Bureaucrats Undermining Constitutional Democracy

ROBERT VIVIAN is a Professor of Finance and insurance at the School of Economic and Business Sciences a position to which he was appointed in 1989. He is the author of numerous books and academic articles. He is a past president of the Economic History Society of South Africa

The thesis of the article is that unelected bureaucrats, especially in the form of regulators, are undermining constitutional democracy. As institutions have evolved this is inevitable. Although this article concentrates on South Africa the problem is not unique to South Africa.

Lord Acton's Conclusion

The renowned Catholic historian Lord Acton (1834-1902) explained the underlying forces which drive history as follows (1895: 60):

> "This [is the] law of the modern world, that power tends to expand indefinitely, and will transcend all barriers, abroad and at home, until met by superior forces, and [that] produces the rhythmic movement of history."

In short power inexorably expands until stopped by a more superior power. History accordingly is about individuals seeking power, mainly for their own benefit and their quest is only halted when they encounter a more superior power. The most obvious, and indeed, one of the oldest forms of power is State power. State power as with other forms of power can be hi-jacked for personal gain. This article demonstrates that this is indeed the case.

In his well-known novel *Heart of Darkness* (1899), the novelist Joseph Conrad (1857-1924) a contemporary of Lord Acton 1899 brilliantly considers the same issue but provides a solution to expanding powers. The question his protagonist addresses is how anyone could commit the atrocities which were committed in that heart of darkness. It is his answer to this question in relation to persons in the civilised world which holds the key. The relevant dialogue is as follows (Conrad 1899:49):

> "You can't understand? How could you - with solid pavement under your feet, surrounded by kind neighbours ready to cheer you or to fall on you, stepping delicately between the butcher and the policeman, in holy terror of scandal and gallows and lunatic asylums - how could you imagine what particular region of the first ages a man's untrammelled feet may take him into by way of solitude - utter solitude without a policeman - by way of silence - utter silence, where now warning voice of a kind neighbour can be heard whispering of public opinion. These little things make all the difference."

Conrad's message is clear. Evil is committed in the absence of constraints, social or otherwise, in the absence of institutions, and thus institutions matter. The difference between what could happen in the heart of darkness and what does not happen in the civilised world is not because of some or other characteristics of the individuals involved but because of the institutions. In the heart of darkness there were no institutions. In the civilised world there were many; the pavement, neighbours, the butcher, the policeman, the fear of scandal, the threat of the gallows or the asylum. It is all these very many institutions which make the difference. To apply Lord Acton's truism; the simple truth is that people do what they do because they

can and what they do not do is because they are prevented. Where evil triumphs, institutions have failed.

It took some time for academia to catch-up with the profound insights of Lord Acton and Joseph Conrad. Institutional economics was more recently brought to the fore by academics such as 1993 Nobel Laureate Douglass North (1981,1990), North *et al* (2009), and in a similar vein Acemoglu and Robinson (2011). Institutional economics is based to a large extent on the understanding that institutions matter. Thus, on the one side, there is the never-ending attempt by individuals to expand their powers thereby gaining an economic benefit; but on the other side exist largely impersonal institutions which constrain this expansion. In modern society, institutions are Lord Acton's superior forces. In institutional economics institutions are, closely in line with Conrad, broad in nature, as stated by North (1990:3), "institutions … are the humanly devised constraints that shape human interaction." Institutions are many and varied. Nevertheless, some well-defined and accepted institutions can be identified as part of constitutional history and law. One important set of institutions relates to the separation of powers. Within the State exist three powers, executive, legislative and judicial. Institutionally these are separated in terms of the so-called Doctrine of Separation of Powers associated with Montesquieu's (1748) *The Spirit of the Laws*. These three powers or functions should be assigned to three different institutions if liberty is to exist within a State. Montesquieu may well have articulated the theory of the separation of powers, but the need for the separation of powers was understood long before Montesquieu. Thus seen from an institutional perspective a State can thus be said to exist where the three powers exist; and to avoid Lord Acton's inevitable power grab these powers must be separated. This view is accepted and not controversial. If this is so, then what one may ask is; what is the problem? The problem lies in what I have referred to elsewhere as the rise of unitary states within the State (Vivian 2011, 2012).

