

The role of democratic institutions of governance in promoting human rights and civil liberties

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GOOD evening comrades, friends, honourable guests and award nominees. It is an honour and a privilege to be asked to give the Kader Asmal Human Rights Awards lecture. Kader was not just a comrade and a friend. He was an inspiration to myself and indeed to millions of freedom loving South Africans. Kader's intellect, cutting wit, good humour, rock-solid commitment and courage to the cause of human rights made him one of the most admired leaders of his time. Kader, while dedicating much of his life to the cause of freedom and democracy in South Africa, was also an internationalist, advancing the cause of human rights throughout the world, fighting injustice on multiple fronts.

I have been asked to focus on the 'role of democratic institutions of governance in promoting human rights and civil liberties'. While we have a myriad of democratic institutions that all play a role in supporting good governance, the role of parliament (the legislators) and the relationships between parliament and citizens and parliament and the executive are fundamental to achieving the human rights objectives in our Constitution. It is these relationships which I hope to explore in some detail.

I need to start with a caveat – human rights and civil liberties are ends, not means. The Preamble to the constitution uses three words of two letters each to mandate the purpose of the very adoption of the constitution, "so as to". This mandate covers four key tasks –

"Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person, and

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations."

The relevant debate today is not a narrow one about civil liberties. It is, rather, a discussion on the quality of the democratic project. There is no doubt that the constitution provides a strong basis for democracy. It articulates the rights, expectations and duties of both citizens and the

state; and makes provision for a range of checks and balances. Too frequently, we attempt to abstract rights and liberties, and the checks – such as the Chapter 9 institutions – and ignore the entire mechanics of what produces a democratic impact in the lives of ordinary citizens.

The Financial Times published a recent article by Christopher Caldwell under the rubric, “Democracy is not a synonym for good government”, an argument which compels one to sit up and take notice. Caldwell drew extensively on a recent book by John Dunn of Cambridge University. Caldwell writes, “While never undervaluing the people’s right to choose their leaders, Professor Dunn draws a sharp distinction between that and self-government. No one inspecting the United States today could sanely conclude that it is governed by its people,” he writes – granting at the same time that the people’s right to choose their rulers is not for nothing.”

So, when the people have chosen, as we have recently done in fulfilment of our obligation to participate each five years, and we have a constitution as strong and articulate as ours is, what happens then?

The Institute for Democracy and Electoral Assistance, (IDEA) recently published a paper entitled “Assessing the quality of Democracy” . They present five key principles to be considered in such an assessment of democracy:

- Democratisation is a process that requires time and patience;
- Democracy is not achieved through elections alone;
- Democratic practices can be compared but not prescribed;
- Democracy is built from within societies; and
- Democracy cannot be imported or exported, but can be supported.

So obviously, our focus has to be on the development of an indigenous South African democracy, born of our circumstances, built, continually by all of us in order to achieve what we define as human rights in our Constitution.

The IDEA paper describes the principles that guide the assessment of democracy as being “popular control over decision makers and political equality of those who exercise that control”. Within the model that we have chosen, there are peculiar South African challenges. The first of these, important in the context of “popular control over decision makers’ is our electoral system. President Nelson Mandela in his last address to Parliament (26 March 1999) alluded to this issue when he said, “Because the people of South Africa ... chose a profoundly legal path to their revolution, those who frame and enact the Constitution and laws are in the vanguard of the fight for change. It is in the legislatures that the instruments have been fashioned to create a better life for all. It is here that oversight of government has been exercised. It is here that our society, in all its formations, has had an opportunity to influence policy and its implementation.” And then he raised the all-critical question of that popular

control when he said, “we do need to ask whether we need to re-examine our electoral system, so as to improve on the nature of our relationship as public representatives with the voters.”

President Mandela’s speech raises two specific relationships in relation to our legislators. The first is to the people of South Africa and the second is to the executive which they are required to have oversight over. Furthermore, in ‘fashioning the instruments’, the legislators also pass the laws that give effect to our Constitution, that put in train the means of implementation. In this process, of passing laws, non-legislators play a crucial role. Does our present electrical system enable the fulfilment of these multiple relationships and roles?

