LESSONS FOR PARLIAMENT EMANATING FROM THE STATE CAPTURE COMMISSION REPORT: TOWARDS A REFORMED PARLIAMENTARY OVERSIGHT AND ACCOUNTABILITY MODEL

BY ANDILE TETYANA

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Student number: TTYAND001

Email: tetyana.andile@gmail.com

Cell: 0835567060

Supervisor: Prof Richard Calland

Declaration

I, Andile Tetyana, declare that this minor dissertation is my own original work. Where secondary material has been used (either from a printed source or from the internet), this has been acknowledged and referenced accordingly.

Furthermore, I hereby declare that I have read and understand the regulations governing the submission of Masters in Constitutional and Administrative Law dissertation, including those relating to length and plagiarism, as contained in the rules of this University, and that this minor dissertation conforms to those regulations.

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Date: _____

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Abstract

This paper examines a topical issue that has occupied the minds of South Africans since President Zuma ascended to the highest office in the land in 2009 – State Capture. The paper does this by looking at the regulatory architecture of parliamentary oversight in terms of South Africa's constitutional scheme. This paper argues unchangingly that the Constitution, together with the Rules of Parliament, especially those of the National Assembly, empower Parliament to effectively exercise oversight over the Executive.

Additionally, this paper looks at the current state of South Africa's parliamentary politics by placing a strategic focus on what presently obtains with the existing oversight and accountability instruments. The primary purpose of this is to look at which features of the current oversight and accountability dispensation require improvements and which aspects require an overhaul.

Furthermore, the paper critically examines the recommendations of the Zondo Report on parliamentary oversight, the spotlight here being on the proposed reforms which the Zondo Commission has mooted as a way of bolstering the current model.

Moreover, this paper looks at the scope and ambit of parliamentary oversight. The emphasis here is on what the limits of oversight are and how far can Parliament go if members of the Executive ignore House resolutions that have been adopted by the legislative branch of government? Here, this paper grapples with concepts like amendatory accountability within the context of the doctrine of separation of powers and South Africa's constitutional architecture in general.

Finally, a strategic case is made for the need for institutional and regulatory reforms. These proposed reforms build on what is already provided for in the regulatory architecture of South Africa's constitutional scheme. To this end, this paper postulates that South Africa's challenge is not a problem of policy or law, but that of leadership.

In conclusion, this paper provides demonstrable proof that for effective oversight to be realized, subjective factors in the form of political will and principled leadership will have to be very much part of the basket of solutions in this regard.

CONTENTS

ACRONYMS

ACJR	Africa Criminal Justice Reform
AGSA	Auditor General South Africa
ANC	African National Congress
BOSA	Build One South Africa
CLSO	Constitutional and Legal Services Office
CODESA	Convention for a Democratic South Africa
COPE	Congress of the People
CRC	Constitutional Review Committee
CW	Corruption Watch
DA	Democratic Alliance
EFF	Economic Freedom Fighters
ERCP	Electoral Reform Consultation Panel
FF Plus	Freedom Front Plus
GNU	Government of National Unity
HSRC	Human Science Research Council
IEC	Independent Electoral Commission
IFP	Inkatha Freedom Party
IGI	Inspector General of Intelligence
ISS	Institute for Security Studies
JSCI	Joint Standing Committee on Intelligence
LOGB	Leader of Government Business
MKP	uMkhonto WeSizwe Party

MP	Member of Parliament
NA	National Assembly
NCOP	National Council of Provinces
NDPP	National Director of Public Prosecutions
NPA	National Prosecuting Authority
OVAC	Oversight and Accountability
PAJA	Promotion of Administrative Justice Act No.3 of 2000
PAN	Principal Agent Network
PCCDT	Portfolio Committee on Communications and Digital Technologies
PCCS	Portfolio Committee on Correctional Services
PCPE	Portfolio Committee on Public Enterprises
PP	Public Protector
PPIPPLA	Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act No.4 of 2004
SCOPA	Standing Committee on Public Accounts
SIU	Special Investigating Unit
SONA	State of the Nation Address
VBS	Venda Building Society

INTRODUCTION

What does it mean to speak of oversight and accountability, and should it be considered significant to assign a nuanced technical legal meaning to these terms, particularly in the context of parliamentary oversight? The question is surprisingly not that simple to answer – as these two concepts often tend to be conflated with one another. This fine distinction is dealt with head-on hereunder.

Primarily, this research paper looks at the State Capture Commission report, particularly the section on parliamentary oversight and asks the question: what are the main lessons for Parliament, especially for effective oversight? There is no denying that in terms of South Africa's constitutional scheme, parliamentary oversight is not just a political opportunity for the opposition, but a phenomenon that is mandated by the Constitution.[1] The Constitution makes oversight purposive for more fundamental purposes, namely a restraint on the abuse of authority, supervision and justification in the use of discretion and, very importantly, to aid in the efficiency and effectiveness of government operations.

Firstly, the paper looks at the regulatory architecture of oversight in terms of South Africa's constitutional scheme. It does this by looking at the empowering provisions of the Constitution, together with the Rules of the National Assembly on parliamentary oversight. This is done with a view to provide demonstrable proof that the abovementioned legal instruments empower Parliament, particularly the National Assembly to effectively exercise this role over the Executive. Simply put, the assertion is made that parliamentary oversight is a constitutional imperative.

Secondly, this paper looks at the current state by focusing on what presently obtains with the existing oversight and accountability mechanisms of Parliament. This is done for purposes of responding to the salient question: does the need for reforms exist?

Thirdly, this paper critically evaluates the recommendations of the State Capture Commission report on parliamentary oversight, the focus here being the proposed

[1] Constitution of the Republic of South Africa, 1996

reforms which the Commission has put forward as a way of fortifying Parliament's current oversight and accountability mechanisms.

Fourthly, this paper looks at a more nuanced and deeper discussion about the scope and ambit of parliamentary oversight. Here, the key question being: how far can Parliament, as an institution, take its constitutionally mandated oversight function? What are the limits that are inherent in this process? Additionally, one of the questions being what are the real teeth of Parliament and what can it really do if the Executive ignores it?

Lastly, but not least, this paper provides the interlocutor's recommendations which are informed by an appreciation of the current political system in which the South African state is anchored. Here, a case is made for the need for institutional and regulatory reforms. On the other hand, this paper argues that for effective oversight to be realised, subjective factors in the form of political will and principled leadership, will have to be very much part of the resolution of this conundrum, particularly in salvaging the existential crisis that continues to plague the South African Parliament.

Finally, this paper borrows a phrase from the founding President of democratic South Africa, Nelson Mandela, when he spoke so passionately about the significance of the South African populace adopting what he termed the 'RDP of the soul'. This paper concludes by asserting that very little progress will be made, if any, regarding effective oversight without what it coins as parliamentary oversight of the soul within those who occupy parliamentary chambers as elected representatives of the people of South Africa. This paper also concludes by positing that Parliament should implement a periodic socio-economic impact assessment of all legislation passed by it.

BACKGROUND

Giving effect to the remedial action imposed by the former Public Protector, Thuli Madonsela, in her report on 'State Capture' (as ordered by the Gauteng High Court), former President Jacob Zuma appointed a Commission of Inquiry into State Capture in early 2018.

The Commission headed by the then Deputy Chief Justice, Raymond Zondo, was mandated to investigate various aspects of what has become known as 'State Capture', including whether the appointment of any member of the National Executive, functionary and/or office bearer was disclosed to the Gupta family or any other unauthorised person before such appointments were formally made and/or announced, and if so, whether the President or any member of the National Executive was responsible for such conduct.

The Commission was also mandated to investigate whether the President or other members of the Executive corruptly influenced the awarding of various tenders. The Commission was also required to make recommendations to the President on what could be done to prevent a recurrence of the events that gave rise to the appointment of the Commission.

One of the lines of inquiry that was pursued by the Commission was whether more could have been done, particularly by Parliament, to prevent or reduce the alleged abuse of power and corruption by members of the Executive, government officials, and the management of state-owned enterprises. Specifically, the Commission asked difficult questions about why those (particularly members of the National Executive) alleged to have been involved in the abuse of power and corruption during the 'State Capture' period have not effectively been held to account.

In 2021, the Commission on State Capture heard evidence from academics, civil society groups, members of the National Assembly, and political party leaders about the failures of the national Parliament (specifically the National Assembly) to hold the President, other members of the Executive, government officials, and senior management of state-owned enterprises accountable for all abuses of power and for corruption associated with State Capture.

The Commission heard that governing party members of Parliament often turned a blind eye to problems, that the President and the Executive became too powerful, and that the Judiciary was the only branch of government that played a significant and effective accountability role during this period, although some commentators warned that the Judiciary – especially the Constitutional Court – may have made itself guilty

of "judicial overreach" in some cases in which it was, in effect asked to create new constitutional rules to fix the accountability problems caused by factors extraneous to the constitutional text.

This research paper is penned against the backdrop of a 'new era' in which the ANC ("African National Congress") suffered a severe electoral decline in the national and provincial elections that were held on 29 May 2024. The ANC only garnered just less than 40 percent of the votes and this means that, for the first time since 1994, ANC representation in Parliament and, by extension, in parliamentary committees is less than 50 percent. This is the most important harbinger of democracy to emerge out of the recent elections, and it presents Parliament with some indications of green shoots ahead insofar as oversight is concerned. The relevance of this is that some of the reforms may be occasioned by this new reality and that Parliament, as an institution, could potentially yield some dividends resulting from the aforesaid changes in our body politic.

Not only does Parliament have new presiding officers drawn from three different political parties, but it has a new Speaker who seems determined to revitalise the institution. No less than ten portfolio committees and three select committees are chaired by Members of Parliament who are drawn from representatives of opposition parties. Political parties are entitled to be represented in committees in substantially the same proportion as the proportion in which they are represented in Parliament. Parliamentary committees are deemed the engine room of Parliament as they oversee and scrutinise the work of government by providing a platform for debate, oversight and ensuring accountability.

The Rules Committee as the pre-eminent committee of Parliament reached a broad consensus that, for the 7th Parliament, parliamentary committees must be comprised of 11 (eleven) members per committee. The current committee membership as per party political configuration is as follows: 4 ANC members, 2 DA members, 2 MKP

members, 1 EFF member and 2 members drawn from other smaller political parties represented in Parliament.[2]

Before the 7th Parliament, parliamentary committees were dominated by only one political party – the ANC. Parliament's presiding officers were all drawn from the ranks of ANC MPs and, in the main, they were a constituent part of the senior apparatchiks from the ANC headquarters – Luthuli House. They would all form a ring of steel around each other on all matters that concern the business of Parliament "in defence of the movement." Those stumbling blocks have, to a greater extent, been dismantled now, in that, parliamentary committees are no longer under the stewardship and political control of the ANC. In the 7th Parliament, of the six presiding officers in the National Assembly, no less than three of them are drawn from the ranks of other political parties – two from the DA and one from the IFP. Parliament has been let loose from the shackles of a dominant party democracy. It is hoped that this diverse political spread in the positions of influence within the domain of Parliament should yield some political dividends in relation to Executive accountability and effective oversight.

[2] Parliament of the RSA, 'Announcements, Tablings and Committee Reports', 24 July 2024, at pg.4

CHAPTER 1

1. THE REGULATORY ARCHITECTURE OF PARLIAMENTARY OVERSIGHT IN TERMS OF SOUTH AFRICA'S CONSTITUTIONAL SCHEME

Section 1 of the Constitution of the Republic of South Africa, 1996 ("the Constitution") deals with the founding values of the Constitution and section 1(d) provides as follows:

(1) "The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(a) …;

(b) …;

(c) …: and

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure ***accountability****, responsiveness and openness.* (my emphasis)

It is important to note that the founding values of the Constitution are the most protected and strongly entrenched provisions of our constitutional scheme.

Section 1 read with section 74(1) of the Constitution states that it requires no less than a 75 percent majority in the National Assembly ("NA") and a supporting vote of at least six provinces if these values were to be changed or taken away.

In addition, section 41(1)(c) of the Constitution provides that all spheres of government and all organs of state within each sphere must provide "*effective, transparent, accountable and coherent government*."

The Constitutional Court emphasised the importance of the principle of accountability in the EFF case:

"*One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of state power and resources that was virtually institutionalised during the*

apartheid era. To achieve this goal, we adopted ***accountability****, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason, public office bearers ignore their constitutional obligations at their peril. This is so because constitutionalism,* ***accountability*** *and the rule of law constitute the sharp and mighty sword that stands to chop the ugly head of impunity off its stiffened neck*."[3] (my emphasis)

1.1 The national executive is accountable to Parliament

Section 85(2) of the Constitution vests the executive authority in the national sphere of government in the President and the Members of his Cabinet. Section 92(2) provides that they are "*accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions*."

In terms of the Constitution, the national executive's accountability to Parliament is not limited to the Cabinet. It extends throughout the national executive for instance to Deputy Ministers in terms of section 93(2); the state institutions supporting constitutional democracy in terms of section 181(5); the public administration in terms of sections 195(1)(f) and 196(5); and the security services in terms of section 199(8).

1.2 The National Assembly's power and duty to hold the executive to account

The NA has both the power and the duty to hold the national executive to account:

Section 42(3) of the Constitution provides that the NA is elected to represent the people and to ensure government by the people under the Constitution. It does this in various ways. One of them is "*by scrutinising and overseeing executive action*."

Section 55(2) of the Constitution imposes a duty on the NA to provide for mechanisms to hold the national executive to account:

"*The National Assembly must provide for mechanisms –*

(a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and

(b) to maintain oversight of,

[3] *Economic Freedom Fighters v Speaker, National Assembly* 2016 (3) SA 580 (CC) at para.1

(i) the exercise of national executive authority, including the implementation of legislation; and

(ii) any organ of state."

Rule 227[4] describes the role of portfolio committees in the performance of this oversight function. Rule 227(1)(b) says that a portfolio committee **must** maintain oversight of -

"*(i) the exercise within its portfolio of national executive authority, including the implementation of legislation;*

(ii) any executive organ of state falling within its portfolio;

(iii) any constitutional institution falling within its portfolio; and

(iv) any other body or institution in respect of which oversight was assigned to it;…"

Rule 227(1)(c) goes on to say that a portfolio committee, "*may monitor, investigate, enquire into and make recommendations concerning any such executive organ of state, constitutional institution or other body or institution, including the legislative programme, budget, rationalisation, restructuring, functioning, organisation, structure, staff and policies of such organ of state, institution or other body or institution*;"

1.3 The tools available to portfolio committees

The tools available to portfolio committees in the performance of their oversight function are not systematically described in any one place. They are scattered through the Constitution, the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 ("the PPIPPLA") and the Rules of the NA.

Rule 167(f) confers a wide mandate on a parliamentary committee to "*determine its own arrangement*". Portfolio committees thus have a wide and open-ended power to conduct their business in whatever way they deem appropriate, subject only to the following rules.

[4] Rules of the National Assembly 9th Edition (26 May 2016)

A committee may summons witnesses to produce documents and give evidence relevant to its public enquiries.