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Rise of States within the State

The constitutional and institutional economics framework which limits both the State and individuals within the State from expanding State powers and hence the use of State for personal gain is the separation of powers. In recent year I have observed a rise of State departments and quangos, collectively referred to as State institutions, which have taken to themselves all three powers. I have called these State intuitions unitary states within the State, since institutionally a State is an institution which has these three powers. These States within the States usually hold themselves out to be regulators, some as independent regulators. They are staffed by unelected bureaucrats. Probably the easiest way to understand this is by way of an illustration. Recently, on 27 January 2015, the Financial Services Board ("FSB") currently the regulator of financial services, a quango, issued a notice pertaining to its Enforcement Committee which reads as follows:

> "The Registrar [of the FSB] and the Respondent agreed on a penalty of R250 000. In reaching the agreed penalty the Registrar took several mitigating

> circumstances into account including the fact that the Respondent has never appeared before the [FSB's] Enforcement Committee [before] and that the Respondent accepted responsibility for its actions and co-operated with the Registrar's office. The order is available on the FSB website at www.fsb.co.za.
>
> **About the Enforcement Committee**
> The Enforcement Committee is an administrative body that has the authority to impose administrative penalties and cost orders, on offenders of FSB legislation" (Emphasis added)

The FSB as a regulator forms part of the executive. However if the statement is read it seems as if the statement comes from a court of law; respondent, penalty, mitigating circumstances, appear before, the order - all of these terms would be familiar to a lawyer as part and parcel of phrases coming from a court of law. Indeed imposing an enforceable penalty is usually the responsibility of a court of law. However the matter was not decided before the ordinary courts of the land, presided over by an independent judge in the ordinary, applying the common law of the land, but was dealt with by the FSB's own court – its own Enforcement Committee. It can thus be observed that FSB has acquired a judicial function. It should also note the outcome was not arrived at by the due process of the law but by agreement. The matter was concluded on the basis of an agreement and mitigating factors were that the accused had not previously appeared before the FSB's "court", it took "responsibility" for its actions (whatever that may have been) and co-operated. The matter was not concluded via the due process of law. What would the position have been if the accused pleaded not guilty? Clearly all the mitigation considerations would have fallen away and a much increased penalty would have been imposed. In short in the place of the due process of law is coercion.

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Finally it will be noted that the FSB's "court" imposes penalties on offenders of the FSB's *legislation*. It, indeed, has its own legislation. All three State powers have been consolidated within one institution. The FSB has become what I have called a State within the State. It is not an exception. There are a growing number of these. In this case the specific piece of "law" was the General Code of Conduct for Authorised Financial Services Providers issued in terms of s15 of the Financial Advisory and Intermediary Services Act 37 of 2002. The Code of Conduct was drafted and promulgated by the Registrar, the CEO of the FSB. In short it is not legislation passed by Parliament, nor is it a regulation under the auspices of a Minister passed in terms of an enabling provision of an Act of Parliament. Neither from the agreement or facts disclosed can it be determined if indeed the code was breached since the agreement required the accused to confess to the breach and it did indeed confess. There is no indication how the R250 000 was arrived at since it too is merely consented to. It will be noted that a substantial fine was levied, R250 000. What happens to this money? It too is paid to the FSB.

The factual position is clear all three of the State powers are consolidated within one State institution. South Africa still exists as a State and maintains the three separate functions but neither the courts nor Parliament is involved in the above illustration. Many others can be cited. What has been happening is now contrasted against Articles in the Magna Carta.

Magna Carta 1215

2015 is the 800th Anniversary of the sealing of the Magna Carta at Runnymede where the Barons forced King John to concede the rights contained in the Magna Carta.

