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Legislative Committees and Deliberative Democracy: the Committee System of the South African Parliament with Specific Reference to the Standing Committee on Public Accounts (SCOPA).

Obiyo, Robert Egwim

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3. The South African Parliamentary Committee System: the Constitutional Parameters and Structure

The mainspring of representative government is not in machinery, however perfected; it is the light it sheds on the acts of the rulers; it is the publicity, which attaches to all their sayings and doings (M Ostrogorski 1902, 718-9)

Strong parliamentary oversight and scrutiny regimes are an essential part of combating corruption and promoting good governance generally, indeed they maybe seen as an essential component of such aims. It is increasingly being recognised that effective parliamentary oversight depends upon an active committee system within the Parliament that allows members to penetrate below the surface of government administration and to make accountability real by promoting direct interaction between elected legislators and civil service (DG McGee, QC, 2002, 1)

One of the most profound changes that have overtaken South Africa's system of Government since 1994 is the new, powerful role the Constitution has accorded to the parliamentary committee system, which, during the *first session of Parliament*, became in many ways as influential as that of the United States Congress. The increase in importance of the committee system in South Africa is, however, not merely a local phenomenon. A number of factors has led to the increased importance of legislative committees throughout the world. In Chapter 58 of his *Modern Democracies* titled "The Decline of Legislatures," Lord Bryce popularized a "decline" already detected by other liberal thinkers, like Lawrence Lowell, from which perspective the nineteenth century marked "the high point," "the golden age," of legislatures and parliamentarianism (notably, but not exclusively, in Europe) with doubts existing as to their future. Bryce recognized that few legislatures have little to decline from but in so far as his fears of the decline could neither be allayed nor removed he suggested five "chronic ailments" to account for it, most notable of which was the growth of modern political parties. As Philip Norton says, political parties have served to aggregate the demands of the electorate and, consequently constrain the freedom of individual action by members of a legislature. Increasing group demands have generated the need for an extensive policy-

making, implementing and regulating executive. The more extensive, and the more complex the measures of public policy, the greater the difficulty of a mass-member, popularly-elected assembly, meeting on a non-continuous basis, maintaining an effective involvement in the policy making. Political parties have, according to Norton, served as the conduits for the transfer of policy-making power *away* from legislatures. Gavin Drewry (1985) argues that the increasing size and complexity of political systems since the mid-nineteenth century has resulted in national legislatures losing control of the executive branches of government, especially in the Westminster model. Olson and Mezey concur with this view. For them (Olson and Mezey 1991), as policy-making became more complex the executive became more sophisticated and the capacity for substantive policy-making intervention by the legislature declined. Hence, Norton notes the establishment of the liberal paradigm, early in the twentieth century: that of lawmaking bodies in a spiral of decline. Two recent writers, AG Jordan and JJ Richardson (1987, 65), have even suggested that what little attention was given to Parliament was too much, since Parliament had not only declined but was in a state of continuing decline.

In the past twenty years, however, progress has been made: the quantity and quality of material on legislatures, collectively as well as individually has increased and, of specific importance, in the late 1950s and early 1960s the potential of legislative committees to rectify the imbalance between the executive and the legislature was increasingly recognized (see JD Lees and M Shaw 1979, R Michael and PG Richards 1988, C Patterson 1989, P Norton 1990, 1996, 1998, 1999, CJ Deering and SS Smith 1997, LD Longley and RH Davidson 1998). Since then, according to Sir G Howe (in *Memorandum to the House of Commons Select Committee on Procedure*, 13 October 1989) as well as Longley and Ágh (1997, 514), the role of such committees has become less *ad hoc* and parliamentary committee systems have emerged that are well established, permanent, specialized and an indispensable part of the parliamentary system, paralleling the structure of the executive itself or sectors of government responsibility. The decade of the 1990s may then prove to have been a decade of opportunity for legislatures. In 1987, the European Parliament, essentially an advisory body to the EC, formally acquired the title of a parliament and, indeed, constituted a legislature *sui generis* with the enactment of the Single European Act (SEA). This and the events of 1989 and 1990 in the Soviet Union and Eastern Europe gave a new significance to legislatures and their committees (see LD Longley 1994, LD Longley and Attila Ágh 1997, LD Longley and Drago Zajc 1998, LD Longley and RH Davidson 1998).

When the democratic parliament took office in SA in 1994 it overhauled the rules governing parliamentary committees and increased their number. Under the apartheid government there were only 13 committees, their hearings were held in secret, they had very limited powers and existed essentially to "rubber-stamp" legislation put forward by the National Party government. After 1994 however, parliamentary committees were, for the first time in SA, open to the public and the press. They quickly became the "engine-room" of the South African Parliament, responsible for drafting legislation, examining and revising the proposals submitted to them by the executive, as well as holding cabinet ministers and their departmental chiefs responsible to the people's representatives in parliament (see Streek 1997; and Calland 1999). As Calland stresses in his *The First Five Years* (Calland 1999), extensive powers are granted to committees under the post 1994 dispensation. Parliamentary committees are, thus, now empowered "to monitor, investigate, enquire into, and make recommendations relating to, any aspect of the legislative programme, budget … policy formulation or any other matter … falling within the category of affairs consigned to the committee (concerned)" (Calland 1999). The transition to democracy in South Africa was marked by consensus-seeking and the politics of negotiation and this, initially at least, rubbed-off onto the parliamentary committees where cross-party work thrived and where the ANC had very rarely need to use its majority. Recently, however, in the wake of the Strategic Defence Procurement Package ("the Arms Deal") controversy, the ANC has began increasingly to impose party discipline and to invoke the majoritarian principle in committee decision-making.

In the Public Accounts Committee, among others, the ANC has used its votes to ensure that the will of its leaders is served (*Mail & Guardian* 8 June 2001). The principle at stake has been expressed recently by key ANC members following the controversy-fraught arms deal probe, which may have ended the era during which parliamentary committees performed their (democratic) "watchdog" function. Tony Yengeni, the ANC former Chief Whip, told *The Sunday Independent* that ANC MPs in SCOPA would in the future operate on strict party lines (*The Sunday Independent* 4 February 2001) thus reiterating the ANC's resolve to use its parliamentary majority to crush minority opinions - a regression from the non-partisan and deliberative practice of the committee during its first five years, in which each MP questioned government officials in the same way, as if they were representing the views of the whole committee not a single party. In the same vein, ANC MP and National Assembly Speaker, Frene Ginwala, pressed by an interviewer on claims that she was biased in favour of the governing party's decision to

exclude the minority view from SCOPA's second report to parliament on the strategic defence procurement package probe, replied that in a democracy, the majority's decision must prevail. Although it is the strategic defence procurement package controversy that has recently drawn attention to the committee, and although what is at stake in this controversy is of crucial importance to democracy in South Africa, SCOPA is, in any case, uniquely important in terms of its nature, structure and purpose. Although it follows the familiar model of committee work, SCOPA is particularly appointed to scrutinise the activities of government *as a whole*, and to ensure that government only spends in accordance with the stated intentions of Parliament. The work performed by SCOPA has, then, been examined in the light of the deliberative conception of democratic decision-making. On this conception, as explained earlier, the legitimacy of collective decisions depends on the extent and quality of the deliberations preceding such decisions, i.e., on whether all salient principles, interests and arguments have received an adequate hearing and on whether the decision eventually made is *based* on reasons recognised as legitimate, even by those disagreeing with its content. This approach does not, thus, proscribe recourse to a majoritarian decision rule; it does, however, seek to specify the conditions under which such recourse, and the decision thus arrived at, can be considered legitimate.

Very much committed to the ANC's resolve for majoritarianism in its parliamentary committees' decisions, VG Smith, head of ANC's study group on parliamentary standing committee on public accounts, as well as the party's spokesperson, responding to journalists on the possible exclusion of the minority views from the public accounts committee's second report to parliament on the government's multibillion arms deal probe, argued that the ANC was the majority party and therefore had the right to rule. In his words, "I don't think that as the majority party we will be entertaining a minority report, but we will consider minority views to be included in the ANC's report" (*The Star* 17 May 2001). Now, as Calland and others have pointed out, merely because there are occasions when the ANC has had to use its majority to pursue its legislative agenda in committees does not mean that the committees are nothing but "rubber-stamps" or a "façade" (Calland 1999). "Inevitably," according to Calland, "the more politically sensitive the issue, the more likely it is that consensus will not be reached in the committee and the more likely it is that the ANC will simply rely on its majority" (Calland 1999). This however as we have argued *supra* (see Ch 1) does not preclude a decision from having been "deliberative," i.e., a majority decision or will can be deliberative or non-deliberative. When it is deliberative it is based on a sustained

reflective consideration of all the relevant facts, arguments and interpretations of the matter at hand and framed in terms acceptable therefore even to those whose will is not reflected in that of the majority. As in Chapter 1, our point of departure is an examination and elucidation of the conception and feasibility of the equality required by deliberative democracy paying particular attention to its basic principles, as deliberative democracy is defended as a theory of democracy improving on majoritarianism.[1]

The investigation undertaken into the legislative committees of the British Parliament (the Mother Parliament and oldest) and the United States' congressional committees (the most powerful) was undertaken with special attention to committee structure, membership, procedure as well as decision rules, in order to enable location of the committee system of the South African Parliament within the broad international spectrum. The deliberative conception of democracy and the role of parliamentary committees in democracy (both of which are covered in Chapter one *supra*) has, in what follows, been applied to assess and analyse the decision-making procedure of committees in the South African Parliament, with particular attention to SCOPA, especially in light of the controversy-fraught arms deal probe. In other words, deliberative democracy has been employed to examine and assess the accountability process and oversight procedure of SCOPA, i.e., the advisability and (proper) financial management involved in Government's expenditure particularly, on the strategic defence procurement packages, itself the single biggest expenditure in South Africa's short democratic history. While party factors inevitably affect the composition and activities of committees, the extent to which committee decisions have been determined by the demands of *party*, rather than by the requirements of *democracy* and legislative responsibility, has been closely examined, as well as the impact of such decisions on citizens' perception of the legislative and oversight functions of Parliament *vis-à-vis* the executive.

Obviously, the chief source of the materials utilised in this study was the variety of primary and secondary research materials already in existence (in archival records and documentation). These include existing interview notes and transcripts from research projects conducted with MPs, researchers and support staff of Parliament. Parliament's

[1] In *The theory of deliberative democracy and the concept of equality*, an unpublished MA Dissertation, at the University of the Witwatersrand, we critically analysed procedural, constitutional, and deliberative democracy and expounded, with considerable care and attention to conceptual detail, the theory of deliberative democracy as an elaboration and improvement on the traditional / popular / participatory democracy. *The theory of deliberative democracy and the concept of equality* is a precursor to this work and quite relevant to it.

sessions' and annual reports by the Secretary of Parliament, during SCOPA's 2001 and 2002 difficult years, were of extreme relevance, and insightful to the developments and experience, especially in SCOPA, between the majority and minority parties, but also between Parliament and the Executive. SCOPA's and other selected committees' minutes, testament to the adversarial relationship not only within SCOPA, but regrettably within Parliament itself were drawn on. The reports of the Chapter 9 institutions could *only* be of unique importance to this work, as they *alone* provided the needed pivot points for the analyses of *Sarafina 2* and the *arms deal.* The Institute for Democracy in South Africa (IDASA) has monitored the daily activities of committees of Parliament since the inception of SA new democracy in 1994. The Parliamentary Information Monitoring Service (PIMS) at IDASA's documentation and publications, both on parliamentary committees as well as on the arms deal probe, have been of immense value. Besides the Parliamentary Hansard, reports about Parliament in newspapers, on radio and TV, Parliament's website, the Parliamentary Monitoring Group's website, the ANC and the Government's websites, the world wide web, and other relevant documentation have been utilised. Major newspapers kept under surveillance from the commencement to the writing-up of this work include, but not exclusively, *Sunday Times, The Sunday Independent, The Star, Business Day, Mail & Guardian, Cape Times, DailyNews, The Mercury, Noseweek, Financial Mail, Business Report, Sowetan, The Citizen, City Press,* and *The Tribune.*

A few in-depth interviews were conducted with MPs between 2002 and 2003. During the same period, additional interviews were also conducted with the support staff of selected committees, especially committee secretaries and researchers. These relatively few in-depth interviews were conducted only where little investigation has been done and/or to clarify existing information. Parliamentary debates and SCOPA and other selected committees' meetings were regularly observed from the Parliament's public gallery, between 2002 and 2003. MPs on both sides of the Parliament's divide were enthusiastic about being interviewed and volunteered information on the decision procedure and oversight of executive custody of the public purse by Parliament. In any case, the support staff of committees showed reluctance to be interviewed, and only agreed to be interviewed, in the very few occasions they did, on condition of anonymity. Consequently, throughout this study, the identity of certain interviewees is withheld for obvious reasons. The in-depth interviews were quite germane to the proper and deeper understanding of Parliament's accountability and oversight mechanisms.