Section 56 of the Constitution provides that the NA or any of the committees may,

(a) *summon any person to appear before it to give evidence on oath or affirmation, or to produce documents;*

(b) *require any person or institution to report to it;*

(c) *compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph (a) and (b)*".

This constitutional provision is supplemented by section 14 of the PPIPLA. It describes the form and content of a summons by which a witness is compelled to produce documents or give evidence in a committee inquiry.

These provisions are echoed in Rule 167(a) which provides that a committee may "*summon any person to appear before it to give evidence on oath or affirmation, or to produce documents*".

Section 15 of the PPIPLA deals with the examination of witnesses as follows:

"*When a House or committee requires that anything be verified or otherwise ascertained by the oral examination of a witness, the person presiding at the enquiry may –*

(a) *call upon and administer an oath to, or accept an affirmation from, any person present at the inquiry who was or could have been summonsed in terms of section 14; and*

(b) *examine that person, or request the person to produce any document in the person's possession or custody or under his or her control which may have a bearing on the subject of the inquiry, subject to any limitation provided for in the standing rules with regard to the type of subject matter about which a witness may be questioned or the type of document that a witness may be requested to produce*".

This provision does not say or imply that a witness, who gives evidence before a committee, may only be examined by its chairperson. It is an empowering and permissive provision and not a restriction on the way in which witnesses may be examined. It must moreover be so construed so as not to contradict or detract from the open-ended power conferred on committees of the NA by section 56(a) of the Constitution to summon any person to appear before them "*to give evidence on oath or affirmation*" without restriction.

Section 16 of the PPIPPLA confers qualified privileges on witnesses who give evidence before parliamentary committees:

Section 16(1) of PPIPPLA provides that the law regarding privilege applicable to a witness in the High Court, also applies to a witness who gives evidence before a parliamentary committee. It means broadly that the witness need not disclose matters subject to legal privilege and enjoys qualified immunity from civil liability for evidence honestly given.

Sections 16(2) and (3) of PPIPPLA make an exception to this general rule. They oblige a witness to answer questions even if the answer is self-incriminating but then provide that such an answer may not be used against the witness in subsequent proceedings.

Rule 168 prescribes that, before a witness starts to give evidence, the chair must inform the witness of his or her rights and duties under section 16 of the PPIPLA.

Subject to the foregoing rules, a portfolio committee is at large to determine its own procedure in the conduct of a public inquiry. Section 57(1) of the Constitution allows the NA to determine and control its own internal procedures and to make rules to do so. Rule 167 (f) is in the form of a default rule that allows a portfolio committee to "*determine its own working arrangements*" where no other rule provides otherwise.

The Constitutional Court recognised this open-ended mandate of the NA in the performance of its oversight of the Executive in the EFF case.[5] Chief Justice Mogoeng (as he then was) put it as follows:

[5] *Economic Freedom Fighters v Speaker, National Assembly* 2016 (3) SA 580 (CC)

"*Is holding the executive accountable a primary and undefined obligation imposed on the National Assembly? Yes! For the Constitution neither gives details on how the National Assembly is to discharge the duty to hold the executive accountable nor are the mechanisms for doing so outlined or a hint given as to their nature and operation*".[6]

"*Both sections 42(3) and 55(2) do not define the structures within which the National Assembly is to operate in its endeavour to fulfil its obligations. It has been given the leeway to determine how best to carry out its constitutional mandate… How to go about this is all left to the discretion of the National Assembly…*"[7]

1.4 The administrative law rules

A committee that holds a public inquiry, merely to report to the NA, in the performance of its oversight function, does not perform "administrative action" subject to the rules of administrative justice laid down by the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). But such a committee does exercise public power. It is obliged to do so in accordance with the fundamental principles of the rule of law. The most significant of those principles, is the requirement of rationality.

A portfolio committee thus has a wide discretion to determine its own procedure and ultimately to compile its own report to the NA. The only legal requirement is that it must do so within the bounds of rationality. Rationality is a low threshold which requires only a minimum standard of procedural fairness and substantive reason.[8]

[6] *Ibid.* at para. 43
[7] *Ibid.* at para. 87
[8] *Democratic Alliance v President of the RSA* 2013 (1) SA 248 (CC) at paras. 33 to 37

1.5 The other tools that are available to the National Assembly

The Constitution[9] also grants the NA powers to remove the President from office by a resolution adopted with a supporting vote of at least two thirds of its members only on the grounds of a serious violation of the Constitution or the law, serious misconduct, or on the ground of inability to perform the functions of office.

Furthermore, the Constitution[10] gives the NA the power to pass a motion of no confidence by a vote supported by a majority of its members to either the Cabinet excluding the President or to both the President and other members of Cabinet.

1.6 Regular elections and a multi-party system of democratic government

It is trite that the assumption underlying this value is that a multi-party democracy – guaranteed by regular free and fair elections – will ensure that the elected representatives and all those who exercise public power will be held to account. It goes without saying that regular, free, and fair elections can be a powerful mechanism to hold the Executive and members of the legislature accountable to voters, especially when members of the governing party fear that their political party will be voted out of power.

1.7 National anti-corruption legislation

It is also instructive to note that South Africa has a National Anti-Corruption Framework, which serves as a blueprint for fighting corruption and malfeasance in the country. The framework consists of key institutions, sectors, laws, policies, practices and specific mechanisms that collectively contribute towards enhancing integrity, transparency and accountability.

Other applicable legislative frameworks include the following:

(a) Prevention and Combating of Corrupt Activities Act, 2004 (Act No.12 of 2004);
(b) Promotion of Access to Information Act, 2000 (Act No.2 of 2000);

[9] Section 89 of the Constitution of the RSA, 1996
[10] Section 102 of the Constitution of the RSA, 1996

(c) Promotion of Administrative Justice Act, 2000 (Act No.3 of 2000);

(d) Public Disclosures Act, 2000 (Act No.26 of 2000);

(e) Public Finance Management Act, 1999 (Act No.1 of 1999);

(f) Public Administration Management Act, 2014 (Act No.11 of 2014);

(g) Municipal Finance Management Act, 2003 (Act No.56 of 2003);

(h) Financial Intelligence Centre Act, 2001 (Act No.38 of 2001);

(i) Prevention of Crime Activities Act, 1998 (Act No.121 of 1998);

(j) National Prosecuting Authority Act, 1998 (Act No.32 of 1998);

(k) Public Service Act, 1994 as amended by Act 30 of 2007;

(l) Public Protector Act, 1994 (Act No.23 of 1994);

(m) Executive Members' Ethics Act, 1998 (Act No.82 of 1998);

(n) Executive Ethics Code; and

(o) King IV Code on Corporate Governance.

Importantly, section 6 of the Executive Members' Ethics Act buttresses the principle of equality before the law and prescribes that nothing in this Act may prevent or delay the prosecution of a Cabinet member, Deputy Minister or MEC in a court.

It is noteworthy to observe that section 91(1) of the Constitution provides that the Cabinet consist of the President, as head of the Cabinet, a Deputy President, and Ministers.

The Nkandla judgment aptly demonstrates the assertion that no one is above accountability and/or scrutiny, including the highest office in the land. Our courts have even pronounced on the President's prerogative to appoint and dismiss Ministers and Deputy Ministers as it happened in the *President of the Republic of South Africa vs Democratic Alliance and Others CCT159/18.* Such is the power of judicial review.

The preceding paragraphs amply demonstrate the interlocutor's viewpoint that the Constitution gives the NA a broader scope and latitude to "*determine how best to carry out its constitutional mandate.*".[11]

[11] *Economic Freedom Fighters v Speaker, National Assembly* 2016 (3) SA 580 (CC) at para. 87

The constitutional duties of oversight and accountability must be read together with prescribed oaths or solemn declarations required, by schedule 2 to the Constitution, to be sworn or affirmed when members of the NA and delegates to the National Council of Provinces ("NCOP") assume office.

Item 4(1) of that schedule provides: that members of the NA, permanent delegates to the NCOP and members of provincial legislatures, before the Chief Justice or a judge designated by the Chief Justice, must swear or affirm as follows:

> "*I, A.B., swear/solemnly affirm that I will be faithful to the Republic of South Africa and will obey, respect and uphold the Constitution and all other law of the Republic, and I solemnly promise to perform my functions as a member of the National Assembly/permanent delegate to the National Council of Provinces/member of the legislature of the province of C.D. to the best of my ability. (In the case of an oath: So help me God.)*"

CHAPTER 2

2. PARLIAMENT'S OVERSIGHT AND ACCOUNTABILITY INSTRUMENTS

In terms of South Africa's Constitution, Parliament consists of two Houses, namely the NA and the NCOP. The Constitution provides that the NA is elected to represent the people and to ensure government by the people.[12] The NCOP represents the provinces to ensure that the provincial interests are taken into account in the national sphere of government.[13] The NCOP does this mainly by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces. Primarily, the NCOP's role is to exercise oversight over the national aspects of provincial and local government.

It bears mentioning upfront that section 42(3) of the Constitution puts it expressly that the NA discharges its constitutional obligations, amongst others, "*by scrutinising and overseeing executive action*." On the other hand, section 42(4) of the Constitution does not expressly accord the NCOP a general oversight role.

As previously stated, the NA is further required in terms of section 55(2) of the Constitution to provide mechanisms to ensure that all executive organs of state in the national sphere of government are accountable to it; and to maintain oversight of the exercise of national executive authority, including the implementation of legislation, and any organ of state.

The stark reality of our Constitution is that it deals with Parliament's legislative authority in more detail compared to Parliament's oversight role. This, in part, is what prompted the conceptualisation and development of the Oversight and Accountability ("OVAC") model by Parliament in 2009, whose primary objective was the establishment of a framework which describes, in detail, how Parliament conducts its oversight business.

[12] Section 42(3) of the Constitution of the RSA, 1996
[13] Section 42(4) of the Constitution of the RSA, 1996

The task team that was tasked with the development of the OVAC model adopted the following definition for oversight:

"*In the South African context, oversight is a constitutionally mandated function of legislative organs of state to scrutinise and oversee executive action and any organ of state*."

In this regard, it is also instructive to deal with the nuances between accountability and oversight, particularly in the context of section 55(2) of the Constitution. In this regard, this paper borrows from Prof Corder's Report on Parliamentary Oversight and Accountability wherein it is made bold that accountability implies a relationship, a hierarchy and a duty by a body to explain and justify its conduct to another body.[14]

Prof Corder's view cannot be faulted, in that, section 55(2)(a) of the Constitution sets obligatory standards of accountability for executive organs of state in the national sphere of government. The constitutional text uses peremptory language that the NA *must* set up mechanisms to hold these executive organs of state in the national sphere of government accountable. The NA is at will to set up mechanisms to hold other bodies accountable where this is thought to be appropriate and within the confines of the Constitution.

According to Prof Corder, while the oversight role of a legislature may entitle it to hold a person accountable, the concept of oversight is a wider one than accountability alone. Oversight describes the broader and more flexible activity of a legislature in relation to the Executive. In the process of carrying out its oversight function, a legislature may need to hold organs of state accountable.[15]

In his affidavit[16]to the State Capture Commission, Prof Corder aptly deals with the dichotomy between accountability and oversight. He posits that accountability means 'to give an account' of actions or policies, or 'to account for' spending and so forth. He asserts that accountability can be said to require a person to explain and justify – against criteria of some kind – their decisions or actions. It also requires that the person

[14] Corder H *et al* Report on Parliamentary Oversight and Accountability, Faculty of Law, University of Cape Town, July 1999, at pg. 6
[15] *Ibid.* at pg. 7
[16] Corder H. In the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State, at pg. 5

goes on to make amends for any fault or error and takes steps to prevent its recurrence in the future. Prof Corder makes the salient point that a condition of the exercise of power in a constitutional democracy is that the administration or executive is checked by being held accountable to an organ of government distinct from it.

On the other hand, Prof Corder submits that oversight refers to the crucial role of legislatures in monitoring and reviewing the actions of the executive organ of government. This includes supervising and scrutinising actions of the executive branch of government. Therefore, the term refers to a large number of activities carried out by legislatures in relation to the Executive. In other words, oversight traverses a far wider range of activity than does the concept of accountability.[17]

2.1 Existing mechanisms for oversight and accountability

The committees[18] of Parliament are the furnaces where the work of Parliament really takes place. Parliament has established mechanisms to fulfil its oversight and accountability mandates in terms of the Constitution and under the rules established by the two Houses, individually and jointly.[19]

2.1.1 Committee system

The committees of Parliament are the extension of the respective Houses of Parliament, namely portfolio committees are an extension of the NA and select committees are an extension of the NCOP. Section 56(d) of the Constitution provides that the NA or any of its committees may receive petitions, representations or submissions from any interested persons or institutions. On the other hand, section 69(d) of the Constitution provides that the NCOP or any of its committees may receive petitions, representations or submissions from any interested persons or institutions. These constitutional provisions allow committees of Parliament to interact with, amongst others, civil society organisations, organised business, experts and professional bodies as a way of enhancing accountability. As previously stated, these

[17] *Ibid.* pg. 6
[18] Portfolio committees for the National Assembly and Select committees for the National Council of Provinces
[19] Parliament of the RSA, Oversight and Accountability Model 2003 in section 3 (no page number supplied)

committees can call any person, including Ministers and departmental heads to account on any issue relating to any matter over which they are exercising oversight.

NA Rule 167 speaks about the general powers of committees and provides that for the purposes of performing its functions a committee may, subject to the Constitution, legislation, the other provisions of these rules and resolutions of the Assembly –

(a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents;

(b) receive petitions, representations or submissions from interested persons or institutions;

(c) permit oral evidence on petitions, representations, submissions and any other matter before the committee;

(d) conduct public hearings;

(e) consult any Assembly or Council committee or subcommittee, or any joint committee or subcommittee;

(f) determine its own working arrangements;

(g) meet at a venue determined by it, which may be a venue beyond the seat of Parliament;

(h) meet on any day and at any time, including –

(i) on a day which is not a working day,

(ii) on a day which the Assembly is not sitting,

(iii) at a time when the Assembly is sitting, or

(iv) during recess; and

(i) exercise any other powers assigned to it by the Constitution, legislation, the other provisions of these rules or resolutions of the Assembly.

As previously cited, committees are where the real work of Parliament takes place. This is where legislation is developed, oversight on government departments is given a focussed approach, public participation is facilitated and the investigation and recommendations on executive proposals are made. This is the reason why Parliament in its website refers to its committees as the 'engine room' of Parliament's oversight and legislative work.

In exercising oversight, committees often obtain first-hand knowledge from people engaged in the direct implementation of specific programmes and/or who are directly responsible for service delivery. To evaluate the work of government from a broader perspective, committees may invite experts from outside government to provide background knowledge and analysis on relevant issues.[20]

Some tasks of Parliament, particularly those involving detailed consideration of matters, are more appropriately performed by a smaller group than Parliament sitting in plenary. For this purpose, in accordance with the Constitution, Parliament in its rules establishes a range of committees with assigned powers and functions to assist it with its work. The committees are required to report regularly on their activities and to make recommendations as appropriate to Parliament for decision.[21]

Thus, a parliamentary committee consists of a designated number of members appointed by a House to perform a specific function and report back to the House. The composition of parliamentary committees reflects, as far as is practicable, the numerical strength of political parties represented in Parliament. Committees are appointed to deal with two main areas of work: the work of Parliament (such as legislation and oversight) and Parliament's internal arrangements and procedures. There are joint committees consisting of members of both Houses as well as committees specific to and appointed by each House.

