Institutional Renaissance or Populist Fandango? The Impact of the Economic Freedom Fighters on South Africa's Parliament

By *Richard Calland* and *Shameela Seedat*[*]

Abstract: *Twenty one years into its democratic life, modern South Africa faces a number of 'growing pains'. While the ruling African National Congress (ANC) has decisively won five national elections in a row since 1994, never falling below 62% of the national vote, fears that dominant party syndrome will diminsh the independence, and undermine the constitutional mandate, of key institutions such as parliament are balanced by the increasingly combative tone and character of opposition parties, especially the new kid on the block, the Economic Freedom Fighters (EFF) that are led by 'firebrand' former ANC Youth League leader Julius Malema. The sudden emergence of a more competitive form of multi-party politics following the May 2014 national election has injected new life into the National Assembly. By examining four episodes of political and procedural contestation that have animated the 2014-19 parliament, this paper seeks to respond to two questions: One, has the newfound parliamentary vigour that has accompanied the belligerent character of the EFF's strategy and tactics enabled parliament to better perform its constitutional mandate in terms of holding the executive to the account? And, second, does the EFF's impact on parliament represent an institutional renaissance after a decade or more of increasing lethargy and mounting irrelevance to the public discourse, or simply and merely a populist fandango? In turn, there are potentially profound implications for the future of South Africa's representative and participatory democratic modality.*

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Introduction: A Parliament Re-born?

On 12 February 2015, scholars, practitioners and activists who care about democratic South Africa looked on in shock and horror as the annual State of the Nation Address was disrupted by twenty-four red-overalled 'economic freedom fighters' (EFF). After considerable

* *Richard Calland* is Associate Professor in Public Law at the University of Cape Town and Director of its Democratic Governance & Rights Unit (DGRU). *Shameela Seedat*, has specialised in constitutional and human rights issues for over 15 years – at South Africa's Constitutional Court and Land Claims Court, the United Nations Development Program in New York and the Institute for Democracy in South Africa (Idasa). She currently makes human rights-based films and conducts independent legal and policy research.

commotion, during which the cellphone signal was jammed by the government, thus preventing journalists and MPs from communicating with the outside world, the 25 EFF MPs were violently removed by police-officers masquerading as parliamentary security officials. The received wisdom of the assembled parliamentary press gallery and commentariat was that it was a 'sad day for South Africa's democracy'. Or was it? Was it not a sign that renewed vigour was entering the democratic process and that ugly and uncomfortable though it might be, real political participation and contestation was being injected into a representative institution that had atrophied over the past decade? In the face of President Jacob Zuma's stubborn refusal to accept accountability for unlawful public expenditure on his private homestead, Nkandla – and his hiding behind institutional weaknesses and the advantage of a dominant majority party – was not militant EFF leader Julius Malema's demand that he 'pay back the money' a powerful, if crude, expression of participatory democracy? Or was it simply an opposition representative employing muscular tactics to advance his political strategy?

Having for many years succumbed to what appears to be one-party dominance[1] and – often in related fashion – institutional lethargy, South Africa's parliament has recently entered a new, more dynamic and arguably more relevant period. Ever since the country's last national election in May 2014 parliament has regained a position of centrality within the political playing field. The Economic Freedom Fighters, a group of mostly ex-ANC Youth members who, on a militant populist ticket, competed in national elections for the first time, secured 6.35% of the national vote – a reasonably good return, given that the party was less than a year old on election day. Thus, the EFF acquired 25 seats in the National Assembly, becoming the third largest political party after the ruling ANC and the main opposition party, the Democratic Alliance (DA). Since the election, media coverage of parliament has soared as result of repeated disruption and the bold use of procedural challenges by EFF MPs. The promise of dramatic commotion as result of the EFF's actions in parliament has kept South Africans glued to parliamentary television and news – not since the days of Nelson Mandela has the National Assembly so vividly caught the public's attention. The element of public spectacle derives much of its impetus from the cult of personality around both President Zuma and EFF leader Julius Malema. While this obvious manifestation of 'personality politics' might well in large part be driving the newfound interest in parliament, there are several events since the last election that are deserving of analytical scrutiny and academic inquiry.

1 For an assessment of where South Africa's democratic trajectory sits within the traditional 'weak' versus 'strong' dominant party theory spectrum, see: *Roger Southall.* The Dominant Party Debate in South Africa. Africa Spectrum 39 (2005), pp. 61-82. For a more nuanced consideration of the some of the major factors of the dominant party tendencies of the ANC that impact on constitutional institutions and principles, see: *Sujit Choudhry*, "'He had a mandate': The South African Constitutional Court and the African National Congress in a Dominant Party Democracy". Constitutional Court Review 2 (2009), pp. 1-86.

Three events deserve special consideration and are the subject of this article: first, the Presidential Question Time sessions which took place on 21 August 2014 and 11 March 2015; second, the debate on the Ad Hoc Committee's Report on Nkandla which took place on 13 November 2014; and, lastly, the State of the Nation Address of 12 February 2015. We examine these events with the aim of gaining a clearer understanding of the extent to which parliament may now be able to better serve its constitutional mandate as a result of the aggressive parliamentary strategy and tactics of the EFF, in contradistinction to the strong trend of the past 10-15 years in which parliament's constitutional authority has been significantly curtailed as a result of one-party dominance, especially in relation to parliamentary oversight of the executive. This, we hope, will shed new light on the health of South Africa's participatory and representative democracy as it enters this new phase in its democratic evolution, by asking questions such as: Is parliament being hijacked by new (populist) political forces or is it - and by implication "we", the people - genuinely becoming more robust and politically relevant? Has a militant populist named Malema breathed new life into what appeared to be a failing representative democracy where constitutional and parliamentary rules had extensively succumbed to the needs of the governing party? Or are the EFF's antics (and the way they have since been mimicked by the DA) a further morbid symptom of institutional decline rather than a vibrant and welcome challenge to the persistent degradation of parliament as an institution by the ANC's leadership?

Conceptual Framing and Constitutional Context

Section 1 of the South Africa Constitution provides for a system of "Universal adult suffrage, a national common voters roll, regular elections and a *multi-party system of democratic government*, to ensure accountability, responsiveness and openness." (our emphasis). South Africa's Constitution-makers designed a system to govern South Africa's post-1994 democratic politics with the following core features. First, an electoral system that must 'result, in general, in proportional representation' (section 46 of the Constitution). South Africa has chosen the simplest form of the proportional representation system, in which the electorate vote for a party from an open list of parties and every vote counts, with no threshold (in a 400 seat National Assembly, just 0.25% of the vote – around 50,000 voters in the last election – are required to win representation of at least one seat in the national legislature).

Second, a system in which the seat in parliament is essentially 'owned' not by the elected representative but by the party upon whose list he or she appeared at election time[2] - meaning that if, as has happened on more than one occasion, an MP is disciplined and has

2 The relevant amendment dealing with loss of membership is inserted by item 13 of Annexure A to Schedule 6 of the Constitution. The insertion is as follows: "*Additional ground for loss of membership of legislatures* 23A. (1) A person loses membership of a legislature to which this Schedule applies if that person ceases to be a member of the party which nominated that person as a member of the legislature.

his or her membership of the party revoked, then he or she will automatically lose his or her seat in parliament. Naturally, this gives the management and leadership of the political party – especially the whippery in parliament itself – a large amount of power and makes holding the line and maintaining discipline within the parliamentary party a relatively easy task. Thus, this feature of the political and parliamentary landscape is a consequence of the constitutional design, which has been exaggerated by the fact that electorally the ANC has enjoyed a series of five substantial victories in the national elections that have taken place since (and including) 1994, which further weakens the hand of the backbench MP.

