

"forensic and devastating" - Aubrey Matshiqi

WORKING DEMOCRACY

*Perspectives on South Africa's
Parliament at 20 Years*

Christi van der Westhuizen

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Foreword

I find myself using the word “counter-hegemonic” a lot in my writing these days. This, I believe, is a function of my state of mind and the state of the nation and is, therefore, about our state of being as human beings and South African citizens.

My mind is populated, among other things, by a gallery of faces from the past and my present. In the present, the image of Christi van der Westhuizen is the face of the counter-hegemonic in this gallery because, as evidenced by her writing in this publication, her logic is nothing if not devastating and challenging.

The collection of her columns and essays in this publication deals mainly, but not exclusively, with our parliament as one of the democratic institutions that must deliver a democratic experience for us as citizens that will, in material and qualitative terms, be the antithesis of our apartheid past.

Since we sometimes take for granted what has been achieved since 1994, her essay on how between 1994 and 1996 the post-apartheid parliament ‘made’ and ‘unmade’ history serves as a useful reminder. In it she reminds us of how the Constitutional Assembly (CA) and the new parliament worked both together and in parallel to destroy the apartheid legislative architecture while, at the same time, the edifice of a new order was being constructed.

But, she reminds us also that our parliament was meant to be the “highest representative body” in our democracy – something that has never been reflected sufficiently in the budget process. As she correctly argues, the fact that the money bills law was not passed after the adoption of

the Constitution in 1996 and was only passed after the third democratic election can, at best, be explained in terms of the change in leadership in 1999 and, at worst, in terms of the impact of the arms deal scandal on the content of parliamentary processes.

For me, this is just another illustration of the corrosive effect of single party dominance in the context of our electoral system of proportional representation (PR). For a brief period between the conclusion of the 2007 Polokwane conference of the ANC and the 2009 elections, ANC parliamentarians were robustly challenging the executive. However, the past 20 years in parliament has generally been about privileging the wishes of party bosses over the needs and interests of citizens. The tragedy is that this malady is systemic and has infected political parties in parliament across the board.

In her essay on the Protection of State Information Bill, van der Westhuizen gives us a sense of realism with a tinge of the cynicism that seized many of us when parliament (read the ANC) decided to subject the bill to a public participation process. The public and media outcry over the draconian bill must have reminded the ANC parliamentary majority of how the Constitutional Court had taken a dim view of parliament's failure in the past to give its processes the appearance of meaningful public participation.

What is critical, though, are two contradictions that some of her essays allude to. With regard to the secrecy bill, the impotence that is imposed by single party dominance and our electoral system on our parliament coincided with the reality of the vibrancy of civil society mobilisation forcing the majority party to be sensitive to the voices of "ordinary" people. The second contradiction is contained in the tension between the supremacy of the Constitution and that of parliament as was the case during apartheid. The possibility, therefore, is that in the foreseeable future the ambivalence of the majority party towards those democratic values

that define this tension will remain a feature of our parliamentary edifice.

This collection of provocative insights and thoughts includes an essay about the DA and how it has dealt with the issue of race. Here, van der Westhuizen is at her most counter-hegemonic and her logic is particularly forensic and devastating.

This collection is a must-have for anyone who needs an erudite but accessible account of the past 20 years in the life of our post-apartheid parliament.

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Abbreviations

ACDP	African Christian Democratic Party
ANC	African National Congress
APC	African People's Convention
AG	Auditor General
CA	Constitutional Assembly
CC	Constitutional Court
CGE	Commission on Gender Equality
CLC	Community Law Centre
CLaRA	Communal Land Rights Act
CPAs	Communal Property Associations
CSOs	civil society organisations
CTOPA	Choice on Termination of Pregnancy Act
DA	Democratic Alliance
DP	Democratic Party
DPCI	Directorate for Priority Crime Investigation, or Hawks
DG	director general
DSO	Directorate of Special Operations, or Scorpions
DTI	Department of Trade and Industry
EE	Equal Education
GAP	Gender Advocacy Programme
GGLN	Good Governance Learning Network
ICD	Independent Complaints Directorate
IFP	Inkatha Freedom Party
IPID	Independent Police Investigative Directorate
IPU	Inter-Parliamentary Union
ISS	Institute for Security Studies

JIT	Joint Investigating Team
MEPs	members of the European parliament
MPs	members of parliament
MTBPS	medium term budget policy statement
NA	National Assembly
NCOP	National Council of Provinces
NDPP	National Director of Public Prosecutions
NIA	National Intelligence Agency
(N)NP	(New) National Party
NPA	National Prosecuting Authority
NGOs	non-governmental organisations
PAIA	Promotion of Access to Information Act
PFMA	Public Finance Management Act
PR	proportional representation
RWM	Rural Women's Movement
R2K	Right2Know campaign
SAHRC	South African Human Rights Commission
SANDF	South African National Defence Force
SCA	Supreme Court of Appeal
Scopa	standing committee on public accounts
SOA	Sexual Offences Act, or Criminal Law (Sexual Offences and Related Matters) Act
SOS coalition	Save Our SABC coalition
SSA	State Security Agency
TCB	Traditional Courts Bill
TLGFA	Traditional Leadership and Governance Framework Act
WEGEB	Women and Gender Equality Bill



SECTION 1

PARLIAMENT 1994-2008

- i. *History unmade and made: The Constitutional Assembly 1994-1996*
- ii. *The Employment Equity Act of 1998: The DA's race fix*
- iii. *The heavy hand of the executive: Paradoxical outcomes*
 - Arms deal ■ Choice on Termination of Pregnancy Act of 1996
 - AIDS denialism ■ Civil Union Act of 2006

History unmade and made: The Constitutional Assembly 1994 - 1996

Between 1994 and 1996 South Africa's parliament was probably one of the most remarkable democratic spaces in the world. History was not merely being made but also unmade: in the very chamber where laws had been adopted for decades to exclude people marked as "black" from power, representatives of those very people were drafting a new supreme law to include all in the land who lived in it.

Parliament performed a double function during those years. Alongside the exciting and also laborious process of repealing apartheid laws and replacing them with democratic, human rights-based laws, and wrestling with the "nightmare" of integrating 14 separate administrations (Manie interview), it served as the CA. This body, with its 490 members drawn from across parties and from across South Africa, was the furnace where the final Constitution of 1996 was forged.

The CA's deliberations ran parallel to the parliamentary programme, exerting immense pressure on MPs. According to Dr Leon Wessels, CA deputy chairperson, "competition for MPs' attention" included shaping parliament into a democratic legislature and integrating the multiple administrations, including the Bantustans, that the apartheid regime had created, while going about the "ordinary" work of parliament, such as

approving departmental budgets (interview). The agendas of parliament and of the CA were coordinated between the CA chairperson and the speaker to ensure that “as many MPs as possible gained exposure” to the drafting of the Constitution.

Twenty years into democracy and the refrain is becoming louder that the Constitution is “too sophisticated”, “too ambitious” or “too liberal”. The latter claim, of the ostensible “liberal” character of the Constitution, blatantly obfuscates and disregards the fact that the Constitution does indeed, almost uniquely, provide for a second tier of socio-economic rights without which, for example, the precedent-setting Grootboom case in 2000 could not have been heard. Indeed, as the Constitutional Court pointed out in its finding on the Grootboom case, the Constitution entrenches the socio-economic rights of access to land, adequate housing, health care, food, water and social security, while protecting the rights of the child and the right to education. The issue, said the Court, is not whether socio-economic rights are justiciable but rather how to enforce these rights.

The challenge of enforcement, which speaks to the capacity of the state, sadly meant that Irene Grootboom passed away in 2008 before the Court’s finding was given effect. The claim that the Constitution is “too ambitious” relates to this challenge of the state’s capacity to enforce rights. This claim can be read in two ways. First, that state capacity, as exemplified by state failure in the Grootboom case, is inadequate to meet the demands of the Constitution. Second, that high levels of violence directed at various groups indicates an intolerance, to put it mildly, towards difference that flies in the face of the Constitution. The obvious response to this claim is: are proponents of this position therefore suggesting that the inadequacy of state service delivery should merely be accepted as is, a kind of “if all else fails, lower your standards” move? Even if the state was not obliged to transform itself after the iniquities that it perpetrated during apartheid, it is commonplace that states are imperfect but necessary institutions in the governance of humans and their needs. Faltering state capacity is a reality that cannot but be addressed.

Interestingly, these claims contradict each other because, on the one hand, it asserts that the Constitution is insufficient and does not go far enough while, on the other, that the Constitution overreaches. Such contradictions alert us to the ideological underpinnings of these arguments: the underlying opposition is to the controls that a majority party is subject to in a constitutional state. This has been the real bone of contention from the time of the negotiations until now.

The accusation of the Constitution being “too sophisticated” runs up against the extensive public participation process that informed the drafting of the final Constitution in parliament. It is worth pausing to look at this process. While much has been written about the Conference for a Democratic South Africa (CODESA I and II) and the multi-party negotiating process (MPNP) that followed the breakdown of CODESA (see van der Westhuizen 2007), parliament’s drafting of the final 1996 Constitution has by and large not enjoyed much analytical attention (Strand, 2001). An exception is Hassen Ebrahim’s book *The Soul of a Nation: Constitution-making in South Africa* (1998) which traces the drafting process in the CA from beginning to end. Ebrahim, who served as the chief executive officer of the CA, devotes a chapter to the CA’s engagement with citizens, titled “The public participation process”. Before the 1994 election political parties managed to reach an agreement that the final Constitution be created by a democratically elected parliament. This was a compromise for the formerly ruling National Party (NP), which had aimed to insulate constitution-making from democratic pressures. While the public could not gain access to the negotiations before the 1994 election, the CA was an open forum. According to Ebrahim (1998:240-1), it was driven by the following imperatives:

“...the process of constitution-making had to be transparent, open and credible. Moreover, the final Constitution required an enduring quality and had to enjoy the support of all South Africans irrespective of ideological differences. Born out of a history of political conflict and mistrust, the credibility of the final constitution was an important aim, and as such it depended on a

process of constitution-making through which people could claim ownership of the Constitution [...] [T]he constitutional foundations of democracy had to be placed beyond question [...] The South African people not only had to feel a part of the process, but the content of the final constitution had to be representative of their views [...] [T]he process had to be seen to be transparent and open." (p. 240-1)

These aims were set to redress the shortcomings in public participation in the pre-1994 drafting of the interim Constitution, as described by ANC MP Salie Manie in a speech at the start of the CA deliberations: "...people on the ground found the process to be very complicated. They could not follow it... because it was... also extremely technical. The pace was extremely fast. We did not know what was happening from one day to the next. We must admit there was very limited grassroots participation in the process" (RSA (Hansard), 1994:58). Therefore, the ANC position was that "the multiparty negotiators did not have the legitimacy that this body's [the CAs] elected representatives have" (ANC MP Baleka Kgositsile in RSA (Hansard), 1994:69). Thus the ANC resisted pressure from the other parties to merely adopt the interim Constitution and instead insisted on "writing a new one". This would be done with the awareness that while legal experts may prefer jargon, the Constitution should be "for the people", with "uncomplicated and unconfusing" language (p.70); the language was of "fundamental significance" (Cyril Ramaphosa in RSA (Hansard), 1996:83). For the ANC at the start of the CA, the "people of South Africa must be involved. They must be consulted, in an organised fashion, on specific issues in order for the new supreme law to be sensitive to and shaped by their realities, and for it to address these realities" (Mbetse in RSA (Hansard), 1994:70). The Constitution had "to be accessible to all the people of our country", thus "[s]implicity, clarity, precision and consistency were to be achieved at all costs" (Ramaphosa in RSA (Hansard), 1996: 83).

The CA adopted a specific set of rules regarding process, in which public

participation and media exposure featured prominently. Public forums were held with “specific attention to the population in rural and underdeveloped areas”. Forums were targeted at consulting both specific sectors and broad-based audiences (p.119). A national survey conducted in the first half of 1995 showed “fairly high” knowledge that a constitution was being drafted but the nature and function of a constitution was still not clear to a “sizeable” proportion of the population (Hassen, 1998:243). Manie and ANC MP Janet Love emphasised the use of media “in a different way, so that people can understand what is going on and issues can be simplified” (Manie in RSA (Hansard), 1994:58). Ebrahim (1998:242) describes a wide-ranging campaign “to inform, educate, stimulate public interest and create a forum for public participation”, using community liaison, media liaison and advertising. The community liaison was geared towards creating opportunities for face-to-face engagement between MPs and members of the public.

Television and especially radio, with its enhanced reach, were used, with regularly scheduled slots during 1995 and 1996 featuring MPs and civil society members. Weekly talk shows featured on eight radio stations in Sotho, Venda, Tsonga and others. The *Constitutional Talk* line allowed members of the public to phone to access information in Zulu, Xhosa, Tswana, Afrikaans and English, while printed media included a *Constitutional Talk* newsletter distributed at taxi ranks. A public campaign was also run to solicit input on the *Refined Working Draft*, a preliminary version of the Constitution containing alternative options. Some five million copies were distributed in November 1995 and 250,000 submissions received. Of the final Constitution, seven million copies were distributed in the 11 official languages. A national Constitution week was hosted in March 1997 to promote the Constitution as reference point and to create a sense of ownership.

CA members were divided into theme committees tasked with particular issues. The need arose for these committees to “consult and engage” with civil society organisations (CSOs) with expertise in the areas of the

different rights to be enshrined in the Bill of Rights, the judiciary, security agencies, public administration, and so forth.

“The preparation of these hearings was handled by a partnership between the CA and structures of civil society. This was a deliberate part of the strategy, for it avoided the possible accusation of partiality, and also ensured the greatest possible representativeness at the hearings, and an agenda that was acceptable to all.” (Ebrahim, 1998:245)

Makhosazana Njobe, who served on the CA’s theme committee on health, explains that the ANC was particularly focused on bringing in CSOs with experience of the lived realities that people faced. CSOs were also “prepared to assist in any away possible” at the time (interview). Njobe, an ANC MP between 1994-2009 and Cope MP from 2009-2014, says ANC MPs brought new practices to parliament: “The NP people wanted to know how can you bring in ordinary people to discuss issues? It was important for us in the liberation movement to bring people in who had been in contact with the experiences on the ground.” Cosatu, churches, business and language groups, among others, also targeted the CA for concerted civil society action.

ANC MP Valli Moosa pointed out at the time: “The whole concept of the CA is that people with no idea of constitution-making should get involved in the process. The idea... is that the final constitution should not only be written by constitutional lawyers and by the law barons but by elected representatives of the people from all walks of life. This is that Assembly. Whether or not diplomats or anybody else likes it, we shall be drafting the next Constitution. We have been elected by the people of this country to do so” (RSA (Hansard), 1994:62). “Constitutional public meetings” were held, particularly in rural and disadvantaged areas to compensate for the limited reach of the media in these areas (RSA (Hansard), 1994: 62). These meetings were accompanied by workshops to prepare members of the public, creating, Ebrahim (1998:245) notes:

“[f]or most people, the first occasion on which they were able to directly interact with their elected representatives [...] It was a humbling experience to realise that constitutional debates and issues are not only the domain of the intellectual elite, but that they belong to everyone”,

Wessels recalls: “Somewhere there would be a policeman sitting, working night shift... He writes a letter to say... which maybe isn’t exactly material to build a constitution from but it shows he knows about the process and he participates. He tells how bad his working conditions are. Thousands of people wrote letters like that” (interview). Some 1,7 million submissions were received from the public, mostly in the form of petitions (Ebrahim, 1998:244). In all, more than two million people participated in the process by either attending meetings, writing letters, making submissions, with a survey showing that the CA managed to reach 73 percent, or 18,5 million, of adult South Africans (Cyril Ramaphosa in RSA (Hansard), 1996:82).

Hence, in parliament’s pursuit of participatory democracy, knowledge about constitutions and constitutionalism was democratised. NP MPs who returned to the democratic parliament “knew” about the apartheid running of a Westminster-styled parliament (Njobe interview). In contrast, ANC members “entered as activists with no idea of what was waiting” for them.

“It was only [in about 1988] that we started realising that there’s a real possibility that we could be part of [the democratisation of South Africa] and then the capacitating process started... The unbanning moved more rapidly than expected... Parliament was very far away... I knew little about the actual institution, what to expect and how it was structured and how it operated. It is only once I came there that I realised the crucial role of the portfolio committees... Little about parliament is collective” (Manie interview).

However, MPs from the liberation organisations of the ANC, Azapo and PAC entered with different knowledges – and, it is here argued, more

relevant knowledges about the actual lived challenges caused by apartheid and colonial legacies. The extent of public participation in the drafting of the 1996 Constitution, as facilitated by parliament, delivers a significant blow to the argument that democratic South Africa's social contract is an "elite" document.

Another oft-repeated charge is that so-called sunset clauses agreed on at the 11th hour during the negotiations secured compromises that still hobble transformation. However, the sunset clauses pertained to short-term security for old order public servants who mostly made use of early retirement opportunities to leave. These clauses did not affect the substance of the Constitution. Rather, a set of "constitutional principles" was the primary constraint on the final Constitution. The CA could not change these principles, or the decision that the final Constitution comply with them, or that the Constitutional Court should certify it as such (Strand, 2001). That, along with the ANC's failure at 62% to achieve a majority sufficient enough to go it alone in the drafting of the final Constitution, ensured that the drafting of the final Constitution was a process shared by all parties that managed to achieve representation in parliament.

That said, the ANC's significant majority and negotiating acumen in the person of Ramaphosa as CA chairperson allowed it to achieve outcomes closer to its own vision and which did not totally adhere to the constitutional principles. The constitutional principles were the following: a three-tiered system with separate democratic elections at national, provincial and local levels; horizontal checks and balances, including an independent Reserve Bank, Chapter 9 institutions and Constitutional Court; equal citizenship regardless of race or gender; affirmative action; collective bargaining and fair labour practices; recognition of traditional leadership and a degree of ethnic self-determination; and provincial powers that were not "substantially less than or substantially inferior to" those in the Interim Constitution.

The ANC managed to manoeuvre its position more favourably regarding the form of the executive, which, along with the contents of the Bill

of Rights, was not circumscribed by the constitutional principles (Strand, 2001:49-50; Ebrahim, 1998:619-626). The particulars of the Bill of Rights were not finalised in the interim Constitution because of the ANC's view that a democratically elected body had to decide these rights (ANC MP Baleka Kgositsile in RSA (Hansard), 1994:68). The question of the executive was not fixed in the constitutional principles because of the NP's demand that the temporary arrangement of a government of national unity (GNU) be made permanent (Wessels interview), in accordance with consociational thinking.

Regarding the executive, the interim arrangement was that it would be subject to "power-sharing", in that parties that achieved a minimum threshold of support in the 1994 election would enjoy representation in a GNU. After the 1994 election, which "cut the NP down to size", then deputy president Thabo Mbeki made it clear that there could be "no such thing as permanent power-sharing" (Wessels interview). The NP's effort to advance a consociational solution was decisively defeated (Habib, 2013; van der Westhuizen, 2007). This could also be attributed to "the seeming infatuation of the CA with an executive president" (Venter, 1996:38). The consociational proposal of the "best" model for "deeply divided societies" being a ceremonial president as figurehead while a premier handled the day-to-day governing, (p. 38) did not gain traction. Instead, the ANC advanced the idea that: "The functions which the president can perform without consulting need to be expanded, if only for the smoother functioning of government" (Strand, 2001:50) However, not all in the ANC agreed, as can be seen in Valli Moosa's comment in an address to the CA about the interim constitution in 1994 that "I am not convinced that we have an adequate separation between the legislature and the executive. Many of us argued that cabinet ministers should be MPs, so that they could keep in touch with... parliament... [W]e need to ask whether they are not so much in touch with parliament that they in fact control it..." (RSA (Hansard), 1994: 64). These turned out to be prescient words.

Ultimately, the ANC managed to navigate the negotiations about the powers of the executive and the relationship between the national and provincial levels of provinces in such a way as to circumvent some of the constraints that the constitutional principles had imposed. The formulation of the executive's powers allowed Thabo Mbeki, the second president of democratic South Africa, to centralise power in the presidency during his first term, in what Habib (2013: 52-3) regards as the third and final evolution in the post-apartheid state architecture during its first two decades. Likewise, the ANC's notion of cooperative governance dominated the formulation of the powers of the different government tiers and ensured that the NP and the DP's versions of federalism were not actualised. The powers that the provinces possess are not exclusive – the national government retains the final say (Strand, 2001:53). Provinces' political programmes remain contingent on the "overall political vision underpinning" cooperative governance, with national government retaining the right to assert executive authority in the provinces. "Power-relations were clearly skewed in favour of the central government" (p.54). The powers of the provinces were among the matters that the Constitutional Court referred back to the CA for revision to bring them in line with the constitutional principles. However, the final version was "still less than or inferior to those accorded to the provinces" in terms of the interim constitution, even if not substantially so (p.60). Thus Strand surmises that the ANC used "its dominance to transfer some power from the provinces to the central government" (p.61).

Resurgent anti-constitutionalism in the public discourse can be traced back to the ANC's proposal to the CA at the beginning of the process, in which it expressed disquiet about "some of the rights in the Interim Constitution [being] drafted without a proper perspective of the challenges of governance and thus do not [strike] the appropriate balance between the role of the courts and the role of Parliament". It added: "It is in our interest only to ensure that there are no unnecessary constitutional limitations on the expression of the will of Parliament" (Strand, 2001:51-2). However, ANC MP Cyril Ramaphosa as chairperson of the CA emphasised that the

constitution-makers did not feel that having the constitution as the supreme law, the Bill of Rights and independent courts would be enough to “safeguard and deepen democracy” and therefore added the Chapter 9 institutions to support democracy (RSA (Hansard), 1996:85). Then deputy president Thabo Mbeki traced the antecedents of the Constitution back to both the Freedom Charter of 1955 and to the Harare Declaration of 1989. The ANC’s own “Constitutional Guidelines for a Democratic South Africa” (1989) emphasised democracy based on a constitution with a bill of human rights. It is worth quoting parts of Cyril Ramaphosa’s address to the CA as its chairperson on 23 April 1996 in the first reading debate on the Constitution of the Republic of South Africa Bill. He pointed out that the Bill of Rights was intended to curtail governmental power while ensuring fundamental rights. It would be inadequate, he argued, to limit these rights to political, civil and customary rights, which is why socio-economic rights are also protected to guarantee equality and thus redress “the imbalances and injustice of past discrimination”. He added: “Our country is now a constitutional state, a country in which the Constitution, not parliament, is supreme; a country in which our courts are the guardians of the Constitution... Effectively, the courts have the power to ensure that this Constitution is not abused by any government and that our people are never abused under this Constitution. Our people have suffered enough, they have been abused enough, they have been subject to improper and immoral exercise of governmental power. Our society has been deeply divided as a result. We have risen to our historic duty to... guarantee that what has happened in the past will never happen again” (RSA (Hansard), 1996:84-5). The Constitution as supreme law was to be, as Mbeki (1996:89) put it in the same debate, “the protector of our nation from tyranny”.

The Employment Equity Act of 1998: The DA's race fix

At the end of 2013, the DA found its policy position on race in the full public glare. Its members in parliament's portfolio committee on labour had voted in favour of amendments aimed at further strengthening the Employment Equity Act of 1998. The original law legislates affirmative action for "designated groups", identified as black people, women and disabled people, while the 2013 amendments enhance the powers of enforcement.

The DA representative on the committee, Sej Motau, declared during the labour budget vote debate in May 2013: "Higher Education Minister Blade Nzimande made a blatantly untrue statement that 'the DA opposes affirmative action'. I challenge the honourable minister to produce a DA policy document stating that the DA opposes affirmative action. For the edification of Honourable Nzimande, the DA supports the constitutional provisions for affirmative action and the objectives of the Employment Equity Act to promote redress in the South African labour market" (PMG, 22 May 2013).

However, as a former DA official pointed out (*Business Day*, 11 Nov 2013), Motau was wrong. There is such a policy document: *The Death of the Rainbow Nation. Unmasking the ANC's programme of re-racialisation*, published in 1998.

The party's former leader, Tony Leon, brought the inconsistency of the DA's support for the Employment Equity Amendment Act of 2013 to the public's attention in the press. What followed were retractions and apologies, not least from DA leader Helen Zille herself, with the result that the DA officially reverted back to its position of rejecting the employment equity legislation.

However, the controversy showed that the party had come before a crucial decision: as its race profile changed and as it attempted to "govern for all" in the places it controlled (Cape Town and the Western Cape), its position on race shifted organically (van der Westhuizen, 2013). As a black leader of the party told *Business Day* (18 Nov 2013): "There is no way you can redress a problem that was created by race without reference to race." Zille admitted to the complexity:

"Ideally we should not have racial classification. But the difficulty is how to move to a nonracial society when the disadvantage that exists is there as a result of racial discrimination?" (*Business Day*, 18 Nov 2013).

Under Zille's leadership, the party shifted from the white pugilist "Fight Back" position under Leon to "The DA delivers for all", inclusive messaging foregrounding women and people of different races (van der Westhuizen, 2011). In response to Leon and RW Johnson, who joined ranks with him on behalf of the party's "old boys", Zille argued that "these critics have come perilously close to postulating a choice between 'merit' and 'colour'. We reject this outright. It is racist, plain and simple. The DA believes that inherent talent and ability are spread throughout all sectors of society." And, she said, affirmative action and employment equity are compatible with liberalism (DA, 2013). But she still rejected the use of demographic representivity to determine racial transformation and she claimed the discussion would not be necessary, "if we had fast enough growth and good education as there would be such a demand for skills" that race would be immaterial (*Business Day*, 18 Nov 2013). This position against representivity and for growth, as articulated by Zille and of

which Motau was unaware, was stated in a cogent form in *The Death of the Rainbow Nation*.

It is worth briefly tracing the genealogy of the present-day DA in relation to race. As elsewhere, liberalism has had a fraught history in South Africa, given its complicity with colonialism and, locally, with apartheid. Strands within South African liberalism broke into more radical stances, such as the African Resistance Movement. The Liberal Party (LP) shifted from a racist, classist position of supporting a qualified franchise for black people to an eventual position of democratic socialism (Egan, 1998). In the end the party dissolved itself rather than abide by the NP regime's injunction against multiracial political parties in 1968. The Democratic Party/Alliance does not come from this strand. Its antecedent is the Progressive Party (PP). The PP consisted of a liberal fraction that had broken with the United Party (UP), a splintering provoked by the UP sliding ever closer to the NP's position. As the LP became more radical, for example joining the ANC in an overseas call to boycott South African products, its more conservative members left for the PP (Everatt, 2009:200). In 1968, the PP chose to shed its mostly coloured members (Ballinger, 1969:488) for its lone parliamentary member Helen Suzman to continue participating in the white democracy that was apartheid, albeit in the parliamentary opposition benches. Suzman was the bane of the sexist Afrikaner nationalists in power but her legacy is complicated by questions of political opposition: is opposition from within possible? Does it not lend credence to the system? Isn't the internal opponent unavoidably complicit? Lastly, the party's position on race is caught up in 20th century liberal thinking in South Africa: that capitalist modernity brings progress that will eventually make racist discrimination unnecessary. The contemporary version of this thinking is that an "open opportunity society" renders race, and therefore also affirmative action, irrelevant. The net result of this position is to leave extant power relations intact.

The present-day DA's race problem made itself felt in the late 1990s when the party repositioned itself to benefit from the crumbling of the (New)

NP. Bereft of its ideological mainstays after the collapse of apartheid and Afrikaner nationalism, and discredited by both, the NNP was floundering. Picking up the pieces, with their ideological baggage, was the newly muscular DP (which became the DA after merging with the NNP) (van der Westhuizen, 2007, 2013).

In the debacle around the Employment Equity Amendment Act in 2013 Leon again emerged as the party's bellwether on race. His statement during the debate on the original act in 1998 was repeated as a mantra: that the Employment Equity Act (EEA) was a "pernicious piece of social engineering". At the time, the then DP had used its response to the EEA to set itself apart from the ANC.

The Death of the Rainbow Nation exposes the party's race thinking, of which Leon remained the gatekeeper 15 years later. It is a mode of thinking, on the one hand, that allowed the DP to unseat the NP as official opposition and become the party of choice for former NP voters. But, on the other hand, it is also a mode that has kept the ceiling in place against which the party keeps on bumping in its efforts to attract support from black voters.

The publication analyses the ANC's "programme of re-racialisation" in four sectors: labour, public service, higher education and sport. The DP positions this "programme" as a "creeping reintroduction of race policies justified by the need for 'corrective action'" (p.2). By page three the lines are blurred between racial and racist: the policies under discussion are described as "racist".

After the introduction and overview, the main body of the publication opens with a description of Jim Crow racial segregation measures in public transport and facilities in the US, under the heading "The danger of racial politics". Sections are quoted from "a seminal work on the rise of segregation in the American South" by C Vann Woodward. The section concludes with the following statement: "...just because race-based

legislation is absurd is no check on its introduction... Racial legislation is a very slippery slope: apartheid, American segregation and Nazi Germany all had very small beginnings..."

No direct statement is yet made that democratic-era legislation is equal to apartheid legislation, or for that matter Nazi or Jim Crow laws. But the section succeeds in creating an equivalence between, respectively, racist legislation and legislation aimed at reversing the effects of racist laws. It allows the later equation in the document of the Employment Equity Bill with the foundational apartheid law the Population Registration Act (p.8), of affirmative action with "positive apartheid" (p.13) and the apartheid-era Group Areas Act (p.26). Introducing its position with an author critical of racist laws (Woodward), the DP manages to align itself with the anti-racist position, and therefore with the higher moral ground of the latter (while bemoaning it on pp.23-4 and 27-8). It is a stunt aimed at disassociating the party from racism, which had been discredited with the fall of official apartheid. Having asserted the party's "anti-racist starting point", it then proceeds to malign steps aimed at *overturning* the effects of legislated racism. In South African politics, this coincides with the Afrikaner nationalist far-right's adoption of democratic terms to legitimise its quest for a *volkstaat* (Pillay, 2005). This attempted trick of perception is a forerunner of the later Red October campaign, which in 2013 appropriated a Communist term along with quotations from US civil rights leader Martin Luther King Jr to advance a racist agenda (van der Westhuizen, 2013).

In the next section of the publication, the Leon mantra of the EEA as "social engineering" emerges, reinforced with a persecutory and also bureaucratic element in the use of the phrase "racial inquisition" (p.12) and "racial bean counting" (p.15). It cites then deputy president Thabo Mbeki's description in 1997 of the apartheid and colonial-created reality of the predominance of white people in spheres ranging from the media to higher education to the public and private sectors. Mbeki is quoted as saying that affirmative action, a policy jointly agreed on during the multiparty negotiations, aims to achieve a more equal, broadly

representative society. This goal is cast in the analysis as demanding the “relentless retreat of minority rights” (p.6), in a move reminiscent of the *swart oorstroming* (black swamping) rhetoric of the NP. In a *swart gevaar* (black peril) move, the goal of the inclusion of a greater variety of people in the upper echelons of the economy is flipped around as the “racial exclusion of minorities” (p.6). Predicating affirmative action on the “racial exclusion” of “minorities” allows the authors to then argue that the Employment Equity Act amounts to “the racial transfer of reserved job opportunities” (p.8).

Simultaneously, and seemingly contradictorily, it is then argued that the policy does “little” for “poor, illiterate, homeless black people”. This positioning naturalises white predominance in all economic sectors as a (minority) “right”, while simultaneously erasing the mutually reinforcing relationship between race-based economic privilege and race-based economic deprivation. These race realities are disconnected from each other in the analysis, with the ANC assigned to attending to the “still” “poor, illiterate, homeless, black” people (see also p.16). Conversely, ANC attempts at redress in the upper echelons of the economy amount to racial exclusion of “minorities” (read: white people). Thus the upper echelons of the economy are posited as naturally white.

The *swart gevaar* motif continues in vaunted “black racial agitation in the workplace” and “racial mobilisation”, which would be caused by the EEA (p.13), the document purports. In the following sentences, black people’s advancement is equated with racial mobilisation, while “individual merit” becomes implicitly the reserve of the “undesigned minority”: “Advancement will be achieved not through individual merit but through racial mobilisation. Whatever the level of the employment equity targets, for business to meet them will require the almost total exclusion of the ‘undesigned’ minority in appointments and promotions” (p. 13). Later in the document, the *swart gevaar* becomes all-encompassing: “When minorities have had their protections removed and the structure of racial domination put in place, they will be too weak to do anything” (p.24).

An oddity in the document is the insistence that the EEA, the Draft White Paper on Affirmative Action in the Public Service, the White Paper on Transforming Higher Education and the document “Towards an affirmative action policy in sport” are racial measures, while simultaneously admitting repeatedly that the actual target groups of these measures are “blacks, women, and the disabled” (pp.14,15,17,18,20,21). For example, under the subheading “Analysing the racial profile of the workforce” it is stated that an employer is required to identify barriers affecting “black people, women and the disabled”. Surely, then, the subheading should read “Analysing the racial, gender and disability profile of the workforce”. This unrelenting folding of the other social categories (see pp.10,12,13,14,15,17,18,22) into race serves to foreground race while erasing the other categories earmarked for advancement in government policy. It effects the very racialisation that the document accuses the ANC of, despite its protestations about “ANC racialisation”.

It also serves to hide the actual category that it seeks to defend and which is the beneficiary of the policy position on offer in the document: that of white, able-bodied men. This category is never named as such but is hinted at by the document’s consistent assumption of a male agent, whether as employer or cabinet minister (pp.9, 10,26). Also, in the use of the phrase “‘undesigned’ minority” (p.13), the document unwittingly gives away the beneficiary of its position. The only “undesigned” group is that of white, able-bodied men. Erasing “white women” as one of the groups designated for affirmative action (see also p.25) aims to create an undivided whiteness, in which racial solidarity trumps gender justice.

The persistent use of “minorities” serves to collapse the categories of coloured and Indian with white, while hiding the latter. It is also inaccurate in that the designated group “black people” in the EEA includes not only the present-day category African but also those categorised under apartheid as coloured and Indian. Therefore, the policy position seeks to recast Indian and coloured people as “minorities”, rather than

those previously discriminated against under apartheid. If one re-inserts the invisibilised categories of black (including Indian and coloured) people, women and disabled people, the policy position on offer is exposed as not only about safeguarding white privilege but safeguarding white, able-bodied, masculine privilege.

The argument is framed by an insistence on de-historicising and de-contextualising the effects of race and racism in South Africa. Overall, acknowledgement of the legacy of apartheid as system of institutionalised racism is avoided by splitting its legacy into two: “group-think with Verwoerdian spectacles” (i.e. “racial transformation”) and the “socio-economic evils” of “the legacy of poverty, of unemployment, of illiteracy, of crime and of institutional decay” (p.33). Thus democratic-era racial transformation is recast as “Verwoerdian”. Acknowledging the “socio-economic evils” allows the statement that racial equality is a “mirage” (p.30-1,34), an assertion which would fall sweetly on the ears of former NP supporters. The few direct references to the legacies of colonialism and apartheid are qualified as “problems” belonging to the ANC to resolve, for example, “in some instances, it [service delivery] is changing for the worse – surely the most searing indictment possible for the government which was supposed to rid us of the legacy of apartheid” (p.16 – see also p.19). Post-apartheid government failures are dehistoricised and pinned solely on the failings of the ANC as ruling party (pp.28, 30). It amounts to a white logic of “let them look after their own people”. As the ANC is explicitly identified as “black” (p.30), black is rendered synonymous with “cronyism, corruption” and “transformation” (p.28).

The dehistoricisation is enabled by blanket denial about historical factors playing any role in South Africa’s socio-political and economic problems, for example:

“‘[T]hree hundred years of the [sic] colonial and apartheid domination’ is such a vague and abstract concept that it applies to everything and to nothing. When it comes to identifying and addressing the concrete problems facing South Africa it is meaningless.”

“What exactly this ‘white privilege’ is, is never explained or spelt out.” (p.27).

When past benefit is admitted, still unnamed whiteness is divided into “individuals... being discriminated against” by ANC policies, and “people with a similar racial phenotype [who] benefited from racial preferences in the past” (p.18 – see also p.22). Another permutation that white undergoes is as “non-black”, in an evocation and therefore equalising with the apartheid-era designation of “non-white”. It is another reversal in which yesterday’s persecuted is displaced by yesterday’s persecutor, to render the latter today’s victim. This is reinforced with the equation of white South Africans with German Jews (p.28).

As mentioned, white is mostly not named as such: it is the invisible pivot on which this policy position turns. When white is explicitly mentioned, it is as “white guilt”, a condition afflicting the older generation unaffected by and therefore unconcerned with affirmative action. White guilt weakens “minorities” and leads to the loss of their protections. The message could be encapsulated in the following phrase: “being white means never having to say you’re sorry”. While the whole document is a lesson in resisting the overturning of the effects of apartheid, such resistance is explicitly denied (p.28).