A committee draws its mandate from and is accountable to the House that created it. It functions in terms of the Rules laid down by the House. It has the power to report and make recommendations to the House but no powers to make decisions, save in respect of its internal proceedings. There are a few exceptions to this, chiefly where a parliamentary committee is given special powers by statute. Section 45 of the Constitution makes provision for the establishment and functions of certain parliamentary committees such as the joint Rules Committee and the Mediation Committee.[22]

[20] *Ibid.* (no page number supplied)
[21] National Assembly Guide to Procedure 2004, at pg. 239
[22] *Ibid.* at pg. 241

It cannot be overemphasised that committees play a pivotal role in the parliamentary process, helping Parliament perform its constitutional functions. Committees are one of the mechanisms required by the Constitution to ensure accountability by and oversight of the Executive.[23] Furthermore, committees give effect to the constitutional concept of "participatory democracy" by holding public hearings and affording the public the opportunity to contribute to their deliberations.[24]

Parliamentary committees have various tools of oversight, including departmental briefing sessions, annual and departmental budget analyses, calls for submissions and petitions from the public, the consideration of strategic plans and annual reports, and public hearings.[25]

Since a committee conducts its business on behalf of the House, it must report on its business to the House. It reports on matters for decision, decisions the committee has taken (except those concerning its internal business) and matters on which it has been unable to reach a decision. Portfolio committees mirror portfolios in government whilst select committees mirror the clusters in government.

When a committee reports its recommendations to the House for formal consideration and the House adopts the Committee report, it gives the recommendations the force of a formal House resolution pursuant to its constitutional function of conducting oversight. The House then also monitors executive compliance with these recommendations.[26]

Once a report has been adopted by the House, the Speaker communicates the recommendations of the House to the relevant Minister and copies the relevant House Chairperson, portfolio committee Chairperson and Director-General. The Speaker also requests the Minister to direct his or her responses to the Speaker for formal tabling. The Secretary to Parliament communicates with the Director-General in the Presidency on all resolutions.[27]

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[23] Constitution of the RSA, section 55(2)
[24] Constitution of the RSA, section 57(1)(b)
[25] Parliament of the RSA *op. cit.* note 19 (no page number supplied)
[26] *Ibid.* (no page number supplied)
[27] *Ibid.* (no page number supplied)

2.1.2 Inquiries

This falls within the scope of the committee system and a very powerful instrument that has been made available to committees via the rules of Parliament for purposes of oversight and accountability. As previously mentioned, in terms of the NA Rule 227(1)(c) a portfolio committee may monitor, investigate, enquire into and make recommendations concerning any such executive organ of state, constitutional institution or other body or institution, including the legislative programme, budget, rationalisation, restructuring, functioning, organisation, structure, staff and policies of such organ of state, institution or other body or institution.

In undertaking an inquiry, the committee is entitled to appoint an evidence leader, if it wishes to do so. It is entirely at liberty to adopt a procedure of this kind. It is well within its very broad mandate to regulate its own procedure. It makes eminent good sense to have someone who collects, organises and presents the evidence, subject to the committee's direction at all times.

The inquiry is clearly inquisitorial and can also be carried out by ad hoc committees expressly set up for this task. Undertaking an inquiry is usually a last resort. A committee will, after a proper analysis of the evidence and information presented to it, typically arrive at conclusions that could result in recommendations for proposed action by appropriate authorities.[28]

Available data show that this power is rarely exercised. Between 2009 and June 2022, no more than 10 inquiries were held.[29]

2.2 Plenary processes for effecting oversight and accountability

Below I deal with processes for effecting oversight and accountability when the House is fully constituted. In other words, when all the members of Parliament from all political parties that are represented in Parliament are in attendance in the House.

[28] "Where Was Parliament?" (2022) A PMG review of parliamentary oversight in light of State Capture and the Zondo Report, at pg. 8

[29] This number excludes calls and plans for inquiries which did not actually get underway

2.2.1 Budget Votes

Parliament has an extraordinary tool at its disposal to exercise oversight and accountability over the Executive, in that, Parliament approves the Budget. Budget votes occur when the Minister of Finance announces the budget projections for the next financial year, as well as each Minister (department). In the Budget, the Minister of Finance sets out how much money the government will spend in the following year. After the presentation of the Budget by the Minister of Finance, each parliamentary committee has hearings with the government department over which that committee exercises oversight and can also check whether the department kept the promises of the previous year and spent taxpayers' money properly. The budget votes are debated in the NA and NCOP once committees have finished discussing the different budget votes.[30] Importantly, the devil of oversight is in the detail and so far as budget scrutiny retains largely an exercise that focuses on the strategic thrust of topline allocations and expenditure, rather than the details of sub budgets with the allocation and expenditure, where the real wastage and corruption occurs. Though that is the mandate of the Auditor General, effective budget scrutiny can assist in curbing corruption. It bears mentioning, for the sake of completion, but most importantly because in a co-ordinated vision of oversight and accountability – as expressed in the constitutional scheme, the parliamentary aspect is complemented and emboldened by other chapter 9 institutions who have a symbiotic relationship with Parliament in relation to oversight.

2.2.2 Questions

Written and oral questions are important oversight tools. Section 92(2) of the Constitution provides that members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions. Members of Parliament are therefore empowered to ask questions for oral reply in special sittings dealing with questions and can pose written questions for written reply throughout the year.

[30] Parliament of the RSA *op. cit.* note 19 (no page number supplied)

The procedure of putting questions to the Executive is one of the ways in which Parliament holds the Executive to account. Questions can be put for oral or written reply to the President, the Deputy President and the Cabinet Ministers on matters for which they are responsible. Oral and written questions to the President and Deputy President are particularly critical because it is the only way Parliament can directly oversee and hold the Presidency accountable. The reason for this is that there is no parliamentary committee that oversees the Presidency as this is the practice with other departments.

Question time affords members of Parliament the opportunity to question members of the Executive on service delivery, policy and other executive action on behalf of both their political parties and the electorate.[31] Compared to the committee system, this tool has limitations in demanding accountability. For instance, there is a limit to the number of written questions submitted in a year. Questions for oral reply only take place at plenary sessions and there are also limits to the number of questions that can be asked.[32]

2.2.3 Members' statements

This is the process in which members of Parliament are afforded the opportunity to make statements on any matter in the House.[33]

2.2.4 Statements by Cabinet members

Ministers may make factual or policy statements in relation to government policy, executive action and other similar matters of which the Assembly should be informed. The Minister asks the Speaker for an opportunity to make such a statement, which should not be longer than 20 minutes.[34]

2.2.5 Notices of motion

Motions are amongst the mechanisms available to members of all political parties which can be used to help fulfil their oversight responsibilities in Parliament by

[31] *Ibid.* (no page number supplied)
[32] "Where Was Parliament?" (2022) *op. cit*. note 28 at pg. 8
[33] Parliament of the RSA, *op. cit.* note 19 (no page number supplied)
[34] *Ibid.* (no page number supplied)

bringing issues to Parliament for debate. Notice must be given of every motion since in principle the House must be informed in advance of any substantive motion so that members and parties have time to prepare to debate it. Notices of motion are therefore a vital tool which can be used by members to bring matters of political importance before Parliament for debate or a decision.[35]

[35] *Ibid.* (no page number supplied)

2.2.6 Motions without notice

Motions which require notice may be moved without notice provided no single member present objects. It is therefore common practice for parties to be consulted before the House meets when seeking to move a motion without notice, and to inform the presiding officer of the intention to do so. Motions without notice are moved when the presiding officer calls for any formal motions, usually near the beginning of the day's sitting. This medium allows for consultation between parties to obtain consensus on issues that must be brought to the attention of the House.[36]

2.2.7 Plenary debates

Plenary debates are a further means to bring important information to the attention of the Executive regarding specific government programmes and legislation required to improve service delivery. In plenary debates, certain mechanisms for conducting oversight are used. These include question time, the consideration of committee reports, showcasing, scrutinising and debating the implementation of policy and budget votes, members' statements and questions by members of Parliament, which draw the attention of the Executive to the concerns of members' constituents.[37]

2.2.8 Members of Parliament as individuals

This individual brilliance by members of Parliament does not necessarily take place within the context of plenary processes only. Acting alone, members of Parliament can have an impact and make an important contribution to building an effective system of parliamentary oversight. Oversight begins with specific steps members of Parliament take, such as receiving and using information received from whistleblowers, carrying out independent oversight visits, posing specific questions to a Minister or department, or calling for further engagements, including an inquiry or some other action.[38]

[36] *Ibid.* (no page number supplied)
[37] *Ibid.* (no page number supplied)
[38] "Where Was Parliament?" (2022) *op. cit.* note 28 at pg. 9

The constitutional duties of oversight and ensuring accountability must be read together with prescribed oaths or solemn declarations required by schedule 2 to the Constitution, to be sworn or affirmed when members of the NA and delegates to the NCOP assume office.

It needs to be underscored that any member of Parliament would have sworn or solemnly affirmed, before commencing his or her duties, that he or she "*will be faithful to the Republic of South Africa and will obey, respect and uphold the Constitution and all other law of the Republic*."

Members of Parliament are obliged to uphold the Constitution, and it is not expected that they will act for naked self-interest or blind party loyalty. In *UDM vs Speaker*,[39] the Constitutional Court recognised that there may be times when a member of Parliament's allegiance to their party does not align with their conscience. The court decided that, in those circumstances, a member of Parliament is bound by his or her oath of office to the Constitution, not his or her loyalty to a party. "*Nowhere*", Mogoeng CJ (as he then was) affirmed, "*does the supreme law provide for [Members] to swear allegiance to their political parties, important players though they are in our constitutional scheme*."[40] The result is that, "*in the event of conflict between upholding constitutional values and party loyalty, their irrevocable undertaking to in effect serve the people and do only what is in their best interests must prevail*."[41] However, in an electoral system as the one that obtains in South Africa, where the seat held is that held and controlled by the party, this otherwise laudable sentiment remains simply that – a sentiment. The member of Parliament is unwittingly reduced to an instrument of the party – and this is sanctioned by the law. There is nothing that compels parties to allow members of Parliament to exercise their duties based on their "conscience".

[39] *United Democratic Movement v Speaker of the National Assembly and Others* [2017] ZACC 21; 2017 (8) BCLR 1061 (CC); 2017 (5) SA 300 (CC)
[40] *Ibid.* at para. 79
[41] *Ibid.*

2.2.9 Removal of President

The NA may, by a resolution adopted with a supporting vote of at least two thirds of its members, remove the President from office only on the grounds of a serious violation of the Constitution or the law; serious misconduct; or inability to perform the functions of office.[42]

[42] Section 89(1) of the Constitution of the RSA, 1996

2.2.10 Motions of no confidence

The Constitution also provides for a vote of no confidence either to the President or to his / her Cabinet. In this regard, the Constitution stipulates that if the NA, by a vote supported by a majority of its members, passes a motion in the Cabinet excluding the President, the President must reconstitute the Cabinet.[43]

On the other hand, if the NA, by a vote supported by a majority of its members, passes a motion of no confidence in the President, the President and other members of the Cabinet and any Deputy Ministers must resign.[44]

[43] Section 102(1) of the Constitution of the RSA, 1996
[44] Section 102(2) of the Constitution of the RSA, 1996

CHAPTER 3

3. CRITICAL EVALUATION OF THE RECOMMENDATIONS OF THE ZONDO REPORT ON PARLIAMENTARY OVERSIGHT

This chapter provides a critical analysis of the recommendations of the State Capture Commission report on parliamentary oversight. Here, the internal logic of the State Capture Commission report is dissected for purposes of charting a new path regarding the future state of parliamentary oversight under the aegis of South Africa's constitutional scheme.

3.1 A dedicated presidency portfolio committee

First and foremost, section 85(1) of the Constitution provides that the executive authority of the Republic is vested in the President. Importantly, section 83(a) of the Constitution provides that the President is the head of state and head of the national executive. Section 85(2) of the Constitution provides that the President exercises the executive authority, together with the other members of the cabinet. Section 86(1) of the Constitution provides that at its first sitting after its election, and whenever necessary to fill a vacancy, the NA must elect a woman or a man among its members to be the President.

Prominently, section 87 of the Constitution provides that when elected President, a person ceases to be a member of the NA and, within five days, must assume office by swearing or affirming faithfulness to the Republic and obedience to the Constitution, in accordance with Schedule 2.

Section 92(2) of the Constitution provides that members of the cabinet (this includes the President) are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.

In a presidential system like in the case of the United States Congress, power flows from the voters and not from Parliament. Whereas in a parliamentary system as is the case with the House of Commons in the United Kingdom, power flows from Parliament.

Prof Booysen argues[45] that it is accepted that parliamentary systems bring fewer checks and balances than its presidential counterpart, given that in parliamentarism the head of government is elected by his/her own party in Parliament.

South Africa is said to have a semi-presidential system of government, with characteristics of both parliamentary government and presidential government. Like parliamentary systems of government, the President is not directly elected by the people, but is rather indirectly elected by the NA, which is also empowered to remove the President and his or her cabinet from office via a vote of no confidence. But the President ceases to be a member of the NA once elected and wields both head of state and head of the executive powers.

In South Africa, 'semi-presidentialism' arises in the sense that the president of the country is also the president to the governing party (the ANC; except for brief five-yearly periods when the leadership of the party changes roughly a year before national elections) while there is a strong symbiosis between the cabinet and the powerful National Executive Committee as the top structure of the ANC. The President of South Africa gains vast power because of the influential and well-resourced Presidency of South Africa, a source that empowers him greatly vis-à-vis Parliament.[46]

The Presidency has a direct Budget of R610 million – or R637 million. Beyond this, the Presidency houses many critical competencies, including structural reform unit Operation Vulindlela, Energy Action Plan and Energy Security Plan, Presidential Youth Employment Stimulus, Infrastructure Investment, Just Energy Transition Programme, Presidential Climate Commission, Red Tape Reduction Team and Red Tape Reduction Council, Intelligence, the National Security Council, the State-owned Entity (SOE) Council and more.

[45] Booysen S. Semi-presidentialism and Subjugation of Parliament and Party in the Presidency of South Africa's Jacob Zuma (2017) at pg.4 - 5
[46] *Ibid.* at page 11

The Rules of the NA[47] provide that questions to the President must be scheduled for a day at least once per quarter during session time within the annual programme and such questions must be limited to matters of national and international importance. The number of questions to the President is limited to six questions per question day. The total time allowed for replies to questions and associated supplementary questions under this rule is limited to a maximum of three hours.

It must be clear from now that even though the President does account to Parliament through Oral Questions, the point must be made that this is only four times a year and patently not enough. In addition, Ministers who constitute cabinet with the President also have Oral Questions, but they also must appear and directly account to portfolio committees whose responsibility is to oversee the respective Ministries in line with Rule 225 of the Assembly Rules. Undoubtedly, the President and Presidency should be held to the same standard, if not higher.