Against this backdrop, it is worth asking: what does the South African public expect of its parliament? The Afrobarometer opinion polling provides some useful guidance in this respect[3]:

- 55% agreed or strongly agreed with the statement that: 'Parliament should ensure that the President explains to it on a regular basis how his government spends taxpayers' money'.
- 63% agree or strongly agreed with the statement that: 'Parliament should ensure that the President explains to it on a regular basis how his government spends taxpayers' money'.
- 95% of those polled had never contacted an MP during the past year, compared with 87% who had never contacted a political party
- 70% agreed or strongly agreed with the statement that: 'Many political parties are needed to make sure that South Africans have real choices in who governs them'.

So, this evidence tends to suggest that the broader population recognizes the importance of political parties, but wants parliament to be effective in holding the executive to account – something that, increasingly, it has been feeble in doing:

> *In a Westminster system, parliaments are always at a disadvantage when compared with the Executive arm of government, which has by comparison all the resources and people, and all the political weight…it is very hard for back bench MPs in such a system to stand up to their seniors – those who holding positions in the cabinet – especially when the electoral system compounds the problem by giving the political bosses – which would by definition include those cabinet ministers as part of the leadership of the party – even more power.*
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> *The National Executive Committee (NEC) of the ANC is elected. But when it meets, those cabinet ministers who were not elected onto the ruling party's chief decision-making body attend as observers. They may lack power and influence within the ANC – Finance Minister Pravin Gordhan, for example, was not an elected member of the NEC for the first three years of his time at National Treasury; he was only elected onto the NEC at the December 2012 Mangaung National Conference of the ANC – but they are still a part of the leadership of the party.*

3 Afrobarometer 2013: http://www.afrobarometer.org/files/documents/summary_results/saf_r5_sor2.pdf.

> *So when a backbench ANC MP wants to stand up to a cabinet minister, it requires particular courage. And courage tends to come with experience. So, the younger you are, the newer you are to parliament, the less likely that you will have the courage and the means to do so.*
> *Beyond the weekly ANC caucus meeting that is held on a Thursday morning, the ANC members of a particular committee meet as a "study group", often prior to the committee's meeting on an issue or a bill and is sometimes attended by the Minister and, sometimes by the Director-General (DG), "which is absolutely wrong" in the view of [Opposition DA MP David] Maynier. In the case of the secrecy bill, the R2K's point is that at key moments [ANC MPs] Burgess and Landers were getting their instructions directly from the executive. As Judith February explains: "Burgess and Landers were both weak and completely pliable. They abrogated their responsibilities as members of parliament completely".*
> *The minister is an MP and a member of the ANC caucus. What appears to happen, particularly if dealing with legislation, however, is that the DG will brief the ANC study group on what amendments are acceptable and which are not. "It subverts the legislative process completely", as Maynier puts it.*[4]

To what extent are these weaknesses due to flaws in the constitutional design – and the wisdom of the constitution-makers – as opposed to the political culture and outcomes of post-1994 South Africa? In the UDM case[5] the constitutional design was considered by the Constitutional Court in the context of controversial 'floor-crossing' legislation that ostensibly gave individual MPs more power to dissent and even leave their party without losing their seat in parliament, but which in practice tended to play into the hands of the ruling party:

> *The first contention was that the amendments undermine the basic structure of the Constitution and for that reason are not sanctioned by any of the provisions of section 74. The second was that the amendments are inconsistent with the founding values of the Constitution set out in section 1, which can only be amended in accordance with the provisions of section 74(1). The third was that the amendments are inconsistent with the voters' rights vested in citizens by section 19(3) of the Bill of Rights, which can only be amended in accordance with the provisions of section 74(2)… There is a tension between the expectation of voters and the conduct of members elected to represent them. Once elected, members of the legislature are free to take decisions, and are not ordinarily liable to be recalled by voters if the decisions taken are contrary to commitments made during the election campaign….It is often said*

4 *Richard Calland*, The Zuma Years: South Africa's Changing Face of Power, Cape town, 2013, p. 149.

5 *United Democratic Movement v President of the Republic of South Africa and Others* (African Christian Democratic Party and Others Intervening ; Institute for Democracy in South Africa and Another as Amici Curiae) (No 2) (CCT23/02) [2002] ZACC 21.

> *that the freedom of elected representatives to take decisions contrary to the will of the party to which they belong is an essential element of democracy. Indeed, such an argument was addressed to this Court at the time of the certification proceedings where objection was taken to the transitional anti-defection provision included in Schedule 6 to the Constitution. It was contended that submitting legislators to the authority of their parties was inimical to*
> *"accountable, responsive, open, representative and democratic government; that universally accepted rights and freedoms, such as freedom of expression, freedom of association, the freedom to make political choices and the right to stand for public office and, if elected, to hold office, are undermined; and that the anti-defection clause militates against the principles of 'representative government', 'appropriate checks and balances to ensure accountability, responsiveness and openness' and 'democratic representation'."*
> *This Court rejected that submission holding:*
> *"Under a list system of proportional representation, it is parties that the electorate votes for, and parties which must be accountable to the electorate. A party which abandons its manifesto in a way not accepted by the electorate would probably lose at the next election. In such a system an anti-defection clause is not inappropriate to ensure that the will of the electorate is honoured. An individual member remains free to follow the dictates of personal conscience. This is not inconsistent with democracy.*[6]

In essence, the Constitutional Court was affirming the central role that political parties play in the South African constitutional and political order. An "individual member remains free to follow the dictates of personal conscience" in theory. But not (or at least very rarely) in practice, prompting another question: does this profound constraint on individual independence mean the 'end of the representative state?' In South Africa, individual MPs are constitutionally as well as politically contained. Internationally, parliaments are structurally weak and increasingly unable to respond to the most pressing challenges of the age, due to the complexity, scale and transnational character of issues such as climate change and energy policy, arm-dealing and security, and natural resource management. When confronted by 'wicked' problems – of macro-economic policy making (the shift from RDP to GEAR in the mid-1990s) or systemic corruption (the failure of the Standing Committee on Public Accounts [SCOPA] to cope with the arms deal scandal at the turn of the century), South Africa's parliament has found itself to be no exception to this international trend.

Is there a 'solution' to this institutional conundrum? After all, on the face of it South Africa's parliament has done in constitutional and procedural terms much of what could be asked of it: it gives its parliamentary committees power and authority that many parliaments traditionally lack; and it requires of its law-making processes that the public are

6 UDM, ibid.

properly involved: South Africa's constitution enshrines the principles of 'participatory democracy' and requires that, for example, national and provincial legislative processes "facilitate public involvement". Section 59(1) of the Constitution reads:

The National Assembly must

a) Facilitate public involvement in the legislative and other processes of the Assembly and its committees; and
b) Conduct its business in an open manner, and hold its sittings, and those of its committees, in public…

There is a similar provision for parliament's second house – the National Council of Provinces (NCOP)[7]. South Africa's Constitutional Court has been asked to rule on these provisions on several occasions, as challenges have been brought against the proceedings of the National Assembly and/or NCOP. In the leading case of Doctors for Life International v Speaker of the National Assembly and Others [2006][8], Justice Ngcobo writing for the majority held (at paragraph 90 of the judgment) that:

> *The right to political participation is a fundamental human right, which is set out in a number of international and regional human rights instruments. In most of these instruments, the right consists of at least two elements: a general right to take part in the conduct of public affairs; and a more specific right to vote and/or to be elected. Thus article 25 of the International Covenant on Civil and Political Rights ("ICCPR") provides:*
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> *"Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:*
>
> *a) To take part in the conduct of public affairs, directly or through freely chosen representatives;*
> *b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors".*[9]
>
> *Significantly, the ICCPR guarantees not only the "right" but also the "opportunity" to take part in the conduct of public affairs.*[10] *This imposes an obligation on states to*

7 Section 72 of the Final Constitution. Section 118 contains a similar provision in relation to the nine Provincial Legislatures.