It is in the maturing of our constitution that we understand very clearly that, as Caldwell argues, “Democracy is not a synonym for good government”.

The key responsibility is to evaluate how all parts of the government interact. We frequently tend to overlook the important role of the Executive in shaping policy and overseeing its implementation. The formulation of policy is frequently but an expression of intent, more important may be the actual implementation of those policies – a function that resorts with the Executive Authority and the Accounting Officers acting jointly. Perhaps the biggest difficulty arises from the fact that the Constitution sets a range of responsibilities that must all be addressed. Section 27 of the Constitution sets out the following mandate:

- (1) Everyone has the right to have access to –
 - a) health care services, including reproductive healthcare;
 - b) sufficient food and water, and
 - c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights.
- (3) No one may be refused emergency medical treatment.

Against this section of the Bill of Rights, the same constitution requires, in Chapter 11, that the state establishes security services and articulates their responsibilities in the context of sovereignty.

It is important to recognise that as and when policies are adopted, there are no absolutes. All of the mandates drawn from the constitution need to co-exist, and in balance to ensure that the overall quality of democracy, provided for in our Constitution, is implemented. As it happens, this quarter of the parliamentary calendar is devoted to precisely that task. In respect of all functions, the question of whether the provisions are adequate, “within available resources”, and within each line function whether the selection of programmes and the metrics for implementation are adequate. This is what the departmental budget debates ought

to be about. Perhaps we have allowed this important annual period of accountability to be debased. Parliament has become a sausage machine, operating with a single objective, that every vote has been debated, however superficially, so that parliament can vote on the entire budget as quickly as possible. It is literally impossible to follow the debates, by department, or to enquire whether there is an overall commitment to produce measurable outputs from the application of available resources, as distinct from promises of new initiatives. Similarly it is not possible to place all of these commitments side-by-side and answer whether on the basis of these decisions; the democratic project is on track. I should point out that this is not a problem of the fifth parliament. The slide has been steady and continuous; though, as in this year, it appears exponential because of the time pressures created by the elections.

We have no choice but to place this key interface between the executive and the legislature on the table for thorough re-examination and urgent action. Optimally, the budget vote debates should inform the public on whether South Africa is any closer to realising the commitments framed in the Constitution – both in the Preamble, and in the Bill of Rights. Let's return to Section 27 highlighted earlier – how many South Africans used the health system in the past year? For what purpose? Are we any closer to bridging the quality gap between private and public healthcare provision? Have we defined what 'sufficient food and water' means? Are we any closer to ensuring such sufficiency than we were last year? And what are the plans to accelerate provision over the next three years, and the next twelve months, in particular? To put it more generally, are we progressively realising all of the rights enshrined in the Constitution?

Ranjeni Munsamy writing in the Daily Maverick last week records, "It is a busy week in Parliament as government departments are on a conveyor belt to present their budgets. On Tuesday there were nine budget debates and on Wednesday there will be 10. There are bucketloads of information being flung out, most of which will go unreported due to the sheer volume the media has to contend with." Parliament is the final arbiter. There is no 'democracy inspector' sitting outside of parliament assessing whether it discharges its mandate in the letter and spirit of the constitution. So, how do we know whether the 'bucketloads of information' contain the detail and the metrics that will be found useful? Who evaluates? Who cares?

Within the mechanics of our Constitutional order, parliament also has a role as the legislature. In the past while, too many pieces of legislation have been returned from the Constitutional Court as being non-compliant. There are also instances where the opinion of the Constitutional Court is canvassed before the President assents to a piece of legislation. Furthermore, there is a great unevenness in the quality of legislative crafting – again, I want to emphasise that this is not a flaw of the fifth parliament (that probably has not passed any legislation yet) – some of this has lingered for some time. The Public Protector Act (Act 23 of 1994) has a curious crafting at Clause 9, which was amended in 2003 to read – "No person shall – insult the Public

protector or the Deputy Public Protector”;. No such provision exists for the President, the Speaker of the National Assembly, the Chief Justice... perhaps it should be inserted into the SABC Act to provide similarly for the COO – acting, or otherwise!