Furthermore, and because of the enormous power which the President and Presidency wield, Parliament needs a platform in the form of an oversight mechanism to oversee a litany of presidential projects and initiatives that are constantly announced in the yearly SONAs and various Presidential Summits.

Members of the ANC have, in the past, been dodging any proposal aimed at establishing a dedicated committee that will oversee the President and Presidency. It is only until recently and because of the change in the political fortunes of the ANC that there has been unanimity amongst all political parties that a subcommittee of the Rules Committee should be established to look at the modalities of making this recommendation of the Zondo report a reality. There can be no doubt that the desirability of such a dedicated committee is beyond question. To this end, on 31 October 2024, the Rules Committee following much deliberation decided, through a vote, to mandate the Subcommittee on the Review of Assembly Rules to process the establishment of an oversight committee on the Presidency. The Subcommittee will

[47] Rule 140 of the Rules of the National Assembly 9th Edition

now consider the modalities of this oversight committee and report back to the Rules Committee.[48] This, in the writer's view, is a step in the right direction.

3.2 A constituency based electoral system

It cannot be gainsaid that our current electoral system is not without problems. This, to a very large degree, reflects the fact that the electoral system we have as a country was forged in the crucible of South Africa's painful and divided past. The true narrative of the South African electoral system is aptly captured in academic political literature, in that, the challenge faced by our leaders at the Convention for a Democratic South Africa (CODESA) was to select an appropriate electoral system for a highly divided and unequal society in the process of a delicate transition.[49]

It can also not be negated that the configuration of an electoral system is of fundamental importance to the nature of a country's politics and, very importantly, the match between the preferences of citizens, the preferences of elected officials, and government's policy direction. The shared view is that South Africa's proportional representation system was selected for its inclusiveness, its simplicity, and its tendency to encourage coalition government.[50]

South Africa employs a proportional representation system, allocating seats in direct proportion to the number of votes a party receives. The South African electoral system is a closed-list proportional representation system. In this system, voters vote for parties – not for individuals. It is the parties' prerogative who it wants in the legislatures. Political parties submit lists to the Independent Electoral Commission (IEC) for the national legislature, provincial legislatures and provincial-to-national or regional lists. These lists are referred to as 'closed' because they cannot be altered by voters even though they are widely publicised for the voter to consider.

[48] Parliamentary Media Releases (1 November 2024) *NA RULES COMMITTEE VOTES IN FAVOUR OF THE PRESIDENCY OVERSIGHT COMMITTEE AND OTHER NEW RULES* at pg.2
[49] http://www.sahistory.org.za/codesa-negotiations
[50] Lodge T. 2003. *How the South African Electoral System was Negotiated*. Journal of African Elections 2(1): 71 - 76

At the end of the electoral process, these lists are used to fill the seats allocated to each party. The higher up on a list a party member is, the more likely that member is to get a seat.

There are several ways to configure an electoral system, each resulting in trade-offs.[51] For instance, a party-list system severs the link between individual representatives and voters, diminishing the voters' say in which individual represents them, but generates a representative and proportional assembly. On the contrary, a system which increases the ability of voters to hold individuals personally accountable generates an assembly that is less representative and disproportional, but freer to pursue unpopular policies. There is no perfect system, and systems need to be considered in the context of changing dynamics within a particular country.[52]

On 17 April 2023, President Cyril Ramaphosa signed into law a change to the country's Electoral Act to allow individuals to contest national and provincial elections independently of political parties. The change followed a June 2020 Constitutional Court judgment that the Electoral Act was unconstitutional because it did not allow independent candidates to contest national and provincial elections. However, there is a strong body of opinion that says that the change corrects one wrong by creating another, especially concerning the principle of proportionality. To illustrate this point, it does not matter how many votes independent candidates receive, but as soon as they have reached the electoral threshold to secure a seat in the legislature, any extra votes received are meaningless as they do not count. However, for political parties, extra votes count towards securing another seat. This underscores the view that the existing electoral system is inherently biased towards a party system.[53]

Based on the abovementioned observations, what is needed is a complete overhaul of the electoral system to arrest the proliferation of small parties resulting in intractable coalition politics. The governance impasses we have witnessed in South Africa's

[51] Norris P. 1997. *Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems*. International Political Science Review, Vol. 18, No.3, 'Contrasting Political Institutions' (pp. 297 – 312). Sage Publications
[52] *Ibid.*
[53] Maserumule M.H. South Africa has changed its electoral law, but a much more serious overhaul is needed (2023) pg.2

metropolises bear testimony to this reality. Besides, the Constitutional Court's decision demonstrates that electoral democracy is possible without political parties. The challenge is to design an electoral system that makes this reality a possibility. Unfortunately, to impose a workable electoral system is outside the remit of our courts. Such a function belongs to Parliament.[54]

In addition, the way local government representatives are elected, despite having a constituency approach element, is also driven by a party system. It appears that the fundamental problem is the country's proportional representation system. It is the reason coalition politics have become so disorderly. The unstable coalitions in major cities have had dire consequences for governance and service delivery. Compared to proportional representation, a ward system is a constituency electoral approach based on the first-past-the-post principle. A candidate with the highest votes in a ward gets a seat in the municipal council as the community's duly elected representative. However, a ward system also allows candidates to contest elections as representatives of political parties. The effect of this is that a vote for a ward candidate who represents a political party adds to proportional voting of their political party in allocating seats in the council and thus a ward system reinforces the party system.[55]

Many commentators are of the view that South Africa's proportional representation came from noble intentions during the multiparty negotiations in the 1990s and this entailed enabling even the smallest political parties a presence in Parliament. The cardinal question is whether South Africa's electoral system is still suited to the country's needs. It appears that it has long outlived its contextual relevance. The fact that the voter turnout in the 2024 provincial and national elections stood at less than sixty per cent (58.57% to be exact) of eligible voters signifies, to a very large extent, that the present electoral system has been rejected by the electorate. Government has the responsibility to design a better electoral system whose objective should be to return power from political elites to the people. Mr Barney Mthombothi[56] had the

[54] *Ibid.*
[55] *Ibid.* pg.3
[56] Mr Barney Mthombothi is a columnist for the Sunday Times and a former editor of the Financial Mail

following to say about the need to review the need to review South Africa's electoral system.

"*If we had a properly functioning democratic system there would have been no need to go to court to stop a charlatan like John Hlophe from having any say in the selection of our esteemed judges. He wouldn't have been in parliament without being elected. And the insufferable Busisiwe Mkhwebane wouldn't be spewing racist bile from the hallowed precincts of parliament. We certainly would not be having the mayoral debacle in Pretoria, because the good burghers of Tshwane – and not some cabal sitting behind closed doors – would have decided who they wanted as their first citizen*."[57]

There can be no doubt that the recommendation by the Zondo report on electoral reforms is on point and the good news is that Parliament is already moving towards that direction. On 14 May 2024, the Portfolio Committee on Home Affairs adopted a report recommending nine names for possible appointment as members of the Electoral Reform Consultation Panel. The panel has since been appointed and it will play a crucial role in examining the current electoral system and many others across the world as per section 23(9)(b) of the recently passed Electoral Amendment Act of 2023.

On 25 October 2024, the Chairperson of the Portfolio Committee on Home Affairs, Mr Mosa Chabane, called on the public, political parties and prospective independent candidates to effectively contribute by making public comments to the Electoral Reform Consultation Panel by 31 October 2024. The panel extended its deadline to 31 October 2024 following a request by the committee to enable extensive public participation in its process that is aimed at assessing electoral systems and recommending an appropriate system for the country. [58]

It is instructive to note that this recommendation for electoral reform to provide for some form of constituency-based representation has been made repeatedly in the past by the Van Zyl Slabbert Commission in the early 2000s. Even more recently, the High-

[57] Barney Mthombothi "*The only way to fix our country and rid ourselves of fools is to review the electoral system*" in Sunday Times, 6 October 2024, pg.17

[58] Parliamentary Media Releases (25 October 2024) *HOME AFFAIRS CHAIRPERSON REMINDS PEOPLE TO CONTRIBUTE TO ELECTORAL REFORM PANEL CALL FOR PUBLIC SUBMISSIONS* at pg.1

Level Panel on the Assessment of Key Legislation, led by former President Kgalema Motlanthe, pronounced on this matter as well.

3.3 Desirability of legislation which protects MPs from losing their party membership merely for exercising their oversight duties

The inherent tension between party loyalty and parliamentary oversight remains a vexed question in the South African political landscape. This is so, to a large degree, because our current political system reinforces a party system. Section 47(3)(c) of the Constitution[59] provides that a person loses membership of the National Assembly if that person ceases to be a member of the party that nominated that person as the member of the Assembly. The existence of this provision is understandable given South Africa's party-based, proportional representation electoral system. However, as the Zondo report puts it, this provision has the potential to render parliamentary oversight ineffective, particularly if there are inadequate constraints against the sacking of MPs from the parties they represent.[60]

Heywood describes a political party as a group of people that is organised for the purpose of winning government power, by electoral or other means. In essence and unlike an interest group, one of the chief aims of political parties is to capture state power and control by placing their members as candidates in office.[61] In summary, a political party is an association of a group of people with the aim of gaining control of public or political office.

Yet the Constitution demands that all members of the NA must swear an oath and allegiance to the Constitution before they can perform their functions. The oath they each take is that they "*will obey, respect and uphold the Constitution and all other law of the Republic*."

An approach that assumes that MPs would routinely violate their oath and place their commitment to their party above their commitment to the Constitution would be

[59] Constitution of the RSA, 1996
[60] Zondo RMM State Capture Report: Part VI, Vol.2 (2022) at para. 1017
[61] Toyin C. Adetiba and Lucky E. Asuelime "ANC accountability and control of South African Parliament. In whose interest: the state or the party?" Vol.5 (2018) *Journal of African Foreign Affairs* pg. 115

inconsistent with this dictum. MPs may not always adhere to their oath, but society must assume that they will be faithful, until the evidence demonstrates the contrary. On the other hand, as much as legislative reforms are required in the parliamentary oversight realm, such reforms are not in themselves a sufficient condition for democratic gorvenance, but a necessary condition from which the will of the people must be anchored on. Simply put, not every ill in our society will be eradicated via legislative reforms.

A closed-list system of proportional representation and strict party discipline should rather be flagged as amongst the major impediments to effective parliamentary oversight. Perhaps a hybrid system needs to be explored in which half of the members of the National Assembly are elected directly (constituency-based elections) and half of them are elected via their political parties through a proportional representation system. This may well insulate some of the individual MPs from partisan political pressure.

Furthermore, and in light of the oath which MPs swear before they can perform their functions, judicial review is another mechanism that can be used to tamper with abuse of power by party bosses. This accords with the Constitutional Court judgment in the *Ramakatsa* case wherein it was affirmed that political party constitutions and rules of political parties must be consistent with the Constitution which is the supreme law. However, the courts should be wide awake to 'esoteric decision-making'[62] and judicialization of politics.'[63] The reality is that there are some questions which should be resolved politically – in deliberative, participatory democratic forums, rather than by the courts. This is at the heart of the concept of the separation of powers and denotes that some matters ought to fall, primarily, outside the ambit of judicial determination.

[62] Esoteric decision-making in the judicial context refers to the express reliance on apolitical, technical and legal justifications to substantiate a judicial outcome which is preferred for private political reasons, which remain unexpressed

[63] Judicialization of politics is a term which may be used to describe the high volumes of so-called 'political cases' which have been brought to the Constitutional Court for adjudication. One of the first proponents of the term was a political scientist, Ran Hirsch

The conclusion reached by Prof Richard Calland is apposite that "*the evidence suggests that it is not a weakness in the legal arrangements or in the Rules of Parliament, per se, that is the problem, but rather the institutional and political culture*."[64] The internal logic of this has to be properly dissected in order to respond to the cardinal question: how best to insulate an ordinary MP from sectarian political pressure, applied generally by the leadership of his or her own party.

3.4 Amendments to section 6(1) of the Intelligence Services Oversight Act 40 of 1994

The recommendation under review was made against the backdrop of section 6(1) of the Intelligence Services Oversight Act No. 40 of 1994 which provides that the Committee shall, within two months after 31 March in each year, submit to the President and to each Minister concerned a report on the activities of the Committee during the preceding year, together with the findings made by it and the recommendations it deems appropriate, and the President shall cause such report to be tabled in Parliament within 15 days of session of Parliament after the report was submitted to him or her. In effect, this provision speaks to one reporting period within a financial year and this regularity or lack thereof appeared to be Justice Zondo's biggest bee in the bonnet. However, it is instructive to note that section 6(2) of the Intelligence Services Oversight Act No.40 of 1994 provides as follows:

"*The Committee may at the request of Parliament, the President or the Minister responsible for each Service or at any other time which the Committee deems necessary, furnish Parliament, the President or such Minister with a special report concerning any matter relating to the performance of its functions, and shall table a copy of such report in Parliament or furnish the President and the Minister concerned with copies, as the case may be*."

The above provision puts paid to the issue of regularity in terms of the reporting requirements, in the sense that, the Committee may report more than once within a

[64] Calland R. Parliamentary Oversight and Executive accountability in a time of 'State Capture': Diagnosis of an Institutional Failure & Ideas for Reform, July 2020, at page 22

financial year cycle when requested to do so either by Parliament, the President and the Minister responsible for each Service.

In addition, Joint Rule 1(2)(l)[65] read with Joint Rule 8(5)[66] in Schedule B of the Rules of the JSCI provides for special reporting of the JSCI. It defines the "special report" as a report that is prepared by the Committee at the request of Parliament, the President or the Minister responsible for each Service, or when the Committee deems it necessary, and tabled or submitted as provided for in section 6(2) of the Intelligence Services Oversight Act. In terms of the "special report", the Committee may report to Parliament, through the special report mechanism, at any given time, as and when the Committee deems it necessary. Accordingly, no need exists for the amendment of section 6(1) because section 6(2) already makes provision for reporting.

The area of focus for the Committee should rather be the implementation of the recommendations of the High-Level Review Panel on the State Security Agency ("HLRP"), set up by President Ramaphosa in June 2018 and chaired by Dr Sydney Mufamadi. Some of the observations which the Panel made after the completion of its work include the following:

"*The JSCI over the past few years has been largely ineffective and impacted by the factionalism of the ANC*

…

The Committee is divided and unable to articulate a coherent collective response on the state of intelligence in the country.

…

The absence of / changes to the Chair of the Committee coupled with a lack of institutional memory has contributed to the dysfunctionality of the JSCI."[67]

The Panel also observed that it did have sight of a number of Inspector-General of Intelligence ("IGI") reports on abuses, such as the report on the Principal Agent

[65] Joint Rules of Parliament 6th Edition, June 2011
[66] *Ibid.*
[67] Zondo R.M.M. *op. cit.* note 60 at para. 1096

Network ("PAN") and others which did indeed identify problems and recommended corrective action.[68] In this regard, the Panel ascertained that despite the said recommendations for corrective action, consequence management never took place in response to the IGI's reports. These are some of the pressing issues which the Committee needs to attend to, without delay, and no need exists for effecting legislative amendments to the Intelligence Services Oversight Act 40 of 1994.