South Africa is a representative parliamentary democracy. Every five years the electorate elects citizens to represent them in the legislatures at the three levels of government: national, provincial and local. The new parliamentary system operates, for colonial and historical reasons, on the Westminster model of democracy and is based on the concept of party government and cabinet responsibility to parliament. However, the Constitution provides for the possibility of a stronger role for the new parliament than their counterparts in other Westminster type systems. South Africa's Parliament, the centrepiece of its new democracy, is bicameral, composed, in accordance with the Constitution, of the National Assembly (NA) and the National Council of Provinces (NCOP).[2] The Assembly consists of 400 members with the 13 political parties in Parliament represented in proportion to the number of votes they received in the 1999 national election.[3] The Assembly is elected to ensure government by the people under the Constitution by choosing the President, providing a national forum for public consideration of issues, passing legislation and scrutinising and overseeing administrative action (Constitution, s 42(3)).

The second chamber of Parliament is uniquely South African - composed of members drawn from all nine provinces as well as local governments to ensure that *provincial (and local) interests* are represented and taken into consideration in the national sphere of government. This it does chiefly by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces (Constitution, s 42(4)). It aims to contribute to effective government by ensuring that provincial and local concerns are recognised in national policy making, and that provincial, local, and national governments work effectively together. The Council is made up of 90 members – one 10-member delegation for each of the nine provinces. Each delegation, in fulfillment of the provisions of the Constitution, is made up of six permanent members and four "special" delegates, which includes the premier of the province or a member of the province's delegation designated by him, being the leader of the provincial delegation (Constitution, s 60). Special delegates drawn from the

[2] Act 108 of 1996: Constitution of the Republic of SA, I have simply referred to, in this thesis, as the Constitution. The National Assembly (NA), hereafter called the Assembly and the National Council of Provinces (NCOP), I have referred to as the Council.

[3] The 1999 Assembly MPs by party is as follows: African National Congress (ANC) 266, Democratic Party (DP) 38, Inkatha Freedom Party (IFP) 34, (New) National Party ((N)NP) 28, United Democratic Movement (UDM) 14, African Christian Democratic Party (ACDP) 6, Freedom Front (FF) 3, United Christian Democratic Party (UCDP) 3, Pan Africanist Congress of Azania (PAC) 3, Federal Alliance (FA) 2, Minority Front (MF) 1, Afrikaner Eenheidsbeweging (AEB) 1, Azanian People's Organisation (AZAPO) 1 (Annual Report of Parliament, 1999).

provincial legislature rotate and allow for the nomination of different delegates depending on what the council is debating. Each delegation has one vote and most decisions require five delegations to vote in favour of the motion. There are also 10 non-voting members nominated by the South African Local Government Association (SALGA) who represent local governments on a part-time basis (Constitution, s 67).

Apart from making laws, Parliament holds the government accountable and serves as a deliberating forum for matters of public and political interest. Thus there is an important sense in which the South African Constitution itself embodies the very *deliberative* conception of popular sovereignty and democracy advanced and argued for *supra* (in Ch 1). Much of the most important work done in Parliament is conducted by parliamentary committees – "specialist bodies of MPs that play a key role in formulating laws and policies of specific government departments and in overseeing what those departments and all other organs of state are doing" (S Heyns 1996, 18). A well managed committee system, by allowing a division of labour and level of expertise rarely present in the plenary sessions of parliament, not only ensures that parliament is responsive to the preferences of citizens and that the development and implementation of policy meets the economic and social challenges facing the country, but also that the work of parliament is executed timeously and cost-effectively (see C Murray & L Nijzink 2002, 4): thus "parliaments are known for the committees they keep."

Before 1994, as was the experience of the committees of parliaments in communist East and Central Europe, where "the role of the committees of parliament and their internal organisation was little developed and corresponded to the decorative role of these parliaments" (Zajc 1997, 489), the SA committee system, reflecting the then undemocratic, unrepresentative Parliament, was a pale shadow of what it is now.[4] There were only 13 committees, Stephen Heyns (1996, 35) observes, their deliberations, hearings and functioning were held in secret, their powers were circumscribed and they

[4] Unlike before 1994, Rule 152(1) of the Assembly states, "Meetings of committees and subcommittees are open to the public, including the media, and the member presiding may not exclude the public, including the media, from the meeting, except when (a) legislation, these Rules or resolutions of the Assembly provide for the committee to meet in closed session; or (b) the committee or subcommittee is considering a matter which is (i) of a private nature that is prejudicial to a particular person; (ii) protected under parliamentary privilege, or for any other reason privileged in terms of the law; (iii) confidential in terms of legislation; or (iv) of such a nature that its confidential treatment is for any other reason justifiable in an open and democratic society."

existed essentially to applaud and "rubber stamp" the initiatives and legislation of the racist National Party government. Bills were drawn up by technocrats at the behest of their ministers, and they would submit amendments as they saw fit. The specific contents of proposed legislation would be revealed to the public only when the bills were published and debated in parliament, often, only days before the bills were enacted into law. The debates, decisions and any submissions made to committees were held behind firmly closed doors, scrupulously confidential, sacrosanct and aloof. Hamstrung by the executive, parliament and its committees offered no avenues for sincere examination and deliberations of government policies, actions and inactions. It is thus to be noted that under apartheid the white electorate, the beneficiaries of white democracy, was deprived of important avenues for *deliberating* on its (own) will: the conditions of white will-formation were undemocratic under apartheid. What little information of import on the activities of the NP government that came to public light through the opposition MPs in Parliament was provided to them by journalists, themselves, hobbled by the states of emergency which precluded publication of the actions of the security forces. At any rate, neither the opposition parties in Parliament, nor the rank and file members of the government in the apartheid regime had any real part in the governance of the country. Their role, together with that of their committees, was just to *legitimise* government's legislation and actions for the (restricted white) electorate.

Since 1994, the old parliamentary rules, procedures and practices have been reviewed in light of the constitutional commitment to Parliament as a truly deliberative and representative institution. This change is a political process, occurring, as C Murray and L Nijzink point out, within a constitutional framework embodying important choices about the role and responsibilities of Parliament. Although South Africa's parliamentary system, within its first five years, witnessed many radical changes, only few were as significant as the speed with which its committee system developed. Those closely observing the new SA Parliament, and its committees, refer to them as the "engine room" of the democratic Parliament (see S Heyns 1996, 35; B Streek 1997, 92; R Calland 1998, 1, 1999, 29). Committees of the nascent South African Parliament became the key focus for the real work of Parliament. Indeed, they became small parliaments in the Parliament.

The law-making process made committees, in both the Assembly and the Council, a logical necessity. The legislative and oversight powers of Parliament, including its committees were explicitly spelt out in the Constitution and rules of Parliament. The Assembly and its committees may initiate or prepare legislation, under certain

circumstances, with regard to *any* matter, except money bills whose introduction is the exclusive prerogative of the Minister of Finance (Constitution, ss 55(1) & 73). Council committees may initiate or prepare only such types of legislation that falls within a functional area listed in schedule four or other legislation referred to in section 76(3) (i.e., matters affecting the provinces), but may not initiate or prepare money bills (see Constitution ss 68 & 76). Assembly committees have the explicit oversight powers of ensuring that all executive organs of state are accountable to, and maintain oversight of, the executive of national executive authority, including legislation (Constitution ss 55(2) & 56). The power to dissolve the cabinet given to the Assembly in section 102 is an ultimate power in relation to the national executive. Interestingly, Council, here, has circumscribed powers. Council committees have an *implied* (rather than explicit) oversight powers and such powers are assumed to be limited to issues that affect provinces on national and inter-governmental relations.[5]

Just like any legislature that passes legislation, the Council has a concomitant role to monitor the implementation of that legislation and review subordinate legislation made pursuant to it. Although committees of Parliament have the power a) to 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, and d) receive petitions, representations or submissions from any interested persons or institutions (see Constitution, ss 56, 69 and 115), the Constitution does not grant Council committees explicit powers of oversight over the executive. But some scholars beg to differ on the constitutional oversight powers and functions of Council's committees. Section 92(2) of the constitution demands "Cabinet members' collective and individual accountability to Parliament for the exercise of their powers and the performance of their functions." Likewise, Council's approval and

[5] Council is a vital part of the mechanism of intergovernmental institutions worked out to ensure that the separate spheres of government in SA function effectively. Council is, in addition, to ensure that the enormous concurrent powers of provinces and the national government neither conflict nor overlap. Council's role in monitoring the effectiveness of the intergovernmental frameworks is not to be limited to any particular field of government action, as intergovernmental relations constitutes the main feature of all Council's oversight. Council is to exercise oversight over the general structure and procedures of intergovernmental relations the logic being intergovernmental executive bodies should be checked by a legislative body that mirrors the multi-level governance of SA. To be sure, *Council* is the "legislative arm" of intergovernmental relations in SA (see the SA Constitution 1996: Act 108 of 1996; Corder, Jagwanth & Soltau 1999; Murray, Christina and Richard Simeon 1999; Murray, Christina, D Bezruki, L Ferrel and ZJ Hughes 2000; Murray, Christina and Lia Njzink 2002).

regular reviewal is required both in the event of national intervention in provincial administration (should a province not fulfill an executive obligation in terms of legislation or the Constitution) and provincial intervention in local government (when a municipality cannot or does not fulfill an executive obligation required by legislation). Referring to these provisions, Hugh Corder, Saras Jagwanth and Fred Soltau ague that "In light of the fact that cabinet is collectively and individually responsible to *Parliament*, and that the Council is granted extensive powers in instances relating to interventions in terms of provisions like sections 92, 100 and 139, it appears that the Council is also mandated with an oversight function" (Corder, Jagwanth & Soltau, 1999, 10).

Staying with Council's oversight role to protect the spheres of government, under section 125(4), disputes concerning the administrative capacity of provinces must be resolved by the Council. Under section 216, both houses of Parliament are required to approve of a decision by the treasury to stop the transfer of funds to a province. Section 146(6) provides that a piece of subordinate legislation cannot prevail over another law, whether statute or subordinate legislation, unless it has been approved by the Council. The Rules of Parliament not only emphasise these powers but, importantly, *extend* the functions of committees of Parliament. Council Rule 103 stipulates that a committee, *inter alia* may, subject to the Constitution, legislation, the other provisions of the Rules and resolutions of the Council a) summon any person to appear before it to give evidence on oath or affirmation, or to produce document b) receive petitions, representations or submissions from interested persons or institutions c) conduct public hearings d) permit oral evidence, representations and submissions … h) exercise any other powers assigned to it by the Constitution, legislation, the other provisions of the Rules or resolutions of the Council. Rule 201 of the Assembly states that a portfolio committee must, among other functions a) deal with bills and other matters falling within its portfolio as are referred to it in terms of the Constitution, legislation, Assembly Rules, the Joint Rules or by resolution of the Assembly; b) 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 iv) any other body or institution in respect of which oversight was assigned; c) 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.

While Council does not exercise oversight of all national government, it oversees the national aspects of provincial and local government. It respects the oversight roles of both provincial legislatures and the Assembly as well as having the unique role of identifying and acting upon problems associated with national policies that are implemented by provincial executives. Provincial legislatures and the Assembly are primarily responsibly for the oversight of their respective executives and neither is in the position of easily identifying, nor promptly acting upon, these problems. Similar problems are experienced by provinces in the implementation of national policy, and these could not possibly be resolved by the relevant provincial committees, exercising oversight separately. Instead, they are taken to the Council, where all member provinces that have been consulted deliberate in order to reach a realistic view of the problem and identify a mechanism compatible with the needs of the provinces concerned. All in all, the Council serves as a conduit of communication between provinces and national government. It provides a forum in which provinces engage national government on grey issues. A joint oversight by the Assembly and Council is required with respect to the a) security services (s 199(8)) b) approval of international agreements (s 231) and c) declaration of a state of national defence (s 203). These provisions emphasize the dual character of Council's oversight role in which Council is not only required to provide a second view on certain matters (already decided by the Assembly) but also as a Chamber representative of the distinct interests of provinces.