So with this state of affairs, how does democracy explain the words of Madiba when he said, “those who frame and enact the Constitution and laws are in the vanguard of the fight for change”?

We must also discharge views on the second aspect in the IDEA paper– “political equality of those who exercise control” over decision makers. We have an obligation to ensure that discussions such as this; about law, rights, the strength of our democracy and the quality of life of our people neither becomes nor remains the preserve of a small elite.

There is a global fiscal crisis unfolding in democracies across the world. Joseph Stiglitz, in a recent paper for the Roosevelt Institute , argues that there are three phenomena at the root of this crisis – “rising income inequality, money power in politics and systematic tax avoidance by the super-rich and globalized corporations”. In examining this issue further, Michael Ignatieff writes , “As inequality rises, Stiglitz argues, it suppresses effective demand. Unequal societies hoard wealth at the upper end instead of spreading consumption and investment through a broad middle class. When inequality holds back demand, corporations sit on large cash hoards, unwilling to invest or consume. As the rich become ever more ingenious in avoiding taxes, the cost of carrying the liberal state falls on the middle class, forced to shoulder the burden alone. It is hyper-inequality that is choking off demand and starving the liberal state.”

In South Africa, the impact of inequality is far more profound. The real challenge here is that there is a perception that income taxes are borne disproportionately by wealthier people. Yet, they opt out public services such as education, healthcare, and even policing. So the sense that there is no value for money for taxes paid, is an additional catalyst for tax avoidance. Yet, these are the classes that chatter. People who believe that their rights are undermined by the extension of services to the majority, happen to be those with voice. We need to factor this in to our own appreciation of that important principle articulated in the IDEA paper that speaks of “political equality of those who exercise control” over decision-makers.

These issues are important in understanding the statement by Christopher Caldwell, that democracy is not a synonym for good government.

It bears repeating that the Preamble to our Constitution sets the goals for good governance. In particular, the sub-clause that speaks of the need to “improve the quality of life of all citizens and free the potential of each person.” The challenge to develop policies appropriate to this mandate, the need to allocate appropriate resources to provide the services that improve the quality of life, and the oversight to ensure that the measurements are in place to ensure that progress is traceable; together describe good governance. The over-emphasis on Chapter 9

Institutions is most unfortunate. The holy grail of governance will be attained when these institutions are to the national body politic what the immune system is to the human body – generally out of sight, but working hard and screaming loudly only when the patient is ill or disease ridden. But that should not detract from the imperative of good governance.

There are a series of questions that we have to grapple to better understand the challenge of good governance. Do we know what, as South Africans, our sense of common purpose is? How do we define common purpose in a society as grotesquely unequal as ours? Is good governance possible in the absence of the essential threads that bind societies – the intangibles such as trust and hope?

And, what of power? Should this be an impolite topic whispered about in dark corners? Or do we need to recognise that it will remain at the epicentre of politics. It needs to be understood, permitted and checked. Appreciating this is also an essential dimension of good governance.

Obviously, we cannot outsource the responsibility for the re-establishment of the sense of good governance to either outside agencies or elected representatives. The challenge is that all of us need to be involved in the process of continual building, and of asking the tough questions. Yet, we must continue to ensure that our public representatives comprise competent women and men.

The author Tony Judt raises the following as a general observation on the building of good societies. He writes:

“The moral impulse is unimpeachable. But republics and democracies exist only by virtue of the engagement of their citizens in the management of public affairs. If active or concerned citizens forfeit politics, they thereby abandon their society to its most mediocre and venal public servants. The British House of Commons today is a sad sight: a parlor of placemen, yes-men and professional camp followers – at least as bad as it was in 1832, the last time it was forcibly overhauled and its representatives expelled from their sinecure. The US Senate, once a bulwark of republican constitutionalism, has declined to a pretentious, dysfunctional parody of its original self. The French National Assembly does not even aspire to the status of an approval stamp for the country’s president, who bypasses it at will.”

The ‘assurance’ that we are not alone is cold comfort. Ours is the youngest republic, and ought to be the most aspirational. The key issue is why good men and women appear to disengage.

In our parlance, the message is clear: “Unzima lomtwhalo, sifuna simanyane.”

Thank you.