While white privilege is denied, affirmative action is touted as creating something called “racial privilege” which will be difficult to dissolve (p.25). Undoing the effects of apartheid is set up as “minorities roll[ing] over” and “surrender[ing] their rights and protections” (p.29). After creating a chasm between “minorities’ rights” (read: white) and affirmative action (read: black), the authors shift to a paradoxical position that it is a “racial myth that ‘black advancement’ and ‘white privilege’ are irreconcilable” (p.29). Finally, on p.30, the solution to the conundrum is offered: racial neoliberalism. Contrary to what “the left” suggest, “opportunities” are not finite. “Blacks” and “minorities” can both be “advanced” if “opportunities” are grown. “Advancement” is of the “colour-blind” and “individual” variety

(p.29). Indeed, non-racialism means colour-blindness (p.13). Irrespective of race, all will benefit when opportunities are expanded – the rising tide will lift all boats, as the neoliberal dictum goes, except that here the tide is not only rising but also colour-blind. In contrast, “racial transformation” means that “individuals cannot compete with each other as individuals”. “Merit” should be prioritised above “race”. This will provide “the competitive edge and belief in individual responsibility on which successful societies and economies rely. It is also a guard against cronyism and nepotism and explodes the myth that the interests of blacks and minorities are mutually exclusive” (p.35). This statement implicitly assigns “race”, cronyism and nepotism to “blacks”, as opposed to “merit”, competitiveness, responsible action and success to “minorities”, code for whites.

The above-quoted statement by Zille that a discussion about race would be unnecessary if economic growth were rapid and good education existed, is a re-assertion of *The Death of the Rainbow Nation*’s ultimate position: that expanding opportunities would ameliorate any need for purposive correction of the racial effects of apartheid. This analysis shows, rolled within this position, a white agenda of racialisation that Zille correctly identified as “postulating a choice between ‘merit’ and ‘colour’”. Apart from election-time rhetoric, the DA is yet to distance itself substantively from this agenda.

The heavy hand of the executive: Paradoxical outcomes

With the South African parliament having laid the constitutional and legislative foundations of a democracy during its first term, the second (1999-2004) term would have seen the onus shift to oversight – theoretically. By 2001, however, claims of massive corruption in the R60 billion arms deal presented the fledgling democracy with a gargantuan test, which in hindsight proved to be too much, too soon.

The stated commitment to parliamentary oversight slammed up against party-political interests. Of the two forces, it was the nascent legislative authority that buckled. The limitations of parliamentary supervision over the executive were established: the executive, in move after move, established its pre-eminence in the relationship, also for future reference. These unfolding events had a domino effect: as parliament's oversight ambitions were curtailed, so were those of other constitutional bodies that became involved in the initial investigation. The stage was set for subsequent interferences with institutions in controversies still to come, with these bodies being swept up into the factional politics of the ruling ANC. The arms deal saga also set in motion what became the habit of using parliament to change or discard structures depending on their (non-)allegiance to internal ANC factions. The doctrine of separation of powers was subsumed by a particularly messy politics.

This section first examines the role of the speaker's office in relation to the attempt by parliament's standing committee on public accounts (Scopa) to fulfil its duties in relation to alleged impropriety in the arms deal. The paradoxical effect of an overbearing executive is then assessed with reference to the Choice on Termination of Pregnancy Act (CTOPA), "AIDS denialism" and the Civil Unions Act.

Scopa commenced its descent into political ignominy, from which it has still not recovered, with its recommendation of an investigation into the arms deal in November 2000. In its report, it cited four agencies which were to undertake the enquiry: Public Protector (PP), Auditor General (AG), the National Prosecuting Authority (NPA) and the Special Investigating Unit (SIU). A concerted set of counter-moves unfolded thereafter.

Apart from the actual recommendation of an enquiry, a bone of contention for the presidency was the inclusion of the SIU because its head, Willem Heath, was not an ANC insider (Feinstein, 2007). Ultimately, the SIU was not only excluded from the investigation but Heath was removed and the unit was incorporated into the NPA. Second, the lead ANC MP in the committee, Andrew Feinstein, was not only ejected from Scopa but also worked out of parliament. He went on to write a damning book about his experience. Scopa itself was manoeuvred into a peripheral position vis-à-vis the enquiry.

Most of the flurry of actions preventing any meaningful parliamentary inquiry into the arms deal centred on the speaker's office, using "constitutional concerns". Then speaker, Dr Frene Ginwala, stepped in almost immediately after Scopa's recommendation of an inquiry. According to Feinstein (2007), this was in response to pressure from the presidency. Ginwala called a meeting in December 2000 with Feinstein and IFP MP Dr Gavin Woods, Scopa's chairperson at the time, questioning the relationship between Scopa and the other bodies in light of their constitutional independence (van der Westhuizen, 2001c). Both indicated that Scopa merely needed to be informed about progress with the

investigation, in order to fulfil its oversight duty. Ginwala's legal advisor, Fink Haysom, agreed that the agencies could keep Scopa informed of their investigation. Ginwala still insisted that Woods writes a letter to the agencies ending direct communication. She edited the letter to further strengthen it in line with her contention. Consequently, Scopa could not keep track of the investigation. Ginwala then proceeded to release a unilateral press statement claiming that Scopa never intended that the SIU be included in the investigation. This gave the presidency, tasked with approving SIU investigations, the necessary grounds to exclude the SIU from the inquiry.

These actions directly benefited the executive, of which several members were implicated in the dubious decision-making about the arms deal, including Mbeki as head of the cabinet committee that decided which offers to accept. The executive's interest in the quashing of Scopa's recommendation was confirmed in January 2001 by a combative letter from the presidency and a media statement issued by the ministers of finance, public enterprises, defence, trade and industry (Obiyo, 2006:363). The speaker's interventions led United Democratic Movement leader Bantu Holomisa to write an open letter accusing Ginwala of partisan and irregular interference. The ANC, in a pre-emptive move, lodged a motion of confidence in Ginwala as speaker in June 2001. In the debate, Minister of Public Service and Administration Geraldine Fraser-Moleketi argued that the Constitution did not allow the legislature to prescribe to the executive arm, except in the form of legislation. Cabinet takes the lead with legislation, which parliament has the power to amend.

Subsequently, a "political committee", was created, headed by then deputy president Jacob Zuma, with the seeming intention to exert direct control over ANC MPs. Scopa as watchdog committee over public expenditure suffered a blow from which it never fully recovered. The principle of Scopa being chaired by an opposition party member was shown to be an imperfect measure when it came to safeguarding the

committee from meddling by the ruling party. Woods suffered repeated attacks, also by ANC MPs newly appointed to the committee with apparently a single agenda: preventing any possibility of Scopa advancing the inquiry.

The final blow to Scopa's unique position as foremost oversight committee came in November 2001. The joint investigating team (JIT, consisting of the AG, PP and NPA) released their report to parliament, only for it to be shared by eight committees – a decision which again involved the speaker's office. Given the financial complexities of the arms transactions, the effect – if not the intent – was to dissipate parliament's capacity to meaningfully engage with the content of the report (van der Westhuizen, 2001b). Scopa was excluded from the substantive findings and therefore, even in its hobbled state, unable to ask the crucial questions about the glaring problems with the report. These include decisions to opt for suboptimal merchandise that was more expensive than other, better products on offer. Examples include the Hawk training aircraft and the corvettes. Other questions were raised by such statements in the report as: "The findings of the investigation where considered necessary and appropriate, have been included in this report. Areas of a criminal and sensitive nature, were considered inappropriate to be included in this report" (JIT, 2001:11). Moreover, the report was already heavily compromised by the time it had reached parliament. The investigating team had secretly presented it to cabinet before a version was tabled in parliament. More than one version of the report existed, and the final version differed from others in important respects (van der Westhuizen, 2005). Scopa's new, amenable ANC committee members prevented any further questions being posed to members of the executive, including the presidency (van der Westhuizen, 2001a,d). That Scopa was a mere shadow of its former self was confirmed when it scrutinised the arms deal at the beginning of 2009 for the sake of "oversight", in the words of its chairperson, Themba Godi (APC, appointed in 2005), and then decided not to act on the information gleaned – despite stumbling across serious discrepancies. Thus ended the committee's last meeting

of parliament's third term. A former senior ANC MP remarks: "A party protects its own interest. If parliament doesn't understand its role and recognises its own authority, the head of the executive will. It's a fiction to say parliament has authority. When you need to use it for participation purposes, you pull it out for that. It would be a different matter if it were possible to directly elect the speaker. The speaker would then really speak for the public."

While the arms deal debacle in parliament is a demonstration of a heavy-handed intervention by the executive, the period of "AIDS denialism" serves as a more insidious example of the stultifying effects of a forceful executive. Subsequent to then health minister Nkosazana Dlamini-Zuma's announcement of the withdrawal of the antiretroviral AZT from government hospitals due to "costs", Mbeki's view that AZT was "toxic" emerged in his address to the NCOP in October 1999 (Lodge, 2002:257). He instructed Dlamini-Zuma's successor, Dr Manto Tshabalala-Msimang, to investigate AZT's use. In 2000, it was announced that a "presidential AIDS panel" would examine whether HIV indeed caused AIDS. Mbeki told the ANC parliamentary caucus that pharmaceutical companies funded the non-governmental Treatment Action Campaign (p.258). On 21 September 2001 he made the controversial statement in the NA that "a virus cannot cause a syndrome". After pressure from the ANC's national executive committee on Mbeki to refrain from making public statements about AIDS, he desisted but continued with assertions behind closed doors. He reportedly told the ANC caucus that a disinformation campaign, involving drug companies and the CIA, was being waged to advance the thesis of HIV as cause of AIDS. The attacks on him were to discredit his efforts to gain a better deal for developing countries (p.259). ANC MPs' response was markedly muted, with only a few – including Sister Bernard Ncube and Pregs Govender – speaking out in support of the provision of antiretrovirals (p.261). Even the ANC's health committee chairperson at the time, Dr Abe Nkomo, "felt he could not answer the question" about the cause of AIDS publicly (p.263). Political scientist Tom Lodge comments that "in an organisation

in which leaders were treated with less deference, things might be different. [There exists an] evident reluctance among the ANC's governing class to express any opinion at odds with the presidency, despite their private reservations" (p.262-3). Behind the scenes the health portfolio committee reportedly sent a confidential memorandum to Mbeki and Tshabalala-Msimang in 2000 requesting a public statement from them confirming that HIV causes AIDS, which the committee refused to withdraw despite pressure from the minister (Nattrass, 2006:11-2).

Asked about the mostly silent public stance of ANC MPs in relation to Mbeki's AIDS denialism, Makhosazana Njobe, who was an ANC MP in the health portfolio committee at the time, opines that the issue of denialism was exaggerated. She also questions whether Mbeki did in fact deny the causal link between HIV and AIDS (interview). A former senior ANC MP, who spoke anonymously, says that to speak out as an individual MP is almost impossible. The example of Feinstein is the most obvious. "The party line has to be followed, right or wrong."

Asked about the impression that parliament rubberstamps decisions taken elsewhere (in the executive or the ANC's headquarters, Luthuli House), Sisa Njikelana, ANC MP since 2004, responds that: "I wish people could be in our caucuses and see how shrapnel is flying when we talk about really upping the scale and be more intensive in ensuring that the executive does deliver." However, he also sees as a "starting point" that "political parties subscribe to certain political values... that they sell to the electorate... [to] assume power... We deploy cadres into various areas, government and parliament and everywhere. From time to time, we monitor and give directives on things. The style of leadership will be informed by the precepts of the ANC... I work within the precepts of my own organisation."

The political implications of taking on the president, cabinet, or the party are profound, as the anonymous former ANC MP contends: "just look at where the power lies". In particular, within the ANC

"the executive is seen as the entity that runs the country. It is not seen as parliament as the highest institution has the final say over the matter. So if you look at the separation of powers now, when a particular minister brings an issue up in parliament and if there [are] different views... If you look at the pecking order in the political structures and I'm sure it's like that in every party, then the most senior people occupy what are seen as the most senior positions. So if the minister is seen as politically more senior, then... the ability of a committee chairperson to engage head-on with a minister is limited. You are supposed to accept this is the line that is coming from the minister and you must not go and counter the minister publicly or even in the committee or even in caucus because they would pull rank. In my view, when you talk about legislation the committee chair is more senior than the minister because the committee chair is the person who has the final say over processing that legislation for it to become effective [and apply] to the country as a whole. Not the minister. If it is blocked by parliament it cannot become law. The law-maker is parliament." (interview)

A possible but improbable solution to the problem would be to appoint more senior party members to parliament and increase the remuneration of senior parliamentary politicians.

Jonathan Berger, who as a researcher for the AIDS Law Project at the time made presentations to the health portfolio committee, found MPs worked closely with civil society during the Mandela-era (interview):

"They knew their stuff and also knew who their allies were. They were there to get a progressive legislative agenda through. A lot of that has changed. The quality of MP has changed. A lot of people who are there now, are there to push a party agenda. The kinds of legislation being passed in the 90s were very different. Things were more clear-cut then."

By the beginning 2000s, Berger found MPs to be “generally reluctant” to engage on any issues apart from what was on the committee agenda before them. They allowed their focus to be circumscribed by the relevant department. AIDS denialism did not present itself directly but was there as a “subtext”. He recalls hostility from MPs towards members of civil society, as healthcare had been turned into a “contested terrain”. MPs reacted with “kneejerk defensiveness” towards any opposition to granting broad discretionary powers to the health minister, as proposed in legislation at the time. The principle of such opposition was that legislation should provide guidance as to how ministerial powers should be used.

“Whenever we raised that, there was a kickback from health committee members. It was never accepted as a matter of principle. It was always seen as a direct attack: ‘Why don’t you think she should have these powers? When has she abused powers?’ It was a simple kneejerk reaction of ‘this is an attack on our leader’.”
(Berger interview)

In the process, parliamentarians cut themselves off from useful insights from civil society.

Njobe confirms this shift from the first to the second parliamentary term (interview). Civil society organisations were very involved in the 1990s but this changed: “I don’t see them much anymore.” She speaks enthusiastically about the quest in parliament’s early years to end the unnecessary deaths of women due to botched abortions. ANC women MPs first advanced the constitutional protection of reproductive rights and then the adoption of the CTOPA of 1996. Different groups of people participated in the law-making process. The MPs were careful to insert certain precautions to prevent abuse of the act. Simultaneously, they made it possible for girls who had been raped within the family context to seek abortion services without the consent of a parent while encouraging them to find someone whom they could trust to assist them.

But now Njobe is concerned that “young women do not understand the aims of the act” and are abusing it. She is also upset about the informal

advertising of abortion services by quacks but seems resigned that nothing can be done about them – including by MPs. This tale suggests that a sense of can-do engagement has since been replaced by a paralysis which contradicts the apparent power that an MP as legislator and overseer of the implementation of laws holds. Drawing on civil society as source of information and possible remedies for these problems has slipped from the picture, confirming Berger’s impression. Civil society activists have access to research that could debunk the myth of “abortion as contraception” and provide other information on how to stop the illegal commercialisation of abortion services (see for example Lince and Albertyn, 2011). When asked directly about civil society involvement, Njobe responds that the legislative ills of apartheid had been corrected and that a new role should be found for civil society. She “is not surprised” that the relationship is hostile at times because civil society’s approach is to monitor, which will cause conflict. “As public representatives, parliamentarians should be prepared to take the criticism,” she adds.

Njikelana explains that the use of an issue as a “political football triggers defensiveness. The media have to sell papers and make profits. They sensationalise and in the process issues get muddled” (interview). This provokes a reaction in which government attempts to control information more and more, he says. Using the Public Protector’s report on the use of public funding to expand Zuma’s private residence Nkandla as example, Njikelana argues that the never-ending flurry of events surrounding the report became bewildering. Combined with it being a politically charged issue, an MP can get to a point of exasperation – of “I’ve got enough on my hands. Let me deal with what I can.” A former senior ANC MP, speaking anonymously, suggests that MPs are frequently unable to get their heads around everything expected of them. Former chairperson of the public service and labour portfolio committees Salie Manie, ANC MP between 1994 and 2006, concurs: “It is extremely difficult to understand parliament. There are four things. You are a lawmaker and you exercise oversight and have to ensure public participation and the accountability of state institutions.” (interview)

In the face of antagonistic and overwhelmed public representatives, the example of the Civil Union Act of 2006 paradoxically illustrates the benefits of a parliament beholden to interventionist executive leadership. Berger, who had made a submission on behalf of the Equality Project, describes the attitude of MPs at the time as “horribly hostile” to the proponents of same-sex marriage. The public hearings hosted at the time were not aimed at actual consultation but allowed homophobic “venting” and “spewing of venom”, says Berger. MPs did not use the opportunity of the hearings to educate the public about the Constitutional Court judgment or to explain parliament’s mandate. MPs in the home affairs portfolio committee dismissed the Equality Project’s concerns about the public hearings.

Members of the executive, both the then home affairs minister Nosiviwe Mapisa-Nqakula and then ANC chairperson and defence minister Mosiuoa Lekota, stepped in:

“the ANC executive had to assert its authority and remind MPs, both in caucuses and in the NA debate, of the party’s policy commitment to equality for all South Africans, as underscored by both the Freedom Charter and the Constitution.” (Judge, Manion and De Waal, 2008:6)

The ANC’s internal differences about the bill were addressed in Lekota’s address during the NA debate:

The question before us is not whether same-sex marriage or civil unions are right or not... The question is whether we suppress those in our society who prefer same-sex partners or not... [V]oting for this bill is not advocating... We are being asked to grant this right... We have no need to preserve for ourselves, purely because of the majority of our numbers, the exclusive right of marriage as recognisable in law, while we deny others the same right... I take the opportunity to remind the house... to... inform those who do not know, that in the long and arduous struggle for

democracy many men and women of homosexual and lesbian orientation joined the ranks of the liberation and democratic forces. Some went into exile... others went into the prisons of the country with us... Some stood with us, ready to face death sentences... (pp.139-140).

Resistance to the Civil Union Act necessitated a three-line whip to ensure that ANC MPs both were present and voted in favour of the bill (p.6). MPs were also compelled to be present and vote in favour of the CTOPA. Manie argues that, it “depends on [your] political perspective whether it is good to have a lot of power at the top, or whether is better to have it dispersed. One can approach this from an ideological point of view.”

To have the party leader as proponent of your issue can pave the way, as Njobe confirms. Talking about securing gender as one of the grounds on which discrimination is forbidden in the Constitution, she says: “we didn’t get women’s rights on a platter” (interview). She was part of the ANC women’s section in exile, theorising gender and devising structures to advance women’s right to emancipation. But some men in the ANC leadership felt that women were waging a “struggle within a struggle”. ANC leader OR Tambo, however, was supportive and challenged the women to pursue their gender goals. Later in parliament, ANC women again benefited from the support of Mbeki, both as president of the ANC and of the country.

In conclusion, the arms deal moment seems pivotal in understanding the shifts in parliament’s role during the first two decades of democracy. Parliamentarians from the liberation movement who arrived in parliament in the 1990s might not have had the experience and knowledge about how the institution worked, as Manie argues, but they did have a vision focused on transforming South Africa into a democracy. Derailing Scopa as foremost watchdog committee in an effort to block a proper enquiry into the arms deal involved replacing MPs with a fervour for justice with MPs who toe the party line. This mirrors a wider shift in the quality of MP

across ruling party benches.

It is probably not a coincidence that Travelgate exploded in those same years. Travelgate refers to fraud that came to light in 2002 involving R36 million in fake travel claims by parliamentarians, in collusion with travel agencies. Some 100 MPs were under investigation by the Scorpions. By 2005, only five ANC MPs and one DA MP resigned after entering into plea bargains with the NPA. Parliament never made the findings of the forensic investigation public. It also did not suspend suspects or expel those found guilty. Instead, parliament's chief financial officer was dismissed after exposing the scandal and expanding the investigation (Zulu, 2013:105-7). Loyalty to the executive's designs has a price tag, and maybe Travelgate was it.

An interventionist executive has to compensate for the consequent weakness in parliamentary benches, and the above analysis shows it being done by using the party pecking order to ensure that MPs vote in accordance with the Constitution. The resultant legalisation of abortion and same-sex marriage has strengthened South Africa's democracy. However, as the next section shows, from 2009 instances started to pile up of parliament using its powers to explicitly serve party interests, such as dismissing Vusi Pikoli as national director of public prosecutions, scrapping the Scorpions and adopting the Protection of State Information Bill. These actions were enabled by the existing problems of an overbearing executive and the party hierarchy taking precedence over the constitutional mandate of parliament, which combined with a third factor: a party line that changes in accordance with internal factional interests. Thus a further derogation of parliament's constitutional role commenced.

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SECTION 2

PARLIAMENT 2008-2013

Parliament as institution: Powers and capacity

i. Growing power

Money Bills Amendment Procedure and Related Matters Bill ■ restructuring of parliamentary committees ■ overseeing regulations ■ Trafficking Bill ■ new bills on police secretariat and complaints directorate ■ overseeing trade agreements and local government ■ department of women, children and people with disabilities

ii. Faltering capacity

Money bills act and public hearings ■ constituency offices ■ accountability of civil servants in local government ■ deadlines of Sexual Offences Act ■ oversight and accountability model ■ proportional representation

Parliament and the public: Accountability vs national security

i. Which 'public'?

Scorpions and Hawks ■ Broadcasting Amendment Bill ■ Scopa and the arms deal ■ dismissal of Vusi Pikoli ■ powers of National Prosecuting Authority ■ the judiciary and the Superior Courts Bill ■ Torture Bill and Traditional Courts Bill

ii. Whose oversight? The defence portfolio

Defence minister's appearances before Scopa and portfolio committee on defence ■ standing committee on defence's closed meetings

iii. Whose security? Protection of State Information Bill

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Parliament and constitutional bodies: "To assist and protect"?

SAHRC: lack of commissioners and commission's independence ■ dilemma of Mpumwana appointment to SAHRC ■ Public Protector and the police ■ Public Protector and justice ministry and committee ■ maladministration at Commission on Gender Equality and women's ministry

Parliamentary speech: A nation's insiders and outsiders

Insider/outsider dynamics in legislative processes ■ department of home affairs and xenophobia ■ Sexual Offences Act and children's sexuality ■ Traditional Courts Bill ■ Communal Property Associations Act ■ Elections and laws affecting traditional leadership

Growing power

Parliament taking back the budget is good news

Published 7 Oct 2008

Finance minister Trevor Manuel may be back in the saddle but treasury's easy ride with the national budget in parliament is potentially at an end. Year after year parliament merely rubberstamps the budget as formulated by treasury. But history could be in the making as this is set to change. The portfolio committee on finance has adopted a bill which could boost parliamentary oversight while giving ordinary citizens the opportunity to directly address concerns with government departments' budgets.

This is an exciting development because it opens up the crucial process of national budgeting to public influence.

South Africa has had three democratic elections and yet it has been impossible for parliament, the highest representative body in the land, to make even the slightest adjustment to government budgets. The budget has been the preserve of treasury.

Many people may not even be aware of the insulation of the national budget from democratic process. However, this reality seems to confirm the view of opponents of former president Thabo Mbeki that his

administration was unaccountable and unresponsive, especially when it came to the day-to-day socio-economic hardship suffered by about half of the population.

The democratic deficit in the budgeting process could have been rectified straight after the 1996 Constitution was adopted. After all, the Constitution provides for a law to allow parliament to modify money bills. To be sure, treasury did table a bill to that effect way back in 1997. However, it was found to be unconstitutional.

The current bill has been initiated by parliament. Before 2004, a commission investigated how oversight by parliament could be improved. One recommendation was to enable the institution to revise the national budget.

The fact that it has taken another four years for us to get here has perhaps more to do with the hiatus that parliament found itself in after 2000 than anything else. The then ANC leadership's actions to prevent a parliamentary examination of the ill-begotten arms deal paralysed the institution for most of the 2000s.

Then the change in ANC leadership came, reawakening the majority party's caucus. Sadly, much of the reactivated energy has been channelled into laws to ameliorate internal power politics, such as on the Scorpions and the SABC board.

But the law about to be adopted by the NA may be the exception. It is called the Money Bills Amendment Procedure and Related Matters Bill and was tabled in July this year.

This bill will for the first time open the country's medium term budget policy statement (MTBPS) to changes by parliament.

Even more significantly, the government's fiscal framework, budgetary allocations to government departments and division of revenue between

different spheres of government will annually be subjected to scrutiny and input by ordinary citizens at parliamentary public hearings.

The fiscal framework is what gives effect to the government's macro-economic policy. It includes estimates of revenue, expenditure, borrowing and debt servicing.

The MTBPS provides the fiscal framework over a period of three years; an explanation of the macroeconomic and fiscal policy position; spending priorities of government; the proposed division of revenue between arms and spheres of government; and a review of actual spending by each national department and provincial government.

Each portfolio committee will consider the money allocated to each state department measured against the latter's strategic plans. Committees on appropriations will coordinate this process to resolve any conflicting proposals of amendments to departmental budgets.

These committees will also hold public hearings on the proposed allocations to departments and the amendments proposed by parliamentary committees.

Parliament will have the power to freeze up to 10 percent of a department's budget to apply pressure on departments to shape up.

To meet these new demands, parliament will be beefing up its capacity by creating appropriation committees in both houses. A budget office, derived from a similar body serving the U.S. Congress, will assist parliamentarians with research and expertise.

This sea change in the national budgeting process has led to alarmist noises about how the ruling party could abuse this power to serve "populist" ends. Treasury also asked the finance committee to insert a "fiscal responsibility" clause in the law.

The equation of democratic accountability with “populism” is worrying and reveals something of the shallowness of democratic commitment in neoliberal thinking.

In any case, the July version of the law has been redrafted to include a set of provisos before budgetary amendments can be effected. These include compelling parliament to consider the effects of revisions on the balance between revenue, expenditure and borrowing; on keeping debt levels “reasonable”; and so forth.

The law also obliges parliament to “consider the short, medium and long term implications of the fiscal framework, division of revenue and national budget on the long-term growth potential of the economy and the development of the country”. Thus the law remains in step with economic policy under Mbeki with its emphasis on growth, which should satisfy the law’s critics.

However, whether the weight attached to growth in relation to development in the law is good news for the country’s poor is highly questionable.

Just as more and more people are nowadays discussing court findings in depth, we should all be engaging with the national budgeting process. The economy is far too vital for our collective wellbeing to be left to economists.

Oversight model ready to be implemented by incoming MPs

Published May 2009

The South African electorate has spoken and our fourth democratic Parliament has been installed. The choices voters made, as expressed in party representation in Parliament, have paved the way for an exciting five year term ahead of us. Voters' choices at the ballot box have reduced the ANC's preponderance, boosting the political competition of ideas in Parliament, which is good for democracy.

The most pertinent question is whether the incoming crop of parliamentarians – some new, some experienced – will have the commitment and the fearlessness to wield oversight powers as foreseen in our Constitution. A sign that we may see more contestation around this very issue is the increased diversity in opposition ranks, combined with the ANC's loss of the psychologically significant two-thirds majority.

The arrival of the Congress of the People in Parliament, along with the Democratic Alliance's success in growing its representation, should lead to a more vigorous challenge when the institution is misused to merely effect the Executive's decisions without question. Parliament is also due to benefit from the re-emergence of some old names with serious clout.

The return of Max Sisulu (ANC) in the central post of Speaker can only benefit Parliament as an institution. He was a member of the panel led by former ANC MP Pregs Govender which made invaluable proposals for the improvement of the institution earlier this year. Hopefully he will ensure that the panel's recommendations are taken on board.

The level of debate should change, if not improve, with the likes of Philip Dexter and Mbhazima Shilowa (Cope); Dr Wilmot James (DA); and Dr Blade Nzimande and Dr Mathole Motshekga (ANC) – that is, as long as Parliament is not used as a platform to continue political squabbles rather than overseeing the implementation of policies.

The latter is the most urgent task ahead. It is accepted that Parliament has over the past 15 years mostly excelled in passing laws that capture the letter and spirit of the Constitution. Its record in calling the Executive to account in implementing these laws has, unfortunately, been far less exemplary.

The reorganisation of Cabinet in portfolios such as higher education and rural development suggest that the ruling party is approaching governance with renewed vigour. But the creation of a monitoring and evaluation ministry in the presidency is not a sign for Parliament to cease its monitoring and evaluation.

Apart from the Govender report, new MPs should also set in motion the implementation of the Oversight and Accountability Model that was adopted by the previous NA in February this year (2009).

A few years ago the joint rules committee established a task team consisting of MPs to investigate the current constitutional and legal provisions and mechanisms that enable Parliament to exercise the responsibilities of oversight and accountability. A model was born from that process which defines oversight as "entail(ing) the informal and formal, watchful, strategic and structured scrutiny exercised by legislatures in respect of the implementation of laws, the application of the budget, and the strict

observance of statutes and the Constitution... [I]t entails overseeing the effective management of government departments by individual members of Cabinet in pursuit of improved service delivery... for all citizens.”

The task team recommended the creation of an institutional mechanism to process and refer petitions, representations and submissions received by Parliament. This would mean a more structured process for dealing with citizens’ proposals and demands.

Another recommendation is to conduct sub-plenary sessions on matters of national importance. These would not be the same as the debates currently held in Parliament. Rather, recommendations and issues arising from these sessions would be referred to the NA for consideration. This would mean that MPs would have to apply their minds to the issues under discussion, which should improve the level of deliberation.

The most exciting recommendation that the task team made is the establishment of a “joint parliamentary oversight and governance assurance committee”. This committee would deal with “broader, transversal and cross-cutting” matters.

A primary reason why Parliament could not effectively deal with the arms deal scandal was that its inquiry was split among a number of committees. No committee in Parliament was able to establish a holistic view of the arms deal transactions, offset deals and the political decision-making about these deals. Such a holistic view would have assisted comprehension of the complexities *and* the discovery of possible foul play.

This proposed joint parliamentary oversight and governance assurance committee would coordinate the oversight work of all other committees. The task team also saw its function as pursuing “all assurances, undertakings and commitments given by ministers on the floor of the House(s) and the extent to which these assurances have been fulfilled”.

The task team wanted to add teeth by instituting a sanctioning

mechanism, for example naming and shaming non-compliant ministers. Question time – when ministers account to MPs -- needs to be urgently reviewed, as found by the Govender panel. This is also necessary in view of the change in opposition representation.

The Govender panel cautioned that the Oversight and Accountability Model was “ambitious” and recommended a detailed implementation plan to ensure the structured and effective implementation of the model.

There is no doubt that the model will enhance Parliament’s ability to fulfil its constitutional mandate. Hopefully Baleka Mbete’s fall from grace will not result in it being shelved. Apart from the Govender panel report, it may well be one of the highlights of her term as Speaker.

Exciting period for new Parliament as restructuring kicks in

Published June 2009

There is a buzz in the air at Parliament. Last year's anxiety about political futures has been resolved as parties have decided who returns and who doesn't. But parliamentarians should not relax. With the change in leadership in the Executive comes other change.

The fourth democratic Parliament is not only novel because of the fresh faces in the corridors. The restructuring of Cabinet portfolios requires the revamping of the parliamentary committee system. As a result it seems the word "oversight" is on everyone's lips again as MPs – old and new – are reminded that Parliament's committees serve an essential constitutional function.

The new-look Cabinet demands the creation of a number of state departments from scratch while existing ones are split or amalgamated. Consequently, functions have to be transferred between departments. Because the current national budget is based on the pre-May government set-up, there will be a transitional phase when budgetary allocations will follow the transfer of functions to newly created ministries and departments.

Parliament will have to provide oversight over these processes to ensure that there are no unnecessary delays as these would have a direct effect on the fulfilment of government duties towards citizens.

These changes can reinvigorate Parliament which, in turn, could shake up moribund bureaucracies.

Some of the first meetings of committees in these past few weeks have been encouraging. South Africans can look forward to a more robust Parliament, judging by a joint meeting of the new-fangled portfolio committees on, respectively, agriculture, forestry and fisheries and rural development and land reform.

As part of the current budgetary process, these two committees received a briefing on the former Department of Land and Agriculture's programmes and activities. When question time came, parliamentarians were ready with substantive questions.

Ebrahim Sulliman (ANC) reminded the department of the Maputo Declaration in which heads of state from the African Union committed themselves to spending 10 percent of their national budgets on agriculture as part of the attempt to reach the first Millennium Development Goal on halving poverty.

South Africa's current allocation sits at one percent, according to Sulliman. He stressed the importance of food security and poverty eradication. While agriculture is not as pivotal to the economy in South Africa as in some other African states, the new government's emphasis on rural development is apposite in a context where, for many, subsistence farming remains the difference between starving and surviving.

Sulliman also confronted the department on the sharp increase in spending on consultants while Mpowele Swathe (DA) pointed out the persistent problem of recipients of land getting inadequate support from government and therefore failing at farming. These points are all highlighted as "issues of concern" in the committee's budget vote report to the NA.

Similarly, the Portfolio Committee on Rural Development and Land Reform points out in its report to the NA that the budget vote tabled in February this year (2009) does not cover rural development sufficiently.

Therefore further allocations will be requested from Treasury to complete our long overdue land restitution programme; to redistribute 30 percent of land by 2014, as per government policy; and to implement a comprehensive development programme to redress the scandal of rural poverty. The committee notes that allocations for rural development are expected in October this year when the MTBPS is released.

The newly created Portfolio Committee on Women, Youth, Children and People with Disabilities will also have to wait until October before its ministry and department will have its own budget. Until then, the budget allocation for this line function is made to the presidency as the various desks for children, people with disabilities and women have been situated there.

At its first meeting, the committee actively engaged the responsible minister, Noluthando Mayende-Sibiya, to ascertain the process through which a fully-fledged ministry and department will come into being. At the time of the publication of this column, the new committee would have already held more than a quarter of the number of meetings that its failed predecessor tasked with “the improvement of the quality of life and status of women” held during the whole of 2008.

The other improvement that is sure to shake up sleepy bureaucrats and politicians alike is the public accountability that has been built into the national budgeting process. Previously budgeting was the sole preserve of Treasury with even the democratically elected Parliament being unable to change a single figure in the budget.

Innovations flowing from the Money Bills Amendment Procedure and Related Matter Act 9 of 2009 translate into the extension of the powers of

the portfolio committees, bolstered by the creation of a standing committee on appropriations.

Currently committees are holding the first-ever public hearings on budget votes, allowing South Africans to directly influence the budgeting process. The standing committee on appropriations will consider the recommendations from the committees, taking into account the public consultations, towards the end of the month.

If a portfolio committee recommends that a portion of a budget be “appropriated conditionally”, funds may be withheld from a government department until certain conditions are met. This is aimed at pulling government departments in line if they are not spending their budgets “effectively, efficiently and economically”.

New members, new structures, new processes: Parliament is entering an exciting period which could provide a much-needed boost for our stressed democracy.

Semenya case shows again why we need gender structures

Published August 2009

One of the benefits of having a department on women, children and people with disabilities is that parliament has had to put in place two fully-fledged committees to provide oversight -- in lieu of the increasingly ineffective joint committee of the past.

The positive results can already be seen, with the National Council of Provinces' (NCOP) select committee on women, children and people with disabilities last week calling the department to account on the case of world champion runner Caster Semenya.

At the meeting, chairperson Peace Mabe (ANC) first made the apt comparison between Saartjie Baartman, prodded at by white, male, European scientists almost exactly 200 years ago, and Semenya, who's been subjected to ostensibly "scientific" gender tests because she does not conform to a certain feminine identity construction.

Mabe indicated that while the media was saturated with this issue, the department's position was not being heard publicly. She also demanded to know whether it had provided any support to the "beautiful young lady". Head of programmes Mbangi Dzivhanyi admitted that they had only congratulated Semenya and that a more strongly worded statement would see the light later that day.

Surprise, surprise, it did. In the second statement the department announced that it had sent a letter to the International Associations of Athletics Federation, demanding an explanation as to why Semenya was being forced to undergo tests.

It added that there “has been a blatant disregard for her human dignity. The questioning of her gender is based on (a) stereotypic view of physical features and abilities attributable to women. Such stereotypes demonstrate the extent of patriarchy within the world’s sporting community.”

Afterwards, Mabe told Independent Newspapers political reporter Carien du Plessis that the department should have proactively prevented the tests by sending in lawyers. Mabe’s actions are a good start to what we expect from a public representative. The select committee had called the meeting to ascertain the progress made in the establishment of the department, one of those which have to be set up from scratch.

The youthful Mabe understands that government departments are not only about the day-to-day execution of programmes. They also have to publicly communicate their fulfilment of the Constitution’s mandate where it bears relevance to the debates of the day. One would venture to say this is especially important in the case of gender, given the backlash against women’s empowerment in South Africa today and the lack of a vocal women’s movement.

Now the department just has to beef up its communications, as the statement got little if any coverage.

Beyond the Semenya case, Mabe and her NA counterpart Barbara Thomson have their work cut out for them. The creation of this department has been controversial – even inside the ANC.

A valid argument being made is that having a separate department ghettoises these issues. The government has previously followed the gender mainstreaming approach where gender is supposed to form part of

policy-making and implementation in all departments and at all government levels to avoid it being sidelined.

With the formation of a ministry and department, it seems the government is turning back on itself to follow a model which has been unsuccessful elsewhere on the continent. Questions are also asked about the everything-but-the-kitchen-sink approach in constituting the portfolio. (The ANC Youth League has since muscled the National Youth Development Agency out of the ministry and into Collins Chabane's ministry in the presidency, despite the obscure fit with monitoring and evaluation.)

