

Editorial

Defend judiciary from trespassers

The price of liberty, as Wendell Phillips, the 19th century American crusader for the abolition of slavery, aptly remarked, is eternal vigilance. South Africans have cause to be mindful of his pronouncement. The independence of the judiciary is once again under threat from the executive.

Judicial independence is enshrined in the founding constitution of post-apartheid South Africa for a reason of profound importance to South Africa's fledgling constitutional democracy. It is to enable the judiciary to uphold the constitution as the supreme law of the land and the touchstone by which parliamentary laws and executive actions should be judged.

Two bills of far-reaching and adverse implications for judicial independence are before parliament. Regretfully it has to be presumed that the huge ANC majority will dutifully approve them without alteration — unless the government and the justice ministry can be persuaded to take account of the concerns of the judiciary and modify them accordingly.

The Constitutional Fourteenth Amendment Bill has particularly ominous connotations for three inter-related reasons:

- ◆ It will, as Professor Hugh Corder, dean of law at the University of Cape Town, had noted, amend the constitution to ensure that ensuing legislation reforming the courts will not fall foul of it, thereby removing in advance constitutional impediments to further more radical amendments to the courts that curtail judicial autonomy.
- ◆ It further proposes to reallocate responsibility for the administration of the courts from the chief justice to the minister of justice, with the specious justification that it not diminish the power of the judiciary but merely enable the judges to concentrate on matters of jurisprudence.
- ◆ It was published in the *Government Gazette* in mid-December when most judges were away on vacation, with a 15 January deadline for comment, thereby inviting suspicions that the justice ministry was seeking to steal a march on the judiciary.

The justice ministry, through its director general, Menzi Simelane, has offered a benign interpretation of

the declared attention to place the minister of justice at the centre of the judicial system as a generalissimo of administration. It is, he avers, merely to enable the judges to concentrate on their core function as judges by unburdening them of their administrative functions.

If, however, the minister assumes administrative responsibility for the court — which includes control of the budgetary purse strings — the executive is strategically positioned to usurp judicial power and undermine judicial independence, in direct violation of the separation of powers doctrine that the constitution is meant to safeguard.

The general council of the bar disagrees strongly with the innocent interpretation offered by the justice ministry. It warns that the Fourteenth Amendment Bill, read with the Superior Courts Bill, will “remove from the judiciary its control over administrative decisions that directly affect the exercise of judicial functions” and thereby “threaten the proper functioning” of the higher courts. It explains: “The exercise of a court’s judicial function is inextricably linked to... the way in which courts function and are administered.”

It is unclear why the justice minister should assume responsibility for administration of the courts, unless it is to extend her fiefdom into the judiciary. If the chief justice, and/or the judge presidents feel the need to lessen their administrative burdens, they are free to appoint administrators who serve under and are accountable to them.

The proposed constitutional amendment furthermore deprives the constitutional court of its prevailing power to suspend the commencement of a law passed by parliament if it violates the bill of rights in the constitution, thus opening the way to an assault on one of the “guaranteed freedoms” in the bill of rights.

Supreme Court of Appeal judge Carole Lewis condemns the “most objectionable provisions” in the bill. She warns that they “undermine the independence of the judiciary in a way that everyone in South Africa should be concerned about, since they will lose the protection of judges unfettered by the government of the day”.

It is time, metaphorically speaking, to mount the barricades in the defence of judicial independence and, with it, individual freedom. □

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Mbeki 'dictatorship' fuels Zuma's cause

2005 was an annus horribilis for the ANC. It was characterised by a series of scandals involving ANC notables including those fingered in the Oilgate and Travelgate scandals, and, of course, the high court finding that the former deputy president Jacob Zuma was a party in a generally corrupt relationship. By Siphoo Seepe

Thanks to Zuma's travails with the law, 2005 proved to be the worst year for the African National Congress (ANC) post-1994. The year saw the unravelling of the artificial and enforced unity of the ANC. Mbeki became an object of ridicule among Zuma supporters and his fear-inspiring rule was openly challenged. Yet the fault lines precede Zuma.

To sustain its political hegemony, each year the ANC craftily invokes the memory of struggle. The masses are reminded of its heroic deeds. Grand plans and noble intentions are unveiled to convince the masses that they have not been forgotten.

The ANC's annual January 8 statement serves this purpose. It sets the political tone for the country as it also influences the state of the nation address during the opening of parliament. The statement, spiced with revolutionary slogans, seeks to rally ANC members to political battle. However it was President Mbeki's decision to fire Jacob Zuma from office, not the January 8 statement that was to shape political developments in 2005.

At one level, the appeal to revolutionary discourse reflects the ANC's conceptual inability to make a shift from the struggle paradigm to that of governance. This allows the ANC to behave as if it is not in power, thus enabling it to avoid taking responsibility for its failures. At another level, its discourse suggests that the ANC is unconvinced that the present democratic framework can adequately advance its political interests.

Accordingly, each year a few scapegoats, purportedly frustrating the revolution, are identified for attack. As presi-

dent of the ANC, Mbeki leads the charge. The scapegoats are not hard to find. They include third forces, opposition parties, counter-revolutionaries, white racists, media, black intellectuals, ultra-leftists and "unpatriotic" white business leaders.

For 2005, the collective mindset of the judiciary was the target. This followed a series of court judgments against the ANC government since 1994. Interestingly, the courts ruled in favour of the very masses that the ANC represents. Understandably, the seeming attack on the judiciary provoked a howl of protest within the country and outside. The attack was seen as a precursor of a clamp down and/or an attempt to undermine the independence of the judiciary.

It is probably an irony of history that having led the charge against the collective mindset of the judiciary, Mbeki would six months later appeal to the court's judgment to dismiss Zuma from public office.

Mbeki based his decision on the court's finding that there existed a *generally corrupt relationship* between Shabir Shaik and Jacob Zuma. While proclaiming that Zuma should be presumed innocent until proven guilty and that he should have his day in court, Mbeki nonetheless moved swiftly to remove Zuma. Mbeki received praise from the media, business and opposition parties.

The decision would test South Africa's fledgling democracy. For ANC members it proved to be the last straw. Zuma's dismissal triggered an open revolt against Mbeki. At the ANC's national general council, Mbeki found himself accused of being part of a conspiracy to frustrate Zuma's ambition to become the

country's next president. It was a case of Mbeki using the state apparatus to crush political opponents. The memory of the Mbeki-backed fictitious plot hatched against three prominent politicians-turned-businessmen was still fresh. Having become used to levelling spurious accusations against rivals, real and perceived, Mbeki was forced to swallow his own medicine. He was accused of leading a conspiracy against Zuma. The cracks within the ANC widened. The battleground shifted. The enemy was no longer outside, but within.

Zuma retorted by openly challenging Mbeki. Since the challenger was from within the inner circle, the usual barbs against external opponents would not do. Mbeki's proposal for the establishment of a commission of inquiry to respond to charges of conspiracy was rejected. It was seen as a self-serving way to shift the terrain of the battle from the domain of the people to the comforts of boardrooms — proof of another attempt to refuse to submit to democratic and consensus politics. Mbeki was effectively questioning the Tripartite Alliance's competency to resolve such intricate matters.

For a period, the ANC faced a leadership crisis. The NEC of the ANC, packed with Mbeki's lackeys, provided none. This crisis gave credence to the view that it is Mbeki who does the thinking for the NEC. If he is in crisis, then the NEC is in crisis. The damage to Mbeki was palpable.

Financial Mail editor Barney Mthombothi sums it up eloquently:

"There was a time not long ago when President Thabo Mbeki's Friday column was required reading. It didn't matter what the subject was or whether we agreed with him. These were the views of the country's first citizen and we had to sit up and

*Mbeki and Zuma...
hardly the best of friends*

listen. Not anymore, it seems... the bloodletting in the ANC has damaged Mbeki. A year ago it would have been unthinkable for Vavi to use such language to excoriate Mbeki on so sensitive a subject. On current form, Cosatu and not the ANC is the best organised political force in the country. The ANC has the appearance of

a rabble — confused and leaderless. State power helps give it an air of organisation. Vavi can speak for Cosatu; Mbeki's writ doesn't run freely within the ANC. His enemies have been emboldened, his allies are running for cover. KwaZulu-Natal premier S'bu Ndebele, an Mbeki ally, will be leading the cheering for Jacob Zuma at Zuma's trial. Rank opportunism it may be, but it's also about political survival."¹

Even before the Zuma affair, Mbeki's presidency was already on the skids. This was due to a number of own goals. One was an attempt to muzzle Archbishop Desmond Tutu. This followed Tutu's belated and feeble criticism of the state of internal democracy within the ANC. Mbeki led the charge against Tutu implying that he (Tutu) is a liar and a creation of the

white media. This backfired badly and the presidency backtracked.

While still smarting from this fiasco, the *Mail & Guardian* carried an exposé suggesting that state resources were channelled through PetroSA to unfairly advance the ANC's political interests. This was done despite the ANC getting a lion's

The NEC of the ANC, packed with Mbeki's lackeys, provided no leadership. This crisis gave credence to the view that it is Mbeki who does the thinking for the NEC

share of financial support from the government for elections. The corruption-busting president remained remarkably silent.

Then the Travelgate scandal — in which MPs were alleged to have defrauded parliament — exploded. The majority of MPs implicated were ANC members. The ANC pussy-footed around for a while before taking a stance. It only took a firm position on the eve of the judgment in the Shabir Shaik trial — this in anticipation of Zuma being implicated.

The dominance of the ANC came to haunt it as its councillors became the targets of countrywide protests. This prompted Mbeki to acknowledge the pervasive incompetence in local government and the fact that the country has a dire shortage of skills. As



could be expected, Mbeki failed to acknowledge that this is a consequence of the ANC deployment policy, thus refusing to assume responsibility as head of the ANC.

How does one explain the sympathy and political support that Zuma

dependent on Shaik for money and he was prepared to sell himself and his reputation for a few lousy bucks. In firing Zuma as deputy president, Mbeki surely had these facts in mind.

The clue to Zuma's support cannot be found in the ANC's transition from

mulates power. Untrusting and paranoid, the leader establishes a party dictatorship. Prominent leaders and icons of struggle are disgraced and purged. The leader becomes contemptuous of opposition parties and institutions of democracy. The leader deploys his henchmen to assume responsibility of the state's instruments of power. These are then used to intimidate political opponents. Accusations of corruption are levelled against them. The commitment to rooting out corruption is selective. Political leaders known for their independence and integrity retire to political oblivion. The atmosphere of suspicion, terror and betrayal abound.

The parallels are obvious. Under Mbeki the ANC is denuded of any democratic practice. The disposition of the ANC is profoundly changed. Gone is the character of the broad church. Members can only be quoted or speak publicly on condition of anonymity unless they are singing Mbeki's praises. ANC leaders showing a semblance of independent thought were isolated and attacked. Mandela was accused by senior members of the ANC of being an agent of pharmaceutical companies. He was a national icon that has turned into a villain. Mandela had broken ranks with Mbeki on the need to provide anti-retroviral drugs to pregnant women who are HIV-positive.

Jeremy Cronin was castigated as a frustrated white male who cannot come to terms with the loss of white privilege. Cronin had cautioned against the centralisation of power and the bureaucratisation of struggle. In one stroke his struggle credentials were questioned. His whiteness was on trial.

At the same time, Mbeki brought together, through his African renaissance project, an omnibus of aspiring

Desmond Tutu was sharply criticised by Mbeki for talking about sycophancy in the ANC

How does one explain the political support that Zuma was able to muster following his dismissal? That someone who is incapable of managing his finances is mooted for presidency?

was able to muster following his dismissal? How does one explain that someone who is patently incapable of managing his finances is mooted for presidency?

After all, the facts surrounding Zuma are damning. A competent court found that Zuma colluded, aided and abetted Shaik's money-grabbing and lying. It found that Zuma was utterly

the liberation movement to a ruling party. Neither can it be found in the fact that former comrades have become career politicians. There were no such strains under Mandela. Besides, politicians in mature democracies are also careerists. The clue is to be found in what the ANC has become under Mbeki's leadership.

The script is familiar. The new leader is sworn in. He accu-



Jeremy Cronin incurred Mbeki's wrath for writing about the 'Zanu-fication' of the ANC

black bourgeoisie, black capitalists, black lawyers, journalists, and academics — the very group that could become the government's vocal critics. In hindsight this proved to be a brilliant pre-emptive strategy. Leading blacks sacrificed their political, moral and intellectual responsibility on the altar of racial solidarity. As likely beneficiaries of affirmative action and government sponsored Black Economic Empowerment, they turned a blind eye to the growing centralisation of power and to Mbeki's misguided and destructive policies on HIV/Aids. In short, the ANC is increasingly remodelled in his image. Mbeki can no longer distinguish his interests from those of the organization, and *vice versa*.

