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Focus areas include:

- Key dynamics of the executive;
- Democracy and the legislature;
- Order, the judiciary and the rule of law;
- Group relations and group rights;
- Freedom of expression, privacy and the media;
- Socio-economic rights and obligations;
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### **South African Monitor**

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# Part I: Key dynamics of the executive

Power corrupts, and after almost 20 years the ANC's power in a one party-dominant system is corrupting democracy in South Africa. Samuel Issacharoff, Reiss Professor of Constitutional Law, New York University School of Law, states in 2013:

*As the founding generation moved off the historic stage, however, and as less-broad-minded functionaries took the reins of power, the heroic ANC emerged as the head of an increasingly one-party state, with all the attendant capacity for antidemocratic abuse. South African democracy entered a period of what is termed "dominant party" democracy, a term that may simply connote the imminent collapse of real democratic contestation.<sup>1</sup>*

The key dynamics of the executive are a particular cause for concern about the transforming political system in South Africa. As the British political scientist James Hamill argues, South Africa is heading for either a severe democratic decline, or an anocracy in which the state and its institutions have been captured by elite factions.<sup>2</sup> The interests of South Africa's communities and citizens are seriously at risk from these dynamics.

## The ANC's self-perception and the National Democratic Revolution (NDR)

The tripartite alliance comprising the African National Congress (ANC), the much smaller South African Communist Party (SACP) and the trade union federation COSATU won in five general elections in South Africa between 1994 and 2014. While the ANC participated in elections, its leadership's rootedness in an armed struggle still permeated its political culture.

As *Economist* concludes in its review of the study of the ANC in exile by the prominent Africanist scholar, Professor Stephen Ellis,

*The real message of Stephen Ellis' history of the African National Congress (ANC) in exile — painfully and palpably obvious between the lines — is how the conspiratorial past affects the ruling party to the present day. It makes uncomfortable reading, for it goes some way towards explaining why President Jacob Zuma, a former head of the ANC's intelligence service in exile, and his comrades now running South Africa find it so hard to embrace the notion that a diversity of opinion and tolerance of dissent must be at the heart of any functioning, decent democracy.<sup>3</sup>*

William Gumede, Oppenheimer fellow at St Antony's College, Oxford, and the biographer of former President Thabo Mbeki and retired Archbishop Desmond Tutu, already noticed during Mbeki's rule that the ANC's political style in exile has become the dominant pattern of the ANC in government. The ANC's approach was one of centralised decision-making, unquestioned loyalty, sycophancy, and no public criticism, as opposed to the open debate of a dynamic democracy.<sup>4</sup>

The ANC has repeatedly recommitted itself to a National Democratic Revolution (NDR) in South Africa. This has been the case at its national conferences at Mafikeng (1997), Stellenbosch (2002), Polokwane (2007) and Mangaung (2012). So has President Jacob Zuma.<sup>5</sup>

1 Samuel Issacharoff, *The Democratic Risk to Democratic Transitions* at <http://constitutionaltransitions.org/wp-content/uploads/2013/09/Issacharoff-Democratic-Risk-to-Democratic-Transitions.pdf>, pp 8-9.

2 <http://www.worldpoliticsreview.com/articles/12437/south-africa-after-the-anc-part-i>.

3 <http://www.economist.com/news/books-and-arts/21569372-how-conspiratorial-past-affects-present-day-good-guys-were-often-bad> and *External Mission: The ANC in Exile, 1960-1990* (Hurst, London, 2012) by Stephen Ellis, Desmond Tutu Professor in the Social Sciences at the Free University Amsterdam, and a senior researcher at the African Studies Centre at Leiden University in the Netherlands.

4 William Mervin Gumede, *Thabo Mbeki and the Battle for the Soul of the ANC* (Zebra Press, Cape Town, 2005), pp 292-301.

5 <http://politicsweb.co.za/politicsweb/view/politicsweb/en/page71654?oid=365935&sn=Detail&pid=71654>.

Dr. Anthea Jeffery of the South African Institute of Race Relations, a liberal think tank, is one of the foremost experts on the NDR. According to her, as a result of the NDR framework, the ANC sees itself as a national liberation movement responsible for implementing the NDR and uniquely entitled to rule. It does not regard itself to be bound by the Constitution, which is widely considered to be a tactical compromise to be changed as the balance of power shifts in favour of the ANC.

Various constitutional provisions have simply, in practice, been disregarded. These include Parliament's duty to hold the executive to account, the need for a new electoral system after 1999, and the prohibition of cadre deployment. The NDR also means, of course, that the ANC has no principled commitment to key constitutional safeguards, including press freedom, an independent judiciary and property rights.<sup>6</sup>

### Patronage to maintain power

The ANC is widely in control of the state. Through its control of the state, it is a source of jobs and careers. The ANC thus reinforces compliance. The ANC also is the patron that dispenses social grants and other benefits to considerable constituencies. The ANC mobilises and uses state resources and access to business opportunities. As a result, it remains the best-funded political party, can counter electoral initiatives by opposition parties, reward allies and punish opponents, as well as contain potential defectors that may form viable opposition groups.

Professor Susan Booysen, a political scientist at the University of the Witwatersrand and a foremost expert on the ANC, concludes that the ANC and central government have multiple plans to end corruption and mismanagement and frequently issue statements in this regard. They work on monitoring and evaluating activities and plan to help secure better conversion of policies into realised effects, also through the redesign of state institutions. However, she also concludes that the ANC-in-government is the custodian of high levels of visible mismanagement and exploitation of state resources for personal benefit. Activities in the 'dubious but legal' category are tolerated and emulated. There is little hesitation to pursue business interests through the state.<sup>7</sup>

### ANC funding by creating a system of patronage

In South Africa, legislation currently ensures that no party is obliged to disclose who its donors are. However, much is already known of the ANC's organisational structure, culture and mechanisms particular to raising money. Based on this, the *Business Day* senior correspondent Gareth van Onselen concludes:

*The African National Congress (ANC) has always had a particularly fraught relationship with its funding. Indeed, since it was unbanned in the early 1990s, it has consistently walked a precarious line between what is and what is not ethically acceptable, just as it has solvency and insolvency, as it has battled to feed an enormous organisation with an insatiable appetite. Over the last 10 years, there is much evidence to suggest it has repeatedly crossed that boundary as its ever-growing hunger routinely outweighed its prescribed diet.<sup>8</sup>*

The ANC relied heavily on large donations from foreign governments and heads of state in order to survive, including General Sani Abacha of Nigeria, General Mohamed Suharto of Indonesia and Muammar Ghadafi of Libya. After the ANC had been elected as the national government in 1994, many foreign allies saw their debt to the ANC as having been satisfied. By 1997, it faced a cash flow crisis. It had also failed to structure its organisation in a way that allowed it to generate and secure new donations from other, more legitimate sources.

6 <http://www.sairr.org.za/sairr-today-1/research-and-policy-brief-the-national-democratic-revolution-ndr-its-origins-and-implications-31st-may-2012>.

7 Susan Booysen, *The ANC and the Regeneration of Political Power, 1994-2011*, p 5, Conference, One Hundred Years of the ANC: Debating Liberation Histories and Democracy Today, 20-24 September 2011 at <http://www.sahistory.org.za>.

8 <http://inside-politics.org/2013/05/08/the-ancs-dubious-donors/>.

Makhenkesi Stofile as the ANC's treasurer-general, made a presentation about party finances to the ANC's 50th national conference in December 1997. The *Cape Times* described Stofile's presentation as follows:

*A damning picture of an ANC plagued by chronic recurring debt, corruption, theft, fraud and financial mismanagement is painted by the confidential report of the ruling party's treasurer-general.*

The *Star* described the presentation by saying that

*Serious weaknesses have emerged in the ANC's financial systems, with criminals taking advantage of them to defraud the organisation and staff members disappearing with vehicles.*

Just after the conference, Stofile said:

*We opted for the role of facilitators for black business in the country. There are black businesses whom we have been able to turn to when we're in trouble.*

As Van Onselen states:

*There followed soon afterwards the implementation of a Black Economic Empowerment programme, possibly the cornerstone of the 'facilitation' to which Stofile referred. Essentially, the ANC would create the necessary conditions for 'black businesses', morally and financially indebted to the ANC, to thrive and it would turn its attention from its external historical allies to a new 'patriotic bourgeoisie' of its own creation. It created a system of financial patronage with an ANC government at its heart.*

*The ANC operates like a loan shark. It will give any potential donor preferential access to state funding, tenders and special attention at a discount price and, in return, it expects large donations to the party in the name of patriotism. Its problem, however, remains its insatiable appetite ...*

*Should the ANC reach a point where its performance in the government becomes so dire its actual support among business declines or it loses a province such as Gauteng (Africa's biggest economy), it has neither the systems nor the organisational wherewithal to cope ... It is difficult to know exactly where the ANC currently stands on this front, its current financial condition is kept from public scrutiny. But if those bits and pieces of information about its internal affairs are a fair reflection of its general state, it could well be the case that the party collapses financially before it collapses politically.*

*Should that happen, and the ANC is still in power when it does, its response will be telling. It has already done much to misuse public monies to its own benefit. When you deny an addict his/her drug of choice, desperation will force him/her to turn to any means necessary to feed his/her disease.<sup>9</sup>*

*Business Day* editor Peter Bruce speculated in 2013 that ANC finances and bankruptcy would probably result in the party returning to its dependence on foreign funders, especially among non-Western powers.

*The Russians will bail the party out of its debt – some say it is more than R1bn – and get big contracts in return. If they are nuclear it will mean offending the Chinese, who also want to build the plants (with technology licensed from the French) but as the (Kgalema) Motlanthe debacle may show, Zuma may already not be concerned about doing that.<sup>10</sup>*

9 <http://www.bdlive.co.za/opinion/columnists/2014/01/06/will-the-anc-collapse-financially-before-it-does-politically?crmid=crm2>.

10 <http://www.bdlive.co.za/opinion/columnists/2013/11/18/thick-end-of-the-wedge-zuma-is-pretty-well-untouchable-politically>.

## Using public office for partisan enrichment

Especially since about 2011, the ANC has increasingly had to rely on its control of government and state institutions for support. This was due to the combined effect of the so-called liberation dividend becoming thin, compared to the lack of service delivery, more internal factional competition for power and positions, and many new young voters becoming disgruntled and supporting opposition parties.

As Professor Booyesen notes:

*The greatest fragility, sabotaging the regeneration of ANC power, was in the interface of long-standing community observations of lack of accountability that combined with pervasive evidence of corruption.<sup>11</sup> Opportunism, careerism and pre-occupation with movement position and power – for what it can leverage in terms of state power – dominate many ANC operations. Talk about the need for containment was far more widespread than actual action to eliminate it. Action can stimulate reaction and trigger revenge, which leaders aiming at elected office want to avoid at all costs. Intra-ANC silences and ‘diplomacy’ – whether on colleagues’ extravagances in employing state resources, being pre-occupied with lucrative business operations while in fulltime ANC and/or government employment – were often due to internal ANC positioning for future leadership.<sup>12</sup>*

Professor Booyesen states:

*In government and in the public institutions of state the ANC was on continuous improvement quests, even if some crucial projects were insufficiently conceptualized and poorly executed. This was particularly evident in its attempted transformations of local and provincial government. It simultaneously battled the balance between comradely deployment and ruthless pursuits of performance. Corruption, insufficient capacity and self-beneficiation over service frequently impeded the ANC’s rise to the achievement of full state power. Organisationally the ANC was a giant on porous legs, courtesy of a plethora of internal contests for position, privilege and influence over state resources, whether for personal or community gains.<sup>13</sup>*

The factional infighting has increased and is expected to remain at high levels, especially as the focus during President Zuma’s second term is turning to who will lead the ANC in 2017. Zuma has not been able to appoint all his allies in the ANC’s national executive committee (NEC) to the cabinet, even though he enlarged the number of ministers and deputy ministers. Those who are overlooked, will look for new alliances and jockey for position with an eye on securing their own future.

During the past few years, this infighting has also taken the shape of political intimidation and worse, especially at local level, but sometimes also at provincial level. Raymond Suttner, honorary professor at the University of the Witwatersrand, as well as an ANC activist and former political prisoner, stated in August 2013:

*(W)holesale assassinations have become a regularised way of deciding on leadership and access to wealth within the ANC and its allies. This is a time when lawlessness is widespread. Consequently one should have realistic expectations and recognise that these events are part of some years of repudiation of the values on which democratic South Africa was established. This period has seen the undermining of constitutionalism and the distinction between public and private wealth being blurred.<sup>14</sup>*

11 Susan Booyesen, *The ANC and the Regeneration of Political Power, 1994-2011*, p 13, Conference, One Hundred Years of the ANC: Debating Liberation Histories and Democracy Today, 20-24 September 2011 at <http://www.sahistory.org.za>.

12 Susan Booyesen, *The ANC and the Regeneration of Political Power, 1994-2011*, pp 6-7, Conference, One Hundred Years of the ANC: Debating Liberation Histories and Democracy Today, 20-24 September 2011 at <http://www.sahistory.org.za>.

13 Susan Booyesen, *The ANC and the Regeneration of Political Power, 1994-2011*, pp 6-7, Conference, One Hundred Years of the ANC: Debating Liberation Histories and Democracy Today, 20-24 September 2011 at <http://www.sahistory.org.za>.

14 <http://raymondsuttner.com/2013/08/18/raymond-suttner-government-and-tripartite-alliance-no-pitch-at-marikana-memorial/#more-1884>.

## Bureaucracy focuses on patronage, not service delivery

The ANC has used the civil service to create an extensive apparatus of patronage. In addition, norms of prebendalism, where public positions are seen as opportunities for personal enrichment and clientelism, have accompanied such patronage.

The government in South Africa now employs 3.03 million staff. Of the total labour force, 22.6 per cent are public servants. The World Bank estimates that most civilian government employment on average accounts for about 11 per cent of total employment.

At about 12 per cent of the GDP, public service costs in South Africa are also proportionately among the highest in the world.<sup>15</sup> According to economist Mike Schussler, it is closer to 14 per cent, taking state-owned enterprises such as Eskom (the national electricity supplier) into account. This compares with Russia (3.7 per cent), Brazil (4.4 per cent), Nigeria (4 per cent) and Egypt (6.9 per cent).