Some activists are unhappy that the gender sector and the Commission on Gender Equality (CGE) had not been consulted about establishing the ministry, as they have relevant research on the matter.

However, the so-called gender machinery has not been particularly efficient so far, presiding over an increase in violence against women; and remaining mum despite public statements from politicians attacking women. Meanwhile, the feminisation of poverty has worsened because of deepening socio-economic inequality in South Africa since 1994.

While a parliamentary committee, a commission, and an office in the presidency on their own cannot turn these trends around, they undermined their own performance with perennial political infighting and an unquestioning loyalty to the ANC party line.

South Africans deserve a shake-up of these structures. The new ministry and department, with concomitant parliamentary committees, could potentially do exactly that. The portfolio committee has already held more meetings in its short existence than the wobbly former joint committee had the whole of last year.

But much more action is required, also with regards the restructuring of the gender machinery. Acting director general (DG) Vuyiswa Nxasana has told the portfolio committee that conflict between the roles of the new

department and the CGE is looming. She had heard rumours that the CGE would be moved to fall under the department.

If this is so, it would be a drastic change given the constitutional intention behind the commission. As a Chapter 9 body it is meant to lobby for and monitor gender equality. There is space for both structures, as its mandate does not clash with the ministry's modelling of itself as a "co-ordinating point for the advance and protection of the rights of women, children and persons with disabilities".

Nxasana indicated that a political decision is needed. It seems late in the day for this discussion. But, especially given the lack of public consultation so far, this is the moment for the new parliamentary committees to show their commitment to democratic participation and open up this decision to public input.

Children and the law: Parliament expands its scope to scrutinise laws' regulations

Published March 2010

One of the most severe indictments of our society after the advent of democracy has been the continued jailing of children. Efforts by government departments and CSOs to address this problem culminated in the passing of the Child Justice Act in 2008, of which the regulations are currently before parliament.

The handling of these regulations, as well as those on the extension of the child support grant to 18-year-olds, reveals a much enhanced understanding in parliament of the scope of its constitutional powers of oversight vis-a-vis the executive.

The alarming escalation of the number of children in prisons to 2716 in April 2000 led to inter-departmental and inter-sectoral actions to divert children in conflict with the law to more appropriate facilities. As a result, by 2006 the number of children in prison had halved. At the end of 2009 it stood at 1341 children, 574 of which were awaiting trial -- two of the latter being under the age of 14.

Ending this unacceptable situation depends on the implementation of

the Child Justice Act. The law has taken almost 10 years to draft, involving costing and implementation plans, and is internationally recognised as a best practice example of lawmaking on children, according to Prof Julia Sloth-Nielsen, dean of law at the University of the Western Cape. This is why some MPs' talk of revisiting provisions in the act is pure folly.

The law is also exemplary in that it stipulates that parliament should approve its regulations. As the drafting of regulations is done by government departments, it can be an opaque process during which civil servants can interpret the law in ways that may not be true to the spirit of the law.

Paula Proudlock, child rights programme manager at the Children's Institute, points out that parliament during the Mbeki era:

"tended to avoid taking a supervisory role in the drafting of regulations, with some MPs arguing that the decisions in the regulations were 'policy' decisions by the executive and that parliament could not interfere with those. But a bill that is tabled in parliament by a minister can also be regarded as a policy decision by the executive. This does not preclude parliament from amending the tabled bill and thus effectively changing the policy. The same goes for regulations. The Constitution says that parliament's mandate is to maintain oversight over the executive, including the implementation of laws. Laws cannot be implemented according to parliament's intentions without regulations that adequately give effect to the principles in those laws. Regulations are delegated legislation, which means they are delegated by the legislature to the executive. Parliament therefore remains the delegator and as such is responsible for supervising the delegatee – that is, the executive -- in the making of the regulations."

In the case of the Child Justice Act, the department of justice and constitutional development and the NPA had 18 months to table the regulations and directives for prosecutors before parliament for consideration before the enactment of the law on 1 April this year.

However, the regulations were only tabled in mid-February and the directives were still outstanding by end-February. This does not leave much time for filling gaps in the regulations, of which there are several, according to Dr Jacqui Gallinetti from the Child Justice Alliance. Long hours of work are lying ahead this month as this law's enactment should not be postponed.

Justice portfolio committee member John Jeffery (ANC) lambasted the department over the delay as it meant "the act was already not being complied with".

During the past month the portfolio committee on social development set a good example for the handling of regulations. The Social Assistance Act, which sets out the terms for the expansion of the child support grant from 15 to 18 year-olds during 2010-2012, does not provide for parliamentary approval of its regulations. Still, the portfolio committee, together with CSOs, pressurised the executive to publish the regulations for comment.

The CSOs commented that the phased age extension in the draft regulations would cause children to drop off every time they have a birthday and move out of the eligible age bracket. During the extension of the grant from seven to 14 year-olds in 2003 to 2006, the same design caused 400,000 children to drop off annually, forcing them to re-register. Caregivers called it the "stop-start" grant, according to Proudlock.

The portfolio committee and the CSOs proposed that all children under 18 born on or after 1 January 1994 be eligible and stay on until their 18th birthday. However, the regulations set the date at 1 October 1994. The committee was adamant that 1 January 1994 should be the date. In response, minister of social development Edna Molewa agreed to amend the regulations again and move the starting birth date to 31 December 1993.

Molewa and deputy minister Bathabile Dlamini, along with senior departmental officials, personally came in to explain the changes to the

regulations to the committee, as well as why it had been difficult to postpone the adoption of the regulations to allow the committee to hold public hearings. Still, committee chairperson Yolanda Botha (ANC) made it clear that the committee did “not take kindly” to hindrances to public hearings.

But, henceforth, due to a vigilant portfolio committee and civil society activists, hundreds of thousands of children won’t again lose the vital income of the grant because of poorly drafted regulations.

Circumspect approach to trafficking bill a wise decision

Published April 2010

Legislating at the last minute is clearly not a sound practice. Nevertheless, parliamentary committees are sometimes aflutter trying to make a deadline set by a court decision or, in worse cases, to satisfy some demand by the executive.

The portfolio committee on justice and constitutional development recently departed from this trend. It took the unusual step of refusing to rush complex legislation on human trafficking -- despite the draft law emanating from cabinet strongman Jeff Radebe's department of justice and constitutional development.

The Prevention and Combating of Trafficking in Persons Bill was tabled in mid-March. This law should have been in place in time for the Soccer World Cup. Such mega-events are associated with a rise in human trafficking, according to US law professor Susan Kreston. She made inputs into the law as an expert on trafficking in children.

With only about two months to go before the tournament, a period interspersed with public holidays, the committee would have had been hard pressed to fit in the necessary public consultations and debates.

There was noticeable agreement across party lines in the justice portfolio committee that the bill should not be pushed through merely because of the World Cup. As the DA's Natasha Michael remarked, "we are not making laws for FIFA".

The trafficking law has been in the making since 2003 but the justice department only solicited public comment on the bill in May 2009. The delay in the tabling seems partly due to the association of trafficking with prostitution. The law on adult prostitution may only see the light next year after a decade of wrangling.

Parliamentarians will be venturing into the contested terrain of whether and how trafficking and prostitution are related. Given that 80 percent of trafficking is for purposes of sexual exploitation, how should parliament address prostitution in the trafficking law? This is a decision that is complicated by the lack of a post-1994 adult prostitution law.

Some analysts stress that trafficking and prostitution should not be conflated. However, US law professor Catharine MacKinnon argued during a recent visit to South Africa that while it is true that prostitution is not trafficking, the only characteristic that distinguishes trafficking from prostitution is the involvement of a third party. As she said: "You can't traffic yourself."

But is this distinction absolute? There is also usually a third party involved in prostitution: the so-called pimp.

Another issue is raised by the US state department's statistic that women and girl children constitute 80 percent of trafficked persons worldwide. Kreston says adult males are usually trafficked for labour. She has not heard of a case of an adult male being trafficked for sex but says it may happen.

Given the preponderance of female victims of trafficking, MacKinnon's proposal to the South African law-makers is that gender and sex be

included in the bill's list of conditions that create vulnerability. In MacKinnon's argument, being a woman produces in itself vulnerability to trafficking because of the system of gender and sex inequality.

Kreston, however, believes women are covered by the tests of deception or coercion in the bill. Also, gender and sex have not been included in laws elsewhere. However, the International Organisation for Migration mentions gender discrimination explicitly as enabling trafficking in its official definition of the crime.

These few points already show that the justice committee's circumspect approach is warranted.

In deciding on the urgency of the bill, committee members John Jeffery (ANC) and Steve Swart (ACDP) were at pains to ascertain whether South African authorities would be able to combat the crime through existing laws during the World Cup period. An example exists in the form of the first conviction in a trafficking case recently in Durban where legislation on sexual offences, racketeering, money laundering and immigration was used.

The Criminal Law (Sexual Offences and Related Matters) Act of 2007 criminalises trafficking for sexual purposes. Moreover, the Children's Act of 2005 addresses the trafficking of children comprehensively. The common law can be used to prosecute related crimes such as kidnapping, along with laws on organised crime and others.

Existing laws do not, however, provide for protective measures for adult victims of trafficking, nor for the repatriation of victims, as pointed out by the South African Law Reform Commission's Louisa Stuurman, who wrote the trafficking law report.

Jeffery picked up on the low rate of prosecutions based on the sexual offences law. This suggests that the law is not being implemented and that the police and the NPA are unaware of its provisions.

The committee decided it will call all relevant departments and agencies to compile operational plans to ensure that existing laws are used against trafficking during the World Cup period. The committee will then concentrate its efforts on making certain that laws are implemented.

The committee took the correct decision but it is of utmost importance that it pays attention to the lacuna regarding adult victims. The department pointed out that the United Nations' "Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children", which South Africa has ratified, contains provisions in this regard which could be applied in the absence of a law. This may be the way to go.

While we decide on the most effective approach to trafficking, we should not expose some of the most vulnerable people in today's globalised world to further abuse and danger. Refreshingly, the committee seems to realise its duty in this regard.

Parliament deploys its powers to ensure Mayende-Sibiya's fall

Published Nov 2010

In what seemed like a frantic last bid to hold on to her job, Noluthando Mayende-Sibiya had a press release sent out on 29 October 2010, two days before she was fired as minister for women, children and people with disabilities. She was “urgently seeking” a meeting with the parliamentary committees tasked with overseeing her ministry.

The press release is a rambling, unfocused piece of writing, similar to other documents that have emerged from the ministry since its creation after the election last year. But it does hint at the role that the parliamentary committees played in her ending up on the list of cabinet casualties.

In the press release, which has a noticeably defensive tone, Mayende-Sibiya addresses criticisms of the portfolio and select committees on women, children and people with disabilities at their last consideration of her department's 2009-2010 budget.

The recent adoption of the Money Bills Amendment Procedure and Related Matters Act No 9 of 2009 means that all portfolio committees have to assess the performance of the departments answerable to them during an annual official process and to produce a report with their findings.

This process potentially enhances parliament's oversight powers. Indeed,

this particular case exemplifies its democratic benefits. The committees had clearly had enough and a particularly damning report saw the light.

The litany of problems besetting the department since its inception has frustrated feminists inside and outside the ruling party. With its creation, a decision that had emanated from the ANC's national conference in Polokwane in 2007, government ignored civil society activists' warning about ghettoising "women's affairs" in a separate ministry, as the model has failed elsewhere.

In this case, the ministry and department crashed before leaving the runway. The department's strategic plan, described as "nonsensical", had to be rewritten several times. Similarly inexplicable was the continued prevalence of vacancies, which exacerbated the capacity problem. The post of DG was only filled at the end of October, with Mayende-Sibiya promising that those of deputy DGs would be filled "very soon".

She also promised that an allocation of R8 million in the medium term budget framework would be used to fill the posts of heads of the departmental branches responsible for women, children and people with disabilities. This hints at the fact that the slow progress with appointments cannot be blamed solely on the former minister.

But how the ministry used the money that was indeed available has been one of the primary bones of contention for the parliamentary committees. The portfolio committee finds in its report that the department under-spent on its budget as a whole while the minister's account shows over-expenditure. Money was spent on entertainment despite it not being budgeted for. The department overspent on catering.

The department blew hundreds of thousands of rands on a mysterious budget line item called "social contributions". Worryingly, the committee points out that it is "unclear what the social contributions allocation pertains to".

The committee concludes that, “[s]alaries and wages, social contributions and travel and subsistence amounted to 75 percent of the total budget... [V]ery little had been spent on operations, hence the committee questions the extent to which the department is preparing itself in terms of establishing the necessary infrastructure to function effectively.”

In Mayende-Sibiya’s response to the report she suggested that the committee would have come to different conclusions, had it fully engaged with the departmental staff that had made the presentation on the budget at a joint sitting of the portfolio and select committees.

Mayende-Sibiya was supposed to have appeared before the committees at that particular meeting but did not make it due to another commitment. The MPs rejected her apology and, to drive home their dissatisfaction with her absence, decided to reserve their questions for when she would appear before them again.

But, judging by the omissions in her response to the report, it is hard to see how they could have come to a different conclusion. Mayende-Sibiya’s statement avoids answering the most pressing concerns raised in the report.

Rather, she defends the catering costs by saying it was necessary for “stakeholder” engagement. She also concentrates on a minor query about travel costs while still not completely addressing the exact question that MPs asked in this regard.

MPs had been particularly unimpressed with the department spending money on flashy once-off events rather than aiming for a year-round spread of efforts and energies. The so-called Women’s National Conference that the department hosted at the end of October was one conference too many.

Mayende-Sibiya’s reference to “stakeholders” is also curious. At a recent seminar on the state of the CGE, attended by gender activists inside and

outside parliament, few knew about the Women's National Conference. It seems only certain "stakeholders" had been invited.

In this regard, we may see an unfortunate continuity between Mayende-Sibiya's tenure and that of her replacement, Lulu Xingwana. The choice of Xingwana for this portfolio is highly questionable. She stormed out of an arts exhibition sponsored by her ministry earlier this year because of internationally fêted photographer Zanele Muholi's portraits of black lesbians. Xingwana called the exhibition "against nation-building".

More recently she has been threatened with a lawsuit after allegedly referring to someone as "that Jewish woman" when she accused a service provider of "fronting for whites". The parliamentary committees' immediate task at hand should be to find out whether Xingwana will be promoting the interests of all women in her new portfolio, or only those that she regards as part of her "nation".

Parliament in 2010: The good and the bad

Published Dec 2010

The year 2010 was replete with contradictions at parliament, one of our primary institutions tasked with giving substance to democracy in South Africa. An overview of the headline issues confirms that much occurred to be dismayed about, centring predominantly around the ad hoc committee on the protection of information bill, which is due to finalise its work on 26 January 2011.

But, happily, there were also brighter moments, such as the withdrawal of the Public Service Broadcasting Bill, which would have been the final nail in the SABC's coffin.

Some of these brighter moments were less noticeable, being hidden in the daily grind of processing legislation and oversight reports. Many could be found in the rather unobtrusive diligence of the portfolio committee on police.

It is early days yet but the combination of the police portfolio committee and the newly revamped civilian secretariat for police could bode well for policing in the future. The committee, under the understated but dedicated leadership of Sindi Chikunga (ANC), passed two bills which represent a significant reaffirmation of the constitutional value of limiting the powers of the state through democratic mechanisms.

These two new laws are the Independent Police Investigative Directorate (IPID) Act and the Civilian Secretariat for the Police Act, both finally adopted by the NCOP at the end of this parliamentary term. IPID

replaces the Independent Complaints Directorate (ICD) that was riddled with capacity problems and lacked legitimacy. It counts among its “successes” clearing former police commissioner Jackie Selebi of corruption allegations in 2006.

The resuscitation of the police secretariat follows years of limbo during the Mbeki era. It had started on a high note in 1995 with the appointment of the respected Azhar Cachalia. Collaboration between the police, the ministry and the secretariat was achieved to such an extent that the Institute for Security Studies (ISS) reported that civilian oversight took its “rightful place” in the shaping of safety and security policies during those years.

Alas, this was not to last as Cachalia had to leave when the now deceased Steve Tshwete took over as minister with much bombast and bluster in 1999.

Police minister Nathi Mthethwa emphasises that the overhaul of the secretariat and the directorate shows the import that the ANC leadership, as elected at the party’s Polokwane conference, attaches to civilian oversight over the police.

It is certainly true that the laws address long-standing criticisms. They possibly signal a departure from the stance of the Mbeki administration, which studiously ignored the criticisms as these vital bodies sunk into ever-deeper irrelevance.

Drafting separate legislation for these bodies represents in itself an essential break from the past when they were governed through clauses in the South African Police Service Act of 1995. The allocation of separate budgets to the bodies, rather than appropriating money from the police budget as before, should reinforce their independence.

The directorate’s powers have been expanded to investigate serious crimes committed by police officers, including murder, rape and torture,

while the secretariat will monitor police conduct, the use of the budget and compliance with the Domestic Violence Act. A consultation forum has been created to draw upon civil society expertise.

The ministry will be aided by the secretariat, including the secretariat's powers to conduct audits of police implementation of policies. The adoption of the law was preceded by the appointment of the experienced policing expert Jenni Irish-Qhobosheane as secretary of police, which suggests the seriousness with which Mthethwa has approached this task.

And a huge task it is, as daily reports of police abuses and corruption indicate. The gravity of the situation seems to have finally inspired the much-needed political support for these bodies.

But the proof lies in the implementation of these laws, as Gareth Newham, head of the ISS's crime and justice programme, points out. Oversight by the police portfolio committee is essential. Among the committee's activities in 2010 was Chikunga's constitution in May of a task team comprising MPs to look into the problem of property management in the police.

While R6,25 billion has been allocated to the construction of new police stations since 1994, only 100 have been built of which a mere 31 were new stations in areas where no station existed before. Average building time per station has been between three to more than six years.

The committee was on the right track with this enquiry as the controversy about the leasing agreement of the police head office broke in August and three supply chain managers resigned. It has since held a meeting attended by police management, the Hawks and the Special Investigating Unit and has requested further briefings on investigations.

The committee has recommended as part of parliament's new annual budget review process that the police budget for capital assets be frozen until the problems with asset management have been resolved. The

committee wants quarterly reports on how these difficulties are being addressed, starting in March 2011.

But, as Newham points out, the true test of accountability will only arise if the committee should ever be in conflict with the ministry or the police commissioner.

The clash this year between defence minister Lindiwe Sisulu and former chairperson of the defence portfolio committee Nyami Booï serves as example. Booï learnt in November that, while being found guilty of theft in the Travelgate scandal does not cause even a blip in Luthuli House's moral universe, crossing a member of the executive can cost you your position.

Accidental trade experts and not-so-quiet diplomats

Published March 2011

The crop of parliamentarians that entered parliament after the 2009 election has set their sights on filling the lacuna in parliament's engagement with the government's external relations. Typically, parliament is only informed of – rather than consulted about – foreign policy decisions, usually after the fact. This includes trade deals that could have significant implications for development.

Democratic South Africa has moved a long way from the apartheid-era executive's practice of not even notifying parliament prior to its illegitimate acts of external aggression, such as the invasion of Angola in the 1970s or the deployment of police force members in 1960s Rhodesia to help prop up the Smith regime.

Still, while South Africa's foreign policy after 1994 made a 180-degree turn from its erstwhile position of regional destabilisation, it has remained typical even for parliamentarians in the democratic era to have to play catch-up. MPs therefore intend stepping up their involvement in matters ranging from the monitoring of South Africa's compliance with international protocols to engaging with the substance of trade agreements.

During February 2011, parliamentarians received a briefing on the potentially ground-shifting events in North Africa and also met with the

European Parliament's "delegation for relations with South Africa" during their 17th inter-parliamentary meeting.

The articulate Tisetso Magama, who chairs the portfolio committee on international relations and cooperation, is one of a new generation of young parliamentarians who entered parliament after the 2009 election. The ANC's unprecedented reshuffling of parliamentary chairpersons in November last year included his promotion to chairpersonship. While it is problematic that some were demoted for being "troublemakers", the appointment of Magama may well prove deserved.

At the briefing Magama took the department of international relations and cooperation on about the delay in rescuing South Africans from strife-torn Libya, insisting on a report-back that very day as "we can't have citizens stranded in a volatile region". He deplored the African Union's "very conspicuous hands-off approach" and pointed out that having the military in charge in Egypt could derail democratisation, as "we know from experience across the world that armies cling to power". The army's complicity in repression exacerbates the potential for a thwarted transition. Lastly, Magama expressed excitement at the North Africans' "toppling of dictatorial regimes". This "should serve as inspiration" to the peoples of Zimbabwe and Swaziland, who have to free themselves as imposed liberations don't work.

A quiet diplomat Magama is not. One could criticise his outspokenness as treading outside a chairperson's traditional role as non-partisan facilitator. But the counter-argument would be that in South Africa, a country itself still in the throes of democratisation, clear articulation of commitment to democratic principles is required from those in power.

Moving to the engagement with the European delegation, one has to remember that, while policy and law always demand some technical understanding, the twists and turns of trade talks require considerable astuteness. The past decade's extended negotiations with the European Union (EU) on economic partnership agreements with the African, Caribbean

and Pacific (ACP) group of states is a case in point. The proposed trade deals, known as EPAs, have been fraught with controversy and missed deadlines. In the past few years South Africa has played a more activist role in opposing EU demands, which it and some other African countries regard as detrimental to development.

ANC MP Bheki Radebe, trade and industry committee whip, was tasked to explain parliament's viewpoint to the European delegation at a joint meeting between the Europeans and the portfolio committees on trade and industry and science and technology. Radebe raised the issue of how the EU's conclusion of interim EPAs with individual states, rather than with the EPA sub-regional groupings, was undermining regional integration. The second issue of concern is the overdue completion of the Doha Development Round at the World Trade Organisation (WTO). Radebe implored his European counterparts to use their influence to move the talks along, particularly with regards the sticking point of US and EU farm subsidies that have wrecked havoc with agriculture-based African economies.

Committee chairperson Joan Fubbs pointed to beneficiation as essential to South Africa and other African countries' development, which should not be of the "dependency type". Radebe repeatedly urged the members of the European Parliament (MEPs) to not let African children continue "going to bed with empty stomachs". In response, British MEP Michael Cashman referred the South Africans to a resolution of the European Parliament which emphasises that the EPAs "cannot be regarded as satisfactory unless they achieve three objectives: offering the ACP countries support for sustainable development, promoting their participation in world trade and strengthening the regionalisation process". German MEP Bernd Lange indicated that the European Parliament could change the direction of trade talks but that the "real problems" needed to be identified. Herein lies the rub.

Clearly the EU thrust at the talks contradicts aspects of the European Parliament's resolution but, while Radebe and Fubbs referred to some

pertinent trade issues, their statements were thin on details. Radebe's argument would have been tremendously strengthened if he had spent less energy on emotive appeals and more on facts. To name but a few examples, he could have highlighted the EU's unjustifiable insistence on being extended the same trade preferences as what may come about through South-South agreements; its opportunistic reintroduction of issues that the South on developmental grounds has managed to exclude at WTO level; and the browbeating of small states into entering into agreements that they do not need.

Parliament's efforts to fix local government undermined by policy constraints

Published May 2011

You know you are in trouble if you are living in a country where a law has to be passed to prevent civil servants from being employed in non-existent posts. This is one of the aims of the Municipal Systems Amendment Bill currently before Parliament. According to the Treasury, in 2009 a full 28 percent of municipal employees were appointed in posts that weren't part of municipalities' organisational structures; in a province like Mpumalanga the figure was as high as 60 percent.

With facts like these, one should not have to search far for the causes of the sometimes violently expressed discontent with service delivery at local government level. Researchers have argued that some issues cited as reasons for the protests, such as education, police conduct and housing, fall outside of local government competencies. However, municipalities manage housing allocation lists and the allegations are that officials use the process to reward cronies and dispense patronage.

It is also worth considering that protestors may be noticing a continuity in political culture running all the way from municipalities treated by local

representatives as their own personal fiefdoms right through to the national level, most recently exemplified by the very minister of cooperative governance and traditional affairs Sicelo Shiceka, accused of using the public purse as though it were his own.

These allegations have come to light on the eve of the local government elections, the one national event that has a direct effect on his department's work. It is laudable that Shiceka, shortly after coming into office in 2009, seemed occupied with seeking solutions to the perennial crises at local government level. His department launched both a turnaround strategy for local government and a plan for municipalities to work towards clean audits. The departmental assessment of the causal factors behind the protests fingered political leadership at local level, especially political factionalism, battles over access to resources and interference in administration.

Parliament took it further, as the ad hoc committee on the coordinated oversight over service delivery stressed "political issues" as "overriding" all other causal factors. In particular, the committee's September 2009 report compiled after public hearings across the country, pinpointed the most significant problem as lying at "the interface of politics and administration, the quality and frequency of public participation, (and) responsiveness to citizens".

It is impressive that the ad hoc committee's report contained a timeline with tasks and that the portfolio committee on cooperative governance and traditional affairs immediately embarked upon meeting the targets that the ad hoc committee had set, specifically with reference to amending the Municipal Systems Act of 2000.

The amendment bill seeks to professionalise the public service at local level, prescribing procedures and competency criteria for appointments; performance agreements; and uniform standards for staff systems. Managers will also be barred from holding office in political parties.

Similarly, regarding public participation, both government and parliament have called for a reform of the ward committee system, as committees are frequently not representative and councillors do not take committee resolutions to the municipal council level. The ad hoc committee recommended that ward committees be given greater statutory authority to exercise oversight over councillors and have the right to recall councillors.

But NGOs have warned that ward committees are being abused as vehicles for dispensing patronage to “yes-men and women” through a monthly allowance. In some cases the ward committee becomes conflated with the branch executive committee of the ruling party and grassroots community leaders become the victims of power games, says Cameron Brisbane of the Built Environment Support Group.

The Good Governance Learning Network (GGLN), consisting of a collection of CSOs, notes that reforming the ward committee system will not necessarily result in the quality of interaction in that space fundamentally changing. The network also points out in its latest report that, while greater professionalisation of municipalities is necessary, questions exist as to “the extent to which legislative provisions can address matters related to political culture”.

Director of the Centre for Civil Society Professor Patrick Bond identified an underlying motive in parliament’s emphasis on “political issues”: claiming that local officials “simply refuse to properly implement the otherwise laudable policies, programmes and projects” obscures the fact that the official policy of cost recovery means that government does not transfer adequate funding for infrastructure and services required by poor people. The ad hoc committee acknowledged that the existing “equitable share” funding model benefits metros and bigger cities that have enough revenue while small allocations are given to rural and poor municipalities without means to generate revenue and that have difficulty being financially sustainable while addressing developmental challenges.

GGLN argues that reforming the municipal system will not by itself dissolve the need for public protests, and neither will an instrumentalist approach to public participation. As Brisbane says, the causes for the protests are overwhelmingly due to local government's failure to deliver on basic human needs such as water, sanitation, and shelter. Corruption and poor management mean that precious resources are diverted from those who need them most.

While the protestors may not be using state-sanctioned communication channels and while their methods may at times be highly deplorable, they are expressing outrage about the inadequate policy response to poverty, compounded by a national political culture of self-enrichment with impunity.

Faltering capacity

Despite parliamentary “constituencies”, voters still don’t call the shots

Published April 2009

Are parliamentarians actively working to solve the problems in their constituencies? This is what should ultimately determine whether they should be returned to Parliament after this year’s election.

One way to find out is to speak to a few. But how easy is it to get hold of our elected representatives at their constituency offices? An informal random check produced a mixed bag, I am relieved to report. Relieved, yes, because the results weren’t uniformly dismal.

I decided to concentrate on the ruling party, given the post-Polokwane promise that ANC MPs would be executing their duties with renewed vigilance. Also, whether those in power like it or not, the governing party (whoever that may be) should be subjected to a higher level of scrutiny than other parties because it controls the levers of government.

Thus, on a day marked on the parliamentary programme as “Constituency Day”, I made calls to mostly backbenchers’ constituency offices as indicated on the ANC’s website.

Some twenty calls later – of which a few went unanswered and some numbers were faulty – I happened upon only two MPs who were physically present at their constituency offices. The one was Chris Gololo, number eleven on Mpumalanga’s provincial-to-national list. But he was in a meeting at his Barberton constituency office, so I left a message to be phoned back. I am still waiting for his call.

In the other case the MP actually picked up the phone. I confirmed that I was speaking to Storey Morutoa, whose constituency is Jabavu, Gauteng. I introduced myself and explained that I am phoning about the challenges in constituencies in the run-up to the election.

Morutoa emitted a little laugh and said, no, she’s not an MP. Perplexed, I indicated that her name is on the ANC’s list (she is number four on Gauteng’s list for Parliament). She said “no” and put the phone down in my ear.

Compared with the abortive chat with Morutoa, or someone purporting to be her, some other calls went exceedingly well. The lively Nthabiseng Khunou, number five on the Free State list for Parliament, chatted eagerly about the problems in her constituency in Thaba Nchu. She gauges joblessness in her area at around 50 percent.

She has tried to make a difference, including organising a women’s group and linking them up with the trade and industry ministry. Another project involves raising funds for agri-business. Commendably, Khunou admitted in a (for an MP) rare moment that she can’t report on the progress of the project because electioneering has taken her away from those duties.

The constituency office of Linda Moss in Clanwilliam similarly indicated that number two on the Western Cape list for Parliament is “not around at the moment as she is canvassing outside”. But I was referred to someone else who took my details and promised that Moss would phone back. Which she did, within two hours. Moss is actively grappling with the difficulties in her area: from farm evictions to water cut-offs to illegal immigrants.

Other offices that sounded fairly well run include that of number 173 on the national-to-national list Ben Mthembu, whose constituency is in Delmas, Limpopo. The office was able to confirm that he was attending a meeting in Witbank. He had given instructions that his number be given to whoever needed to get hold of him.

Sibongile Manana, whose constituency is in Volksrust, Mpumalanga, has a similar arrangement. Her constituency office could not confirm whether she was expected but was able to supply her number. Upon phoning her, she indicated that she was “not well” and “fast asleep” and that I should phone back the next day.

Bheki Mnyandu’s constituency office in Melmoth, KwaZulu Natal (KZN), told me that number 38 on the ANC’s KZN list for Parliament was in Durban for the day and could be reached on his cell phone.

Those who I could not get hold of via their constituency offices include Mnyamezeli Booï, ANC chief whip and number 69 on the national-to-national list. His constituency office is in Philippi near Cape Town. The office indicated that Booï may be at Parliament but this was “not certain”.

Similarly, Thabo Molefe’s constituency office in Rustenburg, North West, was not sure about the whereabouts of their MP (“He was here last week but I’m not sure if he went back to Cape Town”). Ditto number 32 on the KZN list for Parliament, Mbuso Khubekha, whose constituency is in Newcastle, KwaZulu Natal (“He’s not around. I don’t know where he is.”).

The patchy outcomes of this limited informal survey illustrate why some South Africans have agitated for a “real” constituency system where party candidates are elected directly in a parliamentary ward, rather than the present system where candidates vie to be in party leaders’ good books in order to be selected for the proportional lists.

While the ANC’s allocation of “constituencies” to its MPs seems like a move aimed at enhancing accountability, it does not change the reality

that voters in such “constituencies” cannot directly remove parliamentary representatives when they don’t perform.

A compelling argument could be made that the current PR system discourages active citizen participation because South Africans already know that party leaderships will select loyalists – regardless of performance or whether voters agree. For example, if voters had a direct say, would they return a Travelgate suspect such as Booi to Parliament?

The lack of accountability may be what dissuaded those 11,8 million eligible voters who stayed away from the ballot boxes in the 2004 election.

Parliament hobbled by time lags in holding impudent bureaucrats to account

Published July 2009

To get a sense of the health of the South African state, one only has to turn to parliament. Although its first post-election term has barely started, it already has an array of case studies on offer.

The question that crops up time and again is how effective parliament can be in providing oversight over government departments' expenditure and policy implementation. The problem starts with something as simple as time-delays of literally years between when disaster strikes and when "The Official Report on the Disaster" is finally presented to the relevant committee. Just how slow can we allow the wheels of state to turn?

Another question relates to impudent civil servants. During July, the Scopa, which has the responsibility to scrutinise the spending of public funds, was confronted with civil servants that displayed disdain for both the committee and for basic policies on service delivery and corruption.

Judging by the lack of preparation, the insolent silences and the obvious distortions when questions were finally answered, MPs' admonitions seemed to be falling on deaf ears.

One example is the much-publicised hearing on the Auditor-General's report that revealed that some 2,000 civil servants stuck R600 million in their pockets, or in those of family members and associates, via state contracts in 2004/5. Senior civil servants at the level of directors-general of provinces admitted to Scopa that they had barely lifted a finger to stop the feeding frenzy.

Then there was the Auditor-General's report on the N2 Gateway Project. This has been a consistently calamitous case study illustrating why it is that service delivery results seem shoddier in not just housing but across a range of government departments.

The report was discussed in July this year after being tabled in parliament in April this year. The date on the report is July last year. Such a delay should be explained, especially given the amount of damage that can be done in a year, as this project demonstrates.

The AG report details what went wrong since the moment when politicians conceived of the bright idea to do a PR exercise on the shacks lining the N2 highway from Cape Town International Airport into the city.

This was way back in 2004, which means that catastrophe has since struck well and proper. What makes the N2 Gateway Project especially distressing is that one cannot just finger one tier of government. It involves all three – national, provincial, local. Its history reads like a litany of ineptitude and impunity. What makes it worse is that the multi-billions that have been budgeted for this project are coming from you and me.

Scopa chairperson Themba Godi, the African People's Convention's (APC) sole MP, unleashed a well-prepared Lolo Mashiane (Cope) on the bureaucrats of the national department of human settlements and the city of Cape Town.

With more stops than starts, a tale unfolded of a project kicked off without the proper laws in place; the flouting of laws and tender procedures;

and payment of inflated amounts of money despite only three percent of the houses being delivered.

Other MPs joined in, notably Roy Ainslie (ANC), Sheila Sithole (ANC) and Nicolaas du Toit (DA). Over the course of two hours the bureaucrats contradicted each other and the AG report a number of times.

It also transpired that the city manager of Cape Town, Achmat Ebrahim, did not know why the sixth-placed Cyberia won the tender, having not bothered to familiarise himself with such details since he had landed the job way back in June 2006. In the end, Cyberia was paid an astounding 252 percent, or R12 million, of the original tender amount – despite only completing 721 of the originally planned 22,000 houses.

In a rare moment, Director General of Human Settlements Itumeleng Kotsoane admitted that when the local government changed hands from the ANC to a DA-dominated council in 2006, the project became “a political challenge”. It seems the then minister and MECs for housing did not want to engage with newly elected Cape Town mayor Helen Zille – or vice versa.

And thus a project which was started, ostensibly, to address the desperate lack of housing around Cape Town sadly got mired in petty party power play between the ANC-controlled national government and the DA-controlled local government.

Just when you think it couldn’t get any worse, it transpires that no contract was agreed to with the now bankrupt state-owned company Thubelisha Homes that took over from Cyberia.

Exasperated about the evasions and insufficient answers from the civil servants, Scopa postponed the meeting to August with the warning that it wants the full answers then.

Godi at some point remarked that the civil servants seem to assume that

politicians don't read documents, so they can just give some generalised responses and "get away with it". One gets the sense that accounting to Parliament is a pesky but unavoidable chore for such civil servants. They keep their heads low, duck and dive and then they're home-free – until the next time when the ritual is merely repeated.

Clearly, parliamentary committees' current approach is not equal to the task at hand. And we are just talking about the impudence of some civil servants and not of the larger issues at stake, such as the politicisation of the civil service; the conflation of party and state; and the corrupt abuse of state resources.

MTBPS process: Public hearings must become the lifeblood of parliament

Published Nov 2009

November 2009 saw a flurry of public engagement at parliament. The implementation of the Domestic Violence Act was critically examined, a process which in itself was the result of an earlier consultation with civil society. Parliament received public inputs on the Green Paper on national strategic planning.

The MTBPS came under public scrutiny in a process that, for the first time, could have resulted in amendments. In December, service delivery problems will be tackled.

Parliament had previously fallen into a lacklustre approach to public consultation, which led to a Constitutional Court decision that forced it to re-open certain laws for input from civil society. This is doubtless one of the reasons why MPs seem to be taking public hearings more seriously.

But it is also in line with a government that finally acknowledges the problems that South Africans face. Instead of the denial of before (“AIDS – what AIDS?”; “crime – what crime?”) there is an almost disarming honesty, as could be seen at Minister of Cooperative Governance and Traditional Affairs Sicelo Shiceka’s briefing earlier this month to an ad hoc committee set up to investigate the service delivery protests.

He identified the main factor behind the delivery shambles as battles over access to resources, whether jobs or tenders, at municipal level. Corruption is rife; people are employed despite lacking necessary skills. Meanwhile, councillors avoid accountability to the people they are supposed to serve.

Shiceka fingered parliament as one of the culprits in allowing this situation to manifest. After all, parliament is tasked with scrutinising the implementation of laws. This task becomes more imperative when laws are being broken, as is the case with some municipalities.

