

IN THE NAME OF IGNORANCE: TRAMPLING ON THE POWERS OF INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY IN SOUTH AFRICA

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ABSTRACT

In Public Administration, good governance is generally associated with efficient and effective administration in a democratic state. In other words, good governance assures that corruption is minimised, the views of the minority are taken into account, and the voices of the most vulnerable in society are heard in decision-making. It specifically relates to the capacity of the centre of power of a political and administrative system to cope with the emerging challenges of the society. Therefore, governments across the world have constituted various mechanisms for promoting good governance. In South Africa, Chapter 9 of the Constitution of the Republic of South Africa 1996 is solely dedicated to the Institutions Supporting Constitutional Democracy and by extension promoting good governance. This article argues that some Institutions Supporting Constitutional Democracy are more effective than others and the powers of the effective ones are often challenged by both the legislature and the executive, thereby trampling on the principles of separation of powers and those of good governance respectively. This article is premised on the understanding that governance means the process by which decisions are implemented or not implemented. The article presents a case study of the executive and the legislature's decision to trample on the powers of the Public Protector (one of the effective institutions supporting democracy in South Africa) and the subsequent cold contestations of the Constitutional Court judgement, all in the name of ignorance. The findings of the Constitutional Court on the matter of the powers of the office of the Public Protector provides the public with the opportunity to observe the workings of the Institutions Supporting Constitutional Democracy in South Africa in the quest for promoting good governance.

Keywords: *Constitutional Democracy, Corruption, Democratic state, Good governance,*

1. INTRODUCTION

This article examines the trampling of the powers and functions of Institutions Supporting Constitutional Democracy in South Africa by the executive

and the legislature, with specific reference to the office of the Public Protector, from the notion of promoting good governance. On the one hand, governments promote good governance by providing rules that create

incentives or disincentives for various behaviours and actions that either facilitate or obstruct democratic practice (Colomer, 2001; Reynolds, 2002; Macyntyre, 2003). The rules are thus contained in the Constitutions, Acts of Parliament, Rules booklets and other policy documents. On the other hand, governments also promote good governance through the process of institutionalisation by which legislatures develop the autonomy, capacity and skills to fulfil their mandates and deliver political goods like protecting the rights of the citizens, ensuring transparency, accountability and responsiveness (Fukuyama, 2005; Matters, 2005; the Law Society of South Africa, 2015).

This they do through, among others, establishing institutions supporting democracy, developing accountability and oversight mechanisms, and promoting the independence of the judiciary. In South Africa, institutions supporting constitutional democracy are mandated to play their good governance role as stipulated in Chapter 9 of the Constitution of the Republic of South Africa, 1996 (the Constitution). Focusing on the office of the Public Protector, this article explores the manner in which parliamentarians and the executive alike tend to ignore the House Rules, the Court rulings, as well as the findings and recommendations of the institutions supporting constitutional democracy.

The article begins with a background of the Institutions Supporting Constitutional Democracy and the role they play in promoting good governance

in the South African democratic system. The article then turns its focus to a case study on the Public Protector and its powers and functions. The problem statement follows thereafter before research methodology and theoretical considerations are outlined. Since the focus of this study is predominantly on the Public Protector, the empirical study then concentrates on its recent findings and recommendations against the executive.

The court cases it has won in its quest for effectively exercising its constitutional mandates, powers and functions, without fear or favour, in accordance with the principles of good governance, are discussed. The article proceeds with a presentation of some findings and suggestions for further research. The findings of this article have provided some inroads for recommending further research on the effectiveness or lack thereof of other Institutions Supporting Constitutional Democracy in South Africa before the article is concluded. Having outlined the structure of this article, the next section provides a snapshot of the historical background of Institutions Supporting Constitutional Democracy.

