

Trias Politica for Ethical Leadership and Good Governance: Praxis of Checks and Balances in the South African Context

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Abstract: *Trias politica* is an idea aimed at ensuring strict separation of powers between the legislature, executive and judiciary. It is noteworthy that the philosophy is not legislated in South Africa through an Act of parliament but takes form through the provisions of functions, powers and responsibilities of the three arms of government as enshrined in the Constitution of the Republic of South Africa, 1996. For this and other reasons, *trias politica*, taking into cognisance its initial intentions proves not effective in promoting ethical leadership and good governance in government. This is so because the principle of checks and balances has been weakened between the three arms of government. The aim of this article is, therefore, to interrogate the philosophy of *trias politica* in a South African realm vis a vis ethical leadership and good governance. The article is purely theoretical and collect literature through articles, books, newspapers, internet and other readily available sources with a view of attempting to forge and comprehend how separation of powers and particularly checks and balances can be strengthened for achieving ethical leadership and good governance within the South African government.

Keywords: *Trias politica*, separation of powers, good governance, ethical leadership, South Africa

Introduction

The discourses on ethics and leadership have become critical issues of modern societal and scholarship debates. This is so as most governments around the globe are confronted with ethical degeneration and 'bad governance' among other challenges. South Africa is not an exception to cases of unethical leadership and 'bad governance'. This is against public expectations of ethical and good governance which is deemed to be a *sine qua non* and machinery for efficient and effective service delivery (Matshabaphala, 2015). This article aims to confront the *trias politica* (separation of powers) ideology advocated by Charles Montesquieu and its prospects of ensuring ethical leadership and good governance in the South African government context. The doctrine of separation of powers means that specific powers, functions, duties and responsibilities are allocated to distinct state institutions with a defined means of competence and jurisdiction (Mojapelo, 2013). In simple terms,

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separation of powers calls for the horizontal separation of powers between the legislature, executive and judiciary for ensuring accountability and transparency in government affairs. This is in line with the basic values and principles governing public administration enshrined in section 195 of the Constitution of the Republic of South Africa, 1996 (hereafter to be referred to as the 1996 Constitution) which places accountability and transparency on behalf of government as central pillars of democracy and governance. In pursuit of its aim, this article unpacks the principle of separation of powers, conceptualise and contextualise the concepts of ethical leadership and good governance. The article proceeds into forging a link between separation of powers, particularly checks and balances with ethical leadership and good governance.

Trias politica- horizontal separation of powers

It is provided for in the 1996 that there shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness (RSA, 1996; O'Regan, 2005: 120; Mojapelo, 2013: 39). Justices of the Constitutional Court in South Africa however stipulate that there's no universal model of separation of powers safe to say that "all should not be put in one basket" which basically emphasises that all power cannot be concentrated in one arm or person to prevent abuse of such power (Kohn, 2013: 6).

Charles Montesquieu who was a French philosopher is well known for his articulation of the theory of *separation_of powers*, which is basically implemented in many *constitutions* all over the world particularly in developed countries including but not limited to that of the United States of America in the 1780's (O'Regan, 2005; Venter & Landsberg, 2011; Mojapelo, 2013: 37). Montesquieu is also associated with an assertion that says the ".....*the accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny*" (O'Regan, 2005: 123). It must however be pointed out that the first philosopher to propagate the principle of separation of powers is John Locke (1632-1704) who lived way before Montesquieu, but it is Montesquieu who is usually credited with the first formulation of the doctrine of separation of powers (Mojapelo, 2013: 37). The philosophical underpinning of separation of powers doctrine is rooted in an inherent distrust of concentrated governmental power (Legislative Services Agency, 2005: 1). As posited by Mangu (1998: 2), separation of powers is one of the "essential principles" of constitutionalism and democracy. Mangu is also emphatic of the system of divided powers, which talks about federalism and constitutionalism, which is limited government operating under the rule of law. Both principles are based on a similar conception that is the protection of liberty from violation and tyranny (Kohn, 2013: 6).

