THE ROLE OF CONSTITUTIONAL INSTITUTIONS SUPPORTING DEMOCRACY IN FACILITATING EFFECTIVE AND PROACTIVE OVERSIGHT OVER THE EXECUTIVE

23 February 2012

1. Introduction

Governance goals of greater transparency, accountability and participation are directly related to the Legislature’s three primary functions – the legislation, overseeing the executive and representing citizens. The Legislature, executive government and judiciary together with the institutions that support the constitutional democracy and wider society provide the overall governance framework of modern democracies. The well-functioning of the Legislatures in collaboration with the Constitutional Institutions Supporting Democracy (ISDs) is fundamental to promoting good governance. Effective oversight requires Members of the Legislature to fully understand the constitutional injunction and rationale behind the notion of accountability of government. Therefore, oversight helps to promote the constitutional values of transparent and accountable government and good governance.

South Africa has successfully established a wonderful cohort of constitutional Institutions Supporting Democracy. Section 181(1) of the Constitution of South Africa provides for the establishment of the ISDs to strengthen constitutional democracy. The question whether Legislatures are making full use of some ISDs to complement their oversight of the Executive/Government and their adequate utilization in briefing Members of the Legislatures on various matters of public interest on which these institutions may have reported has been raised in various enquires and debates.

This paper aims to highlight the role of ISDs in facilitating effective and proactive oversight over the executive.

2. Institutions Supporting Constitutional Democracy

These institutions are expected to be independent, impartial and perform their functions without fear, favour or prejudice. No person or organ of state may interfere with their functioning and they are subject only to the Constitution and the Law. They are constitutionally enabled to monitor, regulate, advise and assist the Legislatures in conducting oversight. The Constitution of South Africa establishes the following state institutions strengthening democracy, whose mandates and guiding principles are outlined in respective legislation that governs them:

2.1 The Auditor-General

The Auditor-General (AG) is an independent Supreme Audit Institution (SAI) of South Africa which carries out audits of government accounts in order to determine whether government did in fact implement the budget as appropriated by the Legislature and complied with the financial prescripts. Therefore, section 188(1) of the Constitution empowers the AG to audit and report on the accounts, financial statements and financial management of all national and principal state departments and administrations, all municipalities and any other institution or accounting entity required by national or provincial legislation to be audited by the AG. Section 188(3) of the Constitution prescribes that the AG must submit audit reports to any legislature that has a direct interest in the audit, and to any other authority prescribed by national legislation. The AG has additional powers and functions...
prescribed by the Public Audit Act 25 of 2004 (PAA). The purpose of this Act is to provide guiding principles to the AG and gives effect to the provisions of the Constitution by establishing the oversight mechanism, the Standing Committee on Auditor-General (SCoAG) to oversees the AG. The PAA also assigns functions to the AG and outlines the appointment process of the AG and Deputy Auditor-General (DAG). Section 55(2) of the Constitution prescribes that the National Assembly (NA) must provide for oversight mechanisms to ensure that all organs of state in the national sphere of government are accountable to it and maintain oversight over the executive and constitutional institutions. Therefore the SCoAG was established in 2005 and its mandate is outlined in section 10(3) of the PAA which prescribes that SCoAG must assist and protect the AG in order to safeguard its independence, impartiality, dignity and effectiveness.

Summary of the general audit findings by the AG on public sector audit outcomes

Currently, although the Legislatures are collaborating well with the AG, there are still challenges in resolving the following recurring audit findings with audittees by following up the recommendations of Public Accounts Committees and subsequent resolutions of the Houses in the respective legislatures that would lead to improved and enhanced transparency, accountability and oversight in all spheres of government:

<table>
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<tr>
<th>No.</th>
<th>General Findings in Audit Outcomes</th>
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<tr>
<td>1.</td>
<td>Shortcomings on internal controls that limit the government in achieving clean audits relate to reporting on predetermined service delivery objectives and compliance with laws and regulations.</td>
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<td>2.</td>
<td>Lack of oversight by the leadership in the provincial and local government spheres.</td>
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<td>3.</td>
<td>Lack of capacity to manage financial and performance information and compliance with laws and regulations which is further eroded by shortcomings in human resource management in some audittees and the lack of information Technology (IT) governance frameworks in some auditees.</td>
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<td>4.</td>
<td>Repeated receipt of qualified audit opinions without any visible improvement in a number of audittees.</td>
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The AG indicated that experience has taught them that when the country’s political leadership sets the right tone and acts on AG’s audit findings and recommendations, the results tend to be positive hence the emphasis on the key objective of visibility of leadership.

The AG applies a stringent, nationally and internationally accredited audit directive in performing its audit functions. This ensures that the audit opinion of the AG provides an accurate and fair assessment of an audittee’s, thus enabling the Legislatures to perform effective oversight.

The Public Protector

The Public Protector is an office established by the provision of section 181(1)(a) of the Constitution Act 108 of 1996. It is mandated to investigate on the basis of a complaint or on its own initiative at any level of government. This includes national, provincial and local government, any public office bearer, any parastatal and any statutory body. Section 182(1) of the Constitution requires that the Public Protector investigates the state affairs of public administration in any sphere of government that is alleged or suspected to be improper or to result in any misconduct or prejudice, and report
on that conduct, and take appropriate remedial action. The Public Protector may not investigate
court decisions. Additional powers and functions of the Public Protector are provided by the Public

The mandate of the Public Protector as outlined in the Public Protector Act is as follows:

- Strengthening constitutional democracy by investigating and redressing improper and
  prejudicial conduct, maladministration and abuse of power in state affairs.

- Resolve administrative disputes or rectify any act or omission in administrative conduct
  through mediation, conciliation or negotiation.

- Advise on appropriate remedies or employ any other expedient means.

- Report and make recommendations on findings.

- Advise and investigate violations of the Executive Members Ethics Act 82 of 1998.

- Resolve disputes relating to the operation of the Promotion of Access to Information Act 2 of
  2000, and

- Public Protector discharges other responsibilities as mandated by the following legislation:
  - Electoral Commission Act 51 of 1996.
  - Special Investigation Units and Special Tribunals Act 74 of 1996.
  - Protected Disclosures Act 26 of 2000.
  - National Archives and Record Service Act 43 of 1996.
  - Public Finance Management Act of 1999. and

The Public Protector has jurisdiction over all organs of state, any institution in which the state is the
majority or controlling shareholder and any public entity as defined in section 1 of the Public Finance
Management Act of 1999 (PFMA).

**Reporting responsibility of the Public Protector**
The Public Protector is accountable to the NA and must report on his or her activities and performance of his or her function at least once a year. The Public Protector must, however, at any time submit a report to the NA on the findings of a particular investigation if:

- He or she believes it is necessary;
- He or she deems it in the public interest;
- It requires the urgent attention of, or an intervention by, the NA, or requested to do so by the Chairperson of the National Council of Provinces (NCOP);
- Any report issued by the Public Protector must be open to the public unless exceptional circumstances require that a report be kept confidential.

Although the Public Protector is entrusted with the above constitutional responsibilities and producing information and knowledge that is critical to the exercise of oversight over the executive, it is one of the ISDs that the Legislatures are not making full use of to facilitate effective oversight.

2.3 Public Service Commission

Section 196(1) of the Constitution requires that a single Public Service Commission be established for the Republic of South Africa. The Constitution prescribes that the Public Service Commission must be independent, impartial, and exercises its constitutional powers and performs its functions without fear, favour or prejudice in the interest of the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service. The functions of the Public Service Commission are subject to the provisions of the Constitution in terms of which the Commission may exercise the powers and perform the duties entrusted to it by the Constitution, Public Service Commission Act 46 of 1997 or the Public Service Act (PSA) of 1994. The Commission may inspect government departments and other organisational components in the public service, and has access to official documents or may obtain information from heads of those departments or organisational components or from other officers of the department or organisational components. The Commission may make rules which are not inconsistent with the Constitution and PSCA.