2.HISTORICAL BACKGROUND OF INSTITUTIONS SUPPORTING DEMOCRACY

This article is premised on the understanding that governance means the process by which decisions are implemented or not implemented. Models for the Chapter 9 institutions were drawn from around the world. The first ombudsman was established in 1713

in Sweden (Murray, 2006). As search on the United Kingdom (UK) National Audit Office reveals that the idea of an Auditor-General is even older, although auditors are not always separated from government. The earliest antecedent of the Auditors-General or Audit Officers now common in Commonwealth countries may be the English Auditor of the Exchequer referred to in documents from 1314 (Murray, 2006; Southern African Catholic Bishops' Conference, 2012).

According to Hatchard, Ndulo and Slinn (2004), the first ombudsman in Africa seems to have been established in Tanzania in 1966. Murray (2006) posits that independent human rights institutions are a bit newer. In citing resolution 48/134 of the UK General Assembly of 20 December 1993, Murray elaborates that international guidelines for their status, composition, responsibilities and methods of operation were adopted by the United Nations in 1993 in the "Paris Principles".

It can thus be argued that the current South African Human Rights Commission (HRC) and the Commission for Gender Equality (CGE) are modelled on the Paris Principles. Before 1994, South Africa had already established the offices of the Auditor-General and the Ombudsman. Thus the origins of South Africa's Public Protector can be found in the pre-constitutional structure of an ombudsman known as the Advocate-General, established in 1979. The *Advocate-General Act 118 of 1979* established an Advocate-General with the power to investigate mat-

ters relating to financial impropriety in the public sector. In that era, the Advocate-General was regarded as a distinctly South African institution which was unique to the Westminster parliamentary systems. In 1991 the name of this office was changed to Ombudsman and the title of the Act similarly amended.

The 1991 amendments also extended the powers of the office holder under the Act to matters in which "the State of the public in general is being prejudiced by maladministration in connection with the affairs of the State" (s 4(a) inserted by *Advocate-General Amendment Act 104 of 1991*).

However, after 1994, in a democratic South Africa, the Ombudsman was replaced with the Public Protector, which sometimes explains the ignorance (deliberate or not) of the powers of the Public Protector by the executive, the legislature and political parties respectively, as would be seen the later sections of this article.

3.CURRENT INSTITUTIONS SUPPORTING CONSTITUTIONAL DEMOCRACY IN SOUTH AFRICA

The Constitution provides that the Institutions Supporting Constitutional Democracy be established to promote the rights contained in its Chapter 2: Bill of Rights, and to strengthen constitutional democracy. The *Ad Hoc Committee on the Review of Chapter 9 and Associated Institution (2007)* reports that:

"... with the advancement of democracy in South Africa in 1994, a human rights culture was made the cornerstone of a new constitutional dispensation and a wide ranging set of human rights, including socioeconomic rights, was inscribed in a Bill of Rights. In order to achieve this goal, a range of institutions were established in the Constitution itself and in national legislation, the purpose of which was to strengthen constitutional democracy in South Africa."

Chapter 9 of the Constitution provides that the following Institutions Supporting Constitutional Democracy be established, namely: the Public Protector; the South African Human Rights Commission; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Commission for Gender Equality; the Auditor-General; the Independent Electoral Commission; and the Independent Authority to Regulate Broadcasting. Murray (2006) writes that although Chapter 9 of the Constitution brings together six distinct institutions, they have important things in common which suit them for their twofold roles as institutions intended both to monitor government actions and to contribute to transformation.

He states the three features of Chapter 9 institutions as: "... (a) Although they are state institutions, they are outside government; they are not "a branch of government"; (b) Like the courts, they are expected to be independent and impartial; and (c) To differing degrees they are "intermediary

institutions", providing a link between people on the one hand and the executive and Parliament on the other". The Law Society of South Africa (2015) stresses that the Institutions Supporting Constitutional Democracy "... were brought into being to strengthen democracy, promote the rule of law and ensure proper separation of powers". The task of these institutions is to promote and protect those rights within the Bill of Rights which fall within their particular area.

They are impartial, independent and subject only to the Constitution and the relevant laws made in terms of the Constitution. They must exercise their powers and perform their functions "without fear, favour or prejudice". Section 181(3) of the Constitution stipulates that "... other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions". One of the important organs of state in this regard is the National Parliament.

