

'Party loyalty', patronage and the future of the South African parliament

Raymond Suttner

This was initially prepared on the eve of the opening of parliament's 2015 session. At the time, our consciousness had been bombarded with phrases like 'paralysis of parliament' a 'disgraceful moment in South African democracy' and the need to restore the 'dignity' or 'decorum' of parliament. These expressions and many more were a reaction to disruptions in parliament in 2014, unprecedented in South African parliamentary history, whether in the post-1994 era or in pre-democratic parliaments.

What exactly is the political and constitutional status of parliament in South Africa's democracy and to what extent has it lived up to that expectation in the twenty years since its inauguration in 1994? What was the character and effect of events during 2014 (and during the State of the Nation Address in 2015)? What are their implications for South African parliamentary democracy?

Interestingly, this is not a question that has aroused the attention of the newly formed, NUMSA-initiated United Front, confirming the apprehension, expressed in earlier contributions, that what the Front considers radical action does not include defence of legality. Instead, their focus in public statements has mainly related to questions like the budget that are more directly related to class inequalities.

The democratic parliament 1994-2014

Very briefly, the 1994 parliament was the first to be democratically elected, in the sense of universal adult suffrage, enfranchisement of all of the country's population, in the history of South Africa. That in itself evoked considerable symbolic importance for the institution, since *universal* access to the vote had been a key demand in the course of opposition to apartheid. Through exercising that vote citizens immediately transformed the composition of parliament, fundamentally altering who would occupy its benches, what parties would be represented and what ideas could be advanced. These changes imposed a heavy burden of expectation on legislators.

In many respects parliament as an institution was substantially transformed after 1994, including making provision for modes of public intervention prior to legislation being passed or envisaged, though it is not clear that this participation has always been effective. With some exceptions, notably when public representation forced the temporary withdrawal of the Traditional Courts Bill, public participation has had limited effect. This may not have been through bad faith but partly because empowering communities to participate effectively requires resources that were not adequately provided, and partly because communities find it difficult to engage with processes that are often fairly technical.

One such move to include the public was the reform of the committee system, previously conducted behind closed doors but now engaging in public, often in careful consideration of proposed legislation. However, it is true that the portfolio committees do not always have a significant effect on the final product, especially if a minister or a government department is determined on a course of action.

In plenary sessions of the National Assembly and the National Council of Provinces, the quality of debates has not represented high-level engagements between parties, generally failing to provide imaginative political leadership to the nation. Very often, speeches of the ruling party have been formulaic and fawning over whoever has been leader at the time. Under all presidents parliamentary records show the tendency of ministers and MPs to preface their speeches with phrases like 'as the President said' in the debates.

The official opposition, the Democratic Alliance, has found it hard to shake off the image of a party clinging to white privilege. In the context of this continuing stigma, combined with the force of numbers commanded by the ruling party, the ANC has been able to brush aside valid points regarding irregularities or deficiencies in policy or performance.

What made 2014 different from previous parliaments?

What made 2014 fundamentally different is that, instead of it being full of celebrations of the ruling party's achievements as intended, it became a nightmarish experience for the President, who shrank from facing his parliamentary opponents. It was the year when the parliamentary opposition found a voice and a power that had not previously been exercised. But it also raised serious issues about parliament as an institution, now and in the future.

How did this come about? It was not unprecedented for the ANC government to evade accountability, but in the year intended as the one where it had a 'good story to tell', the public witnessed attempts to bypass accountability on a range of irregularities, including expenditure on the President's Nkandla homestead involving the diversion of millions of taxpayers' rands.

This had been the subject of an investigation by the Public Protector. She reported that improvements to the tune of R246 million had in many respects no relation to their supposed justification on the basis of security. The President had thereby been enriched through public funds (in some cases diverted from funds intended for the poor).

The Public Protector found his failure 'to act in protection of state resources constitutes a violation of paragraph 2 of the Executive Ethics Code, and accordingly, amounts to conduct that is inconsistent with his office as a member of Cabinet, as contemplated by section 96 of the Constitution'.

She recommended that, with the assistance of various state departments, it be determined what were the 'reasonable cost of the measures implemented by the Department of Public Works (DPW) at his private residence that do not relate to security'. He should then 'pay a reasonable percentage of the costs of the measures as determined with the assistance of National Treasury, also considering the DPW apportionment document'.

The President has not cooperated with the investigation of the Public Protector and to this day has not answered 18 of the 29 questions put to him, for example relating to a bond that he claimed to have taken out over the property at Nkandla. With the connivance of ministers and ANC MPs he made it clear to parliament that he would not address the recommendations of the Public Protector.