8 *Doctors for Life International v Speaker of National Assembly and others* CCT 12/05 [2006] ZACC 11.

9 See *Jonas Ebbesson,* "The Notion of Public Participation in International Environmental Law" *Yearbook of International Environmental Law* 51 (1997), pp. 70-2.

10 International Covenant on Civil and Political Rights (ICCPR), adopted 16 December 1966 (entered into force 23 March 1976). South Africa signed this instrument on 3 October 1994 and ratified it on 10 December 1998. Article 25 of the ICCPR was based in part on article 21 of the Universal Declaration of Human Rights, adopted 10 December 1948, which provides:

"(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.".

> *take positive steps to ensure that their citizens have an opportunity to exercise their right to political participation.*[11]

The majority went on to hold that that the NCOP had failed to satisfy its constitutional duty to facilitate public involvement in its law-making process. With typical aplomb, Sachs J. added his own distinctive voice to the majority judgement (at paras 227-228):

> *Public involvement in our country has ancient origins and continues to be a strongly creative characteristic of our democracy. We have developed a rich culture of imbizo, lekgotla, bosberaad, and indaba. Hardly a day goes by without the holding of consultations and public participation involving all 'stakeholders', 'role-players' and 'interested parties', whether in the public sector or the private sphere. The principle of consultation and involvement has become a distinctive part of our national ethos.*[12] *It is this ethos that informs a well-defined normative constitutional structure in terms of which the present matter falls to be decided. This constitutional matrix makes it clear that although regular elections and a multi-party system of democratic government are fundamental to our constitutional democracy, they are not exhaustive of it. Their constitutional objective is explicitly declared at a foundational level to be to ensure accountability, responsiveness and openness.*[13] *The express articulation of this triad of principles would be redundant if it was simply to be subsumed into notions of electoral democracy. Clearly it is intended to add something fundamental to such notions.*

So, constitutionally at least, South Africa's parliament brings together traditional conceptions of representative democracy with more modern notions of participatory democracy. But in doing so, the design modality has inevitably to contend with the political impulses that derive from electoral outcomes and the political culture of both the institutions and the political parties that are contesting power. It is against this backdrop that we now turn to consider four potentially seminal, or paradigm-shifting, events that have shaped the institutional culture and practice, as well as the 'zeitgeist' of the new, 2014-2019, South African parliament, prompting both deep concern and optimism in equal measure.

11 ICCPR, ibid, article 25.

12 See *Manfred Nowak*, U.N. Covenant on Civil and Political Rights*: CCPR, Kehl* 1993, p. 439.

13 See *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as* Amici Curiae) 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC), Sachs J at para 625.

A new era of Political Contestation: Four Episodes

Presidential Question Time Sessions on 21 August 2014 and 11 March 2015

Question Time in the National Assembly is a critical mechanism for holding the executive to account. Questions may be put forward for oral or written reply to the President, Deputy President and Ministers on various matters for which they hold responsibility. The President is required to answer a minimum of six questions per term[14]. While in theory Question Time is a powerful democratic tool, which directly provides a bridge between the people's representatives and more powerful political structures, specifically in the executive arm of government, there is a strong perception that it has not operated at all effectively to date. The Independent Panel Assessment of parliament[15] observed in 2009 that the manner in which Question Time is conducted has direct bearing on the integrity and eminence of parliament vis-a-vis the executive[16]. Shortcomings identified within the process include the executive regularly giving vague or inadequate answers which do not address the substance of the question posed, the use of questions from opposition parties solely to embarrass Ministers rather than to obtain information; and the ruling party posing questions which amount to praise singing rather than being informative or substantive in nature[17].

Question Time on 21 August 2014 heralded a dramatic shift in South Africa's parliamentary culture. Parliamentary Rules dictate that, following the ANC victory in the April 2014 election, President Zuma should have appeared for questions in the House at least once per term, which meant three appearances between April and December 2014. However, it turned out that Zuma appeared for questions only once during this period – on 21 August – and that this session ended in high drama and pandemonium, one that may be described as being practically "a declaration of future disruption" by the EFF. This move has had major significance for the tone and workings of parliament since. On the day in question, EFF leader Julius Malema asked Zuma whether he would comply with the Public Protector's findings and recommendations on controversial improvements that had been made at taxpayers' expense on his private homestead in Nkandla, KwaZulu-Natal[18]. The Public Protector had found that Zuma acted in breach of constitutional obligations by exposing himself to a conflict of interest and in failing to comply with the Code of ethics for

14 The Deputy President answers four questions during ordinary question time, generally once every two weeks, and Ministers divide into three clusters for the purposes of questions, with a cluster answering questions each week according to a system of rotation. See Parliament of the Republic of South Africa 'Report of the Independent Panel Assessment of Parliament' (2009) 50 available at *http://www.gov.za/sites/www.gov.za/files/panel_assess_parl.pdf* (last accessed on 8 June 2015).

15 Report of the Independent Panel Assessment of Parliament, note 14.

16 Ibid.

17 See Parliamentary Press Gallery Association submission referred to in Report of the Independent Panel Assessment of Parliament , note 14, p. 51.

18 The Public Protector is appointed under the Constitutional to strengthen constitutional democracy by probing improper conduct and maladministration in state affairs.

members of the executive[19]. Several of the features built with public funds at Zuma's residence – such as a large indoor swimming pool - did not qualify as the "security upgrades" they had been represented as, and the Public Protector determined Zuma recompense the State for the unlawful public expenditure.

Faced with Malema's question, Zuma replied that his responses to all reports concerning the security upgrades to his private residence had been submitted to the speaker on 14 August 2014[20]. Viewing this as evasive of a proper response, Malema and EFF MPs rose from the floor and began to chant "Pay Back the Money". The Speaker of parliament, controversial ANC MP Baleka Mbete, deemed this behaviour as disruptive to the proceedings of the National Assembly, and, for the first time in the history of South Africa's parliament, called in members of the riot police, who proceeded to remove Malema and other EFF MPs from the House. In doing so, Mbete relied on legislative powers accorded to her in terms of the Powers and Privileges of Parliament and Provincial Legislatures Act, 2004[21]. EFF members were subsequently suspended for 30 days from parliament without remuneration by its Powers and Privileges Committee, an action that was later challenged and found to be unlawful by the High Court[22].

Such unprecedented pandemonium in parliament – the first time in history that a South African President was confronted so robustly by opposition parties in parliament - marked a clear departure from the past. While adversarial behaviour during parliamentary sessions had not been uncommon since 1994, the tenor on 21 August 2014 was much more chaotic and heavy-handed on all sides than witnessed before. The day's events arguably set the tone for all of the EFF's subsequent engagements with parliament, at least as far as President Jacob Zuma was concerned. The EFF adopted a new position that was militant and uncompromising: either Zuma should own up to wrongdoing around Nkandla (and hence resign), or the EFF would continue to engage in the 'politics of parliamentary disruption'.

The EFF's question to Zuma and accompanying chant "Pay Back the Money" - however disruptive to the proceedings of the National Assembly – deserves consideration in itself. With great popular appeal and in easily understandable terms, Malema demanded from Zuma not only what the Office of the Public Protector, acting on her constitutional duty, had called for but also what the electorate should rightfully demand of South Africa's democratic architecture. In line with the opinion poll findings outlined above, arguable the

19 Section 96(1) and (2).

20 'Proceedings of the National Assembly' (2014) 22 available at *http://www.parliament.gov.za/live/content.php?Category_ID=119&DocumentStart=10* (last accessed on 8 June 2015).