Functions of the Commission

These are outlined as follows;

- Promote the constitutionally prescribed values and principles that govern public administration in the public service.
- Investigate, monitor and evaluate the organisation and administration, the personnel and practices of the public service.
- Propose measures to ensure effective and efficient performance within the public service.
- Give directions aimed at ensuring that personnel procedures relating to recruitment, transfers, promotions and dismissals comply with the constitutionally prescribed values and principles.

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1 PSC website

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• Reports in respect of its activities and the performance of its functions, including any finding it may make and directions and advice it may give, and to provide an evaluation of the extent to which the constitutionally prescribed values and principles are complied with; and

• Either of its own accord or on receipt of any complaint:
  
  o Investigate and evaluate the application of personnel and public administration practices, and report to the relevant executive authority and legislatures;

  o Investigate grievances of employees in the public service concerning official acts or omissions, and recommend appropriate remedies;

  o Monitor and investigate adherence to applicable procedures in the public service; and

  o Advise national and provincial organs of state regarding personnel practices in the public service, including those relating to the recruitment, appointment, transfer, discharge and other aspects of the careers of employees in the public service.

The Public Service Commission monitors and evaluates the Department of Public Service and Administration which is mandated to foster good governance and sound administration in the public service. The Department is a state department which deals with public service personnel matters relating to conditions of service, management of compensation, human resources, labour relations, public service governance, service delivery, state information technology, capacity building and skills management. Therefore, the Department of Public Service and Administration has a technical oversight role on all state departments as they deliver a service to the people of South Africa. In that instance the Public Service Commission oversees the overseer of all state departments, therefore the Commission has a very important role and provides critical information to assist the Legislatures and facilitate proactive and effective oversight.

**Reporting Responsibility of the Public Service Commission**

Section 196(5) of the Constitution regulate that the Commission must account to the NA. Section 196(6) prescribes that the Commission must report at least once a year to the NA in respect of its activities and the performance of its functions, including any finding it may make and directions and advice it may give, and to provide an evaluation of the extent to which the values and principles of Public Service and Administration as set out in section 195 of the Constitution are complied with. The Commission is also required by the Constitution to report at least once a year in respect of its activities in a province, to the provincial legislature concerned.

**2.4 Human Rights Commission**

The South African Human Rights Commission is the national institution established to entrench constitutional democracy. Human rights are the basic rights that everyone has, simply because they are human. Chapter 2 of the Constitution of South Africa contains a bill of rights which is meant to protect human rights. The Human Rights Commission is established in terms of section 181(1) of the Constitution and Human Rights Commission Act of 1994.
The constitutional functions of the Human Rights Commission are outlined in section 184 of the Constitution as follows:

- Promote respect for human rights and a culture of human rights;
- Promote the protection, development and attainment of human rights; and
- Monitor and assess the observance of human rights in South Africa.

The powers of the Human Rights Commission are also regulated by the Human Rights Commission Act of 1994 as follows:

- Investigate and report on the observance of human rights;
- Take steps to secure appropriate redress where human rights have been violated;
- Carry out research and educate;
- Each year the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment;
- Develop an awareness of human rights among the people of South Africa;
- Make recommendations to the state to improve the carrying out of human rights;
- Undertake studies and report to Parliament on matters relating to human rights; and
- Investigate complaints of violations of human rights and seek appropriate relief.

Although the Human Rights Commission performs the above functions across all government departments and municipalities on social basic needs of the people of South Africa and produce valuable information and knowledge that is critical to oversight, it has not been fully utilised by the Legislatures to facilitate proactive and effective oversight.

2.5 Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities

The Commission is established in terms of Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002. It aims to promote and develop peace, friendship, humanity, tolerance and national unity among and within cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association.