The doctrine of separation of powers is essentially a centrepiece of many constitutional democracies in the world which often provides for the three arms of the state to exercise the element of checks and balances (Mojapelo, 2013: 39). The doctrine however is not static but continues to evolve particularly with the identification of need for further amendment in the legislative framework. The traditional

notion as propagated by Locke and Montesquieu posits that there are separate and distinct roles for the executive, legislative, and judicial arms of the state which should remain inviolate has changed over time to reflect the growing interrelationship among the said arms (Legislative Services Agency, 2005: 1). Separation of powers doctrine as advocated by Mangu (1998) and Mojapelo (2013: 40) is based on the notion that each arm of the state has its own unique set of powers and that these powers are exclusive and not to be exercised by another arm of government so as to prevent the concentration of too much power in the same hands and also ensure that there's checks and balances in all the respective arms of the state. However, as discussed below, the application of this principle in practice overlaps from one arm to the other.

Important in separation of powers analysis is an understanding of the nature of the powers of each separate branch of the state. The traditional characterization of these powers is that the legislative power is the power to make, alter, and repeal laws; the executive power is the power to execute the laws; and the judicial power is the power to construe and interpret the Constitution and laws, and to apply them and decide controversies (O'Regan, 2005: 134). A key limit on the legislature's authority is the executive branch's ability to approve or disapprove legislation passed by the legislature prior to the legislation becoming law (Mojapelo, 2013). This role is performed by the president of the Republic who signs bills of parliament into law. The three arms of the state are elaborated on below particularly in the context of South Africa. It must however be stated that the existence of the three arms of the state is to ensure that there's an element of checks and balances which seeks to hold each other accountable.

Legislative arm

Section 42(3) of the 1996 Constitution provides that the National Assembly is elected to represent the people and to ensure government by the people under the Constitution (RSA, 1996; South African Catholic Bishops' Conference, 2013). The National Assembly actualises this by choosing the President, as well as by providing a national forum for public consideration of issues, by passing legislation and by scrutinising and overseeing executive actions (O'Regan, 2005: 127). Holding the executive to account and overseeing the performance of its functions is one of the fundamental elements of the principles of the separation of powers. Actually, it is the core of this principle.

The 1996 Constitution makes provision that the President of the Republic is elected by the National Assembly which is the main houses of Parliament from among its members at its first sitting after an election (RSA, 1996; O'Regan, 2005: 125). Such election is presided over by the Chief Justice who is the head of the other arm of the state (Judiciary). Once the President is elected by the National Assembly, he or she ceases to be its member. However, it must be noted that even if the President is not a member of the National Assembly after the said elections, the National Assembly may remove the President from an office several occasions including on a vote of at least two thirds of its members and only on the grounds of a serious violation of the Constitution or the law; serious misconduct; and inability to perform the functions of office (RSA, 1996; Venter & Landsberg, 2011). The process of

legislation-making too amongst other processes illustrates the always intertwined relationship between legislature and executive. An example is that a member of the executive initiate, craft and prepare different legislative frameworks which is then introduced either into the National Assembly or the National Council of Provinces for debate and passing. Once a particular bill has been passed by legislature, it is presented to the President for assenting. It therefore means that the process cannot be completed without the participation of the other arm of the state. As stated elsewhere in this paper that the legislature makes laws, the executive implements or executes and the judiciary adjudicates or interprets the said law.

Executive arm

The cabinet which constitute of the President, Deputy President as well as the national ministers are the national executive authority of the Republic of South Africa. Section 92 (2) of the 1996 Constitution state that members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions (RSA, 1996; Maserumule, 2007: 148). After the election of the President by the legislature, he or she appoints his or her deputy together with ministers and deputy ministers from the National Assembly. However the 1996 Constitution provides for the inclusion of at least two ministers from outside the National Assembly. There's often an overlap in the exercise of these functions which is otherwise complements of one government headed by the president as head of the executive arm. For example, ministers in South Africa who are part of the executive continue to be members of parliament and the legislature. Similarly, ministers are the ones often responsible for initiating, crafting and introducing bills in parliament with the assistance of the administrative staff (often senior management) for consideration and approval by the legislature. It is also possible that the legislature may just approve a bill without having amended as introduced by the executive.

Judicial arm

The 1996 Constitution stipulates that the judicial authority of the Republic is vested in the judicial arm of the state and that the judiciary ought to be "independent and subject only to the Constitution and the law" (RSA, 1996), and that it must apply this law impartially and without fear, favour or prejudice. Furthermore, no person or organ of state may interfere with the functioning of the courts including the executive and the legislative arm. Section 172 of the 1996 Constitution provides that while deciding on the constitutionality of the case before it, the court should declare invalid any law or conduct inconsistent with the constitution. Additionally, the judiciary has been given the most vital role of monitoring the application of the separation of powers. Montesquieu correctly asserts that "when the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner" (O'Regan, 2005; Kohn, 2013: 6; Mojapelo, 2013). Mojapelo (2013: 37) however contends that the complete application of the separation of powers is not possible- both in theory and in practice.