According to data supplied by the then Minister of Public Service and Administration, Lindiwe Sisulu, South Africa had an extensive group of 34 ministers, 33 deputy ministers, 159 directors-general, 642 deputy directors-general, 2 501 chief directors and 7 782 directors in 2013.<sup>16</sup> The first cabinet of Zuma's second term that started after the April 2014 elections has 35 ministers and 37 deputy ministers.<sup>17</sup> Stephen Mulholland, the former editor-in-chief of *Financial Mail* and *Business Day*, as well as former CEO of Business Media in South Africa and of the Fairfax Group in Australia, in September 2013 noted that he perceives the current civil service as follows:

*What we have seen is not a steady, planned expansion to serve the people's needs, but an orgy of jobs for pals, obscene salaries, expensive cars, lavish travel and extravagant bonuses.*

The service delivery of the bloated civil service has been highly uneven. There are serious questions on the deployed cadres' commitment to serve, and the public sector is thoroughly permeated by these appointees. There is still limited evidence of successful action against perpetrators of self-enrichment, incompetence and mismanagement.

An on-going weakness, according to Professor Booysen, is that the public sector suffers from low capacity. Turnarounds will take time, even if effectively initiated, which has not yet been done.

In some areas that may affect political support in the short term, the ANC does provide good services, which also serves as a form of patronage. Housing for the poor has meant that one in five now live in a state-provided house, due also to the historically-proficient construction sector. In addition, based on support from the financial services sector – and the redistribution of tax money from a small base of taxpayers – the state delivers pensions, child-support grants and disability payments to about 18 million people per month.<sup>18</sup>

However, in many areas, the bureaucracy is performing badly. The *Management Performance Assessment Tool (MPAT) 2012/13 Report* released in September 2013 by the Minister in the Presidency, Collins Chabane, revealed the weak results of national government departments.<sup>19</sup>

- 80 per cent were non-compliant in service delivery improvement requirements;
- 76 per cent were non-compliant in ensuring that they had policies and systems for promoting professional ethics;
- 64 per cent were non-compliant with the legal requirements for fraud prevention;

15 <http://www.sowetanlive.co.za/news/2012/05/08/sa-s-sizeable-and-costly-public-sector>.

16 <http://www.bdlive.co.za/opinion/columnists/2013/09/08/this-is-the-business-an-orgy-of-jobs-for-bureaucratic-pals>.

17 <http://www.citypress.co.za/politics/jacob-zuma-cabinet-whos-in/>.

18 <http://www.bdlive.co.za/opinion/2013/05/31/anc-will-deliver-just-enough-to-stay-in-power>.

19 <http://www.bdlive.co.za/national/2013/09/11/management-in-public-service-deteriorating-reports-chabane>.

- 74 per cent were non-compliant with the Department of Public Service and Administration directive that their organisational structure should reflect funded posts only;
- 88 per cent were non-compliant with human resource planning; and
- 60 per cent did not have processes in place for detecting and preventing unauthorised expenditure, addressing audit findings and communicating findings to responsible officials.

## Black Economic Empowerment (BEE) to reduce political competition

As political scientist Kenneth Greene has demonstrated, where there has been a one-party dominant system for several terms, the dominant party tends to politicize public resources over which the government has a monopoly and use them for partisan purposes. There is no external constraint in the form of possible alternation, and no internal constraint either, since the bureaucracy is politically controlled through non-merit-based hiring, dismissal, demotion and promotion. The monopoly also reinforces the political dominance of the party.<sup>20</sup>

Public resources can be used for partisan purposes by appointing party supporters to senior positions in publicly-owned corporations. In various ways, public resources are transferred to the party: through politicized appointments in the bureaucracy to reward party supporters and punish party opponents; by privileging party-aligned businesses to contract with the state and publicly-owned corporations; by contracts for public works contracts and other forms of tenders, subsidies, advertising revenue and tax breaks to such entities.

Even privatization can be used as a one-time-only opportunity to use public resources for patronage. As a result, the tools of repression and electoral fraud need not be relied on in one party-dominant democracies. People and enterprises soon learn that their prospects depend on their political connections.

Often, if a state sector is large, there are many resources available to a dominant party for patronage. In the case of South Africa, the public resources structure rests on a complex set of relationships between the ANC-controlled state, as well as emerging black elites in the ANC establishment and large private sector corporations. This set of relationships supports the ANC's use of a number of policy levers. Relatives and allies of President Zuma, including Khulubuse Zuma and Duduzile Zuma, and ANC insiders like Cyril Ramaphosa and Tokyo Sexwale, participate and benefit to a disproportionate degree.<sup>21</sup> The American *Christian Science Monitor* of 10 July 2013 notices that

*Black-empowerment schemes to redress apartheid's injustices have been widely abused to enrich ANC-linked people. Mr Zuma's relatives and pals have hugely benefited ...*

In essence, the ANC has been abusing its access to state resources and business opportunities to fund itself so that it cannot be outspent or out-mobilised by opposition parties. Professor Susan Booysen assesses the ANC as follows:

*It is well-resourced and ensures that it stays that way, if necessary through leveraging state resources and the movement acting as a business operative, often dressed in patriotism and empowerment. The ANC was the best-resourced party in South Africa. It seamlessly leveraged state power for financial deals – with the state and by the ANC benefactors. The ANC's Chancellor House business operations, largely veiled from public scrutiny, dealt in mega-scoring business deals with the state. Chancellor House would help guarantee the ANC the resources to counter opposition advances, including electoral initiatives.*

20 See Kenneth Greene, *Why Dominant Parties Lose: Mexico's Democratization in Comparative Perspective* (Cambridge University Press, Cambridge, 2007); *The Political Economy of Authoritarian Single-Party Dominance* at <http://kgreene.webhost.utexas.edu/greene%20pol%20econ%20auth%201p%20dom.pdf>; <http://www.dailymaverick.co.za/article/2012-12-05-the-ancs-deadly-trinity-politics-power-patronage/#.UnK9675gXzA>.

21 Roger Tangri and Roger Southall, "The Politics of Black Economic Empowerment in South Africa", *Journal of Southern African Studies*, 2008, pp 699-716 (on p 710) and <http://mg.co.za/article/2013-10-25-00-gold-fields-link-to-duduzile-zuma>.

Thus, Black Economic Empowerment (BEE) not only is a result of ANC one party-dominance, but is used to reinforce such dominance. It provides equity in private corporations through exercising or threatening to exercise the state's power over procurement, licensing and privatization.

However, BEE not only reinforces nepotism and corruption, it also reduces political competition. It constitutes a means to punish or incentivize its elites so that they do not defect from the ANC and form a credible electoral alternative.

### **Party-state separation and centralization of power**

The ANC has adopted 'democratic centralism' as a central policy: this means that the making of all policy decisions is concentrated in the National Executive Council (NEC), the ANC's highest decision-making body.

This policy is not only indifferent to the federal structure and multiple centres of policy-making envisaged by the South African Constitution. In its execution, it is corroding the democratic checks and balances built into the Constitution.

As assessed by William Gumede,

*All too often, democratic centralism, or 'vanguardism' – which the ANC has adopted as its operational model – serves only to perpetuate the notion of a small group of people operating in the name of democracy, but in fact taking decisions and enforcing them without a mandate from the electorate.<sup>22</sup>*

The ANC pursues democratic centralism by a policy of cadre deployment. This policy entails deploying ANC supporters to a range of public institutions in order to implement the ANC policies, which have been set by the NEC. Cadres have been deployed to the Cabinet, National Assembly, provincial legislatures and executive committees. Cadres have also been deployed to the executives of national and provincial bureaucracies and parastatals like Eskom and the South African Broadcasting Corporation (SABC).

Cadre deployment has been used to quell dissent and to co-opt potential internal opposition from the ANC's parliamentary caucus. It has been used to recall President Thabo Mbeki and several senior officials, disrupting several links of accountability.

In addition, the ANC and bureaucratic structures are permeated by informal, patron-client relationships that often stem from the struggle period, family and ethnic networks, spiritual advisers, and new business partnerships. This means that it is often difficult for outsiders – and sometimes even for insiders – to get an overview. For example, sometimes a director-general in a department will have some power, but a mid-level official is the actual power on major issues, with the latter following the orders of someone outside the department with whom he has been linked since the underground days.

Informal relations as such may be functional for formal institutions in the sense that they complement them or that they compensate for weak institutions. Informality may co-exist with formal institutions, or informal rules may modify the effects of formal rules, as in several functioning democracies.

However, the problem is the instrumentalization of formal organisations by informal networks, the use of informal power, and the lack of accountability and representativeness.

22 William Mervin Gumede, *Thabo Mbeki and the Battle for the Soul of the ANC* (Zebra Press, Cape Town, 2005), p 305.

As William Gumede indicates,

*In the last local elections, deployment committees pre-selected candidates that would be ANC local councillor candidates and mayors ... The very obvious short-coming of the ANC's current electoral college is that it does not measure leaders on their ability to manage the country, government or ANC well; but on whether they will be able to reward the ANC electoral college, the party establishment and whether they will be able to ensure influential factions are provided with patronage or at least left alone to accumulate wealth.<sup>23</sup>*

### The increased role of politicized security services

The South African security forces can only be understood in the context of the country's political system. In the one party-dominant system, the ruling ANC, previously involved in a guerrilla war (1960-1990), is still permeated by a conspiratorial mind set.<sup>24</sup> President Zuma's history as the intelligence head of the ANC's military wing Umkhonto we Sizwe (MK) in exile, and his reliance on people he trusts from those days, also influence the ANC's current approach.

Ronnie Kasrils, a founding member of MK and former Minister of Intelligence (2004-2008), responded as follows to the question whether the ANC has taken a reversible step towards authoritarianism, as illustrated by the Protection of Information Bill<sup>25</sup> and other initiatives of the Zuma administration:

*I would think so. And I am glad to note that you have not used the term 'irreversible', because my view is that we must resurrect the best values of the liberation movement. My experience as intelligence minister was that the security and intelligence community were hopelessly politicised. This was made worse by a culture of secrecy, paranoia, conspiracy theory and authoritarianism. The Protection of Information legislation is an illustration of this. My impression is that it has more to do with concealing graft and corruption in high places than with national security. Note its obsession with threats that would emanate from whistleblowers and the media with exceptionally heavy sentences.*

In 2014, Kasrils referred to an increased politicization of the intelligence services. However, under Zuma, the ANC executive did not act upon a report he had tabled in 2008 to improve the state of affairs:

*I blew the whistle and I figured out that there were (intelligence) agents, that there were officers who were not working for the state but were doing ... (work) for Luthuli House ... They don't want to know anything about that report because they want the intelligence service to be a tool of Luthuli house and of the president.<sup>26</sup>*

Before the April 2014 elections, news emerged about a group of former intelligence officers working from the eleventh floor of ANC Headquarters at Luthuli House to screen ANC parliamentary and provincial candidates. It was headed by Thabo Kubu, who worked in the National Intelligence Agency and before 1990 in the ANC's notorious Mbokodo security department during exile. President Jacob Zuma was its deputy head from 1986 to 1993. Kubu is listed as a director, with former NIA boss and ANC leader Billy Masetlha, in a company called Maruapula Capital. Some candidates feared that the screening project, known as Project Veritas, was an attempt by Zuma's supporters to tighten his control over the party's caucus, and that the information gleaned during the screening process could be used against them.<sup>27</sup>

23 <http://pambazuka.org/en/category/features/85518>.

24 Stephen Ellis, *External Mission: The ANC in Exile, 1960-1990* (Hurst, London, 2012).

25 The Protection of Information Bill referred to here was passed by Parliament in April 2013. It is widely criticised as being aimed at silencing criticism against the ruling party and at discouraging whistleblowers from making information about corruption in state circles known – see Human Rights Watch's concerns in this regard: <http://www.hrw.org/news/2013/04/29/south-africa-secrecy-bill-improved-still-flawed>.

26 <http://www.iol.co.za/news/politics/intelligence-service-an-anc-tool-kasrils-1.1676525#.U4id-GeKDrc>.

27 <http://mg.co.za/article/2014-03-27-spoops-vet-anc-candidates>.

In a constitutional democracy, the accountability of the defence force to parliament is a key dimension of civilian control of the military. However, the Chief of the South African National Defence Force, together with the service chiefs, have never appeared before the Portfolio Committee on Defence and Military Veterans or the Joint Standing Committee on Defence. Major capital acquisition projects are buried in the Special Defence Account, despite only a small portion of expenditure on projects being tagged as ‘sensitive projects’. According to opposition parties – and this must be accepted as a partisan source – written parliamentary questions are simply ignored, half answered and in some cases simply not answered, with the result that such questions now hardly seem worth submitting.

Access to information requests on the arms deal, which allegedly goes to the heart of the post-1994 government and may taint former President Thabo Mbeki and current President Jacob Zuma, are largely being ignored.<sup>28</sup>

Likewise, the Secret Service Evaluation Committee has essentially been non-functional, also because of protection of their fiefs by senior intelligence officials. The General Intelligence Laws Amendment Bill is intended to formalise the amalgamation of the domestic and foreign intelligence services into one security agency. The Constitution put the President or his delegate in charge of the intelligence services but, over time, authority had shifted steadily to the State Security Minister. Some key proposals will result in the Minister becoming a unique gatekeeper to the agency and its products.

The National Intelligence Co-ordinating Committee comprises the heads of all the intelligence services that collate and sift intelligence for the state and Cabinet and identify potential threats to national security. The proposed legislation would remove the committee’s role in setting intelligence priorities; require all intelligence ‘taskings’ to be initiated by the Minister or, if they come from the President, the Cabinet or its security cluster, to be routed through the Minister; and locate the committee in the Minister’s office. The Bill would reduce the head of the committee, currently a civil servant whose powers balance those of the Minister, to a mere functionary reporting to the Minister.

The issue should be how to ensure that the intelligence services remain above politics. However, in terms of the draft Bill, they would be brought more tightly under the direct control of a politician.

Professor Jane Duncan, Highway Africa Chair of Media and Information Society in the School of Journalism and Media Studies at Rhodes University, describes the political heads of security services as the key actors of President Jacob Zuma’s administration. During Zuma’s term in office, he has been increasingly unable to deliver on promises made, and his powerbase has become less secure. Because of this, Duncan says, there have been significant attempts to strengthen the political security cluster in government policy making. The Minister of Defence, the Police Chief, Minister of State Security and the Head of National Intelligence have become difficult to call to account by Parliament.<sup>29</sup>

### **Subjecting the bureaucracy to the dominant party**

‘Democratic centralism’ and cadre deployment have also weakened the independence of the bureaucracy, including institutions like the Reserve Bank, the Revenue Service, the National Prosecuting Authority, the Government Information Service and the South African Broadcasting Corporation. There is concern that such ANC-aligned bureaucrats do not see themselves as independent civil servants, but as ANC deployees, whose career progression depends on continued close affiliation to the ruling party.

