would, at very least, mitigate the conditions of black workers.

Rejecting the highly visible and politically sexy practise of student protest, which he saw as counterproductive, Turner encouraged students to rather try to educate the white community for democratic change. This he proposed should be done by producing cogent arguments for change and presenting them to white communities – even at times putting oneself forward (at the risk of all kinds of abuse) as candidates for local government.

The destabilisation caused by strikes (that started in Durban in the early 1970s) would force white society longing for stability to at least create better conditions for workers, that could in future be the basis for liberation. Educating workers for union leadership became part of Turner's extracurricular activity.



DEATH OF AN IDEALIST: IN SEARCH OF NEIL AGGETT by Beverley Naidoo
ISBN: 978-1-86842-519-8
Publisher: Jonathan Ball, 2012

His thinking was summed up in the single book he published in his life, *The Eye of the Needle* (1972). A humanistic Marxist argument couched in broadly Christian language, the book argued for 'participatory democracy' in South Africa. It drew heavily on his work with unions and reflects his own openness to any organisation working for positive change in the country. Unsurprisingly it was quickly banned, as was Turner in 1973.

During his banning, Turner continued to write philosophy none of which was published. He also, using names of Foszia and colleagues, wrote articles for the *South African Labour Bulletin*, which he helped found. Though nothing could be proven, the Security Police were probably aware of his activities. Near the end of his banning he applied for a passport to go to Germany to take up a Humboldt Fellowship. This was refused. A few weeks before the banning order lapsed he was shot dead on January 8, 1978.

Born in Kenya a number of years after Turner, on October 6, 1953, Neil Aggett's family moved back to South Africa after Independence. (Aggett's father, who had worked in the Kenyan police during the Emergency, was uneasy about staying on). Aggett completed his schooling at Kingswood College, Grahamstown, a Methodist establishment, where he appears to have been quite devoutly religious. This faith dissipated sometime after he began medical studies at UCT; indeed, Aggett seems to have embraced Marxism at this time, belonging to various socialist student study groups. He also immersed himself in continental philosophy, particularly that of Nietzsche and the Romantics, and wrote poetry in his spare time.

Neil Aggett's circle of friends and comrades represent both continuity and change with Turner's generation. Many of them were part of a cultural movement committed to communal living and simple lifestyle, an echo of a 1960s student radicalism that would have resonated with Turner.

He also began an often tempestuous relationship with a fellow medic Elizabeth Floyd, with whom he would live until his detention without trial and subsequent death. After completing his studies he moved to Johannesburg, lived in a poor working-class neighbourhood, and combined work at Baragwanath Hospital with full-time trade union organising.

Neil Aggett's circle of friends and comrades represent both continuity and change with Turner's generation. Many of them were part of a cultural movement committed to communal living and simple lifestyle, an echo of a 1960s student radicalism that would have resonated with Turner. Interest in continental philosophy and humanistic Marxism was also part of the culture.

There were differences however. Though still banned, the works of Marx, Lenin and Trotsky were more readily available (if one knew where to find them). The newly translated writings of Antonio Gramsci and Louis Althusser (both familiar authors to Turner) were also doing the campus rounds. Marxist study groups in the 1970s were growing, however. More significantly, the ANC and South African Communist Party were quietly re-establishing a base in South Africa. The libertarian left of Turner's era was giving way to a more structured left, rooted in Leninist models of organisation and discipline[5]. Quite a few of Aggett's friends and union comrades were underground ANC members, though it seems that Aggett never formally joined either.

Having moved to Johannesburg in 1977, Neil Aggett started working with the

Industrial Aid Society (IAS), set up by a nephew of imprisoned ANC leader, Govan Mbeki, together with a number of activists, some of them already in the ANC underground. As a doctor who worked three nights a week at Bara, his initial interests were in setting up medical aid schemes for trade unions.

Working closely with the unions he soon became aware of the tensions within them. While some unions saw their primary role as meeting the interests of their members, others were increasingly committed to the idea of the union as a site of struggle for national liberation. In many ways the former were closer to the unions formed in Durban in the early 1970s; the latter represented an older ANC-rooted tradition of the 1950s which was undergoing a revival as the ANC started to regain lost ground within South Africa. In many respects, Aggett's thinking, at least initially, was probably closer at first to the former bloc though politically he was moving closer to the ANC.

Unlike Turner's death, which rapidly found itself in the 'Unsolved Cases' files of the Durban police, Aggett's demise made political waves. His funeral from St Mary's Anglican Cathedral shut down central Johannesburg. The labour movement came out in force to honour him, as did the ANC.

Aggett's move into union organising per se was precipitated by the 1979 Fatti's and Moni's strike led by the African Food and Canning Workers Union (AFCWU). He quit the IAS and took up the task of building a union under difficult circumstances, amidst rising protest action and increased state harassment of unions. At the same time he found himself dealing with problems of corruption, more accurately misappropriation of funds, within the union leadership.