It should however be noted that there are several weaknesses that exist particularly between the legislative arm and the executive arm. The South African Catholic Bishops' Conference (2013) highlights the fact that the executive has a considerable influence over the legislature in that there is an existence of the majority party in the legislative arm. Whenever members of the executive have to account in the legislature through parliament, the opposition parties often argues that there's an element of bias and protection. It is often alleged that the chairperson of the portfolio committee who is often the member of the ruling party often "shield" the members of the executive from answering difficult questions. It therefore means that the accountability of the executive to the legislative arm is often made difficult because of that challenge. However, at times it is argued by legal and Public Administration scholars alike that while the principle of separation of powers is effective with regard to prevention of tyranny, oppression and violence, it may cause inefficiency (O'Regan, 2005: 124; Kohn, 2013: 6) by having to wait for the approval of the other arm of the state. A perfect example is when the executive have to wait for the approval of the budget and most legislative framework by the legislative arm. It is however the view of the authors that even if there may be challenges associated with the principle of separation of powers, there are better than bad including the fact that with it comes functional specialisation in the respective arms of the state. This means that each arm must focus on its own functional areas of which they will specialise and ultimately be experts of their own respective areas of operations. Nevertheless, South African Catholic Bishops' Conference (2013) also counter the argument which is often raised that the legislative arm has a shortfall regarding the human resource capacity by alluding to the fact that where shortcomings are identified, parliamentary content advisors and researchers are provided as supplements. It is the view of these authors that this good effort cannot however successfully address the challenge of the National Assembly, National Council of Provinces and their respective committees supporting, shielding and protecting the executive from accounting in parliament.

Ethics and ethical leadership

To understand the discourse on ethical leadership, one needs to reflect on the concept of ethics. The definition of ethics dates back to Plato, Aristotle and Aquinas (Maserumule, 2014). It is said to be about morals and values found appropriate by the community and its members. Mathebula (2014) argues that norms and moral plays a pivotal role in the pragmatic behavioural shifting which in turn results in ethical conduct of humane in general and public servants in particular. In debates around governance, good governance and public administration practice, ethics is the collection of values, obligations, moral principles, attitudes and norms that serve as conduct and behavioural rules to be observed by public representatives and officials in ensuring that their actions are constantly focused on the promotion, achievement, maintenance and enhancement of the general welfare of society at large (Edwards, 2007; Zitha & Mathebula, 2015). A deduction can therefore be made from this definition that executing and ensuring ethical conduct of public officials necessitate a leader who is keen to ensure that ethics are reflected in all the activities of the institution. To place this in context, Aristotle viewed ethics as the study of excellence or virtues of good character practiced with good life

as a matter of intellectual understanding the sense of what action is most appropriate in a given situation (Edwards, 2007).

With Aristotle's assertions, one then is tempted to interrogate certain situational decisions arising from actions of government leaders in responding to debacles particularly deemed to be unethical in the public eye within the South African government. Such gives rise not only to the need for leadership questioning but of course ethical leadership. The discourse on ethical leadership and separation of powers has been one characterised by non-provable facts rather than being related to ideals on the ground. Public sector scandals and the collapse of public institutions in South Africa can serve as a perfect example of the lack of coherence and relation to unethical conduct and lack of leadership. Leadership refers to the ability to persuade others to devotedly and diligently pursue the project's objective (Havranek, 1999). Bass and Bass (2008) noted a progressive broadening of the definition of leadership to include contributing to social order, introducing major change, giving meaning and purpose to work and to organisations, empowering followers, and infusing organisations with values and ideology while holding to the truth and pursuit of good governance. A person pledged to this commitment is an ethical leader as someone who has low levels of defensiveness, is emotionally stable, has good interpersonal skills, integrity, and has the ability to influence others. This article views South African government leaders as far-fetched from this notion as it is eminent that for example, half of President's Jacob Zuma's cabinet owns and does business with the state (Kondlo, 2015). As he argues, Kondlo views this as a matter for concern particularly if we were to apply the morality test on a case to case basis.