The role of Institutions Supporting Constitutional Democracy in South Africa is purely investigative and administrative, providing a link between government and citizens (Matters, 2005; Murray (2006). The Southern African Catholic Bishops' Conference (2012) elaborates that these institutions are outside partisan politics to ensure that they are independent and impartial in their investigation of government affairs on behalf of the citizens. For the purpose of this article, the focus now

turns on the Public Protector since this institution has received both praises and criticisms, especially during the tenure of the now outgoing Public Protector, Advocate Thuli Madonsela.

4. THE PUBLIC PROTECTOR AND ITS FUNCTIONS

The Public Protector protects citizens from unfair treatment by the state and its officials as well as from inefficient administration and dishonesty with respect to public money. In articulating the functions of the Public Protector, Section 182(1) of the Constitution stipulates that “the Public Protector has the power, as regulated by national legislation – (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice; (b) to report on that conduct; and (c) to take appropriate remedial action.”

The Public Protector can investigate central and provincial government and local authorities. This includes all state department employees such as police officers, pension payout clerks or electoral officers. It can also investigate corporations or institutions performing a public function, such as Eskom and Telkom as well as statutory councils such as the Human Sciences Research Council and the Council for Scientific and Industrial Research. Section 182(2) of the Constitution stipulates that the Public Protector has the additional powers and functions prescribed by national legislation.

Additional powers of the Public Protector are provided by the Public Protector Act of 1994 which outlines its mandate 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 explore any other expedient means;
- Report and make recommendations on findings;
- Advise and investigate violations of Executive Member Ethics Act 82 of 1998;
- Resolve disputes 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;
- ✓ National Energy Act 40 of 2004;
- ✓ Housing Protection Measures Act 95 of 1998;
- ✓ National Environmental Management Act 108 of 1999;
- ✓ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000;
- ✓ Public Finance Management Act 1 of 1999; and
- ✓ Lotteries Act 57 of 1997.

From the above discussion, it can be deduced that the Public Protector has more extensive powers than ombudsman institutions of other countries. In comparison, the jurisdiction of an ombudsman is more limited; certain public administration institutions may, for example, be exempted or excluded from an ombudsman's reach. On the contrary, the Parliament of the Republic of South Africa (2012:3) explains that 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 1 of 1999. However, it should be noted that in terms of the traditional separation of powers, which entails the executive, the legislature and the judiciary, the Public Protector is not considered a branch of government. According to the Law Society of South Africa (2015), the Public Protector must ensure that good governance should be valued above all. While the powers and functions of the Public Protector are published and practiced in accordance with the above legislation, exercising such powers is often not an easy ride, more especially when dealing with matters affecting the executive. It is from this background that the focus of the following section is on the problem statement and research questions.

5. PROBLEM STATEMENT AND RESEARCH QUESTIONS

The Institutions Supporting Constitutional Democracy are especially needed in a young democracy such as South Africa, where many citizens still live in poverty, have limited access to services and the political leaders they have voted for, and where corruption amongst government officials is rife (Murray, 2006). Section 181(3) of the Constitution stipulates that "... other organs of state, through legislative and other measures, must assist and protect these institutions to ensure their independence, impartiality, dignity and effectiveness". Although most of the Institutions Supporting Constitutional De-

mocracy in South Africa have well-established provincial offices across the country, the effectiveness of these offices is uncertain; citizens remain generally unaware of their existence, and are poorly educated on their purpose, powers and functions (Human Sciences Research Council, 2007). Citizens do not know where these institutions are situated and how to access them (Southern African Catholic Bishops' Conference, 2012). The only exceptions are the Auditor-General, the Electoral Commission and the Public Protector, more especially since the appointment of the current Public Protector seven year ago.

The Public Protector has over time proven to be the most popular and effective of all the Institutions Supporting Constitutional Democracy in South Africa. However, recent tendencies suggest that the executive, some members of Parliament, together with their political parties resort to questioning the mandate, findings and recommendations of the office of the Public Protector, especially when the findings appear not to be in their favour. Therefore, the research questions that this article was set out to address are:

- Why is the executive resorting to being less co-operative when the Public Protector exercises its constitutional mandates, powers and functions?
- How does the less co-operation of the executive impact on the Public Protector's contribution towards promoting good gover-

nance?