Within his inner circle he was also facing challenges – tensions in his relationship with Liz Floyd and concern over the ANC connections of close friends. The latter highlighted the question for Aggett over union autonomy versus ANC leadership. Though by no means anti-ANC, Aggett was deeply concerned about the AFCWU maintaining its primary mandate as he saw it: the interests of workers. Despite his reservations about the ANC using the union for political work, and though he seems never to have joined the Movement, Aggett remained close to a mainly white ANC cell in Johannesburg that included Gavin Andersson and Barbara Hogan, up until his detention without trial in November 1981.

After seventy days of intense interrogation at John Vorster Square, Neil Aggett died on February 5, 1982. It's almost certain that he committed suicide. He was 28 years old.

Unlike Turner's death, which rapidly found itself in the 'Unsolved Cases' files of the Durban police, Aggett's demise made political waves. His funeral from St Mary's Anglican Cathedral shut down central Johannesburg. The labour movement came out in force to honour him, as did the ANC. His parents' determined search for the truth led to an inquest which highlighted detention without trial – even if (predictably one might say) the Security Police were exonerated. For some of us who followed the inquest, it shone light on the extent to which our government was willing to use all sorts of dirty tricks to maintain increasingly tenuous control.

Billy Kenniston and Beverley Naidoo have admirably shone light again on

incidents of South Africa's past that have been largely eclipsed by the dramatic decade and a half of resistance and negotiation that led to the emergence of universal democracy in 1994. In telling the stories of Rick Turner and Neil Aggett they have restored to public view two courageous marginal (and perhaps marginalised) heroes whose intellectual, political and moral contributions deserve examination and reassessment.

Turner's vision of participatory democracy, rooted in commitment to rigorous analytical reflection on social realities rather than ideological constructs, is an obvious issue that we need to retrieve today. How do we do politics today? Are we engaging in debate over grassroots realties – or ideological fantasies? Does public policy reflect the world, or does it someway deflect it to serve particular interests? How do we pursue the realistic – while still having enough of a utopian vision to keep us morally honest enough to say that things can and must be constantly reassessed in the interests of the greater good for all?

Indeed, would the independence of their political positions represent the privilege of privilege, or does it suggest a more universal possibility – a kind of political 'believing without belonging' that may point to the maturation of constitutional democracy in contemporary and future South Africa?

As a trade unionist, it might be worth speculating how Aggett might view organised labour today. Subsequent to his death, the labour movement became, for the most part, an agent of political liberation in alliance with what has become the new ruling elite. Has this created a kind of aristocracy within the movement that sees its interests with the elite rather than its rank and file membership? Would this help to explain incidents like Marikana? Would Aggett's more 'workerist' vision have placed COSATU in a different position at Marikana, for example? Indeed, and perhaps conversely, how might this vision have been affected by the new global economy South Africa finds itself in?

Neither Kenniston nor Naidoo, who are primarily biographers rather than political analysts, address these questions to any significant degree. What they do provide is historical material that can be the basis of such reflection. Nor do they really interrogate deeply in their narratives the sociological, psychological and philosophical questions of whiteness: what did it mean to be a white person opposing the apartheid order, to the point of death? How does whiteness, privilege and power affect the choices one makes?[6] Indeed, would the independence of their political positions represent the privilege of privilege, or does it suggest a more universal possibility – a kind of political 'believing without belonging' that may point to the maturation of constitutional democracy in contemporary and future South Africa?

In their own ways, and in terms of being biographies, both books have internal strengths and weakneses. Common to both is the deep sympathy the authors have for their subjects.

Naidoo, a second cousin of Neil Aggett, draws on her personal ties to his family and friends to produce a very dense and personal picture of Aggett. The result, combined with close examination of what remains of Aggett's papers is a book that is very strong in presenting what novelist E M Forster once described as a 'rounded character'. Her reconstructing Aggett's detention and death and the events that followed is historical detection of high quality written with

the intensity of the novelist that she is. What I missed, however, was a more systematic examination of the political debates over the role of South African trade unionism in the late 1970s – are unions supposed to focus primarily on workers' 'bread and butter' issues or should that be subordinate to the national liberation struggle?7

Kenniston comes to his subject without the personal connection, as a historian from the United States who first encountered Rick Turner as a MA student at the University of the Western Cape. This ideological 'freshness' makes him able to interpret Turner outside the often fixed 'positioning' of mainstream South African political debates, and approach Turner's combination of liberalism and New Left Marxism, support for unions and Black Consciousness while paradoxically being open to white civil politics and homeland politicians, free of local prejudices. He is also a skilful writer with considerable passion, with a near adoration of his subject. In truth, this is not uncommon with those who examine Rick Turner, whose personality and style give him an aura – even to those who never met him – of an 'intellectual rock star', analogous with the popularity today of someone like Slavoj Žižek.