28 <http://mg.co.za/article/2011-12-02-arms-deal-bell-was-deaf-to-bribes-and-lost-out>;  
<http://mg.co.za/specialreport/the-arms-deal>; [http://www.armsdeal-vpo.co.za/articles04/told\\_you\\_so.html](http://www.armsdeal-vpo.co.za/articles04/told_you_so.html); Paul Holden and Hennie van Vuuren, *The Devil in the Detail: How the Arms Deal Changed Everything* (Jonathan Ball, Johannesburg, 2011); Andrew Feinstein, *After the Party: Corruption, the ANC and South Africa’s Uncertain Future* (Verso, London, 2009).

29 [http://www.academia.edu/1798769/Voice\\_political\\_mobilisation\\_and\\_repression\\_under\\_Jacob\\_Zuma](http://www.academia.edu/1798769/Voice_political_mobilisation_and_repression_under_Jacob_Zuma);  
<http://www.dailymaverick.co.za/article/2011-06-16-jane-duncan-on-the-ever-increasing-menace-of-sas-security-cabal>.

The record of independent institutions created by the Constitution is uneven in some high-profile cases involving allegations of executive misconduct. For example, in 2001 the joint report of the Auditor General, the Public Protector and the National Director of Public Prosecutions found that there had been no unlawful conduct by the government in the arms scandal. This finding obviously clashed with widespread irregularities and improprieties. The Public Protector also failed to act after the government directed a contract from the state oil company PetroSA to a company that diverted the bulk of the payment to the ANC.

In other cases, allegations of political intervention from above have occurred. As head of the National Prosecuting Authority, Vusumzi “Vusi” Pikoli, instigated criminal charges against disgraced Police Commissioner Jackie Selebi and the then ANC President Zuma. In 2008 Pikoli was suspended from his duties by State President Mbeki, a close confidant of Selebi, and then subsequently fired by Mbeki’s successor, Kgalema Motlanthe, who is an ally of Zuma.

In 2011, the Constitutional Court ruled that the Directorate for Priority Crime Investigations was vulnerable to political interference. The relationships of senior members of the SAPS crime intelligence with members of crime syndicates have also raised concerns.

### **Zulufication in the ANC**

**Z**uma is an ethnic Zulu who also upholds some Zulu cultural traditions. He has more than twenty children and six wives, whom he had married in traditional weddings. For many years before the ANC came to power in 1994, Nelson Mandela, an ethnic Xhosa, was the leader of the ANC. During this time, Zuma was the highest-ranking Zulu in the ANC.

As a result of Zuma’s skills as a mobilizer since 1994, Zulus have come to form the strongest component (almost 25 per cent) of the ANC’s increased membership. At the 2012 ANC conference, the ANC in KwaZulu-Natal voted through its own programme to become the national programme and the province took over half the seats on the ANC executive. Former KwaZulu-Natal Premier Zweli Mkhize currently holds the key position as ANC Treasurer General. KwaZulu Natal is also receiving more than its proportional share of major state projects.

This Zulu dominance is resented by representatives of other ethnic groups, resulting in growing rivalry between often ethnic-based networks. However, as the British historian R.W. Johnson remarked:

*To many Zulus, supporting Zuma meant ‘taking back’ the ANC – it was founded by a Zulu, John Dube, and Chief Albert Luthuli, also a Zulu, had led the anti-apartheid struggle in the Fifties. The Zulus had patiently put up with three successive Xhosa ANC leaders – Tambo, Mandela and Mbeki – and there was a strong feeling that ‘now is our time’.*

Zuma used to be the head of counter-intelligence of the ANC’s guerrilla army. He has installed those he trusts in key positions of the security apparatus. In the process, the influence of Zulu decision makers in the security cluster has been noticeable.

In 2011, these included Bheki Cele as SAPS Chief, Police Minister Nathi Mthethwa, Intelligence Minister Doctor Siyabonga Cwele and Justice Minister Jeff Radebe. In the recently-appointed cabinet, Zulu confidantes of Zuma, like Knowledge Malusi Nkanyezi Gigaba is the Minister of Home Affairs, Nkosinathi Nhleko is the Minister of Police, Jeff Radebe is the Minister in the Presidency and David Mahlobo is the new Minister of State Security.<sup>30</sup>

30 <http://www.biznews.com/undictated/2014/05/jacob-zuma-appoints-new-cabinet-sa-gets-new-finance-minister/>.

## Separation of the executive and legislature<sup>31</sup>

The ANC's dominance during four elections has eroded the checks on power created by the South African Constitution. As explained above, specific ANC policies like 'democratic centralism' and cadre deployment by the party to national and provincial executives and legislatures have weakened the processes of representative democracy.

Strict enforcement of ANC party discipline against ANC MPs has weakened national legislative oversight of the executive. Formally, legislative authority is vested in Parliament, but in practice its role has been reduced to approving bills drafted by the ANC-led executive. Behind the formal structures and processes, cadre deployment and the party rule.<sup>32</sup>

Cadre deployment disrupts the link of accountability between voters and the National Assembly they elect. Instead of voters electing MPs through their inclusion in a list, MPs can be removed and appointed by the NEC. Cadre deployment also disrupts the link of accountability between Parliament and the President. The National Assembly elects the President after an election or within 30 days of a vacancy occurring. The President is accountable to Parliament for the performance of his functions. However, the NEC can remove the President, regardless of whether the National Assembly still maintains confidence in him or her.

Cadre deployment by the NEC also disrupts the link of accountability between a member of Cabinet and Parliament.<sup>33</sup> The President appoints the Cabinet from among the MPs, assigns them their powers and functions, and may dismiss them. The Cabinet is individually and collectively accountable to Parliament for performance of their functions. However, by using democratic centralism, the ANC's NEC can remove a member of Cabinet, even if the National Assembly has not passed a motion of no-confidence in the Cabinet.

Similarly, cadre deployment disrupts the whole chain of accountability within each province. The ANC's NEC, instead of provincial voters, can remove members of the provincial legislature. It can also remove a provincial premier, even if he has not lost the confidence of the provincial legislature. In addition, the ANC's NEC can also remove a provincial member of the executive, even if he or she has not been dismissed by the Premier and the provincial legislature has not passed a motion of no-confidence in the Executive Council.<sup>34</sup>

The rise and maintenance of one-party dominance is checked by a federal constitutional structure. Federalism increases the number of governments that must be elected and creates different political majorities empowered to elect different governments. This creates the political space for parties that lose at national level to try and win support through the backing of a different political majority, and distribute political resources which ultimately shape the competitiveness of national elections.

The ANC's policy of centralism and cadre deployment by the NEC means that the provincial government as a representative of the provincial population has a limited role and authority. It also harms the federal structure by making the elected provincial officeholders not accountable to provincial voters, but to the centre, and then not the centre of the state, but the central decision-making body of a party.

31 This section is largely based on Soujit Choudry, *'He Had a Mandate': The South African Constitutional Court and the African National Congress in a Dominant Party Democracy*, 2010 at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1651332](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1651332) and Samuel Issacharoff, *The Democratic Risk to Democratic Transitions* at <http://constitutionaltransitions.org/wp-content/uploads/2013/09/Issacharoff-Democratic-Risk-to-Democratic-Transitions.pdf>.

32 William Mervin Gumede, *Thabo Mbeki and the Battle for the Soul of the ANC* (Zebra Press, Cape Town, 2005), p 272.

33 Soujit Choudry, *'He Had a Mandate': The South African Constitutional Court and the African National Congress in a Dominant Party Democracy*, 2010 at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1651332](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1651332).

34 For Zuma's agreement with this approach, see <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=108130&sn=Detail>.

## Political alternation and democracy

The ANC's NEC has tremendous power over elected MPs. The system of closed-list proportional representation assigns legislative seats to candidates based on their relative position on a party list, and the NEC draws up the ANC's party list. Even elected MPs can be redeployed by the ANC's NEC and replaced by another ANC cadre. The non-parliamentary wing of the ANC dominates the parliamentary wing.<sup>35</sup> Unelected party functionaries thus set the national government's policy priorities. The public officials subject to electoral accountability tend to be subordinated to unelected party functionaries.<sup>36</sup> Politics are pulled out of the elected legislature into the party and into processes that lie outside Parliament, and do not need to comply with the same norms of transparency, participation and accountability.

For a constitutional democracy to exist, the formal structures are not sufficient. A state may be a constitutional democracy in a formal-legal sense, but due to a lack of alternation, not be a democracy.

According to political scientists, democratic consolidation entails not only compliance with the framework of electoral democracy for political competition, but also at least one electoral loss, coupled with a transfer of power.<sup>37</sup> Political competition, including a viable opposition and the credible possibility that an election may remove a party from office, lowers the risk of a governing party abusing its power.

Statements and actions by the executive do not reflect an appreciation that without the viable option of alternation, a substantial democracy does not exist. They rather project a sense of entitlement to never-ending rule, based on the ANC's history of armed struggle against the previous political order.<sup>38</sup>

Even recourse to Christian and indigenous African religions have been used to legitimize such a lack of alternation. On 5 May 2008, Zuma declared to an ANC rally in Khayelitha:

*God expects us to rule this country because we are the only organisation which was blessed by pastors when it was formed. It is even blessed in Heaven. That is why we will rule until Jesus comes back. We should not allow anyone to govern our city [Cape Town] when we are ruling the country.*<sup>39</sup>

He made similar statements in 2004, 2006, 2009, 2012 and 2014, as did other senior ANC members.<sup>40</sup> In April 2011, Zuma remarked:

*When you vote for the ANC you are voting for Qamata [God], Qamata is the midst of the ANC. We are the mother of democracy, no other party deserves to be voted for other than the ANC. There's always the presence of God where we are. When you vote for the ANC even your hand gets blessed.*<sup>41</sup>

Previously he had said that "only those with ANC membership will go to heaven".<sup>42</sup> In May 2011 he told voters before municipal elections that those who turn their backs on the ANC will face the wrath of the ancestors, a force considered by many in traditional communities to be powerful and actively intervening in daily life.

35 Soujit Choudry, 'He Had a Mandate': *The South African Constitutional Court and the African National Congress in a Dominant Party Democracy*, 2010, pp 17-18, 33-35, at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1651332](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1651332).

36 William Mervin Gumede, *Thabo Mbeki and the Battle for the Soul of the ANC* (Zebra Press, Cape Town, 2005), p 272.

37 Adam Przeworski, Michael Alvarez, Jose Antonio Cheibub and Fernando Limongi, *Democracy and Development: Political Institutions and Well-Being in the World, 1950-1990* (Cambridge University Press, Cambridge, 2000); Kenneth Greene, *Why Dominant Parties Lose: Mexico's Democratization in Comparative Perspective* (Cambridge University Press, Cambridge, 2007).

38 Stephen Ellis, *External Mission: The ANC in Exile, 1960-1990* (Hurst, London, 2012), pp 298-299, 301-302.

39 <http://www.iol.co.za/news/politics/anc-to-rule-until-jesus-comes-back-1.398843?ot=inmsa.ArticlePrint PageLayout.ot>.

40 <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71639?oid=326899&sn=Detail&pid=71639>.

41 <http://152.111.1.87/argief/berigte/citypress/2011/04/11/CP/2/snZuma.html>.

42 <http://www.timeslive.co.za/sundaytimes/article895148.ece/God-is-on-the-ANCs-side-Zuma-tells-crowd>.

*I've been telling people that if you once belonged to the ANC and you leave, the ancestors of the ANC will turn their backs on you and you'll have continuous bad luck.<sup>43</sup>*

In February 2011, Zuma told a crowd in Mthatha that a vote for the opposition is a vote for the devil.

A political worldview that does not allow for political alternation has reinforced those key dynamics of the executive that reinforce the democratic decline in South Africa.

### Voicing protest

The ANC policies of patronage and redistribution of existing wealth under service delivery and welfare programmes have initiated or reinforced dependence on the government to improve their standards of living. Rising living standards and ANC policies have generated expectations of further improvements in people's quality of life, but ANC policies are not encouraging investment, growth, or the generation of new jobs. Meanwhile, high levels of youth unemployment continue and increase.<sup>44</sup>

Data of the South African Police Service (SAPS) shows that there are four to five violent anti-government protests a day in South Africa. The Gauteng province alone had experienced more than 500 protests since the beginning of 2014, of which over 100 had turned violent. According to a research group, Municipal IQ, there has been a sharp increase in protest action over the past five years. The protests combine with declining voter turnout and signal alternative ways of voicing disagreement. In its analysis, the South African Institute of Race Relations stated:

*We agree with the ANC that a crisis of rising expectations is the primary driver of protest action, but many other factors also play a role. These include:*

- *the breakdown of services, particularly water, which is often a function of affirmative action and cadre deployment at local government level. This point is not mentioned nearly often enough – although the term 'capacity constraint' is now in effect a code for affirmative action. Until analysts are willing to overcome their self-imposed political correctness in identifying the root causes of delivery failures, those failures are unlikely to be overcome;*
- *factionalism and jockeying for position within the ANC, particularly at this time when parliamentary and provincial lists are being drawn up and contenders want to show their support on the ground;*
- *the fracturing of the ANC itself ...;*
- *attempts by the ANC to make the Western Cape 'ungovernable' (the key factor in the protests there), which have promoted the spread of protest action to other regions of the country and backfired on the ruling party;*
- *the ANC's decision at its Mangaung national conference to re-affirm mass action as a key pillar of its current strategy and tactics, which is also backfiring on the organisation as much of this mass action has come to be directed against the Government;*
- *years of ANC rhetoric about the need for 'revolutions', 'second transitions', the overthrow of market systems, and punitive action against the 'criminal' private sector, which is now helping to inspire an upsurge in demonstrations. The irony, however, is that much of this anger is now directed at the ANC itself. For many years, protesters have been urged to stand up in revolt – but now that they are in fact rising up, they are literally coming up against the guns of the very State that encouraged their revolt. No doubt the sense of popular betrayal here will drive further antagonism against the Government;*
- *a lack of political choice within the country, which is largely a product of the ANC's having greatly weakened its black opposition in the Inkatha Freedom Party and the Black Consciousness*

43 <http://mg.co.za/article/2011-05-14-zuma-vote-anc-or-face-ancestral-wrath>.