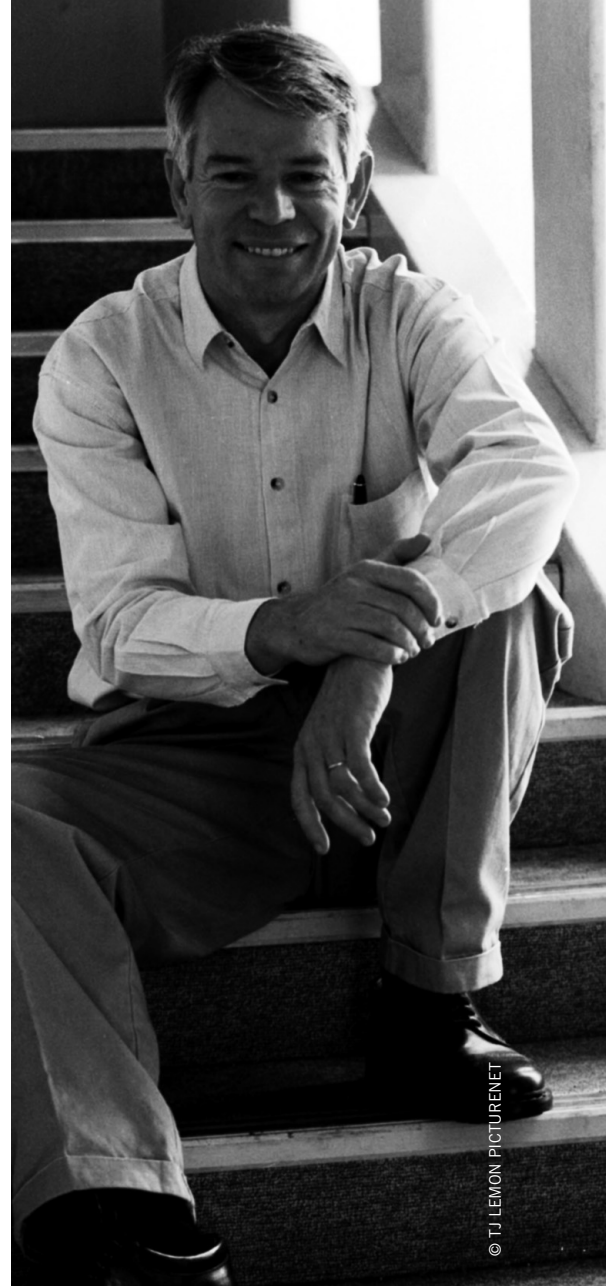
At the heart of Zuma's support is Mbeki's dictatorial leadership style.

Zuma sought to exploit the inherent and self-evident weaknesses that characterised Mbeki's presidency. Zuma provided an alternative voice and opened a political space. The media and ANC alliance members, already tired of dictates from Mbeki, latched onto to every word from Zuma. Taking advantage of the Oliver Tambo memorial lecture, Zuma reminded all and sundry that Tambo did not reduce the ANC to a personal fiefdom. For one, Tambo knew when to pass the baton. Two, Tambo leadership was consultative and took everyone on board. Zuma ridiculed academic politicians who instead of responding to questions hide behind textbooks — a swipe at Mbeki's penchant for misusing and misquoting texts. He called on all ANC members to publicly engage one another without fear or favour. The blows were pointed and telling.

ANC members have now publicly taken sides without resorting to labels. The Congress of South African Trade Unions, the ANC Youth League, the South African Communist Party and the Young Communist League have usurped the public space that Mbeki had considered reserved for him in the Alliance. The notion of a broad church is being reclaimed. South Africa's dominant political party is being re-transformed from a one-opinion organisation to one reflecting the broad spectrum of perspectives represented within it.

Zuma would have continued to ride on the crest of this political wave had it not been for the subsequent rape charge. The charge irrevocably weakened his support.

Publicly humiliated, Mbeki sought to enlist support outside the ANC. He is now leading the charge against incompetence and corruption within the ANC. He speaks against rape and women abuse. This is a welcome change even if it is self-serving. After all, Mbeki spent years arguing that he "will not keep quiet while others whose minds have been corrupted by



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publicly without resorting to labels. Hopefully, ANC members have learned that democracy is about how leaders lead. It is about accountabil-

Leading blacks sacrificed their political, moral and intellectual responsibility on the altar of racial solidarity, turning a blind eye to the growing centralisation of power

the disease of racism, accuse us as being, by virtue of our Africanness and skin colour — lazy, liars, foul-smelling, diseased, corrupt, violent, amoral, sexually depraved, animalistic, savage — and rapist".²

Thanks to the Zuma saga, South Africans can now talk openly and

ity and internal democratic practices as much as it is about having a say in electing leaders. And Mbeki has come to understand that he must rely on all his compatriots, including opposition parties, to discharge his presidential duties. Democracy is the winner. □

Endnotes

1 Editor's Note, *Financial Mail*, 7 October 2005.

2 *ANC Today*, Volume 4, No. 42, 22 - 28 October 2004.

ANC, Saddam & Iraq: a dubious partnership

A UN-appointed inquiry into the oil-for-food scandal in Iraq has raised hard questions about the involvement of ANC notable Sandi Majali and his company Imvume. The ANC government's initial response was to retreat into silence.

By **Raenette Taljaard**

As Focus was going to press President Thabo Mbeki appointed a commission of inquiry to investigate the charges in the Volcker report

The ongoing aftermath of the final report of the Independent Inquiry Committee (IIC) that probed Iraq's oil-for-food scandal poses numerous dilemmas for the United Nations (UN) system, the Security Council member states in particular and ultimately for all individual UN member states.

Many UN member states, including South Africa, have had either individuals or companies implicated in the kick-back and illegal surcharge regime laid bare in Paul Volcker's meticulous 623 page inquiry.¹

The UN oil-for-food programme was one of the largest attempts at conducting a humanitarian operation alongside an active and aggressive sanctions regime. It was a first in UN history: "Under the oil-for-food programme, the government of Iraq sold US\$64,2bn of oil to 248 companies. In turn, 3,614 companies sold US\$34,5bn of humanitarian goods to Iraq".² As an unprecedented programme it also had some unprecedented consequences that continue to reverberate in multilateral and national institutions.

It is estimated that the Saddam Hussein government pocketed approximately US\$1,8bn in illegal surcharges from a host of countries and individuals in exchange for gaining their support in specific arenas of foreign policy.³ Given the sheer scale of the operation, and the concerns at management lapses in the UN system, it will take concerted action from all member countries, who now also have doubt cast on their foreign policy foundations and motivations, to clear the decks and launch investigations and prosecutions to regain their credibility. Crucially, the UN system must steer a bold course to recapture its own lost credibility at a time of considerable continued challenge to the very existence of the global multilateral institution.

A background document by the Council on Foreign Relations, a Washington-based independent, non-partisan foreign policy think-tank, highlights the severity of the alleged transgressions: "If individuals knowingly received profits from oil sales not approved by the oil-for-food programme, they broke the rules of that programme and violated the terms of the UN security resolutions that established the programme and the sanctions against Iraq, say investigators from the House International Relations Committee. In the case of UN employees, accepting bribes would also violate the rules of that body, experts say. Whether individuals on the list will be prosecuted, however, would in most cases be the decision of their own governments and subject to the domestic law of each nation."⁴

In addition to the Volcker report, a flurry of probes, resignations and/or suspensions, fully-fledged prosecutorial investigations and inquiries are underway in various countries that are concerned that the credibility of their foreign policy may be at risk — see table one.

In stark contrast, and despite various attempts by the media (particularly the *Mail & Guardian* and *Sunday Times*) and a number of opposition parties (primarily the Freedom Front + and the Democratic Alliance) to place the matter squarely on the agenda in South Africa, the executive branch of government still needs to send a clear signal of its intentions. The continued silence nearly three months after the Volcker report's release is becoming ominous.

It remains unclear whether or not any domestic prosecutions of any companies and/or individuals will be launched. Whilst the Volcker report is in the hands of the justice ministry action is clearly

required in the face of the growing intensity of international inquiries and specific national concerns in South Africa.

Given the suspected relationship between the companies and individuals implicated in the Volcker report (Sandi Majali and oil company Imvume) and the ANC — an alleged relationship that was further reinforced by the diversion of PetroSA's advance payments to Imvume Management to fund the ANC's 2004 election campaign — the urgency for government to respond in order to salvage South Africa's foreign policy credibility should not be underestimated.

Despite the South African government's brave defence of international law and its sound warning of the long-term consequences of unilateral military pre-emption for the multi-lateral system as well as for Iraqi

civilians, it will be a travesty if the unanswered questions about the alleged linkages between those implicated in the Volcker report and the ruling party remain unanswered.

Moreover, in the context of these alleged linkages, any failure to act on the Volcker report's findings and failure to institute further investigations will erode credibility further in the context of an increasing number of global and national probes.

A brief time-line of the post-Volcker report response highlights the lack of concrete action on the part of the South African government thus far (see table two). Whilst verbal reassurances have been given they stand in stark contrast to clear action in other jurisdictions.

What is to be done?

It is clear that neither member states nor the UN system emerge with

any honour from the sad saga that is the oil-for-food scandal: "*Splits among the diplomats on the UN security council and flaws in the design of the oil-for-food programme played at least as much a part in what happened as negligence by UN officials or collusion in corruption by foreign firms trading with Iraq.*"⁵ It is clear that the UN system's response must include clear resolution of matters highlighted in Volcker's report and the initiation of clear management reforms suggested by the inquiry. This in itself is a mammoth task but more needs to be done. The UN Security Council members that are implicated or have companies and/or individuals including senior politicians implicated must lead by example and launch inquiries to clear suspicions about their own foreign policy objectives during the Iraqi regime's murky days.

Investigations underway subsequent to the release of the Volcker report (Table one).

◆ Five ongoing US Congressional probes including investigations by the International Relations Committee (a subpoena has been issued to BNP Paribas), the Energy and Commerce Committee, the Government Reform Subcommittee on National security, the Appropriation subcommittee on Commerce and the Senate Government Affairs Permanent Subcommittee on Investigations (various subpoenas issued to individuals). ⁸
◆ An ongoing US Treasury department probe (possible US trade law violations given that UN sanctions become part of US domestic law). ⁹
◆ An ongoing federal criminal investigation by the US attorney for the Southern District of New York. ¹⁰
◆ An April 2004 report by the Government Accountability Office (formerly the General Accounting Office) to Congress. ¹¹
◆ The resignation of former Indian foreign minister Natwar Singh and requests in parliament for a fully-fledged inquiry. ¹²
◆ The federal indictment and arrest of a South Korean lobbyist Tongsun Park, Houston-based oil-traders David Chalmers, Oscar Wyatt and Ludmil Dionissiev, the indictment of Russian diplomats Vladimir Kuznetsov and Alexander Yakovlev and the charging of Samir A. Vincent with criminal offences related to the oil-for-food probe. ¹³
◆ The suspension and ultimate resignation of Benon Sevan, the former head of the UN programme and the suspension of Joseph Stephanides — a UN official responsible for contract selection. ¹⁴
◆ Australian Prime Minister John Howard announced an inquiry into the Australian Wheat Board's payment of US\$222 million in kick-backs to the Iraqi regime. ¹⁵
◆ Probes are under way in Iraq, Italy, Thailand, Britain and Switzerland. ¹⁶
◆ State prosecutors in Germany are considering opening a formal probe into companies including Daimler Chrysler and Siemens subject to the availability of evidence. ¹⁷
◆ Swedish prosecutors are to investigate Swedish nationals and companies named in the oil-for-food Volcker report, including Volvo AB and Atlas Copco AB. ¹⁸
◆ French authorities are probing the involvement of former French interior minister Chares Pasqua and foreign ministry officials Jean-Bertran Merimee and Serge Boidevaix. ¹⁹

The South African ministry of justice must give a clear indication of the steps it intends to take in launching an inquiry or conducting specific prosecutions. If international law and UN sanctions have been violated prosecutions must follow. If domestic laws have been circumvented the rule of law must prevail.

Before becoming ensnared in a public relations nightmare due to a trip to the United Arab Emirates, South Africa's Deputy President Phumzile Mlambo-Ngcuka gave clear indications, both in parliament as well as the press, that government would fully investigate UN charges of complicity

in the Iraq oil-for-food scandal: "We definitely will take action... we are going to check on everyone who was involved."⁶ "Government has not as yet formulated a response to the report of the Independent Inquiry Committee into the Iraq UN Oil-for-Food Programme. We have instructed the Ministry of Justice to examine the whole report and give advice on the steps that our government should take. Whilst we await the response from the Ministry of Justice, we wish to reiterate that South Africa's foreign policy is based on South Africa's national interests and international law, and we reject any insinuation

that such policy can be auctioned for private commercial purposes. As far as I am aware, the presidency was not informed that anybody claimed to be the president's advisor."⁷

Anything short of a convincing probe and concrete action will erode what many view as a sound approach to multilateralism and the pivotal role of the United Nations in global affairs. □