As if constitutional and statutory powers were not enough, most committees in the Parliament are specialised "policy committees" and mirror the executive *structure* by having a committee for each government department. Where replication is not exact, as in committees of the Council, which has fewer members than the Assembly, policy areas have been grouped together and one select committee in the Council corresponds with several portfolio committees in the Assembly. Linkages have become close, precluding excessive one-tier particularity and ensuring that subcommittees (where they exist) report to more inclusive parent committees whose jurisdictions resemble those of ministries. This arrangement, several writers have suggested, facilitates oversight and law making as well as the formation of "issue networks" involving legislative, administrative and interest group specialists (I Mattson and K Strøm, in Herbert Döring 1995; Kaare Strøm 1990, 71). So much for the *theory* of the powers of committees of the SA Parliament; the actual powers committees have in law-making and the oversight process is essentially about matching formal powers with the capacity to utilise such powers - effective

committee power – which itself depends upon the interaction of a combination of a set of factors to which reference has been made *supra* and below in this Chapter.

While departmental committees are referred to as ***portfolio*** in the Assembly, those in the Council are called ***select***. Of 27 Assembly portfolio committees only two are not departmentally related. These are the Standing Committee on Public Accounts, and the Standing Committee on Private Members' Legislative Proposals and Special Petitions. The Council has 10 select committees of which nine *broadly* correspond to government departmental *clusters*, and only one of which, on Private Members' Legislative Proposals, is not departmentally related. Select and portfolio committees are permanent structures of the Parliament and are at times referred generally to as ***standing*** committees, although standing committees are specifically committees that do not necessarily correspond with a government department, but deal with certain ongoing business of Parliament. The word "standing" in this context is deployed to refer to all committees, of both the Assembly and the Council, which are permanent structures of Parliament by virtue of their creation, either by the Constitution or an Act of Parliament, irrespective of whether or not they are departmentally related.

Table 3.0: Portfolio and Select Committees of the Assembly and the Council, 1st Parliament (1994 - 1999)

Committee	Size and Party Ratio	Number of Subcommittees[6]
	The National Assembly	
Agriculture and Land Affairs	32 (ANC 19/DP 4/NNP 2/UDM 2/ ACDP 1/UCDP 1/FA 1/IFP 2/ PAC 1)	-
Arts, Culture, Science & Technology	29 (ANC 16/DP 4/NNP 2/UDM 2/ ACDP 1/UCDP 1/FA 1/IFP 2)	-
Communications	29 (ANC 16/DP 4/NNP 2/UDM 2/ ACDP 1/FF 1/IFP 2/PAC 1)	-
Correctional Services	24 (ANC 12/DP 4/NNP 2/UDM 2/ ACDP 1/IFP 2/AZAPO 1)	-

[6] Assembly Rules established some subcommittees belonging to its domestic committees (Assembly Rules 122(1) and made provisions for a portfolio committee to, if need be, appoint a subcommittee from amongst its members to assist the parent committee (Rules 203). Council Rules (Council Rules 87 & 88) established certain subcommittees of its domestic committees but did not specifically authorize Council's select committees to appoint subcommittees should they feel the need. However, subcommittees of Assembly's *standing* committees cease to exist at the completion of the specific tasks for which they were set up.

Defence	33 (ANC 19/DP 4/NNP 1/UDM 2/ ACDP 1/UCDP 1/FF 1/IFP 2/ PAC 1/AZAPO 1)	-
Education	35 (ANC 19/DP 4/NNP 2/UDM 3/ ACDP 1/UCDP 1/IFP 2/PAC 1/ AZAPO 1/AEB 1)	-
Environmental Affairs and Tourism	32 (ANC 18/DP 4/NNP 2/UDM 2/ ACDP 1/UCDP 1/FA 1/IFP 2/ PAC 1)	-
Finance	32 (ANC 19/DP 4/NNP 2/UDM 2/ ACDP 1/UCDP 1/IFP 2/PAC 1)	-
Foreign Affairs	38 (ANC 23/DP 4/NNP 2/UDM 2/ ACDP 1/UCDP 1/FA I/FF 1/ IFP 2/PAC 1)	-
Health	26 (ANC 12/DP 4/NNP 2/UDM 2/ ACDP 1/UCDP 1/IFP 3/PAC 1)	-
Home Affairs	31 (ANC 18/DP 4/NNP 2/UDM 2/ ACDP 1/UCDP 1/IFP 2/PAC 1)	-
Housing	29 (ANC 16/DP 3/NNP 2/UDM 2/ ACDP 1/UCDP 1/IFP 3/PAC 1)	-
Justice & Constitutional Dev	28 (ANC 15/DP 4/NNP 2/UDM 2/ ACDP 1/UCDP 1/IFP 2/PAC 1)	-
Labour	28 (ANC 14/DP 4/NNP 3/UDM 2/ ACDP 1/UCDP 1/IFP 2/PAC 1)	-
Members' Legislative Proposals	22 (ANC 12/DP 2/NNP 2/UDM 1/ ACDP 1/UCDP 1/IFP 2/PAC 1)	-
Mineral and Energy	32 (ANC 15/DP 4/NNP 2/UDM 3/ ACDP 1/UCDP 1/FA 2/IFP 2/ PAC 1/AZAPO 1)	-
Provincial & local Government	33 (ANC 19/DP 4/NNP 1/UDM 2/ ACDP 1/UCDP 1/FF 1/IFP 2/ PAC 1/AEB 1)	-
Public Accounts	26 (ANC 16/DP 2/NNP 3/UDM 2/ ACDP 1/IFP 2)	3
Public Enterprise	33 (ANC 19/DP 4/NNP 3/UDM 2/ ACDP 1/IFP 2/PAC 1/AZAPO 1)	-
Public Service and Administration	28 (ANC 15/DP 4/NNP 2/UDM 3/ ACDP 1/UCDP 1/IFP 2)	-
Public Works	24 (ANC 12/DP 4/NNP 2/UDM 2/ ACDP 1/UCDP 1/IFP 2)	-
Safety and Security	37 (ANC 22/DP 4/NNP 2/UDM 2/ ACDP 1/UCDP 1/FF 1/IFP 2/ PAC 1/AZAPO 1)	-
Social Development	--- ---	--- -
Sport and Recreation	27 (ANC 15/DP 4/NNP 2/UDM 2/ ACDP 1/UCDP 1/IFP 2)	-
Trade and Industry	31 (ANC 16/DP 4/NNP 4/UDM 2/ ACDP 1/IFP 2/ PAC 1/AZAPO 1)	-
Transport	29 (ANC 16/DP 4/NNP 2/UDM 2/ ACDP 1/UCDP 1/IFP 2/PAC 1)	-
Welfare Affairs & Forestry	33 (ANC 18/DP 4/NNP 2/UDM 3/ ACDP 1/UCDP 1/FA 1/IFP 2/ PAC 1)	-
	The National Council of Provinces	
Agriculture and Land Affairs	12 (ANC 6/DP 2/NNP 2/UDM 1/	

	IFP 1)	-
Economic and Foreign Affairs	14 (ANC 8/DP 2/NNP 2/ACDP 1/ IFP 1)	-
Education	13 (ANC 7/DP 3/NNP 1/UDM 1/ UCDP 1)	-
Finance	15 (ANC 9/DP 4/NNP 1/ACDP 1)	-
Labour and Public Enterprise	15 (ANC 9/DP 3/NNP 2/IFP 1)	-
Local Government and Admin	16 (ANC 9/DP 2/NNP 3/UDM 1/ ACDP 1)	-
Members' Legislative Proposals	11 (ANC 5/DP 2/NNP 1/UDM 1/ ACDP 1/IFP 1)	-
Public Services	16 (ANC 12/DP 2/NNP 1/UDM 1)	-
Security and Constitutional Affairs	14 (ANC 9/DP 2/NNP 2/ACDP 1)	-
Social Services	13 (ANC 6/DP 1/NNP 3/UDM 1/ UCDP 1/IFP 1)	-

Source:
http://www.parliament.gov.za

When committees comprise both Assembly and Council members they are referred to as ***joint standing*** committees.[7] Joint committees are either statutory or constitutional in their origins. They deal with matters of equal concern to the Assembly and the Council as well as issues on which the separate Chambers ought not to have special and competing interests. Subcommittees of the Joint Rules Committee deal with several of these matters, *viz* the internal arrangements, the library, Parliament's budget and support for members. The Joint Committee on Ethics and Members' Interests also deals with issues that concern MPs in both Chambers equally. But, the Constitutional Review Committee differs from this model because, according to Murray and Nijzink, provinces, and thus the Council, may have concerns about the Constitution that are different from those raised by the Assembly. However, the two Houses, as required, meet jointly on an annual basis to review the Constitution, to ensure that views are exchanged, that differing perspectives are understood and that the deliberative and consensual approach that marked much of the drafting of the Constitution itself is retained. This, Murray and

[7] Most of the joint standing committees of Parliament are established under s 45(1) of the Constitution which states: (1) the Assembly and the Council must establish a joint rules committee to make rules and orders concerning the joint business of the Assembly and Council, including rules and orders - (a) to determine procedures to facilitate the legislative process, including setting a time limit for completing any step in the process; (b) to establish joint committees composed of representatives from both the Assembly and the Council to consider and report on Bills envisaged in ss 74 and 75 that are referred to such a committee; (c) to establish a joint committee to review the Constitution at least annually; and (d) to regulate the business of – (i) the joint rules committee; (ii) the Mediation Committee; (iii) the Constitutional Review Committee; and (iv) any joint committees established in terms of paragraph (b).

Nijzink say, provides a counterbalance to the monopoly that the Assembly might otherwise be seen to have over constitutional amendments under section 74 (C Murray and L Nijzink 2002, 67).

Section 74 limits the constitutional amendments over which the Council has real influence to matters concerning section 1 of the Constitution, the Bill of Rights and provincial affairs. The Constitutional Review Committee provides an opportunity for the Council to participate in a more wide-ranging discussion of the Constitution (67). Section 45(1)(b) of the Constitution empowered joint committees to consider and report (i.e., legislate) on bills envisaged in sections 74 and 75 that are referred to such a committee. Elaborating on this, the Joint Rule 32(2) warns that "no joint committee may initiate legislation for introduction; or consider legislation in the legislative process except when expressly empowered to do so." However, nowhere in the Constitution was provision made for referring section 76 bills to a joint committee of Parliament. With reference to 1999, when Parliament for the first time referred a section 76 bill to a joint committee, Murray and Lijzink maintain that this was unconstitutional, given the text of the Constitution which expressly authorises joint committees to legislate on section 74 and 75 bill only. In singling out legislation falling under 74 and 75 sections, the Constitution does not intend Parliament to establish joint committees for section 76 bills. For Murray and Nijzink, joint committees to discuss section 76 bill conflict with the constitutional relationship between the two Houses and their different roles. In their view, the two Chambers were established as distinct institutions to enable different interests to be heard in each House exhaustively and beyond party political considerations.

To give effect to the principles of transparency and accountability, multi-party parliamentary committees must have oversight of all security services in a manner determined by national legislation or the rules and orders of Parliament; thus, section 199(8) of the Constitution also empowers joint committees to oversee the activities of state security services, a role, at the moment, played by the Joint Committee on Defence and the Joint Standing Committee on Intelligence. The Joint Committee on Finance, the Joint Committee on Reconstruction and Development, the Joint Monitoring Committee on Improvement of Quality of Life and Status of Children, Youth and Disabled Persons, the Joint Monitoring Committee on Improvement of Quality of Life and Status of Women, the Joint Committee on Human Rights, and the Joint Committee on the Public Protector, are all joint standing committees of Parliament. In addition, there are ***ad hoc*** committees, set up to examine specific matters, including the *Ad hoc* Committee on Pan-

African Parliament, the *Ad hoc* Committee on General Intelligence Law Amendment Bill, and the *Ad hoc* Committee on Report No 13 by the Public Protector. Moreover, Parliament does meet in the form of a larger parliamentary committee, called an ***extended public*** committee, to look at certain bills. These, Stephen Heyns observes, are bigger than ordinary parliamentary committees but do not comprise a full sitting of the house (S Heyns 1996).