Instead of that response, which appears to be legally required, he tasked various departments and officials to investigate the spending on Nkandla and whether he was liable to repay any funds. Unsurprisingly, these officials, who depend on the President for the offices they hold, found that he owed nothing and attempts have subsequently been made to pin the blame for unauthorised spending on lower-level officials (as happened in another scandal surrounding the landing of an aircraft at Waterkloof air base by the Gupta family, friends of the President, where junior staff were charged and when it appeared that the President could be subpoenaed to give evidence, these charges were quickly withdrawn).

It may well be that it can be shown that the Public Protector erred in some of the findings, but the President did not cooperate with the investigation in good faith, and neither addressed the recommendations nor provided a response indicating why he had no liability.

It was not open to him to seek to resolve the matter through other means that bypassed the Public Protector. It is true that the Public Protector's recommendations are not directly enforceable, and that she needs parliament to ensure that they are implemented, but that does not mean they have no legal standing. There is an as yet unresolved legal dispute as to their status, whether described as binding by the Public Protector or as recommendations that need to be considered in good faith. Nevertheless even if not directly binding, the Western Cape high court has found that non-implementation must be based on very good reasons that must be articulated, in this case by the President.

The President failed to provide, according to either interpretation, what appear to be legally required answers to the Public Protector's report. Parliament and other members of the executive supported the President in blocking attempts to force him to answer questions on his accountability. Instead they created a parliamentary committee, which unsurprisingly found that he was in no way liable. Opposition parties withdrew from the committee, protesting over its failure to call for testimony from the President, Public Protector and other witnesses, whom they argued were essential to a proper investigation.

This was not a simple case of ANC MPs following instructions determined by 'party bosses'. MPs followed a party political decision that entailed more than unwillingness to consider issues in good faith. It was a flagrant dereliction of a binding constitutional duty.

What was the duty of parliamentary MPs and is 'party loyalty' an adequate characterisation of their actions?

Analysts often look first to the electoral system when considering ways to remedy the weaknesses of parliament as an oversight body. Since 1994 South Africans have had proportional representation in parliament, also known as the list system, where MPs are elected on the basis of a list compiled in a more or less democratic manner by their own parties. It is argued by critics that this makes MPs beholden to 'party bosses', because if they do not follow the 'party line' they will be removed or not be re-elected. That applies to all parties in South Africa, in that all expect their MPs to abide by caucus decisions.

Focusing on 'party bosses' is inadequate generally but more specifically in relation to the events of 2014. It is an illusion to assume that party caucus decisions are inapplicable under constituency voting systems. While MPs may be elected in particular geographical locations, when they get to parliament they still fall under the rules of the caucus of their party. Consequently, even if we were likely to see such a change of electoral system, it is an error to believe it would solve the 'problem of party loyalty'.

It is also necessary to factor in that the proportional representation system reflects the actual electoral strength of parties, so unlike the UK system, parties with a minority of votes cannot become the ruling party, as has been the case for all but one ruling party in post-WWII Britain.

Equally, because of the low threshold required to secure a seat many people are MPs in South Africa today who would not be under a constituency system, where all the votes received by those who lose in a constituency are completely wasted. Certainly there are systems which combine both proportional representation and constituency elements, as happens at local government level in South Africa and in Germany, that need to be considered, though the power of caucus decisions are in no way diminished in these systems.

The fact remains that MPs are 'beholden' to their parties in every system and we need to consider whether that is an important barrier or an explanation for why MPs in South Africa do not hold members of the executive accountable as they are meant to, or take stands according to their consciences.

In the course of post-apartheid democracy there have been occasions where it was recognised that some MPs had issues of conscience in relation to voting for certain legislation and although they were considered loyal members of the ANC, the party allowed them to be absent during the voting, for example with regard to legislation addressing the termination of pregnancy.

No such allowance has been made in the current context. It is unclear whether or not some MPs or cabinet ministers are unhappy about having to defend the President over Nkandla. If so, understandably, they do not articulate this.

It is true that there were few assiduous attempts to hold the executive accountable prior to the Zuma era, but the current presidency is responsible for – and refusing to account for – misuse of funds on an unprecedented scale.

There are no strong ideological reasons behind this loyalty to the President. At this time (for it may change if Zuma's position weakens) support for Zuma as an individual appears to supersede all other loyalties. What are described as factions do not relate to overall ideological positions where individuals may hold differing standpoints, for example over the National Development Plan. Loyalties and divisions within the ANC relate to proximity to or distance from Zuma, with resultant benefits or loss of access to these.

'Party loyalty', patronage ties and depoliticisation

If that statement is valid let us unpack what it means. It signifies that loyalty to Zuma is a depoliticised relationship. It is part of a relationship of patronage, or clientelism, between a powerful individual and his followers/clients. Those who wish to remain in their positions or derive other benefits believe, rightly it seems, that they should show undivided loyalty to Zuma.