44 <http://www.cnbc.com/news/southern-africa/2014/06/06/safrica%E2%80%99s-youth-hardest-hit-by-unemployment/>.

movement before the first all-race election in 1994. As a result, there is still no credible black rival to the ANC. Hence, the idea that dissatisfied people should use their votes to signal their anger against the ANC is not a realistic option – and helps explain why so many voters choose to vent their frustration through violent demonstrations instead of via the ballot box;

- the Government's mistake in 'rewarding' violence by increasing its efforts to deliver in areas where protests have involved arson attacks, such as the burning down of libraries. People thus believe that the best way to get the State to respond is to burn and destroy. And to keep children out of school, as that also puts pressure on the authorities;
- poor policing by a police service seemingly unable to contain protest actions and create an environment conducive to peaceful demonstration. The Marikana massacre and other allegedly unwarranted deaths at police hands have also fuelled anger against the police, and helped turn police officers and police stations into targets for attack. Once the police are themselves under attack, they have the right to use force in self-defence – but such action can ratchet up conflict yet further.

## The elections of 2014

Elections in South Africa have occurred within the context of a one-party dominant state for the past 20 years. Furthermore, pockets of citizens live comfortably while the majority is relatively poor and a large percentage of the population is unemployed. Professor Nicola de Jager, a political scientist at the University of Stellenbosch, states:

*In such an environment, the incumbent's ability to create jobs, issue tenders, pay for advertisements, determine economic policy and otherwise influence the movement of resources is a pronounced advantage. ... In SA, the ANC gains an important advantage between elections, as it has the lion's share of public funds, access to private funding through party-owned businesses and reaps the rewards of cadre deployment within government. In this context, elections might be free, but declaring them to be **fair** becomes problematic.<sup>45</sup>*

Moreover, efforts to use a combination of mobilization, patronage and intimidation usually proceed long before election monitors take to the field. The Community Agency for Social Enquiry (CASE) did field research into the voting of the poor before the 2014 elections. CASE's research points to the increasingly transactional nature of voting in South Africa, where votes become a transaction currency: a means of buying goods and services from a political elite, and not just an expression of confidence in the inherent capabilities of a particular party or leader.

According to Professor Booysen, voter support for the ANC based on its liberation struggle credentials and policies on the one hand and patronage on the other are increasingly like two tectonic plates moving across each other during election time.<sup>46</sup>

According to Mohamed Motale, CASE's director, the ANC uses the economic needs and anxieties of poor people to influence their voting patterns.<sup>47</sup>

*The only lifeline that poor households have are social security grants and the services rendered to them by the Department of Social Development in collaboration with other departments, such as health and education. Notwithstanding how poorly they are managed and resourced, the roll out of these services keep poor households going.*

45 Nicola de Jager, Why elections in Botswana and South Africa can be 'free' but not 'fair', <http://democracyinafrica.org/elections-bostwana-south-africa-can-free-fair/>.

46 <http://allafrica.com/stories/201405010719.html>.

47 <http://www.iol.co.za/pretoria-news/opinion/why-the-poor-still-vote-anc-1.1680612#.U4iaRmeKDre>.

*The irony is that the inadequate services delivered by the government in desperately poor communities are done by the community members. Service delivery by the Department of Social Development and the Department of Health is carried out by thousands of struggling local community-based organisations (CBOs), community health workers and caregivers whom the government hardly recognised and barely supported ...*

*The poorly resourced organisations and community workers rely on support from the poor communities in which they live and work. The government support for their work is at best patchy and nowhere near universal. But rational behaviour under these perilous and precarious conditions means that people hold on to what they have and the best way of doing that is keeping the ANC in power. In this way, the ANC uses the economic needs and anxieties of poor people to influence their voting patterns.*

*CASE's research shows that the ANC uses strategies that go beyond the charm offensive when engaging with the poor electorate that makes up its support base during campaigning periods. These strategies include providing poor households with inferior services thinly disguised as a caring government, intimidating members of opposing political parties and maintaining the support of poor workers by controlling worker politics through its alliance with Cosatu.*

*It does this, in the short term, by engaging in disinformation, such as threatening to stop social security grants and linking government social security delivery to the provision of services by a political party. Government services are delivered to the poor in a manner that strengthens the ANC's political party support.*

*The ANC also displays its power and strength in an intimidating manner using huge numbers of its supporters to induce a sense of fear and anxiety among the poor electorate. This is apart from engaging in direct acts of intimidation, such as controlling campaigning venues and organising marches to disrupt opposition political parties. These big brother bullying tactics target opposing political party supporters.*

*As the Institute of Security Studies stated: Media reports have revealed that the South African Social Security Agency (SASSA) distributed food parcels at a recent ANC rally. There are allegations that various government departments have increased their spending on advertising their achievements, and using the colours of the ANC in their billboards. There has also been the rather coincidental handing out of ANC T-shirts during government ministers' walkabout. The **Sunday Times** recently reported that a Gauteng Provincial traffic police vehicle was being used to ferry and distribute ANC T-shirts at an event attended by President Jacob Zuma.<sup>48</sup>*

During the elections, the ANC experienced setbacks in several bigger urban constituencies. Major numbers of voters in the black middleclass did not vote for the ANC. Most voters among ethnic constituencies like the Asians, Afrikaners, English-speaking whites and coloureds supported opposition parties. However, according to political analyst Nic Borain, the ANC is using political mobilization and patronage in the populous and largely rural KwaZulu Natal, Zuma's ethnic and political base. Thus, it can compensate for some losses in urban areas.

*If you look at the developmental commitments to the provinces, it is clear to the naked eye that KwaZulu-Natal has been significantly favoured.<sup>49</sup>*

According to Statistics South Africa's Poverty & Inequality unit, there are big contrasts between former homelands – areas where blacks were forced to live under apartheid – in KwaZulu-Natal and the Eastern Cape,

48 <http://www.issafrica.org/iss-today/sa-elections-what-does-the-electoral-code-of-conduct-say-about-the-abuse-of-state-resources>.

49 <http://uk.reuters.com/article/2014/05/04/uk-safrica-election-zulus-idUKKBN0DK04P20140504>.

a traditional ANC stronghold. Between 2001 and 2011, the number of brick houses in KwaZulu Natal more than doubled to 480 000, while in the Eastern Cape homeland areas the figure only rose a third. During the campaign, the KwaZulu-Natal Member of the Executive Council, Meshack Radebe, stated that social grants are only for 'ANC supporters'.<sup>50</sup>

The combination of mobilization, patronage and in some cases intimidation played an important role in the elections of 2014. Despite a considerable rise in public protests and disillusionment among many black voters, also seen in support for opposition parties in the urban areas, the ANC won about 62 per cent of the vote.

Actual physical violence was not widespread enough to have significantly influenced the outcome of the national elections, but it made a difference at local levels. In the six months leading up to the election on 7 May 2014, 76 incidents of election-related violence had taken place. These were mostly clashes between supporters of rival political parties and communities. The most hotly contested provinces experienced the highest number of violent incidents. Violence increased where dominant party power had been confronted by newcomers.

According to the public violence monitoring project of the Institute for Security Studies (ISS), of the 76 incidents recorded since October 2013, two-thirds turned violent. Half of the recorded incidents took place in metropolitan areas, 29 per cent in rural areas and 20 per cent in small towns. Gauteng (29 per cent) and the Western Cape (21 per cent) experienced the highest number of election-related incidents, followed by the Eastern Cape (16 per cent), KwaZulu-Natal (11 per cent), Limpopo (8 per cent) and North West Province (7 per cent). Where the political affiliation of perpetrators is known, the main perpetrating party is the ANC (52 per cent), followed by the EFF (26 per cent).<sup>51</sup>

Political violence could also escalate during the 2016 local government elections. For many local politicians and officials, their government salaries and access to state resources is the main route out of poverty. To date, most political assassinations have tended to be on the local levels.

### The non-democratic tenor of politics

There is a perception among some NGOs and also analysts that while elections may occur every four years, politics have acquired a non-democratic tenor. Doctor De Jager writes:

*Political analysts have begun to observe two trends within South Africa's democracy. The first, political centralisation, is evident in a centralising South African government, with some pointing to the restructured presidency and some to South Africa's dominant party system. The second trend is a weakening of agents of accountability: political and civil society. Analysts have investigated the relationship between the state and civil society, highlighting that the government appears to be constraining the operating space of civil society organisations (CSOs) as agents of accountability, or so-called 'watch-dogs', while others point to the decreasing effective competition from opposition parties ...*

*If you are critical of the ANC-led government or its officials then you will be branded as disloyal to South Africa and the future of South Africa ... Consequently, there is little room for the voices of opposition parties, since they are portrayed as 'forces opposed to transformation'. Opposition is further constrained by the very real threat of being branded as disloyal to South Africa if one is critical of the ANC-led government.<sup>52</sup>*

50 <http://www.issafrica.org/iss-today/sa-elections-what-does-the-electoral-code-of-conduct-say-about-the-abuse-of-state-resources>.

51 <http://issafrica.org/iss-today/what-does-increasing-political-violence-mean-for-the-future-of-south-africas-democracy>.

52 [http://www.kas.de/wf/doc/kas\\_10560-1522-2-30.pdf?070328103113](http://www.kas.de/wf/doc/kas_10560-1522-2-30.pdf?070328103113), pp 15, 25.

Mark Heywood, Executive Director of civil rights group Section 27, refers in an article in the *Sunday Times* of 13 October 2013 to several incidents of threats, veiled threats and burglaries targeting civil NGOs.<sup>53</sup> Among those targeted are the anti-fracking TKAG (Treasure the Karoo Action Group), Section 27, trade union NUMSA and the trade union federation Cosatu. In his view, the incidence is also growing. As he states in the abovementioned article:

*These incidents coalesce to create a climate in which some legitimate civil society organizations begin to fear that they are being watched unlawfully and may be targeted for dirty tricks. These organizations are pro-poor and do all they can to support the government's delivery of its constitutional obligations. But they are also independent and vociferously critical when necessary and they mobilise people to stand up for their constitutional rights. There is once again an assumption that phones are tapped. And there is a lurking fear that things could get worse.*

Hennie van Vuuren, the former Director of the Cape Town office of the Institute for Security Studies, describes it as follows:<sup>54</sup>

*Researching the Mdluli saga, I was struck by the fact that some of the country's highest-ranking current and former police chiefs were afraid to speak on their cellphones. They, like Julius Malema, answer their phones with the rhetorical "Hello, Mr Mdluli". Are top cops really that afraid a criminal network controls police intelligence? And this under the noses of the minister of police, minister of state security and the president?*

*What is certain is that a climate of fear grips politics in South Africa and it is driven by the securocrats. The Protection of State Information Bill (the 'Secrecy Bill') and its ugly twin, the draft General Intelligence Amendment Bill, will block the free flow of information, protect the corrupt and monitor citizens' email, Mxit, Facebook, Twitter and Skype communication.*

*Consider, too, the sinister way the Mail & Guardian's editor and senior members of the M&G Centre for Investigative Journalism were made to report to the police three weeks ago, in what appears to be a pre-arrest process. This foreplay to possible criminal sanction is all because of an exposé linking presidential spokesperson Mac Maharaj – a public servant – to corruption. Did Maharaj consult his boss before pressing charges? Is the intention to charge investigative journalists, or to scare them? This is far too much like the harassment suffered by Sunday Times journalist Mzilikazi wa Afrika and others last year.*

*Other attempts at intimidation happen, but nobody can pin the blame on the state.*

*Earlier this year, Constitutional Court judge Sisi Khampepe and Advocate Muzi Sikhakhane's homes were burgled and their laptops stolen. In the case of Sikhakhane (who also acts for Julius Malema), one of the documents stolen was an affidavit by Tokyo Sexwale requesting a probe into Richard Mdluli's alleged abuse of state resources.*

*One should be circumspect about such allegations. This is a country with much crime. Yet, in the past 18 months, my own office was broken into twice, late at night, using the same cat-burglar method of entry. The first time, my external hard-drive (containing a manuscript on the arms deal) was stolen. The second time, the visitors took nothing because the hard drive was stored elsewhere (and for the record, I am not sitting on some smoking gun). All other shiny objects were left untouched. It may be ordinary crime; it may be coincidence.*

53 For similar conduct under President Zuma's predecessor, Thabo Mbeki, see William Mervin Gumede, *Thabo Mbeki and the Battle for the Soul of the ANC* (Zebra Press, Cape Town, 2005), pp 298-299.

54 <http://mg.co.za/article/2012-08-17-00-zuma-why-were-not-laughing-any-more>.

*Far more worrying is the alleged suicide of the secretary of the commission of inquiry into the arms deal, advocate Mvuseni Ngubane, in May.*

*On the same day he met the president, he climbed into his car and shot himself. He had no known financial or personal problems. Whatever the reason for his death, it has delayed the commission. It is unlikely to start its public deliberations before the ANC's Mangaung conference and will probably conclude only after the 2014 elections – a happy coincidence for corrupt businesspeople, arms dealers and politicians alike.*

Retired Archbishop Desmond Tutu, a fervent anti-apartheid activist and Nobel Peace Prize winner, indicated in May 2013 that he would “very sadly not be able to vote for the ANC after the way things have gone”. As reasons, he referred to pervasive state corruption, mismanagement and the intimidation of political opponents.

### **Political killings and democratic decline in South Africa<sup>55</sup>**

**P**olitical intimidation in South Africa also occurs in the form of political assassinations. At least 60 political assassinations have occurred in South Africa in the past eight years. In August 2013, Raymond Suttner, a lawyer and honorary professor at Witwatersrand University, as well as a former ANC activist and political prisoner, stated:

*(W)holesale assassinations have become a regularised way of deciding on leadership and access to wealth within the ANC and its allies.<sup>56</sup>*

Motives for the political killings have included the silencing of whistleblowers revealing corruption in the ANC or civil service, the targeting of political opponents, or competition for positions in the ANC or civil service that provide access to public funds and cash from firms eager to buy political influence.