There are a number of ***domestic*** committees, normally consisting of senior members of the political parties in Parliament, that deal with matters affecting the smooth running of Parliament. Assembly and Council Rules Committees and their respective subcommittees as well as Parliament's Joint Rules Committee and its Subcommittees, deal with parliamentary rules, parliamentary Budget, support for members, internal arrangements, international relations, the funding of represented political parties, delegated legislation, and the powers and privileges of Parliament. Assembly and Council Programme Committees and their Subcommittees, and Parliament's Joint Programme Committee and its Subcommittee(s), plan the work of Parliament. The Mediation Committee, the Joint Tagging Mechanism, the Disciplinary Committee and the Committee of Chairpersons are also domestic committees, which attend to matters affecting the orderly administration of Parliament. The Joint Rules of Parliament empower certain joint committees to appoint subcommittees, whenever the need arises, either from amongst or outside its members, to carry out a thorough examination of specific issues confronting them.

The structure, membership, area of jurisdiction, and procedure of both the Assembly and the Council committees are largely determined by the Rules of Parliament. Committees derive their powers from the Constitution and Acts of Parliament establishing them *via* the Rules and Joint Rules of Parliament. The sizes of committees varies, but are normally between 15-40 members[8] determined, in the case of Assembly, by the Speaker acting with the Rules Committee, and in the case of Council, by the Rules Committee (Assembly Rules 199, 200(2); Council Rules 151). Parties are represented in committees substantially in proportion to the number of seats they have in Parliament, except that the smallest minority parties are entitled to at least one member per committee (Assembly

[8] Assembly committees have permanent and alternate membership. Each portfolio committee has between 17 and 19 permanent/full members, and a number of alternate members. Council committees consist of three types of membership – full, special and alternate. Each select committee has between 13 and 15 full members, and a number of alternates. Because the Council has only 54 permanent member compared to the Assembly's 400, the select committees shadow the work of more than one national government department.

Rules 125, Council Rules 154). Each committee elects its own chairperson, although the majority party parliamentary caucus is effectively able to decide who will chair the committees and ensure that those candidates are elected. In practice, the majority party and the executive control the selection of chairpersons (Calland 1999, 71). The ANC has a built-in majority[9] on all committees – portfolio, select, joint and *ad hoc*. During the first Parliament (1994-1999), other than the select committee on Members Legislative Proposals, chaired by an Opposition party member, all the Council select committees were chaired by ANC MPs. Of the twenty-seven Assembly standing committees, 25 had ANC chairpersons. Only the Standing Committee on Public Accounts and the Portfolio Committee on Public Works were chaired by Opposition parties' MPs. All *ad hoc* and joint committees were chaired by ANC MPs. No seniority system existed in Parliament when appointing committee chairpersons rather, the ANC appointed its more skilful "third tier" leadership as committee chairpersons, taking into account representivity with regard to race, ethnicity, region as well as Congress of South African Trade Union, South African Communist Party or ANC membership. Although the transition to democracy in South Africa was marked by its emphasis on consensus and power sharing, this did not substantively extend to committee chairpersons (R Calland 1999, 73).

Although it was the central concern of the parties, during the 1994 "negotiated" transition to democracy, to share in the executive of the proposed government of national unity, this could have been at the expense of the significance of the committees of parliament, the "proper place of work" in modern representative democracies. The Parliament and its committees have to create a new role for themselves. The Rules and Orders of the Assembly, as in both the Interim Constitution[10] and the Constitution, must provide for the establishment, composition, powers, functions, procedures and durations of its committees, as well as the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy. Minority parties have long expressed their disagreement with the details of this internal arrangement of Parliament, particularly, regarding the appointment of

[9] It is of interest to record that while questions before committees in Parliament are decided by the majority decision rule, as they are barred from submitting minority report except where provided for in the Rules of Parliament (Assembly Rules 137(4); Council Rules 96(2) & 102(4); and Joint Rules 27(2) & 31(4)), a question before a subcommittee in Parliament is decided by consensus. If consensus cannot be reached all views in the subcommittee on the question must be reported to the parent committee (Assembly Rules 148(1)(2); Joint Rules 42(1)(2)).

[10] See Act 200 of 1993: The Interim Constitution of the Republic of SA s 58 and the Constitution s 57.

parliament committee chairpersons. It is, for Roelf Meyer, former NP MP, an inhibiting factor as a result of which one might have to do things against one's own will (*Parliamentary Whip*, April 4, 1996). The NP would reject as insulting ANC offers of chairmanships of "innocuous, unimportant, internal" parliamentary standing committees. "We are not prepared to be pushed around" was FW de Klerk's riposte to the ANC caucus recommendation to offer the NP the deputy chair of SCOPA and chairs of the internal arrangements, discipline, pensions and private members' bills committees (*Financial Mail*, August 1994). Minority parties in Parliament had to drop their earlier insistence that the chairmanships of committees should be allotted proportionally to the number of votes each party had received at the polls. The reason being that this thorny issue was raised for the first time during Parliament's first sitting, long after the constitutional conference, where it was not discussed at all. The ANC caucus' ideal of deciding by its majority which committee of parliament will be chaired by a minority party, is a very contentious issue and will probably remain one. In some democracies - not excepting the models against which the (new) South African parliamentary process was designed - a tradition of co-operative governance is reflected in a committee system in which opposition parties chair or co-chair essential committees. In the German *Bundestag*, the lower House committee members and committee chairs are distributed according to relative party size. In the *Bundesrat*, Parliament's regional Chamber, seats are distributed between the *Länder*.

Notwithstanding the extensive powers granted committees by the rules of Parliament, several other factors affect the operation of committees. The role each committee plays is strongly linked to how active its chairperson is, and there is little understanding among MPs of the role and powers of committees. As Calland notes, during the Government of National Unity (GNU), if the chairperson of a parliamentary committee was a member of a different party to that of the minister, oversight tended to be greater (R Calland 1999, 34). The relationship between a chairperson and the minister proved to be a critical factor in determining the role that a particular committee was able to carve for itself. For Richard Calland, it is no coincidence that two of the most active committees in the first Parliament, in terms of meetings held and amendments passed, were the portfolio committee on justice and constitutional development. In both cases, the two chairpersons had long-standing relationships of trust with the ministers they were shadowing. Even where the relationship was not so close, and there was a strong proactive chairperson, for example, the portfolio committee on Education, there was scope for the committee to develop a meaningful role (R Calland 1999, 72). Importantly, the attitudes of members of

Parliament, together with the influence of party in legislative decision-making, often result in a situation in which committees and their work have become important in both personal and institutional terms as vehicles for the satisfaction of particular demands and for the making of certain types of decisions. Some ambitious committee members see their job as a career. 'Some treat (committee chairs) as an individual crusade, whilst some make massive empowerment efforts with their colleagues on the committee; some see themselves as "second deputy minister;" others, as leaders of a different estate,' according to Tom Engel, former health portfolio adviser. Committee chairpersons are continually called into government. Vacant committee chairs are hotly contested as chairpersonship is viewed by parliamentarians as nearest to the position of a party whip. Committee members developed genuine interests in the subject areas of their committees as they grew into the job (R Calland 1998, 16, 1999, 34).

The growth in the scale and complexity of modern government led to the proliferation of powers vested in individual ministers and a shift from Cabinet to "departmental" government, with many important policy decisions being taken by ministers or in their departments (often in consultation with outside bodies), rather than in Cabinet or Cabinet committees.[11] They may have a reason to so do. Despite the substantive body of "case

[11] In his *The Struggle to Create a New Political Consensus* Samuel Beer makes reference to "the centrifugal pluralism of ministerial decision-making," and "the establishment of *a new consensus*, shifting the distribution of (public) opinion radically and lastingly," see S Beer, in *New Society* 61 16 September 1982: 451-453, as well as Chapter 1 of this work. According to him, the decline and collapse, over the past two decades, of the old "civic culture" (of deference) of the British political system, and the renewal of the radical tradition, released the tendencies to pluralistic stagnation - a *new pluralism* (of the collectivist postwar British politics) where parties lost cohesion, partisanship was exaggerated, choices made by formal decision often failed to elicit the cooperation needed to make them effective, and sometimes met with outright resistance. The public choice theory provides a model of self-defeating pluralism, which rests upon a certain cultural foundation – namely, distrust. It points to the restoration of trust as a condition that would halt the self-destructive Hobbesian struggles of pluralistic stagnation (disorder). For Beer, trust, in any polity, rests on a cultural foundation in which *expectations* and *norms* are mutually reinforcing. Trust is a calculation about the probable behaviour of others. If people are to act together, even for gains, which may be purely individual, they have to have reason to count on one another. Yet trust, as Beer points out, in this sense of calculation about the behaviour of others, is not *alone* sufficient to enable people to count on one another. If trust is to bear fruit in common action, it must be reinforced by a commitment to trust as a *norm.* Put differently, besides his calculations, the individual has also to be motivated by some feeling of "ought" (at least equal to the "free rider" temptation), which inclines him to comply with the common rule for its own sake. A character of this normative commitment of the feeling of "ought" is a feeling that the common rule of conduct is *legitimate* in a substantive sense. For Beer, insofar as deference, and the sentiments associated with it in the civic culture - which constituted a powerful bond of trust within the polity and its decision-making components - has collapsed, class has decomposed, and

law" governing the scope and content of parliamentary questions, the basic rules are, as Helen Irwin, Andrew Kennon, David Natzler, and Robert Rogers (1993) observe, very clear that the issues on which questions could be asked of ministers must be limited to matters for which ministers were responsible (Helen Irwin *et al* in M Franklin and Philip Norton 1993, 32). Thus "fishing questions" are not allowed. The practice of government reflects, according to Colin Turnip, this clear awareness of separate departmental responsibilities, and parliamentary procedures, which emphasizes the responsibility of the individual minister. Ministers, in answering questions in Parliament or replying in the daily adjournment debate, speak for their own departments and are usually careful to confine themselves to matters for which they are themselves responsible (Colin Turnip, in J Jewel & Oliver D 1989, 118). Irwin and her colleagues also agree that all ministers, not excluding the PM and/or President, answer questions as individual members of government, and have generally transferred questions to other ministers only if the matter lay more appropriately within the responsibility of another department.

Committees in Parliament, which almost mirror the executive structure of government departments, engage regularly in dialogue with one or another minister, focusing upon the minister's own responsibilities and the work of his or her department. After all, as Murray and Nijzink argue, "a specific committee can fully fulfill its legislative and oversight responsibilities only when dealing with its executive counterpart." But ministers, rather, ministries, do not only operate within their various departmental portfolios. Ministerial decision-making processes cut across portfolios. Policies made by one department can have implications in their implementation on other related departments "and policies can have ripple effects that spread throughout the administration," hence interdepartmental decision-making is a necessary condition of the working of Cabinet government. "There is no other condition," wrote HJ Laski, "upon which that teamwork which is of the essence of the *Cabinet* system becomes possible" (Laski 1938, 256). The interdependence of government departments is greater today than when Laski wrote, and departments of governments have now to co-ordinate their policies with the decisions of world bodies to which they belong (H Young and A Sloman 1982, 80-1). There is, however, no one parliamentary committee of the present Parliament that mirrors the interdependence of their executive committee counterpart,

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pluralism has paralyzed public choice upon which collectivist Toryism (and socialism) was founded. For a post-collectivist (neo-liberals, neo-socialists or, rather, neo-radicals) option, which enhances the legitimacy of government decisions, and through participatory reforms, revives the power of the political system to mobilize (wide, deep and lasting) consent, see Chapter 1 *supra.*

and not all parliamentary committees engage in interdepartmental processes. The deference of specialist committees to one another in accordance with norms of reciprocity to enable politicians do their committee work in a more focused manner, as well as allow minority parties to participate more effectively, and thus serve the constitutional principle of multi-party democracy, is, to a very large extent, lacking. When discussing an issue, committees often do so without the knowledge and input of other government departments and parliamentary committees, and this results in ineffective parliamentary oversight and policy input on certain issues (R Calland 1999, 32). It is envisaged that departmentally related committees regularly engage departments other than those with whose affairs they are primarily concerned. Committees, as constitutionally and statutorily authorized, must be seen to exchange evidence and information as well as hold concurrent inquiries. In the absence of this, a rationalization of parliamentary committees into larger, broader clusters, with more subcommittees examining particular issues as they crop up, might well reflect the executive structure more accurately.