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Endnotes

- 1 The activities of South African companies and or individuals cited include the activities of Sandi Majali of Invume and Montega Trading. Some of these companies and/or individuals have served notice that they intend to sue the relevant UN structures for defamation.
- 2 Independent Inquiry Committee into the UN Oil-for-Food Programme, *Report on Programme Manipulation, Chapter One: Summary of Report on Programme Manipulation*, 27 October 2005, <http://www.iic-offp.org>.
- 3 Otterman, Sharon, *Iraq: Oil for Food Scandal, Background Q&A*, Council on Foreign Relations, 28 October 2005, <http://www.cfr.org/publications/7631/>.
- 4 See footnote 3.
- 5 Gregory, Mark, *Companies in oil-for-food scam*, BBC News, 19 November 2004.
- 6 See footnote 28.
- 7 Deputy President Phumzile Mlambo-Ngcuka, Reply to Question No. 23, National Assembly, 16 November 2005, <http://www.gov.za>.
- 8 See footnote 3.
- 9 See footnote 3.
- 10 See footnote 3.
- 11 See footnote 3.
- 12 *Former Indian FM resigns over Iraq oil-for-food*, AFP, 12 June 2005.
- 13 *3 indicted in UN oil-for-food scandal*, CTV News, 14 April 2005, *USA: The Oil-for-food Scandal Seeps into Houston*, Corpwatch, 15 April 2005, <http://www.corpwatch.org>, *Prison term could cap oil trader's legendary career*, USA Today, 22 December 2005, *'Koreagate' figure arrested in oil-for-food probe*, CNN, 6 January 2006.
- 14 *UN suspends 2 in oil-for-food scandal*, CNN, 07 February 2005.
- 15 *Inquiry opens into role of Australian co. in oil-for-food programme*, Asia Pulse, 16 January 2006, Kelly, Rick. *Australian Wheat Board implicated in oil-for-food scandal*, World Socialist Web Site, 14 November 2005.
- 16 See footnote 3, Wadhams, Nick, *Oil for food: When will prosecution start?* *Mail & Guardian*, 23 December 2005.
- 17 *Daimler Chrysler Probed in Oil-for-Food Scandal*, Deutsche Welle, 9 August 2005; *Germans Accused of Bribery in UN Corruption Scandal*, DW, 28 October 2005; *German Prosecutors Mull Probe in UN Scandal*, DW, 31 October 2005, *Daimler Chrysler puts 9 managers on leave over oil-for-food probe-report*, AFX News, 15 January 2006, *Daimler suspends staff in oil-for-food probe*, *Financial Times*, 17 January 2006, Daimler Chrysler is also being probed by the US Securities and Exchange Commission (SEC) and the US Department of Justice.
- 18 *Swedish prosecutors to investigate oil-for-food scandal*, Xinhau News Agency, 3 January 2006.
- 19 *France implicated in oil-for-food*, UPI, 12 January 2006.
- 20 DA and FF+ press releases.
- 21 Radio interview — SABC News.
- 22 Press comments by Ronnie Mamoepa on behalf of department of foreign affairs.
- 23 DA press statements.
- 24 *Invume takes steps against UN committee*, *Mail & Guardian*, 3 November 2005.
- 25 ATC and Order Paper, National Assembly.
- 26 ATC and Order Paper, National Assembly.
- 27 Letter from Barry Aaron & Associates to *Mail & Guardian*.
- 28 FF+ press statements.
- 29 DA press statements.
- 30 DA press statement.
- 31 Brendan Boyle, *State calls for help from skilled whites*, *Sunday Times*, 27 November 2005.

The oil-for-food Volcker Report *(Table two).*

Date	Post Volcker Report response time-line
27 October 2005	Volcker report finds Sandi Majali, Montega Trading and Imvume Management 'profited from Iraq's efforts to deliver business opportunities to South Africa in return for political support' and that Majali had promised the Iraqi regime a US\$464 000 surcharge and that US\$60 000 was paid by an unidentified party.* In addition the IIC states that Majali used the president's name in attempting to solicit oil from Iraq. <i>(*Majali has taken legal steps against the IIC).</i>
30 October 2005	FF+ and DA call for Commission of Inquiry into Volcker allegations and overall activities of Imvume. ²⁰
31 October 2005	Deputy Foreign Affairs Minister Aziz Pahad tells SABC that dealings with Iraq were aimed at finding ways to end sanctions. " <i>I am not convinced there was any violation... by South African companies</i> ". Pahad states that foreign policy objectives had not been compromised. ²¹
1 November 2005	DA condemns government's " <i>head-in-the-sand approach</i> " to the UN report. ²²
2 November 2005	Department of foreign affairs indicates that department of justice is studying Volcker report to advise government on the best course of action to take to respond to the UN process. Government rejects allegation that its foreign policy was compromised by the alleged activities of the few South African companies involved in the oil-for-food programme despite noting the findings of the Volcker report. ²³
3 November 2005	Imvume Management takes steps to institute legal proceedings against the IIC and states its intention to institute proceedings for damages against the UN body. ²⁴
16 November 2005	National Assembly accepts report of portfolio committee on minerals and energy recommending acceptance of Public Protector's probe of 'Oilgate' — the alleged diversion of funds advanced to Imvume Management by PetroSA to the ANC on the eve of the 2004 election. The Public Protector's report exonerated the parties concerned. ²⁵ Opposition parties decry the exoneration as a "whitewash". Deputy-President Phumzile Mlambo-Ngcuka responds to Oilgate questions in Parliament and: <ul style="list-style-type: none"> i. Rejects assertions that South Africa's foreign policy was compromised; ii. Confirms the department of justice is interrogating the full Volcker report probing possible violations of domestic or international law; iii. Rebuffs calls for an independent inquiry into the Volcker findings by the FF+ and DA, and iv. Denies the president was aware that Majali used his name in interactions with the Iraqi regime FF+ and DA reiterate calls for an independent inquiry.
17 November 2005	Standing Committee on Public Accounts (Scopa) criticises Imvume Management and PetroSA on a transaction unrelated to the oil-for-food programme that highlighted the alleged links between the ANC and Imvume Management in terms of which Imvume Management allegedly paid R11m in a diverted payment to the ANC. Scopa highlighted the transaction of the advance payment as irregular: " <i>Imvume Management Pty Ltd clearly misled PetroSA with regard to the purpose behind its request for an advance payment</i> ". ²⁶ Imvume Management issues a response: " <i>At no time did Imvume mislead PetroSA</i> ". ²⁷ FF+ reiterates its call for an independent inquiry. ²⁸ DA invokes the Access to Information Act to request all recorded information and documentation relating to the transactions in question. These requests have been refused and the DA has undertaken to contest the matter before the courts. ²⁹
18 November 2005	DA calls on Mbeki to clear his name or appoint a commission of inquiry. ³⁰
27 November 2005	Deputy-president reiterates in press interview that government is investigating and will take action against any violations of the law. ³¹
9 December 2005	Media (<i>Mail & Guardian</i>) allege a legal opinion from the state law advisor's office was forwarded to the ministry of justice.

Ghosts of past still cast long shadows

Patrick Laurence analyses the controversy, over hardly more than a sentence, that led to the withdrawal of RW Johnson's latest book by the publishers. But following a strategic retreat, in the face of threatened legal action by Rivonia arrestee Bob Hepple, a second edition is pending

Disturbing reports that RW "Bill" Johnson's book *South Africa The First Man, The Last Nation* has been "pulped" are — as Mark Twain remarked on hearing news of his death — "greatly exaggerated". Fortunately so: the book provides a provocative and challenging perspective on South African history in general, and on the momentous years from 1960 onwards in particular.

Jonathan Ball, who published the South African edition under the imprimatur of Jonathan Ball Publishers, offers a more sanguine interpretation of the book's fate, one that does not conjure up sombre images of the destruction of books deemed to be offensive to the prevailing political or religious orthodoxy.¹

The book was withdrawn from the shelves of book sellers in South Africa and Britain — where Johnson's book was first published by Weidenfeld & Nicholson — after Bob Hepple, emeritus professor of law at Cambridge University in Britain, threatened legal action against the publishers. One of the eleven original accused in South Africa's watershed Rivonia trial of 1963 to 1964, South African-born Hepple did so because he was convinced that he had been — in his phrase — falsely defamed by Johnson.² The offending text in the book amounted to hardly more than a sentence, about which more later.

Ball explains that the publishers considered the option of opposing the threatened legal action by Hepple, now a distinguished QC who has been honoured with a British knighthood, but decided against doing so for several interrelated and cogent reasons, including:

- ◆ The huge legal costs involved, particularly if the verdict went against them and they were ordered to pay the expenses of the applicant and his legal counsel.
- ◆ The large proportion of the first edition that had already been sold and about which there was little or nothing that the publishers could do.
- ◆ The minuscule number of words devoted to Hepple in the book — less than 50 — which meant that they could be excised from a pending second paperback edition with a minimum of difficulty or expense and minimal damage to the broad thrust of its context.³

Thus, in short, the publishers opted for a strategic retreat by withdrawing the book while preparing a new revised edition that took account of Hepple's threatened legal action.

Publication of the paperback edition, minus the offending text, will offer some solace to bibliophiles here and abroad who were concerned that the reports of "pulping" might signal the start of a new era of censorship in South Africa after the invigorating cultural and intellectual freedom that was ushered in following the fall of South Africa's politically repressive and puritanically oppressive *ancien regime*.

One of those who thinks that Johnson, a former director of The Helen Suzman Foundation, made an important contribution to South Africa's historiography with the publication of *South Africa The First Man, The Last Nation* is South African-born Paul Trewhela, who is now living in Britain. Trewhela's voice is worth heeding.

A former member of the South African Communist Party (SACP) and a former editor of the underground newspaper of the African National Congress's (ANC) guerrilla army, *Umkhonto we Sizwe*, Trewhela served two years in Pretoria Central Prison, where his prison colleagues included Bram Fischer, an Afrikaner icon of the anti-apartheid resistance movement. Later, in a different phase of his political life, Trewhela emerged as an incisive contributor to *Searchlight South Africa*, a trenchant though no longer extant publication that was fearless in its criticism of the Stalinist and doctrinaire components in the ANC during the

armed struggle to overthrow white ascendancy in South Africa and the manoeuvring for political hegemony in the transition to democracy.

Trewhela believes Johnson deserves credit for “succinctly” putting his finger on the authoritarian

Any elected representative who disagrees with the line decreed from above can be “thrown out of parliament” by the party bosses, Johnson states. Party bosses have the power to “redeploy” elected representatives into or out of parliament without

Trewhela contends that the ultimate origins of the current electoral system are Stalinist via the SACP-ANC alliance and Hitlerian via the NP

nature of South Africa's post-apartheid electoral system⁴, the proportional representation-list system, which — whatever its strengths — empowers political bosses and enhances their control over elected representatives at the expense of the voters who elected the representatives in the first place.

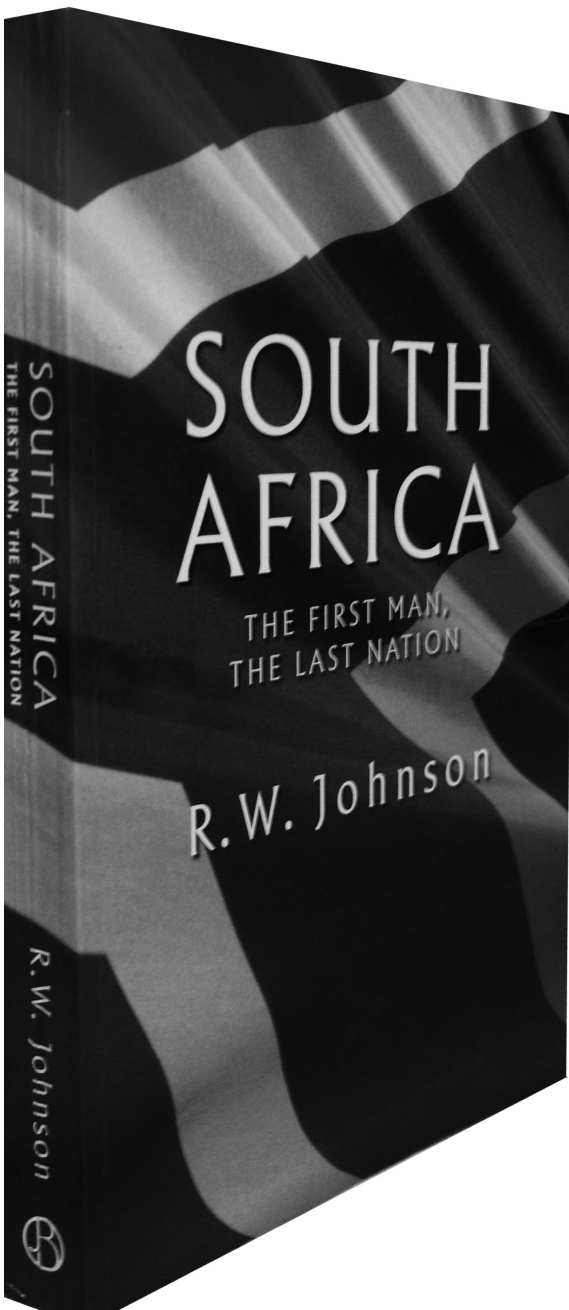
It is worth recalling what Johnson writes in his book on the PR-list system for the election of national and provincial legislatures in the new South African, a system that was designed essentially by the ANC and the National Party (NP), under the convenient doctrine that agreement between them constituted “sufficient census” for their views to prevail.

“... *the new electoral system — unique in the world — was in reality a scandalous political bosses' charter. It is not unusual that PR lists give power to party bosses who draw them up. What made South Africa's electoral provisions unusual was that there were to be no constituencies at all and no possibility for local communities to have any control over their representatives or to choose who they might be. Even when MPs resigned or died there (would be) no by-elections so that political leaders would be spared even those sporadic expressions of grass roots feeling*”.⁵

having to consult with the electorate, he adds. Trewhela, it should be noted *en passant*, takes the point further: he contends that the ultimate origins of the electoral system are Stalinist via the SACP-ANC alliance and Hitlerian via the NP⁶, one of whose *kragdadige* prime ministers, Balthazar Johannes Vorster, was a former member of the fascist-orientated *Ossewagbrandwag* and interned during the Second World War for his Nazi sympathies.

Trewhela argues further that there is a nexus between an electoral system which induces subservience to the party chiefs and the docility that presided in the ranks of the ANC for most of Thabo Mbeki's leadership of the ruling party, including, until recently, the reluctance of party members to challenge Mbeki's disastrous views on HIV/Aids and his refusal to publicly condemn the use by Zimbabwean President Robert Mugabe of repression and chicanery to prolong his tenure as president.