By answering these questions this article attempts to join in the discourse of the effectiveness of the Institutions Supporting Constitutional Democracy; thereby contributing new knowledge in the study and practice of Public Administration. In the following section, the research methodology and the theory that have guided this article towards systematically responding to the above research questions are discussed.

6. RESEARCH METHODOLOGY AND THEORETICAL CONSIDERATION

This article has adopted a qualitative research methodology and is thus exploratory in nature. According to Collins and Hussey (2003:42), exploratory research is undertaken when few or no previous study exists. Literature reviewed for this article suggests that studies on the Institutions Supporting Constitutional Democracy in South Africa are very few.

Therefore, the aim of this article is to contribute to the body of knowledge in this field. The article has explored the extent to which the powers and functions of the Institutions Supporting Constitutional Democracy in South Africa are trampled on by the executive and the members of Parliament, all in the name of ignorance. The data collected for this article is largely drawn from the literature surveyed, a case study on the recent reports on the findings and recommendations of the Public Protector, political analyses, and the ob-

servations of public comments made by the executive and some members of Parliament. The research methodology of this article is informed by the systems theory. Theletsane (2014:836) posits that the systems theory argues that interconnectedness among components or systems should be encouraged in order to improve governance in administration. Thus this article leans more on the soft systems approach.

According to Checkland (1981), soft systems approach is an outstanding method for scoping the specific system that needs to be investigated. Therefore, in this article, the system that is being investigated is the complex relationship between the executive and the Institutions Supporting Constitutional Democracy in South Africa in the quest for promoting good governance. The nature of this relationship is complex, hence it can also be investigated from the complex systems theory approach. In complex systems, impacts are co-produced that act as primary obstructions to good governance.

Shepherd (2006:419) cited in Coetzee (2014:823) elaborates that the concept of "impact" includes effect, brunt, burden, shock, thrust, implication and repercussion. Undermining and/or ignoring the powers and functions of Institutions Supporting Constitutional Democracy in South Africa impacts on good governance in a democratic system. Thus the article will conclude by the impact that trampling on the powers and functions of the Institutions Supporting Constitutional Democra-

cy might have on good governance. Having outlined the research methodology and its theoretical underpinnings in this section has laid a foundation for the empirical study to be presented in the following section in the form of a case study on the Public Protector.

7. EMPIRICAL STUDY – THE PUBLIC PROTECTOR AND ITS FINDINGS AGAINST THE EXECUTIVE

Institutions Supporting Constitutional Democracy in South Africa collectively play an important role in supporting legislatures to carry out their constitutional mandate of exercising oversight over the executive. As such, in terms of the principles of systems theory, these institutions are expected to receive corporation from the executive, members of Parliament and other organs of state in exercising its powers and functions.

However, the effectiveness of the Institutions Supporting Constitutional Democracy as accountability and good governance mechanisms does not solely derive its guarantee from the constitutional declarations of their independence and impartiality but also from the cooperation of the executive, the legislature, the judiciary and other organs of state. This section is therefore aimed at answering the first research question. Why is the executive resorting to being less co-operative when the Public Protector exercises its constitutional mandates, powers and functions? The fact that the incumbents of the Institutions Supporting Constitution-

al Democracy are directly appointed by the President, and by extension the ruling party, often poses a challenge to their effectiveness. This might be the first explanation why their powers and functions are often trampled by the executive and its supporters.

Murray (2006:133) stresses that this is especially the case in a situation of one-party dominance where super majorities for appointment and dismissal are rendered ineffective in securing inter-party support because the governing party can choose the incumbents of the Institutions Supporting Constitutional Democracy. The incumbents of the Institutions Supporting Constitutional Democracy in South Africa are constantly faced with the challenge to establish their credibility and to effectively fulfil their mandates. In the case of the Public Protector, the former incumbent, Advocate Lawrence Mushwana's credibility was often questioned.