The conceptual, constitutional, procedural and structural changes that occurred in May 1994 came, unfortunately, without the necessary staff or infrastructure being in place, and, since then, catching up has been an ongoing uphill struggle. Relatively, the power of Parliament *vis-à-vis* the executive placed the legislature at a great disadvantage (see Calland and Taylor 1997, 202). Committees, as well as parliament itself, are bedeviled by a combination of inexperienced staff and a shortage of the necessary administrative, technological and research resources to support MPs, who themselves lack expertise. In the words of Saki Macozoma ANC MP (1995) and chairperson of the Assembly's Committee on Communications:

> The most shocking thing we found when we got here was the Parliament has no computerisation of any kind to talk about, has no secretarial support, no research support … It was an environment created for a "parliament of farmers." At reaping time, they would go home and harvest their fields and then come for three months. They would see what's on their desks and endorse it and then they would go back again (*I need more than a rubber stamp,* in *Sunday Times* 23 April 1995).

This has obvious implications for MPs' constitutional prerogative to oversee the executive, as well as to scrutinise and initiate legislation. Often, most material documents used by opposition parties' MPs in exercising their duty of requiring that the executive

explain and inform Parliament on what it has and has not done, are either entirely derived from the press, or sought for from the relevant government department at the very committee meeting where the executive is being held to account, rather than in advance. When, in 1996, the portfolio Committee on Health, chaired by Manto Shabalala-Msimang, strove to get the (then) Minister of Health Nkosazana Dlamini-Zuma to explain and justify to Parliament the expenditure of R14.2 million – a case of an unauthorized expenditure of foreign aid – the constraints on committees were very clearly revealed.

Frequently, committees lacking legal advisers or technical assistants have had to rely on the advise of the legal or technical sectors of government departments; but these are the very departments whose activities they are scrutinising. Committees are in principle powerful antidotes to the overwhelming influence of presidents and their cabinet members in framing legislative agenda. How, then, can a legal adviser or technical assistant of a government department, whose interest is it to see his or her department's bill pass parliamentary scrutiny with little or no amendments, counsel a committee's MPs whose purpose very often is - as opposed to that of the government department which it oversees - to kill the department's bill or rather pass it with the widest amendment possible? It is in the interest of neither ministers nor their civil servants to make public too many of the failings of their departments, a practice that can lead to a culture of secrecy and defensiveness (Albert Venter 1999, 244; Marshall 1989, 68-71).[12] As James Callaghan, a former Prime Minister of Britain put it, "we are not going to tell MPs anything more than we can about what is going to discredit us." What advice can a government department, naturally imbued with little disposition to volunteer information that may expose government to parliamentary criticism, offer parliament? Richard Calland (1999, 19) illustrates a seminal case in which the select committee on Home Affairs sought to process the Film and Publications Bill without any adviser - committee or parliamentary - and so had to depend on the head of the legal department of the Department of Home Affairs. This official, in the course of advising the committee on what was and was not apposite by way of amendment to the bill, informed a member of the committee, quite improperly, "we cannot entertain such an amendment at this late stage" (see the *Parliamentary Whip*, October 18, 1995, in R Calland 1999).

[12] See Geoffrey Marshall, *Ministerial Responsibility* (1989), 68-71, for a summary of the conclusions and recommendation of the Radcliffe Committee Report on the conventions governing the publication by ministers of memoirs and other works as well as the specific rules and Official Secrets Act relating to the maintenance of Cabinet secrecy, even after a minister has left office.

There are no verbatim records of committees' minutes, as only committees' final decisions are recorded. Hansard SA has yet to print any proceedings of Parliament and its committees since mid-2002. But if the enforcement of accountability depends largely on the ability of Parliament to prise information from governments, which are inclined to be defensively secretive where they are most vulnerable (C Turnip, in Jewel and Oliver 1989, 146), then, the SA committee system clearly has a "massive problem." Concerning the lack of expertise of the young employees of committees (who received no training), as well as the poor quality of their supervision by the "old," part-time, bureaucrats inherited from the "rubber-stamp" parliament of the pre-May 1994 regime, Alison Tilley, Legislation Monitor of the Black Sash Organisation has this to say,

> skill may be a more significant issue, as opposed to infrastructure. Those who were skilled recognised their need for infrastructure and went out and leased, hired, borrowed and scrounged equipment and staff and researchers. They worked with volunteers and rapidly learned to use NGO capacity in the area of research. Those who were not sufficiently skilled in office work, paper management, public speaking and legislative process found themselves disempowered by the system. That adequate steps around training were not taken is the single biggest criticism that I have (Alison Tilley, in Calland 1998, 11).

Since 1994, there have been neither researchers nor secretaries to serve either the chairpersons or the committees of Parliament. The public accounts committee receives technical support staff from the Auditor-General's office, and has a support staff of between two and 5 people – significantly larger than the one staff member (sometimes allotted only on half-time) that most committees have. Even with a staff of this size, however, the public accounts committee remains resource-constrained, and, in several reports to Parliament, has requested a full-time staff of nine or more to provide research, administrative and secretarial support for oversight activities (see ATC, Parliament of the Republic of South Africa Announcements, Tablings; and Committee Reports, No 34, 24 March 1999, in Richard Calland 1999, 56). Most MPs entered Parliament for the first time in 1994, and were given no induction. For most MPs, Parliament was not only unfamiliar but also intimidating. Admitting their inexperience, a senior ANC member tells us,

It was still early days. We did not know how to deal with something like this. Perhaps we should be condemned for it, perhaps we should be forgiven, but we were more concerned with damage control than we were with parliamentary accountability. In any case, it is a problem we will always have to deal with – like any ruling party in such a system – how to be critical of our own people in government without providing the opposition, in Parliament, in the media, with ammunition to use against us. It's a difficult one, but with *Sarafina 2* we made a complete mess of it (in R Calland 1999, 36-7).

Many MPs find the committees a tedious burden as they struggle to cope with the number of committees they have to sit on. MPs were generally members of at least seven committees and, in the case of minority parties, as many as 15 (*Parliamentary Whip* 18 August 1995). Committee members are forced to spend just a few minutes in one committee, as they have to jump to the next, a situation that inhibits members, particularly of the smaller parties, from developing critical expertise in particular areas. "If you are one of the minority parties with (only) a few members in parliament," says Francois Jacobsz MP (IFP) "you are stretched very thinly to cover the number of committees that you have to deal with" (F Jacobsz, in Hennie Kotzé 1996, 117). There were so many more ANC MPs that they were not spread as thinly, and party whips have become more strategic about how they place party members in committees (R Calland 1999, 34). Worse still, the rate of turnover of MPs has been very high. Between 1994 and 1997, over a quarter of the original recruits of the Assembly ceased to be parliamentarians, and the majority of those leaving were Chairpersons of committees who had taken leading roles in the nascent parliament.

With the legal and constitutional framework in place as a foundation for a strong oversight role, but without the corresponding resources, the political will or the confidence to fulfill such a role, the South African committee system is located somewhere between the Westminster model of somewhat ineffectual committees and the American model of very powerful committees. The post-apartheid South African parliamentary Rules were widely drawn; most significantly they encompassed the power-sharing arrangements of the GNU on certain critical issues, including (to a reasonable extent) the selection of the chairpersons of committees, on whose character and style so much depends, and who have carved out a new role for themselves in different ways and at different speeds (See S Heyns 1996, R Calland 1998, 1999).[13] Consensus-seeking and

[13] The NP quit the government of national unity in 1996 to become the official opposition in its bid for vigorous parliamentary debates and greater criticism of the ANC (see *Sunday Times,* 10 November 1996). This is a decision that may in time threaten the newly established *modus*

the politics of negotiation and debate, which was the *modus operandus* process of the South African transition to democracy, created a paradigm within which committees of parliament progressively moved towards a more active consensus politics (if not full deliberative politics).[14] Both Tom Engel, former researcher of the Assembly's portfolio

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vivendi of the South African transition to democracy within which committees of Parliament made some landmark achievements in their oversight of government: *a priori* as well as *a posteriori*. Discussion of the relations between Parliament and government is concerned primarily with the reassertion of parliamentary *control*, and by this is generally meant a power to *influence* the decisions of government. Hence, control (as influence) is exercised *a priori*. As Colin Turpin notes, a strong form of control would include powers not merely to influence but to direct the actions of government, or to veto proposed actions. Although Parliament possesses powers of direction and veto over the executive, directions (e.g., expressed in legislation) ordinarily proceed from governmental initiative, and veto powers (e.g., in regard to delegated legislation) are only infrequently exercised. Control, as in influence is, for Colin Turpin, a more realistic objective of reform than control as power (see Colin Turnip, in J Jewel & D Oliver 1989, 113; Andrew Dunsire 1984). On the other hand, when it is said that ministers are "responsible" to Parliament, reference is made to an obligation of ministers to *account* for actions already performed (or left unperformed): *responsibility* is retrospective or *a posteriori*. Colin Turnip observes an overlap between the parliamentary functions of "controlling" and holding "responsible" - "calling to account." Such mechanisms as parliamentary questions and scrutiny by parliamentary committees involve both control and the assertion of responsibility. Departmentally-related committees' effectiveness is judged by the yardsticks of, *inter alia* "their influence, direct or indirect, on the Government's actions and their success in holding the executive and officials to account." An *a posteriori* investigation or check may have the aim of influencing future decision-making. The notion of "responsible government" includes both acceptance of responsibility for things done and "responsiveness" to demands, persuasion, and arguments for the modification of policy (see AH Birch 1964, 17-18; CE Gilbert 1959, 373-407). The great complexity of our civilisation and the wide range of our legislation, which make a popularly elected legislature's exercise of complete control over administration difficult (C Turnip 1989, 113-4) notwithstanding, we wish for reform-minded parliamentarians to strengthen both control and responsibility of the executive, without making too fine a discrimination between these concepts.

[14] Ian Gilmour, distinguishing between a more active consensus and the consensus of stagnation, in his *The Body Politic* argues public controversy is almost the only way of making government interesting to the public. People are naturally interested only in their own concerns and can only be brought to take an active interest in public affairs by the spectacle of a good public row and the pleasure of taking sides (I Gilmour 1971, 12). Conflict, as Gilmour says, is a more likely producer of strong and far-sighted government than harmony. Parliament makes government interesting to the public when parliamentary quarrels and conflicts compel attention because their outcome is uncertain. However, it becomes boring where a tightly organised party system has made it predictable. Divisions in government produce news and public interest, while unity produces public relations officers and public indifference (I Gilmour 1971, 13). The executive can make itself genuinely strong only when it abandons the dogma of its unity and infallibility, and the public administration is made genuinely public. Caution and compromise do not necessarily produce social peace or good government. More public conflict in the governmental system would not in the long run necessarily produce more *social* conflict. While it is the job of politicians to reconcile conflicts and to diminish social dissension - "the function of a government is," as Palmerston once reminded Gladstone, "to calm rather than to excite agitation" (Magnus, Sir Philip 1952, 161, in I Gilmour, 1971) - it is not the job of politicians to abolish or conceal all

committee on Health, and Allison Tilley agree that the ANC rarely had to use its majority in committees' decisions. Cross-party work not only developed well *vis-à-vis* the overall development of committees, but fostered an independence of thought amongst members of Parliament, particularly in the ruling party. The progress made by the SA'n committee system in its first five years in terms of legislative oversight and accountability, can be gleaned from the activities of a number of committees.