More than 90 per cent of the hitmen or those who ordered them are still walking free. A few provincial cabinet members and senior ANC officials have been suspected or involved in such killings in Northwest Province, KwaZulu Natal, Free State and Mpumalanga.

Just before the Mangaung conference of the ANC in 2012, Obuta Chika, a district secretary of the ANC in Northwest Province, was shot in the driveway of his house. In February 2013, China Dodovu, the provincial ANC cabinet member for local government, was arrested as the person possibly giving the order for the killing. The former Mayor of Rustenburg and his bodyguard was sentenced in 2012 for the assassination of ANC Councillor Moss Phakoe. According to a forensic report obtained by *City Press* newspaper, many other local politicians may have been involved too.

However, witnesses fear retribution and also do not know for certain whether networks in the police might be aligned with those ordering the killings.

Corrupt policemen and private security people, as well as assassins from neighbouring countries like Mozambique and Zimbabwe are used. Most victims are watched and shot. James Nkambule and other politicians who could have revealed tender corruption related to building projects for the World Cup 2011 were poisoned. The trend seems at present to be concentrated in northern provinces, and have an impact on politics. Mary de Haas, an independent security monitor, states that even experienced ANC cadres in KwaZulu-Natal dislike travelling to meetings at night for fear of being attacked.

55 <http://www.bdlive.co.za/opinion/columnists/2013/08/12/political-assassinations-how-the-anc-is-killing-its-own>; <http://www.ft.com/intl/cms/s/0/b8a413ee-f855-11e2-92f0-00144feabdc0.html#axzz2dL5TbrWy>; <http://thinkafricapress.com/south-africa/political-violence-south-africa-growing-pains-democracy-or-adolescence-anc>.

56 <http://raymondsuttner.com/2013/08/18/raymond-suttner-government-and-tripartite-alliance-no-pitch-at-marikana-memorial/>.

Hennie van Vuuren, former Director of the Cape Town office of the Institute for Security Studies, describes the situation as follows:<sup>57</sup>

*In the shadows, formal and informal security networks are settling scores and doing the dirty work of those in power. Collusion between the people who have the guns and the people who have the money is infecting our politics.*

According to British political scientist James Hamill,

*South Africa's ruling African National Congress party is beset by problems it is incapable of seriously addressing, far less resolving. The main question now is whether it will experience a dignified 'democratic decline' or a descent into Zanuification, whereby, like Zimbabwe's ZANU-PF, the liberation movement asserts its right to rule on the basis of history rather than the will of the people.<sup>58</sup>*

## Part II: Order, the judiciary and the rule of law

The separation of powers in a democracy can only work if the impartiality and competence of the judiciary, police and prosecuting services are ensured. In South Africa, several forces and trends indicate severe shortcomings in this regard.

These forces and trends include extensive practices and sometimes institutionalised norms of nepotism and corruption; close links between some politicians, the heads of security agencies and the illegal domain; as well as the weak protection of citizens and communities against traumatic violent crime. In addition, there is widespread corruption, partisan ANC influence and cadre deployment in the police. A serious emerging trend is the apparent withholding of proper protection of citizens and communities that are not considered to be part of the ruling faction.

### Nepotism and corruption

South Africa has a formal conventional economy, which has become strongly entangled with the ANC political elites. However, there also is an informal economy, part of which is dominated by crime syndicates with links to politicians and security agencies. As in countries like Mexico and Colombia, these two domains co-exist in the same political system.

Historically, the legal and illegal domains are also interlinked. In the case of the ruling ANC, partnerships of some cadres with drugs and smuggling crime syndicates during the years of the political underground and exile have continued after 1994. A former Mandrax specialist became a business partner of Billy Masethla, former chief of the National Intelligence Agency and now a Zuma loyalist.<sup>59</sup> The ANC's Polokwane conference in 2008 which brought Jacob Zuma, a head of ANC intelligence during the underground years, to power, was also attended by Zuma confidante Mo Shaik, later head of the South African Secret Service. Shaik, currently head of the Development Bank of Southern Africa's international division, was at the time accompanied by syndicate leader Cyril Beeka, who gave him the lift to Polokwane.<sup>60</sup>

Mo Shaik's brother, Shamim "Chippy" Shaik, at some stage head of acquisition of the Defence Force, was later sentenced for his involvement in the series of billion-dollar arms trade scandals. These scandals reach to the inner core of the ANC and the foundation of the new political order, allegedly involving the then defence minister Joe Modise and later Presidents Thabo Mbeki and Jacob Zuma.

57 <http://mg.co.za/article/2012-08-17-00-zuma-why-were-not-laughing-any-more>.

58 <http://www.worldpoliticsreview.com/articles/12437/south-africa-after-the-anc-part-i>.

59 <http://mg.co.za/article/2011-10-21-the-wellconnected-mr-klamp>.

60 Stephen Ellis, *External Mission: The ANC in Exile 1960-1990* (Hurst, London, 2012), pp 168-170, 273-274.

The African National Congress also held a ten per cent share in Nkobi Holdings, a company of which Zuma's financial adviser Schabir Shaik was a director. Nkobi was one of the companies that benefited from the multi-billion rand arms deal. All the details of the arms deal have not been unearthed yet, but much is already available in the public domain.<sup>61</sup>

## Zuma and Nkandla-gate

More recently, the expensive refurbishment of President Zuma's private residence at Nkandla has been condemned by the Public Protector, Thuli Madonsela. The Public Protector boiled her investigation into Nkandla down to twelve questions.

She found that there was authority for state spending, but it was improperly activated and most thoroughly violated. The state bodies involved in Nkandla violated supply-chain rules or acted improperly. In fact, they "failed dismally". The upgrades went beyond what was required for the security of the president and became "a license to loot". The expenditure was excessive and President Zuma, his family and relatives improperly benefited from state spending. Every high-ranking official involved either made mistakes or was guilty of maladministration. There was the belief among technocrats that there was political pressure on them, and they acted accordingly. Money intended for much-needed inner-city regeneration and managing the risk of dolomite (which leads to sinkholes) was diverted to Nkandla.

Technically, Zuma might be liable for a great deal, but in fairness, he should repay only a portion. In the Public Protector's opinion, he was however guilty of ethical violations. He failed to protect state resources, should have asked hard questions as early as December 2009, and (probably inadvertently) misled Parliament. There also were other, more general, "maladministration issues. The state unlawfully occupied land adjacent to the homestead, and many of those involved in the probe (most seriously Zuma himself) delayed its conclusion. There was a problem with the rules regarding the benefits due to presidents, their deputies and former holders of office. Unless they were remedied, there could be another Nkandla in future.

Madonsela's report also described many attempts to prematurely end, delay, frustrate or cancel the report she released. There was the abortive November 2013 attempt by the security ministers to secure what practically amounted to court-sanctioned censorship rights over the report. "The investigation has had an unprecedented number of threats to litigate, right up to the eve of the release of the report."

Madonsela writes that, at one point, she was dealing with seven attorneys and five advocates representing various parties. "Many of these threats involved an intention to prevent the publication of the report." In early 2013, the State Attorney, the Chief State Law Adviser and several ministers "insisted" that the Nkandla investigation should be suspended. At other times lawyers acting for President Zuma argued that Madonsela was not fit to question security measures because she is not a security expert. She was told that the existence of other investigations meant there were no longer allegations of impropriety for her to investigate. In one case, the presidency delayed the provision of information that it was obliged, by law, to give to the protector on request by nine months.<sup>62</sup>

In addition, oil concessions gained by Zuma's nephew in the DRC have also been linked by investigative journalists to Zuma's use of his influence with the DRC government.<sup>63</sup>

On 19 April 2014, religious leaders from the Christian, Muslim and Buddhist faiths, including Archbishop Emeritus Desmond Tutu, marched to parliament to call for the protection of Chapter 9 institutions, like the

61 <http://mg.co.za/article/2011-12-02-arms-deal-bell-was-deaf-to-bribes-and-lost-out>; <http://mg.co.za/specialreport/the-arms-deal>; [http://www.armsdeal-vpo.co.za/articles04/told\\_you\\_so.html](http://www.armsdeal-vpo.co.za/articles04/told_you_so.html); Paul Holden and Hennie van Vuuren, *The Devil in the Detail: How the Arms Deal Changed Everything* (Jonathan Ball, Johannesburg, 2011); Andrew Feinstein, *After the Party: Corruption, the ANC and South Africa's Uncertain Future* (Verso, London, 2009).

62 <http://mg.co.za/article/2014-03-19-madonsela-exposes-the-rot-at-the-heart-of-nkandla>.

63 <http://www.citypress.co.za/news/khulubuse-zumas-r100bn-oil-deal/>.

Public Protector, as well as an end to corruption and maladministration in the South African government.<sup>64</sup> Anglican Archbishop Thabo Makgoba took President Jacob Zuma to task for his response to criticism regarding Nkandla:

*In the face of the nation's questions to our president on the international embarrassment we call the Nkandla question, he has opted for silence. Unfortunately those advising him have forgotten the admonition ... silence screams the truth. I, like many, want to believe our president when he said that he didn't rob Treasury. But if he didn't, did he hold the ladder?*

### **Instrumentalizing disorder**

In South Africa, the ANC sometimes intervenes and sometimes allows disorder to restructure the political order. The ANC uses the benefits gained from the weak institutionalization of formal bureaucratic political practices. Where the ANC as patrons nourish their clientelistic networks, the manner in which they have managed to obtain their resources will very largely be considered to be legitimate, even if it is illicit. As explained by the prominent Africa expert, Professor Patrick Chabal, this is also the case in several other African states.

Accountability within the political system now mainly takes the form of selective redistribution by political patrons to their clientelist networks. There is limited serious censure of corruption as long as the proceeds are deemed to be suitably redistributed according to the obligations of ethnic, factional or nepotistic ties of solidarity and patron-client norms of mutual obligation and exchange.<sup>65</sup> Anti-corruption rhetoric is seldomly followed-up effectively, and then often aimed at political or factional opponents.

This is the combined result of ANC cadre deployment and the bureaucracy being focused on patronage, rather than service delivery. Democratic political accountability to the citizens and different communities in South Africa has been sharply reduced.

### **Traumatic violent crime**

The ANC-in-government is increasingly relinquishing its responsibilities to protect all citizens from crime. Substantial security was achieved during the World Cup in 2010, when there was an interest to placate foreign concerns. However, before and since then, there has been a limited effective response to the concerns of citizens and communities regarding violent crime.

Violent crime is a serious problem in South Africa, and has increased considerably during the past few decades. Since 1994, hundreds of thousands of people have died due to violent crime and hundreds of thousands have been raped in South Africa. At present, it is estimated that on average, more than 40 people are murdered each day and an average of more than 140 raped.<sup>66</sup>

When assessing the impact of violent crime on South Africa's citizens, it is of major importance to take note of the psychological impact of fear. As noted by foreign psychologists visiting South Africa, in some parts of the country a continuous fear of violent crime is prevalent that usually only emerges in areas of armed conflict. The reason is that a violent incident can occur anywhere, and at any time, in a completely arbitrary but brutal manner.<sup>67</sup>

64 <http://www.enca.com/south-africa/religious-leaders-take-zuma-task-nkandla>.

65 Patrick Chabal and Jean-Pascal Daloz, *Africa Works: Disorder as Political Instrument* (International African Institute, London, 1999) pp 14, 79, 100.

66 <http://www.news24.com/Multimedia/South-Africa/SA-named-world-rape-capital-20120420>.

67 See the report by Fred de Vries, correspondent for the Dutch newspaper *Trouw* and author of *Rigtingbedonnerd*, an acclaimed book on South Africa at <http://www.trouw.nl/tr/nl/4324/Nieuws/article/detail/1354583/2007/01/12/De-Johannesburgziekte.dhtml> and <http://soulsafari.wordpress.com/2012/11/05/afrikaners-rigtingbedonnerd-exclusive-interview-with-fred-de-vries/>.

In this regard, the fear of violent crime against oneself and loved ones in private spaces like homes plays an important role. House robbery is a growing problem across most provinces. It involves hold-ups of the house's inhabitants, often entailing threats or actions involving assault, rape, torture and murder of children, the elderly or women. Official crime figures show that house robbery increased nationally by 64.4 per cent in the past eight years and appears to have stabilised at a high rate. In addition, Interpol has named South Africa the "Rape Capital of the World" in 2012. Extrapolating from the statistics, one in three South African women will be raped in their lifetime. Between 1994 and 2004, 512 869 incidents of rape were recorded at an average of 140.4 per day.

A global crime study, conducted by renowned global polling group Gallup in December 2012, showed that South Africa ranked second behind Venezuela on the list of countries where adults were afraid to walk alone at night on streets where they lived. A representative nation-wide crime survey concluded in September 2013 by Pharma Dynamics, a company that also specialises in treating depression in South Africa, revealed that more than 94 per cent of people who took part in the survey were "extremely afraid" of falling victim in the near future:

*With serious and violent crime currently at a 10-year high, with increases in murder, attempted murder, car hijacking, street robbery and house robbery – all crimes which South Africans are most afraid of – it is no wonder that perceptions of insecurity are so high. Our survey is indicative of how much crime, specifically violent crime, can contribute to a mass fear of insecurity.<sup>68</sup>*

Government released its annual national crime statistics in September 2013. While there were decreases in many categories of reported crimes, the figures did show a worrying increase in some of the most violent crimes. There are debates about the accuracy of the crime statistics of the South African police. Due to the uneven quality of policing and no independent audit of the data-gathering process of crime statistics, the statistics of crime of Interpol have often been much higher than the statistics of the police. Police statistics are widely regarded as underestimating the situation. Security researcher David Bruce concludes:

*The implication is that the non-recording of crime is widespread within the SAPS and that this non-recording is responsible for much of the reduction in violent crime that has been reported in statistics over recent years. The implication of this, in turn, is that current crime statistics cannot be regarded as a reliable indicator of trends in crime, particularly in violent crime.<sup>69</sup>*

With this in mind, a number of facts and statistics pertaining to violent crime in South Africa are now provided. The statistics revealed that there had been a total of 806 298 serious crime arrests effected in 2012/13, significantly more than the 777 140 of the previous year, and 352 513 convictions during the period. However, they showed there had been a 0.6 per cent increase in murder during 2012/13, while attempted murder had increased by 6.5 per cent during the period. The statistics also showed that in 2012/13, there had been increases in incidents of violent house robberies (an increase of 3.6 per cent), car hijackings (an increase of 5.4 per cent) and aggravated robbery (an increase of 1.2 per cent).