According to Mathebula (2014), the concept of morality which is so closely linked and related to ethics can be understood in terms of general expectation that people must conduct their official duties with cognisance to humanity, respect, loyalty, honesty etc. The reality of ethical leadership is more complex and an ambiguous construct with higher stakes which increased its relevancy as institutions "fallen from grace" (Freeman & Stewart, 2006; Monahan, 2012). Ethical leadership can be understood according to Mihelic, Lipicnik and Tekavcic (2010), as the demonstration of normatively appropriate conduct through personal actions and interpersonal relationships and the promotion of such conduct to followers through reciprocal communication, reinforcement and decision-making. It can be drawn from this definition that followers are important role players in ensuring ethical leadership. This is so because leadership is about persuading followers towards conducting activities according to policy objectives set by the leader. Ethical leadership can also be defined as the process of influencing employees through values, principles and beliefs that extensively border on the accepted norms in the organizational behaviours (Alshammari, Almutairi & Thuwaini, 2015).

The notion of good governance

Scholars who have attempted both to construct and (or) deconstruct and place in context the concept of good governance find it so elusive to realise this ideal. One needs to first understand the concept of governance as an epistemological foundation of what today became known as 'good governance'.

Maserumule (2014) acknowledges that there is a “conceptual *problematique* in the broader contemporary development discourse” of good governance. Governance is one of the recent paradigms of Public Administration which the discipline has and continue to ‘import’ to the exercise of government business. For operational purposes, the World Bank (1994) defines governance as the exercise of political, administrative and legal authority in the management of a nation’s affairs. It is clear from this definition that governance is exercising authority for good course across all (three) arms of government. Governance thus according to Naidoo (2012: 66) has to do with the manner in which responsibility is discharged. It is in this line that the discharge of responsibilities acquired through elections, appointment or delegation in the public sector (Naidoo, 2012) can either be referred to as ‘good governance’ or ‘bad governance’. According to Maserumule (2014: 964), the concept of good governance can be traced back to philosophers such as Plato, Aristotle and Aquinas. Clearly, the concept has gained momentum in usage in the current academia, government and society discourse. Matshabaphala (2014) correctly points out to the fact that good governance is naturally democratic, participatory, transparent, responsive, equitable and consensus-oriented. If good governance is all this, it then requires leadership to drive ‘good’ in the public sector. It need a leadership that is grounded “on the ethical principles of promoting goodness over badness through good governance, justice and fairness, honesty, integrity, and freedom” (Matshabaphala, 2014: 1010). As complex as the concept is to unequivocally explain, the misuse in the development discourse and lack of superlative lineage, this makes it even more complicated to apply in practice and the idealisation to ethical leadership in government.

Checks and balances for ethical leadership and good governance in south africa

The discourse on ethical leadership and good governance according to Matshabaphala (2015), is imperative since it has a direct bearing on the state’s capability of public service delivery. However, a challenge that arises is by virtue of the concepts of ethical leadership and good governance receiving various and sometimes confusing interpretations based on the societal values, principles and philosophy they find themselves in. These has led to the concepts losing their reality value with “the on-set of new leadership and good governance narratives” (Matshabaphala, 2015: 497). Then the question is; what would befit a South African narrative of how the two must be conceptualised with a view of contextualising it to the current debate? This article takes a position of self-reflecting ethical leadership and good governance with the principle of separation of powers that creates for checks and balances between the legislature, executive and judiciary.

During the Multi-Party negotiations, it was agreed that there shall be separation of powers between the legislature, executive and judiciary with suitable checks and balances for the purpose of accountability, responsiveness and openness (O’Regan, 2005). It is along this provision that ethical leadership and good governance in the South African government which is ‘tormented’ with maladministration, corruption and other ills is demanded. This article advances an argument that government that is open for public view and critique while also demanding those exercising public duties to account, unethical conduct and ‘bad governance’ can at least be replaced with ethical and

'clean' governance. But the question that is always sought for is; how? In a democratic system of government such as that of South Africa, checks and balances which result in the imposition of restraints by one of government upon another (O'Regan, 2005) ethical leadership and good governance is an ideal. However, the challenge in this arrangement is that, as indicated earlier in the article, there is no absolute separation of powers, thus undermining checks and balances. In principle, the three arms of government must be autonomous and conduct their affairs outside the scope of influence by one another. Of course the institution of separation of powers and that of checks and balances is equally weak within the South African government.