Just after allied troops landed back in Europe marking the beginning of the end of World War II, King George VI while passing Runnymede which is situated between London and Winsor Castle remarked "that is where it all started' (Vincent 2012:2). That was the beginning of constitutional democracy. In view of the historical occasion of its 800th anniversary and its constitutional significance, it is appropriate to consider the above developments against the contents of the Magna Carta. Most commentators on the Magna Carta hold that it is now merely a historical relic. According to this view, few, if indeed, any of the provisions have any modern application. I can only conclude those who hold that view have not read the provisions of the Magna Carta nor understand how to interpret historical constitutional documents. Constitutional documents are not read in a narrow legalistic way as maybe the case with other legal documents, such as contracts. This is generally true of constitutional documents but specifically true for ancient constitutional documents. In *S v Makwanyana and Mchunu*; 1995 (3) SA 391 CC, the Constitutional Court declared capital punishment to be largely unconstitutional Chaskalson P (as he then was) wrote (par 9):

Even when drafted, the Magna Carta never set out to define new rights but attempted to restore or confirm existing historical rights and liberties of the English people, the so-called ancient rights of the Englishman, which the Barons argued, King John had violated (Hindley 2008: xix)

> "It [the Constitutional Court] gave its approval to an approach which, whilst paying due regard to the language that has been used, is "generous" and "purposive" and gives expression to the underlying values of the Constitution.'

He continued to endorse the view set out in a Canadian case:

> "In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be...a generous rather than legalistic one, aimed at fulfilling the purpose of a guarantee and securing for individuals the full benefit of the Charter's protection.'

Even when drafted, the Magna Carta never set out to define new rights but attempted to restore or confirm existing historical rights and liberties of the English people, the so-called ancient rights of the Englishman, which the Barons argued, King John had violated (Hindley 2008: xix). It was never intended to deal clearly or exhaustively with the then existing rights. When reading the provisions of the Magna Carta one should thus see these as part of now well known "historical origins of the [constitutional] concept enshrined' in the Magna Carta.

Further, those who usually consider the document focus to be King John and the political problems of the time, forget that it is not the king but government officials who are the main parties. The Magna Carta deals significantly with these officials.

The Magna Carta was greatly concerned about " … misuse of their powers by royal officials (Davis 1982:23)." It was concerned, in particular, with the actions of sheriffs and so-on. Not only did the Magna Carta impose constraints on the King but also government officials. With the latter it was so successful that it has taken some 800 years to re-emerge. With this in mind, some of the specific provisions in the Magna Carta are now examined in relation to the modern regulator.

No Taxation Without Consent: Bureaucrats Placing Themselves on the Private Sector Payroll

Probably the most famous provisions in the Magna Carta are those which outlaw any taxation without consent. The most obvious misuse of State power is to take money from the public by decree. That is what King John wanted to do.

> Article 12: No "scutage" or "aid" may be levied in our kingdom without its general consent …
>
> Article 14: To obtain the general consent of the realm … we will cause the archbishops, bishops, abbots … to be summoned individually by letter. To [others] we will cause a general summons to be issued …
>
> Article 15: In future we will allow no-one to levy an "aid" from his free men …

And so the fundamental principle was articulated. No taxation by the government without consent, which morphed into without an Act of Parliament. No extractions of any sort from the public without the consent of Parliament. During the ensuing centuries various attempts were made to by-pass this historical constraint with epic consequences. So, when King Charles I tried to raise taxes without the consent of Parliament the English Civil War (1642-51) was the consequence. When the British Parliament tried to levy taxes on the American colonies, the battle cry became, no taxation without representation. The American War of Independence (1775-83) was the consequence. Not even Parliament could levy taxes without consent of the taxed. Article 15 is significant for this article. The existence of that specific article makes it clear that others besides the king were imposing taxes. The ability of all others to levy taxes was thus outlawed. Parliament became the sole institution which could levy taxes.

"A founding principle of Parliamentary democracy is that there should be no taxation without representation and that the executive branch of government should not itself be entitled to raise revenue but should rather be dependent on the taxing power of Parliament, which is democratically accountable to the country's tax-paying citizenry."

The matter of taxation received some attention in the recent case of *Shuttleworth v South African Reserve Bank and others* 2014 ZASCA 157. The SA Reserve Bank ("SARB") had decided to impose an exit levy as a prerequisite to allow residents to take their own money out of South Africa. A consequence was Mr Mark Shuttleworth paid an amount of R250m under protest to SARB. He then took the matter to court. The SCA had no difficulty, rightly, in declaring the levy to be unlawful taxation. Without reference to the Magna Carta the SCA noted (at par 29):

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Essentially a government institution tried to levy taxes – that, as pointed out, was outlawed 800 years ago by Article 15 of the Magna Carta. Montesquieu (1748: Bk13, par5) pointed out what would happen if every government institution had taxing powers:

> "If this rule [single taxing power in a State] was not followed, the Lord and the collectors of public taxes will harass the poor vassal by turns till he perishes with misery or flies into the woods."