The fact that he was generally viewed as leaning too much towards the governing party in exercising his mandate, the findings of the Public Protector were regarded, among other things, as whitewash (See The Sunday Times, 14 November 2006, <http://www.sundaytimes.co.za>). The former Public Protector's poor investigation of the Oilgate party funding scandal may be seen to support this view. On the contrary, the credibility of the current Public Protector, Advocate Thuli Madonsela is intact. In fact, she has received accolades from the citizens, political parties, public agencies, academics

and international institutions for her outstanding work in carrying out her office's constitutional mandates. Ironically, criticisms levelled against her office and her personal capacity most came from the executive, the governing party and its alliance.

These bodies seemed to be adamant in trampling on the powers and functions of the Public Protector, more especially since her findings and recommendations on the case involving the State President were not in their favour. The fact that they regarded the Public Protector's findings and recommendations that remedial action be taken against the President as not binding suggests that they pleaded ignorance of the Constitution whose contents they are supposed to be highly knowledgeable of. Instead, the powers and functions of the Public Protector were suddenly equated to those of the Ombudsman. Again, this explain the deliberate trampling of the powers and functions of the Public Protector by the executive.

The Law Society of South Africa (2015:7) cautions that "... it is important for the office of the Public Protector does not get caught up in the debated regarding the binding nature of its findings, but to rather flesh out the appropriate remedial action and place its findings in the public domain". It can thus be argued that it is from this understanding that the Public Protector stood her ground, remained professional and ethical, amidst criticisms and in some instances, insults and threats. Instead of implementing the remedial actions

recommended by the Public Protector, the executive resorted to delaying tactics of, among others, constituting a committee of inquiry to scrutinise the report of the Public Protector, which resulted in the blame being put on the administrators and service providers. In the interest of protecting the integrity of the Public Protector, the opposition parties took up the matter to the highest court of in the land, the Constitutional Court.

On the 31st March 2016, the Constitutional Court presented an unequivocal judgement on the long-dragging Nkandla case broad about by the Public Protector's findings and recommendations for remedial action against the President. In the report titled "Secure in comfort", Public Protector found that the President and his family have unduly benefited from the supposedly security upgrades at his Nkandla homestead, a project that was funded by the taxpayer's money. While the powers and functions of the Public Protector are, arguably, clearly stated in the legislative framework, the President together with his legal team and members of the executive have vehemently denied that the findings of the Public Protector are binding; and tried all the tricks in the book to avoid implementing the remedial action recommended.

De Wet (2016) reports in *The Mail & Guardian*, 20 to 26 May 2016 that "... remedial action directed by the Public Protector, said the highest court in the land, was binding, and neither the president nor Parliament could simply

ignore it." The Constitutional Court ruling of 31 March 2016 is viewed as a vindication of jurisdiction and centralism of the Public Protector in protecting our most fundamental constitutional values. The Court characterised the Public Protector as an independent and essential fighter against public administration. Therefore, given the findings of the Constitutional Court, a further analysis of the treatment of the Institutions Supporting Constitutional Democracy in South Africa is worth noting.

8. ANALYSIS AND DISCUSSION

The Parliament of the Republic of South Africa (2012) recognises the contribution of the Institutions Supporting Constitutional Democracy in promoting good governance when stating that:

"... 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 Institutions Supporting Constitutional Democracy is fundamental to promoting good governance" (Parliament of the Republic of South Africa, 2012:1).

Although the Public Protector is entrusted with clear constitutional responsibilities and producing information that is critical to the exercise of oversight over the executive, it remains one of the Institutions Supporting Constitutional Democracy that the legislatures are not

making full use of to facilitate effective oversight (Parliament of the Republic of South Africa, 2012:4).

The findings of this article suggest that while the functions of the Institutions Supporting Constitutional Democracy are well-legislated, their operations and recommendations are often challenged by the executive when they find themselves on the receiving end. The executive and the legislature are thus viewed as trampling on the powers and functions of Institutions Supporting Constitutional Democracy in South Africa, thereby impacting on the principles of good governance. Thus a discussion of the impact that the undermining of the powers and functions of Institutions Supporting Democracy might have on good governance becomes necessary.