The Constitution by establishing this Commission seeks to:
• Heal the divisions of the past;

• Establish non-racial and non-sexist society based on democratic values, social justice and fundamental human rights;

• Promote equality;

• Promote respect for, and the protection of, cultural, religious and linguistic communities; and

• Promote unity in our diversity.

Functions of Commission

The Constitution outlines the basic functions of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities as follows:

• Promote respect for the rights of cultural, religious and linguistic communities;

• Promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association; and

• Recommend the establishment or recognition, in accordance with national legislation, of a cultural or other council or councils for a community or communities in South Africa;

The additional powers and functions of the Commission are regulated by National Legislation, which is necessary to achieve its fundamental responsibilities, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning the rights of Cultural, religious and linguistic communities.

The Commission in fulfilling its constitutional tasks plays a key role in assisting with the building of a truly united South African nation bound by a common loyalty to the country and, its people.

2.6 Commission for Gender Equality

The Constitution of South Africa provides that the objective of the Commission for Gender Equality is to promote gender equality, and to advise and make recommendations to Parliament or any other Legislature with regard to any laws or proposed legislation which affects gender equality and the status of women.

Functions of Commission for Gender Equality

Section 187 of the Constitution requires that the Commission for Gender Equality to:

• Promote respect for gender equality and the protection, development and attainment of gender equality.

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• Have the powers, as regulated by the Commission on Gender Equality Act 39 of 1996 (CGE Act), which are necessary for it to perform its functions, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.

• Additional powers and functions prescribed by CGE Act are to:
  o Monitor all organs of society to ensure that gender equality is safeguarded and promoted;
  o Assess all legislation from a gender perspective;
  o Commission research and make recommendations to Parliament and other authorities;
  o Educate and inform the public;
  o Investigate complaints on gender-related issues;
  o Monitor South Africa’s progress towards gender equality in relation to international norms.

The Commission for Gender Equality co-operates with other ISDs to promote human rights and democracy, including the South African Human Rights Commission and the Public Protector.

2.7 Independent Communications Authority of South Africa (ICASA)

Although not specifically dealt with under Chapter 9 of the Constitution, the Independent Communications Authority of South Africa (ICASA) is an important role player in the advancement of our Constitutional Democracy. It is an independent regulatory body which was established in 2000 by the Independent Communications Authority of South Africa Act. The ICASA amendment Act of 2006 includes the Postal Services, which was previously regulated by the Postal Authority Act. The membership of the ICASA Board increased in 2006 from seven to nine to accommodate the new members from the dissolved Postal Authority body. ICASA is a licensing body, a regulator and a quasi judicial body because it licenses, regulates, adjudicates and issues sanctions. Section 34 of the Constitution gives powers to ICASA to adjudicate and issue sanctions as it prescribes that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. ICASA is also an organ of state bound by the Bill of Rights which protects the right to equality, human dignity, life freedom and security of the person, freedom of religion, belief and opinion, freedom of expression etc. Section 8(1) of the Constitution regulates that the Bill of Rights applies to all law, and binds the Legislature, the Executive, the Judiciary and all organs of state. The responsibility of ICASA is aimed at the protection of democracy and ensuring free and open airwaves.

Mandate of ICASA

ICASA’s mandate is to regulate electronic communications (broadcasting and telecommunications) and postal services in the public interest. It derives its mandate from the following primary pieces of legislation and subsequent amendment of ICASA Act of 2000:

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• **The Constitution of South Africa, Act 108 of 1996**: The Constitution of South Africa requires Parliament to establish an independent regulatory institution which is required to provide for the regulation of broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society. Parliament amended the ICASA Act of 2000 to accommodate postal services to ICASA functions and added the regulation of electronic communications.