The reshaping of an entire society was the salient feature of the first democratically elected Parliament. A whole new legal and institutional framework had to be created on a democratic basis. The lion's share of this mammoth task was accomplished by the new committee system, where leading committee members had to apply incisive and well considered views to the flurry of legislation presented to parliament by the executive (rather than rubber stamp the executive's ideas, as happened before 1994). A total of 553 acts were passed during the first term of parliament – fifty two in 1994, eighty eight in 1995, one hundred and eight in 1996, one hundred and eight in 1997, one hundred and thirty seven in 1998 and sixty in 1999 (see R Calland 1999, 14-9; C Murray & L Nijzink 2002, 74-5). In processing this (reasonably) high level of legislation, Parliament, as an agency of change, demonstrated just what role the main democratic institution can play in the transformation imperatives of the country. In this regard, a few committees of parliament, according to Calland, were effective in "their capacity for amending legislation and for doing so substantively, (showing) their political will and the ability to operate independently from the executive and/or the ruling party, and their propensity for hard work and diligence in their various constitutional and rule-based duties and powers." These committees are vital as they deal with the nuts and bolts of important policy and legislative issues, and, indeed, they legislated in a very substantive sense,

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public conflict in the governmental system. More governmental conflict would produce more public awareness and a more active consensus, not the consensus of stagnation (I Gilmour 1971, 15). "The point at which a consensus is reached is not a constant. More tension in government would also produce more governmental action…Nor would stronger government lead to increased social dissension…To lament the lack of public discussion and quarrels in the political system is not therefore to plead for violence, class war, crusading ideologies, or the end of tolerance. Conflict binds people together as well as it sets them apart. And to lance a wound is less painful and harmful than to let it fester. Public conflict in the political process, by interesting the governed and stimulating the executive, would enable governments to deal with problems at an earlier stage before the damage had been done. What is needed is more conflict without more extremism" (see the discussion in Ch 1 *supra* of political antagonism in relation to deliberative democracy).

> [t]he committees are drafting legislation, rigorously examining and revising the proposals submitted to them by the executive, and extracting unprecedented degree of accountability from cabinet minister and their departmental chiefs. They are also creating a bridge on which the whole panoply of institutions that constitutes civil society can meet government in the law-making process (Barry Streek 1997, 90).

The portfolio committees on justice, constitutional affairs and education re-wrote a considerable number of pieces of legislation within the period under review. The portfolio committee on justice weighed significant issues with wide ramifications. The original Promotion of National Unity and Reconciliation Bill was a very slender document when it began its process into law. It represented, as Wyndham Hartley observes, political agreements reached in the government of national unity between the ANC and the NP. After being torn to shreds during public hearings by organisations from civil society, the bill went through Parliament's committees on justice and came out drastically changed as MPs applied their minds and did not simply rubber stamp the executive's wishes (see *Business Day* 30 May 1997). This committee "practically rewrote the Human Rights Commission legislation." It played an enormous role in the final draft of the Truth Commission legislation in 1994 and, more recently, in the Magistrates' Amendment Act, 1996, and the new bail legislation, which proposed the tightening of bail provisions (the Criminal Procedure Amendment Bill, 1997) (see Barry Streek 1997, Calland 1999). Responsible for this commendable progress of the Assembly's committee on justice, is its membership, which included many lawyers acquainted with the intricacies of constitutional law, and they adapted to the law-making function of Parliament quicker than most of their colleagues not trained in law. In addition, the Chairperson of the committee Johnny De Lange MP (ANC) and the Minister of Justice Dullah Umar MP (ANC) had a strong relationship, a consequence of a long experience of working together.

The Assembly's portfolio committee on labour embraced a core of experienced left-wing activists, including Brian Bunting and Philip Dexter. This helped the committee see through legislation of even greater magnitude than that of the justice committee. The portfolio committee on education played a substantial role in the detail of a number of major transformational laws, including the South African Schools Act, 1996. The portfolio committee on correctional services ensured that virtually all policy initiatives received the attention of the committee early on in the process. The committee was, as Calland says, well organised, and planned well ahead, scheduling meetings after

consultations with the ministry about up-coming plans. The committee was closely involved in the process around local government reform, using a political advisory committee chaired by the parliamentary committee chairperson, supported by a technical committee comprising experts, policy researchers and civil servants. The committee also played a significant role in the writing of the Multi-Party Democracy Bill. The ministry presented the bill to the committee with just the bare bones of what was required to give proper effect to the Constitutional provision "for the funding of political parties participating in national and provisional legislatures on an equitable and proportional basis." Over the course of ten meetings, the committee added the requisite detail to the bill, renaming it in the process, "the Funding of Represented Political Parties Bill" (R Calland 1999, 40).

Some committees introduced their own policy and legislative changes, and, most importantly, some committees began to develop a keen interest in engaging seriously with the executive over policy development. The Joint Standing Committee on Defence has consistently crossed swords with government over sales of land mines and other arms to other countries. More recently, in what *Mail and Guardian* entitled "a clash of the titans," Thandi Modise MP (ANC) Chairperson of the parliamentary committee on defence, insisted that the committee should have a say on the export of arms, while Kader Asmal MP (ANC) Chairperson of the National Conventional Arms Control Committee (NCACC) of Cabinet, which approves the issuing of licences for the sale of arms to other countries, was of a contrary view. Some committees were beginning to master the need to balance polarised representations on legislation. In 1996, the portfolio committee on mineral and energy affairs heard greatly divergent views from both sides of industry on the Mines Health and Safety Bill. Some committees began also to produce excellent reports, as is shown by the very incisive report by the Assembly committee on Health after its field trip to the Eastern Cape to inspect hospitals. The correctional services committee regularly visited prisons and comprehensively reported its findings (see *The Star* 8 August 1995, Barry Streek 1997, R Calland and M Taylor 1997, R Calland 1998, 1999, *Mail & Guardian* 30 August 2002).

It is clear from the above that Parliament, with its committees, appreciates its constitutionally defined legislative functions and powers.[15] But Parliament cannot responsibly make laws without a full grasp of what informs executive actions (or

[15] For the legislative powers of the Assembly, Council, Provincial Legislatures and Committee or Members of Legislatures, see ss 55, 68, 114, 73, 119 of the Constitution.

inactions). This it gathers from fulfilling its responsibility of scrutinising executive actions. Moreover, in modern parliamentary democracies, partial fusion (rather than separation) of legislative and executive powers, if not functions, exists, and the law-making responsibility of parliament is more real in theory than in practice. It suffices to reiterate that at times Parliament's responsibility simultaneously combines law making and the scrutiny of executive actions, as in its budget processes and budget vote debates. And, as it became the key role of the executive to initiate legislation, parliament's primary task shifted to ensuring that legislation so initiated is thoroughly and openly debated; that issues raised by the proposed legislation are adequately addressed; that the needs of citizens are properly accommodated; and that appropriate changes to proposed legislation are made (C Murray & L Nijzink 2002). In other words, the main function of the South African parliament is to provide scrutiny or oversight of the executive initiation of legislation,[16] its actions and its inactions. It is the duty of the entire parliament and its members, regardless of party affiliation, to review the decisions and actions of the executive and government officials.[17] Because the size of modern government has made Parliament's effective scrutiny of all executive actions almost impossible, part of the oversight role of parliament, therefore, is to put adequate alternate mechanisms in place to ensure that problems areas are timeously identified and brought to the attention of parliament (C Murray & L Nijzink 2002, 6).

Chapter 9 of the Constitution establishes a number of institutions including the Auditor-General, the Public Protector and the South African Human Rights Commission to support and strengthen constitutional democracy.[18] As an integral part of the checks and balances of a constitutional democracy and accountable government, these institutions

[16] The shift in the structure of the People that takes place here is worth noting. The elected representatives see their function shift from giving voice to the popular will through legislation, to scrutinizing – on behalf of the people, legislation emanating from the executive. This shift makes the role of parliamentary committees even more important and makes the deliberative approach to democracy (even if it ends up expressing a majority will) also more important.

[17] On the oversight function of Parliament *vis-à-vis* democracy, see ss 1, 42(3), 55(2), 56, 68, 92, 114 of the Constitution, and Ch 1 *supra*.

[18] Chapter 9 of the Constitution sets out 7 independent, impartial, state institutions supporting and strengthening democracy in the Republic of South Africa: the Public Protector, the Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General, the Electoral Commission and an Independent Authority to Regulate Broadcasting (now, the Independent Communications Authority of South Africa (ICASA)). Their powers and functions are set out therein. They are accountable to the Assembly and report to it at least once in a year on their activities and the performance of their functions as well as on the expenditure of their budgets.

inform, assist and complement Parliament and its committees in its oversight of government. Together with Parliament they are a watchdog body over the government and organs of state. In our complex modern government, a lack of time and adequate resources, coupled with the internal party pressure to which they are subject, have rendered parliamentarians in need of assistance when it comes to identifying and checking the arbitrary use of power by the executive. Chapter 9 institutions support and aid Parliament in its oversight role by providing it with information that is not derived from the executive. The Auditor-General performs the primary role of oversight in financial matters, but this is also clear in relation to other chapter 9 institutions. The Public Protector has, as its major role, the investigation of improper conduct in state or government affairs and in the public administration; this also forms a crucial part of parliament's oversight function. The Human Rights Commission not only ensures the protection and development of human rights, but is also the cardinal vehicle through which the implementation of socio-economic rights in government departments is monitored. The effective functioning of these institutions enhances Parliament's oversight function, as through calling government to account they strengthen and promote respect for the Constitution and law by society at large (*confer* chapter 9 of the Constitution; Corder, Hugh, Saras Jagwanth and Fred Soltau 1999; Murray, Christina and Lia Njzink 2002).

State institutions supporting constitutional democracy "are accountable to the Assembly, and must report on their activities and the performance of their functions to the Assembly at least once yearly." The accountability of these institutions to Parliament requires them *firstly* to report to it on the performance of their functions and how their budgets were spent. *Secondly* these institutions report to Parliament to inform, assist and complement its oversight role. Bearing these two kinds of reporting function in mind, state institutions supporting democracy report to Parliament *via* a) section 8(2) of the Public Protector Act 23 of 1994 which provides that the Public Protector must report to Parliament at least twice yearly on the findings of investigations of a serious nature, and may also do so at any other time of his or her own volition or if requested to do so by the Speaker of the Assembly or the Chairperson of Council; b) the Human Rights Commission which must submit quarterly reports to Parliament on findings in respect of functions and investigations of a serious nature which were performed or conducted by it, and may also do so at any other time it deems it necessary (s 15(2)) of the Human Rights Commission Act 54 of 1994); c) section 11 of the Commission on Gender Equality Act 39 of 1996 which requires that the Commission on Gender Equality may make recommendations to

Parliament concerning gender issues and must prepare and submit any reports to Parliament which relate to international conventions, covenants and charters; d) the Constitution s 188(3) in terms of which the Auditor-General must submit audit reports to any legislature that has a direct interest in the audit. Additionally, reports must be submitted to Parliament and provincial legislatures (the Auditor-General's Act 12 of 1995); and e) the Electoral Commission Act 51 of 1996 which provides that the Electoral Commission must, as soon as possible after the end of each financial year, submit an audited financial report and a report in regard to its functions, activities and affairs to the Assembly (s 14(1)). Similar arguments may be advanced in respect of the other bodies set up in terms of the Constitution for oversight and accountability purposes, including the Public Service Commission, the Financial and Fiscal Commission and the Judicial Service Commission. The Promotion of Access to Information Act 2 of 2000 (dubbed the Open Democracy Act) presents another opportunity for citizens to hold the executive to account.[19]

Oversight is a commodious concept and refers to the crucial and indispensable role of parliament in monitoring and reviewing the actions of the executive organs of

[19] Parliament's oversight responsibilities, and its obligations under the Promotion of Access to Information Act 2 of 2000 which requires the proper keeping of records and making these available to the public is rooted in the constitutional right of access to a) "any information held by the state and b) any information that is held by another person and that is required for the exercise or protection of any rights." The objects of the Open Democracy Act are, *inter alia* to give effect to the above mentioned citizens' constitutional right of access to information (Constitution, s 32(1)(a)(b)), and "generally, to promote transparency, accountability and effective governance of all public and private bodies by enabling persons to obtain access to records of public and private bodies as swiftly, inexpensively and effortlessly as reasonably possible and by empowering and educating everyone to effectively scrutinise, and participate in, decision-making by public bodies that affect their rights" (Act 2 of 2000, s 9). The Act mandates all departments, functionaries or institutions of state exercising powers or duties in terms of the Constitution (including Parliament) to provide information that will assist citizens in understanding their rights of participation relative to public and private bodies, this, being a prerequisite for citizens' understanding of the powers, functions and operations public bodies (s 9(e)). The Act provides, despite its exemptions to the disclosure of *certain* records of public and private bodies, for mandatory disclosure in the public interest where a) "disclosure of a record would reveal evidence of a substantial contravention of, or failure to comply with the law, or an imminent and serious public safety or environmental risk; and where b) the public interest in the disclosure of the record clearly outweighs the need for non-disclosure (or the harm) contemplated in the provision concerned," giving due weight to the importance of an open, accountable and participatory system (see s 46 and 70). Parliamentary records, as arch examples of records received by governmental bodies, are an important source of information under the Open Democracy Act, hence, Parliament has an obligation in documenting, preserving and providing access of such records to the public.

government. Parliament thus requires the power to hold the organs of state to account in the performance of its oversight function, apart from its lawmaking function. A crucial aspect of Parliament's oversight role is the scrutiny of delegated, subordinate or secondary legislation.[20] Parliamentary scrutiny and oversight of the administration entitles it to hold the executive accountable, yet, arguably, the concept of oversight embraces a far wider range of activity than does the concept of accountability. While some scholars see oversight as describing a broader and more flexible range of activities undertaken by parliament relative to the executive, foremost amongst which is the power to hold the executive accountable, others say "oversight" and "accountability" are two sides of the same coin in terms of which accountability to parliament of the executive is exercised when the former enforces oversight and scrutiny over the latter's actions (*confer* H Corder, S Jagwanth & F Soltau 1999; C Murray & L Nijzink 2002).[21] However, in the letters of the Council National Strategic Planning Workshop held on 13 November 1998,

> oversight in the South African context is the pro-active interaction initiated by a legislature with the executive and administration or other organs of state that encourages compliance with constitutional obligations, such as being accountable to elected representatives, good governance, development, [and] co-operative governance.