If Johnson has provoked debate on South Africa's electoral system, the few words that he devoted to Hepple in the first edition of his book⁷ have significance beyond the meagre space they occupy. They raise a broader question which occurs not infrequently in South Africa's history: the question of how to categorise those members of the anti-apartheid resistance who, under the stress of prolonged solitary confinement, sustained interrogation and, at



the least, psychological torture, made statements to their police captors.

Hepple was arrested at Lilliesleaf Farm in Rivonia on 11 July 1963, together with six of the men who appeared with him in the dock during the early phase of the Rivonia trial. Another four men, one of whom was Nelson Mandela, joined them on the accused bench on charges of committing multiple acts of sabotage. As Hepple admitted in a memoir⁸ that he wrote in May and June of 1964 after he fled from South Africa, he

ly integral to any final assessment of Hepple's actions at the time.

The debate over Hepple's statements to the police and whether or not they constitute "betrayal" has persisted, however, due in large measure to an article published in the October 2005 issue of *Noseweek* entitled "Should Bob have thrown the book at Bill?" The thrust of the unsigned article is to quote from various accounts of the Rivonia trial to show that at various phases in the unwinding saga two of the Rivonia accused, Ahmed

Two explanatory points are in order here. First Sisulu was the ANC's secretary-general as well as accused number two in the Rivonia trial, and, secondly, his reported statement on Hepple was originally published in Helen Joseph's autobiography *Side by Side*.

To the quotations cited in the *Noseweek* article, another can be added from Kathrada's *Memoirs* published in 2004. Writing of the first meeting between the eleven original accused in the Rivonia trial and their defence counsel, he recalls: "One other item of significance was the revelation by Bob Hepple that he had been asked, under interrogation, if he was prepared to turn state's evidence and testify against us. We were rudely jolted when he admitted that instead of categorically rejecting the suggestion, he was giving it some consideration".¹²

The quotations in the October issue of *Noseweek* are the prelude to a pertinent question: why did Hepple not take up the hostile remarks about him with the same vigour as he manifested in relation to Johnson's book? Hepple's answer is that he did. "From 1964 onwards, I did challenge accounts which accused me of being a 'traitor'" he ripostes. "The publishers apologised publicly and undertook to insert erratum slips." He specifically cites the publisher of Joseph's *Side by Side* and Shubin's *A View From Moscow* as one of those that apologised and inserted a correcting erratum.¹³

Hepple goes a step further, quoting a letter from Sisulu, written shortly before he was sentenced to life imprisonment, along with seven of his co-accused, in 1964. In it Sisulu dissociates himself from those who condemned Hepple as a traitor, explaining that his earlier remarks to that effect were delivered under the "pressure of cross-examination" and, according to Hepple, "on the hypothesis" that particular sections of the prosecution evidence was true. Kathrada, too, seems to have changed

The pattern of reaction seems to have been one of initial anger and disappointment that abated over time and led to the re-emergence of understanding and friendship

made three separate statements to the police under duress, though he insists that he did not give the police any information that they did not already have. What is beyond dispute is that he did not, however, give evidence for the state in the trial of the Rivonia accused. He fled into exile rather than do that.⁹

It is in the public domain that Johnson accused Hepple of betraying his comrades, thereby triggering the process that led to the halt in the sale of the first edition of his book. Hepple contends that there was no justification for accusation or for Johnson's comment that it was "astonishing" that Hepple's "betrayal" did not prevent him from being elected as head of a Cambridge college. Hepple's contention is not disputed by either the publishers or Johnson: the publishers have withdrawn the relevant edition of Johnson's book and excised the offending two sentences from the pending second edition, while Johnson has apologised unreservedly for his accusation and, as important, acknowledged that he had not made it clear that Hepple did not testify against his anti-apartheid comrades in the Rivonia trial, a fact that is obvious-

Kathrada and Walter Sisulu, expressed horror and indignation that Hepple had made statements to the police and/or had even considered giving evidence for the state.

The article quotes a letter from ANC and SACP stalwart Kathrada to his comrade and reported lover Sylvia Neame. In the letter Kathrada, one of the eight men who were sentenced to life imprisonment at the end of the Rivonia trial, states in part of Hepple: "From the first day when we were released from 90-day detention, I suspected him of telling the police more than he admitted."¹⁰

It goes on to quote from *A View from Moscow* by the Russian scholar Vladimir Shubin, who wrote of Hepple:

"Robert Hepple was the first activist to agree to be a state witness in a political trial. Though he managed to avoid disgrace by leaving South Africa illegally before his day in court, his comrades did not forgive him. Even Walter Sisulu, a man of very fair judgment, said during the Rivonia trial: 'He is a traitor. Anyone who gives information to the police is a traitor... Hepple will be ostracised to such an extent that he can do no further harm...'"¹¹

tack, describing Hepple as “a worthy friend and comrade” whose integrity was never in question. Hepple states emphatically that Kathrada’s “kindly remarks” were not made at the request of his lawyers.¹⁴

Publicly voiced suspicions of betrayal were not confined to the (later retracted) accusations made by Kathrada and Sisulu, however. Hepple put the additional accusations in what he considered to be the correct context in an email letter to *Focus*. They did not emanate from the Rivonia trialists but from “some on the (white) Stalinist left”. He cited the labelling of him as a “traitor” by Joseph and Shubin in their books. But he insisted that it had more to do with the discovery after he left South Africa that he had been “dissident” than his conduct at the trial.¹⁵

A plausible interpretation of the apparent contradictory statements is that different protagonists in the Rivonia drama had different views on Hepple and, more interestingly, that the attitudes of some towards him changed over time. On the latter point, the broad but not invariable pattern of reaction seems to have been one of initial anger and disappointment that abated over time and led to the re-emergence of understanding and friendship.

Hepple’s role as Mandela’s advisor during the ANC leader’s 1962 trial¹⁶ for inciting the protest stay-at-home

strike against the newly proclaimed white-dominated republic the year before may have played a role in shaping attitudes to him over time. It might easily have accounted for sharp disappointment to begin with, followed by the relief that he did not in the end testify against his former comrades. Hepple believes that his contribution

Hepple did not “cross the line”, unlike those who betrayed their comrades by giving evidence for the state in political trials, particularly those who did so in several trials

to the anti-apartheid movement in Britain while in exile, as well as his subsequent role, after 1990, as a member of the ministerial task team that drafted the new labour laws in the 1994, were more important.¹⁷

Hepple himself concedes that he may have made an “error of judgment” by agreeing to make statements to the police under the pressure of detention without trial and the tribulations of solitary confinement, psychological torment and constant harassment and interrogation. He adds a rider, however: “... but the outcome was that I was able to escape without doing any significant harm to those with whom I’d worked”.¹⁸ He explains that he did not categorically reject the invitation to testify for the state in the Rivonia trial as “a stratagem” to secure his release from detention: “I and those

close to me knew that had I not been released, I would have refused to testify against the accused.”¹⁹

With the advantage of hindsight it seems clear that Hepple did not “cross the line”, unlike those who did betray their comrades by giving evidence for the state in political trials, particularly those who did so in sev-

eral trials and thus became, as it were, professional state witnesses in political trials, or, more perjoratively, itinerant narks.

While many of Hepple’s former comrades appear to have come to terms with his “error of judgment”, that is not true of those who “crossed the line”, including Bruno Mtolo, who testified for the state in the Rivonia trial. Neither does it apply to Piet Beyleveld, a former president of the pro-ANC Congress of Democrats who gave evidence in the later trial of the widely respected Fischer. Joseph derisively compares Beyleveld to a dog in her book *Side by Side*. Nor does it pertain to Bartholomew Hlapane, who was used by the police as a kind of travelling state witness and who was killed by ANC assassins.²⁰

In the theology of the ANC they, and not Hepple, are the Judases. □

Endnotes

- 1 Interview with Jonathan Ball.
- 2 Letter to *Noseweek*, September 2005.
- 3 Interview with Ball, op cit.
- 4 Email letter from Trehwela, 14 November 2005.
- 5 RW Johnson, *South Africa The First Man, The Last Nation*, Jonathan Ball Publishers, Page 208.
- 6 Trehwela op cit.
- 7 RW Johnson op cit
- 8 Published in the University of Cape Town’s *Social Dynamics*, volume 30, summer 2004.
- 9 Ibid.
- 10 Quoted in *Noseweek*, October 2005.
- 11 Ibid.
- 12 Ahmed Kathrada, *Memoirs*, Page 166.
- 13 Email communiqué from Hepple in response to questions from *Focus*, 17 January 2006.
- 14 Ibid.
- 15 Email communiqué from Hepple, 25 January 2006.
- 16 Hepple memoir published in *Social Dynamics* op cit.
- 17 Email communiqué from Hepple, 25 January 2006.
- 18 Email communiqué from Hepple in response to questions from *Focus*, 17 January 2006.
- 19 Email communiqué from Hepple, 25 January 2006.
- 20 Shubin Vladimir, *A View From Moscow*, Page 71.

State of education: lights flashing red

An audit of the 2005 matriculation result is reminiscent of the hourglass, which, depending on perspective, can be seen as half full or half empty

By **Graeme Bloch**, education policy analyst at the Development Bank of Southern Africa

Last year's matriculation results have produced the usual spectrum of reactions: elation from those who did brilliantly, relief from those who attained university entrance qualifications, disappointment from those who did not and, of course, anguish and even despair from the 30 per cent who failed.

But despite reports of Nigerians selling cheap certificates on Hillbrow streets, there is no doubt that the 2005 matriculation examinations have been a test of students' perseverance and abilities, in a process that Umalusi — the official accreditation body — fairly judged to be credible, reliable and valid.

Some 508 363 learners wrote this year, up from 495 408 in 1994. A moderate increase of numbers passed, up to 347 184 from 287 343 in 1994, and 16 500 more than in 2004 despite a slightly lower pass rate at 68,3 per cent. Learners passing maths and science on higher grade improved marginally. A disappointment has been the falling rate of matric exemptions, at just around 17 per cent. While 82 010 attained endorsement in 2003, 85 117 in 2004 and 86 531 in 2005, this is still fewer than the 88 497 in 1994.

The all-important analysis of performance breakdown by district, and even by school and type, is still to be done.

The 'meaning' or value of matriculating aside, it is clear the results show a departmental infrastructure and set of capacities that are able to deliver on a large-scale operation, relatively efficiently, with clear procedures, in a reasonable time-period, to acceptable and fairly high standards. Education appears to be fairly stable, and perhaps even on a moderate upward curve, though current trends are perhaps still too early to call.

But even the Minister of Education, Naledi Pandor, has shown caution at the results. Her most important *caveat* is we must not forget to look at the overall system. She lists some worrying trends, some necessary actions, and indeed warns that without some decisive interventions, we may well be heading for crisis.

Crisis? Is this too strong a term? What can we say about the state of education 11 years after apartheid? How have the new authorities tackled their tasks? Are we on a road to education renewal, and to providing the economic, social and democratic

skills our citizens need to face a future of global challenge and potential growth at home?

Last October, I argued before the Human Rights Committee that South African education was in serious trouble. The term 'crisis' did not mean collapse — indeed, achievements such as the merging of racially-divided education systems, re-orientation and the high priority given to education in national and provincial budgets (over 6 per cent of GDP), and a range of day-to-day delivery of services from textbook to education support to matric exams, are no mean source for pride.

But South Africa is a country on the brink of expanded growth — and the current production of high-level skills is insufficient to meet the stresses and demands of a burgeoning economy. Furthermore, in a country with great expectations of equity, education is failing to make the grade, in a way that particularly impacts on poor, rural and township schools.

It might even be argued that for 60 to 80 per cent of our children, education reinforces marginalisation, condemning them to a second economy of unemployment and survival. At their worst, many township and rural

schools have been described as sink-holes, where children are 'warehoused' rather than educated. We can say there are two parallel education systems, mirroring the two economies that separate South Africans.

In terms of a number of key indicators, the education system is failing to make the grade. This finds expression in relatively poor outcomes. Our basic reading scores, and maths and science literacy, are consistently amongst the world's worst, including much of Africa. Recent scores showed that only 20 per cent of 6th graders could do maths at the appropriate grade levels (average score 27 per cent) and only 40 per cent in language of instruction (average score 38 per cent) (*www.iol.co.za*, 12 December 2005).

But more alarming are the disparities amongst schools. In one 2001 study, where 65 per cent of children in model C (ex-white) schools achieved appropriate scores at 6th grade level, the figure for ex-DET (black) schools was only 0,1 per cent. This is confirmed recently where the average score for 6th grade maths in the lowest fee-paying schools (under R100) where some 72 per cent of chil-

dren are located, was 22 per cent. Only some 5 per cent of students do higher grade maths and science for matric and, as we have seen, the matriculation exemption rate is static or falling at 17 per cent.

In general, probably some 50 per cent of learners do not even make it

Problems from the schools are also pushed elsewhere in the system. So higher education, under merger pressure, experiences intense and desperate demands for admission, suffers from poor base skills in students, and fails to ensure adequate throughput. Similarly, teacher morale is low, few

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through the school system and drop out before completion, with one recent study claiming only 32 per cent of 2003 grade 10s actually made it through grade 12 (*Business Day*, 11 January 2006).

Surveys talk about an overwhelming sense of sadness among the young unemployed, and circles of doom that reinforce their marginalisation and lack of hope.

Where students should expect opportunities and assistance, they find their hopes and dreams crumbling before their eyes, and face obstacles rather than ladders to progress and self-esteem.

new teachers enter the system, and the majority of trainees (some 80 per cent) are white (with language and cultural implications). The FET-vocational system, gearing up for recapitalisation in a R1,5bn departmental programme, has yet to show its promise.