His criticism is deserved. Ten years into democracy it was not uncommon to hear politicians and even pundits say that, with parliament having adopted most of the laws necessary to give effect to the Constitution, “the political action” had shifted elsewhere, which was why talented people moved on to other challenges. This is reflected in the ever-diminishing resources that media companies are willing to expend on their parliamentary coverage.

Parliament’s shrinking significance was due in no small measure to the heavy hand of the executive paralysing those MPs who remained behind, rendering them diligent only when doing the executive’s bidding.

Whether the ad hoc committee’s public hearings on service delivery will be effective depends on who gets to speak and, of course, whether they are listened to. The public “consultation” that preceded the dismantling of the Scorpions was an example of public hearings being a “formality used merely to further an existing government agenda”, to apply a phrase used by Idasa’s Shameela Seedat.

The just-completed MTBPS public consultation process unfortunately again serves as an example of the obstacles in the way of meaningful public consultation. While parliament’s finance committee has throughout the years conducted public hearings on the budget, it was without the necessary powers to amend the budget.

Despite a constitutional provision, it has taken until this year for the Money Bills Amendment Procedure and Related Matters Act to see the light. It empowers parliament to revise the fiscal framework and the budget.

The lag should not be surprising, given the previous government leadership's resistance to public engagement on economic policy. Insulating economic policy from democratic pressure in developing countries has long been promoted by neoliberal economists, including at the Bretton Woods Institutions.

Comparing the finance committee's 2008 report on the MTBPS, before the Money Bills Act was adopted, with its 2009 report, one would hope for more substantive recommendations in this year's report. Instead, despite what should be a significantly enhanced process, there are some disturbing similarities.

Firstly, the finance committee's sparse recommendations to the NA include that the parliamentary programme should allow more time for engagement with the MTBPS -- exactly what was recommended in last year's report.

Furthermore, the committee admitted to being unable to engage with the technical aspects of the MTBPS because the budget research office has not been set up yet. This means MPs drafted those clauses in the act that stipulate research support but took no steps to actualise them. The law has been in place since April this year. Surely six months should be enough time to set up such an office?

Judging by the questions during the public hearings, the parliamentarians need the research support urgently. MPs even sought clarification on economics jargon instead of digging into the substance of presentations.

Parliament is notorious for ignoring its own recommendations. Given that the request for more time to deal with the MTBPS was the same as last

year, will we have another request for enhanced research capacity in next year's report?

Perhaps more troubling is the fact that the public submissions were from the usual crowd that has been making inputs at finance committee hearings over the past 15 years: organised business, organised labour and an economist from a large financial institution. Only one civil society organisation – Idasa – featured.

Similarly, the appropriations committee – set up in terms of the act to consider departments' budgetary allocations – only received public inputs from economists and two statutory bodies. The People's Budget Coalition could not make it.

Merely listening to the inputs of the same well-resourced and connected organisations and individuals flies in the face of democratic participation. Civil society organisations should grasp this opportunity to influence where and how our money is spent. But we also need more than lip service from MPs to the worn-out slogan of "taking parliament to the people".

Committees don't hold departments to deadlines

Published June 2011

The slow but steady decline in ANC support, as shown again by the local government election results, has prompted the ruling party to consider introducing oversight mechanisms at local level, following the example of Parliament. But this may not be a panacea.

Jackson Mthembu, ANC national spokesperson, explained the thinking as follows in an interview: "Provincial and national government seem to be working better than local authorities because there are very strong oversight mechanisms institutionally. Parliament holds the executive accountable regularly and, portfolio committees can call whatever portfolio (sic) in cabinet to come and account." While what Mthembu says sounds good in theory, he is painting an overly rosy picture of parliamentary oversight. "Portfolios" have successfully resisted being called to account, as most amply illustrated by defence minister Lindiwe Sisulu who used Luthuli House muscle to get the pesky defence portfolio committee to back off as she shifts military information from public view.

In contrast to the defence committee, the ad hoc committee on the protection of information bill slavishly toes the ANC leadership's line. ANC MPs' extraordinary antagonism towards civil society and the media stands in sharp contrast to their fawning over inputs from minister of state security Siyabonga Cwele. This has been a case of accountability in reversal: The public hearings on the bill are being exposed as a ruse, ANC

MPs merely going through the usual motions before giving effect to what their political masters in the executive and Luthuli House have ordered.

Generally, parliamentary oversight has been haphazard, depending on the agenda of the currently dominant party, especially when it comes to big ticket political items such as the arms deal, the Scorpions, Vusi Pikoli and, presently, what civil society has dubbed the “secrecy bill”. What about the daily grind of oversight over the implementation of legislation that neither the ruling party nor other actors, such as the media or business or even opposition parties, have much investment in?

Tshwaranang Legal Advocacy Centre has conducted a systematic investigation of government departments’ implementation of two vital pieces of legislation aimed at ending endemic violence against women, an abominable feature of post-apartheid South Africa. These laws are the Domestic Violence Act of 1998 and the Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007. The research, led by Tshwaranang director Lisa Vetten, is illuminating partly because it studies legislation passed in two different eras in the democratic parliament’s existence.

The Domestic Violence Act was adopted in the afterglow of our first democratic election, when a general sense of can-do optimism still pervaded. However, the law was not costed, as has since become a general practice. Also, it omits to explicitly assign duties to government departments. The Sexual Offences Act (SOA), in contrast, is mentioned in some (not all) budgets and also gives detailed mandates to departments. However, it is lumped with other legislation in the budgets and the evidence suggests that it has also not been costed.

Specifically, the power of Tshwaranang’s analysis lies in its exposure of not only wide-ranging failure on the part of departments in executing their mandated duties but also on the part of parliamentary committees in calling these departments to account. The findings include the following: The police have no explicit strategy in place to address either

domestic violence or sexual offences. The justice department has shifted its focus from “gender equality” to “vulnerability” within which a hierarchy of vulnerable groups has been created. The numbers show women at the bottom with the least access to justice, despite constituting the vast majority of victims.

Less than half of South Africans who apply for protection orders in terms of the Domestic Violence Act ultimately succeed. This may be explained by the fact that the police and the courts’ measurement of success is reducing the number of cases, which serves the system rather than the victims. Similarly, the number of victim-centred sexual offences courts has dropped because such courts require more resources; magistrates resist specialising in sexual offences matters; and because such courts do not fit with what magistrates regard as “efficient” case-flow management.

The Thuthuzela one-stop centres, the NPA’s most thriving programme addressing sexual violence, seems to be funded in large part with foreign money, raising concerns about both government’s commitment to these services and their sustainability. The health department was supposed to have designated health facilities to provide post-exposure prophylaxis to rape victims to prevent HIV transmission but has not done so.

There is little indication of parliament taking action on these failings. The portfolio committee on women, youth, children and people with disabilities did conduct public hearings on the implementation of the Domestic Violence Act in October 2009 but took a full year to table a report on the hearings in the NA. Nothing seems to have come of this report. But even conducting such an inquiry was unusual. Committees are on the whole failing at the most basic level in that departments have missed multiple deadlines for tabling reports in Parliament on the implementation of the SOA but are not being called to account.

Tshwaranang acknowledges the heavy workloads of especially the committees on justice and police. The onus is on Parliament to change its processes to strike a balance between its legislative and oversight functions.

Failure to hold departments to account exacerbates the already patchy access to essential services, depriving South Africans not only of justice but also of protection.

Parliament's institutional amnesia

Published July 2011

Parliament has since 1994 excelled at its legislative function, passing reams of inspired and inspiring laws to give effect to the Constitution and undo the oppressive edicts and institutions of apartheid. As the legal scaffolding of our democracy took shape and the pace of lawmaking slowed, Parliament should have shifted its focus to increasingly monitor the implementation of these laws and policies.

However, as Speaker Max Sisulu acknowledged when he delivered Parliament's budget speech during June, parliamentary oversight has been ineffective. As a result, Parliament falls short in providing the essential checks and balances for good governance.

I have previously written (previous column) about how parliamentary committees missed their own deadlines in holding government departments to account in the execution of the SOA. The Department of Justice and Constitutional Development has since presented the national policy framework (NPF) for the act to the relevant portfolio committee. One appreciates the difficulty in five departments reaching agreement on the framework -- but how did they miss an already extended deadline with two years? In the meeting with the Portfolio Committee on Justice and Constitutional Development, officials partly attributed the delay to new responsibilities that the act brings. But, as Tshwaranang Legal Advice Centre's Lisa Vetten has noted, this is also a favourite excuse of the police when they fail their mandate.

Surely it is not a “new” notion that the justice department also has to ensure the dispensing of justice to victims of sexual violence? Ditto the police. While both ruling party and opposition MPs confronted the officials about the delays, the limitations of oversight were again exposed at the meeting. Questions from Steve Swart (ACDP) revealed that the departments had not only omitted to table the annual reports necessary for tracking the realisation of the act but had planned to fob parliament off with a “collated report” in July.

Swart pointed out that, in lieu of the annual reports, the committee has been unable to intervene in terms of the Money Bills Amendment Procedure and Related Matters Act, which would have allowed it to reallocate funds to address bottlenecks in the overdue creation of the sex offenders register. This illustrates how something as seemingly trite as furnishing a report on time is nonnegotiable for effective governance.

A gloomy mood descended on the committee meeting as MPs reprimanded the officials, also about the overdue NPF being mostly aspirational rather than concrete in content. Committee chairperson Luwellyn Landers (ANC) commented a few times that maybe the justice committee had expected too much when it drafted the act; maybe MPs had “stars in their eyes”. In an about-face from his hawkish role in the Ad Hoc Committee on the Protection of Information Bill, Landers apparently drew on the Tshwaranang research report on the act in asking his questions and then spent a few minutes thanking Tshwaranang for its “wisdom” and requesting its assistance in future. Some organisations research the effects of laws on the ground and are well placed to expose the shortfall between theory and practice. Parliament, in addressing its own failures in overseeing government departments, should draw on civil society as a resource.

While Parliament is remiss in the application of its own laws, it also seems to suffer from institutional amnesia about its own investigations, of which the lengthy turnaround times belie the urgency in addressing festering incompetence and corruption. Take, as an example, the sorry tale of the CGE, for several years the object of investigations by the Public Protector

and the AG. Perennial problems that started a decade ago with infighting and mass resignations have culminated in a disclaimer from the AG in 2008-2009 and findings of fraudulent and irregular expenditure.

As far back as 2007 the parliamentary Ad Hoc Committee on the Review of Chapter Nine and Associated Institutions, led by the late Kader Asmal, found that the commission's interaction with Parliament was unsatisfactory. Between 2006 and 2007 the commission had no commissioners as Parliament omitted to appoint new ones. To this day the commission is functioning with fewer than the legislated minimum of commissioners, despite a reminder from the Public Protector about the vacancies. The Public Protector's recommendations from two investigations are, among others, that the CGE Act be aligned with the 1996 Constitution – not a new idea, as parliament's own ad hoc committee wanted the CGE Act to be updated as it still refers to the 1993 interim Constitution. Last year, parliament at long last got around to appointing an ad hoc committee to deliberate on the two agencies' findings and a report was tabled in April this year.

Parliament's new focus on improving the fulfilment of its oversight function is therefore absolutely necessary, just judging from these few cases. Honourable Landers, on the other hand, may be wandering into dangerous territory with his "stars in the eyes" lament. One hears more often than not nowadays that maybe Parliament should have rather refrained from passing "ambitious laws" such as the SOA. It fits with the discourse that suggests that South Africa's Constitution is "too sophisticated" for South Africans. Are these comments meant to propose that South Africans are inherently incapable of respecting human rights and democratic institutions?

We should remind ourselves that institutions are sedimented practices. South Africans, including Parliament, have to improve our practices over and over again until enhanced practices become entrenched. We are still new to democracy. The more we practise, the better we will get at it. But it takes time.

Proportional representation trips up accountability yet again

Published Dec 2011

The year ends with a sword hanging over the heads of two parliamentarians, Ben Turok and Gloria Borman, after their decision not to vote for the Protection of State Information Bill. Their fate again raises questions about the type of electoral system that we have in South Africa, where public representatives can be punished if they do not act as voting fodder for the party bosses. Meanwhile we, the people whose votes determine the number of parliamentary seats that parties have available for their members, have no recourse when MPs serve narrow party agendas rather than democratic interests.

More fundamentally, it is also about participation in this democracy. The newly appointed chairperson of the NCOP committee that will be overseeing the next phase in the bill's sorry career, ANC MP Papi Tau, regards the debate about the bill as "highly, highly elite". His committee wants "ordinary people from rural areas" to understand the bill. This is a dismissive swipe in the direction of the R2K and its support from more than 400 organisations and 20,000 individuals.

How do Tau's allegations fit with Turok's explanation that he refused to vote because even MPs do not understand the bill? Turok is one of the more intellectually rigorous MPs, so he could not be accused of laxness.

Does this mean that ANC MPs were not properly informed about the contents and implications of the bill before they voted? If this is indeed so, it is an indictment of parliament and all parliamentarians and exposes another failing in the system of PR.

Because, if MPs' continued presence in parliament was directly dependent on a constituency, nobody would be able to suggest that only an "elite" knows about a bill. Each and every MP, especially before voting on significant legislative change, would take care to develop a full understanding in order to explain it to their constituencies and get feedback. This is what Borman did: she spoke to legal experts and she reflected on her responsibility towards the church community that she represents. For her trouble she has been called "ill-disciplined" and may lose her seat. From ANC secretary general Gwede Mantashe's point of view, "public representatives of the ANC are holding public offices at the instance of the ANC. They are therefore bound by policy directives of the ANC and not their whims and thoughts."

It is common knowledge that the current system of PR has the undesirable side effect of rendering MPs solely beholden to their parties. Mantashe clearly regards it positively but democrats would disagree. Borman and Turok, rather than acting on their own "whims", demonstrated responsiveness to citizens' concerns, unlike their colleagues.

The problem is not so much an "elite" imposing its distorted interpretations upon an excellent piece of legislation, as per Tau's insinuation, but rather that the electoral system forces MPs to unquestioningly do the bidding of their party masters, whose paternalistic attitude is not reserved for citizens but also extends to parliamentarians.

The saga justifies revisiting the 2003 report produced by the cabinet-appointed Electoral Task Team, led by the late Dr Frederik van Zyl Slabbert and which recommended changing South Africa's electoral system to address the lack of accountability while still fulfilling the criteria of fairness, inclusiveness and simplicity. The majority of the task team differentiated between individual and collective accountability. While collective accountability is ensured every five years when voters go to the polls to accept or reject a party, individual accountability from public representatives is far more difficult to extract, especially between elections.

Would a single-member constituency system be the answer to the problem? Apartheid's constituency-based system in no way contributed to democratisation: NP MPs merely served as conveyor belts, diligently feeding the racist line of the nationalists of the day to their constituencies.

Slabbert's task team pointed out that a single-member constituency system would not solve the problem because voters, especially at this historical juncture, are unlikely to vote for another party even if dissatisfied with the incumbent. The team's proposed solution was gradually phasing in a multi-member constituency system where each political party proposes a number of candidates in a given constituency, with voters selecting those that make the grade.

This system means that competition would be introduced between candidates within parties on the basis of voters' demands, rather than those of the party bosses. Candidates would have to campaign in constituencies before an election – currently unknown in South Africa, apart from the flashy road shows that the national leaders embark upon. When elected, candidates would have to represent their constituencies, which would require regular interaction with voters, also currently unknown. In short, it would "put a face to the politician". And, most importantly, it would "substantially increase voter participation in the democratic process". It would also, apropos Tau's concerns, ensure that "South Africans in both urban and rural areas feel much more closely involved in the democratic process".

However, despite the considerable work done by the task team, the report was dead in the water. Slabbert said at the time the ANC had no intention of changing the system, even before the task team had started its work. How does this tally with its stated commitment to enhanced participation by those who are still frequently excluded from democratic processes? But, like Borman and Turok probably know, we should rather not worry our little heads about such matters. The party bosses have it all sussed out.

Budget tools still not being used

Published Oct 2012

Xolela Mangcu in his latest book *Biko – A Biography* writes about a “big chief syndrome” that exists among the current ruling elite, in which followers are placed at the mercy of the “chief”. South Africans arguably suffer as much as politicians from big chief syndrome, in that we imbue leaders with inordinate power. This has to do with how we approach political power.

With the ruling party’s elective conference in Mangaung around the corner, South Africans who bother to read are swept along in a deluge of speculations about anticipated leadership changes. These speculations provide only temporary respite from the usual incessant musing about the minutiae of factionalist infighting in the ANC.

Questions such as “who has power?” and “what is going on in the president’s head and what is he trying to do?” merely lead into “a labyrinth from which there is no way out”, French philosopher Michel Foucault wrote. Needless to say, reams of descriptions of internal ANC games of musical chairs, passing as “analysis”, produce a similar result.

Power is best analysed in how it is exercised and the effects it produces, Foucault argued. He was talking about how identities are formed. We can apply this line of thinking to ask how the exercise of political power, through the adoption of laws, affects the lives of people. Speaker of the Gauteng legislature Lindiwe Maseko explains this question in the form of an interlinked chain of political actions that end in an equation: “Policy > inputs (budget) > outputs (service delivery) = outcome (better life).”

Translated into words, the formulation means “the evaluation of the efficacy of public service programmes and the appropriateness of financial resource allocations and management, and the relationships between these key elements”. This is the focus of a legislature sector oversight model adopted earlier this year. This new model ostensibly “builds” on parliament’s oversight and accountability model of 2009. But it seems rather that the 2009 model has been shifted sideways, probably because of its genesis in the Mbeki era. Whatever the case may be, the new model provides a more detailed engagement with oversight.

The models mark a shift in parliament and the provincial legislatures’ focus: between 1994-2009, apartheid laws had to be replaced with laws fit for democracy but now the legislatures should be overseeing their implementation and impact.

Implementation of laws hinges on budgets, which are key instruments in the exercise of power. The 2009 oversight model provided for the adoption of the Money Bills Amendment Procedure and Related Matters Act of 2009. This law empowers parliamentary portfolio committees to intervene when government departments use financial resources ineffectively and fail to deliver, in Maseko’s terms, “a better life”.

During the month of October every year, committees should be drafting budget review and recommendation reports. These reports have to be based on critical comparisons with departments’ strategic plans, estimates of expenditure and other relevant reports.

The reports feed into the national budgeting process as, come February, the finance minister has to explain if and how their recommendations have been given effect.

The money bills law should loosen the sticky grip of technocrats on national budgeting and democratise the process, also by allowing direct inputs from the public. But, three years after the adoption of the act, parliament is yet to actualise its potential.

Public finance economist Tania Ajam told the “People’s Power, People’s Parliament” conference that parliamentary committees do not draw on independent sources of information to validate departments’ claims and rely on departments’ assessments of themselves. This surely defeats the purpose. They do not measure the budgets in terms of job creation or the rights of children, disabled people and women.

Ajam also pointed out that the committee’s budget reports *describe* instead of *analyse*, and are *retrospective* rather than *prospective*. While it is almost impossible to influence the current budget, committees should be looking at the medium-term budget framework period and make recommendations on forward allocation of resources.

For democratic budgeting to reap fruits, parliament needs to be as good as treasury, Ajam asserted. But, as in other sectors, capacity is a challenge. This has been exacerbated by an inexcusable delay in creating the budget support office at parliament that the law provides for.

Equal Education’s (EE) attempt to contribute “critical information” to strengthen the budget report prepared by the portfolio committee on basic education in 2011 exposes the failures of the process as it stands. In new research compiled by Keren Ben-Zeev and Samantha Waterhouse, EE found the committee’s budget report for 2011 to be shallow and too technical. The committee’s report also set ridiculously low standards, for example citing as a “success” a project that was two years overdue, and omitting that the department had only spent 28 percent of its budget in the reporting period.

Countries such as Brazil show that democratising budgets can have direct positive effects on poor people’s lives. Fundi Nzimande from the National Labour and Economic Development Institute also points to Ecuador where a significant reduction in infant and maternal mortality rates has been attributed to public participation in state budgeting.

South Africa, in contrast, has produced the ignominies of a maternal mortality rate that has quadrupled over the past few years, while infant mortality has risen by at least a third. These results expose the real workings of power, 18 years into democracy. It is an indictment that ever more tools are available to improve *and* save lives but are not being used.

What parliament can do about violence against women

Published March 2013

South Africans started 2013 with two high-profile cases of violence against women. The murders of Anene Booysen and Reeva Steenkamp attracted headlines due to the sadistic extremes of the first and the celebrity connection of the second.

Lest we forget, every eight hours in South Africa a woman is murdered by her intimate partner, according to the Medical Research Council. Let's avoid the trap of accepting everyday instances of gender-based violence, which form the vast bulk, as "ordinary".

The abominable MRC figure confirms the epidemic of misogyny that prevails in South Africa, with Booysen and Steenkamp among its many victims. The figures should jolt us into rethinking current approaches.

While the government has created a council on gender-based violence, gender organisations are asking for a commission of inquiry into the causes of this violence and obstacles to implementation of laws.

These organisations want a fund to ensure adequate resourcing of prevention and support services. Because, as they point out, we have the incongruous situation that the very organisations with the necessary know-how to work against gender-based violence are shutting down due to lack of state support.

Indeed, as the organisations doing the work on the ground close down, the government indulges in a proliferation of expensive, less effective state structures. The Ministry for Women, Children and People with Disabilities replaced the Office on the Status of Women in the Presidency. The overlap between the ministry's powers and functions and that of the CGE is still not sorted out.

What justifies the channelling of state funds to a gender-based violence council when a vital organisation such as Rape Crisis teeters on the edge of collapse?

Before creating ever more structures, we should be looking hard at why existing legislation and structures seem to be failing. This is where Parliament comes in.

South Africa is a member of the Inter-Parliamentary Union (IPU), an international body representing parliaments which works closely with the United Nations. In 2006, the IPU adopted a resolution at its 114th assembly in Nairobi on how parliaments can promote effective ways of combating violence against women.

This was followed in 2008 by the launch of an IPU campaign called "Parliaments take action on violence against women". At a conference held in Geneva that year IPU members discussed "a parliamentary response to violence against women". Curiously, the delegates' list shows only one representative from South Africa: Pregs Govender, who at that point was no longer a member of parliament.

South Africa was completely absent at the IPU's regional meeting in December last year in Tanzania on how to overcome the gap between legislation and enforcement of laws on violence against women.

Drawing on case studies of experiences from around the world, the Geneva conference identified six priority actions for the effective use of

parliamentary powers. These suggest that South African MPs are not as fully informed as they might think.

These actions are: adopting laws that work; ensuring these laws are implemented; demonstrating strong political will; building partnerships to show the combating of violence against women is a national priority; educating and sensitising women and men about women's human rights; and establishing a sound institutional framework.

Laws should be framed by the acknowledgement that violence against women is a form of gender-based discrimination. This point is of particular significance in South Africa, as some politicians persist with misattributing violence against women to generalised social challenges. Such a gender-blind approach makes it impossible to analyse and transform the unequal power relations that underpin this kind of violence.

The IPU says that ensuring implementation means allocating sufficient budget. The crisis in support and shelter services for GBV victims is plainly due to a lack of state prioritisation, which gives the lie to politicians' regular sympathetic noises about victims.

Appropriately, the government has been lauded for the creation of the Thuthuzela one-stop centres for victims of sexual violence. But these centres depend on non-state funding, which raises questions both about their future sustainability and government's commitment to such services, as activist Lisa Vetten has pointed out.

Ensuring implementation also means regular reviews. The police wisely reinstated the specialised family violence, child protection and sexual offences units that fraudster Jackie Selebi had disbanded in another low point in his career as police commissioner.

Similarly wise is the justice ministry's decision to reintroduce sexual offences courts. But, as the Women's Legal Centre found in its review of the State of the Nation Address (SONA) 2013, there is a discrepancy

between the urgency with which so-called violent protestors are being prosecuted, on the one hand, and the ministry's puzzling call for "patience" with regard the reinstatement of these courts. MPs should hold the ministry to its promise of an announcement in this regard in April.

Coming to sensitisation, the extent and quality of human rights training of police officers, magistrates and others deserves a thorough examination in parliamentary committees, given continuing reports of atrocious treatment ranging from dismissive to abusive.

Assessing the implementation of laws hinges on data. The Women's Legal Centre's SONA reviews have for three years found little sex-disaggregated state data on women's lived realities and laws' effects on them. The IPU priority actions include that "parliamentarians must have access to comprehensive, sex-disaggregated data and use indicators and targets to assess the impact of laws on women".

How can laws be monitored without data? But then, parliamentarians would be alert to this fact had they been engaged with the IPU campaign on violence against women.

Which 'public'?

Does the public have a say about the Scorpions?

Published 8 Aug 2009

Who is the public? Is it the 3,834 voting delegates at the ANC's Polokwane conference? Or is it the majority party's constituency? Or the citizens of South Africa?

This question is at the heart of parliament's deliberations on whether it should disband the Directorate of Special Operations (DSO), also known as the Scorpions. This week at the public hearings on the so-called Scorpions bills in parliament, frequent reference was made to what "the public" may think about the issue.

The decision on the Scorpions will be made "on the basis of the view of the public", said ANC national executive member, Sicelo Shiceka, at the hearings. If an overwhelming number of South Africans and ANC supporters are opposed to the dissolution of the Scorpions, parliament can't ignore them, declared justice portfolio committee chair Yunus Carrim.

Parliamentarians are confronted with the extremely difficult task of deciding which "public" they should serve. The decision to disband the Scorpions comes from a policy conference of the ANC held in mid-2007. It was confirmed at the ANC's national conference in Polokwane in December last year.

In a bid to counter this decision various organisations, including the DA, have embarked on petition drives. The DA gathered about 100,000

signatures presenting the view of a different “public” who wants to keep the Scorpions in place.

While the Polokwane “public” is not the only public, so the 100,000 signatories to the pro-Scorpions petitions are also not the only public. They are parts of the larger public, many of whom are without a voice. Indeed, what should guide parliament is the more encompassing concept of the public interest, based on our constitutional values.

But the clash in views shows us how contested this matter is. In such a case, what is the responsibility of a parliamentary committee in a democracy? And to whom should a party that holds a preponderant majority be accountable? The voting delegates at its conference or to its own constituency or to the electorate? Or the all the people of South Africa?

What complicates all of this is that the posts of MPs are assigned by party leaderships. With little time left before the next election, considerations of future employment may interfere with law-making processes. This is especially so because of the palpable uncertainty brought about within ANC ranks by the sweeping overhaul of its leadership at Polokwane.

Perhaps unsurprisingly, therefore, the question of which public to listen to was foreclosed by the heads of the relevant parliamentary committees, Yunus Carrim and Maggie Sotyu. In response to the DA's presentation of what its “public” thinks of the issue, Carrim and Sotyu declared last week that the Polokwane decision is final.

The ANC subsequently realised it had a public relations disaster on its hands. More than that: if the outcome of the hearings has been prejudged, these bills could be challenged following two court findings on the legislative arm's duty to conduct proper public consultation.

Therefore significant time was devoted to disaster management at the hearings this week. Carrim took time to convince “the public” that their inputs would be taken seriously and that parliament would “exercise its

full oversight role". Amazingly – ask any parliamentary news reporter – all the submissions were available without the usual hassle.

In an unprecedented move, the committees' heads met separately with CSOs to iron out the issue of public consultation. Media interviews were happily granted.

However, the impression that the demise of the Scorpions is a fait accompli was confirmed by a number of signals, apart from Carrim and Soty's faux pas last week.

Firstly, in the advertisements for the public hearings the dissolution of the Scorpions is framed as part of a new criminal justice system review. Deputy Minister of Justice and Constitutional Development Johnny de Lange presented the review at the start of the hearings. He did not mention the Scorpions once, confirming that the demise of the unit was never part of the review, contrary to the ANC's insistence on this since Polokwane.

A related point is that De Lange indicated that the review would not have been accompanied by any legislative changes, which is what the Scorpions disbandment requires.

Secondly, the review seeks the closer cooperation of prosecutors and investigators to ensure effective preparation of criminal cases – which is exactly the model the Scorpions have been following and, counter-intuitively, which the laws under consideration are aiming to do away with.

Thirdly, the ANC made concerted efforts to deny that the disbandment of the Scorpions has to do with the Polokwane decision, insisting instead that it was about the Scorpions' poor track record. No rational connection could, however, be established during the public hearings between performance (Scorpions prosecutions clocked a 90 percent success rate) and the decision to dissolve the unit.

Fourthly, the ANC has repeatedly claimed that the Scorpions are merely being moved from the NPA to the police. However, the entity that will be created in the police has less powers and a lower status than the Scorpions.

The powers that made the Scorpions especially effective – the “troika” approach of combining prosecutorial, investigative and intelligence functions – are being done away with, making the new entity just another law enforcement agency stuck with archaic and fruitless police practices.

Finally, and perhaps the most chilling factor, is the reality that some MPs have been under investigation by the Scorpions. And they may be sitting in these very parliamentary meetings, deciding whether the Scorpions should be smashed.

Law-making becomes a weapon in ANC power battle

Published 3 September 2008

Power-politics produces bad laws. Parliament is currently engaged in law-making seemingly aimed at reinforcing the ascendance of a particular power bloc within the majority party. The resultant laws may undermine the public interest and could lead to legal challenges.

There are a few examples of this. NA committees are working their way through two amendment bills on the South African Police Service and the NPA.

These bills are designed to crush the Scorpions and create another unit with less power and status within police structures (and not to incorporate the Scorpions into the police, as some media reports would have it under the influence of ANC spin).

Qualms also exist about health and environmental bills passed during the current session -- because of the lack of proper engagement with the implications of these bills.

And the NCOP is considering the Broadcasting Amendment Bill, which has already been passed by the NA. The bill is being hurriedly pushed through without it addressing all the shortcomings in the existing law and associated codes. These shortcomings allow the SABC's independence to be compromised.

The Broadcasting Act of 1999, which the current bill seeks to amend, leaves a lot to be desired. At the time, the passage of the law was expedited despite glaring gaps. One such gap is the omission of a procedure by which parliament could replace the SABC board, or members of the board, if such action was required.

The amendment bill rectifies this oversight. One cannot have a problem with this, per se. However, it is instructive that the parliamentary committee tasked with communication has in the past been unperturbed by this obvious lack in the law. That is, until the ANC's national conference in Polokwane last year.

The problem of political interference at the SABC is not a rumour but reality, as we know. An "unfavourable" documentary on President Thabo Mbeki was pulled. Certain commentators were blacklisted by dictate of SABC head of news Dr Snuki Zikalala.

There were the attempts (even via the courts) to block public scrutiny of the report of the Sisulu commission of inquiry into the blacklisting – contradictory behaviour for an institution which by its very nature should be pursuing transparency and a free-flow of information.

And all of this involved the board, which has since engaged in a farcical battle against suspended SABC CEO Adv Dali Mpofu which also saw Zikalala suspended and reinstated.

These shenanigans would've seemed funny if it weren't our public broadcaster, the one media institution that should serve all the people in this country, irrespective of economic status, gender, race or region – or political persuasion. Which its programming has not been doing.

The SABC has become a political football in the ANC's internal power struggle. Mitigating this crisis should indeed occupy the minds of the MPs assigned to oversee this vital democratic institution.

But by selectively changing the law and not remedying all the deficiencies, the portfolio committee on communication – opposition MPs excluded -- has shown itself to be as much in the thick of ANC power politics as the SABC Board itself. At this point ANC parliamentarians will protest that they have to execute their party's mandate, as does every other MP.

This brings us back to the predicament of whether and how our public representatives could balance serving the public interest with fulfilling party mandates. These two roles do not necessarily clash but what happens when they are in conflict?

Judging by the proceedings of the communication committee during this past month, this dilemma enjoyed no consideration by ANC MPs. Do they even remember being the very people who recommended the appointment of the SABC board that they now so excitedly want to scrap?

The committee, despite objections by most of the opposition parties, has cobbled together a bill to dissolve the thorn in the ascendant ANC leadership's side, namely to get rid of the incumbent SABC board that is regarded as partial to the Mbeki faction within the party.

The rush to do this now is about the election. Recent reports about Zikalala allegedly preventing journalists from reporting on ANC president Jacob Zuma confirm that the struggle over SABC content continues.

While the amendment bill addresses some concerns, such as that proper legal grounds should exist for the removal of the board, it leaves other problems in the Broadcasting Act, the Memorandum and Articles of Association of the SABC and the Shareholder Compact between the SABC and the Minister of Communications untouched.

Among others, these codes facilitate political interference by giving the minister powers over the board's affairs. S/he could meddle with the editorial policy of the broadcaster, as pointed out by the Save Our SABC (SOS) Coalition of CSOs.

The appointment criteria remain intact, allowing for a board that is biased towards business and non-representative of other interests. The bifurcation between commercial and public activities, which underlies the SABC's dysfunction, remains in place.

The speaker of the NA has been written into the law as having to be consulted by the president when the latter appoints the board. In effect the principle of the separation of powers is being undermined to assuage the ascendant ANC bloc's anxieties about Mbeki using his power one last time. This will be prevented by speaker Baleka Mbete who is also the post-Polokwane ANC national chairperson.

Law-making seems to have become a weapon in the ANC's internal power battles. This translates into national legislative processes being used to deal with the short-term power-political exigencies of the ruling party, which is untenable.

Situating Scorpions replacement in police is problematic

Published Nov 2008

Would the new police unit that is replacing the Scorpions have investigated national police commissioner Jackie Selebi? Or, for that matter, former deputy president Jacob Zuma, former ANC chief whip Tony Yengeni and the 31 Travelgate MPs?

Pursuing unpopular cases against powerful individuals is the test that the new Directorate for Priority Crime Investigation (DPCI) will have to pass if it is to achieve the same level of public trust enjoyed by the Scorpions, or DSO.

But will the SAPS Amendment Bill passed last week (23 Oct) allow freedom from political interference? Have parliamentarians – the law-makers – made it possible for the new unit to pursue cases without fear or favour?

Firstly, it should be acknowledged that the members of the portfolio committees on justice and constitutional development and safety and security, respectively, improved the bill significantly from what the police had tabled in parliament.

But ultimately the MPs were giving effect to a party-political decision – to disband the Scorpions – which had little to do with fixing any real problem. After all, while the Khampepe Commission expressed concerns about the DSO and intelligence-related issues, it was satisfied with its location in the NPA.

Instead of directly addressing the identified problems, ANC MPs heeded the instruction to crush the DSO. The new unit was an afterthought -- a sop to placate concerned South Africans. It also provided a rationale other than sheer abuse of power: the DSO is being replaced with a "better" unit.

But the DSO model worked. Despite propaganda to the contrary, the NPA's latest annual report puts the DSO's success rate at 94 percent, or 171 convictions out of 182 cases for the year up to March 2008. It seems it was too effective -- no suspect was off-limits, not even the party mandarins.

The primary obstacle to the DPCI pursuing corruption in high political places is its institutional location in the police.

This constitutes an obstacle because, apart from corruption and incompetence in the South African Police Service (SAPS), the "SAPS has inherited the culture of the former SAP (South African Police) in terms of which deference to political authority takes precedence over the need to uphold the law. This has been accentuated by an environment of intimidation and the fear of arbitrary censure within the organisation," according to police expert David Bruce from the Centre for the Study of Violence and Reconciliation (CSVR).

Does this sound like a police service that will investigate its own commissioner if the latter is suspected of graft?

The Constitution envisaged two quite different animals in its sections on the SAPS and the NPA. While the SAPS is meant to be a docile animal, the NPA is enjoined by the Constitution to prosecute without fear, favour or prejudice. This made the NPA the ideal home for the DSO.

MPs had to go all out to overcome these institutional challenges. The barrage of public criticism seems to have broken through the stage-managed public consultation process to some extent. One such criticism was

about an earlier version of the bill making the unit's director report to the national police commissioner. Instead, the MPs have placed the DPCI under tight control by cabinet, overseen by parliament.

The law now provides for the DPCI director to be a deputy police commissioner, appointed by the safety and security minister in concurrence with cabinet. The DPCI will select priority crimes on the basis of policy guidelines drawn up by a ministerial committee.

The committee will not only lay down the policy guidelines but will "oversee the functioning of the unit" and receive regular implementation and performance reports from the director -- and also from the national commissioner.

The MPs were not able to insulate the DPCI from interference by the national commissioner, as he/she will appoint the unit's members; request secondments from other departments; and serve as accounting officer for the unit's budget.

The MPs were also less successful in their attempt to address concerns about the loss of the DSO's troika approach – the combination of prosecution, investigation and intelligence functions.

The new law provides for a "multidisciplinary approach", including the NPA making available prosecutors to work with the police officers in the DPCI. However, this practice has had limited success in the police. It is not the same as working day in and day out in one team with colleagues from the same institution – a factor which lay at the basis of the DSO's achievements.

That said, a positive innovation is that the director of the DPCI can refer a case to the national director of public prosecutions, thereby opening an avenue for the investigation of corruption within the police.