[20] For Parliament's oversight of secondary legislation, see H Corder's *Final Report on Methods for Scrutiny of Legislation by Parliament* (2 March 1999).

[21] I wholly agree with Corder's version of the concepts, as Murray and Nijzink may have fallen into confusion trying to define oversight and accountability as distinct separate concepts at one point yet conflating the two at another. When Murray and Nijzink postulate that "oversight" and "accountability" are two sides of the same coin, they imply that oversight is exhausted in accountability (C Murray & L Nijzink 2002, 87), yet shortly after that they endorse the legitimacy of Corder's both broader oversight concept and narrower concept of accountability without apparently being conscious of it (88). The main law-making function of the SA Parliament, Murray and Nijzink agree, is not the initiation of bills but the full consideration and scrutiny of legislation initiated by the executive (5) – this is parliamentary control by which is meant a power to influence the decisions of government, exercised *a priori.* Elsewhere, they imply, this is distinguishable and separate from parliament's obligation to hold the executive accountable for the implementation of legislation and policy, i.e., politicians' ongoing responsibility of evaluating the functioning of the executive or the success (or failure) of laws and policies – here, is meant the responsibility to parliament of the executive, i.e., the obligation of the administration to account for actions already performed (or left unperformed) exercised retrospectively or *a posteriori.* Yes, an overlap exists between the oversight and accountability role of parliament where experiences of *a posteriori* investigation are drawn on for future lawmaking; however, the tenuous line that exists between the two concepts must *always* be borne in mind.

Through the implementation of legislation or policy, the executive or administration acquires enormous power (i.e., the ability to influence or determine a person's conduct). Concomitant with the exercise of this power in any constitutional democracy, H Corder *et al* argue, is the accountability of the administration to a separate and distinct organ of government.[22] Inherent in this notion is the concept of the separation of powers and responsible government; this simultaneously provides for checks and balances of executive power and the accountability to parliament of Ministers and their Departments as well as statutory bodies, parastatals, and institutions funded or mandated through government departments and other bodies of executive authority. The constitution gives expression to the principle of separation of powers by recognising the functional independence of the three branches of government (the Constitution s 43, 85, 165), however, the SA parliamentary system of government (like all other parliamentary democracies) does not give *full* expression to the notion of separation of power because of the unavoidably close links between the legislature and the executive. The executive is chosen from the legislature and primarily from the leadership of the majority party. A strong party-based system exists in South Africa, in which frequent or regular change of government is unlikely. This is made worse by the proportional representation electoral system which distances politicians from the nation's constituencies and in which MPs retain their seats through their membership of political parties. This hampers effective oversight because MPs, as is often the case in a dominant party system, for fear of being perceived as disloyal, or, even, for fear of expulsion from the party and the consequent loss of parliamentary position, duck their responsibility to call a government of the leadership of *their* party to account.[23]

Indeed, the constitutional obligation to hold the government accountable is complicated by the very loyalty demanded by the party system. While some members of the ANC are (appallingly) not certain that oversight is their responsibility, the majority of the members of the leadership of the ruling party regard oversight either as a challenge to the ruling party or as undermining the authority of the executive (R Calland 1999; H Corder, S Jagwnth and F Soltau 1999; H Corder 1999; C Murray & L Nijzink 2002). At other levels, the mistake has been to muddle the legal responsibility of the accounting officer of ensuring sound financial management in the department (being a civil servant contracted by

[22] See the theoretical discussion of the separation of powers and oversight (Ch 1) *supra.*
[23] This inherent tension between the pull of party and the pull of democracy is discussed *supra.* It is hard to imagine modern politics, including therefore modern democracy, without parties, and yet parties are also obstacle to democracy.

government), with the political and constitutional accountability of the Minister for the way in which the department is managed: this results in the Minister being absolved from responsibility – an idea both unreasonable and absurd.[24] This confused misunderstanding of the oversight role of parliament undermines the ability of legislatures to carry out proper political accountability.

Accountability and oversight can be at their most effective, according to Hugh Corder, if recognised by those in power as the central organising principle of the SA Constitution.[25] It is a limited and deficient version of the oversight role that identifies the opposition parties alone to police and expose maladministration and corruption. Oversight and accountability ensure that the administration complies with rules of Parliament and the dictates of the Constitution in carrying out its tasks of implementing laws and policies. Through oversight, Parliament keeps control over the laws it passes and promotes the constitutional values of accountability and good governance. Through it, a richer and more open, transparent and effective democratic government is ensured. Only when oversight is seen as one of the central tenets of SA democracy can Parliament ensure that the administration effectively and efficiently carries out its mandate, as well as monitor the implementation of its legislative policy drawing on these experiences for future

[24] It is acknowledged, for obvious reasons, that ministerial responsibility as an effective means of parliamentary oversight has been overstretched by the growth and development of modern government. However, the complex bottom line with respect to ministerial responsibility is that while ministers can, in the face of modern governments, in several instances, disclaim responsibility, the *traditional* doctrine of ministerial responsibility only exonerates public servants from responsibility (at least to parliament). It is at all events clear that the traditional doctrine neither properly reflects the existing role of civil servants nor can it easily accommodate any significant extension of the power of parliament to call civil servants to account, as it is on record that while a minister's duty to give an account can be delegated, "the liability to be held to account…cannot" (P Leyland & T Woods 1997) - "what has happened and why" in the event of failures remains the untransferable obligation of the minister to explain to parliament and the public. Well aware of the impediments to the fulfillment of parliament's oversight role, the leadership of Parliament more recently wrote to the Deputy President stressing the problem, and the Assembly commissioned two studies on oversight and accountability in 1999 while the Council, recently, undertook one. All three studies have long reported back to Parliament and made recommendations in respect of the lack of understanding of the oversight role of Parliament amongst MPs, and between them and the executive, and to a resulting inadequacy in the procedures for oversight, but consequent substantive changes and/or outcomes are still being awaited (see H Corder, S Jagwnth and F Soltau 1999; H Corder 1999; C Murray, D Bezruki, L Ferrel & J Hughes 2000; and Letter dated 29 January 2001, distributed in the Assembly *Tablings* No 4, 2001 dated 31 January 2001).

[25] It is important to point out that the South African Constitution itself embodies the idea of the People "thinking" and "reflecting" about itself, about what is being done, by others, in its name, i.e., the specifically deliberative conception of democracy.

lawmaking. Only then is the oversight role of Parliament a complement - rather than a hindrance - to the effective delivery of services with which the executive is entrusted. Oversight and accountability enhance public confidence in government and ensure that government is close and responsive to the people it governs (H Corder *et al* 1999, 9-12). Should the values of accountability and oversight and the purposes they serve in a constitutional democracy be realised, the executive will more willingly submit to them, thereby fostering and enhancing the principle of co-operative governance contained in the Constitution.

Foremost among Parliament's wide oversight powers, flowing from the separation of powers and the concept of responsible government, is the power to call the administration to account. Parliament, the Constitution requires, must establish mechanisms to ensure that all executive organs of state are accountable to it and that members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performances of their duties. *Thus, section 92(2) entrenches the doctrine of ministerial responsibility:* a minister is individually responsible for both his own actions and those taken in the department under her charge, and ministers are jointly responsible for all decisions and policies of government. The term "responsibility" is a wide, somewhat imprecise and multifarious concept although it has a central constitutional importance and is indispensable. In its constitutional context "responsibility" has legal, political, administrative, and managerial implications. Ministerial responsibility is primarily political not legal however, resting upon convention, and the practice of government, and may be considered part of the morality of the constitution in the Commonwealth jurisdictions sharing the same parliamentary system of government (Geoffrey Marshall 1986, 11-12).[26] Section 92(2) of the SA constitution gives ministerial responsibility the force of law, in which Parliament has the right to demand accountability from the executive, which the latter cannot refuse. Accountability is therefore removed from the realm of vague political convention to that of concrete constitutional law. At any rate, this parliamentary right is more ambiguous than it might, on the surface, appear to be. It forms part of a political framework and cannot normally directly be enforced *via* the law courts *without* prior legislation – a law must first of all

[26] The British system is a typical example of such Commonwealth jurisdictions. English constitutional conventions are quoted in South Africa as normative examples, both by commentators, politicians and the popular press. Moreover, English constitutional conventions have been followed and adapted in South Africa's history since 1910. British (i.e., English) moral and legal practices will therefore be examined to clarify the issue of the relationship between ministers, civil servants and Parliament.

impose liability on a Minister for the acts or omissions in his or her department before a court of law could force such a political office-bearer to resign.[27] Packed in the concept of ministerial accountability to Parliament and the public are the executive's (minister's) obligations to a) inform b) explain c) amend and d) resign.

Informatory responsibility refers to the duty of ministers to answer or give account and provide to Parliament, including its committees, and the public, information as "full" as is possible about the policies, decisions and actions of government, as well as the activities of the departments of government, and not to deceive or mislead Parliament and the public. The observation of the British House of Commons' 1979-80 Social Services Committee's third report was that the ability of Parliament to make a reality of ministerial accountability largely depends on the availability of appropriate *information* extracted from government, which becomes secretively defensive when challenged. The absolutely central democratic importance of this obligation is obvious (see Ch 1 *supra* on democratic theory). As Richard Scott puts it, "a failure by ministers to meet the obligations of ministerial responsibility by providing information about the activities of their departments undermines, in my opinion, the democratic process" (see *The Scott Report* 1995-6, HC 116, 15 February 1996). It also undermines the constitution, for, it is not, Scott contests, "ministerial preparedness to resign when ministerial responsibility for failure has been established" that lies at the heart of an effective system of Parliamentary accountability, but, rather, the obligation of ministers to give, or to facilitate the giving, of information about the activities of their departments and about the actions and omissions of their civil servants. This, in Scott's opinion, "is almost self-evident" (Richard Scott, in *Public Law* 1996, 415). The obligation of ministerial accountability ought, surely, to include the obligation of facilitating, so far as it is in the ministers' power to do so, the provision to parliament, and its committees, of information about the matters under inquiry that is as full and as accurate as is practicable.

[27] For accountability to be effective, there must be predetermined objectives or standards against which performance is measured and assessed, otherwise Parliament's oversight role becomes vague and uncertain (for lack of identifiable criteria to judge the reporting bodies) and thus makes oversight difficult and often meaningless; hence it is presupposed in accountability that there are a) persons possessing decision-making powers as well as the authority and power to discharge decisions so made b) the conduct of such persons are assessed by a set objectives or standards and c) decision-makers are under an obligation to answer to an acknowledged authority in possession of the means of calling them to account.