What is to be done in what is clearly a mixed picture, but one with decidedly bleak undertones? We need to sit up, face reality, and acknowledge some issues.

The first acknowledgement is that we are in trouble, whether we use the word 'crisis' or not. The scale of marginalisation and drop-out is unacceptable. While even in England the

Parents, educators and learners harvest produce from the traditional agriculture section of one of the vegetable gardens at Piet N Aphane High School, one of the few outstanding successes among many state rural schools



Audit Office found 25 per cent of schools (with some one million learners) were not performing, and MPs are in revolt at government plans for education reform (see the *Guardian*, 12 January 2006), and while we, in contrast, can proudly note the achievement of the Millennium Development Goals (MDGs) for primary and gender enrolment in SA, we nonetheless have to name the depth of the problem we face.

abuse, criminal gangs, lack of books or people to assist at home, all impact on what happens in the classroom. The heritage of apartheid is not just a slogan. In a very real way, the ghosts of the past have come back to haunt us — and they don't have just an ethereal bark but a searing bite.

This bite is experienced frequently from problems like the spatial (apartheid) issues of school transport,

tions with unsure prospects. For many, the post-apartheid space has opened up room for a first generation of school or academic achievers who must make it with little parental guidance on the way.

Then, there are “policy breaches”. While former education minister Sibusiso Bengu's priorities were restructuring and de-racialising, the progressivist optimism of OBE (Outcomes Based Education) contributed to overload the system, leading to massive failures among poorly resourced schools and inadequately qualified and/or prepared teachers.

Similarly the focus of Bengu's successor, Kader Asmal, on matriculation results and high-profile victories: while driven with intent to raise morale and focus, it failed to lay the foundation for the long-term pathways required. His straight talking perhaps only heightened the tendency of relations with the teacher unions to become characterised by conflict rather than mutual professional development.

Some problems are administrative and relate to coordinating government in a complex system. The labour and education departments struggle to advance the skills development strategy, as do institutions such as the South African Qualifications Authority (Saq) and the Sector Education and Training Authorities (Seta's). Provincial and other institutional disjunctures are almost written in by constitutional guarantees; thus a crack team of experts cannot be sent from Gauteng to Limpopo without a complex set of memoranda and agreements.

The last problem relates to teacher issues. Content knowledge, burdens of administration, suspicion of and difficulties with OBE, insufficient time spent teaching and much ill-disci-

Institutional disjunctures are almost written in by constitutional guarantees; a team of experts cannot be sent from Gauteng to Limpopo without a complex set of memoranda and agreements

The second acknowledgment is the complexity of education. Everybody who has been to school thinks they have the solution. Yet education is deeply embedded in our history, our social and economic past and present. It means that solutions aren't simple; and it also means that there are very few quick fixes. Unravelling this puzzle will take a lot of work, of thinking, of organizing, and great effort to build consensus and direction around core priorities.

Many of the problems are hardly of schooling's making. Thus, malnutrition, hunger, poverty, Aids, child

to the sociology of apartheid teachers. For many years teaching (and nursing and social work) was the only aspiration and opportunity for “middle-class” blacks. Today, some teachers have ‘escaped’ into bureaucracies, into new jobs or running their own companies — is it surprising that many of those left behind feel resentment or, to coin a word, dis-ease?

New opportunities for young blacks now mean the brightest and best aspire to a wider world, and are reluctant to join the ranks of low-paid educators in uninspiring situa-



Pupils from Piet N Aphane High School visit Cape Point during a school tour in December 2005

pline: it is unsurprising that reports show over half of teachers have thought of leaving, morale is low, and teacher training gaps are increasing.

How do we go forward?

The first step is to engage with centres of excellence, the many places in the system where things are working. We need to find out why, and how, and put in place measures to enhance and support these best-practice resources.

That offers the department a challenge to enhance former model C schools' contribution to the system overall, to avoid complacency in the demographic changes that have occurred, to look at teaching demographics and assist with solutions. In short, it is right to place emphasis on the 75 per cent of (township and rural) schools that need fixing — some of the results of the model C system are in any case mediocre, and the schools cannot exist as privileged and dismissive islands of excellence in a troubled sea of poor achievement.

Still, there are many poor schools where things do work. Take the example of the Piet N Aphane High School, an Impumelelo Awards prizewinner:

Piet N Aphane High School (Headmaster Mr MA Moloto) is situated in Magatle Village, near Lebowakgomo in rural Limpopo. This year it celebrates its tenth anniversary. Its slogan, "Hardwork pays dividends", is reflected above all in two things.

Their matric results have improved from a dismal pass rate of 18 per cent in 1998 to 91 per cent in 2003. The pass rate is now in the high 80s. Through creative fundraising they have a science and biology lab, and a media centre and a home economics centre "which is today known as *Technology Centre and permakitchen*" are soon-to-be. A range of academic streams and active sports clubs complement a programme of visits that has taken learners as far afield as Robben Island, the Pretoria Police Museum and KwaZulu-Natal sugarfields "where we learnt a

lot about science and biology". Students enter Olympiads and at least 6 are on school tertiary bursaries.

Yet, the main object of the school's pride is its vegetable gardens, and sites for perma-culture and agro-forestry. Not only do they supply and train surrounding schools, but the post office, police, clinics and others have benefited. Boreholes, "rain harvesting", and a whole environmental policy have enthused and mobilised the village.

In the school's own words, "(We congratulate you) for wanting to know

It is not just collapsing classrooms or lack of toilets and electricity that prevent schools from being places of development, but also a dearth of libraries and laboratories

more about what is happening in schools. Piet N Aphane never said that 'Manna will come from Heaven'. Piet N Aphane has had to be an early bird that caught the fattest worm since 1994. And we don't have a community or SGB (School Governing Body) serving like an opposition party. However, we achieve all these through team work, hard work, as the motto of our school says, through sacrificing our time, e.g. coming to work even during the holidays and weekends; and over and above all conveying our efforts to the Celestial Surgeon (God)".

What happens at the school level and in the classroom is crucial. It is quite clear that concerted school leadership, discipline, and cooperation amongst the various stakeholders involved at school level, can make a significant difference even in the poorest schools. Tied to good leadership must also be a campaign to empower and encourage teachers to do what is necessary: from enhancing skills, district-level support, access to materials, to issues such as discipline and time-on-task.

Environmental messages on a board at the entrance gate to Piet N Aphane High School

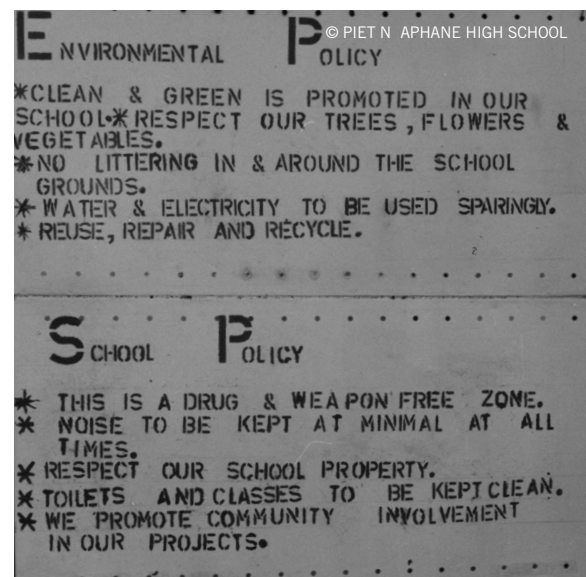
Pandor is right to stress the importance of resource conditions — or lack of them — in schools. It is not just collapsing classrooms or lack of toilets or electricity and telephones, but also issues such as libraries, laboratories and sportsfields, so that schools can begin to be whole places of social and individual development for communities and their children.

If we are to get that right it is absolutely crucial to mobilise a great society-wide consensus around our educational goals and priorities.

Neither the 'blame-game' nor ideological solutions will help. While many things can be fixed in the short-term, it will take a massive medium-term effort by all South Africans to rally around and intervene to find solutions.

The 'listening' stance of Pandor and her department is a good start, but it needs to be translated into decisive consultations, broad consensus, and firm prioritised action.

Perhaps it is time for some sort of get together, where we can acknowledge the depth and nature of the problem, where we can listen and re-focus, and develop long-term plans that can help us re-prioritise our energies to produce the educational outcomes South Africa needs. The future of our country and our children depends on making the education system work. □



Founts for delivery – a terrain of failure

An examination of local government as contested terrain in the context of the objective of a productive division of powers between the national, provincial and local levels of government leads to the conclusion that national government is slowly eroding the authority of provincial government. By
Peter Leon

Introduction

Is this the right time?

The purpose of this comment is not to prescribe, but to elicit discussion and debate as we enter the twelfth year of democracy and, more importantly, on the eve of our third, somewhat delayed, democratic local government elections on 1 March, 2006. Some may question the need for raising these questions when, for the first time, the African National Congress (ANC), despite its current centrifugal tendencies, controls all nine provinces, all six metropolitan municipalities, has an unassailable majority in the National Assembly and likewise dominates non-metropolitan local government.

The 1996 constitution has served us well...

The lesson of democracy, however, is that, paradoxically, government is often weakest when it appears strongest and what served the country well during the transition — the 1996 Constitution — may not necessarily serve as effectively a decade later. This note accordingly focuses on the division of powers among the three levels of government and argues that the time has come to re-visit this issue, particularly in relation to provincial and local government.

... but ten years later, may need re-visiting...

The need for this is not simply driven by the imminence of local government elections, but by what seems to be a serious systemic problem of effective service delivery throughout local — and to some extent provincial — government. Inadequate service delivery manifests itself not only in district municipalities in rural areas, with high levels of poverty and unemployment, but also in resource-rich metropolitan municipalities, such as Johannesburg, the department of provin-

cial and local government's Project Consolidate notwithstanding — particularly when there is growing evidence of serious dissatisfaction with local service delivery. This has, in turn, led to the beginnings of social unrest, whether over the abolition of cross-boundary municipalities or simply a deficit of basic services. But however it is characterised, it has its origins in poor service delivery and economic deprivation, which if not addressed, could escalate if the gap between the formal and informal economies widens. Recent empirical research into social unrest in the Free State has shown that such unrest has its origins in poor fiscal planning, which, in turn, led to inadequate capital expenditure on key items of service delivery. While this issue is the subject of an altogether different debate, the question of whether our existing model of government serves us well is not.

The division of powers

A decentralised model of government, with limited provincial power...

The 1996 Constitution builds largely on the decentralised model of government, with limited provincial powers, of the interim Constitution of 1993. That is, it distributes powers among the three levels of government, while retaining the most important powers at a national level. Although this is based, in part, on the principle of subsidiarity (ie locating powers and functions at the most appropriate democratic level), in the main it reflects the 1993 constitutional settlement, as modified by the 1996 Constitution, with its emphasis on cooperative governance as the *leitmotif* of intergovernmental relations. As prescribed originally i.e. the interim Constitution, and replicated in the final

Constitution, provinces, unlike municipalities, have no real revenue-raising ability (only 3 per cent is generated provincially), very limited legislative competence — and thus policy-making ability — and are essentially delivery arms of the national government.

... while municipalities have substantial revenue-raising ability...

Municipalities, by contrast, principally those in metropolitan areas, often raise over 90 per cent of their own revenue (although this is not true in rural areas, where the figure can often fall as low as three per cent), and legislate on municipal matters. Furthermore they can to a degree, where national legislation does not impose a legislative strait-jacket, make municipal policy (although a plethora of recent legislation, based on the principle of 'decentralised centralisation' has admittedly made this much more difficult). This is reflected in the national budget and the annual Division of Revenue Act, driven in turn by the provisions of s 214(1) of the Constitution, which requires that nationally raised revenue is divided "equitably" among the three levels of government, after taking into account the recommendations of the provinces, the Financial and Fiscal Commission (FFC) and organised local government.

... the provinces receive the bulk of nationally-raised revenue...

Using this fiscal formula, the provinces will in 2005/6 receive 57,7 per cent of national budgetary allocations, municipalities 4,7 per cent (a figure which is growing incrementally) and national government departments 37,6 per cent.

A sign of the times: instead of voting to obtain a house, people are refusing to vote until they get houses

... but in 2004/5 underspent their capital expenditure budgets by 20 per cent...

Ironically, although provinces receive the biggest slice of the national budget, underspending in this sphere of government is acute. In the 2004/5 financial year, no fewer than 26 provincial departments underspent their budgets by more than 10 per cent.

Capital expenditure was the area in which provinces performed worst — again, in 2004/5 provinces failed to

spend R2 billion (or 20 per cent) of the R10 billion allocated to them for capital expenditure (principally in education and health), a key element of effective service delivery. This compares with a relatively low two per cent underspending at a national level.

... with the result that ineffective provincial service delivery has led to greater centralisation...

Recent national frustration with ineffective provincial service delivery has led to the creation of a national social security agency, thus removing an important area of provincial social

security responsibility. In similar vein, the Financial and Fiscal Commission has recently recommended that the national government should revisit the division of powers and functions between the national, provincial and local government particularly in relation to health, housing and transport. The FFC found that municipalities were often the bearers of "unfunded mandates" from the national government and the provinces, which com-

Recent research into social unrest in the Free State has shown that it has its origins in poor fiscal planning which led to inadequate capital expenditure on key items of service delivery

pelled the municipalities to "top up" their equitable share of national revenue from their own resources in order to render transport and housing services (even though the rendering of such services might not properly fall within their constitutional mandate, but rather within the concurrent responsibility of national and provincial government).