Another is the appointment of a retired judge to receive complaints. DPCI members are empowered to alert the judge in case of undue interference with a DPCI investigation. The judge can either investigate the matter or refer it to various institutions, including the NPA, the police or the South African Human Rights Commission (SAHRC).

Still, it remains ironic that the police have been chosen to house the new unit. Amid the unsubstantiated accusations that the DSO was politically manipulated, it has seemingly already been forgotten who were commandeered to pursue the bogus coup allegations against Mathews Phosa, Cyril Ramaphosa and Tokyo Sexwale in 2001. The police were the weapon wielded to quell their political ambitions.

Is the dismissal of Vusi Pikoli “the will of the people”?

Published 30 Dec 2008

Parliament will reconvene a week early in January to decide on President Kgalema Motlanthe’s recommendation that adv. Vusi Pikoli be fired as national director of public prosecutions. Will parliamentarians be bold enough to exercise their constitutional duty or will they again buckle before the ruling party’s version of the “will of the people”?

Motlanthe’s recommendation constitutes yet another attack on the integrity of the national prosecuting authority, following hot on the heels of the dismantling of the Scorpions, pushed through by parliament. These moves are part of the campaign to prevent the prosecution of ANC president Jacob Zuma. Will MPs resist the pressure and consider the Pikoli matter on its merits?

The hope for a more robust parliament has been realised in some respects during the past year. ANC MPs have become more outspoken. Swift action was taken here and there to amend laws.

Sadly, some of the legislative changes either destroyed what was working (the Scorpions) or fell far short in fixing what were not working optimally (the SABC; Chapter 9 institutions). These cases suggest that the sudden flurry of activity was aimed at appeasing the new incumbents in the ruling party rather than passing laws that serve the people of this land.

But the retort from ANC MPs has been that “serving the people” is exactly what they are doing – because, from their point of view, the ANC as majority party represents “the will of the people”.

This position was articulated by ANC MP Ms Lumka Yengeni (who was made a parliamentarian after husband Tony lost his job) in the NA’s debate on the Broadcasting Amendment Bill in August 2008: “Understand that the ANC has been voted into power by the majority of this country... the voice that will emerge is the voice of the party that was given (a) mandate by the people through their votes. That party is the ANC and the ANC will not be intimidated to use that power.”

A more problematic version of this perspective was put forward by ANC MP Mr SE Kholwane during the communications portfolio committee’s deliberations on the same bill. He was addressing DA MP Ms Dene Smuts: “I thought what we are doing here (is) amending the law... Whether she (Smuts) likes it or not is neither here nor there... she must learn to understand we are the majority here. We will take decisions, whether you like it or not. We’re going to put it down your throat until amen (sic).”

Leaving aside, for the moment, the impunity that this kind of violent talk suggests in the context of a national epidemic of gender-based violence, I do not buy that this is just part of the so-called cut and thrust of parliamentary politics. It speaks of an attitude which we ignore at our peril.

Do the public representatives of a party with a parliamentary majority have the right to put decisions “down people’s throats”, “whether they like it or not”? It is true that, given our history, democratic principles demand that “the will of the people” be of utmost import. But it can also be the recourse of the politically expedient, as the manipulation of parliament’s public consultation process on the Scorpions showed.

Moreover, surveys show that “the will of the people” sometimes clashes outright with fundamental human rights. Witness South Africans’

attitudes on foreigners, abortion, lesbians and gays, domestic violence, the death penalty, corporal punishment... This should not come as a surprise, given that we have been fed on a diet of intolerance during centuries of colonialism and apartheid.

Simple majoritarianism is not supported by the social contract underpinning our democracy. It seems to be always necessary to remind ourselves that we live in a constitutional democracy. The Constitution is the highest authority.

Parliamentarians are also beholden to the Constitution. Schedule Two of the Constitution contains the oath that MPs are required to take. It states: "I swear/solemnly affirm that I will be faithful to the Republic of South Africa and will obey, respect and uphold the Constitution..."

Based on the Constitution, the Constitutional Court has given us the test for both majoritarian and minoritarian positions. The court found in the same-sex marriage case that the test is whether the measure being considered "promotes or retards the achievement of human dignity, equality and freedom". Parliamentarians should be testing each decision they make against the imperative of whether it serves the principles and values of the Constitution in letter and in spirit.

Lastly, those with majoritarian impulses should be reminded that the ANC was in fact not voted into power by "the majority of this country". If one counts all eligible voters, including those who did not register for the last election in 2004, 11,8 million South Africans did not vote while 10,9 million voted for the ANC.

This oft-ignored fact led political scientist Prof Roger Southall to remark a few years ago that the ANC's 2004 "majority" was in fact a minority of just below 40 percent if the party's votes are calculated as a percentage of the total of about 27,4 million eligible voters at the time.

Our public representatives should apply their minds carefully to the Pikoli matter, lest one constitutional body is again abused to weaken another – at a great loss to all of us.

Ridding the NPA of a good comrade gone wrong

Published 4 Feb 2009

If ever there were a matter with which parliament could shrug off the epithet of “rubberstamp”, it is the consideration of President Kgalema Motlanthe’s recommendation that National Director of Public Prosecutions Vusi Pikoli be fired – unprecedented in the life of our nascent democracy.

It is another low point in a fraught political drama involving vital constitutional principles: separation of powers, equality before the law and the rule of law are all at stake here.

Which is why it is distressing to hear ANC MP Oupa Monareng declare that the principle of equality before the law is “hypothetical”, as he stated last week (on 27 Jan) as chairperson of the parliamentary Ad Hoc Committee tasked with the Pikoli matter. He could surely not believe this, having been unable to escape prosecution after attempting to bribe police officers who caught him driving a stolen vehicle in 1996?

Similarly distressing should be ANC MP Butana Khompela’s statement to Pikoli during the committee meetings in the second half of January that the independence of the NPA is “periphery (sic.) stuff”.

The NPA, according to Khompela, is not a “technical thing that has verbose (sic.) autonomy. Autonomy can’t run amok (sic.)... The NPA is

operating in a political environment. If the NPA tramples on the toes of this environment, its powers will be diminished.”

It could not have been stated more bluntly. Diminishing the powers of our national criminal prosecutions body is indeed the exercise that Parliament has been engaged in, at the behest of the post-Polokwane ANC leadership. The first step was the excision of the Scorpions. The second is ridding the NPA of a good comrade “gone wrong”.

Pikoli has served in various capacities without controversy. Little did the powers-that-be know that he would take his constitutionally assigned duties as National Director of Public Prosecutions (NDPP) seriously enough to even stand up to the president, as he was fated to do with the corruption case against national police chief Jackie Selebi.

Khompela’s brusque *realpolitik* reveals what is behind the ruling party’s insistence that Pikoli does not possess sufficient “sensitivity” to national security. National security is a convenient ruse that rulers use to explain away decisions. Measured against the definition of national security in section 198 of the Constitution, it is hard to see how Pikoli could be guilty.

While dismissing most of the presidency’s ever-changing list of accusations against Pikoli, Dr Frene Ginwala, appointed to investigate Pikoli’s fitness to hold office as NDPP, expressed concern about his understanding of national security and the sensitivities of the “political environment”. This is probably where Khompela gets his position from. Ginwala also felt that Pikoli was not sufficiently concerned about “the mood of the SAPS and their possible reaction to the arrest” of Selebi.

Motlanthe latched on to Ginwala’s concern, as did Director General in the Presidency Frank Chikane. Chikane repeated the argument to the committee, describing Pikoli as defying the president who can access all intelligence and therefore was “the only person” who could “make a decision about the security arrangements” of Selebi’s arrest.

There was “great risk” of the country being destabilised but this intelligence cannot be made public “because that is not how you run a country”, claimed Chikane. We mere mortals will never know what disaster would have struck if Selebi was prosecuted in September 2007, when Pikoli had his warrants ready, instead of in January 2008 when it eventually happened. Significantly, the only political upset that occurred during that period was Mbeki being deposed at the ANC’s Polokwane conference...

To avert the unknown crisis, Pikoli was suspended and processes were “properly managed” until Selebi was charged, Chikane added. What he omitted, and what Pikoli pointed out to parliament, was that this “proper management” involved various attempts to stop the prosecution of Selebi. Acting NDPP Mokotedi Mpshe was first instructed by the justice department to apply to court to have the warrants withdrawn. Then he was instructed to appoint experts to re-assess the case. These attempts failed and Selebi’s trial continues.

Pikoli reminded MPs that the police are still withholding evidence against Selebi from the NPA, which led to the current prosecution of acting police chief Tim Williams and other officers.

So, how many questions did MPs pose about the “great risk” of national destabilisation, among others due to “the mood” in the police? It was down to opposition MPs to ask such questions. And to ask why the reasons for Pikoli’s suspension have changed at least three times. And why none of the later accusations, including national security, was included in the letters between Mbeki and then justice minister Brigitte Mabandla.

From ANC MPs we had questions about the “evil” Browse Mole report, which Pikoli had not compiled and which he had handed over to the appropriate agencies.

We had questions about how he could allow “Hollywood-style” raids and use private security companies (as do other agencies). We had

suggestions from ANC MP Yunus Carrim that the NPA law be changed, based on his loyal following of the TV series “Law and Order” – ill-timed humour, given that we are in a constitutional crisis.

Noticeably, the ANC MPs were especially active on the day of Pikoli’s appearance. Eight sets of questions were asked by ANC MPs (including one verbatim repetition!).

The next day justice minister Enver Surty, despite not being minister at the time of Pikoli’s suspension, still managed to fill an uninterrupted 40 minutes with “answers”; followed by Chikane, who clocked 30 minutes. In contrast to the previous day when Pikoli was grilled, there were five sets of questions from the ANC during that morning’s session, compared with the opposition parties’ seven.

Was there a proposal that the former president and the former justice minister come and explain themselves? No. And, yes, the obvious question remains unasked: What could be more damaging to national security than the police chief being in the pocket of an organised crime boss?

Gunning for an end to the arms deal investigations

Published March 2009

Imagine a parliamentary committee rigorously interrogating the issue of the arms deal. All those who have made allegations have to present their cases. The NPA is called to answer tough questions about progress with its investigations into the alleged corruption. Government departments are grilled about the investments promised as a sweetener to the deal.

This is indeed what happened during February 2009, the last month of the third democratic parliament's final session. The Standing Committee on Public Accounts (Scopa) did all these things, exactly as we would want our elected representatives in Parliament to do – bar one essential step.

But let's start at the beginning. Scopa decided in 2008 to assess the implementation of the recommendations that the Joint Investigating Team (JIT) had made regarding the "strategic defence procurement packages" in 2001. The investigations of the JIT, consisting of the NPA, the Public Protector and the AG, resulted from steps taken by Scopa after the first claims of irregularities in the arms deal.

Scopa acts as the parliamentary watchdog on how the government spends our money. At the time when information on irregularities emerged, Gavin Woods (IFP) chaired the committee and Andrew Feinstein was the leading ANC MP in the committee. In the sorry spectacle

that followed, Feinstein lost his job and Woods was bulldozed. Scopa's role in the arms deal investigation was cut down.

New ANC heavies were brought in and Scopa was stifled through a tightly controlled political process – another vital oversight entity reduced to a silent victim of the arms deal scandal. After that, the committee stuck narrowly to its mandate, avoiding any upsets to the powers-that-be.

But, apparently in the spirit of renewed activity at parliament, Scopa recently invited submissions from critics of the arms deal such as Feinstein, now an author, and Richard Young, a businessperson whose arms bid had failed. It also called Armscor and the Department of Trade and Industry (DTI) to explain progress made with investments that are supposed to make the arms deal worth all the trouble.

Has Scopa recaptured some of its former integrity and courage? It looked pretty good. Especially the DTI was grilled. Questions from Scopa chairperson Themba Godi (APC) and Pierre-Jeanne Gerber (ANC) revealed a chasm between direct jobs promised at the time (40,000 to 65,000) and direct jobs created so far (15,689).

Further questioning by ANC MPs indicated that Scopa had in the past asked for a "common base" to measure targets. This has not been created, so DTI DG Tshediso Matona had to admit that ambiguity exists about whether the jobs are direct or indirect. The DTI is also confused about the financial targets of the offset deals as indicated in the JIT report.

Gerber pointed out that the offsets were used to motivate the arms deal to the public. He wanted to know whether "we've been taken for a ride". A question from Godi about the foreign investment expected from the offsets revealed that the DTI has not worked with a target amount.

The overall impression of obfuscation was strengthened when the DTI insisted that the separate offset deals were being audited but repeated

questions from opposition and ANC MPs revealed that this was probably not the case. Yet again, murkiness pervaded the issue.

The only clear thing was that more stringent monitoring, coupled with corrective action, is required to ensure that “we” are not “taken for a ride” with the offset. The corruption claims haven’t even been touched on.

So what is Scopa doing about all these worrying signs? Up until the end of the committee meeting, ANC, DA and ID MPs displayed an appropriate grasp of parliament’s oversight role. But, astonishingly, nothing further will come of this meeting. Godi stated that all the committee had needed was “information” in order for it to exercise its “oversight function over the executive”.

The DA’s Eddie Trent suggested that, for the sake of institutional memory, the committee should at least make suggestions to the new Scopa coming in after the election. Godi retorted that, except for a further submission from Young, there was “no issue from our side to take forward”.

So what was the purpose of the exercise? Was it, as was reported, that Scopa sought to extricate names from the NPA as to who could still be prosecuted?

Another revealing hint as to the meeting’s aim came from ANC MP Vincent Smith, one of those who replaced Feinstein. He told the NPA in the meeting:

“My own view is at some point we need to find a way to say what is the logical cut-off point for this thing because if I want to be mischievous, not mischievous... if I want to be engaging I could every year, or every five years, give you something new, and then you are duty-bound to look at it... I certainly don’t think we need another ten years of the arms deal but I also certainly don’t think we should put anything under the table if it is material... but I can’t

think of sitting here for the next hundred years looking at the arms deal because new evidence emerges at different points... It can't be an ongoing thing."

Senior NPA member Willie Hofmeyr had to remind him that a law enforcement agency cannot refuse to investigate a crime if new evidence comes to light.

So, judged by the outcome, or the lack thereof, Scopa's last meeting for this parliamentary session ultimately boils down to a fishing expedition for the proponents of a "political solution" to the arms deal scandal – that is, unconditional absolution for suspects who are politicians.

MPs ignore NPA annus horribilis

Published Dec 2009

"You're in very good company. The committee will do everything it can to support you to keep our country safe from criminals."

This was justice portfolio committee chairperson Ngoako Ramatlhodi's response when the acting CEO of the NPA Khotso De Wee ended his presentation of the body's annual report with a confirmation of the NPA's commitment to freeing the country from "the shackles of crime and violence".

But that's not all De Wee had said to parliament's justice portfolio committee. In what sounded like a plea, he'd added that "the Constitution places a specific responsibility on the NPA and only by fulfilling this mandate as the prosecuting authority will we truly arrive at the vision of living in a non-racist, non-sexist, democratic South Africa free of crime and where justice is ensured for all".

2009 has been an annus horribilis for the NPA. Relentless political pressure has dramatically compromised its ability to fulfil its constitutional mandate, rendering it a mere shadow of what it used to be. Apart from involuntarily shedding the Scorpions and the fearlessly independent Vusi Pikoli as national director of public prosecutions, this has been reflected in low morale and a high vacancy rate.

Presently, no one can assume that the NPA abides by the principle of "justice for all", which is about the pursuit of justice without fear or favour. The NPA's credibility was destroyed by the withdrawal of charges

against ANC leader Jacob Zuma, of which the low point was the cribbing of a foreign court judgement to justify this decision.

The anti-constitutional turn of events has been compounded by the recent appointment of ANC loyalist Menzi Simelane as national director of public prosecutions.

But, while parliament's portfolio committee on justice and constitutional development subjected the NPA's presentation of its 2008/2009 annual report to a rigorous examination, there was no acknowledgement of the damage done and the continuing threats facing this vital institution, as hinted at by De Wee's plea.

The committee's treatment of the annual report exemplifies where the fourth parliament, elected this year, is an improvement on the previous one – but also where it falls short.

Parliamentarians fired a barrage of questions and admonitions, among which were enquiries from John Jeffery (ANC) and Dene Smuts (DA) about the progress with the transfer of cases from the now defunct directorate of special operations (DSO or Scorpions) to the new police unit.

We have been assured time and again by ANC politicians that the Scorpions' cases would not fall through the cracks as they would be carried over to the police unit that was ostensibly created to "replace" the DSO but which lacks the DSO's innovative combination of investigative and prosecutorial powers.

But the Mail and Guardian has reported on at least one case – involving a R32 million tender – that was indeed scrapped because of the closure of the DSO.

In response to the questions, former acting national director of public prosecutions Mokotedi Mpshe painted a rosy picture of continuing cooperation between the NPA and the new police unit, known as the

directorates for priority crimes investigation or Hawks. This is despite the admission in the annual report that the transfer of personnel to the police unit presents the “biggest challenge”.

Another suggestion that cooperation may not be as smooth as alleged was Mpshe’s explanation of why apartheid crimes have not been prosecuted. He revealed how interference from the directors-general (DGs) in the security cluster paralysed these cases to such an extent that some have proscribed and therefore can no longer be prosecuted.

From about 2006, these DGs have disputed the NPA’s constitutional prerogative to decide on prosecutions. This fits with descriptions before the Ginwala Commission of Simelane undermining the work of the NPA by overstepping his powers when he was still DG of the justice department.

Mpshe’s renewed attempt last year (2008) to call a meeting on apartheid cases met with silence from the DGs and, initially, an outright refusal from the police. This tells us that inter-agency rivalry remains alive and well and, more ominously, that political resistance against the prosecution of apartheid crimes persists.

But, while MPs had previously proffered inter-agency rivalry as one of the reasons to disband the DSO, they avoided it this time round, as they did the ramifications of a hobbled prosecuting authority that De Wee had raised so circumspectly. While the NPA was hammered on several points, the political devastation of the institution remained the unnamed elephant in the room.

Looking at the record of the fourth parliament, parliamentarians grill civil servants and even cabinet ministers about the most miniscule details but they remain mum about actions of the executive that compromise the constitutional mandates of institutions.

In fact, like their predecessors who disbanded the DSO and approved Pikoli’s removal, they diligently play their own part, when required, in the

undermining of institutions. One example is the election of Lawrence Mushwana to the SAHRC despite (or should it be “because of”) his political docility as former Public Protector.

The renewed assiduousness in monitoring the implementation of policy is a commendable departure from the fatigue that had set in during the Thabo Mbeki era. But, given that ANC MPs’ allegiance to party leaders continue to trump parliamentary oversight, acting in the interest of South Africa as a whole on politically sensitive matters still happens incidentally and not by design. Therefore, we can gather that Ramatlhodi’s opening remark is only valid as long as the NPA refrains from stepping on powerful toes.

Broadcasting Bill: Keeping the door ajar for political meddling

Published Feb 2010

Parliament will remain a hotbed of contestation this year. Pending laws that ring alarm bells are the “shoot to kill” amendment of Section 49 of the Criminal Procedure Act; and the latest legislative exercise in controversy, the Public Service Broadcasting Bill.

This bill continues the ANC Polokwane victors’ battle for domination of the SABC as public institution, raging for the past three years. The public broadcaster seems in for another bout of lawmaking which may compromise the SABC’s freedom of speech further and strengthen the grip of the relevant minister, currently communications minister Sipiwe Nyan-da, on the broadcaster.

Lawmaking was used to assuage the ANC’s internal political anxieties at the end of 2008 when the Broadcasting Amendment Bill was rushed through to enable parliament to fire the then SABC board, regarded as Thabo Mbeki apologists. The president’s office then had to refer that bill back to parliament because of constitutionality problems.

At the time, a consistently vocal grouping of progressive CSOs – now known as the SOS Supporting Public Broadcaster Coalition – campaigned for a comprehensive legislative process that would address the myriad problems with the Broadcasting Act of 1999. But the looming election

made control of the public broadcaster more important to the politicians than lawmaking in the public interest, so the pleas were ignored.

With the election over, the Department of Communications sprung into action, exerting itself more in eight months than in the 10 years under previous communications minister Ivy Matsepe-Casaburri.

In July last year (2009), the department published a discussion document that covered everything from the SABC's public mandate to signal distribution. It seemed the comprehensive review that civil society had been clamouring for would finally happen. But the deadline for comments provided a mere month to tackle the complex document, which included 67 questions ranging from policy to practical dilemmas.

Moreover, the department outlined a timeline that displayed a disregard for the requirement of parliamentary public consultation: it aimed at introducing the draft bill to parliament in November, to "be in place by the end of the year".

The bill proposes a complete overhaul of the broadcasting system, signalling, among others, a fundamental shift with the imposition of a 1% tax to provide a new funding base. This is a progressive step, as Journalism Professor Jane Duncan has pointed out, given the difficulty with balancing commercial viability with the inclusion of the voices of people marginalised along class, geographical, gender, language and political lines.

But the bill will also cement some of the worst features of the existing dispensation by keeping the door ajar for political meddling. Moreover, its constitutionality is in question, as it infringes the principles of freedom of expression and association.

This is all the more dangerous, given the bill's objectives of serving "the developmental goals of the Republic" and not the Constitution; and "safeguarding... the country's national security" and even "promot(ing) access to content of national security".

Reminding ourselves how “national interest” was abused by the ruling party to rid the NPA of its former head, the pesky and principled Vusi Pikoli, South Africans should be very worried.

Comments on the bill had to be furnished within one month. Civil society pressure again slowed down the process in the interest of consultation, with the deadline postponed to January 15. However, the timing of the consultation over the holiday season casts doubt over the commitment to actual participation.

Yet again it seems that the legislative process is being swept along by imperatives other than democratic criteria. Both the discussion document and the bill urged the early submission of comments. Why the rush? Why not follow a White Paper policy process that will allow enough time to think through what is required and how to achieve that in law?

The coalition points out: “...(T)he recent prolonged period of crisis at the SABC has demonstrated the clear need to further protect the SABC against interference by vested interests, whether commercial or political, and a renewed desire to strengthen the constitutional position of the SABC has emerged.”

The flawed legislative process, so far, suggests that whatever remains of the independence of the SABC is under new siege.

The coalition wants the Constitution to be revised and the SABC to be included as a Chapter 9 body – along with the Human Rights Commission and others – to guarantee, at least on paper, its independence from government. Making it a Chapter 9 body will strengthen the SABC’s accountability to parliament, instead of the executive, as the new law will do.

It reasons, correctly, that the “SABC’s role in providing ordinary citizens with quality news, information and education programming is essential to the well-being of our constitutional democracy, as only an informed citizenry is fully able to engage in democratic processes”.

This bill should be seen in the context of several laws that have the effect of circumscribing freedom of expression, with the Film and Publications Amendment Act being the most recent. Despite indications that parliament would address this act's adverse implications (including pre-publication censorship) President Jacob Zuma unexpectedly promulgated it in August 2009.

Confronting the portfolio committee on communication with the dangers of the broadcasting bill could provide the opportunity for a complete redraft, as has been done in the past in particularly the justice portfolio committee. But what are the chances, given the experience with the Film and Publications Amendment Act? Can majority party MPs in the communications committee, given their previous haste to follow orders from Luthuli House, muster the courage to resist Nyanda's agenda?

A cooperative judiciary

Published April 2012

On 22 April 2009, Jacob Zuma addressed the last ANC rally before the election that returned the ANC as ruling party and made him president of the country. He spoke about everything from education to crime before he identified two institutions that required “transformation”: the judiciary and the media.

Just prior to that, on 7 April 2009, the day the withdrawal of corruption charges against Zuma was confirmed, he declared that the probe against him “was supported by a vicious media campaign”. Various initiatives have since been underway to clamp down on the media. During that same time, when he was refuting the charges against him, he told the Independent Newspapers that he sought a review of the Constitutional Court: “If I look at a chief justice of the Constitutional Court, that is the ultimate authority, which I think we need to look at ... because I don’t think we should have people who are almost like God in a democracy... you can have a judge of whatever level making a judgment (and) other judges ... saying it was wrong... And therefore we have to look at it in a democratic setting; how do you avoid that?”

Amid continuing verbal attacks from ANC leaders on the judiciary, it has transpired Zuma’s notions have remained steadfast. In November 2011 the cabinet announced that the executive would “review” the Constitutional Court. Zuma again told the Independent Newspapers in February 2012 that: “We want to review [the Constitutional Court’s] powers. It is after experience that some of the decisions are not decisions that every other judge agrees with... You will find that the dissenting [judgment]

has more logic than the one that enjoyed the majority. What do you do in that case?" He added that judges "are influenced by you guys (the media)".

The announcement of the review followed on the courts' overturning of several key ruling party decisions during 2011. These court rulings all had to do with changes that the Zuma faction pursued in structures that it regarded as having been subject to political manipulation by a different ANC faction or other "influence". These decisions included the following: the Constitutional Court findings on the Hawks and the president's powers in extending judges' terms; the Constitutional Court decision against an appeal involving Western Cape Judge President John Hlophe; and the SCA decisions on Menzi Simelane and the corruption charges against Zuma.

Cabinet's ostensible purpose with the review is "to ensure the judiciary conforms to the transformation mandate as envisaged in the Constitution in terms of non-racialism, gender, disability and other transformational variables"; and "to affirm the independence of the judiciary as well as that of the executive and parliament with a view to promoting interdependence and interface that is necessary to realise transformation goals envisaged by the Constitution". Cabinet also agreed to the following approach: "Appropriate mechanisms (are to) be developed to facilitate... regular interface between the three spheres of the state to enhance synergy and constructive engagement among them in pursuit of common transformative goals... to benefit society at large".

The public outcry following cabinet's announcement led to changes in the review's terms of reference. Gone was any explicit mention of "mechanisms" to facilitate "interface" but the SCA was added to the review, which probably has to do with its recent "unhelpful" judgments.

The review could provide valuable information on the Constitutional Court's immense contribution to South African democracy in developing constitutional jurisprudence. Law professor Pierre de Vos has also argued

that it could shed light on the problem of the lack of constitutional development of the common law; and on the accessibility of the highest courts.

But the events leading up to the review serve as a reminder of its real intent. It is also notable that the terms of reference are still framed by the justice ministry's "Discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African state". This document confirms cabinet's November 2011 decision on approaches to transformation of the judiciary, including that a mechanism be established for the three branches of state to engage in "regular debates".

The notion of "cooperation" between the executive, legislative and judicial arms is ANC policy. A 2007 ANC discussion document misapplied the constitutional principle of co-operative governance to these arms, adding that they should work "in tandem with one another" and that "the Constitution envisages a system where all branches of government work in collaboration".

Given that this review does not form part of the Superior Courts Bill's present rearrangement of the courts, its findings will have to be effected in future legislation. The ANC discussion document on the judiciary for its national conference in Mangaung in December 2012 recommends that the Superior Courts Bill should "deal with the courts (the structure, composition, jurisdiction and functioning thereof)", while separate legislation (a "Judicial Authority Act") should be drawn up to create a governance structure (a "Judicial Council") "under the command of the Chief Justice". This draft law will also prescribe the rules of court regarding "the procedure and processes applicable in court proceedings, including requirements and conditions that must be met by any person who approach the court as a litigant", which affects access to justice.

Whether and how the review fits into this proposed legislation is not clear. It could be tempting for the legislators to introduce some mechanism for

"interface" there.

A legislature that does not respect itself

Published June 2012

Dr Mathole Motshekga, ANC chief whip, at the end of June wrote in *ANC Today* that, “parliament survives on the confidence and respect the public have in it, without (which) its dignity and integrity is eroded”. The context was Cope leader Mosiuoa Lekota sticking to his guns that President Jacob Zuma had violated his oath of office by not protecting *City Press* and artist Brett Murray against ANC party leaders’ “fascist-style measures and tactics” in the saga of the painting *The Spear*.

Motshekga’s response was that MPs should adhere to the rules of parliament to preserve its “decorum and prestige” as “a supreme representative institution of the people”. In this case, Lekota should have brought a “formal motion backed up by evidence”. Lofty and admirable sentiments. Curiously, however, while Motshekga’s concern about parliament’s “prestige” in relation to members of the executive is now known, he has remained mum about two unprecedented developments in the same period which both undermine parliament’s integrity.

The first was the NCOP select committee on justice and security’s move to defer the negotiating mandates that the provincial legislatures had agreed after provincial hearings on the Traditional Courts Bill (TCB). The second was the continuing interference of the ministry and department of state security in the drafting of the Protection of State Information Bill.

Regarding the TCB, provincial delegates were not allowed to present their

mandates to the committee meeting scheduled specifically for that reason. Instead, it was suggested that provinces could continue with public consultations. This was done by conflating the national, NCOP-level public consultation, a distinct process still to be conducted by the select committee, with the provincial consultations, thereby undermining the outcomes of the provincial consultation process. This seems a case of “consult until you get the answers you want to hear”. Some traditional leaders are seemingly unhappy with the answers that rural people gave to the legislatures, which led four of the nine provinces to reject the bill, while another four want wide-ranging amendments. Justice minister Jeff Radebe has since told the SABC that consultations are gathering momentum.

This is after the effort rural citizens made to attend the public hearings, even in the face of intimidation, as happened at a hearing in KwaZulu Natal where traditional leaders tried to silence the few women present. Judging from traditional leaders’ responses in the media, some seem unhappy about facts emerging in the public debates on the bill. For example, the Rural Women’s Movement (RWM) had the opportunity to make public its research on abuses of power that amount to blackmail.

The Traditional Leadership and Governance Framework Act (TLGFA) of 2003 empowers traditional leaders to administer government services. The RWM found, for example, irregular levies on access to government services such as housing. Other arbitrary levies punish certain expressions of gender and sexuality by fining unmarried couples for living together, or fining unmarried mothers.

The TLGFA and TCB also re-entrench the boundaries drawn by the 1951 Bantu Authorities Act as demarcations of traditional councils and courts’ jurisdictions. These facts fly in the face of traditionalist Phathekile Holomisa’s counterattack against opponents in which he calls traditional leadership “the one remaining truly African institution”. This would suggest an institution somehow removed from the processes of history, untouched by colonialism and apartheid. Sadly, history shows otherwise.

The public debates also expose the TCB as an attempt to shore up traditional leadership with authoritarian measures, suggesting the institution is not as roundly supported as certain leaders claim. For example, the powers that the TCB concentrate in the hands of a “presiding officer” of the court do not exist in practice today, as traditional leaders are bound by decisions taken by the community or traditional council. Hence the contention by the Alliance for Rural Democracy, a collection of CSOs opposing the bill, that the current bill is not only unconstitutional but also violates customary law as practised.

Moving to the Protection of State Information Bill, unrelenting rebuttals by the ministry and department of state security has marred its progress through parliament, both in the meetings of the NA committee and currently in the NCOP committee meetings. In the last meeting, opposition MPs pointed out that the department kept questioning matters that all parties, including the ANC, had already reached consensus on. Among these is a limited concession by ANC MPs to allow for a public interest clause to protect disclosure of information that reveals criminal activity.

In response, both the department and chairperson Raseriti Tau (ANC) pre-empted aspersions on the process by paying lip service to the committee’s right to “make the final decision”. Still, the last meeting of the parliamentary term ended with MPs only able to agree to request an extension for its work in the face of a forceful ministry piling up “legal opinions” that serve its own narrow interests. The usual, and procedurally acceptable, practice is for officials to draft as per MPs’ instructions. In this case, however, the department is obsessively blocking proper consideration of submissions by groups not driven by an agenda of secrecy and subterfuge. The committee’s response shows Lekota is not far off the mark with his observation of a “deepening asymmetry” in power between the executive and the legislative arms of government. It seems the realisation is yet to dawn on the current crop of MPs that a legislature can only demand respect if it respects itself and its own processes.

Lawmaking to please factions produces schizophrenic state

Published Sep 2012

As assault charges are laid against the police in the aftermath of the Marikana massacre, the outrageous reality is that torture is still not criminalised in South Africa. A draft law called the Prevention and Combating of Torture of Persons Bill is before parliament but far from adoption. The relevant parliamentary committee has postponed the public hearings on the bill that had been scheduled for August 2012. The hearings will now apparently happen beginning September.

The bill as it stands is woefully deficient, as it neither holds the state accountable for torture that officials perpetrate on its behalf, nor guarantee redress or recompense for victims, according to the Centre for the Study of Violence and Reconciliation. These omissions are even more reprehensible in light of Marikana.

It is barely 18 years after South Africans formally ended a regime in which the police routinely used measures ranging from brute force to torture in silencing legitimate demands. This is what informed the post-apartheid decision to transform the police force into a police service. In a perilous lapse of memory, we have in the past few years seen a remilitarisation of the police amid resurgent calls from politicians for police to use maximum force, signalling the rise of an authoritarian populist tendency in the

ruling party. It therefore doesn't seem like a coincidence that, at the same time, legislators have been lackadaisical about criminalising torture.

If lawmakers were compelled to act in the public interest, rather than to pander to factional, elite-driven interests in the ruling party to ensure their continued tenure in parliament, the torture bill might have been passed a long time ago. Instead, we have witnessed an enthusiastic punting of the Women and Gender Equality Bill (WEGEB) and a face-off over the TCB between two of ANC leader Jacob Zuma's myriad divergent internal support bases: the ANC Women's League and traditional leaders.

These groups are pushing their constituencies' interests through legislation in advance of the ANC national conference to be held in Mangaung in December this year. The WEGEB entrenches the principle of equitable representation of women in the upper echelons of the state and private sector. Lulu Xingwana, minister for women, children and people with disabilities, was betting on this bill to quieten discontent, also within the ANC, about her ministry's lacklustre performance. After all, the bill addresses the concerns of a constituency in the middle class and elite who is still being locked out of senior positions merely because of their gender.

It is a worthy cause. But the zealous promotion of the bill contrasts starkly with the silence from women in power, including Xingwana, about the collapse of organisations such as Rape Crisis and the Saartjie Baartman Centre that provide support services to women who survive gender-based violence. These organisations help the most vulnerable: women with little resources who, without assistance, would remain trapped in domestic violence. But the ANC Women's League's internal party power base seemingly does not depend on such women.

Xingwana received an unexpected political boon in the form of the TCB, as it allowed her to position herself as vocal defender of rural black women – face-to-face with the ANC's traditionalist lobby, which is hell-bent on expanding its anti-democratic powers. Contradictory reports abound

about the status of the TCB, with Xingwana even claiming an “overhaul” of the bill. But the justice department’s subsequent proposed revisions retain the bill’s recreation of the apartheid-era separate and unequal legal system for rural black people.

While these groups are jockeying for power, Zuma, with one eye on Mangaung, has tried to turn his TV-broadcasted faux pas equating womanhood with heterosexual motherhood into political capital. He released the Green Paper on Families to “contextualise” his statement, a move sure to be popular with his retrogressive support base. This arbitrary use of laws and policies to shore up support from contending factions in the ruling party, instead of addressing the country’s real problems, unsurprisingly produces results that undermine the intent of the Constitution and legislation adopted earlier on in the post-1994 process of democratic consolidation. It causes a schizophrenia in the state which, among others, enables the police service, transformed in name only, to revert to its erstwhile violent ways in protecting the interests of a privileged few, culminating in the Marikana massacre.

Constitutional law expert Prof Pierre de Vos at the recent “People’s Power, People’s Parliament” civil society conference urged a re-think of political parties’ internal election processes to allow room for public representatives to indeed represent the public rather than their parties’ interest. De Vos’s argument is that changing the electoral system to allow some measure of direct representation, rather than the current system where party leaderships determine who goes to parliament, is insufficient to address the lack of accountability. The failure of the system of directly elected municipal councillors to enhance accountability is a case in point. Following the examples of countries such as Argentina, Mexico and Germany, a party law should be adopted to compel political parties to have democratic internal election procedures concordant with the country’s election laws.

The law should render internal elections of individual members to party lists open to scrutiny, including how individuals fund their campaigns. Of

course, party funding should also be transparent, as the “People’s Parliament” conference recommended in a memorandum handed to parliament. Who knows, lawmakers elected transparently may exhibit something that has become exceedingly rare in recent years: they may even follow their consciences when passing laws.

MPs in choreographed act with NPA

published June 2013

The NPA is running riot at the behest of its political masters. Its failures are piling up but still Minister of Justice and Constitutional Development Jeff Radebe insists that criticism amounts to “nonsense” which is not to do with the NPA but with its critics.

In the recent past, the NPA has failed in a number of cases, ranging from the withdrawal of charges in the Anene Booysen case against a suspect that the victim herself had identified, to the carefully orchestrated evidence by police officers which led to their acquittal in the Andries Tatane case. J Arthur Brown walks away with a slap on the wrist while thousands have been impoverished in the Fidentia scandal.

Still, the minister goes as far as to proclaim the overcrowding of the jails as a sign of the success of the NPA, and becomes irate when it is pointed out that a third of the incarcerated are in fact awaiting trial prisoners. Awaiting trial prisoners have been a perennial feature of South Africa’s prison system and the minister would surely know about it. Why then the dissonance between criticism based on well-known facts and the position of what is surely the most powerful minister in cabinet and foremost defender of President Jacob Zuma’s interests?

A clue is to be found in the NPA’s flouting of a high court decision instructing it to hand over the transcripts of the so-called Zuma spy tapes. Instead, they handed them to Zuma’s lawyer.