3.5 Allocation of adequate funds to portfolio committees

Parliament does not only pass legislation, but it also bears the added and crucial responsibility of scrutinising and overseeing executive action. The role of parliamentary committees as the 'engine room' is of fundamental importance in this regard. Undoubtedly, the work that parliamentary committees must perform in fulfilling Parliament's constitutional obligations requires that they must be adequately resourced. Both the OVAC Model and the Corder report make this point very palpably.

Recently, we have seen massive cuts to the budget of Parliament, and this has, to some degree, negatively impacted the work of parliamentary committees. Parliament has consistently made submissions for more funds to the National Treasury in order to improve the execution of all its primary mandates: law-making, oversight, public participation, cooperative government and international engagement. These have found expression in the engagements between the Executive Authority (Speaker of the NA and Chairperson of the NCOP) and the Minister of Finance as well as Parliament's Accounting Officer (Secretary to Parliament) and the Director General of the National Treasury and other senior officials in the National Treasury.[69]

One of the salient points that needs to be made is that the role of select committees should not be relegated to insignificance because their clustering of portfolios means

[68] *Ibid.*
[69] Parliament's Implementation Plan 03 November 2022 at page 10

that they require adequate resource allocation to ensure that permanent delegates are able to execute their functions effectively.[70]

Again, it must be underscored that in South Africa oversight is constitutionally mandated and the appropriate mechanism for Parliament to conduct oversight of organs of state is through parliamentary committees. Several witnesses who appeared before the Zondo Commission expressed displeasure at the problem of inadequate resource allocation for this important function. Mr Cedric Frolick, the Chairperson of Committees, explained to the Zondo Commission that currently a mere R50 to R60 million of the R2 billion annual budget of Parliament is allocated to the oversight function. He informed the Commission that this R50 to R60 million was intended to pay for the implementation and hosting of regular committee meetings, placing advertisements to invite public comment on legislation, oversight visits, including the travelling of MPs and staff, together with general oversight expenditure. His conclusion was that with such a meagre budget, it was not sustainable to exercise oversight, let alone effective oversight. As regards the lack of implementation of the OVAC report, Mr Frolick laid the blame squarely on insufficient funds.[71]

However, that does not mean that the resources which Parliament has currently at its disposal render it incapable of doing its work. The fact of the matter is that there has been no political will to confront the abuses and excesses of the Executive. Even the National Chairperson of the ANC, Mr Gwede Mantashe highlighted this to the Chairperson of the Commission that "*the effectiveness of legislative oversight is not a function of oversight capacity but of political will*"[72]. Even when the ANC was commanding majority in the state, including Parliament, its political will to make the institution work and to ensure effective oversight and accountability was questionable. ANC President, Mr Cyril Ramaphosa put it so aptly in his highly publicised letter to ANC members dated 23 August 2020, in which he said that, on

[70] *Ibid. at* pg. 10 - 11
[71] https://www.statecapture.org.za//site/files/transcript/352/Day 338 - 2021-02-05.pdf
[72] Zondo R.M.M. *op. cit.* note 60 at para. 563

state capture, the ANC may not stand alone in the dock, but it does stand as 'accused number one.'

Another avenue which the Zondo Commission did not explore or engage with, in this regard, is the fact that Parliament approves the Budget and it almost beggars belief that an institution that is the pre-eminent approver of the Budget, complains about inadequate allocation of resources, especially when those resources are aimed at the realisation or achievement of an important constitutional function – parliamentary oversight, which is at the centre of the country's democratic governance project.

3.6 The scale and skill of the research and technical assistance made available to portfolio committees be enhanced

The phrase "knowledge is power" is often attributed to Francis Bacon, from his *Sacred Meditations* (1597)[73]. Thomas Jefferson used the phrase in his correspondence on at least four occasions, each time in connection with the establishment of a state university in Virginia.

This recommendation is very much linked to the previous one. Support to the work of parliamentary committees requires a ring-fenced oversight war chest, especially for the ramping up of research and technical assistance, not only to portfolio committees, but to all the parliamentary committees – portfolio committees, select committee, standing committees and joint committees.

Currently, Parliament has no less than 30 portfolio committees, 10 select committees, 5 standing committees and several joint committees. All of these require cutting edge research support and technical assistance. Each committee has a secretary, a researcher and a content adviser. Although legal advisers are not allocated per committee per se, the Constitutional and Legal Services Office ("CLSO") provides legal support to parliamentary committees, as and when such legal support is required. The same is also true for procedural advisers who fall under the auspices of the NA Table and whose responsibility, amongst others, is to provide procedural

[73] John Bartlett, *Familiar Quotations*, 10th ed. (Boston: Little, Brown and Co., 1919). 168

support to parliamentary committees, as and when such procedural support is required.

It is a well-known fact that no constitutional requirement exists for MPs of the South African Parliament to possess a certain level of academic qualifications. This necessitates that professional units within the parliamentary administration play a pivotal role in capacitating MPs. Since June 2022, and as part of a comprehensive response to the recommendations of the Zondo report, no less than thirteen content advisers supporting thirteen committees were appointed; nine legal advisers have been appointed to increase drafting and related capacity and no less than sixteen researchers have been appointed to beef up the research capacity of parliamentary committees. All critical appointments aimed at addressing capacity constraints are being prioritised.[74]

There is a resounding commitment from Parliament to enhance the research and technical capacity of its committees as part of strengthening its oversight constitutional mandate. However, as the entire country is on the edge of a fiscal precipice, all organs of state have been instructed by the National Treasury to do more with less. A point that needs to be underscored is that no matter how best the research and technical capacity of Parliament's administrative units can be, but without political will from the institution itself, Parliament will remain a paper tiger. Again, I would hang the whole thing - parliamentary oversight - on the hook of 'political will.' It is an axiomatic truth that it takes more than decent running shoes for professional athletes to win marathons.

[74] Parliament of the RSA Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State and their implications for parliamentary procedure 26 June 2023, at pg. 3

3.7 Late submissions of reports by members of the Executive

It bears pointing out upfront that parliamentary committees already have the necessary legal arsenal to whip members of the Executive into line when they interact with them.

Section 57(1) of the Constitution of the Republic of South Africa empowers the NA to determine and control its internal arrangements, proceedings and procedures; and to make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement. Similarly, section 70(1) of the Constitution of the Republic of South Africa contains a corresponding provision for the NCOP.

Rule 167(f) of the Rules of the NA confers a wide mandate on a portfolio committee to "*determine its own working arrangements*". Likewise, Rule 121(1)(d) of the NCOP confers a wide mandate on a committee of the NCOP to "*determine its own procedures*." Practically, what this means is that parliamentary committees are at will to determine how members of the Executive conduct themselves when they are called to account before parliamentary committees. Nothing impedes parliamentary committees from developing their own rules of engagement when members of the Executive are called upon to submit their reports timeously. Parliamentary committees may also prescribe timeframes within which reports by the Executive should be submitted to them.

Not long ago, on 20 September 2024, the Portfolio Committee on Sports, Arts and Culture sent the Department of Sports, Arts and Culture packing on account of ill-preparedness. The department sent a presentation to the committee earlier in the week and presented something else when it appeared to brief the committee on its performance on the 1st quarter of the 2024/25 financial year.[75] This is a glowing example which signifies that when political will hold sway, parliamentary committees can exercise their oversight functions diligently and without delay.

[75] Parliamentary Media Release (23 September 2024) *COMMITTEE ON SPORTS, ARTS AND CULTURE SENDS DEPARTMENT PACKING FOR ILL-PREPAREDNESS* at pg.1

The above-mentioned conspectus of facts amply demonstrates that the tools exist to stem any wayward behaviour from members of the Executive. However, before the national and provincial elections of 29 May 2024, this behaviour was allowed to creep in because of South Africa's dominant party democracy and thus no political will existed to seek relief from these readily available legal instruments. Pierre du Toit and Nicola de Jager define dominant party systems as those in which one political party succeeds in winning at least four consecutive national elections, enabling it to dominate the polity and policy making.[76] And by its very nature, a dominant party democracy leads to reduced accountability. Although it is tempting to say that the current configuration of the Parliament of the Republic of South Africa is on a path of renewal, however, until the reforms are institutionalised, it is not possible to be categorical about this eventuality. The GNU may break down and these reforms may dissipate, or they may disappear altogether after the 2029 national and provincial elections when the government is reconfigured, and a new set of coalition partners may be in office. So, it is a set of contingent reforms, not institutionalised ones yet.

3.8 Is there a need to legislate on the issue of reports by representatives of the Executive to Parliament?

This recommendation by the Zondo report as it relates to the issue of reports by representatives of the Executive is intrinsically linked to the previous recommendation. This inadequate reporting manifests itself in various ways, namely late submission of information to committees, submission of information which lacks the necessary detail, repeat of information previously received in reports by the Executive to Parliament, submission of information that does not speak directly to the committee's business or agenda, or being non-responsive or lack of feedback to remedial measures proposed by Parliament.

As previously advised, there are available tools to parliamentary committees in the performance of their oversight function. No need exists for an intervention in the form

[76] Nicola de Jager and Pierre du Toit, eds., *Friend or Foe? Dominant Party Systems in Southern Africa: Insights from the Developing World* (Tokyo, New York and Cape Town: United Nations University Press and UCT Press, 2013) at pg.10

of legislation regarding the issue of reports by representatives of the Executive to Parliament. As previously demonstrated, parliamentary committees are at will to develop guidelines on managing this exercise. The Constitution and the rules of Parliament already house that regulatory regime. Our current constitutional scheme already permits parliamentary committees to determine their own arrangements and procedures. Accordingly, there is absolutely no need to reinvent the wheel in this regard.

The regulatory framework already exists and, as we have come to witness over the past thirty years, checks and balances are barely functional in a dominant party democracy. The ushering in of the Government of National Unity ("GNU"), as a result of the ANC dropping its electoral support just below 40%, presents the South African populace and indeed Parliament with the real possibility of a rebirth regarding how politics are conducted by different role-players within the realm of South Africa's legislative arm of the state.

3.9 Ministers and others who fail to arrive at scheduled meetings

There is an apparent correlation between this recommendation by Justice Zondo and the two preceding recommendations. Again, contrary to what has been proposed in the Zondo report, I demonstrate below that there is no need for any legislative amendments in this regard as the current regulatory framework suffices as a bulwark to prevent recalcitrant members of the Executive and those who fail to arrive at scheduled committee meetings.

The tools available to portfolio committees are found in the Constitution, the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 ("the PPIPPLA") and the Rules of the National Assembly.

As previously mentioned, Rule 167(f) confers a wide mandate on committees to determine their own working arrangements. Portfolio Committees thus have a wide and open-ended power to conduct their business in whatever way they deem appropriate, subject to the following rules.

A committee may summons witnesses to produce documents and give evidence relevant to its public inquiries. Section 56(a) of the Constitution provides that the National Assembly or any of its committees may summon any person to appear before it to give evidence on oath or affirmation, or to produce documents. The section 56 constitutional provision is supplemented by section 14 of the PPIPPLA. It describes the form and content of a summons by which a witness is compelled to produce documents or give evidence in a committee probe or investigation. These provisions are echoed in rule 167(a) of the NA which provides that a committee may "*summons any person to appear before it to give evidence on oath or affirmation, or to produce documents*."

Section 15 of the PPIPPLA deals with the examination of witnesses and it is an empowering and permissive provision and not a restriction on the way in which witnesses may be examined. It must be construed as not to contradict or detract from the open-ended power conferred on committees of the NA by section 56(a) of the Constitution to summons any person to appear before them "*to give evidence on oath or affirmation*" without restriction.

Section 16 of the PPIPPLA confers qualified privileges on witnesses who give evidence before parliamentary committees. Section 16(1) of the PPIPPLA provides that the law regarding privilege applicable to a witness in the High Court, also applies to a witness who gives evidence before a parliamentary committee. Thus, a portfolio committee is at large to determine its own procedure in the conduct of a public inquiry or its business. Section 57(1) of the Constitution allows the NA to determine and control its own internal procedures and to make rules to do so. Rule 167(f) is a default rule that allows a portfolio committee to "*determine its own working arrangements*" where no other rule provides otherwise.

In terms of section 17(1)(a)(i) of the PPIPPLA, a person who has been summonsed in terms of section 14 and who fails, without sufficient cause, to attend at the time and place specified in the summons commits an offence and is liable to a fine or to imprisonment for a period not exceeding 12 months or to both the fine and the imprisonment. This sanction applies even to persons who fail, without sufficient cause

to answer fully and satisfactorily all questions lawfully put to them and those who fail, without sufficient cause to produce any document in their possession or custody or under their control which they have been required to produce.

3.10 A system to "track and monitor" implementation by the Executive of corrective action proposed in reports adopted by Parliament

It is submitted that there is a very robust case in favour of the proposition that this is a matter which requires serious consideration by the 7th Parliament. Accountability demands that the Executive responds timeously to Parliament to report on remedial actions taken. The Corder Report on oversight and accountability articulated this view more than two decades ago.

Parliament should, first and foremost, put its own house in order prior to putting the blame squarely at the door of the Executive in this regard. Recommendations emanating from committee activities should be thoroughly substantiated and time bound. Such recommendations should also relate to a matter that is within the scope and ambit of the Assembly. This requires diligence and adroitness from the secretariat and the other personnel that supports the committee. Currently, committees do follow up on actions to be taken by the Executive, but the absence of an electronic dashboard that would allow for Parliament to ensure compliance and keep track of deadlines is disempowering on the side of Parliament. Although both the NA and the NCOP have manual systems in place, an easily accessible e-system is required, not only to maintain an electronic record of House resolutions, but to take stock on how the Executive has fared in dealing with them. Such an approach would go a long way in tracking and monitoring the implementation of house resolutions or lack thereof.

In instances where there are delays, such an e-system should trigger a liaison mechanism between the Speaker and the Leader of Government Business ("LOGB") to ensure that the Executive does indeed provide responses to the resolutions of the two Houses of Parliament. To this end, the rules of Parliament should be amended in such a manner that the Speaker would bear the responsibility of reporting semesterly to the Rules Committee on the status of responses from the Executive. The LOGB should submit an annual report to the Speaker on the progress made by the Executive in implementing corrective action as spelled out in the reports adopted by Parliament.

The Rules Committee should consider the Speaker's report and, in turn, report on it to the House. The tracking and monitoring of the implementation by the Executive of

corrective action proposed in reports adopted by Parliament should be one of the apex priorities of the 7th Parliament. It is instructive to note that both the OVAC Model and the Zondo Report are vociferous proponents of this very important function by Parliament - the tracking and monitoring of the implementation by the Executive of corrective action proposed in reports adopted by Parliament. Undeniably, the significance of this recommendation by the State Capture Commission report cannot be faulted.

3.11 The establishment of an Oversight and Advisory Section by Parliament

The core functions of Parliament include making laws, overseeing the work of the Executive and state institutions, facilitating public participation, international participation and cooperative governance.

Ordinarily, the expectation would be that Parliament has dedicated units that are seized with each of these five streams of its core mandate. Regrettably, that is not the case. The current organisational design of Parliament does not definitively speak to the five pillars of its mandate. Fortunately, Parliament is currently seized with an organisational realignment project, and one hopes that, when all is said and done, the subject recommendation by the Zondo Report will see the light of day.