The national government has, in part, accepted this invitation: in relation to housing, from 2005, municipalities — rather than provinces — became accredited delivery centres. But the reverse is also true: again



from this year, provinces, rather than municipalities, are responsible for primary health care. Furthermore, under the Intergovernmental Relations Framework Act, which came into force on 15 August 2005, national government may exercise even more control over the implementation of policy through the Act's requirement that different spheres of government

further established, through a profiling exercise of the various municipalities, that (amongst other indicators of deficient service delivery):

- ◆ in 182 municipalities, less than 60 per cent of households have access to refuse removal;
- ◆ in 203 municipalities, less than 60 per cent of households have access to sanitation;

health services — in district municipalities, rather than in local municipalities, which are closer to the people and arguably, in many instances, a more appropriate site for direct service delivery.

These changes were effected, however, without ensuring that district municipalities had the capacity or the financial resources to carry out these functions, resulting in a “funding mismatch” between the authority rendering the service and that receiving the income. The minister of provincial and local government has attempted to alleviate this problem by exercising his powers under section 84(3) of the Municipal Structures Act, to authorise local municipalities to exercise certain functions vested in district municipalities. Although outside the scope of this note, these issues around the appropriate site for service delivery raise serious questions about the effective use of fiscal resources in a middle-income developing economy.

Is there a case for converting the provinces into regions, abolishing the provincial legislatures, and turning the provincial executives into administrative agencies of national government?

“...must co-ordinate their actions”, where the implementation of policy depends on the participation of a different sphere from that which enacted the policy. The measure provided for in the Act to give effect to this is the “implementation protocol”: basically a form of agreement among the different spheres of government on the role of each in the execution of policy (which may well be biased towards the national sphere).

The question is, where does this leave the provinces...

This, of course, raises two important issues of governance:

1. where does centralisation (and thus accountability) end and what long term implications does this have for the provinces;
2. if municipalities are plagued by service delivery problems, does it make sense to confer further delivery mandates on them?

... at a time when half our municipalities have little or no capacity...

The department of provincial and local government's (DPLG) Project Consolidate has recognised that nearly half of South Africa's 284 municipalities are “at risk”, or as the president put it recently, “have little or no capacity to service their areas and therefore need urgent support to service their areas ...” The DPLG has

- ◆ in 122 municipalities, less than 60 per cent of households have access to electricity;
- ◆ in 155 municipalities, less than 60 per cent of households have access to clean water;
- ◆ in 116 municipalities, less than 60 per cent of households live in formal housing.

Project Consolidate — designed to run from the end of 2004 to the end of 2006 — will target the municipalities with the gravest capacity problems first.

At a local government level, outside the metropolitan municipalities, the capacity problems identified in the profiling exercise are compounded by the differing legislative mandates between local and district municipalities, with the result that in these areas (often, but not always in rural or semi-rural areas) there are four levels of government: national, provincial and two local.

Originally, prior to 2000, section 84 of the Local Government: Municipal Structures Act, 1998 (“the Municipal Structures Act”) provided that district municipalities would be responsible for the bulk delivery of municipal services, while local municipalities would be responsible for the retail delivery of these basic services. An amendment introduced in 2000 vested the most significant municipal services — such as water, electricity, waste and municipal

Centralisation: is there a case for asymmetry?

Questions of governance arise from centralisation...

While centralisation is an understandable reaction to ineffective governance, whether at the level of service delivery or simply management, this in itself raises a number of governance issues. If, as has happened, the national government has slowly displaced the provinces, whether in the provision of social grants, the supervision of local government, the re-classification of provincial roads, or the provision of houses, what space does this create for the provinces, if these, constitutionally, remain sites of concurrent legislative competence?

... particularly in relation to provincial accountability and the role of provincial legislatures...

What does it say about accountability, when the provincial legislatures are constitutionally enjoined to legis-

late in areas of exclusive and concurrent legislative competence, but are likewise responsible for exercising oversight over the relevant provincial departments? Do provincial legislatures still legislate and, if so, on what? Is there a case for making them part-time bodies in the Dutch or Belgian model? Are provincial legislatures really exercising effective oversight over provincial departments? Has any audit of the provincial legislatures and provincial capacity been undertaken and, if so, with what result?

Does this make a case for provincial asymmetry...

More importantly, is there a case for approaching the whole issue of provincial powers asymmetrically, borrowing, in a sense, from Nepal's African peer review mechanism: ie providing financial and functional incentives to those provinces demonstrating a consistent record of good governance, while re-distributing powers and resources from those which consistently under-perform nationally determined norms and standards, set in consultation with the Financial and Fiscal Commission?

... or is there a case for converting the provinces into regions?

While most of these are unanswered questions, deserving of a much more detailed investigation, unless addressed, in the long term, they may well call into question the justification for the continued existence of provincial government as a separate and autonomous sphere of government, except as a source of political patronage. And if that is so, is there a reasonable case, based on the exigencies of the last decade, for converting the provinces into regions, abolishing the provincial legislatures, while turning the provincial executives into administrative agencies of the national government? If so, how would this

impact on our constitutional settlement, reflected in the constitutional principles appended to the 1993 constitution, and recognised by the Constitutional Court's 1996 judgments in the two Constitutional Certification cases?

Extended municipal mandates: the capacity constraint

Is an extended municipal mandate feasible, when municipalities are so weak...

A combination of frustration with the slow pace of provincial delivery and the fact that municipalities are, in reality, at the coal face of service delivery, has meant that the national government, encouraged more recently by the Financial and Fiscal Commission, has located local government as a key driver of service delivery. The question is whether, in the light of initial reports from the DPLG's Project Consolidate, this is an appropriate choice, as this has indicated that nearly half of South Africa's municipalities are themselves suffering from an acute shortage of resources, whether financial or human, while half the municipal managers in one province were found to have shockingly inadequate levels of skills.

... or will this not simply give rise to more service delivery bottlenecks...

While the philosophy of delivering basic services at the level closest to the people — which is itself based on the principle of subsidiarity — is unexceptionable, it makes little sense to do so if the local level of government is plagued by capacity constraints. While these can, in time, be fixed through the short-term acquisition of resources, whether from government's current recruitment drive in India or re-employing former officials, in the long term re-skilling is essential, while additional local government mandates continue unabated in the short. As financial resources are

diverted from second to third tier government, the result, at least in the short term, is almost certain to be a severe capacity bottleneck, potentially undermining the original rationale itself.

Another investigation?

While some of the issues raised in this note fall within the remit of the Forum of South African Directors-General (Fosad) ongoing investigation into the functioning of the state, it is submitted that they require a wider, more inclusive and detailed investigation, which takes the views not only of those involved in the three levels of government, but of civil society itself.

Although parliament has a Constitutional Review Committee, this has not proved to be a particularly effective forum, as the issues raised by this debate go well beyond constitutional reform, but concern the effective functioning of our democracy itself. For this reason, the time seems ripe, ten years after the adoption of the 1996 Constitution, to re-visit the division of powers under our current constitutional model, not simply in the light of empirical experience, but in view of the severe capacity constraints of the modern South African state. □

Leon is a partner in Webber Wentzel Bowens, Johannesburg, former chairperson, Ministerial Advisory Committee on Local Government Transformation (2000 to 2002). The author acknowledges the assistance of Danie Smit, associate, Webber Wentzel Bowens, in the compilation of footnotes for this article.

The author has supplied extensive footnotes which are available to readers on request. Please email info@hsf.org.za or call +27 11 880 3352.

Better elected leaders than appointed judges

Judges have their strengths and ought to be respected when considering weighty questions of law. But in political matters they are people of flesh and blood with their share of prejudices. The public should therefore be wary of referring contentious political issues to them for final judgement

By **Howard Preece**

Let's put South Africa's still fledgling Constitutional Court (the 'Court') into some disputable perspective.

It is often too easily assumed that, while the public naturally has a pretty low opinion of politicians generally (Nelson Mandela and a few lesser figures aside), there is, properly, a very much higher regard for the judiciary; crucially judges.

From this follows a widespread presumption that if dispassionate, logical analysis of some flammable social, socio-political or socio-economic political issue is needed, the best chance is from some supposedly coolly analytical judge rather than leaving such matters in the hands of politicians or any broadly-defined "political" grouping.

Critically, too, judges are widely portrayed as the ultimate impartial defenders of constitutions and constitutional rights, whether formally written or evolved over generations of common law. That at least is the theory.

Moreover, the newer are the constitution and the constitutional court (or

equivalent body, modelled perhaps on the lines of the Supreme Court of the United States) the more reverential tends to be received support from popular, academic, legal and other circles.

I think there is some truth in this. I also think there is a great deal of hogwash.

Crucially, I don't think are judges intrinsically better qualified intellectually or morally than a relevant cross section of leading democratically-elected politicians to guard the public interest.

Judges are not (or very rarely) clinical robots. They are real flesh and blood people, with real personal beliefs and opinions.

Of course, that doesn't matter in most of their work. Their essential function, then, is the administration of well-established laws.

The more senior a judge, however, the more he or she moves into vital areas of interpretation of the law and even to precedent-setting rulings.

Judicial "activism", whether dubbed liberal or conservative by critics, is unavoidable sometimes. This applies above all to the Con-

stitutional Court, now set to be South Africa's effective supreme court. Here some rulings must inevitably appear to be nothing more than "prejudices" to those opposed to them.

Sure, long-time exiled African National Congress (ANC) operative Albie Sachs, one of the court's members since its founding over 10 years ago, has particularly sought to defuse this issue.

When the court ruled the death penalty unconstitutional he noted: "Our function is to interpret the constitution as it stands. Accordingly, whatever our personal views on this fraught subject might be, our response must be a purely legal one."

I have no doubt Sachs is absolutely sincere about that. Also, as an opponent of capital punishment for as long as I can remember, I wholly agree with the court's decision.

But if I supported the death penalty I have no doubt that I could equally find some justification in the constitution, and especially in the Bill of Rights, to endorse my view.

That's in the nature of all such documents. In the end it's all about

interpretation. And interpretation by any judge in strongly contentious matters will most likely be rooted in that judge's broad personal beliefs.

But aren't such rulings at least inherently more clinical, collectively anyway, than can ever be expected from politicians? Perhaps, but I still have plenty of reservations.

Politicians are indeed mostly held in a great deal less popular esteem than they might wish. But so are adversarial lawyers, and journalists come to that, and plenty of other "protectors" of the people, too.

In the end judges are lawyers, and lawyers have never enjoyed anywhere near the popular acceptance so often claimed for them, and especially by them.

"The first thing we do, let's kill all the lawyers", says one of the rebels, Dick the Butcher, in Shakespeare's *Henry VI*, part two.

We can be pretty confident Master Will knew his market. Shakespeare was sure of plenty of raucous cheering from almost all the audience at The Globe at this severe verbal assault on the legal profession.

Indeed, it is one of the more enduring historic ironies that even in popularly accepted regimes (which, as with Elizabethan England, certainly doesn't necessarily mean democracy) people mostly distinguished between "the law" and its practitioners.

Yes, technically the whole training and background of judges should make them more open-minded and free-thinking than politicians.

But when, for example, the United States Supreme Court, divides so often (not always) on political lines on major political issues (such as the validity of the Florida vote in the 2000 presidential election) we

should be highly sceptical about any so-called "dispassionate" judiciary.

If it comes to the crunch this must apply to South Africa.

The ANC commands dominant political support in South Africa. Naturally, therefore, the membership of the Constitutional Court reflects that.

That is fair enough. But in mature democracies, as South Africa must hopefully steadily become, political power changes at some point.

Then clashes between the court and the elected government are bound to intensify.

In the 1930s a conservative majority in the Supreme Court originally struck down many features of Franklin Roosevelt's "New Deal."

Roosevelt's perfectly understandable response was progressively to engineer a dominant liberal standpoint in that court.

Let's not delude ourselves, therefore, that any form of supreme court in a democracy, such as South Africa's Constitutional Court, sits loftily above politics.

Thus it is highly debatable whether it is better for vital socio-economic and socio-political matters to be determined by elected politi-

The more senior a judge the more he or she moves into vital areas of interpretation of the law and even to precedent-setting rulings. Judicial "activism" is unavoidable sometimes

cians or politically-appointed judges.

Of course there is a pivotal role for the judiciary in any true democracy. There are many hugely important issues that society has to confront, but varying levels of intellect, above a reasonable basic level, say nothing about the qualities of particular individuals to make judgment.

I go with politicians. At least we can vote against them if we feel strongly enough about some matters. And they know it.

Additionally, there are vast numbers of social-political-issues (the



The Constitutional Court

hugely overwhelming majority) where everything hinges on how best to give practical expression to almost universally desirable goals.

extremely sharp-worded disputes between The World Bank and *The Economist* over the roles of economic growth, aid, taxation, the use of pub-

“rule of law” that necessarily was central to that history — such a bill had to be put in place.

The great majority of the people previously denied any formal say in the government of the land of their birth naturally demanded this.

As always, however, the more “rights” that are supposedly entrenched, the more the scope there is for bitter debate about their application. This is especially true of so-called “secondary rights”, those relating to general living conditions.

I reiterate my key contention: broadly-taken political decisions are often far more effective in gaining eventual acceptance from critics than pure judicial rulings.

The highly emotive question of what the law governing abortion should be is a particular case in point.

In the United States, the Supreme Court decided by majority vote in 1973, in “Roe v. Wade”, effectively to legalise abortion nationally and to end the right of individual States to determine policy.

This judicial ruling still holds. What has happened, however, is that Roe v. Wade remains at the centre of a deep-seated running political-legal battle in the US.