Another clue is the case against state prosecutor Glynnis Breytenbach, exonerated by the NPA's own internal disciplinary hearing. Instead of attending to what should be the NPA's core agenda, namely the pursuit of criminals, acting NPA head Nomgcoba Jiba remains in full pursuit of Breytenbach and plans to take the disciplinary findings on review.

Breytenbach's "crime" is that she intended to prosecute former police crime intelligence head Richard Mdluli, another member of the panoply of untouchables associated with Zuma. She seems to have also crossed the political elite in another controversial case, the Kumba Iron Ore/Sishen and Imperial Crown Trading mining rights case. Zuma's friends the Guptas and his son Duduzane are involved in Imperial Crown Trading.

Could it be that the minister does not share critics' point of view about the NPA's "failures" as he does not view these as failures but rather as the NPA doing exactly what is required of it? The NPA has been thoroughly politicized, but citizens will be disappointed if they thought parliament would intervene in this sorry affair.

The portfolio committee on justice and constitutional development discussed its draft report on the justice department's budget vote at a meeting towards the end of May. Some problems with the NPA were raised, such as budget shortfalls. An ANC MP also asked whether a permanent head for the Special Investigating Unit has been appointed, to be informed by the committee chairperson that rumours about appointments had not come to fruition.

Why do our public representatives depend on rumours regarding the filling of a vital post in government's anti-corruption arsenal if they can call the relevant people to account before the committee?

The fact that the position of the national director of public prosecutions is still occupied only in acting capacity (by Jiba) was not raised. Of course, the discussion also excluded the NPA's inexorable slide in to a politically compromised position.

In contrast, MPs were more critically inclined in their discussion about the Public Protector at the meeting, expressing concern about adv Thuli Madonsela ostensibly not understanding her accountability to the committee or to parliament. MPs also feel that she is not investigating the right kinds of cases. Is it merely a coincidence that these questions are being asked of an office that is in full pursuit of its constitutional mandate, rather than a party-political agenda?

Not all legislators share Radebe and ANC MPs' contentment about the NPA. After numerous unfulfilled promises from Radebe and Zuma, the DA has decided to bring a private members' bill to curtail the president's discretion in the filling of NPA posts and to bring parliament into the process.

Radebe dismissed the bill out of hand in his budget vote speech in May 2013 but, thanks to IFP MP Mario Oriani-Ambrosini's efforts, ANC MPs will still have to formally consider the bill. The ANC is sure to use its parliamentary majority to block the bill. Still, it will form part of the NA's permanent and searchable records which would also allow voters access to these proposals, as the Constitutional Court said when it found in Oriani-Ambrosini's favour last year.

Part of Oriani-Ambrosini's argument was that parties who summarily "kill" these bills, would do so "at their own political peril and can be held accountable for their conduct at the next election". While accountability does not unfortunately work as seamlessly in the South African electoral system, Oriani-Ambrosini's action overturned the unconstitutional situation in which the executive has acted as the legislators and bills never originated from the actual legislators – MPs.

That parliamentarians were happy to labour under this denial of their foremost function since 1999, due to parliamentary rules that contradicted the Constitution, speaks volumes. It would suggest ease with being "mere choreography", as Oriani-Ambrosini put it.

If MPs are “mere choreography”, who are the choreographers? A similar question applies to those in acting positions at the NPA: acting for whom?

Whose oversight? The defence portfolio

Parliament can't call ministers because they have a country to run

Published Apr 2010

It feels like déjà vu: Scopa having a run-in with the executive and the ANC's parliamentary leadership over the defence portfolio. The previous time it was about the arms deal, which had devastating consequences for not only Scopa but parliament as a whole. This time what should have been an easily resolved tiff has been blown out of proportion – possibly with another goal in mind.

In 2000 Scopa "dared" to fulfil its mandate by attempting to investigate what has turned out to be democratic South Africa's nemesis, the arms deal. The executive came down on Scopa with such calamitous weight that its inquiring instincts were all but snuffed.

A battered Scopa limped on until last year, when the fourth democratic election seemed to usher in a newly robust parliament. For sure, certain matters still remain out of bounds – for example, NDPP Menzi Simelane's final twists of the knife in what will soon just be the cadaver of the NPA.

Still, several committees have been noticeably diligent. Scopa, in particular, has adopted a policy to summon ministers and one minister after another has abided.

Until Minister of Defence and Military Veterans Lindiwe Sisulu, that is. She is boycotting Scopa for treating her like a “recalcitrant child” after committee members reprimanded her for being unavailable on three occasions to attend meetings about the department’s accounting problems. This was after acting defence secretary Tsepe Motumi mishandled MPs’ questions.

Her decision comes partly from the misinformed position that ministers cannot be summoned to parliament except by the joint standing committee on intelligence or the Speaker.

A cursory glance at the Constitution, which the ANC still exalts every now and again, reveals that Section 56 gives any committee of the NA the right to summon any person to appear before it. Moreover, Section 92 states that cabinet members are accountable collectively and individually to parliament for the exercise of their powers and the performance of their functions.

Providing insight into how members of the executive regard their relationship with parliament, Sisulu preferred to ignore these sections and instead emphasised Section 3 of the Constitution in an address to the defence portfolio committee. She said, “the constitution is very adamant and we were very adamant when we were drafting it that the principal of cooperation between various organs of government is absolutely important...”

She quoted Section 3’s provisions on state organs having to cooperate with each other in mutual trust and good faith by fostering friendly relations and then complained: “but what you find (instead) is subpoena this minister, summon this minister...”

Sisulu’s actions shed further light on her attitude towards parliament: she met with ANC Chief Whip Mathole Motshekga and leader of government business Deputy President Kgalema Motlanthe. According to her,

they then took a decision as “members of the ANC” that she would absent herself from Scopa while the defence department would continue to engage with the committee.

However, this is inadequate. As constitutional expert Prof Pierre de Vos points out, Section 92 makes clear that, while directors general are the departments’ accounting officers, ministers are still required to politically account to parliament.

The decision by the minister, the chief whip and the deputy president as “ANC members” that Sisulu should boycott Scopa shows that they are oblivious to the fact that Scopa is not interested in Sisulu as ANC member but as defence minister. Moreover, Sisulu seems to have forced a reversal of Motshekga’s “categorical affirmation” in March this year of “the ANC’s uncompromising support of the principle of the executive accounting to all parliamentary committees, including Scopa”.

This statement was made after conflict in the ANC caucus over Motshekga’s earlier comments to an ANC study group that Scopa seeks to “parade and embarrass” ministers who should not have to appear before Scopa because “they have a country to run”. He reportedly had to withdraw this statement in a letter to the speaker.

Judging by Sisulu’s own account her quarrel with Scopa could have been resolved without all the huffing and puffing. First, the conflict between her and Scopa is partly the result of miscommunication between her and Scopa’s offices. Her non-attendance was due to state visits to Britain and Uganda, the timing of which she had no control over.

She has confirmed her previous willingness to attend Scopa meetings -- to the extent that she had initiated her first attendance in February, which then had to be postponed due to a cabinet meeting. Why then the extreme umbrage, escalated to a level that exerts pressure on an already besieged Constitution?

Something that has gone unreported is that Sisulu made some ominous remarks to the defence committee on what she regards as “a disjuncture in the way that oversight over defence is conducted” because having “300 (sic.) committees that are demanding the attention of defence is not right”. Defence matters are security matters, she argued, therefore committees – apart from the joint standing committee on intelligence – do not have the necessary “ability” or “insight” to handle defence. What is needed is an “instrument” that “has the confidence of the defence force... that the defence force feels they can share their concerns with”, she added.

Did the minister pick this fight because she wanted to re-open the debate over who should be reporting to Scopa? Is she seeking a special arrangement for the defence force that involves less oversight and transparency?

Insulating the defence portfolio from public scrutiny

Published Jun 2010

What could Minister of Defence and Military Veterans Lindiwe Sisulu possibly have up her snazzy sleeve, is what observers of parliament have been asking themselves lately. Or, more specifically, are we seeing a securocratic resurgence, this time of an ANC variety?

Sisulu's spat with the Scopa was instructive. She refused to appear before the committee until Scopa members apologised for criticising her for not being available three consecutive times. With this quarrel, which Sisulu calls "a storm in a teacup", she managed to get ANC chief whip Mathole Motshekga to back down from an earlier confirmation of Scopa's right to call ministers to account.

Subsequently, the minister told the Sunday Independent in an interview that parliament needed to enact legislation to compel her and other ministers to appear before Scopa. Sisulu has therefore reopened questions raised in the ANC earlier this year about whether Scopa can summon ministers. Scopa's firm position – shared by ANC members of the committee -- was that it has the power.

But not everybody was clear on this. Obed Bapela, the national assembly's chairperson of committees, wanted the Public Finance Management Act (PFMA) to be amended so that ministers could be called, alongside directors general (DGs), to account for departments' finances.

Bapela motivated his proposal by citing the problem of certain government departments (such as defence) receiving qualified audits year after year. His rationale is thus to improve Scopa's oversight capacity.

Ministers should be invited in three instances, Bapela suggested. One, in cases where DGs blame their departments' problems on their ministers. Two, "when a department becomes a serial offender", requiring answers from the political authority in the person of a minister. Three, where policy is being ignored and officials give vague explanations.

But such an amendment would in fact constrain Scopa's oversight capacity because it would limit the conditions under which ministers could be called before the committee. As Idasa's Shameela Seedat and Judith February indicated in a letter to Bapela, no law can alter the powers and responsibilities that the Constitution grants to any institution. Cabinet members' accountability to parliament can therefore not be watered down.

According to Idasa, amending the PFMA is unnecessary as it does not prevent Scopa from calling ministers before it. Moreover, despite the fact that it has become practice to invite specifically DGs to account to parliament, the PFMA does not make them solely accountable to Parliament for how departments conduct their finances.

Rather, "section 92(2) of the Constitution explicitly gives the executive the responsibility of keeping its own officials in check, and ultimately is the body that remains accountable to Parliament at all times".

Bringing it back to Sisulu, the minister seems therefore to be erring when she thinks that a legislative amendment is required to compel her to answer to Scopa. But it seems our minister has adopted a two-pronged approach. In the press interview, she also elaborated on her idea that MPs should initiate a bill to allow her to share "everything" with them.

According to her argument, the bill should enable the joint standing

committee on defence enhanced oversight over defence – similar to that enjoyed by the joint standing committee on intelligence, which she chaired at one time. These standing committees' meetings have become routinely closed despite parliament's rule that closed sessions should only be allowed if such closure would be justifiable and reasonable in a democracy.

Sisulu fails to mention that this "enhanced access" would be limited to MPs behind closed doors and therefore hidden from the media and broader public scrutiny. She also omits the fact that the standing committee on defence is basically an inactive committee, having sat only once.

Ever since last year's conflict over her department's recalcitrance in reporting on the defence force's military preparedness the minister has pressurised the portfolio committee on defence to pass a law to allow in camera meetings. At the end of April this year the minister handed out to the portfolio committee selected pages of the white paper on defence and parliament's rule book in which sections on the standing committee were highlighted. The push seems towards shifting the oversight functions of the portfolio committee to the standing committee.

This is confirmed by Sisulu referring matters she considers "confidential" to the standing committee on defence, according to the DA's David Maynier. Here we enter the murky terrain of what the minister regards as "national security". One example is a DA question about the number of Hawk planes that have been delivered in terms of the arms deal, and associated issues and costs. The minister's response: this information is classified; raise it in the standing committee. As this committee is effectively dormant, these issues remain under wraps.

Maynier reads it as that the minister is employing a "divide and rule" strategy. The portfolio committee on defence is feeling the pressure and has requested clarity from Bapela's office on its role and function vis-à-vis that of the standing committee.

Overall, the trend is towards greater secrecy and less transparency. Whichever committee conducts oversight, it is imperative that the defence force and the responsible minister are not left to their own devices. Of all government structures, the ones that we as citizens have granted the monopoly on violence should specifically be subjected to constant public scrutiny. Securocrats on the loose have burnt South Africa once before. We cannot allow that to happen again.

Much-needed change not an opportunity to hide information

Published Feb 2011

If impact on parliament is anything to go by, Minister of Defence and Military Veterans Lindiwe Sisulu's political star remains strongly in ascendance. While former minister Siphile Nyanda overplayed his hand in the communications portfolio and was dropped in the last cabinet reshuffle, Sisulu has cemented her position despite a series of run-ins with parliament.

She resolved these using her political clout with everybody from the speaker and the chief whip to the deputy president and the powers that be at Luthuli House, the ANC's headquarters.

A sure sign of Sisulu's success is the re-activation of parliament's joint standing committee on defence. After lying dormant for some time, it has already had two meetings this year and is due to have a workshop in February. This comes in the wake of considerable pressure from the minister for the committee to be resurrected.

In April 2010 the minister tabled a section of the White Paper on Defence at a meeting of the portfolio committee on defence and military veterans. She highlighted the section that refers to the setting up of a joint standing committee which would be able "to investigate and to make recommendations on the budget, functioning, organisation, armaments, policy, morale and state of preparedness of the SANDF" and perform functions related to parliamentary supervision. At the time Sisulu also called for new

legislation as the defence force would prefer to have an “instrument” (committee) at parliament in which it could have “confidence”.

In the spirit of the ANC promise of renewed vigilance at parliament, the portfolio committee sought clarity from Speaker Max Sisulu – brother of Lindiwe – on its mandate vis-à-vis that of the joint standing committee.

Reconsidering the oversight mechanisms at parliament is not in itself a bad thing. What is of concern is the issue of secrecy, a main item on the agenda at the committee workshop this month.

Sisulu has from the start of her tenure as defence minister driven a campaign for a special dispensation for defence, similar to that of intelligence. Parliament’s joint standing committee on intelligence holds all its meetings behind closed doors, away from the glare of public scrutiny -- despite parliament’s rule that in camera meetings should be justifiable in an open democracy. DA MP David Maynier points out that “there is nothing in the parliamentary rules which requires the joint standing committee on defence to meet behind closed doors like the joint standing committee on intelligence”.

Sisulu’s push for a special “instrument” fits into an emerging pattern of government resistance to public accountability, as exemplified not only by the Protection of Information Bill but by her own conduct as an influential member of the ruling party. She had barely started in her portfolio when she clashed with the defence portfolio committee about reporting on the military preparedness of the South African National Defence Force (SANDF). She then entered into public battle with the Scopa, arguing that the committee did not have the powers to summon ministers, despite the Constitution’s provisions to the contrary.

Later the portfolio committee sought access to reports from the interim national defence force service commission which, MPs argued, would aid them in their deliberations on the Defence Amendment Bill. Sisulu refused point blank. Her legal advisor locked horns with the parliamentary legal advisor, who supported the committee’s position that it had the right to access the report. The committee refused to process the bill until it had

laid eyes on the reports, leading to a reprimand from Max Sisulu. Luthuli House backed Lindiwe Sisulu and the ruckus ended in the unceremonious dismissal of Nyami Booï as portfolio committee chairperson.

Simultaneously, joint standing committee chairperson Hlengiwe Mgbadeli – who infamously told Mail and Guardian editor Nic Dawes that “there is nothing South African about you” – was also booted out. Booï and Mgbadeli’s removal is the coup de grace, paving the way for the joint standing committee to take central position on matters military in parliament.

The minister is correct in her suggestion that legislative changes may be required. Originally, the joint standing committee on defence was tasked with overseeing the SANDF while the portfolio committee passed legislation. But the rules of parliament foresaw the eventual setting up of a joint committee on oversight of security matters which would do an annual overview of both the SANDF and the police. This committee would replace the joint standing committee on defence. After all, the joint standing committee on defence, which includes members from both houses of parliament, was an animal of the transition and is up to this day governed by the interim Constitution of 1993.

At the time of the transition, given the complicity of the defence force in propping up apartheid, the joint standing committee was created as the vehicle to ensure proper political oversight, including over the integration of the military wings of the former liberation organisations with the former SADF. The aim of the joint standing committee’s workshop is to define its mandate, role and function. Committee members, apparently under the influence of the minister, decided that they should specifically deliberate on whether to open meetings or not.

Parliament should grasp this opportunity to create the planned joint committee on oversight of security matters and bring the transitional arrangement of the joint standing committee on defence to an end. But the need for legislative change should not be used as a ruse to hide yet another parliamentary committee’s deliberations from public view.

Whose security? Protection of State Information Bill

The paranoid state

Published July 2010

Parliament is currently the arena of a battle that may see South Africa being pushed back into a dark age of secrecy, subterfuge and state paranoia. Public inputs on the Protection of Information Bill of 2010 had to reach parliament by 25 June and public hearings will be held on 21 and 22 July. This draft law is government's second attempt at putting in place a system of classifying and declassifying state documents and regulating access to state documents.

In 2008, vehement reaction from civil society and the media caused the withdrawal of the bill's predecessor, which had been tabled by then minister of intelligence Ronnie Kasrils. It is round two and the reworked draft law has been tabled by minister of state security Siyabonga Cwele.

Kasrils's own ministerial review committee, which included Frene Ginwala and Laurie Nathan, criticised the 2008 Bill's approach to "secrecy in the national interest" as "reminiscent of apartheid-era legislation and in conflict with the constitutional right of access to information".

The 2010 bill, however, poses the same dangers. Since 2008 there was the drama around the Browse Mole report, grist on the mill of every conspiracy theorist in the ruling party, so the bill reflects spooks in overdrive, spotting enemies of "the state" (or of the ANC?) around every corner.

The primary problem with the 2008 bill was the overly broad and catch-all definition of national interest, the basis on which state documents

are to be classified. The 2010 definition is substantially the same, also referring to the national interest as including “all matters relating to the advancement of the public good”; and “the pursuit of justice, democracy, economic growth, free trade, a stable monetary system and sound international relations”; among a host of other things.

It gets worse. Section six, containing “general principles of state information” that inform the application of the bill, notes the importance of the free flow of information for accountability, among others. However, instead of the bill being couched in the understanding that such free flow is the lifeblood of a constitutional democracy, all of these provisions are subject to “the security of the Republic, in that the national security of the Republic may not be compromised”.

The 2010 bill’s definition of national security includes the 2008 version’s stress on protection from hostile acts of foreign intervention. It has added a flourish that amounts to South Africans being in breach of national security if they do not share the resolve “to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life”.

The ISS warns in their submission to parliament on the 2010 bill that the expansive definition of national security risks turning the role of intelligence, the functions of the state security sector and the use of secrecy into functional aspects of all government departments.

Turn to section 32 where the retrogressive impetus of the bill manifests in attacks on “the enemy within”: those that Cwele, speaking in parliament, referred to as investigative journalists “hiding behind” press freedom and the public interest, or academics “experimenting with their mental knowledge”.

Section 32 on “hostile activities” means that using evidence from classified state documents to expose wrongdoing may be punished with sentences ranging from three to 25 years in prison. This provision also runs

directly against the Protected Disclosures Act of 2000 which protects whistle-blowers.

Cwele protested at a meeting of the parliamentary ad hoc committee on the protection of information bill that the bill was not aimed at inhibiting either whistle-blowing or freedom of expression. But legal advisor to the NIA Premjith Supersad acknowledged, after a direct question from David Maynier (DA), that a whistle-blower will “unfortunately” be charged with an offence in terms of the bill if s/he is in possession of a classified state document that s/he is not authorised to have.

Cwele added that whistle-blowers should report wrongdoing to the appropriate agency for investigation, rather than exposing such wrongdoing publicly. The same goes for journalists. Rather than exposing the wrongdoing in the media, the document should be taken to the “relevant authorities” that will handle it in the “proper, lawful manner”, the hawkish committee chairperson Cecil Burgess (ANC) said. He also contested the “assumption” that a journalist should be “the sole person to determine whether there is unlawful activity contained in the document or not”, as the journalist is “subjective”.

Cwele’s protestations were belied by the turn that the committee meeting took. He requested that the meeting be closed, and Burgess agreed, in order for committee members to be “empowered” with understanding. Given that parliamentary meetings should only be closed to the public if this can be justified in an open and transparent society, the DA objected but Burgess retorted that “it is not necessary for the public to know some of these things”.

The attitude exemplified by the interactions between the committee members and the representatives from the ministry and NIA is one of paternalism and a belief in a system where only some people are “objective” enough to access the top end of a hierarchical pyramid of state information, which this bill aims to put in place.

May these people be the same ones who tried to prevent police commissioner Jackie Selebi from being prosecuted; or who used ill-begotten voice recordings to “convince” the NPA to drop the corruption charges against Jacob Zuma?

Clear and present danger to freedom of speech

Published Aug 2010

Freedom of expression was under siege at parliament's recent public hearing on the Protection of Information Bill, purported to be putting in place a new system for the organisation and management of state information.

The apartheid regime's anti-democratic Protection of Information Act of 1982 should be replaced with legislation that corresponds with the 1996 Constitution. But the Protection of Information Bill does not meet this criterion. Rather, it criminalises anyone who discloses state information, whether or not such disclosure is in the public interest. Whistle-blowers, journalists and even MPs can be incarcerated for up to 25 years if the bill remains in its current form.

In a movement towards the secrecy reminiscent of apartheid's dark days, the bill even contradicts legislation of the democratic era – the Protected Disclosures Act of 2000 and the Promotion of Access to Information Act (PAIA) of 2000.

Several presenters at the public hearing optimistically stated that the bill has a bona fide intention but that it falters when one gets to the nuts and bolts.

However, the way in which the ad hoc committee on the Protection of Information Bill chose to interact with members of civil society and the media at the public hearing rings alarm bells about the actual motives

behind this bill. Indeed, this particular engagement constitutes a low point in parliament's many interactions with the public since our democratic transition.

The hearing was punctuated by the badgering of civil society members. Luwellyn Landers (ANC) thought it necessary to strike a blow for men by sniping at the South African Media and Gender Institute for being concerned about women's physical safety.

Instead of calling Landers to order, chairperson Cecil Burgess launched into one of many convoluted interrogation sessions which seemed to have only one purpose: to undermine presenters' composure and intimidate them.

The gender dynamic was reinforced when Theo Coetzee (DA) patronised Nyoko Muvangua from the Centre for Constitutional Rights with a "compliment" on "how the young lady presents herself". The harassment was extended to old men, as Landers tore into Raymond Louw, Rand Daily Mail veteran. Presenters with Nigerian and American accents seemed to cause consternation. Hlengiwe Mgabadelo (ANC) found it necessary to emphasise her "indigenous" status.

The proceedings were thus marked by a prevailing "in" group/"out" group dynamic, with presenters only being afforded courtesy without condescension if their organisations fell within the sphere of the ruling party.

This was reflected in the flagrant disinterest in the expertise on offer. Parliament has a legislative tradition in which civil society experts have over the years been invited to assist with the drafting of clauses in bills. When this possibility was proffered this time round, Burgess dismissed it by saying the ad hoc committee's future meetings are "open" and the relevant organisation (Idasa) could raise issues there if it wanted.

This raises concern because the public hearing was characterised by MPs displaying a strikingly low level of understanding. Instead of engaging

with the substance of presentations, MPs were repeating scripted questions. As one example among many, the stock question from Thandile Sunduza (ANC) to presenter after presenter was how they would feel if their personal information “was lying around”. At the end of day one, Alison Tilly from the Open Democracy Advice Centre cautiously pointed out that the bill does not pertain to private information and that committee members may need to find out about the Protection of Personal Information Bill that is also currently under consideration.

Burgess retorted that this was unnecessary as he was in touch with the justice portfolio committee. Despite this exchange, Sunduza continued on her merry way the second day, again asking about “personal information lying around”.

The misdirected questions did however reveal an ideological intention. Mgbadeli told Mail and Guardian editor Nic Dawes the following:

“The family of media must go home and think about their whole contribution as a family of media. Is it that much difficult for the media to have a family? Instead of making us see the media as an asset of the nation, it becomes different pockets of business. Because it starts from there: Do I trust this family? Before you go to your office you are part of this country. ... The media was going to be a very valuable tool. But I get the impression back home there is nothing South African about you. This is a question of conscious[ness]. I look forward to meeting you as media family, not this business collective and competition kind of approach.”

Burgess (formerly from the ID before he crossed over to the ANC) then explained his new comrade’s words thus: “As we said in the days of the struggle: are you with the struggle or against it? The media seems to have created an institution of its own that is not with the people. The honourable member is not being dishonest.”

Sunduza confirmed the intentions further: “The media is important but it overstepped its bounds with the Browse Mole report.” And: “Coming to

the issue of human rights: I had a journalist in my garden coming to take a photo of my Mercedes Benz. If I had a gun I would have shot him. He was intruding in my private space.”

Other musings were on South Africa not being “one nation”; whether investigative journalists are trying “to destroy the country as some are not happy about democracy”; and that the government is unable to abuse power given its obligation to implement policies.

Only the Letsema Centre for Development and Democracy supported the bill as is, and this was the one submission that Burgess singled out as “open and honest” and “eye-opening”.

Letsema’s comments included: “Who will protect me better, the media or the state? The public should be empowered but so should the state”; and the bill “strengthens” PAIA and the Protected Disclosures Act. Letsema also believes, “we are faced by the giant of the commercial media which fear that the state will become a monster but the commercial media can become a monster that will crush us”; “the media is hitting the state and citizens over the head every day”; and that cabinet ministers should be protected against the media.

Furthermore, if a government elected by the majority of people wants to pass a law it should be given the “benefit of the doubt”. “Coincidentally”, Letsema shared Sunduza’s repeated concern about the media’s treatment of the late Manto Tshabalala-Msimang.

All the while Burgess was asking presenter after presenter whether their concern about the bill curbing the media meant they did not trust the Chapter 9 bodies and the police. Until Dario Milo, media lawyer, reiterated what almost all presenters had said: the media has a democratic right and a duty to expose wrongdoing. Any suggestion that this role should be curtailed is “deeply anti-democratic”.

Committee drags feet on Protection of State Information Bill

Published Apr 2011

“If you can’t beat ‘em, wear ‘em down.” This seems to be the unstated motto of ruling party members in parliament’s ad hoc committee on the protection of information bill, judging by actions taken against civil society and the lack of progress with the bill.

The latest display of impunity involves ruling party members knowingly allowing Right2Know (R2K) campaign members to be barred from a committee meeting. Despite the provisions of Section 59 of the Constitution, ANC MPs were adamant that the meeting’s proceedings should not be halted to ascertain why nine activists were blocked at the security entrance to parliament. The activists were told that they were being barred because of the R2K’s silent protest in February 2011 at parliament. Later, what amounted to a ban from the meeting, was dismissed as a “misunderstanding” by the powers that be.

This is a continuation of the spirit of open disdain shown to civil society participants at the public hearings in July 2010, which has also been manifest in the ad hoc committee wiling away the past eight months – all talk but little action, apart from proposals to tinker here and there. The lackadaisical attitude was confirmed when parliament omitted to extend the life of the committee earlier this year, with Deputy Speaker Nomaindia Mfeketo then unprocedurally extending the committee’s term. The opposition parties staged a walkout before the committee was eventually

properly reconstituted, this time with a deadline of June 24. The chances of meeting this deadline are slim, as MPs are involved in campaigning for the local elections.

Looking at the substance of the problems remaining with the bill, progress with amendments was most noticeable immediately after the hearings, clearly in response to immense public pressure at the time. The executive's involvement has been palpable throughout, so the few changes proposed thus far have followed the pattern in mostly coming from the minister of state security, Siyabonga Cwele.

The problematic definition of national interest will be dropped and national security will be the measure for classifying state information, according to Idasa political researcher and R2K advocacy coordinator Sithembile Mbete, who is monitoring proceedings. But it is unclear to what extent the overly broad definition of national security will be narrowed down. The other substantial shift has been away from the cavalier acknowledgement that whistleblowers will be prosecuted to a position that the bill will be aligned with the Protected Disclosures Act of 2000.

But, Mbete points out, ANC MPs remain stringently resistant to the inclusion of a public interest clause, which is necessary if investigative journalism is to survive in South Africa. Journalists who disclose classified information should be allowed to prove that non-disclosure would cause more harm to our human rights-based democracy than disclosure would. If not, the door is opened for the persecution of investigative journalists, with the predictable consequence of self-censorship in order to avoid incarceration. This is how apartheid apparatchiks avoided exposure of their heinous deeds.

The committee is also still pushing ahead with the goal of turning all state organs, ranging from governments departments to Eskom to the Brakpan Bus Company, into intelligence structures. The extent of the required classification will lead to the creation of a cadre of hundreds of censors, vetted by the NIA, at all three levels of government and in every

state-owned entity. Facilities will have to be put in place at each state entity for the strict control of information. One is reminded of the operations of totalitarian regimes; the former East Germany's Stasi secret police would have felt right at home.

There has been a suggestion that the bill be aligned with the PAIA of 2000. Chairperson Cecil Burgess (ANC) thinks it is a good idea to let each state entity's PAIA officer double as a censor. But international experts say that officials, unsure about the status of documents and eager to protect themselves, tend to over-classify state information. The SAHRC and the Open Democracy Advice Centre have repeatedly reported on the difficulties in implementing PAIA, with whole departments not fulfilling their legislated reporting tasks. If the PAIA official is made responsible for censoring information too, the current trickle of information procured through PAIA may dry up completely.

The bill remains fatally flawed. The opposition parties are busy with politics as "the art of the possible", which means seeking consensus. It is over to civil society to step up the pressure for the bill to be thrown out in totality. This is probably why the R2K campaign members were barred from parliament, an action that is in line with the spirit of this bill. It serves as a reminder that the bill threatens the very core of South African democracy. It has to be stopped.

“For security reasons”

Published Nov 11

While sitting in the public gallery in the NA watching the adoption of the Protection of State Information Bill, someone unexpectedly tapped my arm. “Switch it off,” a parliamentary official snarled at me, waving in the direction of the audio recorder in my hand. I was taken aback. The Constitution requires NA meetings to be open to the public, which this one was. The gallery was two-thirds full.

The proceedings would also, as per usual, be reflected verbatim in the Hansard parliamentary record, publicly available. In the press section of the gallery news reporters were making notes. Photographers were taking pictures. The gallery was bustling. This was, after all, one of the bleakest days in post-apartheid South Africa as a draconian law was about to be passed by a majority of heckling ANC parliamentarians.

“Why?” I asked the official. Almost perfunctorily, he uttered those three magic words: “For security reasons.” With those words any space can be closed, even one that the Constitution guarantees as open to public scrutiny. The official’s words were a premonition of what was to come from Luwellyn Landers, leading ANC MP in the ad hoc committee that processed the bill.

“Irreparable” harm would be done to “the state and the people” if it transpired that the disclosure of certain information was not in the public interest, Landers said a few minutes later from the podium. Which is why

the ANC would not allow a public interest defence clause, a fatal omission in the bill. Landers would probably be well versed in matters such as these, having been a member of the tricameral parliament, created in 1984 under the auspices of PW Botha, the apartheid securocrat in whose footsteps ANC MPs seem hell-bent to follow.

It is true that the Protection of State Information Bill had been improved from the version tabled last year. But, on top of the lack of a public interest defence clause, problems remain which hold substantially destructive consequences for our democracy. Of these, the most ominous is the expansion of the intelligence sector's sphere of influence throughout the state.

One of the improvements cited is the separation of the information regimes for security agencies from other government departments in the bill. While the former are compelled to classify information, the latter are only required to safeguard "valuable information". The classification regime will insulate the defence force, police and intelligence services from public scrutiny. People who breach this system can go to jail for 25 years. In practical terms it means that whoever leaked the information on the police leases, as well as the journalists who wrote the story, would have been facing lengthy prison sentences if the bill had been in place.

Other government structures are only required to protect "valuable information" against alteration, destruction or loss. But it should be noted that it is the cabinet member in charge of intelligence who becomes the authority over information in all other government departments, eroding the powers of the minister of arts and culture who is tasked with the safekeeping of state information in the national archives. In terms of the bill the minister in control of intelligence will make the regulations that determine the controls applicable to "valuable information", including "technical surveillance countermeasures and contingency planning" at all other departments. The same minister will also determine the responsibilities of the heads and employees of all other departments when it comes to "valuable information", and will decide on the training and "guidance" for all relevant officials in other departments.

Thus, with this bill the power and influence of the minister of state security is extended to all organs of state, whether the National Department of Health, the Natal Sharks Board, or the municipality of Trompsburg. The bill goes further in that it opens a door for other government departments to adopt the censorship regime that will apply to all security agencies. It contains an “opt-in” clause whereby any other organ of state could, “on good cause shown”, join the classification regime contained in the bill. Guess who decides whether a department or a municipality or the Algoa Bus Company may censor access to its information? Why, the minister of state security, of course. This is the one cabinet portfolio of which the *raison d’être* is secrecy, so it seems likely that the incumbent will mostly agree that more concealment is a “good cause”.

Implementation of laws has proven the greatest challenge of the post-apartheid state, with research showing that civil servants struggle to keep up with legislative changes. How will they in practice discern between “valuable” and “classifiable” information? The earlier concern remains that civil servants tend to over-classify, as also shown by international examples. The narrowing down of the definition of national security will ameliorate this problem somewhat. But the definition still includes items such as “exposure of a state security matter with the intention of undermining the constitutional order”.

Who decides what undermines the constitutional order? Consider the case of Dawit Kebede, managing editor of the Awramba Times in Ethiopia, who was recently forced to flee his country to avoid arrest. Previously Kebede was charged with “inciting and conspiring to commit outrages to the constitutional order”. Why? Because he criticised the security forces’ extrajudicial killings of unarmed protesters. Today’s freedom fighter is tomorrow’s terrorist. How far are we away from this shift when the minister of state security, Siyabonga Cwele, calls activists “proxies of foreign agents”?

The expansion of the securocrats’ sphere of influence fits in with a broader pattern, which includes defence minister Lindiwe Sisulu’s determined

campaign to insulate the defence force from public scrutiny. These moves are laying the groundwork for the militarisation of our society. We are increasingly sliding into the clammy hands of persons for whom the three words “for security reasons” represent enough reason to violate other people’s rights.

Reliable civil society

Published Apr 2012

Cynicism permeated the atmosphere at parliament's latest round of public hearings on the Protection of State Information Bill, ringing alarm bells about increasing hostility emanating from parliamentarians towards civil society. While the interaction should be rigorous, as different views are tested, the mere hosting of public hearings should not in itself be contentious in a democracy.

Parliament has become diligent in arranging such consultations after the Constitutional Court had to refer laws back to the legislators in the past due to insufficient public consultation. Nevertheless, it is difficult to escape the impression that parliament wants to be seen to be hosting public hearings, instead of ensuring substantive consultation as part of democracy in action. This has especially been a problem with politically driven laws, such as that scrapping the Scorpions and, presently, the Protection of State Information Bill (POSIB).

MPs exhibited unprecedented animosity towards representatives of nongovernmental organisations (NGOs) during the NA's public hearings on POSIB in 2011. Now it seems that a pattern of obstructionist behaviour has marred the NCOP's countrywide public hearings on the bill. The R2K campaign has gathered affidavits indicating that members of the public were cut short or harassed when they voiced opposition to the bill. R2K has also sought clarification about parliament paying for transport for selected people to attend the hearings. Are some South Africans more deserving of participation in parliamentary processes than others?

ANC MP Ruth Bengu's statement earlier this year comes to mind. She prevented the posing of questions in parliament drafted by what she called "the class of NGOs calling themselves civil society". In 2008, ANC MP Mtkeni Sibande gave this suspicion about some NGOs a racial twist when he criticised assistance to victims of the xenophobic attacks. He declared that, "our leadership must alert our security institutions about the so-called NGOs that are operated by unknown whites in those affected areas, because we don't need people who are instruments of imperialism". His statement resonates with Minister of State Security Siyabonga Cwele's accusation last year about civil society being "proxies for foreign agents", a claim repeated by ANC supporters at the hearings.

Another charge came from SACP deputy general secretary Jeremy Cronin writing in *Umkhelenzi Online* that civil society formations are "unaccountable... and yet they are those who claim the task of holding the state to account". Cronin, quoting a Brazilian sociologist, specifically objected to civil society "representatives" that "tend" not to be transparent about the election of their leaders, origins of funds and forms of decision-making. Such charges can be traced to former ANC president Nelson Mandela's address at the party's national conference in Mafikeng in 1997. Mandela declared that, "many of our NGOs are not in fact NGOs, both because they have no popular base and the actuality that they rely on domestic and foreign governments, rather than the people, for their material sustenance... We will have to consider the reliability of such NGOs to achieve (people-driven social transformation)".

Should we therefore also be suspicious of the government itself? It will receive, for example, €980 million during 2007-2013 from the European Union, which includes former colonial powers and which, some would argue, pursues neo-colonial policies today. A part of that money goes to civil society but the vast proportion is allocated to government programmes. By last year €580 million had been committed, "mainly through budget support programmes" that included employment, education and healthcare. Does this mean the government is pursuing a "foreign agenda" in these sectors?

The notion of “foreign agendas” is questionable in itself. Is it being suggested that a principle such as accountability has been “imported”, as though it is the exclusive property of the North? Such a suggestion would be a slap in the face of every African who has ever agitated for social justice. It seems curious that foreign funding of NGOs would be a problem now, given that progressive forces depended on foreign funding during the apartheid era, much to the chagrin of the NP regime.