It is at this point we encounter the rather extraordinary section 15A in the Financial Services Act 97 of 1990 which deals with the method of funding the FSB.

> "The board may impose by notice in the Gazette levies on financial institutions and may, subject to the provisions of this section, at any time in similar manner amend, substitute or withdraw any such notice."

The FSB imposes a tax on financial institutions without consent, without Parliament, indeed without any safeguards at all. Unelected bureaucrats have achieved what King John could not do, and indeed neither kings nor parliaments thereafter have ever been able to do – to unilaterally impose taxes by decree. It is not surprising that the FSB staff complement and budget has grown by leaps and bounds since its inception. The budget currently stands at nearly R600m pa, with senior bureaucrats taking multiples of millions rands as salaries. The current proposal is to double up regulators with the introduction of the Twin Peaks model. Once can anticipate the next peak will cost another R600 m pa. Unelected bureaucrats have managed to simply place themselves on the private sector payroll, with unlimited taxing capacity. This is precisely what Lord Acton indicated would happen – power expands naturally, unless stopped.

The outlawing of government courts, morphed with the doctrine of the separation of powers was sufficient to avoid this problem resurfacing for some 800 years. Until now, that is.

Unelected Bureaucrats' Courts

A further evil identified in the Magna Carta was government officials having their own courts. This was outlawed by Article 24.

> Article 24: No sheriff, constable, coroners, or other royal officials are to hold lawsuits that should be held by the royal justices

With the passing of time this Article morphed into the supremacy of the courts of law within the doctrine separation of powers. Government departments or quangos cannot have their own courts. Again, the fact that the Magna Carta outlawed government courts is an indication that at the time this was a significant problem. The outlawing of government courts, morphed with the Doctrine of the Separation of Powers was sufficient to avoid this problem resurfacing for some 800 years. Until now, that is.

Lex Talionis – Principle of Proportionality

One of the fundamental constitutional principles which is increasingly being violated is the imposition of fines, which historically and constitutionally is a judicial function. Increasingly Parliament and now government officials are taking it upon themselves the right to impose fines. The *Lex Talionis*, or the law of proportionality, is an ancient legal principle. The fine must be in proportion to the injury; an eye for an eye. In the above illustration the fine was R250 000, a very

significant amount. What however was the harm caused. None whatsoever. The principle of proportionality appears in the Magna Carta.

> Article 20: For a trivial offence, a free man shall be fined only in proportion to the degree of his offence …
>
> Article 21: Earls and Barons shall be fined only by their equals, and in proportion to the gravity of their offence.

Now clearly one of the reasons why sheriffs and other officials wanted their own courts and to make their own laws was to impose excessive fines because they kept the money. This was simply extortion and coercion using State power; if they could not impose taxes then they could impose fines.

So what happens to the fines imposed by the FSB's Enforcement Committee?

The separation of powers, adjudication by impartial persons, trial by jury, and the rule of laws and not of men. In 1215 the law of the land was the common law- long before parliamentary law existed. As is said in the English legal tradition, it is that law which rests safely in the breasts of Her Majesty's judges.

As indicated above the FSB keeps the fines imposed and collected. Something outlawed 800 years ago. Section 6D(2)(a) of Financial Institutions (Protection of Funds) Act 28 of 2001 reads "The enforcement committee … impose a penalty by ordering the respondent to pay a sum of money to the board …' It imposes its own taxes and fines and keeps both! The FSB managed to improve on the Sheriff of Nottingham, he could not get taxing powers or the power to collect fines.

Unelected Bureaucrats Making Their Own Laws

Article 39 of the Magna Carta has been revered around the world for centuries as the article which ushered in the Rule of Law. It is regarded by most as the Crown Jewel in a magnificent sparkling crown. It reads:

> "Article 39: No man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land."
>
> (Emphasis added)

In this article all is to be seen. The separation of powers, adjudication by impartial persons, trial by jury, and the rule of laws and not of men. In 1215 the law of the land was the common law – long before parliamentary law existed. As is said in the English legal tradition, it is that law which rests safely in the breasts of Her Majesty's judges. No person would henceforth be deprived of his property by government courts in terms of made-up government laws.