21 Section 11.

22 *Economic Freedom Fighters and Others v Speaker of the National Assembly and Others* [2014] ZAWCHC 204 where the court interdicted the interdicted the Speaker of the National Assembly and anyone acting under their authority from giving effect or enforcing the decision taken by the National Assembly to suspend the EFF members from the National Assembly without remuneration.

EFF was simply amplifying the public's wish that the executive, and the President specifically, be held to account. Zuma was already appearing in parliament under a cloud of allegations: of corruption, unaccountability, the undermining of both parliament and the Office of the Public Protector, his involvement in the "Guptagate" saga, the death of thirteen South African soldiers who allegedly protected business interests linked to the Zuma family in the Central African Republic, and his still-unanswered questions around the arms deal. The Nkandla findings provided Malema with a direct instrument with which to target the country's leader.

South Africa's Constitution articulates "accountability" as one of the founding values of the democratic state and "parliamentary oversight" as a key way of ensuring that government directs the resources of the state in the promotion of the public good rather than for its own narrow interests[23]. South Africa's parliamentary website emphasizes that the genuine test of democracy is "the extent to which Parliament can ensure that government remains answerable to the people"[24]. Parliament therefore has the duty to "detect and prevent abuse of power and illegal or unconstitutional conduct by the national executive; [to] protect the rights and liberties of citizens and hold the Government answerable for how tax money is spent; and [to] make Government operations more transparent in order to increase public trust in the Government"[25]. The Constitutional Court in Oriani-Ambrosini MP v Sisulu, MP Speaker of the National Assembly[26] (2012) observed that parliament's oversight responsibility is "a collective responsibility of both the majority and minority parties and their individual members to deliberate critically and seriously on legislative proposals and other matters of national importance"[27].

However, in practice the ANC's substantial majority in parliament rendered it unlikely that the National Assembly would ever seriously question the President about potentially problematic conduct. The EFF and other minority parties' use of Question Time on 21 August 2014 is a prime example of how parliamentary processes can be used to demand greater accountability from the highest office bearer in the land. Yet an analysis of the events on this day cannot begin and end with this proposition alone - the fact remains that an important and time-limited parliamentary process entirely collapsed. Parliament itself was as result rendered dysfunctional by a minority political party (with just 6% of the seats in the National Assembly) that saw fit to disrupt it. During the course of the altercation the Speaker of the National Assembly – someone filling a position that demands impartiality – was accused of favouritism and of failing to uphold her parliamentary duties. Ultimately, parliament – an institution which ideally sets an example for the rest of the country as a body that manages diverse positions by means of negotiation and persuasion - became

23 Sections 1 and 55 respectively of the Constitution of the Republic of South Africa, 1996.

24 http://www.parliament.gov.za/live/content.php?Category_ID=20 (last accessed on 8 June 2015).

25 Ibid.

26 *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* 2012 (6) SA 588 (CC).

27 *Oriani-Ambrosini*, note 26, p. 22.

tinged by violence. Given that violence in various forms is one of the major problems facing South Africa, such a perception becomes even more problematic.

Disruptive behaviour can also undermine representative democracy as it can progressively - or even in a single instance - undermine the functioning of parliament as a central national institution. One can reasonably posit that "We, the people" will not be served by our representatives – as is demanded by the classic democratic theory of "government for the people by the people" - if parliament is prevented from carrying out its business at any given time. The EFF's disruptions arguably weaken parliament's reputation as a space of dignity and order, one that hosts respectful proceedings and conducts serious business – and in principle this can have wide-reaching negative effects on democracy itself. While it has been argued that the EFF's "street tactics" are but a making-visible of the hard realities of concealed existing power politics, they may also serve to undermine the very instruments which aim, at least in principle, to limit both concealment and the abuse of power.

Several other weaknesses in the operation of parliament, ones which directly reflect its limited ability to pursue its constitutional oversight mandate, came to the fore during the Question Time debacle. These tend to support the perception that parliament's constitutional role has been in jeopardy because of the extent to which ANC dominates politics in South Africa. The first relates to the role and conduct of the Speaker of the National Assembly. Failure of confidence in the Speaker (as result of the events of 21 August 2014) was expressed by the EFF in its affidavit to the High Court when it challenged its suspension from the National Assembly:

> *"It is thus mandatory for the President to attend Parliament, at least once per term. The reason for the President's attendance in Parliament is to respond to questions asked by members of Parliament, which include members of the opposition political parties such as the EFF. The President cannot decide on his own whether or not he wants to come to Parliament. Also, the President cannot decide which questions he will answer. He is required by law to attend Parliament and answer the questions put to him when he is in Parliament. Further, the answers given by the President when he has been called to Parliament to account must be meaningful. The Speaker, as the leader of the National Assembly, is constitutionally obliged to ensure that the answers given by the President are meaningful. If the President fails to provide meaningful answers in Parliament to the questions put to him, the fundamental purpose of calling the President to account in the National Assembly is defeated. It was therefore incumbent on the Speaker to require the President to explain when he intended complying with the clear findings of the Public Protector since I had raised the matter pertinently. The Speaker failed to request the President to answer my question directly. In asking the question, which I did, I was not only representing the view of the EFF; I was also raising an important issue in the public interest and in relation to the mandate of an important institution of our constitutional order, namely, the role of the Public Protector. If the reports of the Public Protector are ignored, as seems*

> *to have happened in this instance, without any rational grounds and without judicial sanction, the essence of a vital constitutional organ will be eroded. The essence of my question was to request the President to provide an explanation of the steps that he intended taking in order to give effect to the clear and unambiguous findings and recommendations of the Public Protector. This question also spoke to the issue of signal importance about the President's respect for constitutional institutions."*[28]

Speaker Baleka Mbete's reputation has been heavily compromised as result of her conduct during Question Time (and also during further parliamentary events discussed later in this paper). It is a given that the Speaker must be non-partisan and even-handed. Mbete – and the ANC by its deployment of her – have however drastically failed to respect such a basic principle. While the Speaker of the National Assembly has always been drawn from the majority party, this in itself does not compromise his or her position as Speaker - previous speakers have clearly demonstrated that one can place parliamentary business (and fairness) at the centre of one's use of authority notwithstanding a long-held fidelity to the ANC. Mbete, as chairperson of the ruling party, however falls into a different category – the conflict of interest involved here is insurmountable and even if she if an objective sense she is acting impartially, the perception of partiality will linger.

A second weakness in the practical operation of the National Assembly – namely its lack of assertiveness – is emphatically demonstrated by its failure in 2014 to call the President to answer questions at Question Time on four occasions, as expressly required. One of parliament's primary vehicles for holding the executive to account and for obtaining information on pressing issues of national importance fell away. No matter how ineffectual Question Time might be in practice, it remains one of the tools that animate the idea of representative democracy. This failure of implementation occurred despite insistence from minority parties that parliamentary rules should be upheld. Following the direct confrontation with President Zuma on 21 August over Nkandla, and the collapse in the proceedings, opposition parties attempted to compel Zuma to appear before the National Assembly to answer questions. However, they were unsuccessful and Zuma did not appear for the remainder of 2014. This angered opposition parties – and in Novermber 2014 the opposition moved for a Motion of No Confidence in the President [29].