Strictly speaking we are not dealing with 'party loyalty' or politics in the sense of achieving specific political goals or programmes. We are dealing with the careers of individuals; their success is signified by prestigious and lucrative positions, which in turn are dependent on their closeness to a particular leader. Patronage was an important basis of support for Thabo Mbeki's power, though many who put their future in his hands 'jumped ship' when it became evident that he would fall, and many of these are in the current leadership and cabinet.

That personal loyalty appears to transcend political ideology and the principles of the organisation, insofar as the physical integrity of the organisation may come under attack in the pursuit of this loyalty. This is evident in physical attacks and murders that have occurred within the ANC, notably in KwaZulu-Natal, Mpumalanga, North-West and Limpopo, reportedly related to support for allies or opponents of Zuma.

Finally – and this is the issue that concerns us here – that loyalty appears to be compatible with undermining constitutional obligations to hold the President accountable for irregularities. In other words, the allegiance demanded by the President as a benefactor or potential patron appears to override the oath of office sworn by MPs and cabinet ministers.

There is nothing unlawful about depoliticisation, or seeing loyalty to an individual as more important than advancing particular political goals and aspirations. There is nothing unlawful about seeing that loyalty as more important than loyalty to the organisation, even if transgressions against the

rules of the organisation could be legally actionable, as in the case of expulsions and murders. Seeing the leader as more important than the organisation has no legal implication in itself.

But now this conception of loyalty has led to an abdication of their duty to hold the President accountable, and this is a realm that cannot, in law and within the prescripts of the constitution, be subordinated to loyalty owed to the President. Again it is important to stress that this is not simply party loyalty but loyalty to an individual, emphasising thereby that patronage differs from broader loyalties that all members may hold towards a party.

Legality and parliament

The ruling party has to operate under the constitution, and it is precisely its refusal, not simply neglect, to exercise constitutional oversight that has led to disruptions of parliament's functions, as well as to an incipient constitutional crisis. It is not necessary to approve or disapprove of the actions of the Economic Freedom Fighters (EFF) as a temporary or continued mode of parliamentary engagement, as I enlarge on below. It suffices here to recognise that it was the ANC's failure to account that provided some measure of justification for the EFF's actions.

What is different about the current constitution, compared with those that preceded it – apart from the abolition of racial discrimination in law and universal suffrage – is that the various arms of government are subordinate to it.

Members of parliament are bound to do what they are mandated to do, but within the confines of legality. It matters nothing how great the majority a ruling party commands. It must still conform in its actions to the prescripts of the constitution.

Indeed, both members of the National Assembly and the President on assuming office swear an oath to be faithful to and obey the constitution (Sections 48 and 87 of the constitution). Furthermore, the constitution is explicit in demanding that MPs hold the executive accountable. It must provide mechanisms 'to ensure that all executive organs of state in the national sphere of government are accountable to it' and it must 'maintain oversight over any organ of state' (Section 55 (2)).

Nkandla in parliament 2014

The 2014 elections saw the election of MPs from the EFF, who dramatised their entry into parliament through wearing red overalls and domestic workers' uniform, a claim with considerable symbolic significance, connoting the colour of the workers' blood, the class traditionally claimed to be the core constituency of the ANC, which it has allegedly abandoned. But the EFF also pursued their parliamentary role in a more dramatic fashion than had been seen before.

When President Zuma appeared to answer questions before parliament he refused to respond on whether he would repay funds, as recommended by the Public Protector. Instead of asking him when he would be in a position to provide an answer, as she should have, the Speaker sought to silence his questioners. The EFF then disrupted proceedings by repeatedly chanting 'pay back the money!'. This led to the summoning of riot police into the National Assembly, and they did so on a second occasion when an EFF MP refused to withdraw the statement that Zuma was a 'thief'. When the police were brought in to remove her, scuffles broke out not only with the EFF but also involving the DA.

When the ANC attempted to push through its report 'whitewashing' the President's responsibility over Nkandla, the EFF and DA combined with a few other parties to frustrate the process using filibustering techniques, later copied by the ANC to suit their own purpose. In general these standoffs made it impossible for parliament to continue its business on an efficient and regularised basis.

There is no need to evaluate every disruption or attempted filibuster from the opposition and ruling party to understand that parliament ended its 2014 session with a sense of its own dysfunctionality.

But how have attempts to articulate that dysfunctionality been framed? The ANC has sought to frame it within the concept of decorum, wearing 'proper' attire, adopting appropriate forms of addressing members and following ritualised procedures that were put in place by previous colonial regimes. Some attempts to curb the more robust approach of the EFF may well have fallen within the ambit of parliamentary rules. Interestingly, the EFF appears to have prepared very carefully for their entry into parliament and seem very conversant with its rules and procedures.