Gareth Newman, Director at the Institute for Security Studies, said incidents of violence remain unacceptably high:

*Serious and violent crime is increasing in South Africa. This shows that Government's approach to crime is not working. After a long period of decreases in serious and violent crime, these are the worst figures we have seen in ten years. We have seen increases in murder, attempted murder, car hijacking, street robbery and house robbery. These are some of the crimes South Africans are most afraid of.<sup>70</sup>*

68 <http://www.iol.co.za/news/crime-courts/south-africans-live-in-perpetual-fear-1.1581044#.UmghmmL7CRD4>.

69 David Bruce, *Tackling Armed Violence: Key Findings and Recommendations of the Study on the Violent Nature of Crime in South Africa* (The Centre for the Study of Violence and Reconciliation and The Department of Safety and Security, 2010), pp 5-6, 15.

70 <http://www.securitynewsdesk.com/2013/09/24/south-africas-violent-crime-figures-slammed-as-worst-for-ten-years/>.

South Africa displays major variations in terms of the distribution of the major forms of violent crime. The country is split into nine provinces of which high per capita rates of robbery are recorded in KwaZulu-Natal, the Western Cape, and most noticeably in Gauteng.

Violent crime in the metropolitan areas, particularly in townships and inner city regions, is associated with young men, often part of informal gangs or more organised syndicates.<sup>71</sup> In response to the lack of trust in the police, millions of South Africans have turned to private security companies, especially the ‘armed response’ companies that send armed guards rushing to your house within minutes of your alarm being triggered. This means that businesses and households are paying for security twice over – via tax to fund the police and again to purchase private security.

According to the South African Institute of Race Relations, there were almost 7 500 registered private security companies in South Africa in 2010, compared to about 4 600 in 2005. The number specializing in armed response had grown from 743 to more than 2 700 in the same period.<sup>72</sup> However, even some who have these services, are attacked, raped and killed, either outside of their securitized homes, or sometimes even inside them. As a result, the sense and reality of being unsafe continue.<sup>73</sup>

In black communities, those who have protested against gaps in service delivery, have experienced forms of police intimidation.<sup>74</sup> In its *Annual Report 2012*, Amnesty International expressed serious concerns about brutality, including torture and extrajudicial killings, at the hands of the police in South Africa.<sup>75</sup>

As stated by the South African Institute of Race Relations, the hundreds of demonstrations in South Africa in the past five years also present a considerable challenge:

*The protest action already evident could also rapidly spiral out of control. The police clearly lack the resources, skills, training, and equipment needed to contain current demonstrations. By their own admission, they are already feeling overwhelmed by the scale of protest action. There is thus a major risk that South Africa could witness another massacre, in which poorly equipped and trained policemen shoot a number of protestors dead in a single incident. Spiralling tensions could also be fuelled by a sustained period of high inflation, which would bring about a commensurate decline in the real value of welfare grants and reduce the living standards of millions of poor households. Either of these developments could prompt a further upsurge in violence in impoverished areas across the country. Such events could follow the pattern of the 2008 xenophobic riots, which spread across South Africa in a matter of days and required military intervention to end.*<sup>76</sup>

The ability of the state to protect its citizens and its resulting legitimacy in South Africa is suffering from a grave historical crisis. In addition, the ANC-ruled state itself has become responsible for a high level of violence through its direct abuse of power. In this regard, the killing of protest leaders like Andrew Tatane, but especially also the Marikana massacre of protesting miners in August 2012, are considered to be key indicators.

According to the government’s green paper on policing, drawn up by the police civil secretariat and released earlier in July 2013, violent crime is preventing South Africans from participating socially and economically in the country. In addition to the about R68 billion in tax money spent annually on the South African Police

71 David Bruce, *Tackling Armed Violence: Key Findings and Recommendations of the Study on the Violent Nature of Crime in South Africa* (The Centre for the Study of Violence and Reconciliation and The Department of Safety and Security, 2010), pp 5-6.

72 <http://www.theglobeandmail.com/report-on-business/international-business/crime-falls-but-fear-remains-big-business-in-south-africa/article620863/>.

73 [http://www.voanews.com/content/crime\\_study\\_shows\\_south\\_africans\\_fear\\_housebreaking\\_most/1523355.html](http://www.voanews.com/content/crime_study_shows_south_africans_fear_housebreaking_most/1523355.html).

74 <http://www.ru.ac.za/highwayafrica/articles/name,79752,en.html>.

75 <http://www.amnesty.org/en/region/south-africa/report-2012>.

76 <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=547431&sn=Detail&pid=71616>.

Service (SAPS), violent crime is costing the country dearly due to loss of productivity and foreign investment.<sup>77</sup>

## Widespread corruption in the police

Corruption is broadly defined as the abuse of official power or authority for personal gain. The police, however, are in a unique position compared to other public servants. They have a monopoly on the state-sanctioned use of force, powers that allow them to deny people their freedom, access to both public and private places, and access to information not readily available to other civil servants.

In recent years, trust in state institutions has started to decline substantially. The 2011 South African Social Attitudes Survey (SASAS) by the Human Sciences Research Council (HSRC) found that 74 per cent of all South Africans believed that corruption had increased in the past three years. Two-thirds of the respondents (66 per cent) felt that bribery and abuse of power for personal gain were prevalent among members of the SAPS. A substantial minority of people also perceived widespread corruption among officials of the Department of Home Affairs (38 per cent), national politicians (37 per cent), officials awarding public tenders (37 per cent), and people working in the judicial services (36 per cent).

The HSRC survey also suggests that citizens do not believe that the state is doing enough to tackle corruption. Almost two-thirds (63 per cent) felt that the national government and Parliament were not doing enough to fight corruption, while 33 per cent believed that corruption flourished because of inadequate punishment by the judicial system.<sup>78</sup>

According to a survey reported in Transparency International's *Global Corruption Barometer 2013*, 83 per cent of South Africans believe the police to be corrupt.<sup>79</sup> In its Annual Report 2012 on South Africa, Amnesty International has (as has been stated above) expressed serious concerns about brutality, including torture and extrajudicial killings, at the hands of the police.<sup>80</sup> Independent studies have confirmed that the SAPS had been used to repress peaceful marches and freedom of association. Total civil claims against the police for abuses including wrongful arrests and destruction of property more than doubled in the past two years to R14.7 billion. The 2012 National Victims of Crime Survey revealed that police corruption is the second most prevalent form of public sector corruption as reported by victims, and the rate has increased since 2011.<sup>81</sup> Both experiences and perceptions among citizens reinforce this conclusion of widespread corruption in the police.

Consolidated statistics for corruption in the police is no longer made available publicly. However, police members themselves believe the whole of the SAPS to be widely corrupt. Involvement of police officers in criminal activities is a cause for concern in Gauteng, stated provincial Premier Nomvula Mokonyane in September 2013:

*A worrisome statistic shows that 18 out of 50 provincial policing precincts were reported as crime-infested dens that recorded police collusion and outright corruption. The Johannesburg central police precinct tops the list with approximately 13 000 criminal cases that were perpetrated by officers in uniform.<sup>82</sup>*

In August 2013, the parliamentary portfolio committee on police heard that a major general, 10 brigadiers, 21 colonels, 43 lieutenant colonels, 10 majors, 163 captains and 706 warrant officers have been found guilty of serious offences. In total 1 448 members of the police have convictions, according to an audit up to January 2010.

77 <http://www.fin24.com/Economy/Violent-crime-harms-SA-economy-20130618>.

78 <http://www.issafrica.org/iss-today/can-citizen-action-alone-tackle-lawlessness-and-corruption-in-south-africa>; <http://www.issafrica.org/iss-today/safe-as-houses-what-do-we-know-about-home-roberies-in-south-africa>.

79 <http://www.iol.co.za/news/crime-courts/majority-of-sa-thinks-police-are-corrupt-1.1545776#.UmkOnL7CRD6>.

80 <http://www.amnesty.org/en/region/south-africa/report-2012>.

81 <http://www.issafrica.org/iss-today/roots-of-the-crisis-facing-the-south-african-police>.

82 <http://www.iol.co.za/news/crime-courts/gauteng-cop-corruption-worries-premier-1.1580676#.Umgn2b7CRD4>.

The crimes include murder, attempted murder, culpable homicide, rape, attempted rape, assault, aiding an escapee, theft, housebreaking, drug trafficking, kidnapping, robbery, and malicious damage to property.<sup>83</sup>

The instrumentalisation of disorder has become a disincentive to the benefiting elites to establish a better-functioning state. It must be born in mind that there is a large number of hard-working, dedicated policemen and women who willingly serve their communities under very difficult circumstances.<sup>84</sup> However, their morale is seriously being affected by the misdeeds of many of their seniors and colleagues. Many officials also feel inhibited in a hierarchical organisation like the police and are concerned about damaging their careers by taking strong stands against measures or inaction that they oppose.

In addition, investigative journalists and whistleblowers that exposed cases of corruption inside the security agencies could not rely on the protection of democratic institutions, but had to face various forms of harassment and intimidation instead. One of these incidents in 2010 involved the then National Police Commissioner Bheki Cele. As stated by Gareth Newman and Andrew Faull, researchers at the reputable Institute of Security Studies:

*The image of SAPS senior management was further damaged by allegations in August 2010 that Cele irregularly interfered to secure a tender for politically connected businessman Roux Shabangu. The journalist who wrote the first story containing this allegation was arrested soon after the news broke, but was released without charge, suggesting that the arrest was an attempt at harassment. A five-month investigation by the Public Protector and Special Investigating Unit (SIU) into the allegations found that both the Minister of Public Works, Gwen Mahlangu-Nkabinde, and Cele had acted improperly and illegally by approving funds for the leases of two buildings without it going out to tender, and that police deliberately manipulated the needs analyses to align them with Shabangu's building. Less than two weeks after the release of the Public Protector's first report, SAPS intelligence officials arrived at the office of the Public Protector and requested documents pertaining to the report. Their actions were widely perceived as police intimidation. The officers involved were briefly suspended before being reinstated in their positions as crime intelligence officials.*<sup>85</sup>

### ANC influence and cadre deployment in the police

**D**ue to cadre deployment, key crime intelligence, investigative and prosecutorial services are unable to effectively use their constitutional powers against senior ANC politicians allegedly involved in corruption, including President Zuma.

Corruption in the police has been inadequately checked to a serious degree. Opportunity, evidence of corruption at the political and organisational top, and fundamental organisational and management failures are to blame. As in some US cities at the beginning of the twentieth century, the political culture at present allows for widespread police corruption to flourish in South Africa.

Career politicians have been appointed as SAPS National Commissioners as opposed to experienced police professionals. One instructive example is former President Thabo Mbeki's protection of Police Commissioner Jacky Selebi in the face of hard evidence that Selebi was involved in corruption. Another is accusations of political interference in the National Prosecuting Authority's corruption case against Jacob Zuma in 2008 and the subsequent closing of the Directorate of Special Operations (known as the 'Scorpions'), which had investigated him and his allies. The 2009 conviction of a senior police commander for meddling with a blood

83 <http://www.theguardian.com/world/2013/aug/15/south-african-police-convicted-criminals>; <http://www.iol.co.za/news/crime-courts/criminal-cops-have-rights-phiyega-1.1568980#.UmuqtlRJxMs>; <http://www.bdlive.co.za/national/law/2013/07/30/police-with-criminal-records-still-at-work>.

84 <http://www.issafrica.org/iss-today/growing-calls-for-inquiries-into-policing-in-south-africa>; <http://www.economist.com/news/middle-east-and-africa/21573156-death-taxi-driver-highlights-failings-throughout-police-bad-cop-bad>.

85 Gareth Newman and Andrew Faull, *Protector or predator? Tackling police corruption in South Africa* (ISS, Pretoria, 2011), pp 23-24.

sample drawn from ANC heavyweight Tony Yengeni, who had been caught driving under the influence of alcohol, is another.<sup>86</sup> Currently, the Independent Police Investigative Directorate are investigating reports that the present National Police Commissioner Riah Phiyega allegedly tipped off an officer about probes against him. The outcome of the investigation is not known yet, but the very fact that such an investigation was deemed necessary, seems to point to an ongoing trend of questionable relationships entertained by National Police Commissioners.<sup>87</sup>

The Directorate of Special Operations (known as the ‘Scorpions’), formed in 1999 under President Thabo Mbeki, investigated Zuma and his allies on charges of corruption before he became President. Its staff of 536 consisted of some of the best prosecutors, police, financial, forensic and intelligence experts in the country, but it was disbanded in the late 2000s, allegedly due to political pressure.

Besides the seven convicted criminals on the ANC’s national executive committee (NEC), six NEC members were at the time the subject of criminal investigations. At least two of these were being investigated by the Scorpions – Ngoako Ramathlodi for allegedly being a secret shareholder in a company that had received a multimillion-rand tender from the Limpopo Provincial Government when he had been Premier of the province, and Thaba Mufamadi for receiving bribes in a social-grants tender award. The then impending charges against Police Commissioner Jackie Selebi and the indictment of Jacob Zuma came about because of investigations by the Scorpions.<sup>88</sup>

Richard Mdluli, a Zuma supporter, was appointed as Divisional Commission of the police’s Crime Intelligence Division effective from 1 July 2009. Shortly thereafter, the Scorpions was formally disbanded. Advocate Vusi Pikoli, former National Director of Public Prosecutions, recently alleged in his memoirs, *My Second Initiation*, that Billy Masethla, the ANC cadre deployed as head of the National Intelligence Agency, wanted to forbid Pikoli from prosecuting Jacob Zuma for corruption. Kgalema Motlanthe, President at the time, agreed with Masethla. Pikoli also states that the decision to disband the Scorpions investigating unit was “aimed at protecting corrupting politicians”.<sup>89</sup>

The official Directorate for Priority Crime Investigations, known as the ‘Hawks’, replaced the Scorpions. In 2011, the Constitutional Court also found that it was “insufficiently insulated from political influence in its structure and functioning” to fulfil its functions as an anti-corruption investigation agency.<sup>90</sup> The Hawks is vulnerable to political interference as there are two processes by which its head could be removed: one through the Minister of Police and the second by Parliament, but there is no clarification on which process is superior.<sup>91</sup>

The Hawks’ investigation of crime intelligence appears to have pitted former Scorpions members involved in the corruption probe of then-Deputy President Jacob Zuma against those seen as his supporters. A pattern of tit-for-tat court cases, investigations and media leaks has come to define local law enforcement agencies in recent years. In March 2011, a warrant was issued for Mdluli’s arrest, in connection with the murder of Oupa Ramogibe, who was shot dead on 17 February 1999. The Hawks also began investigating Mdluli, Crime Intelligence Finance Chief Solly Lazarus and Senior Supply Chain Manager Hein Barnard over the alleged plundering of the division’s secret account.