Zuma finally appeared for Question Time on 11 March 2015. Opposition parties continued with their campaign to get Zuma to answer questions on Nkandla. At the start of the session, these parties requested that questions posed to him last August - when the session broke down - should now be addressed. Speaker Mbete ruled that Zuma could not be asked questions from last year's session and that should these be posed anew then they would be answered in written form. When the DA asked why Zuma had failed to appear last year, he

28 See EFF founding affidavit in *EFF v Speaker*, note 22.

29 See 'DA goes to court to ensure motion of no confidence is heard' available at http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71639?oid=341112&sn=Detail&pid=71639 (last accessed on 8 June 2015).

denied that he had ever 'dodged' questions, stating that he had never been asked to come to parliament[30]. This appeared to contradict the impression created by the Speaker that she had been consulting with the Presidency to arrange a date but that no agreement had been reached[31]. These conflicting accounts have to date not been reconciled.

From a positive perspective, the fact that questions around the nature and occurrence of Question Time have been brought into sharp focus and are now on the agenda of minority parties in a more vocal and vigorous way than before may simultaneously suggest positive signs for the relevance of parliament and, therefore, the state of representative democracy. One positive result seems to be that Zuma has now publicly committed himself to appearing five times a year. While minority parties, the ANC, the Speaker and the President do not seem to agree on the details of how Question Time fell away in 2014, this impasse has led to not only political parties but also parliament and the executive taking greater interest in how Question Time comes about in practice – and, implicitly, what level of responsibility the President owes to parliament. The EFF and other minority parties maintain that the National Assembly must set a date and time when the President must appear, and that the President's primary commitment is to parliament. The ANC on the other hand maintains that a date needs to be negotiated with the President via the Speaker, since he may be engaged with international travel or important state matters and cannot reliably be expected to appear at the times when the National Assembly sees fit[32]. It appears that the appropriate process is still the subject of debate within parliament, but what is clear is that there is much greater pressure on parliament's Programming Committee to take decisive steps than before. Overall, it can be argued that any fresh parliamentary debate on the nature and occurrence of Question Time itself is beneficial for parliament in the long-term.

The Ad Hoc Parliamentary Committee on Nkandla

As noted, the issue upon which Malema and the EFF have attached their vigorous parliamentary tactics is that of Nkandla, and specifically the President's response to the Public Protector's reports and the remedial action that she has proposed, which includes paying back some of the money spent unlawfully on the upgrades to the President's private residence. At its heart, this is an issue about the strength or otherwise of the Public Protector, a Constitutional body, in relation to the ruling party and, in turn, parliament's willingness or ability to ensure that Zuma and the ANC respect the Public Protector. Indeed, it is worth noting that when President Zuma finally responded to the question from Malema on 11 March, his answer was revealing: "The public protector made recommendations. And rec-

30 See https://pmg.org.za/hansard/20502/ (last accessed on 19 October 2015) and 'Zuma: I have never dodged questions' available at http://ewn.co.za/2015/03/11/Zuma-Ive-never-dodged-questions (last accessed on 8 June 2015).

31 'Mbete or Zuma "is telling lies"' available at http://www.bdlive.co.za/national/politics/2015/03/13/mbete-or-zuma-is-telling-lies?service=print (last accessed on 8 June 2015).

32 Ibid.

ommendations are recommendations. [They a]re not verdicts. Recommendations are recommendations. Subject to be taken or not taken, if they are recommendations. It is only a judge verdict that you have got either to go to prison or pay the money. If there is a recommendation that recommendation has to be subjected to those that the public protector reports to.[33]" Zuma's attitude derives from his reading – or, rather, deliberate misreading – of the decision of the High Court in DA v SABC[34], an important judgment to which we return below.

By means of a resolution of the National Assembly on 19 August 2014, parliament had established an Ad Hoc Committee to consider the 'Report of the President regarding the security upgrades at his private residence'.[35] The ANC and minority parties (DA, EFF, Congress of the People, Inkhata Freedom Party and Freedom Front) were all represented on the Committee in accordance with South Africa's multi-party committee system, one whereby party political representation is proportional to the number of seats a party has in parliament. From very early on in the life of the Committee, stark disagreements emerged between members of the ANC and those of opposition parties, particularly with regard to the appropriate process to be followed. Differences arose over whether witnesses should be called before the Committee to answer questions and provide information or not, over the weight accorded to various source materials[36] that the Committee was considering and over whether legal advice could be solicited in order to shed further light on the status of the Public Protector's report or not.[37]

One of the central areas of dissension – the status of the Public Protector's findings and remedial actions[38] – deserves further consideration not only because of the sensitive nature of Chapter Nine institutions but also because the legislature itself has a special duty to uphold the dignity and integrity of these institutions. Opposition parties maintained that the "remedial action" proposed by the Public Protector[39] is binding and enforceable on all or-

33 http://panmacmillan.bookslive.co.za/blog/2015/03/12/mr-president-we-have-a-problem-julius-malema-again-asks-zuma-to-pay-back-the-money/ (last accessed on March 12th 2015).

34 *Democratic Alliance v South African Broadcast Corporation Limited and Others* 2015(1) SA 551 (WCC).

35 This report was tabled into the National Assembly on 14 August 2014.

36 Inter-Ministerial Security Cluster Task Team Report, the Joint Standing Committee on Intelligence Report, the Special Investigating Unit Report and the Public Protector's Reports.

37 Even before such disagreements on methodology, parties had disagreed about the election of the chairperson. The constitutionality of the committee was also contested by COPE, who decided as early as 25 September not to participate in its work. See 'Report of the Ad Hoc Committee to consider Report by the President regarding the security upgrades at the Nkandla private residence of the President' (2014) 2953 available at http://www.parliament.gov.za/content/ATC.pdf (last accessed on 8 June 2015).

38 Report of ad hoc committee, note 35, p. 2954.

39 See Public Protector, Secure in Comfort report on the investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the department of public works at and in respect of the private residence of President Jacob Zuma at

gans of state and persons and that the report of the Public Protector superseded all other reports on the Nkandla issue that were placed before the Committee.[40] The ANC maintained, to the contrary, that the Protector's remedies were neither binding nor enforceable and that the President's own formal report should be the main focus of attention. They argued that the Protector's Report should be relegated to one of four source documents and that it should not be given any more attention that the three other documents consulted. [41]

On 26 September 2014, when the Committee failed to reach consensus on the procedure to be followed, opposition party MPs withdrew their support and all walked out of the Committee, having delivered impassioned speeches on the fundamental constitutional prescripts of accountability and oversight at stake. The Ad Hoc Committee was now composed exclusively of ANC members and continued according to its desired procedure: it would consider the President's reports and the source documents in its possession but would not open an inquiry, review any reports or call any witnesses, nor invite legal opinion on the status of the Public Protector's remedial acts and recommendations.[42]

In the Committee's report, drafted by ANC members in the ensuing weeks, a portion of the High Court judgment in the DA v SABC matter was referenced as providing appropriate clarity on the status of the findings and recommendations of the Public Protector[43]. Schippers J. found that the "powers and functions of the Public Protector are not adjudicative" and that the "findings of the Public Protector are not binding on persons or organs of state"[44] – the holding of the court that President Zuma had latched onto in his reply to Malema on 11 March (referred to above). Contrary to the view of the Public Protector, the Ad Hoc Committee finally concluded that there was no rational basis to conclude that President Zuma benefited unduly from the upgrades at Nkandla. It dealt with the Public Protector's findings and remedial action by noting that the Public Protector had actually cleared Zuma of many of the serious allegations levelled against him[45] (such as lying before parliament, benefiting his brother, and so on). With regard to the finding that Zuma and his family had in fact benefitted from non-security related items and should repay expenses incurred, it stated:

Nkandla in the KwaZulu-Natal Province. (2014) available at http://www.publicprotector.org/library%5Cinvestigation_report%5C2013-14%5CFinal%20Report%2019%20March%202014%20.pdf (last accessed 19 October 2015).