Apart from lip service, the ANC has ignored calls for a law to be passed to compel political parties to reveal their funding sources. In contrast, information about NGOs’ funding sources is “generally commonly” available, according to Shelagh Gastrow, executive director of the South African Institute of Advancement, Inyathelo. Some 85,000 NGOs are voluntarily registered with the Department of Social Development, which requires them to submit annual financial statements to the department. Furthermore, the Non-Profit Organisations Act of 1997 prescribes that a registered organisation has to draw up a constitution that specifies its governance and decision-making mechanisms.

NGOs worth their salt do not deny that structural limitations exist that hinder participation in parliamentary processes. Samantha Waterhouse, who runs the CLC’s parliamentary programme, says that parliamentary submissions are usually made by better-resourced NGOs, with community-based organisations (CBOs) lacking the necessary capacity. Moreover, a CLC study found that NGOs are much more active in legislative processes than in monitoring parliament. NGOs therefore devote more resources to the improvement of legislation than to ensuring government accountability.

Waterhouse believes one way to ameliorate these shortcomings is for NGOs to form alliances, which would assist less-resourced organisations in having their voices heard in parliamentary processes. R2K has made a point of assisting smaller CBOs to participate in the public consultation on the POSIB. But, despite these efforts, the NCOP committee working on the bill still excluded these groups. Again a case of them not being “reliable” civil society representatives?

Information Bill another boost for new securocrats

Published May 2013

The final draft of the Protection of State Information Bill contained a typo: on page 6, the word “for” appeared as “foe”. This slip of fingers over keyboard inadvertently hints at the political agenda behind the bill, which sees enemies everywhere. This is the agenda causing the internecine battles in the ANC. It’s an agenda that distrusts democracy and infantilises citizens.

From its perspective the R2K campaigners are “foreign spies”, as suggested by Minister of State Security Siyabonga Cwele. Parliamentarians are suspected of being “in the pay of another government”, an accusation made by ANC MP Luwellyn Landers and reinforced by Cwele during the debate on the adoption of the bill in the NA.

After the re-tabling of the bill in 2010, security specialist Dr Laurie Nathan described spooks’ currency as being that of secrecy. Consequently, the State Security Agency (SSA) is institutionally incapable of devising legislation on the regulation of government information that would advance the constitutional injunction of openness.

Indeed, the re-tabled version of the bill did not improve the 2008 version. Protest marches followed. Luminaries expressed their distress at the legislative throwback to PW Botha’s securocracy.

But SSA has weathered the storm of resistance, resolutely driving forward the enhancement of its powers. Unabashed, it has sustained its involvement at a step-by-step level in the three-year long legislative process in Parliament, forcefully rebutting criticism and leaning on MPs at every opportunity.

The bill conjured spectres from the past, all the more haunting given the ministry's post-2009 renaming from intelligence to state security. The new securocrats do not mind bearing a name reminiscent of BJ Vorster's Bureau for State Security.

Unfortunately apartheid-era violations are not the only examples of the abuse of the intelligence services. In 2008, the Ministerial Review Commission on Intelligence found that intelligence gathering in post-apartheid South Africa has been politicised.

Indeed, as Kevin O'Brien points out in his book "The South African Intelligence Services. From Apartheid to Democracy 1948-2005", the intelligence services have been a political battlefield since the first democratic election. An early salvo was the coup allegation in 1998, made by then-SANDF head Georg Meiring, followed by more coup allegations in 2000, spying on political parties, and the allegations against former NIA head Billy Masetlha.

This abuse of intelligence is possible because the National Security Management System, set up by Botha's securocrats in the 1980s, was not dismantled but restructured to continue domestic intelligence gathering. It made sense at the time, given the need for information to fight the high level of crime. But, as the ministerial commission found, NIA also became embroiled in power battles between and within political parties.

Nathan explains in the journal "International Affairs" that intelligence agencies have special, intrusive powers that allow them to operate in secrecy and acquire confidential information.

He adds: “Politicians and intelligence officers can abuse these powers to infringe civil liberties, harass the government’s opponents, favour or prejudice political parties and leaders and thereby subvert democracy. Because of their proximity to the country’s rulers and their capacity to ferret out personal and party secrets, intelligence agencies have the means to wield undue influence within the state and the political arena.”

It is a measure of the extent of the influence of the intelligence services that the Protection of State Information Bill has been unstoppable. Instead of addressing the crisis in intelligence, as O’Brien calls the politicisation of the services, Cwele has doggedly pursued the advancement of the bill through parliament.

It is true, as Landers has pointed out, that the bill is an “improvement” from the version tabled in 2010. This is plainly due to concerted pressure from citizens. But key draconian elements remain.

These include putting the SSA in charge of not only classified information but also vaguely defined “valuable information”, with the power to enforce compliance by all organs of state. This is a massive expansion of the agency’s powers throughout the state sphere.

Accessing classified information is subject to a lengthy process of declassification which will encumber active citizen engagement in holding officials to account. Members of the public can still be prosecuted for possessing classified information even if that information is in the public domain.

While it is true that the act finally provides protection to whistleblowers and others who disclose information, this protection is narrowly circumscribed. Disclosing information that may be deemed to advance a foreign state’s interests is criminalised as espionage and can lead to prison sentences of up to 25 years, whether “espionage” was the intention behind the disclosure or not.

Meanwhile, the bill does not automatically declassify apartheid-era information, despite the impression the ANC tries to create.

The bill creates a Classification Review Panel, which has the power to oversee and reverse classification decisions, but it reports to Parliament's Joint Standing Committee on Intelligence, of which the meetings are closed to the public.

Placing the regulation of state information under the intelligence services means that the overall thrust remains counter to the openness required for a thriving democracy.

Those hoping that Jacob Zuma will use his presidential powers to test the constitutionality of the law should note what O'Brien calls a "line of continuity". He traces this line from the "Stalinist counterintelligence-led outlook" that drove Mbokodo, the ANC's security department in exile, through to the abuse of intelligence as political instrument in present-day South Africa.

Let's not forget that Zuma headed Mbokodo in the 1980s.

Parliament and constitutional bodies: “To assist and protect”?

SA Human Rights Commission left in the lurch – again

Published Dec 2008

Women of principle are making a comeback in post-Polokwane political structures. Barbara Hogan is minister of health; Nozizwe Madlala-Routledge is deputy speaker of parliament; and Pregs Govender has just been selected as a new commissioner at the politically beleaguered SAHRC.

While parliament was sidelined in the era of former president Thabo Mbeki, it has been prominent in the new ANC leadership’s reshaping of the political landscape. The legislature has been crucial in the party’s campaigns to change the SABC board and to crush the Scorpions, given that laws had to be changed.

New cabinet ministers have been drawn from the ranks of parliamentarians; and comrades who have ensured the support of parliament for the ANC’s Polokwane conference decisions have been awarded with promotions in parliament.

The new leadership in parliament has meant that a position in the SAHRC – under significant political pressure since the Malema hate-speech affair -- has finally been filled after being vacant for two years. It is no small

matter that the parliamentary ad hoc committee selected Govender. She is a steadfast feminist activist, a former ANC MP who opposed the arms deal and Mbeki's AIDS denialism. For her trouble she was worked out of parliament.

Her selection in November is an indication of the new openness to debate and even dissidence within the ruling party.

The saga of the SAHRC over the past six years illustrates what happens when parliament fails in its oversight duty. It also shows how interconnected our constitutional institutions are. If one is not functioning properly, it directly affects the others.

According to the Constitution, the SAHRC is accountable to parliament's NA. In June 2002, a parliamentary ad hoc committee conducted interviews and recommended to the president the appointment of eleven full-time commissioners.

Then-president Mbeki elected to appoint only five of the eleven, plus one part-time commissioner. This meant that the president appointed the bare minimum of commissioners allowed by the Human Rights Commission Act No 54 of 1994.

In parliament's review of the Constitution's Chapter 9 institutions in 2007, a committee led by former ANC MP Kader Asmal pointed out that the president's power of appointment is non-discretionary, “in the sense that provided that the correct procedure has been followed, he or she may not refuse to make the appointment... The president's role is to carry out the recommendations”. In 2002 the non-discretionary nature of the president's powers was “not fully appreciated”, as the review euphemistically put it.

But it was not challenged by parliament in 2002 -- or at any other point since, despite the serious implications this decision has had for the capacity of the commission to fulfil its constitutional mandate. Let's remind

ourselves that the SAHRC is the body that we should all be able to go to if our rights have been violated.

To make matters worse, Commissioner Charlotte McClain-Nhlapo landed a contract with the World Bank and the presidency agreed to her taking unpaid leave from December 2004. The SAHRC was consequently operating below the minimum capacity as determined by the Act. Yet again parliament paid no attention.

Despite appeals from the commission regarding the pressure caused by McClain-Nhlapo's absence, the presidency represented by then minister Essop Pahad maintained this situation -- with the full knowledge of the justice ministry -- until she resigned in December 2006.

With her resignation, the complement of commissioners had dropped below the legally required minimum. However, the position was not filled. Parliament allowed this untenable situation to continue up until now.

It speaks volumes that parliament only filled the vacancy once Mbeki was no longer in office. The heavy hand of the executive is palpable in this sorry tale.

However, while the position has now been filled – and with nobody less than the calibre of Govender – parliament yet again passed up on the opportunity to rectify the original injury, which was the presidency's 2002 decision to appoint less than half the commissioners that parliament wanted.

It is not as though parliament would have had to spend much time considering this. It would have been a matter of sticking to its own decision. Also, some of the other interviewed candidates – Rhoda Kadalie and Danny Titus -- are clearly fit to be commissioners.

If, however, parliament found itself wondering whether it would be the right thing to properly capacitate the SAHRC, it could have just referred to its own review of the Chapter 9 bodies, concluded in August 2007. The review called the president's appointment of an insufficient number of commissioners “deeply problematic and wholly inadequate” and recommended the “speedy” appointment of another two commissioners.

The review also pointed to the even more indefensible situation of the CGE being without commissioners for more than a year. Commissioners' terms expired simultaneously without parliament making appointments. The review fingered parliament as being responsible for the resulting “shambles”.

The same situation looms at the SAHRC as the terms of all the commissioners – bar Pregs Govender -- come to an end in September next year. To avoid vacancies and to promote continuity and institutional memory, the review recommended that the Human Rights Commission Act be amended to extend the current commissioners' terms pending a revision of the act to bring it in line with the 1996 Constitution.

But, as in the case of the Broadcasting Act, parliament's last pre-election session ended with another missed opportunity to fix the functioning of a vital democratic institution.

New SAHRC a mixed bag

Published Oct 2009

The new commissioners that parliament selected for the SAHRC are a mixed bag of encouraging and exasperating choices.

Most represent a strong combination of skills vis-a-vis the promotion of socio-economic rights, cultural and language rights and the rights of women, the disabled and rural people. But some have left previous positions under clouds of controversy, or seem “confused” about the political independence of the Constitution’s Chapter 9 bodies, such as the SAHRC and the Public Protector.

These appointments by parliament follow hot on the heels of that of the new Public Protector (the able Adv Thulisile Madonsela) and of the SABC’s board (also a mixed bag).

Given parliament’s role in the weakening of the NPA through the dismantling of the Scorpions and the removal of Vusi Pikoli, we should watch closely how such processes turn out. This is especially true after the cabinet’s replacement of members of the Judicial Services Commission, which compromised the body, as seen by its decision not to use cross-examination to determine the truth in the case between the Constitutional Court judges and Western Cape Judge President John Hlophe.

Of concern is the Portfolio Committee on Justice and Constitutional Development’s selection of Adv Loyiso Mpumlwana as human rights commissioner. It seems Mpumlwana was nominated for commissioner by the Nelson Mandela National Museum, of which he is a council member appointed by the relevant cabinet minister.

Something which MPs were apparently unaware of is that the Truth and Reconciliation Commission (TRC) laid charges against him for fraudulent misrepresentation in 1997, as indicated in Volume One Chapter 11 of the TRC Report. He allegedly moonlighted for the Eastern Cape premier's office while working as the TRC's regional head of investigations in that province. The TRC sued him to recover R154,000 which he had received in remuneration. Mpumlwana countersued for defamation. It is unclear what happened to this case after it was postponed indefinitely in May 2000.

These events followed after disciplinary action by the TRC that had found Mpumlwana guilty of eight out of ten charges relating to failure to perform his duties, leading to his resignation.

Another successful candidate with historical baggage, this time with the SAHRC itself, is Lindiwe Mokate. She resigned as chief executive officer of the commission in 2005 after an independent inquiry found that she undermined the authority of chairperson Jody Kollapen and the other commissioners.

In response to questions from DA MP Dene Smuts, Mokate convincingly identified the problem as the laws governing the SAHRC and public finances being contradictory with regards the roles of the CEO and the chairperson.

Mokate was impressive during the interview, compellingly arguing how her economics background would serve the commission by saying “the country is battling with service delivery... If we don't have our economic and social rights in place, especially around education (and) health, there is no future for civil and political rights... I'd like to throw myself in there and see what is stopping us from delivering on those rights.”

In contrast, the interview with former ANC MP and outgoing Public Protector Lawrence Mushwana confirmed existing doubts about his suitability. A court decision recently overturned one of the many findings that

he made in favour of high-profile ANC politicians. It did not help that he fudged the issue of independence during the interview.

First he told MPs that Chapter 9 bodies are institutions “within government”. Then he called the Public Protector “an organ of state”, after which he corrected himself.

Smuts then alerted him to a Constitutional Court finding that such bodies are outside government, to which he replied:

“My understanding is that the Public Protector is appointed by parliament, which is the state... Let’s look at the reality. You are appointed by the head of government. What are you, in the strict sense of the word? I’m not saying that person can come to you and give you instructions. I am talking about the reality that you are not the Public Protector outside South Africa. You are the Public Protector in South Africa, subject to the Constitution and the law.”

The latter comments stated the obvious and seem an attempt at distraction. Another question from the IFP’s Mario Oriani-Ambrosini made Mushwana decide that the Public Protector is indeed “outside the definition of government”.

Director of the Legal Resources Centre Janet Love was another successful nominee who, apart from Mpumlwana and Mushwana, has direct links with the ANC. But she stated unequivocally that she would resign as ANC NEC member and from other positions that may cause conflict.

One gathers more hope when looking at Adv Joseph Malatji, who is to be the first blind commissioner, and Dr Danny Titus, a former professor of law. Titus had a spirited engagement with the MPs, questioning the postponement of the interviews (which was then explained); elaborating on how the executive is “clearly in violation of so many rights” (collapsed services and corruption); and how politicians should not feel threatened by diverse opinions. Despite his forthright manner, he made it.

Someone who did not, however, is the current SAHRC CEO Adv Tseliso Thipanyane. Along with his recent conflict with ANC Youth League leader Julius Malema, ANC MPs also challenged his insistence that the SAHRC should take government to court when it is in breach of laws. He did not endear himself to those who hold sway.

The Mpumlwana conundrum

Published Oct 2009

Parliament is suddenly finding itself in uncharted waters. What to do when information becomes available that puts a resolution of the national assembly in jeopardy?

This is what happened recently when parliamentarians discovered that one of their choices for the SAHRC, Adv Loyiso Mpumlwana, was found guilty of fraudulent misrepresentation after working simultaneously for the TRC and the Eastern Cape provincial administration in the late 1990s.

Parliamentarians only discovered this information when Adv Luzelle Adams of Cope brought it to the national assembly's attention in the debate on the SAHRC selection. Adams became aware of it while preparing for the debate and, "googling" Mpumlwana, stumbled across a TRC press statement about the steps against him.

This information was not tabled during the interviews that the portfolio committee on justice and constitutional development conducted. Mpumlwana's CV states that he stopped working at the Eastern Cape premier's office in 1996 and started as regional head investigator for the TRC that same year.

While the CV omits the exact dates, we now know that the court found that Mpumlwana fraudulently misrepresented himself to the TRC at the time. Needless to say, this would preclude him from being defined as a "fit and proper person" which is what the law and common ethics require a Human Rights Commissioner to be.

If this weren't bad enough, questions have also arisen about who nominated Mpumlwana. Prof Kader Asmal wrote a letter to the Cape Times stating that the museum council, of which he is the chairperson, was not involved in the nomination. Moreover, neither had the management “any hand or foot” in the nomination.

The nomination letter, which is on a Nelson Mandela National Museum letterhead, states that “(t)he Museum management team after a teleconference and deliberations on the advertisement” took a resolution to nominate Mpumlwana.

So, who nominated him? Parliament still needs to ascertain this.

To the credit of all political parties in parliament, swift action was taken after Adams rang the alarm bells. Speaker Max Sisulu requested the president to delay Mpumlwana's appointment while proceeding with the other five appointments.

Justice committee chairperson Adv Ngoako Ramatlhodi and Sisulu met with Mpumlwana, apparently with a view to persuading him to withdraw his candidature but failed to do so. It seems the ANC is now exploring how best to handle the situation.

What is important is that parliament does not leave it to the president to reject the nomination but rather fulfils its role as foreseen with regards the Constitution's Chapter 9 bodies. One is reminded of former president Thabo Mbeki's decision to appoint only five of the 11 commissioners whose names parliament referred to him in 2002, thereby crippling the commission under Jody Kollapen.

Despite the president only enjoying non-discretionary powers and not having the power to refuse to appoint parliament's nominees, parliament left it at that. This time round parliament should deal with the matter in a way that fully complies with its mandate.

To do just this, the DA's Dene Smuts has asked for the matter to be referred back to the justice portfolio committee. Ultimately, Mpumlwana should be called before the committee and given a fair chance to explain himself. She is adamant that parliament should fulfil its legal role, as is Cope's Adams. Ramatlhodi has been unavailable, so the ANC's position is unclear. How our public representatives handle this conundrum will be a decisive harbinger of the extent to which the fourth democratic parliament will serve us as citizens.

On another note, the police portfolio committee chairperson Sindiswe Chikunga is someone to watch. Police commissioner Bheki Cele and his top management came in for a grilling recently as committee members waded through the police's soup of frequently nonsensical crime statistics, as derived from their annual report for 2008/2009.

Throughout the more than four hours that the meeting lasted, Chikunga was making notes, one of the few times that I have ever witnessed a committee chairperson do so. But she means business. Running into the lunch hour – also almost unprecedented -- she spent 20 minutes spelling out to the police where improvement was needed, based on her notes.

On the desk she had, among stacks of parliamentary papers, police expert Antony Altbecker's "A Country at War with Itself" and a letter from Lisa Vetten at Tshwaranang Legal Advocacy Centre about contradictions in the rape statistics. The police's statistics show a reduction in rape – which is counterintuitive, given that the definition of rape was expanded in the SOA of 2007.

Chikunga promised to study the letter and to seek clarification from the ministry, if necessary. And, in an unsolicited addition, she told me that she is open to criticism. "Constructive criticism," she added, with a smile. For all the erosive moves currently noticeable in our democracy, some among our post-election crop of public representatives are indeed serious about their new(ish) responsibility.

Parliament's role in protecting the protectors

Published July 2011

Parliament is presented with another constitutional test following Public Protector Thuli Madonsela's finding of maladministration and unlawful conduct in the police's leasing of buildings. But instead of decisive action, we have seen prevarication in the wake of the release of her "Against the Rules" report in February about irregularities in the leasing of a building in Pretoria. Ditto "Against the Rules Too", released in the first half of July, examining the police's leasing of a building in Durban.

The prevarication seems due to a combination of, on the one hand, confusion over the mandates of the different arms of government in a case like this and, on the other, attempts to win time to find a backroom solution amidst the latest twists in what amounts to an ongoing constitutional crisis. Lest we forget: the attempts at intimidating Madonsela into silence fit into a pattern that started in the late 1990s when the Special Investigating Unit (SIU) and parliament's Scopa were both blocked from investigating the infamous arms deal. The ruling party replaced those persons pursuing the mandates of the SIU and Scopa with loyalists who would do the bidding of their political masters – that is, thwart any possibility of proper investigation. They were seemingly mistaken in their appointment of Willie Hofmeyr as SIU head.

Such interventions have been repeated with the Scorpions and with

former National Director of Public Prosecutions, Vusi Pikoli. Interference with the Public Protector’s office has thus far been unnecessary as former incumbent Lawrence Mushwana did not use the full extent of the office’s powers of investigation when confronted with allegations fingering high-profile politicians. The Supreme Court of Appeal (SCA) recently confirmed this with its finding regarding the “Oilgate” case, in which state money was allegedly routed from PetroSA to the ANC.

Therefore, a Public Protector that fully implements the institution’s constitutional mandate represents uncharted waters to the current rulers. Which would explain why government spokesperson Jimmy Manyi is displeased with Madonsela throwing cabinet’s “road map” for the management of her findings in “turmoil”. This road map seemingly involved backroom activity. Justice minister Jeff Radebe had reportedly “struck a deal” with Madonsela not to release the second report but rather to hand it to cabinet, which would then make public the report along with its own recommendations. It would fly in the face of the Public Protector’s constitutionally guaranteed independence to release its reports via the executive.

This is especially true if we remind ourselves what the SCA said in its finding about the “Oilgate” case: “The function of the Public Protector is as much about public confidence that the truth (about malfeasance or impropriety in public life) has been discovered as it is about discovering the truth.” Inspiring public confidence is impossible without transparency. To Madonsela’s credit, and Manyi’s chagrin, she resisted the executive’s attempt at meddling.

Which is where parliament comes in. Its duty in this case would be to oversee the executive’s implementation of the Public Protector’s recommendations for remedial action. With regards the police attempts to cow Madonsela into silence, the Constitution instructs organs of state to “assist and protect” the Public Protector to ensure its “independence, impartiality, dignity and effectiveness”. To the credit of Max Sisulu, Speaker of parliament, his office released a statement confirming that the Public

Protector “enjoys the full confidence of parliament” three days after the media leak that Madonsela was to be arrested. Sisulu also met with police minister Nathi Mthethwa and, at her request, with Madonsela.

A resounding silence has nevertheless emanated from the parliamentary portfolio committees concerned with justice, police and public works. Especially the police committee should be applying its collective mind to the police’s obvious attempts at intimidation, which suggest along with other actions that the police are becoming a law unto itself.

Unfortunately, the treatment that some ANC MPs in the justice committee meted out to Madonsela after the police’s first attempt at intimidation in March serves as a disquieting harbinger of things to come. Some MPs questioned the seriousness of the incident in mocking tones. The unexpected arrival of police officers demanding documents from an independent institution tasked with the protection of the public interest is nothing compared to what people experienced from the apartheid regime, one MP even suggested.

If the oppressive apartheid regime becomes the standard by which we measure the conduct of security officials today, we will obviously merely repeat what has passed before. A new standard is in place, namely that of the Constitution. MPs are duty-bound to heed its principles. Parliamentarians should remind themselves that the Public Protector acts as a defence against corruption and malfeasance in public office that could “insidiously destroy the nation”, as the SCA put it. It added: “If that institution falters, or finds itself undermined, the nation loses an indispensable constitutional guarantee.”

The art of the possible: Stretching parliament's limits

Published Nov 2011

If politics is “the art of the possible”, recent events have paradoxically revealed a buoyancy to South Africa’s democracy that bodes well for our collective future. Persistent demands of government accountability by a Chapter Nine institution and by civil society activists have had real effects during the course of 2011. The consequences have been the dismissal of two cabinet ministers and the suspension of the police commissioner; the withdrawal of the draconian Protection of State Information Bill; and the appointment of a judicial commission to investigate the arms deal.

In the 19th century, the first German chancellor, Otto von Bismarck, coined the phrase “politics is the art of the possible”, meaning that politics can only achieve what existing conditions allow. While this is frequently seen as a negative statement, recent events suggest a positive dimension as well. The three breakthroughs demonstrate the vital importance of independent Chapter Nine institutions and a strong and active civil society for democracy to work.

The reactivated Office of the Public Protector, under adv. Thuli Madonsela, has demonstrated the powerfully protective potential of our constitutional bodies, should they be used for the purposes they were created for. Terry Crawford-Browne’s unrelenting pursuit of justice in the

arms deal saga confirms that civil society activism can succeed against all odds in holding the powerful to account, while the Right2Know Campaign shows how a broad, non-partisan social alliance representing the political spectrum from Cosatu to the Anti-Eviction Campaign to the DA can serve the public good.

These concerted interventions have shrunk what is politically possible to such an extent that they forced the hand of President Jacob Zuma and had him institute steps that serve the ends of accountability and transparency, without which a democracy is inoperable. However, it is instructive to study parliament's role, especially in relation to the dismissal of the ministers and the suspension of the police commissioner.

Parliament is another essential institution in the democratic matrix. It should stand in a closely supportive relationship with the Chapter Nine bodies and civil society. However, it seems the breakthroughs were made in spite of parliament, rather than because of it.

In the midst of the police leases drama, following Madonsela's reports, former public works minister Gwen Mahlangu-Nkabinde wrote a letter to the portfolio committee on public works requesting an opportunity to put her side of the story. She in all probability hoped for some support, given her own background as former parliamentary committee chairperson and deputy speaker. She had to withdraw her request when the speaker of the NA, Max Sisulu, in a vaguely worded statement, indicated that he had started a “process”. It was unclear what such a process could entail, given that Public Protector findings cannot legally be second-guessed or challenged by parliament.

At the end of August 2011 Mahlangu-Nkabinde, while addressing the portfolio committee on public works, asked again to share her side of the story, just to be told that a joint portfolio committee had been appointed to look into the reports. This committee was due to sit on 10 October but for spurious reasons could not do so. Zuma's decision overtook whatever parliament was planning to do, which was unclear from its course of action.

What parliament could have done, was to put pressure on the executive to take action as per the Public Protector’s reports. This is after all the injunction in the Constitution: that institutions such as parliament must support the Chapter Nine institutions in their work. Instead, we saw parliament employing delay tactics which allowed the executive time to find its feet. Clearly, Madonsela’s dedication to the constitutional mandate of her office caught the ruling elite by surprise.

Thus, parliament was playing its role to ensure that the executive had time to ascertain all possible options to suit the currently dominant political agenda – in other words, to widen what Bismarck called “the possible”. But the Public Protector’s fulfilment of her mandate narrowed down “the possible” to such an extent that all that remained for Zuma to do, after months of mulling, was to make a decision that would strengthen accountability.

Parliament, however, emerges yet again as subservient to the narrow political goals of the ruling party leadership. This is further confirmed by the fact that Sicelo Shiceka’s extended absence from his post as minister of cooperative governance and traditional affairs was by all accounts never questioned by the portfolio committee tasked with oversight over the ministry. The committee is the first site where alarm bells should have rung about Shiceka’s eight-month-long tennis break (he confirmed that despite being ill he had been brushing up on his game, not unlike that other infamous “patient” Schabir Shaik). Indeed, in meeting after meeting (at least six during 2011) Shiceka’s deputy, Yunus Carrim, appeared on his behalf. The last time the portfolio committee saw Shiceka was in October 2010.

To top it off, despite this glaring failure of duty, the chairperson of the portfolio committee, Lechesa Tsenoli, has been promoted to a deputy minister post reform in the cabinet reshuffle that saw Shiceka being axed. Tsenoli did not excel in any way as chairperson, and one has to question the timing of this promotion. Is it because he was covering for Shiceka all those months, acting as though nothing was? Tsenoli’s passivity seems

in stark contrast to some of the strong pronouncements made in recent months by other portfolio committees about the failures of certain departments, such as health, or about national director of public prosecutions Menzi Simelane's no-show before the justice portfolio committee.

But this contrast can be explained as that committees seem free to speak out only when matters are not politically sensitive. This they have been doing vigorously since Luthuli House's instruction that ANC MPs should engage in active oversight. But, if this oversight is limited to politically "safe" issues, isn't it just a question of wanting to be seen to be providing oversight, as opposed to actually providing oversight? This places the police portfolio committee's headline-grabbing grilling of Police Commissioner Bheki Cele a few weeks before his suspension in a totally different light. Was it only allowed because MPs already knew that the writing was on the wall for Cele?

CGE's improvement hampered by lack of commissioners

Published May 2012

It is a no-brainer that a commission without commissioners ceases to operate. But, by the second half of May 2012, the CGE had only two commissioners left, both with terms expiring before the middle of June. So it has been déjà vu at the CGE: in 2006-2007, the CGE had no commissioners, for which the blame should be laid before parliament's door, as it failed to ensure new appointments. During the latest replay of this crisis, the number had already back in 2010 dropped below the legal requirement of seven commissioners.

If the commission is not legally constituted, it could have far-reaching implications for the exercise of its powers, which include the issuing of subpoenas and holding of hearings. As matters stand, the lack of commissioners has forced those remaining to disband internal sub-committees responsible for financial oversight and for projects on gender-based violence and other CGE work, according to Janine Hicks, whose term as commissioner ends on 7 June.

The current delay in appointments seems to stem from confusion over numbers to be appointed to fill vacancies (the CGE Act provides for the appointment of 11 commissioners plus a chairperson), as well as differentiation between part- and full-time commissioners. Parliament has

placed before the presidency a list of nine commissioners to be appointed, a process the presidency claims to be finalising. Among those recommended is Wallace Mgoqi, confirming that the ruling party still regards Chapter Nine institutions as parking spaces for loyal comrades. Mgoqi may be known for defying the DA after his axing as Cape Town city manager but definitely not for any gender work.

Meanwhile, the successful candidates have been in limbo, not knowing if and when the presidency will effect the appointments. Hicks, along with outgoing commissioner Kenosi Meruti, CGE CEO Keketso Maema and management, earlier in May presented the CGE's strategic plan for 2012-2017 to the portfolio committee on women, children and people with disabilities. Commissioners used the opportunity to appeal to the portfolio committee to pursue the matter of the delays with the presidency and have also written to the speaker. The portfolio committee promised to look into it.

It is notable that, among the constitutional chapter nine institutions, particularly the CGE seems subject to delays in appointments. The CGE has been without a chairperson since 2009, another appointment that the presidency failed to make. Maema acted in the position of CEO for two years before finally being appointed in 2010.

Feminists close to the process regard these problems as stemming from the ANC's toying with the idea to have the commission disbanded, especially after Public Protector and AG investigations into misconduct and fraudulent and irregular expenditure in the 2007/2008 and 2008/2009 financial years. A controversial independent audit recommended in 2008 that the commission be placed under “mentorship”; parliament's ad hoc committee on the review of chapter nine and associated institutions, which the late Kader Asmal chaired, recommended in 2007 that the CGE be collapsed into the SAHRC.

While the commission has not been able to totally avoid controversy in recent years, as its last chairperson, Nomboniso Gasa, left under a cloud,

the outgoing crop of commissioners has worked hard to clean up the commission's act. The commission is due to receive its second unqualified audit from the AG, testimony to its return to sound governance. It has also been applying its full powers to call hearings and subpoena government departments and companies to appear before it. However, while the outgoing commissioners have turned things around, parliament still has to attend to the long overdue alignment of the CGE Act with the 1996 Constitution and the PFMA, recommended by its own ad hoc committee on the CGE forensic investigation already in April 2011.

Previously, the justification for pressure to scrap the commission was that the commission was dysfunctional. Why it would make sense to scrap the organisation rather than to fix it, is unclear. Particularly, as Hicks notes, as gender power relations have not substantively improved between 1996 and today. Some of the impetus for scrapping the CGE emanates from the new institutional kid on the block, the ministry for women, children and people with disabilities (or “the ministry for everybody except able-bodied adult men”, as an activist joked).

The incumbent, Lulu Xingwana, is known as a proponent of collapsing the commission into the SAHRC. Since the minister's appointment in 2010, attempts by the CGE to set up a high-level meeting with her on role clarification have been unsuccessful. Xingwana has complained about 50 percent of “her department's budget” going to the commission, which is an incorrect depiction, as the commission has its own budget allocated by the treasury which is merely channelled via the department. Previously it was channelled via the justice department.

She should reconsider her position. The CGE has unique oversight powers which a minister cannot exercise in relation to her peers in cabinet. Also, the CGE's present budget is inadequate for the implementation of its mandate, which means the ministry won't win much if it absorbed that budget. It makes political sense to vie for more money to be allocated to gender work all-round, including her ministry, instead of merely

transferring an already measly budget from one institution to another. If motivating increased spending on women's empowerment is a problem, treasury should be reminded of the deteriorating statistics on rape and socio-economic inequality, which affect women most.

Parliamentary speech: A nation's insiders and outsiders

Shifting enemies

Published Feb 2012

"No rubbernecking", I was told by an official when I crossed into Zimbabwe from Botswana in the late 1990s. I immediately understood that as a journalist I am allowed entry as long as I don't "snoop around". Zanu-PF's resistance to being held accountable, also by "outsiders", had already by that early stage infiltrated the lower levels of the state bureaucracy. It was spurred on by growing democratic demands amid worsening socio-economic conditions, demands apparently unfathomable to the minds of the rulers.

This way of thinking resonates with Minister of State Security Siyabonga Cwele's recent obfuscating response to questions in parliament. He refused to comment on what he called the media's "interpretation or misinterpretation" of his accusation that civil society opponents to the Protection of State Information Bill are "proxies for foreign agents". His accusation also resonates because it is intended to sow suspicion about a "rubbernecking" civil society, to use the Zimbabwean official's ominous phrase.

Cwele seems to be in step with his defence counterpart, Lindiwe Sisulu, who has succeeded in stonewalling parliament's attempts to hold her accountable for the operations of her department. Thus it is no surprise that defence spokesperson Ndivhuwo Mabaya untruthfully denied that a shadow plane followed the presidential plane into the US. He then reportedly declared that the defence ministry does not have to justify itself to anyone, a ridiculous claim to make in a constitutional democracy.

Such denials and name-calling form, along with the secrecy bill, part of a seemingly intensifying drive by the government's security departments to place them beyond public scrutiny. In analysing this thinking, it is useful to consider the suggestion from Dr Ivor Chipkin, author of "Do South Africans Exist?", that nationalist elements within the ANC harbour an aversion towards democratic challenge because of the misperception that the party is identical with "the nation".

If "the party is the nation", it means non-supporters are to be excluded from "the nation". Being equivalent to "the nation" also means that "the party is the state", a mode of thinking that Sisulu shares. She declared last year that the defence department would have been "honoured" to fund her party's centenary celebrations.

This conflation of party, state and nation creates an insider-outsider dynamic in which name-calling is wielded against opponents and critics, along with other authoritarian moves. In lieu of policy changes and improvement in state service delivery, these moves are about retaining power despite deepening political discontent over socio-economic divisions.

This is the context in which opponents become branded "proxies for foreign spies" or, more frequently, "counter-revolutionaries". The term "counter-revolutionaries" as way of stigmatising political opponents did of course not originate with the ANC. It featured almost 100 years ago when the new Bolshevik government in Soviet Russia set up the All-Russian Extraordinary Commission for Combating Counter-Revolution and Sabotage, known as "Cheka". Cheka was set loose on counter-revolutionaries, with deadly results.

I am struck by such similarities in discourses, having just returned from visits to Germany and Hungary, which have both suffered through successive totalitarianisms of the National Socialist and the Soviet varieties. While it would be a serious error to make easy comparisons with these murderous systems, we should pay heed to their insider-outsider dynamics as both ideological currents feed into South African politics.

French thinker Michel Foucault stated that these systems link in that they both expelled and annihilated “enemies”. For the Nazis the circle of “social undesirables” that “infect[ed] the master race” included Jews and even epileptics. For the Soviets, those threatening the revolution-with-a-capital-R were the “class enemy”, but this was not a fixed category, which is the difference between the two systems. It was adapted depending on shifting power relations outside and inside the ruling party to ultimately target all those considered a political threat.

To illustrate the difference, the Nazis would mark someone interned at a concentration camp such as Sachsenhausen outside Berlin with a sign indicating their offence against “racial purity”: a pink triangle for homosexuals, a yellow Star of David for Jews. In contrast, many prisoners arriving at the Soviet Special Camp created in the exact premises of Sachsenhausen after World War II had no idea why they had been rounded up.

The flexibility of the term “class enemy” allowed for the internment of a category of persons known as “unreliable” by Hungary’s Soviet-aligned regime. The Hungarian Communists’ notion of “reliability” was not far removed from the position of their National Socialist predecessors in the Arrow-Cross Party. The latter called their branch headquarters in Budapest the “House of Loyalty”.

South Africa is not a political island. Fascist tendencies fed into the NP, of which some former members still hold positions in both the state and the ANC. Stalinist tendencies are in evidence among those currently in power, some of whom spent years in exile in the former Soviet states. The terms “comrade” and “counter-revolutionary” delineate insider/outsider status in that ideological tradition.

Like South Africa, Hungary is still battling to consolidate its democracy. In a wry historical twist, Hungarians are again facing the threat of fascism in the form of the populist governing party Fidesz. Fidesz has gone beyond the mostly rhetorical threats against the courts and media that we have

been faced with in South Africa to establishing political control over both institutions.

What is happening in Hungary serves as a timely reminder that we must all painstakingly resist every attempt to collapse back into the authoritarian habits of our various pasts.