86 <http://www.bdlive.co.za/national/2013/10/15/legislation-does-not-protect-hawks-from-political-interference>.

87 <http://www.citypress.co.za/news/ipid-case-alleged-riah-phiyega-tip-complete/>.

88 <http://mg.co.za/article/2008-01-21-scorpions-disbanding-is-to-protect-anc>; <http://www.corruptionwatch.org.za/content/switching-scorpions-cases-hawks>; <http://www.economist.com/node/11333160>.

89 <http://www.legalbrief.co.za/article.php?story=20131024121805632>; <http://www.iol.co.za/news/politics/zuma-sex-scandal-pikoli-speaks-out-1.1594519#.UnKfeb5gXzB>; Vusi Pikoli and Mandy Wiener, *My Second Initiation* (Picador Africa, Johannesburg, 2013).

90 SAPA, Hawks law sent back to parliament, *IOL News*, 17 March 2011; <http://www.iol.co.za/news/politics/hawks-law-sent-back-to-parliament-1.1043485> (accessed 22 March 2011); Andrew Faull, *Inside view: Police officials’ perceptions of corruption and integrity management at three Gauteng SAPS stations in 2009* (ISS, Pretoria, 2011); Andrew Faull, *Corruption in the South African Police Service: Civilian perceptions and experiences* (ISS, Pretoria, 2011); Gareth Newman and Andrew Faull, *Protector or predator? Tackling police corruption in South Africa* (ISS, Pretoria, 2011), pp 20-24.

91 <http://www.bdlive.co.za/national/2013/10/15/legislation-does-not-protect-hawks-from-political-interference>.

The special account had been used for years as a political slush fund and the division's officers had merely taken this a step further by abusing it for their private benefit. Mdluli was alleged to have employed his friends and family as intelligence operatives, misused safe houses for mistresses, and misused police funding to purchase luxury cars.

The fraud and corruption charges against Mdluli were dropped on 14 December 2011. On 23 September 2013, Judge John Murphy instructed the SAPS to reinstate all criminal charges against Mdluli without delay. According to the court, Lieutenant General Nhlanhla Mkhwanazi in the withdrawal of disciplinary action against Mdluli had "undermined the integrity of SAPS and failed to ensure that it operated transparently and accountably". Riah Phiyega, then Head of the Office of the Inspector General of Intelligence and current National Police Commissioner, according to the court, "failed in her constitutional duty to investigate allegations against [Richard Mdluli] and the unfeasibility of his holding of a position of trust at the highest level in SAPS".

The decision by Andrew Chauke, Director of Public Prosecutions for South Gauteng to withdraw murder charges against Richard Mdluli without consultation was criticised and found dubious by the court. It found that based on an invented reason, specialised Commercial Crimes Unit Head Lawrence Mrwebi dropped corruption charges against Richard Mdluli. According to the court, Advocate Nomgcobo Jiba, Deputy National Director of Public Prosecutions at the NPA, failed in her constitutional duty by remaining "supine" in the face of the public outcry over Mdluli. In April 2014, the Supreme Court of Appeal confirmed three of the four court orders and changed the fourth one so that the National Director of Public Prosecutions should decide which of the 18 charges against Mdluli should be re-instated.<sup>92</sup> Some of the charges will be reinstated, although it seems as if the murder charges will be excluded.<sup>93</sup> At present, moves and lobbying are still underway to pave the way back for Mdluli as a Zuma ally into the SAPS though.

Meanwhile, President Zuma has expunged the criminal record of Jiba's husband, Booker Nhantsi, who had been found guilty of embezzlement. Interestingly, Mdluli had supported Jiba after she had been suspended from the NPA for allegedly abusing her power to derail the prosecution of former SAPS National Commissioner Jackie Selebi. Following a closed-door deal, the NPA also dropped serious corruption charges against two senior KwaZulu-Natal politicians who are known supporters of a second Zuma presidency.

Thus, the key crime intelligence and investigative units of the police service and the main prosecution agency have been overtaken by factional battles due to politicization and corruption.<sup>94</sup> Much of it can be related to the National Prosecuting Authority's inexplicable withdrawal of charges on over 700 counts of corruption against President Zuma shortly before the 2009 election. Since then, the President or his supporters have ensured that these actors are sufficiently contained or controlled through cadre deployment to ensure that he stays out of court.

As stated by the Institute of Security Studies:

*There have been various incidents that have suggested a lack of integrity and independence within the NPA, most notably the withdrawal of serious criminal charges against those connected to or openly supporting President Zuma.*

*Indeed, there were accusations of political meddling when former NDPP Bulelani Ngcuka made the controversial statement in 2003 that even though there was a prima facie case of corruption for Zuma to answer to, the NPA was not going to prosecute as it felt the case was not winnable. This was the case despite the fact that Shabir Shaik was convicted and sentenced to 15 years for*

92 <http://mg.co.za/article/2014-04-17-sca-rules-mdluli-may-face-murder-charges-again>.

93 <http://mg.co.za/article/2014-06-17-mpa-to-reinstate-certain-charges-against-mdluli>;  
<http://www.news24.com/SouthAfrica/News/Mdluli-not-charged-with-murder-again-20140618>.

94 <http://mg.co.za/article/2013-10-31-infighting-vs-crime-fighting>; <http://www.dailymaverick.co.za/article/2013-05-06-saps-mdluli-on-the-rise-again-while-rumours-of-the-coming-purge-persist/#.UnUHQ75gVD4>.

*corruption involving Zuma. Again in April 2009, when then acting director of the NPA Mokotedi Mpshe dropped criminal charges of corruption, fraud, money laundering and racketeering against Zuma, many people suspected that the reasons were primarily political in nature. The NPA's credibility took a huge knock both when Mokotedi said the reason for his decision was not based on the merits of the case, meaning the evidence against Zuma, but because of untested and illegally obtained crime intelligence tapes, and when it emerged that he had plagiarised an overturned Hong Kong court judgement to explain his argument.<sup>95</sup>*

## The justice system and the judiciary

Policy documents of the ANC state unambiguously that the organisation uses its policy of cadre deployment to give the ANC control over “all centres of power”. In terms of this policy, the ANC has already succeeded in gaining control over most institutions that wield power.

The South African judiciary is still generally seen as independent and free of executive interference. However, this tendency is under threat, since both policy processes and the emerging institutional norms and incentive systems of patronage and prebendalism inhibits the capacity of the police, as well as prosecution and correctional service delivery. As a result, the potential positive roles of the judiciary in ensuring law and order, the rule of law and justice are hugely inhibited. Still, the judiciary has issued several judgments in past years that reflect its continued position as an independent voice.

In 2011, of the 226 judges, 135 were black and 91 white. However, transformation has largely focused on demographics. Concerns have been expressed that appointments should also take into account skills, a judicial mind set and a philosophy that embraces the values of the South African Constitution. There are concerns that the language of demographic transformation will be used to push for the appointment of more ‘pro-executive’ judges.

Unanswered questions remain about whether the Judge President of the Western Cape, John Hlophe, attempted to influence two Constitutional Court Judges, Chris Jafta and Bess Nkabinde to decide a matter in favour of Jacob Zuma. George Devenish, Emeritus Professor of Public Law at the University of KwaZulu-Natal (Durban) and one of the scholars who assisted in drafting the interim constitution in 1993, has assessed the Hlophe issue:

*This traumatic state of affairs must be seen for what it is – a constitutional crisis of chronic proportions that could do permanent damage to the judiciary with dire consequences for democracy.<sup>96</sup>*

In 2008, the Constitutional Court was deciding on a case dealing with Jacob Zuma, then an ordinary citizen. After visits by Western Cape Judge President John Hlophe to Judges Jafta and Nkabinde of the Constitutional Court, their discussions were reported to other members of the court, including the then Chief Justice Pius Langa. On the strength of these reports, the judges of the court lodged a complaint with the Judicial Service Commission (JSC) based on an allegation of an improper attempt to influence the court’s pending judgment in the Zuma case.

After litigation had been initiated by Hlophe to clear his name, Jafta and Nkabinde made sworn statements confirming the contents of the complaint insofar as it related to them. An inquiry finally got underway in 2009. The JSC subcommittee charged with the task heard evidence from Jafta, Nkabinde and Hlophe, then decided this evidence was insufficient to establish that Hlophe had improperly attempted to influence the other two judges.

95 <http://www.issafrica.org/iss-today/whither-integrity-and-independence-in-the-mpa>.

96 <http://www.iol.co.za/the-star/hlophe-case-a-stain-on-judiciary-1.1592943#.UmTUPr7CRD4>; <http://mg.co.za/article/2013-10-17-hlophe-matter-must-not-be-swept-under-the-carpet>.

However, the organisation Freedom under Law, chaired by Judge Johann Kriegler made an application to the Supreme Court of Appeal. It argued that the JSC had abdicated its constitutional duty to investigate the complaint properly and had failed to assess the evidence in a legal fashion. Inexplicably, it had disallowed cross-examination of the three witnesses. In March 2011, a unanimous bench of the Appeal Court ruled that the process had to recommence.

Constitutional Law experts Issacharoff and Pildes distinguish between first-order and second-order approaches to constitutional judicial review. In South Africa, the Constitutional Court has tended to use a first-order approach that gives attention to those consequences of the ANC's domination that manifests themselves as violations of rights. A second-order approach to tackle the background rules that structure and result from ANC domination has been largely absent.<sup>97</sup>

At present, as argued by Constitutional Law expert Sujit Choudry, the Court lacks an adequate understanding and the conceptual tools to question the assumption of political competition and alternation in South Africa's political order. The Constitutional Court judges do not realize that it cannot rely on the risk of losing power as a strong check on the ANC's abuse of power.<sup>98</sup>

President Jacob Zuma has previously expressed his view that the power of the Constitutional Court needs to be reduced. Deputy Chief Justice Dikgang Moseneke and fellow Constitutional Court Judge Johann van der Westhuizen are due to retire during Zuma's term of office. They will join Justice Thembile Lewis Skweyiya, who recently retired.<sup>99</sup>

The three judges were all appointed by former President Thabo Mbeki and are constitutionally required to retire after serving a 12-year, non-renewable term or on reaching the age of 70. Their retirement gives Zuma an opportunity to tilt the scale of the top court in South Africa.

### **The NDR and withholding protection from farmers**

Under Zuma, the police has been expanded by 70 000 members and its budgets have increased by 22 per cent, but cases finalised have dropped by 10 per cent. Appointments based on patronage and ANC cadre deployment have had a major impact, also directly on the political system: there is a weak handling of the increasing number of political killings in South Africa, which is often related to whistleblowers revealing corruption, or to competition for positions that would give access to resources.

Gareth Newham of the Institute for Security Studies states:

*The police cannot become more effective because the national commissioner of police was a political appointment and has no police experience. The system for a professional ethos has collapsed and lower level officials are excluded because they aren't politically-aligned. If people are not seen as a part of the ruling factions and they are killed, there is little chance of an investigation.*<sup>100</sup>

A particularly serious category of crime, is attacks on the small community of about 30 000 commercial farmers. These attacks are not being perpetrated against members of minorities only, however most of the victims of such attacks are Afrikaner farmers. More than 3 300 farm attacks have been recorded in the period 1991-2013.<sup>101</sup>

97 Sujit Choudry, "He Had a Mandate": The South African Constitutional Court and the African National Congress in a Dominant Party Democracy, *Constitutional Court Review*, 2010.

98 Sujit Choudry, "He Had a Mandate": The South African Constitutional Court and the African National Congress in a Dominant Party Democracy, *Constitutional Court Review*, 2010, pp 5-6, 37-38.

99 [http://mg.co.za/article/2014-05-08-zuma-judges-to-dominate-constitutional-court?utm\\_source=Mail+%26+Guardian&utm\\_medium=email&utm\\_campaign=Daily+newsletter&utm\\_term=http%3A%2F%2Fmg.co.za%2Farticle%2F2014-05-08-zuma-judges-to-dominate-constitutional-court](http://mg.co.za/article/2014-05-08-zuma-judges-to-dominate-constitutional-court?utm_source=Mail+%26+Guardian&utm_medium=email&utm_campaign=Daily+newsletter&utm_term=http%3A%2F%2Fmg.co.za%2Farticle%2F2014-05-08-zuma-judges-to-dominate-constitutional-court).

100 <http://allafrica.com/stories/201310220779.html?page=3>.

101 Dirk Hermann, Chris van Zyl and Ilze Nieuwoudt, *Treugrond [Land of sorrow]* (Kraal, Pretoria, 2013); <http://www.issafrika.org/iss-today/>

Few of these incidents involve large-scale theft. Usually, arms, vehicles, mobile phones and cash are robbed, but combined with high levels of brutality, violence and even torture. Eileen de Jager and Roelien Schutte, two sisters who clean up crime scenes nationally, have said that they had seen a definite increase in extreme violence in farm attacks. They said if the public realised what actually happened during such attacks, it would serve as a wake-up call that would mobilise communities to be more vigilant. De Jager stated:

*Victims are often tortured before being dragged behind cars, or they are mutilated with boiling water. It is beyond insane.*<sup>102</sup>

Even the organisation Genocide Watch of US Professor Gregory Stanton voices concerns about farm attacks and murders. However the former South African Minister of Police, Nathi Mthethwa, refused to categorise this as a priority crime, deserving of special police strategies to prevent such incidents.<sup>103</sup> His successor still has to voice an opinion in this regard. The unwillingness to prioritise farm murders comes after the ANC government had disbanded the rural commandoes that served as a protective mechanism. It indicates the subjection of even a general interest like food security and general stability to political preferences and opportunities to gain resources.