• **The Independent Communications Authority of South Africa Act 13 of 2000 (ICASA Act)**: The primary purpose of this Act is to provide for the regulation and control of telecommunications matters in the public interest. It seeks, inter alia, to promote the universal and affordable provision of telecommunication services.

• **The Electronic Communications Act 36 of 2005 (ECA)**: The substantive regulatory function of ICASA is pertaining to broadcasting, postal services and electronic communications sectors.

• **The Broadcasting Act 4 of 1999**: This Act seeks to clarify the powers of the Minister and the regulator. It provides for a new broadcasting policy that will, among others, contribute to democracy, development of society, gender equality, nation building, provision of education and strengthening the spiritual and moral fibre of society.

• **The Promotion of Administrative Justice Act 3 of 2000 (PAJA)**: PAJA binds ICASA in its deciding functions and the complaints and compliance in their exercise of their administrative and judicial functions. Some of ICASA’s governing principles are prescribed by PAJA the law which regulates administrative justice.

• **The Competition Act of 1998**: The Competition Commission and Competition Tribunal play a complementary role or co-jurisdiction role with ICASA on competition matters within the electronic communications environment. The Competition Commission holds an *ex post* jurisdiction over competition related matters. ICASA holds an *ex ante* and *ex post* jurisdiction over competition related matters.

**Some of the functions of ICASA include the following:**

• To license broadcasters, signal distributors, providers of telecommunication services and postal services;

• To make regulations;

• To impose licence conditions;

• To plan, assign, control, enforce and manage the frequency spectrum;

• To ensure international and regional co-operation;

• To consult with the Ministry of Communications;

• To give effect to the EC Act of 2005; and

• To decide on complaints.

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ICASA would be of assistance to Parliament as possesses technical and litigation expertise which help to produce a very important information and knowledge that Parliament may make full use of it to facilitate proactive and effective oversight.

3. SOME COMPARATIVE INTERNATIONAL EXPERIENCE

3.1 Equality and Human Rights Commission of England

The Equality and Human Rights Commission (EHRC) of England promotes and monitors equality, human rights and provides support for the Human Rights Act. EHRC was set up in terms of THE Equality Act of 2006 to bring AN inclusive approach and:

- promotes equality and human rights;
- provides more effective support for discrimination legislation; and
- tackles discrimination in relation to sex orientation, age and religion or belief.

The EHRC equalities work covers England, Scotland and Wales. However, Scotland has its own Human Rights Commission. The EHRC replaced the disability Rights Commission, the Equal Opportunities Commission (EOC) and the Commission for Racial Equality (CRE).

The Human Rights Act of 1998 (HRA) places a duty on all courts and tribunals in the United Kingdom (UK) to interpret the legislation as possible in a way compatible with the rights laid down in the European Convention on Human Rights (ECHR). ECHR is an international agreement or treaty to protect human rights and fundamental freedoms in Europe, which was drafted in 1950 by the Council of Europe. All council of Europe member states are party to the Convention. The HRA applies to all public bodies within the UK, including central government, local authorities, and bodies exercising public functions. However, it does not include Parliament when it is acting in its legislative capacity.

Despite the fact that the Act states that it applies to public bodies, it has had increasing influence on private laws governing litigation between individual citizens as in disputes between the state and citizens. Section 6(1) of the HRA defines courts and tribunals as public bodies meaning their judgements must comply with human rights obligations except in cases of declarations of incompatibility. Therefore, judges have a duty to act in compatibility with the European Convention on Human Rights even when an action is a private one between two citizens. Even though the Act’s interpretative instruction is to interpret legislation as compatible with convention right, it applies only to statute not to common law.