As previously stated, Parliament's own OVAC Model which was completed more than two decades ago points to the need for a dedicated Oversight and Advisory Section whose primary mandate would be to provide advice, technical support, co-ordination, and tracking and monitoring mechanisms on issues arising from oversight and accountability activities of MPs to which they belong.[77] The establishment of such a specialist unit would come in handy and even streamline performance management systems within the unit.

Currently, parliamentary units that fulfil this role are scattered across the various divisions of Parliament. There is an argument that says that the focus should be on building capacity more than on establishing new structures. This argument, in my

[77] Parliament of the RSA *op. cit.* note 19 in section 4 (no page number supplied)

respectful view, misses the point, in that, a dedicated Oversight and Advisory Section would ensure a more co-ordinated, integrated and holistic approach to this critically important core mandate of Parliament. To a large degree, Parliament is already in possession of the requisite personnel and the attendant skills, however, the skill set it has, needs to be rearranged, re-organised, and better positioned for effective oversight.

The scope and ambit of oversight cannot just be limited to MPs asking questions from members of the Executive. Oversight is much broader than that – it includes, but not limited to, monitoring and tracking Executive compliance with House resolutions. It also includes information management and the provision of information and advisory support to parliamentary oversight activities. One hopes that the outcome of Parliament's organisational realignment project would be the advent of a dedicated Oversight and Advisory Section. Such an approach would be par for the course with our constitutional scheme because oversight is a constitutionally mandated function of Parliament in the South African politico-legal landscape.

3.12 Legislating the principle of "amendatory accountability"

Quite often it is said that accountability is the hallmark of modern democratic governance, and that democracy remains dull and lacks originality if those in power cannot be held accountable in public for their acts or omissions, for their decisions, their expenditure or policies.[78] Prof Corder stretches this definition by asserting that accountability also requires that the person goes on to make amends for any fault or error and take steps to prevent its recurrence.[79]

According to Prof Corder, amendatory accountability refers to the duty, inherent in the concept of accountability, to rectify or make good any shortcoming or mistake that is uncovered.[80] Put simply, the obligation to redress grievances by taking steps to remedy defects in policy or legislation can be termed amendatory accountability.[81]

[78] *Ibid.*
[79] Corder H. Affidavit in the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State, (2020) at page 5
[80] *Ibid.* at page 13
[81] Corder *et al. op. cit.* note 14 (no page number supplied)

According to Professor Corder, the elephant in the room is that, at present, there is no machinery that exists by which Parliament can compel the Executive or an organ of state to answer to it even though the South African Constitution makes accountability to Parliament mandatory.

Professor Corder's view is that the constitutional provisions empowering oversight are a skeleton that requires flesh in the form of legislation to give detail to what is expected of MPs and consequence management for the Executive. To the extent that effective oversight requires legal authority and rules to enforce accountability, one cannot fault Professor Corder's scholarly view and recommendation that Parliament must draft and enact an *Accountability Standards Act and Independence of Constitutional Institutions Act*. Without doubt, such legislation will concretise the law on accountability and remove accountability from the realm of political ambiguity. The effect of such legislation would be to map out, standardise, and devise clear mechanisms that promote responsiveness and effective accountability. Such a bold step from Parliament would not only be commendable but would put paid to political uncertainty in relation to oversight and accountability. In amplification of this, I would hasten to add that a best practice study needs to be undertaken by Parliament to look at whether other jurisdictions have comparable laws.

3.13 Amendment of Parliament's rules to enhance the principle of amendatory accountability

In terms of the Constitution, Parliament is constitutionally empowered to determine and control its internal arrangements, proceedings and procedures; and to make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.[82]

The subject recommendation by the Zondo Report is inherently linked to the previous one, in that, absent an empowering legislation that supports the principle of "amendatory accountability", the State Capture Commission was of the view that an

[82] Sections 57(1) and 70(1) of the Constitution of the RSA, 1996

amendment of Parliament's rules could be undertaken to give effect to this important principle of accountability.

As previously communicated, the biggest bee in the bonnet with oversight is that Parliament's authority cannot just have a recommendatory character and be without consequence management. Simply put, the issue is what happens when Parliament has suggested remedial measures and the Executive has not attended to those, without reason. This is at the heart of amendatory accountability, and sadly, this is glaringly lacking within our current parliamentary system of government.

The key question is: other than facilitating co-operation between Parliament and the Executive, what fallback position does Parliament have in the face of a disobedient Executive? This is the nub of Professor Corder's principle of amendatory accountability, the cardinal issue by the State Capture Commission report being whether in the absence of a targeted legislative machinery that speaks to this important aspect, the parliamentary rules can be bolstered in order to deal with this missing link in the plenary powers of Parliament. I must hasten to add that I provide a searing critique of this recommendation, together with the preceding one in the next chapter wherein I deal with the scope and ambit of parliamentary oversight.

3.14 Support of a majority of members of a portfolio committee vis-à-vis remedial action and the role of the Speaker, the President and the Leader of Government Business

In terms of Rule 154 of the National Assembly, parties are entitled to be represented in committees in substantially the same proportion as the proportion in which they are represented in the Assembly. A portfolio committee consists of the number of Assembly members that the Speaker may determine with the concurrence of the Rules Committee in each case, subject to the provisions of Rule 154.[83]

For the first time since 1994, ANC representation in parliamentary committees is less than 50 percent. At the heart of this recommendation is the fact that parliamentary committees' hands are not entirely tied when a member of the Executive is non-

[83] Rule 226 of the Rules of the National Assembly 9th Edition

compliant or is not attending to remedial action as sanctioned by Parliament. If the committee is faced with a recalcitrant minister, the portfolio committee could escalate the matter to the head of the institution – the Speaker of the National Assembly – who, in turn, may take this up with the Leader of Government Business or the President as the head of the national executive.

However, this could only happen if such recourse finds support of the majority of members of a portfolio committee. Our recent past has shown that in the context of our political system, a dominant party democracy diminishes any sense of accountability. Voting and decision-making even at the level of parliamentary committees is done along party lines. Notwithstanding this, in the current political environment, and contrary to what Prof Calland had presented to the Zondo Commission, the oversight and accountability powers of Parliament should not be determined by "the political attitude and disposition of the 'ruling party'." There is no 'ruling party' anymore, as it were, as Parliament now has the power not to be reduced to a mere rubberstamp, but instead an august institution with the power to hold the Executive accountable.

When the State Capture Commission mooted this recommendation, the political landscape in South Africa was that of a dominant party system. The Zondo Report had imagined that barring narrow and sectarian party-political interests which had characterised Parliament before the May 2024 national and provincial elections, a portfolio committee could put a minister to terms in respect of remedial action, with a support of a majority of members of a portfolio committee. The current configuration of Parliament creates favourable conditions for committees to stamp out any wayward behaviour from a member of the Executive as regards accountability and oversight.

The political climate is conducive for the escalation to the Office of the Speaker of any sticky issues which the committee may have stemming from recalcitrant ministers regarding remedial action. The Speaker may take this up with the Leader of Government Business, who is usually the Deputy President. Should this fail, the Speaker could escalate the committees' grievances to the President, who is the head of state and head of the national executive. As previously communicated, the

parliamentary rules will have to be amended such that they place an obligation on the Speaker to report to the Rules Committee on a semesterly basis regarding the further conduct of all matters that have been escalated by parliamentary committees to his/her office. In turn, the LOGB should also be directed to, through the development and amelioration of parliamentary rules, compile a yearly report and account thereon to Parliament regarding all the matters that have been escalated to his/her office.

3.15 Appointment of more representatives of opposition parties as chairs of portfolio committees

As noted earlier, committees are the engine room of Parliament where the bulk of the work of the Executive is scrutinised. In the main, the role of committees includes exercising oversight over the Executive and facilitating public involvement in law-making. Chairpersons play a key role in presiding over and in determining the agenda of meetings and organising the administrative affairs of a committee. This is a very powerful position, and the incumbent largely sets the tone for the committee.

Even the Zondo report says the following about the importance of the role of committee chairs:

"*Many witnesses agreed that the role played by the chair of a portfolio committee is influential in determining the extent to which a committee succeeds or fails in its oversight mandate. It is a matter of considerable concern that not all persons appointed as committee chairs have the requisite inclinations or demonstrated capacities*."[84]

From 2004 to 2009, the Chairperson of the Portfolio Committee on Correctional Services ("PCCS") was Mr Dennis Bloem, then an ANC MP. He was a morally upright figure who had no truck for corruption. As a result of his personality and character, his style of leadership energised the committee to probe the corruption allegations concerning Bosasa[85] and the Department of Correctional Services. Mr Bloem

[84] Zondo RMM *op. cit.* note 60 at para. 1235

[85] Bosasa was a South African company specializing in providing services to government, most notably the Department of Correctional Services. The company was liquidated in 2019 after whistleblower Angelo Agrizzi revealed the malfeasance in a prolonged scandal about its allegedly corrupt relationship with members of the ANC, aired during the Zondo Commission of Inquiry

demonstrated bravery in the face of intense political pressure from senior members of his political party (ANC), which was the dominant party at the time.

In 2017 and 2018, ANC MP, Zukiswa Rantho, was the Chairperson of the Portfolio Committee on Public Enterprises ("PCPE") and she courageously led a parliamentary inquiry into corruption and maladministration at ESKOM. This parliamentary inquiry resulted in a robust report that was unanimously adopted by all political parties across party lines. The report recommended criminal investigations against certain officials and was very scathing against ministers Lynne Brown and Malusi Gigaba.

Giving evidence at the Zondo Commission of Inquiry, Ms Rantho had the following to say about the daunting challenges of chairing a committee that deals with sensitive political matters:

"*Whilst members of the ANC's PCPE "study group" supported the idea of instituting an inquiry, there was a push to scupper the inquiry from a substantial number of members in the ANC parliamentary caucus, who argued that the inquiry would cause divisions and would taint the integrity of the ANC. Of particular concern to some members of the caucus was the risk to the reputation of the party. These views were openly communicated to me in clear and emphatic terms.*"[86]

Sadly, this gallantry and act of valour from both these distinguished former chairpersons meant they had met their political fate, in that, Mr Bloem had to leave the ANC and join the Congress of the People ("COPE") whilst Ms Rantho testified at the Zondo Commission that "*I believe that the fact that I am no longer a Member of Parliament – and that only two of the ANC's 2014 – 2019 PCPE study group are still members – may illustrate the point.*"[87]

As a result of the aforesaid political dynamics within the context of the configuration of the erstwhile parliamentary committee system, it was recommended that Parliament should consider whether representatives of opposition parties should be appointed as chairs of portfolio committees. The rationale for this is that

[86] Zondo RMM *op. cit.* note 60 at para. 869
[87] *Ibid.* at para. 867

parliamentary oversight may be better served if more chairpersons were elected from representatives of opposition parties as it is the convention with the Standing Committee on Public Accounts ("SCOPA"). In 2023, the Rules Committee did not agree with the view expressed by the State Capture Commission in this regard. In rebuttal of this, the previous Rules Committee sought succour from sections 57 and 70 of the Constitution which empower both the Assembly and the Council to determine their internal arrangements, proceedings and procedures.[88]

Regrettably, the position of Parliament's Rules Committee in this regard is on a collision course with section 57(2)(b) of the Constitution which stipulates that the rules and orders of the NA must provide for the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy. Nothing, in law, impedes Parliament from developing, via its parliamentary rules, a proportional formula that speaks to party representation on the appointment of chairpersons of portfolio committees. Even though at the beginning Parliament was balking at such an idea, the outcome of the recent national and provincial elections has left the institution with no choice other than to cave in to this progressive democratic practice. The picture has changed dramatically in this 7th Parliament, and one hopes that the South African nation will reap its most prized dividend of accountability and effective oversight. Out of 30 (thirty) portfolio committees, 7 (seven) are chaired by representatives of opposition parties. Out of 5 (five) standing committees of the National Assembly, 3 (three) are chaired by representatives of opposition parties, namely Standing Committee on the Auditor-General, with Mr Wouter Wessels from the FF Plus as its chairperson; Standing Committee on Public Accounts, with Mr Songezo Zibi from Rise Mzansi as its chairperson and the Standing Committee on Appropriations, with Mr Musi Maimane from Building One South Africa ("BOSA") as its chairperson. And, out of 10 (ten) select committees of the NCOP, 3 (three) of them are chaired by representatives of opposition parties.

[88] Parliament of the RSA *op. cit.* note 74 at page 5

Although the jury is still out on how the current configuration of the chairpersons of parliamentary committees will impact Parliament's constitutional oversight function, there is a glimmer of hope that these representatives of opposition parties, who are chairing these parliamentary committees, will discharge their responsibilities without any fear of personal consequences, or free from undue partisan political and leadership pressures. And as previously mentioned, the incident that took place on 20 September 2024 at a meeting of the portfolio committee on Sports, Arts and Culture in which the department of Sports, Arts and Culture was sent packing for ill-preparedness amply demonstrates the oversight and accountability advantages of having this arrangement. The current chairperson of the portfolio committee on Sports, Arts and Culture is Mr Joe McGluwa who is a member of the Democratic Alliance ("DA") from the North-West province. The stance the portfolio committee has taken under his stewardship is unprecedented and a step in the right direction for accountability and effective oversight.

The majority which the ANC used to command in previous parliaments has been reduced by the South African voters in the recent elections, and this ushered in a new culture on how the business of Parliament is or ought to be conducted, akin to what the late Professor Etienne Mureinik[89] distinctively coined a "*culture of justification*."[90] Parliament has a constitutional responsibility to nurture this culture by bringing the Executive before it (and by extension, before the public) and calling on it to justify and explain the policies adopted and implemented and the governance decisions taken.[91]

3.16 Proposals by Corruption Watch on appointments by Parliament

The joint submission by Corruption Watch ("CW") and the Institute for Security Studies ("ISS") to the Zondo Commission was predicated on a detailed examination of evidence about the nature of Executive manipulation and interference in law enforcement agencies, particularly under the administration of South Africa's former

[89] Etienne Mureinik (January 1954 – 10 July 1996) was a South African lawyer and legal scholar. He was an expert on administrative law and constitutional law.
[90] E Mureinik, "A Bridge to Where? Introducing the Interim Bill of Rights," *South African Journal on Human Rights* 10 (1994) at pg. 31
[91] I Currie and J de Waal *The New Constitutional and Administrative Law* (2001) at pg. 89

President, Jacob Zuma. These concerns have, to a large degree, been raised in the past by several non-governmental organisations and civil society in general, including research and advocacy institutes like the Africa Criminal Justice Reform ("ACJR").

At the heart of the submission under review is that independence from manipulation and interference by the Executive is the very pivot of how law enforcement agencies should conduct their work. For instance, the core mandate of the National Prosecuting Authority ("NPA") is to institute criminal proceedings against persons and companies on behalf of the state. It is the only state body mandated to do so, and it can be argued that the NPA stands in a very special relationship to the constitutional principle of accountability, even more so, one may argue that the NPA is the custodian of this principle.