40 Ad hoc committee report note 35, p. 2954.

41 These are the Inter-Ministerial Security Cluster Task Team Report, the Joint Standing Committee on Intelligence Report, the Special Investigating Unit Report and the Public Protector's Reports.

42 Ad hoc committee report, note 35, p. 2956.

43 Ad hoc committee meeting report,note 35, at 2957.

44 Ibid.

45 Including that Zuma had lied to Parliament when he said government did not build the house, government build a spaza shop for Mrs Zuma, family benefitted from the project. See ad hoc committee report, note 35, p. 2979.

> *"The Public Protector in her report has noted that "President Zuma has improperly benefited from the measures implemented in the name of security, which include non-security comforts, such as the Visitor's Centre, swimming pool, amphitheatre, cattle kraal with culvert, and chicken run (para 10.5.3, p 431). In the judgement of Democratic Alliance v The South African Broadcasting Corporation Limited and Others (Case No:12497/2014), WC High Court Judge Schippers referred to the nature and extent of powers of the Public Protector and stated as follows: "…further...unlike a decision of a court, a finding of the Public Protector is not binding on persons and organs of state. If it was intended that the findings of the Public Protector would be binding, the Constitution would have said so". Regarding the above, the Committee thus finds that the Constitution, section 167 (4) e) specifies that only the Constitutional Court can decide that Parliament or the President has committed a constitutional violation[46]."*

On 13th November, the Report of the Ad Hoc Committee[47] appeared on the National Assembly's agenda for vote and passage. This session again made parliamentary history in terms of length and vibrancy. Minority parties spent seven hours filibustering, raising motion after motion, and ostensibly hoping to delay the vote by tiring out ANC MPs so that a quorum would not be sustained. Parliament was sent into disarray and Speaker Mbete again called for riot police to enter the National Assembly. DA members blocked the path of the police, saying their presence was a "violation of the constitutional order" and of the "social contract"[48]. With the ANC's majority holding firm, the National Assembly eventually passed a vote and adopted the report.

What might these events suggest in terms of the health of parliament and the practical workings of representative democracy? The failure of the Committee to reach consensus on the process to be followed and the consequent walk-out of every single opposition party reflect a breakdown within the committee system and of representative democracy. Parliament's own website declares that the role of the Committee is to "…ensure executive accountability to an informed parliament. Committees form an important space for intervention from minority parties and the public, so increasing opportunity for informed public debate on policy and legislation[49]." When political parties do not participate in deliberations, 'the people' lose the opportunity to make an input into both legislative process and executive oversight.

The voting session on the Report in the National Assembly was highly unusual. Riot police were called into a parliamentary house, a forum that is meant to serve as a model for debate and exchange in orderly fashion. Opposition parties were arguably making a valid

46 Ad hoc committee meeting report, note 35, p. 2980.

47 Ad hoc committee meeting report, note 35..

48 See 'Parliament diary scenes of shame' available at http://www.dailymaverick.co.za/article/2014-11-14-parliament-diary-scenes-of-shame/#.VQnKRGYy22w (last accessed on 8 June 2015).

49 http://www.parliament.gov.za/live/content.php?Item_ID=300 (last accessed on 8 June 2015).

point, namely that they agreed neither with the outcome of the report nor with the committee's processes. The Report, which fails to properly probe the President's conduct with sufficient vigour, further relying on the unenforceability of the Public Protector's recommendations rather than on the substance of her findings, demonstrates a practical weakness of South Africa's system of representative democracy: it is too costly for majority party MPs to ask difficult questions of senior party members, especially of the President.

The Committee deliberations on the day when opposition parties withdrew participation demonstrated the ANC MPs' single-minded determination to cover up for Jacob Zuma and the weakness of institutions such as parliament in the face of such dogged determination to do so. The DA**,** EFF, FF and COPE however all powerfully penetrated ANC positions at every turn, presenting impassioned expositions on accountability and transparency with attention to both detail as well as the bigger context and hitting the ANC in the solar plexus. The predominant underlying tone of the ANC's contribution to the debate was that they had won successive elections and should not have to play second fiddle to recommendations from the Public Protector. As was put rhetorically by a senior ANC MP: can the Public Protector be treated as more important than we who have been elected to parliament by the people?[50]

The debate on the status of the Public Protector itself was once again vigorously pursued during the vote in the National Assembly. Opposition parties suggested that the rightful constitutional status of the Office of Public Protector was being undermined not only by Zuma but also by the Ad Hoc Committee. They sought to interrogate further the Committee's reliance on the High Court judgment invoked, arguing that while Judge Schippers had stated that recommendations of the Public Protector are neither binding nor enforceable, the executive - according to that same judgment – still has a duty to explain why they are not being taken into account and implemented[51]. Schippers J. made the crucial point that "…the fact that the findings of and remedial action taken by the Public Protector are not binding decisions does not mean that these findings and remedial action are mere recommendations, which an organ of state may accept or reject." To not accept the remedial action of the Public Protector, the state must have "cogent" reasons and that such a decision would be an exercise of public power that, in turn, must be rational.[52]

The effect of the decision in the High Court – which is the subject of an appeal – is that in the Nkandla case, the government, and President Zuma specifically, must have cogent,

50 *Richard Calland*, 'Nkandla fiasco reminiscent of arms deal mess', *Mail & Guardian* 9 October 2014, available at http://mg.co.za/article/2014-10-09-nkandla-fiasco-reminiscent-of-arms-deal-mess. (Last accessed on 22 February 2015).

51 'Minutes of proceedings in the National Assembly', pp. 3313-3314 available at http://www.parliament.gov.za/live/commonrepository/Processed/20141121/593635_1.pdf (last accessed on 21 March 2015).

52 See also Serjeant at the Bar 'SABC case helps define the public protector's powers', *Mail & Guardian* 31 October 2014. Available at http://mg.co.za/article/2014-10-30-sabc-case-helps-define-the-public-protectors-powers (Last accessed 31 Oct 2014).

rational reasons for not executing the remedial action set out by the Public Protector in her Nkandla report, 'Secure in Comfort'. Accordingly, President Zuma is still required to provide rational grounds for refusing to implement the Public Protector's report. The explanation offered by the ANC was that inter-ministerial and other similar reports had found that Zuma was not in breach of the law; the opposition of course countered that such reports were government reports and as such did not constitute "rational grounds".

Furthermore, opposition parties argued that the ANC could not rely on the above-mentioned DA v SABC judgment alone and that the committee was required to engage with the substance of the Public Protector's report[53]. Given the political circumstances at hand, it is unlikely that there will ever be consensus on this matter within the National Assembly. But what is most striking from both the Committee and Assembly debates is the emerging disturbing fault-line in contemporary South African politics: the ANC's growing contempt for the constitution and its increasingly muscular complaint about counter-majoritarianism. While the ANC may be fully aware that the Constitution is the supreme law of the land and that a constitutional body such as the Public Protector therefore has significant authority, this at times does not provide a satisfactory *political* answer to the issues at stake. In effect, the ANC is emphasizing the counter-majoritarian impact of the constitution and its various institutional manifestations, whether in the form of the courts overturning government laws or policy or the Public Protector ordering "remedial action" to be taken by the executive that is not to the President's liking.

A positive consequence of the fracas around parliament's treatment of the Nkandla matter is that important questions about the relationship between Chapter Nine institutions and government – and what is at stake when recommendations of Public Protector are essentially ignored – have been raised. Given the sensitive nature of the Office of Public Protector, parliament has a special duty to give it unequivocal support, as with other Chapter Nine institutions. In this case, it was minority party MPs who rose to this call, making impressive arguments around what holding the executive to account means in actual practice. By implication, the bigger question of parliament's role and authority in a constitutional democracy has been placed on the agenda again.