In the late 1980s, for instance, the nomination of one of the most brilliant conservative legal figures in the US, Robert Bork, was blocked for membership of the Supreme Court by the Democrats who had control of the Senate because of his known opposition to Roe v. Wade.

This bitter fight on abortion continues today. Indeed, at times it seems the critical litmus test of “liberal” and “conservative” views, although that is actually far from the case, as might be expected about any “moral” issue.

Former ANC stalwart, constitutional court judge Albie Sachs, believes judges should put their personal lives aside. Easier said than done, however

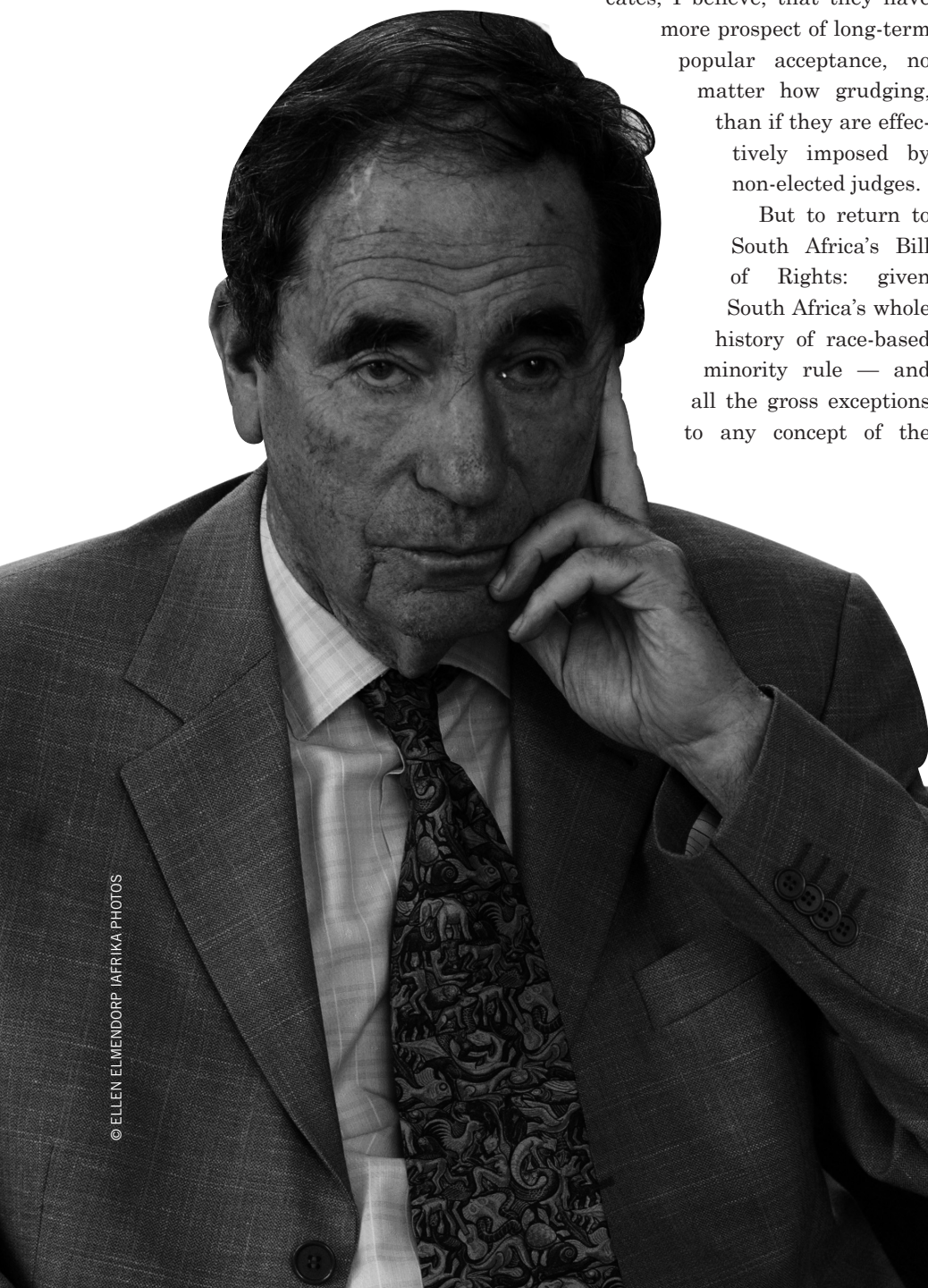
It is highly debatable whether it is better for vital socio-economic and socio-political matters to be determined by elected politicians or politically-appointed judges

For instance, we all profess to be in favour of “upliftment of the poor.” But defining “poor”, with even limited precision, is the subject of eternal debate. As to the remedies, just read, among hordes of other options, the

lic money, the place of market forces and so on. Judges have no innate wisdom here.

When severely controversial decisions are taken by elected politicians overall international experience indicates, I believe, that they have more prospect of long-term popular acceptance, no matter how grudging, than if they are effectively imposed by non-elected judges.

But to return to South Africa’s Bill of Rights: given South Africa’s whole history of race-based minority rule — and all the gross exceptions to any concept of the



Compare that with the situation in Britain. Legalised abortion was enacted in the United Kingdom in 1967 by the traditional route for conventional “matters of conscience” — laws relating, especially, to capital punishment, sexual conduct, abortion and others. This route is the “private member’s Bill” where change in the existing law is proposed by a backbench MP and members of the House of Commons are free to vote according to their preference.

That’s how fundamental abortion law change came about in Britain. It still provokes controversy, but on minimal scale compared to the US.

In part that relates to the profoundly differing place of religious views in the politics of the two countries. But in part it is also a function of the fact that one decision was taken by a small group of unelected judicial activists and the other by a majority of MPs together answerable to the electorate.

This issue — the role and power of the Constitutional Court in South Africa — is bound to acquire more and more focus over the coming years.

The eleven-member Court, which was created after the first democratic elections in 1994, was given primacy “only” on constitutional matters. But the ANC government is now set to give it supremacy over all other courts. Furthermore, it is government that in reality decides the membership of this highest court.

These, at any rate, are the apparent intentions of a draft constitutional amendment slipped quietly into the Government Gazette on 14 December last year.

For the present the court and the government are by definition broadly of similar thinking. So no US (and that applies to many other countries) power struggles for dominance in the highest court have taken place. Yes, there have been a couple of potentially flammable developments.

The highest profile of these was the court’s endorsement of the ruling by the Pretoria Supreme Court in favour of the Aids activist lobbying group Treatment Action Campaign (TAC) and against the government. The court found in 2002 that the government must start distributing the anti-Aids retroviral drug, Neverapine.

Formally, the government accepted this, as it had to in terms of the Constitution and the Bill of Rights that accompanied the landslide election of the ANC to power in 1994.

Practical application has been another matter, but the goodwill relationship between government and the court has pre-empted any

constitutional crises. But down the line? Who can possibly know. Consider the Kaunda and others versus the State case.

This featured a dissenting minority view expressed by Judge O’Regan, supported by Judge Makgoro, in issues arising from the internment in Zimbabwe of alleged South African mercenaries charged with seeking to foment a coup in Equatorial Guinea.

As there was little public interest in the whole issue the division in the court was of no consequence.

Compare that, however, with the dominant issue in the mainstream print and electronic media in the United States in January. This related to the Senate “confirmation” hearings for Supreme Court nominee Samuel Alito. For two weeks this attracted more front-page banner reports and more general reportage and comment columns than any other single issue. I base that observation primarily on a long-time daily reading online of the *Washington Post*.

I also assume that while the level of emphasis on Alito must have varied within the main newspapers and television networks in the US, the *Washington Post* broadly reflected the immense weight attached to that debate.

Certainly, in this period Alito left a host of other momentous matters — among them, the war in Iraq, Iran’s nuclear power ambitions, America’s massively growing trade deficit with China and the outlook for the dollar — trailing in its wake.

In Europe, however, and in the rest of the world generally, including South Africa, Alito ran well behind those and some other stories where the US was either the central focus

It was assumed this was an America-only story with little importance elsewhere. But it was a battle for political control of the Supreme Court, similar to control of the White House or Congress

or at least a major player. It was mostly assumed that this was merely an ultimately America-only story with little importance elsewhere.

It was not. It was a battle for political control of the Supreme Court, in the same league as control of the White House or control of Congress.

For the *Washington Post*, this was clearly the most important, single front-page issue in that whole period.

I assume that while the extent of the coverage of — and, vitally, comment on — the hearings must have varied slightly from publication to publication the *Washington Post* was essentially reflecting the immense consequences of the “Alito affair” for the US.

Ultimately the US Senate voted narrowly in favour — totally on party political lines — to confirm Alito’s nomination.

South Africa should start thinking seriously now — way ahead of any such event here — of what it might mean for this country when one day we also find ourselves on that road. □

Local government poll: no elixir for malaise

The purging by the ANC of incompetent or corrupt incumbent ANC councillors may mask a more Machiavellian move to marginalise Zuma loyalists, the repercussions of which may strengthen opposition parties. Add to that the large number of dysfunctional municipalities and the result is a heady political brew. By **Lawrence Schlemmer**

More than any previous elections, national or local, the forthcoming March 2006 local government elections seem destined to test both the quality of our democracy and its effectiveness in achieving better administration and a better life for all. Over 50 per cent of municipalities are dysfunctional or severely challenged in the management of their finances and/or the performance of their service delivery and development tasks. Moreover, problems of service quality or consistency exist in even the strongest municipalities. The minister of safety and security is reported to have counted nearly 6000 demonstrations or protests by groups of residents, activists or voluntary organizations last year.

Poor people are clearly more than disenchanted with the performance of local government. Those who do vote will once again expect better service from their local councils. The African National Congress (ANC) and all the other parties have prioritised local service delivery and the ANC in particular has made bold commitments to improve its record. What can these voters expect? So far the indications are very mixed.

A hopeful sign

Senior ANC decision-makers seem to realise that a great deal of their political credit has oozed away into the slime of corruption, incompetence, inability to spend funds allocated, nepotism in local appointments and tender awards and absurdly inflated salaries and bonuses paid to undeserving senior municipal managers. There seems to be a new determination, or perhaps desperation, at higher levels, to correct the failings

that are so clearly evident. At last President Mbeki has done more than indulge in promises and has become angry about the appointment of incompetent comrades and tolerance of corruption and inefficiency.

Mbeki may be worried, but are the local officials and the new teams of councillors likely to be equally concerned? One positive development is that the candidate lists now include a 50 per cent quota of women. However they have been chosen, we might expect women to be somewhat less-inclined than the men they replace to perpetuate the present masculine cult of mutual back-scratching, crass materialism and power mongering. The women may also replace some of the weakest male councillors.

Uncertainties and doubts

At the same time, however, the criteria for the selection of candidates by the ANC have been widely questioned, resulting in mass ferment in many local areas. A "quota" of women does not necessarily guarantee the best available quality, as we know from other transformation quotas and targets. Some observers detect or suspect that the ANC has taken the opportunity to get rid of disobedient members who support Jacob Zuma or who are too close to "radical" civic and labour-based movements. The inclusion of candidates who are suspected of corruption, and in particular the nomination of two women found guilty of fraud in the parliamentary Travelgate scandal, is hardly encouraging. A recent attitude poll by the reputable organization *Research Surveys* suggests that not much more than some 40 per cent to 45 per cent of adults will vote, hardly



© DARRIN ZAMMIT LUPI/AP PHOTO POOL

President Thabo Mbeki frankly admits the existence of corrupt ANC councillors but promises to exclude them and guard against future corruption in ANC ranks

reflecting great enthusiasm and faith in the local representative system.

Ironically, however, some good may come out of the tight party control over candidates lists, in the sense that in various places unsuccessful candidates are standing as independents. True, a proportion of the new “independents” may be unemployable former councillors desperate to cling to their incomes and status, but surely among them there must also be some people with experience in local government who can add to the weight of opposition.

Pressure on the ANC has also been strengthened by a subtle change in the stance of the state broadcaster, the SABC. This change has been obscured by lapses, like a very feebly excused failure to cover the launch of the Democratic Alliance’s (DA) Western Cape election campaign, and there will no

doubt be more. But recent coverage of problems and failures in local government has been more forthright than similar coverage in previous elections. Quite a few of the demonstrations and protests that have erupted around failures in service delivery in various parts of the country have also been well covered. The press in general has been resolute in publicising corruption, service breakdowns and the absurdly high salaries and bonuses of senior municipal officials. The ANC is still the dominant choice of voters in the country as a whole, but that support is now much more conditional than in the previous local elections, and even reluctant.

Furthermore, some very distasteful public utterances about coloured people by a former advisor to the ANC executive mayor of Cape Town and deep suspicions that the province’s waiting lists for public

housing put long-standing applicants in coloured areas at a disadvantage as well as a forced march of affirmative action for Africans in senior provincial positions, have let the genie of racial tension out of the bottle in the Western Cape. This comes at a time when the ANC faces the relatively new Independent Democrats (ID) for the first time in local government elections. The ID happens to have a high profile coloured leader, Patricia de Lille.

The big question is whether or not this deepening cynicism will benefit opposition parties. Opposition parties may or may not win over ANC voters in the coming elections, but even if they can achieve a higher turnout among their supporters than the ANC, the effect of an increase in pressure on government will be the same. In most established democracies the pressure of a competitive

opposition is the first step towards the success of democracy in improving administration, service to the public, accountability and responsiveness in government. Will the same rules and prospects apply in South Africa?