For example, it is submitted that there is a very robust case in favour of the proposition that the National Director of Public Prosecutions ("NDPP") is very powerful and with this power comes the real risk that an unsuitable person may be appointed, and that the appointee may be beholden to the President or persons close to the President. The entire top echelon of the NPA, at least 14 positions, is appointed by the President and the Minister of Justice without any input from other key stakeholders, such as Parliament, professional bodies, or the public in general.[92] The ACJR is amongst the organisations that have made submissions that this centralisation and lack of transparency pose significant risks for the NPA's independence and integrity.[93]

The requirement that the NDPP be a fit and proper person is relevant in both the appointment and dismissal of the NDPP.[94] The parliamentary ad hoc committee that dealt with the suspension and dismissal of Adv Vusi Pikoli observed that "it may be an anomaly that Parliament plays no role in appointing the NDPP, but has the final say in his or her removal." As things currently stand, the NDPP can be removed from office by a simple majority vote of the NA as provided for in the NPA Act.[95] Civil

[92] Ss 11(1), 13(1), 15(1) (a and c) of the National Prosecuting Authority Act No.32 of 1998
[93] An important precedent was set with the appointment of Adv Batohi as NDPP in both the appointment of an interview panel and opening the interviews to the public.
[94] Ss 9(1)(b) and 12(6)(a) of the NPA Act
[95] Section 12(6)(c) of the NPA Act

society has made submissions that this seems strange, given the vast powers of the NDPP, compared to the Public Protector ("PP") and Auditor-General of South Africa ("AGSA") for which a two thirds majority in the NA is required to remove them from office for misconduct, incapacity and incompetence.

Civil society organizations have recommended that the appointment of the NDPP and other senior positions in the NPA must be clearly described in the Constitution and this requires an open and transparent process that relies on evidence, and which is based on merit and protected from political interference and that assesses candidates objectively against the criteria set out in section 195(1) of the Constitution. These organisations have further recommended that the Constitution be amended at section 179 by providing for a removal procedure along the lines of what has now been developed in respect of the removal of the President and functionaries of Chapter 9 institutions. The idea is that such an approach will bring consistency in the interpretation and application of constitutional principles and values as set out in section 195(1) of the Constitution.

An important precedent was set with the appointment of Adv Batohi as NDPP in both the appointment of an interview panel and opening the interviews to the public.[96] This was a crucial step in rebuilding trust in the NPA. As much as this is commendable, it cannot be left to a sitting President to decide how the NDPP will be appointed. The Constitution should provide for such a procedure. Civil society has pointed out that the NA is tasked with appointing the heads of key institutions and that there is a need for selection processes to be amended in order to ensure that, amongst others, the parliamentary appointment system is embedded in the principles of transparency, meritocracy and public participation.

Speaking at the Mapungubwe Institute and Thabo Mbeki Leadership Institute conference on 20 Years of Democracy, held at the University of South Africa on 12 November 2014, former Deputy Chief Justice Dikgang Moseneke said as much as the Constitution is supposed to rest on co-operative governance between the different

[96] 'High Court Orders NDPP Interviews Open to Media', Mail & Guardian, 13 November 2018 <https:/mg.co.za/article/2018-11-13-high-court-orders-ndpp-interviews-open-to-media/>

levels of power, "*a careful examination of the powers of the national executive chapter in the Constitution displays a remarkable concentration of the President's powers of appointment.*"[97]

The former Deputy Chief Justice suggested that in the next two decades South Africa should revisit the dispersal of public power because the manner in which the power is currently allocated is not always optimal for advancing the democratic project. He pointed out that the President also appoints the Chief Justice, the Deputy Chief Justice, appoints all judges and heads of institutions such as the NPA, the PP, the AGSA, members of other Chapter 9 institutions etc, and may remove them on specified grounds.

The former Deputy Chief Justice also pointed out that the President appoints the head of police, military, intelligence service, governor of the Reserve Bank, Commissioner of the South African Revenue Service, and similar institutions. He said when the Constitution was being formulated and there were differences over who had the power to appoint a state official, negotiators were too eager to put much power in former President Nelson Mandela's hands because, "*he (Mandela) would have done the right thing*."[98] The former Deputy Chief Justice continued, "*as you would expect, powers of appointments are often coupled with powers of removal, albeit subject to some prescribed process*."

The former Deputy Chief Justice said the question was how appointments of such public functionaries could be shielded from personal preferences and vagaries of the appointing authority. He posed the question, "*how best must we safeguard the effectiveness and integrity of public institutions indispensable to the democratic polity?*". He warned ominously: "*This uncanny concentration of power is a matter which going forward we may ignore, but only at our peril*."

Speaking at the Conhill Trust's We the People Campaign in March 2022, and asked about what he would change about the Constitution, the former Deputy Chief Justice said: "*We created an imperial Presidency where just about everything that wield power is appointed by the President – all the key appointments, there is remarkable concentration of*

[97] https://www.news24.com/news24/moseneke-calls-for-review-of-presidential-powers-20150429
[98] https://enca.com/south-africa/moseneke-calls-review-presidents-powers

executive power and the consequence is that there are insufficient mechanisms to temper this power." He said the "*weak link*" in the Constitution is the architecture of the Executive.[99]

In view of the foregoing, whilst there is nothing unlawful or unconstitutional about our present constitutional scheme as regards the appointment and removal of heads of key institutions, there is no denying that constitutional reforms are necessary. The proposed reforms would not only strengthen our democratic polity, but they would safeguard the effectiveness and integrity of the appointment and removal process thus tempering this concentration of power in the President. This would shield the heads of our key institutions from personal preferences and vagaries of the appointing authority.

[99] https://www.dailymaverick.co.za/article/2022-03-21-imperial-presidency-the-weak-link-in-the-constitution-retired-justice-dikgang-moseneke/

CHAPTER 4

4. THE SCOPE AND AMBIT OF PARLIAMENTARY OVERSIGHT

This chapter looks at a more nuanced and deeper discussion about the scope and ambit of parliamentary oversight. Here, the key question being: how far can Parliament, as an institution, take its constitutionally mandated oversight function? What are the limits that are inherent in this process? Moreover, one of the questions being what are the real teeth of Parliament and what can it really do if the Executive ignores it?

4.1 Doctrine of separation of powers

The doctrine means that specific functions, duties and responsibilities are allocated to distinctive institutions with a defined means of competence and jurisdiction. It is a separation of three main spheres of government, namely, Legislative, Executive and Judiciary. Within the constitutional framework, the meaning of the terms legislative, executive and judicial authority is of great importance.

Legislative authority is the power to make, amend and repeal rules of law. Executive authority is the power to execute and enforce rules of law. Judicial authority is the power; if there is a dispute, to determine what the law is and how it should be applied in the resolution of that dispute.[100]

The doctrine of separation of powers means ordinarily that if one of the three spheres of government is responsible for the enactment of rules of law, that body shall not also be charged with their execution or with judicial decision about them. The same will be said of the executive authority, it is not supposed to enact law or to administer justice and the judicial authority should not enact or execute laws.

Whilst there is an appreciation that complete separation of powers is not possible – either in theory or in practice, however, our jurisprudence seems to be authoritative on the fact that the primary responsibility of a court is not to make decisions reserved

[100] Rautenbach I M *Constitutional Law* 4 ed (2003) at pg.78

for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. Against this background, it would militate against this doctrine if Parliament were to be turned into a law enforcement agency or, primarily, as an investigatory body. To quote from two eminent scholars, parliamentary control over the executive "*means influence, not direct power; advice, not command; criticism, not obstruction; scrutiny, not initiation; and publicity, not secrecy*".[101]

Explanatory accountability requires the giving of reasons and the explanation for action taken as the Constitution requires of the Executive. The bulk of the oversight work done in Parliament falls under this category. This is what Prof Calland terms 'soft accountability', and it builds on Professor Etienne Mureinik's renowned conceptualisation of a "*culture of justification*".[102] Conventionally, this is in the form of oral and written questions, debates, parliamentary inquiries and resultant reports.

Amendatory accountability, on the other hand, is the "*obligation to redress grievances by taking steps to remedy defects in policy or legislation*"[103] - to amend or to make amendments. This primarily deals with the ability of Parliament to alter the behaviour of the Executive, either through the imposition of sanctions and consequence management. Professor Calland terms this form of accountability as 'hard accountability' and his view is that this is a task better suited to another branch of government: the judiciary. This is consistent with the doctrine of separation of powers. However, the fact that other state institutions have more teeth than Parliament in exercising this form of accountability does not denote a monumental routine failure on the regulatory architecture of Parliament. Parliament should, as a matter of principle, not usurp the pivotal role played by Executive organs of state - prosecutorial and investigatory bodies - because doing so would be on a collision course with Parliament's elementary constitutional mandate, which is to make, amend and repeal laws. Primarily, the power to execute and enforce laws should be left to the Executive.

[101] C Turpin and A Tomkins *British Government and the Constitution: Text and Materials* (2007) at pg.590
[102] Calland R *op. cit.* note 54 at pg.12
[103] Corder H *et al op. cit.* note 14

The doctrine of separation of powers is essentially about striking this necessary balance amongst these three different branches of government.

4.2 Lack of political will

Parliament also possesses what the writer calls the 'stick approach' type of accountability in its oversight and accountability arsenal in the form of its ability to pass no confidence motions, even though this does not apply in relation to individual ministers. In addition, the power of Parliament to refer apparent unlawful conduct on behalf of government to prosecutorial and investigatory bodies bears testimony to this reality. However, the problem with these mechanisms in practice, is that they are all dependent on the political will of those who occupy positions of influence, and according to Professor Calland, "*the centre of power of which resides beyond the walls of Parliament*".[104]

The Chairperson of the ANC, Mr Gwede Mantashe, told the Zondo Commission that "*the effectiveness of legislative oversight is not a function of oversight capacity but of political will*".[105] To illustrate this point, media reports about the Guptas started in 2011, yet there was no political will in the then leadership of the ANC to act against them because its then President, Mr Jacob Zuma, and his associates were feeding at the public trough. Yet, at the time, no less than eight motions of no confidence in the President were proposed by opposition parties during his term of office and all of them dismally failed. As we now know, "*if the ANC had not protected President Zuma and he had been removed from office, the Guptas would probably had fled as they did in 2018 and therefore would not have looted the way they did*."[106]

On 22 March 2023, the ANC voted against the formation of a parliamentary multi-party ad hoc committee to investigate the Phala Phala matter even though a panel of three independent legal experts had concluded that President Ramaphosa had a case to answer. Again, because of absence of political will, the ANC used its numerical strength at the time to block the NA from exercising its oversight over the Executive.

[104] Calland R *op. cit.* note 54 at pg.12
[105] Zondo Report *op. cit.* note 60 at para 563
[106] *Ibid.* at para 733

During the Question-and-Answer session of Deputy President Paul Mashatile the then Chief Whip of the Democratic Alliance, Ms Siviwe Gwarube, had asked a question to the LOGB as to what should be done about Parliament's constitutional obligation to investigate the Head of State and Government about the Phala Phala matter, as part of its duty to exercise oversight over the Executive. In reply, the LOGB had pleaded for Parliament to wait while other state institutions, such as the Public Protector, the Hawks, the Reserve Bank and others are investigating the Phala Phala matter. This is a fundamental departure from South Africa's constitutional scheme because Parliament has an obligatory constitutional function to exercise oversight over the Executive and it obviously cannot be expected to delegate such oversight to the very same Executive and/or its organs. The question begs: what is the most important reason or purpose of parliamentary oversight? Is it to simply ask questions and expose problems, or does it extend to taking a dim view of any partisan and parochial party interests that seek to direct MPs of every political hue to collude in or cover up illegal or unconstitutional conduct?

It is instructive to note that there are instances where the presence of political will has borne some fruit, for example, in the establishment of the ad hoc committee into the fitness of SABC Board in 2016 and again in the inquiry into Eskom, Transnet and Denel in 2017. The respective portfolio committees held public hearings in which numerous witnesses gave evidence and were questioned. Consequently, the committees made several critical findings, including that there was *prima facie* evidence that the primary mandates of these public entities had been compromised by a lapse of governance and that their respective boards had not discharged their fiduciary duties.

Again, in 2023 when President Ramaphosa was not warming up to some of the names who were recommended for selection into the SABC board by the Portfolio Committee on Communications and Digital Technologies ("PCCDT"), the members of that committee had a courage of conviction and endorsed a legal opinion whose advice was simply that the President had no legal basis whatsoever to prescribe to the NA and, by extension, to the committee on how it should conduct its business. In the final analysis, the President caved in, and the committee's word prevailed. These are some

of the good stories to tell regarding parliamentary oversight, and they amply demonstrate that where there is a will, there is indeed a way. Regrettably, these glowing examples of demonstrable political will are few and far between. And the reason for this was confirmed by Gwede Mantashe's submission to the Zondo Commission that "the effectiveness of legislative oversight is not a function of oversight capacity but of political will."

4.3 Leadership

The absence of leadership is the biggest bugbear that has a corrosive effect on the pulse of the South African nation. This starts right at the top from the highest office in the land – the President – and permeates every nook and cranny of our state organs, including Parliament. In the Nkandla judgment, the Constitutional Court had the following to say about the centrality of the President in our constitutional democratic state:

"*He is the first citizen of this country and occupies a position indispensable for the effective governance of our democratic country. Only upon him has the constitutional obligation to uphold, defend and respect the Constitution as the supreme law of the Republic has been imposed*."[107]

The first part of the Zondo report was published on 4 January 2022 and the fifth and final part was published on 22 June 2022. As we now know, the Zondo Commission cost the state close to R1 billion, far more than any other judicial inquiry in the history of South Africa, yet some members of the Executive were implicated in the Zondo report and none of them have been fired by the President. Writing in his Sunday Times column, Mr Barney Mthombothi, had the following to say about this situation:

"*Thus far none of the big beasts fingered in the commission have been held to account. They're enjoying their freedom and their loot. Some are even making laws in parliament; others are making decisions in the cabinet, with a gaggle of sycophants at their beck and call*."[108]

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[107] *Economic Freedom Fighters v Speaker, National Assembly* 2016 (3) SA 580 (CC) at para 20

[108] Barney Mthombothi "*Batohi has become a poster child of the failure to combat scourge of corruption*" in Sunday Times, 24 November 2024, at pg.17

On the other hand, the President has been issuing numerous proclamations to the Special Investigating Unit ("SIU"), authorising the Unit to clamp down on corruption, yet he does nothing to those who are serving in the Executive at his behest. This demonstrates that the President lacks moral courage, and this lends credence to the metaphor that the fish rots from the head down. This speaks volumes about his leadership style and denotes that in addition to being a major contributing factor in an institution's success, leadership is also the root cause of an institution's failure and demise. We now know that the blocking of the establishment of a multi-party ad hoc committee on the Phala Phala matter is most probably one of the topical issues that did not hit the right note with the voters as the ANC's electoral support dipped substantially in the recent provincial and national elections.

Currently, we have a serving Minister, Ms Thembi Simelane, who has been seriously implicated in the VBS Mutual Bank imbroglio, yet the President has, hitherto, not acted on it. This is so even though Adv Terry Motau's report on the looting frenzy at VBS was released in October 2018. To sum up, the dictum that we have no problem of policy, but that of leadership rings true.