In contrast, when the ANC brought riot police into the parliamentary chamber it crossed a threshold, indicating its willingness to use force in what is meant, constitutionally, to be the primary debating chamber under South Africa's democracy. Insofar as no physical danger was posed to parliament as an institution or any of its members, the action must be seen as antithetical to the constitutional status of parliament, and an attack on its integrity.

The EFF claimed that it would pursue its attempts to secure an answer to its questions addressed to the President at the State of the Nation Address, which was held on 12 February 2015. It was feared that this would lead to more disruptions or strong-arm tactics to evict EFF MPs and that did indeed happen.

On the evening of 12 February 2015 President Jacob Zuma presented his State of the Nation Address to a combined sitting of the National Assembly and the National Council of Provinces. Before the sitting began media and MPs complained that mobile phone signals had been blocked and the DA chief whip, in protesting to the Speaker, suggested that this was being done in order to

prevent coverage of what might happen during the proceedings that were to follow.

While the Speaker sought to dismiss this by saying that the Secretary of Parliament would investigate, MPs would not allow proceedings to begin until the signal was restored, which it was.

When the President began his speech, EFF MPs rose repeatedly to ask questions on the basis of various rules of parliament. The Speaker read prepared answers saying that the rules of parliament did not cover their questions and observations and eventually, after repeated interruptions, EFF leader, Julius Malema and subsequently, Deputy leader Floyd Shivambu were asked to leave the House.

When they and another EFF MP who had asked questions refused to leave the Speaker asked the parliamentary services to remove them and then also made a vaguely phrased reference to other security services.

The television feed then focused on the Speaker's podium so that it was not possible for viewers to see what was happening at that point. Footage provided from mobile phones by eNCA reporter Paula Chowles amongst other showed the entry of men wearing white shirts who used considerable force to evict not only the MPs ordered to withdraw by the Speaker but all EFF MPs. Some EFF MPs fought back. A female MP, Reneilwe Mashabela, was badly injured and hospitalised for a broken jaw.

Zuma was photographed laughing as these events unfolded.

Once the eviction was completed and the session resumed, the DA asked whether it was correct that men armed with firearms were members of the SAPS. When the Speaker would not give a clear answer the DA explained that this was a violation of the freedom that was intended to characterise parliament as a democratic space and they (and the UDM, under General Bantu Holomisa) then walked out.

It is reported that the Chief Justice Mogoeng Mogoeng also walked out, though it appears from statements he made that he withdrew because the matter could well come before the courts.

The recurrence of such disruptions may also result in more and more rules to ensure that the President is protected from serious questioning.

The beefing up of security and the use of force at the State of the Nation Address, increases the apprehension that the ANC remains ready to use strong-arm methods where reasoning fails in its quest to defend anti-constitutional practices.

What is clear is that whatever one may think of the EFF and its methods, it has alerted the public to the Nkandla issue and the failure of the President to be

accountable, evidenced by the popularity in the public domain of the EFF slogan 'pay back the money!'

What lies ahead for parliament?

Clearly there is no intention on the part of the ANC to comply with the legal requirement to abide by the constitution. In other words the ANC MPs, with or without the assistance of strong-arm tactics, clearly intend to ignore the parliamentary duties prescribed in their oath of office. So where does that leave us?

Protracted confrontations along the lines pursued by the EFF during 2014 and in the State of the Nation Address may cause further disruption, but how does it build democracy over the long run? Do such actions form part of a broader strategic goal? What is it meant to lead to? One can break down an institution, but what purpose does that serve? One needs to ask what can be done to rebuild our democracy.

There seem grounds to believe that legal action can be instituted to compel Zuma to account for the money, either through interdicting parliament to follow processes enjoined in its duty to secure accountability or to directly seek an order to compel the President to refund it. There may well be other paths empowering the Public Protector to secure answers or pursue other legal routes.

But what about the citizens of South Africa? Must we be observers while our democratic gains are destroyed? Do we not have a role to play in securing constitutional rule? A wide range of citizens have an interest in securing the rule of law and constitutional governance. It is important that we dispel any notion that defending legality is for sissies, or that it is not the 'real work' of radicals, who supposedly concern themselves purely with socio-economic change.

The framework of constitutional democracy was a hard-won gain, providing a framework for politics that makes possible that which had never previously been open to South Africans. If that space closes we lose the opportunity to freely advance a progressive politics and contend and debate over meanings of any potential emancipatory outcome. Admittedly legality will not in itself resolve a range of socio-economic issues, but without respect for constitutionalism, democratic practices in general come under threat.

Defending constitutionalism, respect for legality and clean governance is in the interests of a wide range of sectors in society. These need to be brought together in order to demand recovery of the democratic promise of 1994.

Raymond Suttner has recently published *Recovering democracy in South Africa* (Jacana Media). He blogs at raymondsuttner.com. His twitter handle is @raymondsuttner

[This is a revised version of work prepared for Heinrich Boll Foundation in February 2015]