State of the Nation address (SONA), 12 February 2015

The lead-up to President's Zuma's State of the Nation Address in February 2015 was marked by anticipation of another parliamentary disruption by EFF members. ANC members forewarned Malema that questions relating to the President and Nkandla would not be tolerated as "convention" does not allow for questions during SONA. Malema offered the following in response:

> *"We don't comply with conventions that are not working for our people, that convention only applies to a President who respects Parliament and who takes Parliament*

53 Ibid.

> *seriously and who consistently accounts to Parliament. The convention also is that the President has never dodged answering questions, so if he can break that convention, then we can break convention of not asking questions. We are learning from him... We waited the whole of three terms last year when we were told that: the President is coming, the President will come when there is order, the President was here long before and why do you want to subject the President to questions. We got excuses from Parliament since President Zuma appeared in Parliament from the last time."*[54]

At the opening of parliament on 12 February 2015, Zuma was to address government's achievements over the past year and outline its proposed plan of action for the year ahead and any law reform. Before he could take to the podium, however, Malema lived up to the heightened sense of anticipation that had been growing in the media all week, rising to offer a point of order (as opposed to a question) as allowed by Joint Rule 14 of Parliament[55], which grants the option for points of order to be raised without interruption. Malema again demonstrated that his party would engage in the 'politics of parliamentary disruption' for as long as Zuma failed to account properly for Nkandla.

Speaker Mbete then made a ruling that the point of order would be disallowed, deeming it to be irrelevant to the proceedings of the day. One after another, EFF MPs rose to defy the ruling and continue to raise the same point of order. Concluding that these members of the EFF were disrupting the National Assembly, the Speaker then once again called in riot police[56] Armed policemen, not in uniform and dressed in the standard uniform of parliamentary staff (black trousers, with white shirts), arrived immediately and proceeded to remove all EFF MPs. There was an unseemly and violent commotion. Some who tried to resist were physically assaulted[57]. The DA, the largest opposition party, left the House in

54 Interview with Malema on Radio 702 on 10 February 2015 available at http://www.702.co.za/articles/1672/sona2015-eff-says-plan-is-still-to-ask-questions (last accessed on 8 June 2015).

55 Joint Rule 14U states that: "A member may speak [during a joint session such as SONA] (a) when called upon to do so by the presiding officer; or (b) to a point of order."

Joint Rule 14L states that at a Joint Sitting a member "may only speak from the podium, except to raise a point of order or a question of privilege"..

56 The Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, 2004 empowers the Speaker to call in police if any person disrupts the Assembly. However, there is disagreement amongst commentators about whether it was justified under the circumstance. Some also argue that the police conducted themselves in an undue manner.

57 See: 'EFF disrupts SONA, frog marched from Parliament' available at http://www.enca.com/south-africa/eff-disrupts-sona-ordered-leave-parliament (last accessed on 20 March 2015).

'Malema calls on ANC to account for Parliamentary chaos' available at http://m.ewn.co.za/2014/11/14/Malema-ANC-must-be-held-responsible-for-degeneration-of-Parly (last accessed on 20 March 2015).

'One EFF MP taken to hospital: Malema #SONA2015' available at http://www.timeslive.co.za/politics/2015/02/12/one-eff-mp-taken-to-hospital-malema-sona2015 (last accessed on 20 March 2015).

protest soon after, having raised as another point of order the question of principle as to whether the security officials that had entered and forcibly removed the EFF MPs were police or not. After prevaricating initially, Speaker Mbete conceded that police were involved, whereupon DA parliamentary leader Musi Maimane led his party from the chamber.

Tensions within the Assembly had also played out in a separate issue that transpired even before Malema and EFF MPs raised the point of order. An hour or so before SONA began, parliament's cellular phone signal was disabled so that those within the precinct could not send or receive phone messages, make or receive calls, or access the internet. The scrambling or disabling of the signal in parliament directly breaches constitutionally protected rights to receive and impart information[58]. The DA, along with the EFF and other parties, objected strongly to the state of the affairs and demanded to know who was responsible for the shut-down. It was pointed out that a violation of the constitutional order, freedom of expression, and the right to access the proceedings of Parliament was taking place. The signals were eventually reinstated, according to procedures that have not yet been satisfactorily explained.

This was arguably the most dramatic opening of parliament in the country's history, one that was watched closely by many South Africans on television and debated voraciously at dinner tables and in the media for many weeks after. So what does this highly dramatic debacle suggest about the state of South Africa's representative democracy? In effect, the EFF disobeyed the authority of the Speaker of the National Assembly by repeating a point of order that she had explicitly disallowed. Arguably, the EFF's refusal to obey the Speaker's ruling undermined parliament in its institutional capacity, since parliament has a legitimate right to engage in its business and carry out its mandate free from disobedience and disruption. By seeking to disrupt the State of the Nation Address, opposition MPs from the Economic Freedom Fighters, it could be argued, abused parliamentary rules and convention to the point where the constitutional rights of other MPs were infringed. Although, it should be added that it is the absence of consensus about such conventions – that close the gap between the formal rules and the contested politics of an increasingly adversarial parliament – that is a major contributory factor.

Importantly, the fact that the two largest opposition parties – the DA and EFF - were absent from SONA highlights the dysfunctionality of parliament on this major occasion. The blocking of signals during SONA also demonstrates weaknesses in parliament's understanding of its own role[59] . The Speaker is required to take direct responsibility for proceedings in the house; however, it was the State Security Services that appeared to be in control

58 See sections 16 and 32 of the Constitution. See also CASAC media statement on SONA available at http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=959623&sn=Detail&pid=71619 (last accessed on 8 June 2015).

59 The Powers Privileges and Immunities of Parliament and Provincial Legislatures Act of 2004 makes it clear that police or other public order forces may only enter Parliament if there is an 'imminent danger' to life or property. The response of the security officials would appear to be entirely disproportionate to the problem of removing recalcitrant MPs. SEE CASAC Media Statement

of communications and who by blocking signals arguably violated constitutional rights of access to information and freedom of expression.

Once again, a likely positive spin-off from the 'blocked signal affair' at SONA will come in the form of concrete court judgments on the use of jamming devices in parliament and on the illegality of interrupting broadcasts on account of disruptions in parliament[60]. The SONA case also brings to the fore various significant constitutional issues which are still being contested. Put in a crude manner, EFF members, from their point of view, are being asked to be faithful to the rules and decisions of the National Assembly when President Jacob Zuma himself refuses to properly account for the steps he is taking to redress Nkandla, despite an official report and recommendations from the Public Protector. The Office of the Speaker of National Assembly has itself been compromised, and MPs will arguably be less likely to have faith in her rulings, particularly when they are following a course of parliamentary disruption as a means to draw attention to Zuma's lack of accountability. The statement by the Council for Advancement of the Sourth African Constitution (CASAC) sums up the dilemma at hand:

> *"The State of Nation Address is the occasion at which the President, as head of the national executive, reports to Parliament on his government's programme. To deny the President this opportunity is to undermine the accountability function of Parliament. If the President is unable to set out the programme of his Government, Parliament will have no basis on which to subsequently hold him to account…the President has not yet provided adequate answers to questions that were posed to him in August last year relating to the Public Protector's findings and remedial action on Nkandla. This, too, represents a failure in constitutional accountability that must be urgently rectified by the President."*[61]

Furthermore, in recent times the EFF successfully used the courts to challenge the supposed impartiality of decisions of the presiding Speaker during Zuma's previous State of the Nation Address in June 2014. In Malema and Another v Chairperson of the National Council of Provinces and Another[62], Malema challenged the presiding officer, Thandi Modise's ruling that it was "unparliamentary and did not accord with the decorum of the House" for him to say in parliament that the ANC government had massacred mine workers at Marikana in that the police who killed them represented the ANC government. Modise had asked Malema to withdraw his statement, arguing that he was effectively accusing members of the National Assembly of being mass murderers since many members of the Assembly were also

on SONA issued on 13 February 2015 available at http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=959623&sn=Detail&pid=71619 (last accessed on 8 June 2015).