In a newspaper article published by News24 in August 2015, members of the executive and the ruling party African National Congress (ANC) expressed concern over the judiciary interfering with the executive and the legislature. ANC secretary general Gwede Matashe referred to this as "judicial overreach". In recent times, this and other unwarranted attacks on the judicial arm of government are seen as an attempt to weaken checks and balances and a threat for the judiciary to continue holding the executive accountable through the courts of law. Then if this is a case, who must then hold the executive accountable? As far as the case should be, both the judiciary and the legislature through parliament as logic and principle dictates must demand explanations and answers for executive actions. Recently, scandals have hit the South African government very hard with members of the public and opposition political parties raising questions over the ethical conduct and the absence of leadership. This of course undermines principles of elected and trusted government. However, according to Naidoo (2012: 660), the South African public sector is experiencing increased unethical practices and political distrust of both the political and administrative leaders.

The turmoil and scandal of unethical conduct and bad leadership also stands tall and high in defiance of the National Development Plan's of building a capable and ethical developmental state. For instance, President Jacob Zuma and his family unduly benefitted from a R240 million security upgrades in his Nkandla homestead (Mathebula, 2014). Kondlo (2015: 489) poses a very serious and uncomfortable question that *"how a President, who supposedly has a live conscience and patriotic consciousness, should have handled the matter?"* In exercising ethical leadership, the President ought to have done what is 'right'. In pursuit of clean and good governance, he ought to have realised that taxpayer's money have unduly benefitted him and his family and therefore repay public funds. Other cases of unethical leadership are before the courts of law whereby the judicial arm of government is asked to make judgements and hold the executive and other government officials accountable for engaging in failing to exemplify ethical leadership and good governance. In a case¹ of the President of the Republic recently heard by the highest court in the land, it was held that the Legislature failed to exercise its oversight role by failing to hold the executive accountable. It was then up to the judiciary to determine that Parliament and the President as the head of the executive failed to honour their

¹Economic Freedom Fighters v Speaker of National Assembly and Others; Democratic Alliance v Speaker of National Assembly and Others [2016] ZACC 11.

constructional obligation. On this issue which arose the interest of the country on separation of powers, it was stated that:

The Executive led by the President and Parliament bear very important responsibilities and each play a crucial role in the affairs of our country. They deserve the space to discharge their constitutional obligations unimpeded by the Judiciary, save where the Constitution otherwise permits. This accords with the dictates of Constitutional Principle VI, which is one of the principles that guided our Constitution drafting process in these terms:

“There shall be a separation of powers between the legislature, the executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness (ibid).”

However, with the continued threat of interference between the three arms of government, separation of powers which has the intention of ethical leadership, good governance, accountability and transparency is completely eroded. With this being said, good governance requires ethical and ‘accountable leadership’ (Matshabaphala, 2014: 1010) that will consequently address South Africa’s service delivery challenges in the 21st century. In turn, ethical leadership is a prerequisite for good governance but other arms of government except the executive must be active in playing their roles and functions.

The lack of concern for corruption in government, ineffective mechanisms to prevent and curb corruption and unethical leadership are significant impediments to good governance in South Africa (Naidoo, 2012: 662). But the question that we ought to ask ourselves is perhaps whether the legislature through parliament and the judiciary through the courts of laws can hold the executive arm of government which is viewed to be at the centre stage of public service delivery? In a verge to enforce accountability on part of the executive, South Africa’s 5th democratic parliament has been embroiled in major and intensified debates and disruptions. Opposition political parties such as the Economic Freedom Fighters and the Democratic Alliance have even resorted to court in an effort of ensuring that certain executive actions be publicly accounted for. All these and other actions clearly points out that the doctrine of separation of powers in functional. However, the presence of ethical leadership and good governance in conducting government business must be exemplary and take precedence without forcing accountability out of leaders. The tensions and animosity the three arms of government are said to arise in instances that President Zuma initially avoided responding on the Public Protector’s report findings on the Nkandla debacle and his personal and toxic friendship with the Gupta family. In cases where opposition parties are of the opinion that parliament fails to hold government leaders accountable, they resort to the judiciary.

Conclusion

In this article the concept of separation of powers and particularly checks and balances between the legislature, executive and judiciary were considered to determine how it influences ethical leadership and good governance. The focus was on the South African government leadership particularly in the national sphere. Separation of powers as a doctrine has been examined in this article with a view of comparatively seeking to forge relations with how government leaders can execute their public duties ethically and thus promote good governance. Within the South African government environment, interpretation on how the doctrine practically operates is still uncertain. This in turn impacts on how

the three arms of government interrelates with one another for the purpose of providing coherence on the functioning of government as a unit. This has been indicated using practical examples in the article.

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