A more competitive opposition may be the first necessary step towards a successful democracy, but

deviate from their ideologies, and are thus forced to respond to competition by discrediting opposition, sanctioning supporters and pressurising them to conform. The latter response does little to improve accountability and responsiveness, and increased pressure from opposition is likely to be met by increased manipulation of supporters.

not only burdened by corrupt and self-serving local elites, but even more importantly they are desperately short of artisans as well as financial, professional, general managerial and programme management skills. Any chance of these skills being attracted back to the poorer small towns has been blasted out of the water by the Sector Charters for industry that will drive businesses to scour every available residue of black skills in order to meet their own equity and broad-based empowerment targets. With only 17 per cent of school leavers able to achieve exemption passes enabling them to enter higher education, our educational system cannot remotely keep pace with the country's skills needs, particularly if we edge towards economic growth levels of 6 per cent.

Small town local government will steadily lose what skills it has to the private sector from now on. There is absolutely no prospect of attracting white former local government officials back to small town service because even if some of them need the employment, they would feel, or be made to feel, most unwelcome in "transformed" administrations. Central and provincial government can bail out and nursemaid these dysfunctional municipalities for a while but the provincial skills base is almost equally under threat.

Given these harsh realities it is amazing that only the DA has said anything sensible about simplifying the now overly complex structure of local government. The DA has correctly identified the combination of local and district municipal authorities as over-elaboration. Beyond that the districts are often huge sprawling areas with too few vehicles and sometimes not even enough money for fuel. The ANC, on the other hand, seems to be committed to trying to keep the system in its present form but offering financial and management support and train-

Small town local government will lose skills to the private sector. White former officials will not return as they would feel, or be made to feel, unwelcome in "transformed" administrations

will this step be sufficient? Assuming realistically that the ANC will retain its overall numerical advantage for some time, two other large questions are raised. The first is how easily or otherwise a governing party like the ANC is able to respond positively to a competitive electoral challenge.

What will the effects of a strengthening opposition be?

A long-standing distinction between political parties of two types made by Sigmund Neumann, Seymour Martin Lipset and others is relevant here. They argued that political parties, in their basic make-up and structure, tend to be either "*parties of representation*" or "*parties of integration*". The first type would correspond to most parties in established democracies of a broadly liberal type throughout the world, that tend to be ideologically flexible enough to operate as contestants in a political system of give and take. Parties of "integration", on the other hand are more like social movements, driven by ideological passions. They are less flexible, being bound by commitments of a non-negotiable type like ethnic, racial, revolutionary or post-liberation solidarity. Parties of the first type respond to competitive pressure by competing harder and if necessary changing their pitch to retain or win support. Parties of integration on the other hand, dare not

What kind of party is the ANC? Some would point to its shifts in economic policy and argue that it has become flexible and responsive. This may be a naïve and very partial view, however, since it can be pointed out that the ANC's neo-liberal economic policies are fundamentally a vehicle for black economic empowerment and that the business community has been both accommodated and co-opted to drive elite transformation. The ANC's tight control over the nomination lists for elections fits the less democratic "party of integration" model perfectly.

My own view is that the ANC is a party in slow transition from liberation solidarity to flexibility and concern with representation of supporters. For some time to come the ANC will be a blend of both types set out above and opposition pressure will elicit both "democratic" and "anti-democratic" reactions.

Is the condition of poor municipalities chronic?

Finally, the second large question is whether the ailments of local government are treatable. Can the most dysfunctional poorer local administration, be rescued? This may sound like a very doleful question but consider the following.

The dysfunctional municipalities, usually the smaller poorer ones, are

ing. However, as usually happens in skills-starved systems, it will end up training future recruits for the private sector.

The prospects

Mbeki has constantly, and correctly, lamented South Africa's "two nations", with its fault line of divisions between (less and less) largely white middle class prosperity and mainly black mass poverty. Amid a deluge of rhetoric about a better life for all, his party's most determined commitment, however, has been to ensure that the least disadvantaged blacks can join the first world of middle class prosperity.

This core strategy — transformation — has worked as well as anyone could

have expected, so well, in fact, that inequality within the black community has widened dramatically.

minute, and the local councillors are often unemployable local activists who contribute little. Hence the gap

Parties of integration dare not deviate from their ideologies, and are forced to respond to competition by discrediting opposition, sanctioning supporters and pressurising them to conform

This divided nation problem has increasingly reproduced itself in local government. Large municipalities with middle class tax bases have their problems, but because they have resources, can attract a minimum of skills and opposition is significant enough to test and challenge decisions, they are not at risk of collapse. The poorer small local or district municipalities have none of these advantages. Informed opposition is

between the have and the have-not municipalities is likely to grow.

Democracy is effective in stimulating development but only if there is a minimum of capacity for it to impact meaningfully. Without capacity it can become senseless factionalism. Local government elections and local democracy in cities and richer towns can become increasingly competitive and effective from now on. In such areas attempts to control candidate lists will become increasingly counterproductive. In the poorer small municipalities, however, administration and service delivery will probably decay even further, notwithstanding intervention from above, deepening the divide between Mbeki's "two nations".

Bold decisions are needed to rescue the dysfunctional municipalities. Power without capacity is lethal. Local government should be simplified. Rural District Councils should not have their own layer of officials but should be serviced by provincial or wider regional bureaucracies reporting to the councils. In all the small, struggling towns, local dominant party control has produced more problems than solutions. Multi-party government should be considered in order to utilise all available experience. What other options are there? □

Patricia de Lille, leader of the Independent Democrats, may be the unintended beneficiary of anti-coloured remarks by the former advisor to Cape Town's mayor

Parliamentary assault on the Fourth Estate

Raymond Louw, editor and publisher of *Southern Africa Report*, reflects on the implications for media freedom of the expulsion of correspondents from their offices in Parliament which they have occupied for nearly 100 years



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The South African Parliament, Cape Town

An under-reported event occurred in the National Assembly in October 2005 when the Parliamentary Press Gallery had a row with parliament's institutional support divisional manager, Lionel Klassen, after he ordered the telephone connections and a range of document services to the journalists be cut.

The reason for the unprecedented action is stark and simple.

Parliamentary officials were ejecting the journalists from the offices a few steps from the Press Gallery in the main debating chamber occupied by them for nearly 100 years to offices in a building in Plein Street, Cape Town, and, according to Klassen, the journalists were not co-operating.

He gave a deadline of 10 October for the move two weeks earlier — when parliament was in recess and a number of journalists

were away and unable to respond. The journalists had agreed under duress earlier in the year to make the move but insisted that their work should not suffer.

The Press Gallery Association (PGA) has been in a lengthy battle with the parliamentary officials who say they need the offices to accommodate the expanding staff of officials. On 7 October when many journalists still occupied their old offices and three days before the deadline, Klassen summarily ordered the journalists' telephones to be cut off and instructed the service officers (messengers) not to deliver documents to them, causing much disruption in the Press Gallery.

On Monday 10 October, the PGA held an urgent general meeting at which they demanded the reinstatement of telephone and related services. Association chairman Mpumelelo Mkhabela said that the journalists also demanded a reasonably practical time within which to relocate to the building at 100 Plein Street, which is in the parliamentary precinct next door to the ministerial office block at 120 Plein Street.

The phones were re-connected and the document service resumed on 11 October and Klassen agreed to give the journalists more time to move. The journalists pointed out that it was not simply a matter of moving a desk into another office but sophisticated communications links needed to be transferred and Telkom officials and their own technicians required time to do this.

Beeld, one of the few newspapers that reported on the incident, described the parliamentary officials' conduct as "kinderagtig" (childish).

Neither *Beeld* nor members of the PGA and their editors appear to have absorbed the message that parliament and the government have conveyed to the media by this action. The message is: The press is of no consequence. It can be treated like a recalcitrant tenant who hasn't paid his rent or his phone bill. For them Edmund Burke, who put an historic stamp on the role of the press in Britain's parliament in the 18th Century, may never have spoken.

In 1774, Burke gestured to the reporters in the House of Commons, exclaiming, "There are three Estates in Parliament; but, in the Reporters' Gallery yonder, there sits a Fourth Estate more important by far than they all". It is a phrase which reflects the role of the media in informing the public and representing it in the gathering and dissemination of information. It has been used time and time again to stress the importance of the role of the media in a democracy.

Indeed it may have been in the mind of the politicians and civil society representatives who framed South Africa's Constitution with its safeguards for freedom of expression and freedom of the media in 1996.

Clause 16 of the Bill of Rights, which spells out everyone's right to freedom of expression, includes freedom of the press and the media. It contains a phrase which appears to have eluded the parliamentary officials: "Freedom to receive and impart information or ideas."

But South Africa's constitution does not stop there. The first clauses in the Bill of Rights impose onerous duties on civil servants and the state they represent, duties which also appear to have escaped the attention of the parliamentary officials.

Clause 7 (2) lays down as a basic principle that "the state must respect, protect, promote and fulfil the rights in the Bill of Rights". The following Clause 8 (1) "... binds the legislature, the executive... and all organs of state" to uphold the Bill of Rights.

Clearly, Klassen and his officials were not obeying those stern injunctions in the Constitution when they cut the Press Gallery's telephones and document services. They also did not seem to appreciate that parliament is at the heart of South Africa's democratic system and they were destroying the ability of an important element of that system to carry out its functions, thus limiting democracy.

Had reports of these developments gained currency overseas, it would have made South Africa the laughing stock of mature democracies. One wonders, as South Africa stands up to be assessed under the African Union's

the politicians believed they would gain the maximum publicity in their home constituencies.

South Africa's current proportional representation system has done away with this need; now potential MPs are not selected as parliamentary candidates by voters in parliamentary constituencies but by party machines which do not care a fig for what voters may think of an individual candidate.

So the government was not burdened by an MP's stature in a constituency when they decided to turf the journalists out of the parliamentary building and house them some distance away, thus reducing their

There are three Estates in Parliament; but, in the Reporters' Gallery yonder, there sits a Fourth Estate more important by far than they all. Edmund Burke 1774

Peer Review Mechanism, how such conduct will be measured under the "good political governance" provisions.

But the underlying message that ordinary officials can simply march in and prevent the media from carrying out its duties by disabling important services is one that should concern all South Africans. Media freedom is their freedom and if it is to be treated in this cavalier way, when will the freedoms of individuals be encroached upon in a similarly arbitrary manner.

When South Africa set up its parliament in 1910, the politicians carefully provided facilities and accommodation for the press to enable it to function as efficiently as possible. That is why the journalists' offices were situated near the Press Gallery and why they had ready access to the lobbies and corridors where they could button-hole members of parliament to discuss the affairs of the day.

The electoral constituency system was the reason for this determination to give the journalists maximum access to the public utterances of MPs. By providing these facilities,

ready contact with MPs and increasing the physical requirements of getting in and out of parliament.

The other important change that has been brought about is the imposition of a rental charge on the correspondents' office space — applicable to all except the South African Broadcasting Corporation (SABC) which is regarded as a state entity and thus not required to pay.

Up to now the parliamentary correspondents received their accommodation rent free, in accordance with the view that there should be the maximum facility provided for them. The reporters who will be constrained by this charge are the freelance and community media who do not have the resources of the big newspaper groups.

And now South Africa has experienced the summary severing of correspondents' telephones at the whim of a junior official. The implications are ominous: The press is an insignificant institution that can be pushed around by any minion of the state. Indeed, the thinking may be that it is expendable. □

Government's lackeys trample media freedom

By Raymond Louw

Barely two months after the bizarre conduct of a parliamentary official in cutting the communications of journalists in the parliamentary Press Gallery — as undemocratic an act as could possibly be contemplated at the very seat of South Africa's vaunted democracy — a similar barrier to media freedom was raised in Johannesburg.

The occasion was the first appearance of the sacked national deputy

president Jacob Zuma in the city's magistrate's court on a charge of rape. Johannesburg Police Commissioner Oswald Reddy, surrounded by a phalanx of police officers and Zuma bodyguards, barred the media and the public from entering the court room. It was a full hour before the scheduled start of court proceedings that Zuma had entered the building through a side entrance, all tactics designed to sidestep press coverage.

Reddy, according to the reporters, brushed them aside, dismissing their complaints that their rights and those of the public were being infringed, saying the proceedings were "highly confidential" and that "no one was allowed in".

Yet another senior official, National Prosecuting Authority spokesperson Makhosini Nkosi, justified the privileged treatment accorded to Zuma — stating, according to reports, that the interests of the media could not be allowed to supersede those of Zuma as an individual. He tried to pacify the angry journalists by expressing sympathy with them. To cap it all, as Zuma

left the building, the cameras of a press photographer were grabbed to prevent him from photographing the accused. The South African Chapter of the Media Institute of Southern Africa spoke of its outrage at the "blatant interference" in the media's duties and cited the constitutional requirements for the state to promote the media's freedom of expression rights.

The Freedom of Expression Institute accused the police of abusing their authority and of usurping the magistrate's powers to decide whether or not to close the court. The South African National Editors' Forum took its protest to Police Commissioner Jackie Selebi.

Both Johannesburg's chief magistrate Gert Jonker, and the magistrate Johan Boudrix, who presided over the hearing, told reporters they were not aware of their exclusion, which meant that they had not ordered it.

The magistrates apparently did not see it as their duty either to intervene and legitimise the proceedings by ensuring the court was open to the public or to protest.

It would appear that none of the officials, from chief magistrate to the lowest ranked policeman, recognised that they were part of the "judiciary and all organs of state" specifically bound with carrying out the Constitutional requirement to "respect, protect and promote" press freedom. □

Last year journalists were prevented from covering the court appearance of former deputy president Jacob Zuma on a rape charge