4.4 Electoral system

South Africa's Constitution is largely based on a party-list system of proportional representation. Under this system, MPs do not represent a particular constituency. Their election and re-election prospects turn on where they are placed on a party list and the proportion of support enjoyed in an election by that party. Accordingly, under these circumstances, voters vote for a political party and not for a person. This, to a large degree, distorts the democratic process and its outcomes.

A system which incorporates both components of proportional representation, together with substantial elements of a constituency-based electoral system is desirable. However, a constituency-based electoral system of the President would be commendable in order to strengthen accountability of Parliament and its elected representatives. For instance, unlike in other countries where the Deputy President is a running mate who is elected on his own, in terms of the South African political

system, the Deputy President is appointed by the President. Speaking at the Mapungubwe Institute and Thabo Mbeki Leadership Institute conference on 20 Years of Democracy, held at the University of Stellenbosch in 2014, our former Deputy Chief Justice, Dikgang Moseneke, had the following to say about this situation:

"*This means he or she may be dismissed summarily by the President. Our history has shown how the dismissal of a Deputy President could be deleterious to the executive function*."[109]

Our current electoral system fosters a culture in which MPs are accountable and beholden to their party bosses and not to the electorate. Justice Zondo had the following to say about the prevalence of this anti-democratic culture in our body politic:

"*A system in which Members of Parliament are accountable and beholden to party bosses is not well suited to securing parliamentary oversight of the executive comprising, as it generally does, party bosses*."[110]

The political fate that befell Ms Zukiswa Rantho and Mr Dennis Bloem for discharging their constitutional obligations as chairpersons of their respective portfolio committees bears testimony to this unfortunate reality. Mr Andrew Feinstein's name also comes to mind, particularly regarding the role he played in SCOPA as an advocate against corruption in respect of the Arms Deal. Axiomatically, South Africa's current electoral system is one of the inhibiting factors when it comes to the exercise of parliamentary oversight by members of Parliament. However, and as previously advised, one must hasten to add that electoral reforms will not be a panacea to all the ills that beset our body politic as all electoral systems have their advantages and disadvantages.

4.5 The inherent tension between party loyalty and parliamentary oversight

As previously mentioned, the constitutional framework, including the oath of office which MPs take prior to assuming their constitutional obligations does not allow them to vote according to their party's wishes if they believed that to do so would be against

[109] Daily Maverick *op. cit.* note 99
[110] Zondo RMM *op. cit.* note 60 at para 1010

the interests of the people of South Africa. However, section 47(3)(c) of the Constitution sets the cat amongst the pigeons, in that, it provides that a person loses membership of the NA if that person ceases to be a member of the party that nominated that person as a member of the Assembly.

Although this inherent tension between party loyalty and parliamentary oversight is intrinsically linked to the way in which South Africa's electoral system is designed, the writer has thought it prudent to put it as a stand-alone item because it is sanctioned by the Constitution. One must also hasten to add that the existence of such a constitutional provision is understandable given our party-based proportional representation electoral system. However, as Justice Zondo said in his report, this provision has "*the potential to undermine effective parliamentary oversight over the executive branch of government, particularly if there are insufficient constraints against expulsion of members of Parliament from the parties they represent*."[111]

The above concern by the Zondo Commission builds on Professor Calland's work in which he posits that to his mind the institutional insulation of individual members of Parliament from partisan political pressure, applied generally by the leadership of their own party, is the primary challenge to confront and address.[112] Although Prof Calland may have said this in the context of a dominant party regime, but his postulation rings true even within the realm of the so-called GNU.

4.6 Structural limitations and party influence

Again, because of the way South Africa's political system is designed, there is a tendency of promoting senior MPs, usually chairpersons of committees, to the Executive sphere of government. For instance, when there is a Cabinet reshuffle, replacements are usually drawn from this cohort. This obviously weakens oversight as the incumbents are bound to be Executive minded in their quest to position themselves as part of ameliorating their political career prospects.

[111] *Ibid.* at para 1017
[112] Calland *op. cit*. note 54 at pg.22

Another corrosive tendency is that of ordinary portfolio committee members being shuffled from one committee to another and hardly ever sitting in one committee for the duration of the entire electoral term. This, in effect, weakens oversight, in that, committees as the engine room of Parliament become a revolving-door workplace akin to an organisation that people tend to enter and leave very quickly. As one can imagine, this negatively affects oversight effectiveness.

There is no denying that oversight is political in character and thus the central role which political parties play in this process cannot be wished away. The high turnover rate of MPs is one of the issues that weaken oversight. For instance, in this 7th Parliament, only thirty nine percent (39%) of the current cohort of MPs in the National Assembly are returning MPs. Sixty one percent (61%) of them are new MPs. This means that out of every ten MPs, six are new. Without doubt, this leads to the loss of institutional memory which has the effect of eroding capacity in the institution.

Furthermore, the importance of educational qualifications amongst MPs cannot be overemphasised as they exercise oversight over multi-billion-rand budgets of state institutions. Surely, political parties have a moral duty to protect the people of South Africa from substandard MPs. In this regard, Parliament can train MPs, but political parties deploy them. Indeed, the conversation should start there if we want to talk about a fit and proper MP. If political parties continue to hold back on setting minimum criteria for the eligibility of party members to become MPs, then the expectation of a fit and proper MP will remain a fantasy, and the standard of oversight is likely to remain at a low ebb.

CHAPTER 5

5. CONCLUSION AND RECOMMENDATIONS

This section makes a strategic case for the need for institutional and regulatory reforms and begs the question: what are the lessons for Parliament emanating from the State Capture Commission Report?

5.1 Establishment of a parliamentary committee to oversee the Presidency

As previously communicated, the Subcommittee on the Review of Assembly Rules is now seized with the modalities of establishing this oversight committee, after which a detailed report will serve before the Rules Committee, for consideration and report. As a corollary, the Rules of the Assembly will have to be amended to reflect this progressive development.

5.2 Electoral reforms

The importance of introducing these reforms is beyond question and the Electoral Reform Consultation Panel ("ERCP") has already begun its work in earnest. Whilst this is no panacea for all the ills that beset our body politic, there is no doubt that this significant step will assist in fortifying our democracy. Parliament should be commended for eventually setting the wheels in motion regarding this important process.

5.3 Socio-economic impact assessment of all legislation passed by Parliament

Going forward, Parliament should, after the completion of each term, commission a study into the socio-economic impact assessment of all legislation passed by it. This will help in giving a sense of whether the mischief which the legislation was intended to address has been achieved, failing which a plugging of holes, if any, should be initiated by the succeeding Parliament. For this practice to take place, it must be grounded in the parliamentary rules. The prescribed timeframe in which this assessment should be carried should be after a period of five years of the legislation

coming into effect. In other words, for the assessment to take place, the relevant legislation should have been promulgated for a period of no less than five years.

5.4 Sub judice rule

Parliament should not hide behind this rule in discharging its constitutional obligations. Parliament and the judiciary are institutions of equal standing. Neither trumps the other. There is no rule that says that Parliament may not enquire into and report on a matter merely because it also happens to be before the courts. Parliament and the judiciary perform different functions and may do so in parallel in relation to the same subject-matter. The fact that a matter is pending before the one does not sterilise the other. This must be clearly articulated in the rules of Parliament and the current rules will have to be changed to reflect this momentous development.

5.5 Retention of skilled and experienced MPs after the elections

Whilst this resides in the realm of political parties, the high turnover rate of MPs leads to the loss of institutional memory, and this erodes capacity in the institution. The leadership of the institution in collaboration with the leadership of all political parties that are represented in Parliament should advocate for an outcome that has both elements of change and continuity in the retention of MPs after the elections. Democracy must not work to the disadvantage of the electorate.

5.6 Setting minimum criteria for the eligibility of party members to become MPs

This also sits within the domain of political parties, but the leadership of Parliament must be at the forefront of advocating for this because without it, accountability and effective oversight are likely to remain impeded. Other political parties have already started moving in this direction because Parliament is a complex institution that does not require substandard MPs, particularly in the current epoch.

5.7 Changes to section 47(3)(c) of the Constitution

As things currently stand, this provision might be on a collision course with the work that the Electoral Reform Consultation Panel is seized with in its quest for electoral reforms. In terms of the Joint Rules of Parliament, the Constitutional Review Committee ("CRC") must review the constitution at least once annually.[113] This is one of the big-ticket items that must serve before the CRC in this 7th Parliament because this provision has the potential to undermine effective parliamentary oversight over the Executive branch of government. A full-scale review of this provision will have to be undertaken by the 7th Parliament under the aegis of the CRC.

5.8 Development of a tracking and monitoring system

Parliament must urgently attend to the development of a tracking and monitoring e-system to ensure that the perennial problem of the same issues recurring, with no redress, is prevented. Otherwise, even the good work produced by parliamentary committees is rendered useless if committee recommendations and, by extension, House resolutions are not diligently followed up and attended to by the Executive.

5.9 Allocation of adequate funds to committees

Effective parliamentary oversight can only be realised if such a constitutional function is backed with adequate resources. Whilst committees remain the engine room of Parliament, it is also true that physical oversight allows for better interrogation and understanding of issues than presentations given in a committee room. Oversight visits create a far more personal engagement with the realities on the ground, empowering MPs to hold the Executive to account and assist the Executive in identifying challenges and providing evidence-based solutions. This requires funding and it is unjustifiable for Parliament to spend more money on international travel than on its constitutionally sanctioned mandate – overseeing the Executive. The Speaker of

[113] Joint Rule 131 Joint Rules of Parliament 7th Edition

the NA and the Chairperson of the NCOP must lead by example and demonstrate leadership in this regard.

5.10 Office of the LOGB

The rules of Parliament should be amended in such a way that the Speaker bears the responsibility of reporting semesterly to the Rules Committee on the status of responses from the Executive. And, in turn, the LOGB should submit an annual report to the Speaker on the progress made by the Executive in implementing corrective action as spelled out in the reports adopted by Parliament. This practice must be embedded in the rules of Parliament.

5.11 Parliament's role in appointment processes

It is now common cause that state capture was facilitated by the appointment of pliant individuals to powerful positions in state institutions. This malpractice can only be averted by ensuring that the principle of public participation is a central feature in the parliamentary appointment process. For instance, it cannot be left to a sitting President to decide how the NDPP will be appointed. The CRC must review the Constitution in this regard and report on the review to the NA and the NCOP, this includes but not limited to, the removal threshold of the NDPP vis-à-vis the Auditor-General and the Public Protector.

5.12 Amendment of section 79 of the Constitution

Section 79 of the Constitution deals with assent to Bills and it does not place any deadline for assent by the President. The President can sit on Bills without acting on them for years without any consequences or recourse by Parliament. The Protection of State Information Bill is a case in point. On the other hand, Bills are assented to by the President and not being promulgated. Whilst Parliament should thread carefully in rectifying this anomaly with the Executive and not be on a collision course with the doctrine of separation of powers, realistic and reasonable timeframes must be agreed to between Parliament and the Executive as part of holding the Executive accountable. The Speaker must exercise leadership in this regard and take this matter up with the

LOGB and ultimately with the President. The CRC must review this constitutional provision and report on the review to Parliament. Otherwise, this practice makes mockery of our democratic project.

5.13 Standing anti-state capture and anti-corruption commission

On 22 June 2023, the Human Science Research Council ("HSRC") hosted a colloquium with Chief Justice Zondo on the State Capture Commission, and he called for a standing commission that would be able to call any implicated person to testify when there are allegations of state capture from the President downwards. In its interaction with the Executive, Parliament must be at the helm of this ideation and the Speaker must exercise leadership in this regard.

5.14 Regular engagements with sector specialists from academia

Parliament should create a collaborative platform for regular engagements with sector specialists from academia to enhance oversight in the 7th Parliament. The OVAC Model also makes mention of this, but Parliament is not making use of this proposal sufficiently. A cross-pollination of ideas between Parliament and sector specialists from academia can only bolster and fortify oversight and, again, the Speaker must exercise leadership in this regard.

5.15 Appointment of chairs of parliamentary committees from representatives of opposition parties

Parliamentary rules must be changed and should reflect that chairs of parliamentary committees should be appointed from the parties represented in Parliament according to a proportional representation formula. This should be part of the institutionalisation of the current changes that have been borne by the political realities of the moment. The rules of Parliament must be vociferous and unambiguous in this regard and not be predicated on a whim of the existence of the so-called GNU.

5.16 Framework towards professionalising the public service

The Zuma years have amply demonstrated how cadre deployment contributes to state capture and the weakening of parliamentary oversight. Cadre deployment exalts party loyalty and party membership above merit when evaluating candidates. Parliament should agitate for the development of a framework for the professionalisation of the public service to stem the tide of cadre deployment.

5.17 Political will

The Chairperson of the ANC, Mr Gwede Mantashe put is so aptly when he appeared before the Zondo Commission and said, "*the effectiveness of legislative oversight is not a function of oversight capacity but of political will*."[114] The political protection of President Zuma during the state capture years bears testimony to this reality. Parliament must exude political will in holding the Executive accountable.

5.18 Amendatory accountability

As previously articulated, Parliament is not a law enforcement agency nor is it primarily an investigatory body. This is consonant with the doctrine of separation of powers. However, Parliament can contribute towards changing the behaviour of the Executive by referring unlawful conduct to prosecutorial and investigatory bodies. Again, this requires political will, and Parliament as an institution must espouse this principle of virtue and demonstrate leadership in this regard.

5.19 Leadership

The absence of political will is the offspring of poor leadership in our political institutions, including the highest office in the land. Only principled leadership can facilitate proper oversight and accountability. It is true that ours is not a problem of policy, but that of absence of leadership. The fact that Cabinet has, within its ranks, people who have been implicated in the Zondo report, or in wrongdoing generally, lends credence to this well-measured assertion. This is also true of Parliament

[114] Zondo RMM *op. cit.* note 60 at para 563

harbouring people who have been impeached without addressing such gaps in legislation or in the rules of Parliament, if any, through the CRC and the Rules Committee. This points to a dearth of leadership in the institution and Parliament can only get it right if a critical mass of MPs across the political spectrum can adopt what the writer terms the 'parliamentary oversight of the soul'. This requires a great deal of soul-searching and Damascene conversion by all those who occupy parliamentary chambers as elected representatives of the people of South Africa.

5.20 Promotion of active citizenry

It is a fact that after 1994 civil society was demobilised, yet in every government you need civil society as a bulwark against corruption, bad governance and maladministration. Parliament must make it its mission in this 7th Parliament to link up with civil society as a strategic partner in nation building. The proposal for a national dialogue is but one step in the right direction. Parliament prides itself as an activist Parliament, however, it cannot play this role without placing a high premium on the centrality of civil society in the pulse of the nation. Notwithstanding this, the people of South Africa must take their destiny into their own hands if they do not want a repeat of what happened during the state capture years. Again, the cardinal question is: who will protect the people if another group of people were to do exactly what the Guptas did to pursue state capture? My simple answer is active citizenry. And as the quote which is often credited to Thomas Jefferson goes, "*The price of freedom is eternal vigilance*."

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