As indicated above, the R250 000 was not paid as a consequence of an allegation of breaching any parliamentary law let alone the common law. Quangos are making "laws", each of which points to more income arising out of fines going to the quango. 800 years ago the Magna Cara outlawed any further notion that administrations could make laws.

Probable Cause

A problem the public will face is harassment, fishing expeditions with the hope that something will be found to be used to extort a confession and a fine. This

is not confined to South Africa. Recently Sir Cliff Richard's home was raided, at the same time filmed and broadcast life on TV. Surreptitious allegations were made that somewhere in his distant past Sir Cliff may have been involved in sexual impropriety. Clearly the purpose of the television broadcast is to entice persons to come forward and lay accusations against Sir Cliff. At first the British police vehemently denied they had advised the television station. When it became clear that it could only have been the police, they conceded they had tipped off the media. The police lied.

Nowadays a small and declining measure of protection comes from the Doctrine of Probable Cause. Article 38 of the Magna Carta contains the genesis of the doctrine of probable cause. No-one can be harassed by government officials unless probable cause exists. There can be no stopping, no searches, and so on without probable cause.

It is a common occurrence for the FSB to simply state it received a complaint and then refuse to reveal the identity or substance of the complaint.

> Article 38: In future no official shall place a man on trial upon his own unsupported statement, without producing credible witnesses to the truth of it.

In the above illustration it will be noted the complainant, if indeed one existed, played no role. Indeed it is a characteristic of the modern regulator that seldom, if ever, does the complainant play a role. It is a common occurrence for the FSB to simply state it received a complaint and then refuse to reveal the identity or substance of the complaint.

In Summary

The above Articles from the Magna Carta indicate some of the provisions detailing the unacceptable practices of King John's officials. The personification of these evil officials has come down to this age as latter day Sheriffs of Nottingham. Article 48 set about rooting out the evil customs of government officials under more constraints of the law.

> "Article 48: All evil customs relating to … sheriffs and their servants … are at once to be investigated … and are to be abolished completely and irrevocably …"

And Now the Truth Begins to Dawn

Unelected bureaucrats are once again taking over all three powers of the State and society is returning to the position before this was outlawed 800 years ago. If lawyers are confronted with the above narrative, their predictable response, no doubt, would be that the government officials are acting in terms of what is known as Administrative Law and then leave it at that. They would not question if Administrative Law itself is unconstitutional. This is however changing. Recently Professor Philip Hamburger (2104) published his comprehensive research in his book; Is *Administrative Law Unlawful*? He concludes administrative law is indeed unlawful. Even without reference to the Magna Carta there can be little doubt at all the Professor Hamburg is correct and as time progresses this will become increasingly clear.

For some time now I have pointed out that "unitary states" operate within the State. Recently Professor Michael J Glennon (2014) published his comprehensive research on a similar point in his book *National Security and Double Government*. He notes the existence of governments within the Government. He notes that

the second government is not constrained by what he calls the "Madisonian Institutions" – the President, Congress, Senate and Judiciary – what I have called the Separation of Powers. His analysis is however much narrower than mine. He concentrates on issues of National Security. In my view the "unitary states" within the State are much more pervasive. They are not confined to national security.

Conclusion

If the above were not bad enough, there is worse. If Lord Acton's insight is reconsidered- if power has expanded- it is a clear indication that the constraining institutions have failed. How is it that in a constitutional democracy could so many "unitary states' within the State could evolve? It can only be if the institutions themselves have failed especially the institution of Parliament. It is clear that bureaucrats draw up legislative proposals which are then merely rubberstamped by "Parliament."

The Magna Carta worked historically because the executive was on one side and elected representatives on the other. In law there is the doctrine of substance over form. The form is the same, Parliament, the substance is different. It is the substance not the form which provides the institutional safeguards. The existence of unconstitutional "unitary states' within the State points to a much more fundamental problem: Parliament as an institution has failed.

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