The provision of factual evidence to a committee of parliament in order to enable the committee to establish what had happened ought not be seen as something in which officials with first hand knowledge of the facts would be giving evidence "on behalf of ministers" (see *The Scott Report* 1996; Richard Scott, in *Public Law* 1996). They would rather be giving evidence based on knowledge acquired in the course of their departmental duties, on a matter in respect of which the minister was accountable to Parliament. A minister's duty to account to Parliament for what his department has done ought, in Scott's view, to be recognised as extending (in the absence of any special limiting factors) to an obligation to assist an investigating committee to obtain first-hand evidence on the matters being investigated. Any refusal on the part of government to facilitate the giving of evidence to a committee of parliament constitutes a failure to comply fully with the obligation of accountability owed to Parliament (Richard Scott, 1996, 423-4; Second Report of the Public Service Committee *Ministerial Accountability and Responsibility* (1995-1996) HC 313, paragraphs 76-83). Accountability will depend on the adequacy of the "account" provided (see Ch 1 *supra* on the concept of a threshold of acceptability or adequacy). The Public Service Committee, in its second report to Britain's House of Commons *Ministerial Accountability and Responsibility* (1995-6) states that ministerial accountability crucially depends on clarity about who can be held to account and responsible when things go wrong, and on confidence that parliament is able to gain the accurate information required to hold the executive to account and to ascertain where responsibility lies. If, and to the extent that, the account given by a minister to parliament, whether in answering parliamentary questions, or in a debate, or to a select committee, withholds information on the matter under review, the account given is not a "full" account and the obligation to account for what has happened has *prima facie* not been discharged.[28] Any Minister who lies or knowingly misleads

[28] Richard Scott *Ministerial Accountability* (1996) recognised and set aside some subjects in respect of which full information cannot be given, two examples include information about the operations and personnel of the security and intelligence agencies and information about imminent changes in the interest rates or in exchange rates. Scott, however, argues that the necessity (public interest immunity (PII)) which will sometimes arise, of withholding in the public interest information from parliament and from the public does not alter the fact that to do so involves a dilution *pro tanto* of the obligations imposed by ministerial accountability. Hence, the withholding of information by an accountable minister should never be by rote, should never be based on reasons of convenience or for the avoidance of political embarrassment, and should always require special and clear justification. Richard Scott *The Acceptable and Unacceptable Use of Public Immunity* (1996) emphasizes of any discussion about PII that PII should not, strictly, be claimed either on a class basis or on a contents basis except in respect of documents or information that would otherwise be disclosable under the rules of discovery applicable to the proceedings.

Parliament should (according to the British House of Commons 1995-6 Public Service Committee's second report) "carry the can" by resignation.[29]

Except in rare cases where grave damage to national interest might be caused, as illustrated by the example of the question about an imminent change in interest rates, or in exchange rates, in which a true answer might cause a run on the Rand, or, perhaps, on some other currency, or might prompt speculation damaging to national interests, all answers to parliamentary questions must be as complete and true as possible. Half the picture can be true but yet inconsistent, and thus involve a failure to comply with the requirements of the constitutional principle of ministerial accountability; when the audience does not know that it is seeing only half the picture, it would protest if it did and would request to know the reason, if any, for the withholding of a full answer. *Full* disclosure of *all relevant* information is, in the letters of final report of the Canadian (1979) Royal Commission on financial management and accountability, an essential requirement for full accountability by government to both parliament and the people. Section 92(3) of the SA Constitution places an obligation on minister to administer their portfolios in accordance with the Constitution and to provide Parliament with *full* and

[29] On the adverb "knowingly," Scott believes, "it must always have been the case that misleading statements made in ignorance of the true facts were not regarded as a breach of a minister's obligation to be honest" although questions might of course arise as to why the minister was ignorant. A "highly constitutional principle" is at stake here. If ministers are only constitutionally responsibly when they know that Parliament is being deceived, who is constitutionally responsible when ministers do not know? How could Parliament and the public know when ministers are knowingly and unknowingly misleading them? Should culpable civil servants be directly accountable and responsible to Parliament? This will entail the reworking of the present government's view that civil servants are primarily servants of their minister and give account to Parliament's committees, for example, "on behalf of their ministers." Closely linked to this is government's distinction between ministerial accountability and ministerial responsibility wherein it is government's view that while ministers are accountable, in the sense of having to account for (or explain away) everything that occurs in their department, they are only responsible, in the sense of being personally blameworthy, for things which they themselves knew about. While the reason behind this distinction - that as the conduct of government has grown so complex, the need for ministerial delegation has become so great as "to render unreal the attaching of blame to a minister simply because something has gone wrong" in his department - is difficult to refute, ministers have, as a corollary, to accept the obligation to be forthcoming with information about the incident in question, for, this could be the only avenue by which Parliament and the public will be able to assess whether a minister's claim of lack of personal knowledge has been fairly and properly made. It is a known fact that where ministers know a great deal of their department's work as a result of being over-involved in the day to day affairs of their inferiors, they nonetheless rely on and indeed encourage the perception that they know nothing other than matters of high policy and do not descend to the level of daily operational matters (see Adam Tomkins, *Government Information and Parliament: Misleading by Design or by Default*, in *Public Law* (1996): 472-489).

regular reports concerning matters under their control. The duty to regularly supply to parliament a range of financial information and/or financial accounts attesting to the regularity (propriety) of government expenditure. This financial information, very crucial for accountability, would provide parliament with a framework with which to examine departments' performance in carrying out policies, functions, programmes and projects and the means for ensuring that departments are accountable by answering for their stewardship of public funds, voted by parliament, and public responsibilities[30] (see H Corder *et al* 1999; C Turnip, in J Jewel & D Oliver 1989).

Explanatory accountability requires that explanations and reasons should be given for the actions of government. Sections 56 and 69 of the Constitution as well as the Powers and Privileges of Parliament Act of 1963, spelled out in Rules of the Assembly (201) and Council (103), empower the Assembly and Council, or any of their committees, to summon a person to appear before it or to report to it.[31] "A government that is compelled to explain itself under cross-examination," HJ Laski says, "will do its best to avoid the grounds of complaint. Nothing makes responsible government so sure" (HJ Laski, 1938, 149). As in informatory responsibility, the claim of the public interest can restrict the duty of explanatory accountability. While civil servants who make mistakes acting in good faith are defended, a minister has no obligation to defend a civil servant whose errors were negligently and/or willingly committed, or who took actions of which the minister disapproves, or has no knowledge, and would not have approved should it have been made known to the minister (Albert Venter 1998, 92, 1999, 249).

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[30] Cf. John Garrett observes that although the volume of information on government spending has increased, most of it "is of little value for parliamentary scrutiny" (J Garrett *Westminster: Does Parliament Work?* 1992, 125). The struggle to ensure explanatory accountability has been unceasing although mechanisms exist for parliamentary questioning of ministers and civil servants. A Hopwood and C Tomkins argue, "Information is a source of power, and as such, is guarded by the institution" (A Hopwood and C Tomkins *Issues of Public Sector Accounting* 1984, 26). While government acknowledges and stresses the importance of ministerial responsibility, ministers have not, in practice, always fulfilled their duty. The enforcement of explanatory accountability ultimately depends upon government's respect for the "rules of the game" - arrangements and procedures and settled customs of parliament, which are parts of the system within which it must itself operate. And the leadership of parliament has a crucial role to play, in ensuring obedience to standing orders and as "guardian of the rights and responsibilities of the House," most especially those of backbenchers. The leader of the House must consistently be mindful of his or her responsibilities as leader of the House towards every member of the House - though a member of government, s/he has an obligation to safeguard the legitimate rights of the opposition parties.

[31] For an elaboration on the constitutional context of the powers and privileges of Parliament see Murray C and F Soltau's *Report on the Powers and Privileges of Parliament* submitted to Parliament (January, 1999).

The key to ministerial answerability and submission to parliamentary scrutiny is the executive's traditional obligation to redress grievances.[32] Amendatory accountability, as C Turnip observes, entails an acceptance by ministers that they "bear responsibility" to parliament for what is shown to have gone wrong, whether or not they accept culpability for the failure. Ministers take Parliament into their confidences, admit that things have gone wrong in the respective departments, and promise that remedial actions will be taken for revealed errors or defects of policy or administration, whether by compensating individuals, reversing or modifying policies or decisions, disciplining officials, or making changes in departmental organisation or procedures. Again, while officials should doubtless be properly accountable for their own decisions (which ministers neither knew about nor ought to have known about), it does not follow that ministers should be relieved of all responsibility to parliament for official acts that they have not personally authorized (C Turnip 1989, 32; C Murray 2002, 89). If the discharge of amendatory responsibility excludes the "liability to resign" on a minister who is free from culpability when things have gone wrong in the department, it is still right that the minister should answer to parliament for such errors committed by officials by having to explain "what happened and why" and by taking appropriate remedial action. Ministers' responsibility for the effective and efficient management of their respective departments should not be overlooked (C Turnip 1989, 32). While it is true that the organisation and administration of a department are normally delegated to the director-general, and agency chief executives are to have "maximum managerial authority" to run their agencies (see

[32] While it is a universal observation that the central core of the concept of accountability is an obligation to answer and give account of an action taken, C Turnip is in agreement with P Day and R Klein (1987) that the power to take action on the information provided, if it extends to the imposition of sanctions or penalties, is characteristic of a strong form of responsibility which they distinguish as "accountability," to give emphasis to the feature of "holding to account" in the sense of fixing blame and securing redress. For them, invariably, accountability is synonymous with responsibility, where responsibility exists in a spectrum including strong and weak versions. Other scholars seem to differ with Turnip, Day and Klein on the issue. On ministerial accountability, in oral evidence to the Richard Scott inquiry, Sir Robin Butler expressed preference for use of the expression "constitutional accountability" rather than "constitutional responsibility" in order to avoid confusion between accountability and culpability. "Accountability," for Butler, and Scott agrees, means the obligation on the Minister to always answer questions and give an account to Parliament for the action of his department whether he is "responsible" in the sense of attracting personal criticism himself, or not. Here, "accountability" is used so as to leave out, as it were, the blame element of it. In certain cases, as Butler clarifies, the Minister is as accountable as he is personally blameworthy, while there will be occasions when he is not personally blameworthy (see Sir Richard Scott *Ministerial Accountability,* in *Public Law* (1996): 410-26. This thesis agrees with the latter understanding of the issue.

Government Efficiency Unit Report *Improving Management in Government: The Next Steps* HMSO, 1998), commentators nonetheless concur that the minister remains constitutionally responsible for ensuring that proper mechanisms are in place to identify problems and for ensuring compliance with legislation (see C Turnip 1989, 133; H Corder 1999, 15; C Murray 2002, 89). Sir Ian Bancropt has put it succinctly,

> The Minister in charge of a department is … responsible, and accountable to Parliament, for the effectiveness of his department's policies and the efficient and economical use of the resources allocated to it. It is part of that responsibility to ensure that his department has the systems, procedures, organisation and staffing necessary to promote efficient management (Third Report, Treasury and Civil Service Committee, vol. ii (Evidence) (1981-2) HC 236-II, Memorandum (p. 174) Annex A, paragraph 1).

It suffices therefore to say that it is right to blame a minister for mistakes that arise from improper departmental administrative systems, or for decisions that were not communicated to the minister for lack of sound management of the department. When ministers are criticized in this way they will be forced to put mechanisms in place that will ensure that in future they have access to necessary and sufficient information about the operations of their departments.

The resignatory obligation of a minister is the most controversial aspect of ministerial responsibility. This duty implies that a minister accepts responsibility for misconduct or errors of judgment on the part of officials in the department, or for his or her own culpability in the conduct of the department's affairs (C Turnip 1989). Should a minister accept vicarious responsibility for delinquent civil servants in his or her department and be punished by resignation or dismissal by the premier? Or, is the direct personal culpability (of the minister) the only criterion? This remains the crux of the problem of individual ministerial responsibility in all parliamentary democracies. That ministers should be held personally accountable for their or their departments' failings by being forced to resign their posts, both G Marshall and C Turnip seem to agree, has been seen by some as the touchstone of ministerial responsibility. But the realisation that a minister is inevitably unaware of, and unable to control directly, a considerable part of the work of modern government has, as C Turnip also observes, destroyed for ever the idea that the responsible minister ought always to take blame and resign when something has gone badly wrong (C Turnip 1989, 139).