There is no constitutionally protected Bill of Rights or written constitution, the basis of the relationship between state and citizen is instead constructed on a variety of statutory provisions and common law rules, which seek to confer on the citizen certain rights and liberties. For example, the protection of rights to life is primarily ensured by the criminal law (crimes of murder and manslaughter); Protection of the right to freedom of expression and conscience is encouraged and guaranteed by the parliamentary privilege for the freedom of expression by Members of Parliament.
3.2 Ofcom of Britain

The Broadcasting Act of 1990 aimed at reforming the entire structure of British Broadcasting
and British Television. The Act abolished the Independent Broadcasting Authority (IBA) and
replaced it with the Independent Television Commission (ITC) and Radio Authority and later
both of them were replaced by the Office of Communication (Ofcom) which were both given
the responsibility of regulating with very limited powers and did not have such strong powers
as the IBA. The Communication Act of 2003 confers functions and powers of the Ofcom to
make provision on the regulation of broadcasting, television and radio services as follows:

- To regulate mergers involving newspaper and other media enterprises and in that
  connection amend the Enterprise Act of 2002.

- To regulate any function in relation to telephone numbers conferred on it by the law.

- Institute and carry on criminal proceedings in England and Wales or Northern Ireland
  for an offence relating to a matter in relation to which it has functions.

- Make payments (where there is no legal liability) to persons adversely affected by
  carrying out of any function of Ofcom.

- Establish and maintain its separate offices in each of the following parts of the UK:
  - England,
  - Wales,
  - Scotland, and
  - Northern Ireland.

The Communication Act of 2003 also outlines the general duties of Ofcom to:

a) Further the interests of citizens in relation to communications matters;

b) Further the interests of consumers in relevant markets, where appropriate by
   promoting competition;

c) Regulate wireless telegraphy of the electro-magnetic spectrum for optimal use;

d) Regulate the availability of wide range of electronic communication services
   throughout the UK;

e) Regulate the application, in the case of all television and radio services, of standards
   that provide adequate protection to members of the public from the inclusion of
   offensive and harmful material in such services; and

f) Regulate the application, in case of all television and radio services, of standards that
   provide adequate protection to members of the public and all other persons from
   both:
      i. Unfair treatment in programmes included in such services; and
ii. Unwarranted infringements of privacy resulting from activities carried on for the purposes of such services.

In performing its duties Ofcom must have regard, in all cases to the principles under which regulatory activities should be transparent, accountable, proportionate, and consistent and the targeted cases in which action is needed. In addition, any other principles appear to represent the best regulatory practice.

*Reporting responsibility of Ofcom as required by the Communication Act is indicated as follows:*

- Ofcom is also responsible for complying with a direction of the Secretary of State to provide him or her with information falling within its functions.

- The European Convention requires Ofcom to provide it with information for the purpose of enabling it to perform any of its functions in relation to electronic communications network, electronic communication services or associate facilities.

Parliament of England and other statutory bodies in Europe make full use of Ofcom as a body of knowledge to facilitate and enhance their proactive and effective oversight.

4 Conclusion

Oversight over annual reports and financial statements critical to, may not however, adequately promote effective and proactive oversight. Each year, departments and public entities are required to submit their annual reports to Parliament once a year. Parliamentary committees analyse the annual reports including the financial statements and the annual audit reports to spot irregularities and underperformance which help them to facilitate oversight over the executive. This is a reactive oversight that sometimes is not effective. However, the information and knowledge of the ISDs has been not fully utilised by the Legislature. ISDs do not have to report once a year they may report any time the Legislatures require them to. The information produced by the ISDs should always be credible because they are independent from the executive and because this is critical for the survival of democracy. Therefore, making full use of the ISDs by the Legislatures that would help to facilitate the proactive and effective oversight over the executive.

Reference

Broadcasting Act of 1990 of Britain

Communication Act of 2003 of England


Commission on Gender Equality Act 39 of 1996 (CGE Act)

Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act 19 of 2002

Equality Human Rights Commission of 2006

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European Convention Treaty of 1950
Executive members Ethics Act 82 of 1998
Human Rights Commission Act of 1994
Independent Communications Authority of South Africa Act 13 of 2000 (ICASA Act)
Public Service Act 103 (1994)
Public Protector Act 23 (1994)