With postmodern daring, Kenniston chooses to structure his biography, in his own words, as a kind of collage: the book is a mixture of the author's narrative, analysis of *The Eye of the Needle* (but very little of Turner's unpublished philosophical writings), and long accounts from some of Turner's family, friends and colleagues. The effect, for me at least, was to make the book disjointed. The fact that Kenniston does not interview a number of key people in Turner's life – with the effect that we never quite get a sense of his relationship with his children or indeed with many university colleagues.

Having said that, the book – like that of Neil Aggett – is an important contribution to South African biography. It is even deeply moving. Certainly there is enough here to make it essential reading to the small but growing number of us who identify with Turner and his noble vision of freedom, seeing it as a remedy for the addled reasoning, poverty of thought and self-centred posturing in much of what passes contemporary political discourse.

On a broader level it is good that these books have been published. Together with similar works, they offer us a more nuanced, more complex history of the anti-apartheid struggle. Insofar as they deal with white heroes, they challenge Manichean accounts of race that persist twenty years into our new democracy, while begging for a more systematic examination of the meaning of whiteness in South African history. They give the lie to the idea that patriotism is the preserve, and last refuge, of the party hack.

NOTES

1 Though 'death squad' activity is well-documented from the 1980s onwards, the information on State assassination activities is very limited and often vague. See: Kevin A O'Brien, The South African Intelligence Services: From apartheid to democracy, 1948-2005 (London: Routledge, 2011), 38-39. An exception to this, but a book that many consider somewhat suspect, is the partly-autobiographical Gordon Winter, Inside BOSS: South Africa's Secret Police (London: Penguin, 1981).

2 Many claimed at the time, based on previous 'suicides' in detention, that the State was lying. In the book under review the author accepts that it was almost certainly suicide.

3 Barbara Hubbard emigrated after Turner's death to the United Kingdom, where she later married bestselling novelist Ken Follett (one of whose earlier bestsellers, a World War Two thriller, was coincidentally titled Eye of the Needle) and became a long-serving Labour Party member of parliament.

4 How close this relationship was is a matter for debate. At least two friends of Turner have told me that though they had political disagreements, Biko and Turner were very good friends.

5 Ironically, as Kenniston notes, many of them had been Turner's former students.

6 Any examination of this issue must inevitable engage with the brilliant work of Ivor Chipkin. In particular, see: Ivor Chipkin, Do South Africans Exist? Nationalism, Democracy and the Identity of 'the People' (Johannesburg: Wits University Press, 2007).

7 This debate can be found in the pages of many back issues of the South African Labour Bulletin and in the many works of industrial sociologists like Eddie Webster, Karl van Holdt and Sakhela Buhlungu.

helen.suzman.foundation

promoting liberal constitutional democracy

"I stand for simple justice, equal opportunity and human rights: the indispensable elements in a democratic society – and well worth fighting for."

Helen Suzman

INVITATION TO BECOME A FRIEND OF THE FOUNDATION

We invite you to assist the Foundation in promoting liberal constitutional democracy.

Democratic South Africa faces challenging times. There is much to celebrate in South Africa but much that gives rise to concern, frustration and even anger. Each of us can make a difference to ensure the development of South Africa.

The Helen Suzman Foundation is making a difference. We protect the rights enshrined in our country's constitution, tackle issues of governance and accountability in the public arena, disseminate informed research and provide a platform for public engagement and dialogue.

More recently, the Foundation intervened successfully in the Constitutional Court challenge to the dissolution of the Scorpions and has also made significant interventions into the public domain. These include:

- National Health Insurance Green Paper
- The Independence of the Hawks
- The Protection of State Information Bill
- The SAPS Amendment Act
- Legal action with regard to the Judicial Service Commission

The Foundation is not aligned to any political party. We engage actively with a range of people and organisations to enhance the country's emerging democracy.

The Foundation invites you to support our work and become a **Friend of the Foundation**.

Subscription levels (per annum) – **Silver R1 000, Gold R5 000** and **Platinum R10 000+**.

Donations are tax deductible and a receipt will be issued in terms of Section 18A of the Income Tax Act.

Our banking details are: Helen Suzman Foundation, Nedbank, Branch code: 195 805, Account Number: 1958 496006, Swift Code: NEDSZAJJ

We trust that you will respond positively to this appeal. If so, please confirm payment by advising name, email address, telephone number and postal address to Roshan Arnold (roshan@hsf.org.za).

yours sincerely

Francis Antonie
Director

helen.suzman.foundation

promoting liberal constitutional democracy

www.hsf.org.za