60 See *Primedia Broadcasting, a Division of Primedia (Pty) Ltd and Others v Speaker of the national Assembly and Others* [2015] ZAWCHC 24.

61 CASAC statement, note 59.

62 *Malema and Others v Chairperson of the National Council of Provinces and Another* (12189/2014 [2015] ZAWCH 39 15 April 2015).

members of the executive. Malema had refused to retract his statement and was subsequently ordered to leave the House. Modise maintained that the only manner in which an MP could accuse fellow MPs of criminal activity according to the rules of parliament was by way of a substantive motion containing a properly motivated claim. Malema, on the other hand, argued that Modise's interpretation of his statement not only impinged upon his constitutional free speech guarantee but that Modise as presiding office was also 'abus(ing) her powers to protect the governing party against lawful criticism in the parliamentary debate'[63].

The court ultimately concluded that Modise's interpretation of what Malema had said was unwarranted as it would place severe limitations on free speech and future debates in the Assembly if such an expansive meaning was ascribed to the term 'government' in the present case.[64] Importantly, the court emphasised the need for the rules of parliament to safeguard free speech and robust debate - a fundamental requirement of the Constitution.[65]

With regard to the conduct of the Speaker during parliamentary sessions, the court recognized that specific skills and expertise were needed to oversee parliamentary debates – to which the courts should afford due deference rather than readily substitute their own opinions. [66] However, the court emphasised the trite principle that had been previously articulated in Lekota and Another v Speaker of the National Assembly and Another[67], that "the Speaker although affiliated to a political party, was required to perform the functions of that office fairly and impartially in the interests of the National Assembly and Parliament" and that in maintaining order and applying parliamentary rules, he or she 'should jealously guard and protect the members' rights of political expression entrenched in the Constitution'[68].

Conclusion: Institutional Renaissance or Populist Fandango?

Like many parliamentary, Westminster-style democracies, South Africa's post-1994 parliament has struggled to cope with the dominance of its ruling party, the ANC. As a result, the Constitutional mandate of the National Assembly has been weakened over time. Since the 2014 national election, however, new energy and vitality has been injected into the proceedings of the House. South Africa's representative institution has entered a new phase with a stronger opposition, a weaker ruling party, and a 'new kid on the block' in the form of Julius Malema and his small but assertive party of 'Economic Freedom Fighters', a political leader who is as courageous and incisive when tackling the ANC as he is effective in

63 Ibid at par 6.

64 Ibid at par 58 -59.

65 Ibid at par 10.

66 Ibid at par 19, 45, 60.

67 *Lekota and Another v The Speaker of the National Assembly and Another* (14641/12) [2012] ZAWHC 385 (last accessed on 11 December 2012).

68 Ibid at par 10.

harvesting media attention and proffering dangerously vacuous populist policy prescriptions.

The EFF's politics of parliamentary disruption arises in a context where President Jacob Zuma is widely perceived as being corrupt and unaccountable, with several issues clouding his Presidency. The crisis in legitimacy surrounding the President has in practice been playing out in parliament, something which has placed this crisis firmly on the public map. Since the April 2014 elections, minority parties have also more actively made use of the rules of parliament in order to hold Zuma to account for the unlawful public expenditure on his private homestead, Nkandla.

The unresolved issue at stake, however, remains that the politics of parliamentary disruption also undermines the functionality and dignity of parliament. The EFF may well have been staging such theatricalities as a tactic to get votes and media attention. By seeking to disrupt SONA, for example – an opportunity where the President, as head of the national executive, reports to parliament on government's programmes – the right of both parliament and individual MPs to debate, to engage with and to hold the executive to account was jeopardised[69].

Notwithstanding the above, President Zuma has not to date provided satisfactory answers to questions that were posed to him in parliament in August 2014 relating to the Public Protector's findings and proposed remedial action on Nkandla. This in itself represents a failure in constitutional accountability, one which the President needs to rectify[70]. During Question Time on 11 March 2015, Zuma again emphasised that the Public Protector's findings on Nkandla are "recommendations" and not "judicial rulings", and that he will not pay back money until the Police Minister has decided whether he should, and if so, how much."[71] This suggests that the Nkandla issue may well continue to haunt parliamentary processes in the future.

Despite parliament's constitutional mandate to represent public views and to monitor government spending and policy execution, the institution has already in the past appeared lacklustre and impotent with regard to several major oversight matters, suggesting that South Africa's set of constitutional guarantees and accompanying parliamentary rules seeking to promote participatory and representative democracy, however strong in form, depend in practice on the extent to which the political environment allows for their survival and vigour. The ANC's majority in parliament will most likely, for example, ensure that its own position – rather than that of the opposition – will prevail on Nkandla.

On a positive note, parliamentary events since the 2014 election suggest that new life is being breathed into many of South Africa's constitutional prescripts and rules. Minority

69 See CASAC statement op cit note 44.

70 See CASAC statement op cit note 44.

71 See https://pmg.org.za/hansard/20502/ accessed on 8 June 2015 also see 'Nkandla: Zuma stands his ground' available at http://ewn.co.za/2015/03/12/Parly-session-Zuma-sets-the-record-straight (last accessed on 8 June 2015).

party MPs have sought to hold Zuma and the executive to account with sustained doggedness and relevant debates have since been taking place on issues such as the content and occurrence of Question Time, the nature of the Speaker's role, executive accountability, the appropriate methodology for exercising parliamentary oversight and the role and status of Chapter Nine Institutions.

This evidence indicates that there is something of an institutional renaissance. The supreme irony is that it is a uncompromisingly populist party which is now breathing new life into parliament – perhaps suggesting at a further level that 'polite participatory democracy' may not be effective when faced by a Zumarite ruling ANC. The EFF is likely to proceed with its militant posture in parliament at least until the local government elections in 2016. This contest will present a critical test for whether Zuma and the ANC are losing support at municipal level in favour of the EFF and the DA. Leading up to those elections, opposition parties may want to ensure that there is a political cost to be paid by the ANC for using its majority in a cynical fashion, as demonstrated by its MPs during the Nkandla debate on November 2014 and discussed earlier in this paper. The more the ANC is forced to rely on the power of its numbers rather than on its arguments, the weaker it will look within the framework of 'proper' parliamentary debate. Yet it remains to be seen whether the rules of engagement are currently undergoing a paradigm shift or whether the antics of the EFF is simply a populist parliamentary fandango.

Opposition parties may still have a great deal further to go if they are to turn improved parliamentary engagement into electoral progress, whether by adherence to the spirit of the constitution and parliamentary rules or whether by switching to a newfound populist and more volatile approach, one which arguably by itself may end up undermining the notion of democratic constitutionalism.

Looking towards the future, South Africa's parliament in either case is likely to become more relevant to the citizenry and therefore more politically important, regardless of its structural impediments. This in turn suggests, as this paper has argued, that the answers to questions around how to reinvigorate representative and participatory forms of democracy are to be found not in constitutional law and governance, but in politics and in the ability of opposition political representatives to use democratic institutions to hold the executive to account on things that matter most to the populace.