9.THE IMPACT THAT THE TRAMPLING ON THE POWERS OF INSTITUTIONS SUPPORTING DEMOCRACY HAS ON GOVERNANCE

This section is dedicated to provide answers to the second research question of this article. How does the less co-operation of the executive impact on the Public Protector's contribution towards promoting good governance? In igniting the answers to the research question, the article acknowledges that good governance is an important part of holding the executive accountable, in line with the systems theory. Effective legislatures contribute to an accountable government by delivering on their constitutional mandates and thus performing functions that are crucial for

sustaining democracy.

Theletsane (2014:836) argues that poor governance may result from factors such as incompetence, ignorance and lack of efficient institutions. This article has argued that the degree of efficiency of the Institutions Supporting Constitutional Democracy varies, with some institutions being more efficient than others; thereby impacting on good governance. According to King (2006:15), governance involves fairness, accountability, responsibility and transparency on a foundation of intellectual honesty.

Thus governments make use of mechanisms such as Institutions Supporting Constitutional Democracy, among others, to promote good governance. On the one hand, Gildenhuys and Knipe (2000:91) are of the view that governance will be good when a government achieves its ultimate goal of creating the conditions for a good and satisfactory quality of life for all citizens.

On the other hand, Bridgman (2007:14) views good governance as the qualitative state of excellence in decision-making and conformance, and that performance and governance can only be achieved when all institutional roles are operating collectively. It is from this perspective that Coetzee (2014:830) stresses that good governance includes the existence of sound corporate public sector and moral governance. On the same breath, Theletsane (2014:839) cautions that good governance manifest itself when (according to the systems thinking the-

ory) systems and structures function as intended. Therefore, the findings of this article suggest that trampling on the powers and functions of the Institutions Supporting Constitutional Democracy, in the name of ignorance, have a negative impact on good governance, especially in a new democracy like South Africa. The impact also touches on moral and transformational leadership.

10.RECOMMENDATIONS AND CONCLUSION

Flowing from the findings of the empirical study, the above section has outlined the impact that the Institutions Supporting Constitutional Democracy in South Africa have on good governance. Thus in line with the tradition of providing recommendations just before concluding a research article or report, this section is meant to suggest some recommendations for further study.

While Chapter 9 of the Constitution of the Republic of South Africa 1996 details the functions and powers of the Institutions Supporting Constitutional Democracy, this article has argued that some institutions are more effective than others. Literature surveyed for the purpose of this article has revealed that studies on the Institutions Supporting Constitutional Democracy in South Africa are minimal. The first recommendation of this article is that more research needs to be conducted on the effectiveness and barriers of other Institutions Supporting Constitutional Democracy, since this arti-

cle has mainly focused on the Public Protector. It is from this point that the second recommendation of this article is in a form of a suggestion for other researchers to consider conducting a comparative study, for example, of the extent to which the findings of the Auditor-General and the Public Service Commission are being implemented by government departments and/or municipalities.

The final recommendation emanating from this study is for the executive and Parliament to seriously take to heart the lessons learned from the Constitutional Court ruling of 31 March 2016 that the findings and recommendations of the Public Protector are binding. The same respect that is to be given to the Public Protector should thus be extended to all the Institutions Supporting Constitutional Democracy in South Africa.

Given that the term of office of the current Public Protector comes to an end in September 2016, it was considered proper to ignite the conclusion of this article in the words of the Executive Director of Corruption Watch, David Lewis (31 March 2016), when stating that "... Thuli Madonsela's term of office has underlined how important it is that the Public Protector be a person of integrity and courage."

The powers and functions of all the Institutions Supporting Constitutional Democracy in South Africa are central to holding the executive and other organs of state accountable. Finally, the executive, the legislature and the

judiciary should then cooperate with the Institutions Supporting Constitutional Democracy in compliance with the Constitution, the principles of good governance and the systems theory.

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