Veering between the Constitution and xenophobia

Published Aug 2011

Language is not merely a tool with which we convey messages to sustain human life. It is a system of symbols loaded with meanings that determine power relations, particularly who is allowed into the “in”-group and who are marked as outsiders. Words can be wielded to effect violent exclusions of “undesirable others”. Apartheid discourse is a prime example.

The xenophobic violence that reached an organised pitch in May 2008 and has intermittently continued, serves as a bloody reminder of how stuck South Africans remain in exclusionist apartheid thinking. An HSRC study quotes Malawian scholar Paul Zeleza’s analysis of our xenophobia as the “racialised devaluation of black lives”, with “shades of blackness (becoming) a shameful basis” to target African immigrants and, one could add, minority ethnic groups, such as Xitsonga speakers. Thus the recent use of the dehumanising terms “cockroaches” and “snakes” in the political discourse – terms that featured in Rwanda’s genocide -- should make our ears prick up.

Against this background, how would parliament’s Portfolio Committees on Labour and on Home Affairs approach their recent joint meeting with the theme “the presence of the (sic.) foreign nationals in the South African labour market”? The phrasing may not be overtly hostile but the mere existence of foreign nationals in the labour market was framed as problematic in itself.

Would we see a resurfacing of a stigmatising discourse in which the cause of the victimisation of African migrants is ascribed to them having “flooded” the country and somehow enjoying an “unfair advantage” over South Africans? Human Rights Watch warned as far back as 1998 against politicians feeding into widespread misperceptions that millions of foreigners have invaded South Africa. In reality, a mere three to four percent of the total population are foreign, according to the Forced Migration Studies Programme.

In mid-2010, Police Minister Nathi Mthethwa suggested that foreigners had an “unfair advantage” as they buck the system by operating shops out of homes; not paying tax; and breaking municipal bylaws. It is unclear why undocumented migrants would benefit more from the lack of regulation in the informal sector than South Africans in the same sector. Regarding the much-resented “favouring” of foreigners for casual labour, employers get away with super-exploitation of foreigners due to their very undocumented status.

Against such facts, Major Kobese, director of policy support in the office of the Director General of Home Affairs, told MPs that South Africa’s “jobless growth economy” has to do with “how employment is managed”, in particular the “displacement” of locals by foreigners. He said: “Ten years ago Grand Parade (in Cape Town) was run by South Africans. Those people have been displaced by foreign nationals. What happened to those South Africans running Grand Parade? ... Are they able to provide for their families? If you go to Alexandra (Johannesburg), you go to Sunnyside (Pretoria), you go everywhere, spaza shops, hair salons, everything has been taken over by foreign nationals... They displace South Africans by making them not competitive.”

Another home affairs official, deputy director-general of immigration Jackson McKay, showed MPs a map with a multitude of arrows shooting into South Africa from our neighbours – ostensibly showing “immigration trends”. How else would people enter South Africa, except by moving

from their countries to ours? Little could be gleaned about “immigration trends”, its ostensible purpose. But the image effectively conjured up the idea of an invasion. Cited “trends” sounded more like exceptions being presented as the rule, for example that Zimbabweans regularly cross the border “just to access our grants”. Confusingly, in the same presentation, the department stressed that, “there are many categories of persons who actually and potentially add considerable value to a nation’s economy, including ... refugees and ... economic migrants”.

Labour committee chairperson Mamagase Nchabeleng stressed that “our challenge is that (foreigners) who live within the borders of this country are treated as human beings”, the only statement from MPs that challenged Kobose’s view, albeit indirectly. This contradiction suggests that the government is torn between two discourses: the one provided by our constitution that “enshrines the rights of all people in our country”; and a nationalist, xenophobic discourse that disconcertingly echoes with Islamophobic “security” rhetoric in the West.

This clash is revealed by the following juxtaposition. The Department of Home Affairs’ motto, “caring, compassionate, responsive”, featured on each page of McKay’s presentation. Despite this, McKay explained that the department views itself as a “security department” aiming to “allow in people who would add value and keep out undesirable elements that would bring harm to us and our national security”. These “undesirable elements” enter partly because of “our porous borders”.

But, alongside criminals that exploit porous borders, the most vulnerable of migrants also cross borders. Research has shown that the department struggles with distinguishing between different types of migrants in practice. During the presentation the categories of refugees, asylum seekers and economic migrants were not clearly differentiated, and all categories were maligned with accusations of abuse of the system.

With the stench of suspicion toward racialised “others” hanging heavily in the air, it was unsurprising to see the idea of “transit centres” quietly

cropping up in the department's diagram of possible future interventions, as part of the presentation.

Given the department's ambition to block "undesirable elements" and its difficulty in differentiating between the various categories of foreign migrants, there is no telling who will end up in such transit camps. It all depends on the position that wins in this clash of discourses.

Criminalising children's sexual expression

Published Dec 2010

The Jules High School case brings into sharp relief the folly of subjecting lawmaking to populist whims. In the process, a living, breathing human being finds herself exposed to the jagged edges of the criminal justice system's workings – a dismal experience at best; a horrific and potentially destructive experience if you are 15 years old.

If the Jules High School sex incident was indeed consensual, over which considerable doubt exists, it again shows why sections of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 should be changed.

As a whole the act was a much-needed improvement on the apartheid law. But it contains anomalies that reflect the fierce competition in our society between two versions of justice. The first is people-centred justice in the service of the Constitution; the second is justice as punishment, exemplified by the wagging fingers of moralistic conservatism and the further stigmatisation of socially vulnerable persons such as girls.

As happens more often than not in South Africa, sexuality and sex are at issue. In 2006, the portfolio committee on justice and constitutional development at long last adopted the SOA with clauses criminalising consensual sexual expression between children.

The law set the age of consent at 16, with children defined as being between 12 and 16. The act's section 15 (2) allows for the prosecution of children above 12 and below 16 for penetrative sex. Section 16 (2) takes it further and criminalises non-penetrative "consensual sexual violation" between children in this age bracket.

This decision flew in the face of appeals from progressive civil society. MPs remained resolutely oblivious to the truism that the law is a blunt instrument when it comes to changing social behaviour. Particularly Johnny de Lange (ANC), in his powerful position as committee chairperson, was adamant as far back as February 2004 that consensual sexual activity between "children" should be criminalised.

Acting director of public prosecutions in Johannesburg, Xolisile Khanyile, apparently shares the MPs' attitude. She reportedly said recently that the NPA's decision to charge the kids in the Jules High School case is intended as a message to all children that, "what you are doing is unlawful".

The deliberations in 2004 happened in the run-up to the April election that year and politicians did not want to be accused of encouraging "sex between 12-year-olds".

The religious right were exerting influence over the ANC, as hinted at by the committee's amenable attitude to the ACDP's suggestion that the age of consent be increased to 18. In 2006 the committee, led by De Lange's replacement Fatima Chohan (ANC), recommended further investigation of the ACDP's proposal.

The moralistic impulse underpinning aspects of the law was confirmed by the expansiveness of the crime of "consensual sexual violation". It sparked controversy at the time as even "direct or indirect contact between the mouth of one person and the mouth of another person", usually known as kissing, was a "violation" if you and your kissing partner happened to be between 12 and 16.

Using the term “violation” for what is usually merely sexual exploration stigmatises ordinary activities by attaching negative connotations to them, as noted by Samantha Waterhouse, parliamentary programme co-ordinator of the CLC at the University of the Western Cape.

The caveat that the prerogative to prosecute children lies with the National Director of Public Prosecutions (s. 15) and with Provincial Directors of Public Prosecutions (s. 16) were added apparently to reduce the number of prosecutions, which would suggest a realisation among MPs that sexual experimentation is not limited to adolescents older than 16.

It is this prerogative that the current NDPP exercised in his decision to prosecute the children in the Jules High School case. The Child Justice Act 75 of 2008 provides diversion of children as protection against their arrest and detention. The enduring concern for activists such as Waterhouse is what happens until the NDPP or the provincial DPPs decline to prosecute and diversion kicks in.

Before diversion, kids accused of sexual activity, whether penetrative or not, can still be arrested; questioned by officers in a police service notorious for sexual bigotry; and locked up in police cells as “suspects”. It is a drawn-out process of public humiliation.

Therefore the argument, also made in the Jules High School case, that children are not criminalised because they will eventually be diverted, is cold comfort, as Waterhouse says.

Research published by the Human Sciences Research Council debunks the commonly held prejudice that “today’s teenagers” are much more sexual than the generations before them. The increase in children under 15 having sex happened 40 years ago and has since then been constant at below 10 percent (12 percent for boys; 5,5 percent for girls, exploding that other popular myth of the “loose teenage girl”).

This is not to say that early sexual debut should not be addressed, or that what happened at Jules High School should not be attended to if it was consensual. But the way to address the problem is through comprehensive programmes, including “sex education, access to services, youth development, family outreach and an open attitude to sexual health and relationships, shown to be much more effective than laws prohibiting consensual sexual activity”, Waterhouse argues.

Meanwhile, there are indications that children’s rights organisations are about to challenge sections 15 and 16 of the law in the Constitutional Court. These steps come not a moment too soon.

Sexual Offences Act undermines healthy sexuality

Published Aug 2012

The recent fiasco with the SOA should serve as an alert about continuing problems dating from before the act's adoption in 2007 and that have still not received parliament's attention. The Western Cape High Court in May 2012 upheld a finding that meant that the courts could not pass sentences for 29 crimes for which the SOA did not explicitly prescribe penalties, leaving victims in the Western Cape in limbo.

Lawyers Against Abuse and the Women's Legal Centre insisted that the Western Cape High Court was mistaken, as the act showed that the legislature intended for the courts to "always be able to hand down sentence". A full bench of the SCA vindicated activists' arguments. Meanwhile, Kwa-Zulu Natal and Free State courts had detected no such hindrance and were sentencing perpetrators in terms of the act.

The discrepancy in interpretations serves as reminder of the reality of opposition, also in the judiciary, to the democratic transformation of apartheid and colonial conceptions of sexuality and sexual rights. Some in the judiciary have resisted instituting the minimum sentences prescribed for some sexual crimes, arguing that the prescription interferes with judicial discretion. Isn't it curious that the Western Cape High Court decision amounts to the judiciary itself casting doubt on its right to exercise judicial discretion if the lawmakers don't explicitly prescribe it?

Commendably, parliament moved swiftly to amend the act within a month after the high court finding. Activists have called on parliament to also address other problems, such as sections 15 and 16, which ridiculously and dangerously criminalise adolescent sexuality. Since appeals have fallen on deaf ears, the Teddy Bear Clinic and Resources Aimed at the Prevention of Child Abuse and Neglect (Rapcan) are currently challenging these provisions in court.

Section 15 criminalises consensual intercourse between persons aged 12 to 16, in contrast with countries that make exemptions for kids close in age (usually maximum two years apart). Section 16 takes it further by punishing consensual sexual exploration – even kissing – between teens. The shameful result is that consenting teens merely exploring their fledgling sexualities may be included alongside rapists in the justice department's register of sex offenders.

The act goes even further by compelling anyone who is aware of consensual sex between 12 to 16 year olds, including parents, to report it to the police. Healthcare workers are turned into the "surveillance arm of the law" in breach of their ethical duty to safeguard patient-doctor confidentiality, says Lisa Vetten, director of Tshwaranang Legal Advocacy Centre. Therefore, the very people that teens could turn to during a stage of great physical and psychological change have been incorporated into a state apparatus seeking sexual control.

The rebuttal that such children are usually diverted for rehabilitation is cold comfort to teens who, before diversion, will still be humiliated into explaining their sexual behaviour to police officers. Thus the veil of silence that hangs over sex in South Africa, as shown by research, is drawn even more tightly. While healthy sexual interaction is being driven underground, teenagers' need for information does not disappear, Vetten cautions. Surveys show that, respectively, up to 80 and up to 34 percent of teens between 12 and 16 have kissed and engaged in heavy petting, while up to 26 percent have had sex. Teens will be left to find the facts

of life in the media and pornography, both of which are guilty of wildly unrealistic and frequently bigoted depictions of sexuality.

The act's punitive approach will deter sexually active teens from seeking HIV counselling and testing, contraception and abortion. Vetten contends that, "nobody wants 12 and 13-year-olds to become mothers and fathers". However, judging by the current moralistic panic about young people's sexuality in some quarters, one can't help but wonder. The political position has changed from encouraging empowerment about sexuality to a clampdown, illustrated by the fact that the SOA contradicts other laws on access to abortion and contraceptives and service providers' reporting duties.

It is useful to reflect on the history of the SOA's drafting. Rapcan notes in an affidavit that during the act's drafting in the 2000s, the justice portfolio committee's argument for prosecuting young people was to achieve "parity", as such provisions were ostensibly applied more frequently to boys than to girls in the past. This parity could have been achieved by prosecuting neither girls nor boys, says Rapcan. Instead, the law as it stands today (July 2012) renders girls more vulnerable to prosecution because pregnancy makes the "offence" more noticeable. This unjust outcome is not surprising.

Research published by the Gender Advocacy Programme (GAP) and Tshwaranang reveals that the chairperson of the justice portfolio committee at the time, Johnny de Lange, had a decisive hand in the writing of the act, even in his later capacity as deputy justice minister. De Lange's gender politics is exposed in the autobiography of Pregs Govender, former chairperson of parliament's joint monitoring committee on the improvement of the quality of life and status of women. When she approached him to advance laws that would address the gender iniquities of apartheid, he shouted at her: "Since when are women's laws the priority?" The GAP/Tshwaranang research concludes that the SOA "most clearly bears the imprint" of de Lange's "preferences", including his insistence on creating another register for sexual offences despite it duplicating the more

comprehensive Children's Act register. The time has come for parliament to address these anomalies in the act, not only because they are seemingly the result of the idiosyncrasies of one individual but also because they undermine the potential for healthy sexualities in a context already rife with sexual pathology.

Traditional Courts Bill throwback to the past

Published March 2012

The re-tabled TCB, if adopted in its current form, will relegate at least 17 million South Africans to a separate and *unequal* judicial regime merely because they happen to live in the rural areas – a location in many cases imposed on them by the apartheid regime. While cabinet’s planned “review” of Constitutional Court decisions threatens to violate the doctrine of separation of powers, this bill already does just that.

And it accomplishes this no less by rehashing aspects of apartheid and British colonial law stretching all the way back to the 19th century. In terms of the bill, traditional leaders will be appointed presiding officers of traditional courts with the powers to decide on both civil and criminal matters involving members of traditional communities, or even people just passing through. These are the same traditional leaders who, in terms of the TLGFA of 2003, administer government functions, including welfare, economic development, land, management of natural resources and registration of births, deaths and marriages.

Moreover, according to the University of Cape Town’s Law, Race and Gender (LRG) Research Unit, the bill gives traditional leaders the power to make customary law. The chief-cum-judicial officer can pass various sentences, including fines, forced labour, or depriving someone of “customary benefits”, which could mean losing access to land. This concentration

of judicial, legislative, executive and administrative powers means the same person who makes the rules and executes government decisions also metes out punishment when deeming a rule broken.

Historically, the antecedent of this system is colonialism, which was dubbed “decentralised despotism” in the influential book *Citizen and Subject -- Contemporary Africa and the Legacy of Late Colonialism* by Ugandan scholar Mahmood Mamdani. He reminds us that there was nothing “natural” or voluntary about customary law. The most authoritarian elements of pre-colonial social and political arrangements were concentrated in so-called customary law. Rather than recapturing the ways of people before the ravages of colonialism, as traditionalists would like us to believe, customary law’s purpose was to advance the colonialist and, later, apartheid agenda.

Mamdani points to what he calls colonialism’s “bifurcation” of the state in which civil law applies to “citizens” while “customary” law applies to “subjects”. Customary law turns people into mere subjects because it denies them the protections that civil law affords citizens. Women were particularly compromised, as they were declared perpetual minors who could neither inherit nor bequeath, according to the Natal Code of Native Law of 1891. This was reinforced in the Black Administration Act of 1927, only repealed in 2005. The TCB and the CLaRA of 2004 (declared unconstitutional in 2010 for not being tagged as a bill that affects the provinces) both effectively perpetuate the second-class status of especially rural women.

The TCB entrenches a localised absolutism by denying rural people not only legal representation in traditional courts but refusing them the right to opt out and have their cases heard in the civil courts. It allows representation by relatives which, says the LRG, would reinforce the current practice of barring widows from speaking in the “sacred” space of the traditional court. The male relatives “representing” them are frequently the very same people eyeing property they are entitled to.

The irony of the re-entrenchment of this parallel system of subjugation becomes bitterer when one remembers PW Botha's divide-and-rule tricks in the 1980s. A legal division was created between black urban insiders, admitted as part of "White South Africa", and black rural outsiders, locked down in the 20th century's last colonial relics, the Bantustans.

The LRG sees the Bill as part of a "silent coup". The legal perpetuation of these colonial dynamics is a testimony to how well traditionalists have navigated the post-apartheid parliament to promote their own interests. Since the traditionalists' political flip-flop away from the apartheid regime into the lap of the ANC, they have had more success than other reactionaries such as the *volkstaters*. Could it be because traditional leaders are promoters of a system that enables the kind of social control that a government could use in times of socio-economic distress?

British colonialist Theophilus Shepstone said in the 1880s that the main objective of customary law was to "ensure control", as the "natives" were not regarded as sufficiently "civilised" to enjoy citizen's rights. At least the Bill does not refer to civilisation but its stated aim is to position traditional leadership as an "institution" that maintains "peace and harmony" and "prevents conflict". Are these 21st century euphemisms for social control?

Of course the Bill is saturated with references to upholding the Constitution. One clause accentuates women's participation. But, if the TLGFA is anything to go by, the commitment to gender equality is thin. That Act allows for its own measly one-third quota for women in traditional councils to be lowered even further if there are too few women available to fill the positions.

Finally, the way in which the TCB found its way back to parliament undermines the pledges of constitutional alignment. Civil society, including rural people, pointed out the problems when it was first tabled in 2008, including that only traditional leaders had been consulted in its drafting.

Instead of addressing these flaws, the exact same version of the Bill has been re-tabled in the NCOP, which shows that it was CLaRA's failure in the Constitutional Court that was heeded and not the calls of rural South Africans.

Serenading the chiefs before the election

Published Aug 2013

A pattern can be discerned over the past decade: every time an election looms, parliamentary manoeuvres accelerate to boost certain constituencies. In particular, just when it seemed unthinkable that black people could be disenfranchised as before, the past decade has seen the surreptitious reinstatement of unelected and unaccountable traditional leadership.

On the eve of the April 2004 election, the then portfolio committee on provincial and local government finalised the TLGFA, which was duly adopted.

The framework act renames apartheid “tribal authorities”, as created by the Bantu Authorities Act of 1951, to “traditional councils” while re-enforcing the imposed tribalisation associated with apartheid. The basis for these entities remains the 1951 act. The echo of apartheid is unmistakable, as these structures only apply to black people who are spatially separate from the urban citizenry.

Simultaneous with the passage of the framework act was the tabling of the CLaRA. The CLaRA, since found unconstitutional, gave punch to the framework act by according traditional councils expansive powers over the use of communal land, arguably the single most vital resource in rural areas.

Now, with another election less than a year away, parliament is again poised to adopt a series of bills that would bolster traditional leaders’

powers. The TCB was originally tabled in 2008, just before the 2009 election. Widespread rejection of the bill during public hearings saw government adopting a holding position, just to withdraw and re-introduce the exact same version in 2011 in the NCOP.

Another round of public hearings passed last year, held at provincial level, with the bill again resoundingly rejected by everybody except traditional leaders. The majority of provincial representatives returned to the NCOP's Select Committee on Security and Constitutional Development with mandates opposing the bill.

In what might be an unprecedented move, the presentation of the mandates was blocked at the subsequent committee meeting, despite being on the agenda. Instead, another public hearing was scheduled. The department of justice and constitutional development compiled a report on the submissions from the last hearing. Provincial representatives were told to take the report back to their legislatures for consideration.

The strategy at play seems to be one of "keep on consulting until we get the right answer". Since the end of last year, parliament has been treading water on the bill; it hasn't re-surfaced on the committee's agenda. It is unclear whether the summary report has been discussed in the provincial legislatures.

But behind the scenes the jockeying continues. A hint of this was the misinformation spread in the run-up to the ANC's national conference in Mangaung via the government's official communication channels. It claimed the bill had been withdrawn. As with the timing of these laws in relation to elections, one is hard-pressed to imagine that this inaccurate report was merely "coincidence" – especially as it was subsequently featured as fact in the weekly "ANC Today" newsletter.

Was the rumour of the bill being dropped an attempt to appease, in return for support at Mangaung, those branch members disillusioned by the latest attempt to buttress chiefs' unaccountability? Whatever the

case may be, wary eyes remain fixed on the legislative schedule for the third parliamentary term of the year, especially given the past history of laws being sprung onto stakeholders.

Another two draft laws are in the pipeline, seemingly timed to secure chiefs' support ahead of next year's election. While little is known about the National Traditional Affairs Bill, the Communal Property Association (CPA) Amendment Bill should be available for public comment before the end of the year.

The Department of Rural Development and Land Reform has identified the CPA Act of 1996 as a "problem" because it allows for land returned in restitution processes to be owned by CPAs. Traditional leaders have been in conflict with CPAs as these associations allow rural people independent access to communal land, overseen by elected leaders. Again, at the behest of chiefs, the government wants to overturn one of its earlier decisions that communal land ownership can also be held by accountable bodies, and not only traditional leaders.

It is extreme cynicism to force citizens to become voting fodder by re-entrenching unchecked powers of coercion and control, as manifested in the apartheid version of traditional leadership. It is true, as the portfolio committee said at the time of its adoption of the framework act, that traditional leadership could be reconciled with the values of the Constitution. This transformation should be the prerequisite for traditional leadership going forward.

The committee seemingly understood that traditional leadership is beholden to the Constitution and the Bill of Rights, as it attributed the framework act with "transforming" traditional leadership "so that it is consistent with the needs of our new democracy". Nevertheless, the framework act, as elaborated on by the CLaRA and the TCB, fails this test of transformation.

The reason for this failure is perhaps to be found in the committee's additional comments: "It has to be appreciated that, while customs and traditions are not static, they have a momentum of their own... Transformation in the areas of custom and tradition [has] to be phased in appropriately."

The "appropriate" phasing in of transformation evidently hinges on traditional leaders' delivery of votes, rather than on the democratic "momentum of their own" with which those very voters infuse the custom under which they live.

No land ownership if you're black and rural

Published Apr 2013

Powerful lobby groups regularly sound alarm bells whenever the torpid rate of land reform fleetingly raises the possibility of land expropriation and, with it, the spectre of the violation of white farmers' property rights.

In reality, it is black, rural, poor South Africans who are already being deprived of the right to own property, even communally. In this year, the centenary year of the infamous 1913 Land Act, people's land rights continue to be violated only because they are black and rural.

Therefore, black, rural South Africans are not only being threatened with the revocation of their democratic rights as citizens, through legislation such as the TCB, but also the deprivation of the right to land ownership which their urban counterparts, irrespective of race, enjoy.

This is possible due to the TLGFA of 2003 and the Community Land Rights Act (CLaRA) of 2004. In 2010, the Constitutional Court declared CLaRA invalid due to lack of public consultation but without addressing the applicants' argument that the act denies secure tenure to the 16 million people living in the former Bantustans.

CLaRA's unconstitutionality created a legal lacuna. Section 25 (6) of the Constitution requires that Parliament passes a law to rectify insecure legal tenure brought about by past racially discriminatory laws or practices.

This legislative gap was raised with minister of land reform and rural development Gugile Nkwinti at the recent Land Divided academic conference. The conference, hosted on 24-27 March in Cape Town, looked at the century-long aftermath of the 1913 Land Act, the law at the heart of colonial dispossession of black people.

Nkwinti responded to delegates with some puzzling answers. According to him, the Spatial Planning and Land Use Management Bill, currently in the NCOP, partly serves as CLaRA's "replacement". However, the bill does not address the issue of security of tenure on communal land.

Despite stating repeatedly that land ownership is approached as part of a "single four-tier system", he then conceded that "sensitivities" have led to the treatment of communal land tenure in a separate, forthcoming policy.

In accordance with the 2011 Green Paper on Land Reform, people should enjoy "institutionalised use rights" on communal land. "Institutionalised" here refers to "traditional institutions".

Nkwinti insisted that his department wishes to protect the rights of women- and child-headed households. But it transpired that the "sensitivities" he referred to are in fact chiefs' ambition to have all communal land under their control.

That this is the thrust of the laws on "traditional governance" adopted since 2003 is confirmed by two developments. Firstly, Section 28 (5) of the 2003 framework act abolishes elected community authorities in favour of unelected traditional leaders.

Community authorities were the triumph of rural black people over the apartheid regime's attempt to corral them under imposed tribal authorities headed by compliant chiefs. Tribal authorities were created by the Black Authorities Act of 1951.

Due to the concerted resistance of rural black people against imposed tribalisation, the apartheid regime in 1964 amended the Black Authorities Act to allow for elected community authorities.

An example of such a community is Driefontein, where people of different ethnic groups came together in 1912 and bought a section of a farm near Piet Retief in today's Mpumalanga on which they settled. This they did, ironically, on the advice of Pixley ka Seme, a founding member of the then South African Native National Congress, today known as the ANC.

The Driefontein community has now been left in the lurch as the ANC government's 2003 framework act unilaterally abolished community authorities. Neighbouring chiefs have swooped in to do what they could not achieve under apartheid: impose chiefly authority over people who do not acknowledge them as such.

The irony could not be more bitter: the Driefontein communal landowners successfully resisted the apartheid regime's attempt to forcibly remove them in the 1980s just to have to fight against subjection to undemocratic traditional leadership in a democratic South Africa.

A second, equally grave development involves the Communal Property Associations Act of 1996, which allows recipients in land reform processes to jointly own land through Communal Property Associations (CPAs). But a ministerial moratorium has halted the transfer of title deeds to CPAs of land won through restitution and redistribution. The effects on communities have been devastating.

Nkwinti told the conference that not "only traditional leaders have a problem with the CPA Act. It is a wrong model from us as government... you have the communal area and part of it... is excised by apartheid [and] they moved people... to another place. Came 1994, people are able to claim the land back. They are not coming back home, they're coming back creating a communal area within a communal area... What we are doing is to correct that. We are asking lawyers to look at whether

that can be done retrospectively. We say if you are coming back to this land, which was part of that whole, you can't create a new communal area. That is why chiefs and people are conflicted..."

The amendment to the CPA Act will therefore not address the very real problems with the act, such as that it does not empower individuals, but it will disallow CPAs within the borders of the former Bantustans. In this way, traditional leaders can impose control over all land and people in the former Bantustans, even victims of forced removals who in many cases resisted chiefs that collaborated with the apartheid regime.

Mandela: I am you

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The parliament of the Mandela era, from 1994 to 1999, was a markedly different space to the parliament of today. Fresh air was being let into musty chambers where, for decades, laws had been hatched to enforce the grand-scale theft of resources, justified in the name of white supremacy. A sense of expectation, newness and creativity infused the atmosphere.

Parliamentarians who served during Nelson Mandela's single presidential term speak of a vivid sense of possibility. Mandela himself described it in his last address to parliament as president on 26 March 1999: "Personally I dare to say that moments in my life have been few and far between when I have sensed the excitement of change as in this august chamber."

Change was the operative word. It started with simple things, like creating washrooms for female MPs. Previously, the few toilets for women were marked "for wives of members". Apart from race, the change in women's representation in parliament is the most compelling: it shot up from 2,7 percent to 25 percent after the 1994 election.

Today's 42 percent representation by women was unthinkable before 1994, as was the possibility that the leader of the official opposition could be young and black and a woman. But young black women who, like DA parliamentary leader Lindiwe Mazibuko, demand their autonomy, find themselves increasingly in the cross-hairs 19 years into democracy.

We see this in the moral panic about teen pregnancy and the disproven "abuse" of child support grants. We see it in the chants of "burn the

bitch” and in the aspersions cast over rape victims, and in the SOA that dissuades girls from bringing rape charges. We see it in the physical assault of women for choosing their own clothes.

We see it in the way that ANC MPs have brought these strikes against young women’s autonomy into the NA with their “body blows” against Mazibuko for not conforming to their prescripts for female bodies.

This shift towards attacking political opponents on the basis of their sex and gender is facilitated by how women MPs do not see themselves as activists anymore but as professionals pursuing a career in parliament, as professor of political science Amanda Gouws found in a study. In the mid-1990s, parliament was abuzz because MPs had an activist sense that they were moving the country away from apartheid and into democracy.

The Mandela era parliament was a construction site building the scaffolding of democracy. It passed about 500 laws and, doubling as the constitutional assembly, hammered out our 1996 Constitution.

Today there is much cynicism about the “naivety” of that “honeymoon” period. As we come to understand the extent of the task, we berate ourselves for thinking we could be a “rainbow nation”, as the other father of our nation, Desmond Tutu, willed us to be.

Mandela is criticised for having been too hands-off as president, with Thabo Mbeki as deputy president doing most of the day-to-day running of state affairs. It was also the time of the arms deal, our young democracy’s nemesis. The Truth and Reconciliation Commission conducted its hearings at the time, just to have its recommendations discarded, and with them the elusive task of remembering in order to forge a different future.

While “rainbowism” deserves criticism for being long on feel-good value and short on redress, our newfound “realism” has sapped our country from the energy and the courage that the Mandela era overflowed with.

Let's allow ourselves to remember what Mandela imagined for us. He is the symbol of that collective hope in the afterglow of the first democratic election when we voted for a "new South Africa" (another term that has since fallen into disuse).

In Mandela's first address to parliament as president, on 24 May 1994, he referred to the "glorious vision" of Afrikaans poet Ingrid Jonker, adding that, "she instructs that our endeavours must be about the liberation of the woman, the emancipation of the man and the liberty of the child. It is these things that we must achieve to give meaning to our presence in this chamber and to give purpose to our occupancy of the seat of government. And so we must, constrained by and yet regardless of the accumulated effect of our historical burdens, seize the time to define for ourselves what we want to make of our shared destiny."

As the end of Mandela's life looms, it behoves us to recall his caution in his last address to parliament against developing a cult of personality around him in lieu of accepting responsibility as citizens. "I have noted, with deep gratitude, the generous praise that has often been given to me as an individual. But let me state this: To the extent that I have been able to achieve anything, I know that this is because I am the product of the people of South Africa..."

He emphasised three aspects that form a leitmotif of his leadership: the accountability of leaders to citizens, the fact that we are all leaders in our own right, and the primacy of unity: Leaders "are the voices of the good men and women who exist in all communities and all parties, and who define themselves as leaders by their capacity to identify the issues that unite us as a nation."

He reminded us that, "together, we must continue our efforts to turn our hopes into reality. The long walk continues."

Briefing note: Citizen participation in relation to Parliament's Ethics Committee and the Speaker's Office

Ethics Committee

This briefing note provides information for public participation in relation to the South African parliament's Committee on Ethics and Members' Interests, known as the ethics committee, and the Speaker's Office. It explains the parliamentary rules¹ that apply to the committee and where and how the public can gain access to its work and hold it to account. Thereafter the rules² in relation to public participation and the Speaker's Office, and the opportunities for public engagement, are explained.

COMPOSITION

The committee is a joint committee, meaning that its members are selected from both houses of parliament – 14 from the NA and 9 from the NCOP. The committee therefore has two co-chairpersons, one from each house. Members are appointed on the advice of their political parties.

PURPOSE

The committee is tasked with implementing parliament's "Code of Conduct for Assembly and Permanent Council Members". It has to develop standards for ethical conduct for MPs and regularly review the code. The committee also serves as an advisory body to MPs regarding the implementation and interpretation of the code.

1. Joint Rules of Parliament, 5th Edition, Nov 2009

2. Rules of the NA, 7th edition, Jun 2011

THE CODE OF CONDUCT FOR ASSEMBLY AND PERMANENT COUNCIL MEMBERS

REGISTER OF MEMBERS' INTERESTS

A senior parliamentary official is appointed as registrar under the authority of the committee. The registrar compiles the Register of Members' Interests, recording interests and amending entries when necessary.

The register consists of two parts: public and confidential. Only committee members and the registrar have access to the confidential part. Those privy to information may only disclose it if a court so orders. The public part of the registrar is publicly accessible and is published annually in the month of April.

Upon appointment or after the opening of parliament, MPs have to declare all "registrable interests" to the registrar within 30 days. Thereafter, annual reporting is required.

REGISTRABLE INTERESTS

Registrable interests are financial interests of the following kinds:

- (a) shares and other financial interests in companies/corporate entities;
- (b) remunerated employment outside parliament;
- (c) directorships and partnerships;
- (d) consultancies;
- (e) sponsorships;
- (f) gifts and hospitality from a source who is not a family member/permanent companion;
- (g) any other benefit of a material nature;
- (h) foreign travel (other than personal visits paid for by the member, business visits unrelated to the member's role as a public representative and official and formal visits paid for by the state or the member's party);
- (i) ownership and other interests in land and property; and
- (j) pensions.

The information to be recorded, includes:

- (a) The name/type of shares/corporate entity/employer/business activity and the value/amount of remuneration;
- (b) Source, description and value of sponsorship or benefit or pension;
- (c) Source, description and value of any gift over R1500;
- (d) Description of journey abroad and its sponsor;
- (e) Description of land and its extent, where it is situated and nature of interest

Entries should be made in the public part of the register, except for the following that should be noted in the confidential part:

- (a) Value of financial interests in a corporate entity other than a private or public company;
- (b) The amount of any remuneration for any employment outside parliament/any directorship or partnership;
- (d) Details of foreign travel when the nature of the visit requires those details to be confidential;
- (e) Details of private residences;
- (f) Value of any pensions;
- (g) Details of all financial interests of a member's spouse, dependent child or permanent companion to the extent that a member is aware of.

In case of doubt about whether an interest should be disclosed, MPs are encouraged to act "in good faith". The committee has the power to instruct the registrar to record entries in the register's confidential part "on good cause".

"ETHICAL CONDUCT"

The code's section on ethical conduct requires that MPs declare to parliamentary forums all interests that they, their spouses or business partners may hold and withdraw from such proceedings until other MPs have decided the relevance of the interests to the matter at hand. A similar rule applies when presentations are made to a member of the

executive. Members are forbidden to “lobby for remuneration” and can only hold extra-parliamentary employment with the approval of their parties and if the employment does not conflict with their work as public representative.

BREACHES OF THE CODE

In case of a member failing to comply with the code or wilfully providing incorrect information, the committee must investigate and report its finding within 30 days to the relevant house. Penalties are: a reprimand; a fine not exceeding the value of 30 days’ salary; a reduction of salary/allowances for a period of 15 days or less; and/or the suspension of privileges or a member’s right to a seat in parliamentary debates/committees for up to 15 days.

PUBLIC ACCOUNTABILITY AND OPPORTUNITIES FOR CITIZEN PARTICIPATION

The committee operates under strict confidentiality, demanded both from the members and from the registrar in charge of the “Register of Members’ Interests”. Matters concerning MPs are only considered in closed meetings, with public access denied. The committee operates on the principle that such matters are confidential.

The official opportunities to hold the committee to public account seems to be (a) at the time of the committee’s annual report to both houses “on the operation and effectiveness of the code”, (b) when the “public part” of the register is published in April every year and (c) when the committee reports on a breach of the code by a member.

The effectiveness of the ethics system in parliament hinges in large part on “good faith”, i.e. that MPs will voluntarily disclose all relevant information. There is no mechanism in the system to confirm whether an MP has made full disclosure.

The entries in the confidential part of the register are those that pose real dangers of impropriety but, because they are confidential, the public is

required by the current system to entrust MPs with monitoring themselves. As no independent verification is done, the threat of political manipulation of this information is real. This is underscored by the committee assigning itself the right to instruct the registrar to move entries to the confidential part of the register “on good cause”.

Civil society organisations may want to campaign that parliament rectifies the lack of independent checks in its ethics system.

Speaker's Office

The only parliamentary rules that speak to public participation in relation to the Speaker's Office are those on “petitions” from the public. The power to approve petitions for tabling rests with the speaker. After approval, the speaker tables petitions from the public in the NA. The speaker is obliged to refer petitions on special matters to the Committee on Private Members' Legislative Proposals and Special Petitions. Petitions of a general nature are referred to the relevant portfolio committee or another appropriate committee.

Therefore, no other rules exist that govern specific citizen participation in relation to the Speaker's Office, or that facilitate active citizen approaches to the Speaker's Office itself. This is a lacuna that CSOs may want to address in campaigns aimed at parliamentary accountability.

Working Democracy – Perspectives on South Africa's Parliament at 20 years takes an analytical look at a vital institution. Were the makers of the Constitution, who were also the first parliamentarians of democratic South Africa, too ambitious? Does the Democratic Alliance have a problem with race? The drawbacks of the currently overbearing executive are clear, but are there benefits? Was the post-Polokwane parliament merely an example of a Prague Spring? Crucial moments in the first two decades of South Africa's democratic parliament are examined, particularly the arms deal, AIDS denialism, the dismissal of Vusi Pikoli, the destruction of the Scorpions, the adoption of the Protection of State Information Bill and the tabling of the Traditional Courts Bill.

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