Food security has dropped in the past five years to include only 45.6 per cent of the population. Yet, better protection of farmers is being withheld.<sup>104</sup> The Masibambisane Rural Development Trust programme, the only wide scale nationally driven food security programme, is just as subject to political preferences. After being initiated by the government, Masibambisane somehow transformed into an NGO, chaired by President Jacob Zuma and run by a relative, Sibusiso “Deebo” Mzobe. Mzobe has little prior experience in this field.<sup>105</sup>

Land ownership and land reform are contentious issues in South Africa. Farmers or land owners are often singled out and blamed for the slow progress made in this regard. The ANC political elites have also racialised the issue to mobilize support for the ANC’s policy of increased access to resources, be it through new regulations, taxes and shares related to business – especially in the mining and energy sector – or to land.

ANC Youth League Deputy-President Ronald Lamola called on several occasions in June 2012 for the expropriation of farms and even threatened violence as part of this process. He inter alia said:

*If they don’t want to see angry black youths flooding their farms they must come to the party. Whites must volunteer some of the land and mines they own. They can’t only be compelled to do so through legislation.*<sup>106</sup>

He also called for changes to the Constitution to allow the state to appropriate land and said youth unemployment could not be dealt with unless land was expropriated. Lamola stated that “it is an illusion if South Africans believe they can get their land back peacefully” and “we need an act as forceful as war to bring it back to the Africa”.<sup>107</sup>

Some of the violent attacks on farmers, like some attacks in urban areas, show signs of thorough planning and professional execution by well-trained gang members or militias. Unlike the case of farm invasions in neighbouring Zimbabwe, to date insufficient evidence has emerged of militias being responsible for some of

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farm-attacks-and-farm-murders-remain-a-concern.

102 <http://news.iafrica.com/sa/829892.html>.

103 <http://genocidewatch.net/2012/12/07/country-profile-south-africa/>; <http://www.citypress.co.za/news/farms-are-not-special-areas-minister/>; <http://mybroadband.co.za/vb/content.php/6070-Farms-do-not-deserve-more-police-focus-Police-Minister>.

104 <http://www.news24.com/SouthAfrica/News/Food-security-in-SA-declining-study-20130806>.

105 <http://www.iol.co.za/news/politics/zuma-s-cousin-caught-in-a-scandal-1.1521950>; <http://www.iol.co.za/business/companies/brics-event-nets-r2-3m-for-zuma-relative-1.1577779#.UnPVaL5gVD4>; <http://www.enca.com/south-africa/zuma-implicated-rural-development-deal>; <http://mg.co.za/article/2013-02-08-00-zumas-most-trusted-lieutenants>.

106 <http://mg.co.za/article/2012-06-05-ancyl-land-reform>.

107 <http://mg.co.za/article/2012-06-05-ancyl-land-reform>; <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71654?oid=307730&sn=Detail&pid=71616>.

these attacks. However, it cannot be excluded that new evidence may emerge in future, especially from under-policed urban township areas that point to a different conclusion.<sup>108</sup>

Doctor Johan Burger of the Institute for Security Studies states:

*The murder of 32 farmers (exclusive of their families and workers) in 2011 provides a murder ratio of 98.8 killings per 100 000. This is over three times higher than South Africa's national average of 30.9 murders per 100 000 in that year and 14 times the global average of 6.9 murders per 100 000. South African farmers are almost twice as likely to be murdered as police officials, where a ratio of 51 murders per 100 000 was recorded during 2011/12. This was enough of a concern for the Minister of Police to host a national summit on police killings in July 2011, which resulted in a "Ten Point Implementation Plan" to address this problem.*

*So why are the murders of farmers not being prioritised by the government? There is already a crisis in commercial agriculture and these attacks are making it worse. If this situation continues it will have a very negative impact on the rural economy and South Africa's food security. It is crucially important for government to prioritise the security of our farming community and to resume the monitoring and reporting of these attacks and murders. We will all be worse off if the government continues to ignore this pressing problem.*

In the case of political killings of mostly black whistleblowers revealing corruption or people not seen as part of the ruling faction, police investigation and follow-up protection has been limited and almost reluctant.<sup>109</sup> Similarly, proper protection of the farmers whose property is coveted and who are not seen as part of the ruling faction, is being withheld.

Several factors reinforce what amounts to a government policy of withholding protection from citizens and communities not considered as part of the ruling faction: the ANC's policy of a National Democratic Revolution, also in land possession and ownership; its cadre deployment, also in the police; its focus on own patronage rather than service delivery; its decreasing accountability to citizens and communities; and factions in the ANC that want the land of many farmers to be transferred to ANC cadres and constituencies.

By withholding protection, as Africanist Professor Patrick Chabal has noted in some cases elsewhere in Africa,<sup>110</sup> the ANC is in effect allowing violent crime to restructure the political environment in its favour.

## Part III: The threat to property and investor rights

### Increased political intervention and selective patronage

In August 2012, the Zuma government adopted the National Development Plan (NDP) as South Africa's policy blueprint until 2030. The ANC national conference in Mangaung (Bloemfontein) in December 2012 endorsed the plan, which aims at boosting the economic growth rate to 5.4 per cent of GDP and generating 11 million jobs.

However, the ANC has also proceeded with several statutes and bills that greatly increase the government's interventionist powers and clearly prioritize the redistribution of the existing economic pie rather than its expansion.<sup>111</sup>

108 <http://www.moneyweb.co.za/moneyweb-south-africa/business-worried-about-increase-in-violent-crime>.

109 <http://allafrica.com/stories/201310220779.html?page=3>.

110 Patrick Chabal and Jean-Pascal Daloz, *Africa Works: Disorder as Political Instrument* (International African Institute, London, 1999).

111 The ANC govt's war on economic rationality, Anthea Jeffrey, 27 March 2014 at <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=579465&sn=Detail&pid=71616>; <http://www.economist.com/blogs/baobab/2014/03/property-rights-south-africa>.

In a report on all business-related legislation since 2013, the South African Institute for Race Relations concluded that a common thread through all the bills is that “they weaken property rights, reduce private-sector autonomy, threaten business with draconian penalties, and undermine investor confidence.”<sup>112</sup>

Recent examples include new regulations and legislation regarding mining and energy, the security industry, affirmative action and black empowerment, land, and foreign investors in general. During their implementation, these laws are especially likely to enhance the opportunities for political and bureaucratic decision makers to gain access to lucrative positions or to engage in selective patronage.

### Foreign business distrust in ANC policies reflected in limited investment

Foreign investors have been influenced by their negative perceptions of and experiences with the ruling ANC and the effects of its policies. The World Economic Forum’s global competitiveness index (GCI) reflects the perceptions of domestic and international business.<sup>113</sup> In terms of the overall GCI in 2013, South Africa ranks quite well, namely in position 53 out of 148 countries measured. However, the GCI measure of South Africa’s competitiveness is distorted favourably by its spectacular performance in a number of the GCI’s sub-components. These include aspects strongly shaped by the private sector, like auditing standards, efficacy of corporate boards and the availability of financial services.

In GCI sub-indices that measure business perceptions of the government, South Africa fares very poorly. South Africa has low scores for the diversion of public funds (99<sup>th</sup>) and the perceived wastefulness of government spending (79<sup>th</sup>). In terms of the reliability of the police, it is in the 96<sup>th</sup> place, and in terms of organised crime, in the 113<sup>th</sup> position. For “business costs for crime and violence” it is in the 141<sup>th</sup> position out of 148. The quality of the educational system is very poor (146<sup>th</sup>), with low primary and tertiary enrolment rates. South Africa does not only rank 98<sup>th</sup> in terms of “public trust in politicians”, but 116<sup>th</sup> in terms of “the burden of government regulation” and 120<sup>th</sup> in terms of “favouritism in the decisions of government officials”.<sup>114</sup> International media reports revealing self-enrichment and selective patronage by President Zuma and his entourage have reinforced these perceptions.<sup>115</sup>

Business-government relations in the past five years have been characterized by growing mutual distrust. To judge whether the government is perceived to be “anti-business” in areas of the economy, it is necessary only to “follow the money”, or rather the lack thereof.

There have been several large deals since 1994, mainly in banking, retail and telecommunications, but South Africa has not attracted the amount of foreign investments most macroeconomic measures suggest it should. Instead, South Africa’s FDI is volatile and on average lower than comparable developing countries. United Nations data show that FDI fell to \$4.6 billion in 2012 from \$6 billion the previous year, and still lags far behind portfolio inflows. In 2013 there was again an increase in FDI. However, greenfield long-term investment remains an exception and overall FDI limited and volatile.<sup>116</sup> An estimated 60 per cent of the top Johannesburg Stock Exchange-listed firms now earn most of their revenue offshore. Due to a combination of economic conditions, government policies and business perceptions, this is unlikely to change significantly in the near and medium term.

112 <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=579465&sn=Detail&pid=71616>.

113 <http://www.bdlive.co.za/opinion/columnists/2014/03/31/a-hard-ask-for-business-to-criticise-government>; Klaus Schwab and Xavier Sala-i-Martin (eds), *The Global Competitiveness Report, 2013–2014*, World Economic Forum 2014, pp 43, 346–347.

114 Klaus Schwab and Xavier Sala-i-Martin (eds), *The Global Competitiveness Report, 2013–2014*, World Economic Forum 2014, pp 346–347.

115 <http://www.bbc.com/news/world-africa-26669080>; <http://www.euronews.com/2014/03/20/south-africa-zuma-accused-of-flagrant-abuse-of-public-money/>; <http://www.nydailynews.com/news/world/south-african-president-jacob-zuma-charged-flagrant-abuse-article-1.1728390>; <http://www.csmonitor.com/World/Africa/Africa-Monitor/2014/0320/South-Africa-s-President-Zuma-Is-this-his-let-them-eat-cake-moment>; <http://www.gva.be/nieuws/buitenland/aid1555940/zuid-afrikaanse-president-bouwt-kippenhok-en-zwembad-met-belastinggeld.aspx>; <http://www.faz.net/aktuell/politik/ausland/afrika/suedafrika-zumas-bad-im-feuerloeschbecken-12854377.html>; <http://www.nzz.ch/wirtschaft/wirtschafts-und-finanzportal/suedafrikanische-road-show-1.18252690>; <http://www.aljazeera.com/indepth/opinion/2014/03/south-africa-at-20-storms-behi-2014320155339545752.html>.

116 Balance of Payments Manual: Fifth Edition (BPM5) (International Monetary Fund, Washington, D.C., 1993).

Business not aligned to the ruling ANC is reluctant to publicly oppose those policies and practices that harm investment and growth, since it is unwilling to jeopardize the government licenses they require to operate. However, both local and foreign business have adapted the forms and extent of their investment in South Africa accordingly. Meanwhile, the degree of capital flight among short-term portfolio investors has recently resulted in Central Bank warnings. Portfolio investment have helped to plug South Africa's yawning current account deficit, but are liable to dry up or reverse when the perceived political and business risk in South Africa becomes too high.<sup>117</sup>

### Growing suspicion of ANC policies in domestic business circles

Since 2013, several ANC-directed business bills and acts have increased distrust and concern in foreign and domestic business circles. A headline in *The Economist* of 27 March 2014 was clear: "Bashing business for votes: New legislation may save the ANC votes but will chase away foreign investment". The *Wall Street Journal* of 9 May 2014 stated that the ANC envisaged a greater role in the economy, prompting the headline "South African Policies Worry Big Business". Foreign diplomats, usually reserved, started to openly voice their concerns.<sup>118</sup>

According to Bobby Godsell, Chairman of the lobby group Business Leadership South Africa and a member of the government's National Planning Commission, "Business and government is a marriage that's gone wrong, if it was ever right."

In the 1990s, as leader of the Consultative Business Movement in the early 1990s, Theuns Eloff organised the first partnerships between business and the ANC government through the National Business Initiative and the R1bn Business Trust. According to Eloff, that trust is now all but dead and buried:

*All that these laws will do is chase business away. ... What the government is proposing is exactly the way Zimbabwe went over the past 10 years. The agenda of this government is not economic transformation. Its agenda is to create benefits for a part of the population — the upper part, the middle class upwards. They can't blame business for not having done enough to achieve economic transformation. Their policies have made it clear that this is not what they're interested in.*<sup>119</sup>

The business leaders who would support economic development are not close enough to the government to make it happen. Those who are close to it "probably would not want it because they're cosy" with things as they are.

*Only a few of the business leaders of the biggest groups in the country have access to Zuma, and that's because of their party political affiliation and not because they are senior leaders of the business community. Leaders of the big corporations don't have the access they used to have.*

According to Eloff, the government of President Thabo Mbeki, President Zuma's predecessor, already had an attitude that business should pay up, but leave the implementation of joint projects to the government. This approach wrecked the projects, wasted vast amounts of private sector money and "began a process of withdrawal" by business.

117 South Africa's Central Bank Warns of Capital Flight Risk <http://online.wsj.com/news/articles/SB10001424052702304518704579520901590608912>.

118 <http://www.economist.com/blogs/baobab/2014/03/property-rights-south-africa>; <http://online.wsj.com/news/articles/SB10001424052702303948104579537802749237362>; <http://www.polity.org.za/article/businesses-brace-for-transformation-pressures-as-elections-loom-2014-04-08>; <http://www.bloomberg.com/news/2014-04-14/anc-adopts-laws-before-vote-that-may-hurt-south-african-business.html>; <http://www.bdlive.co.za/business/2014/03/09/diplomats-break-silence-on-investment-bill>.

119 <http://www.bdlive.co.za/national/2014/03/30/why-business-and-the-anc-fell-out-of-love>.

*Business realised government didn't have the capacity, but it hoped that through implementing these projects capacity would be built. But then the ANC started developing their cadre deployment policy and they brought literally useless people into areas of government .... The fault line was the regime change in 2009. Until then there were some frustrations, but lines of communication were open and there was hope that things would turn for the better. There is a fundamental lack of understanding in government of the way business works — that there are shareholders and there must be certainty.<sup>120</sup>*

Tony Leon, former South African ambassador to Argentina and previously leader of the pro-business opposition Democratic Party, described government expectations of business in April 2014:

*It is the enemy, or at least that section of it that has not submitted to the government's itch to control it.<sup>121</sup>*

### **A new expropriation bill by another name<sup>122</sup>**

Under the new Promotion and Protection of Investment Bill of 2013 (better known as the Investment Bill or PPIB), the rights of foreign and domestic property owners will be much reduced. The Investment Bill is supposed to apply equally to foreign and domestic investors.

The current Expropriation Act of 1975 gives property owners the right to full compensation on expropriation, which must include not only the market value of their properties, but also compensatory damages for consequential loss. The Act also guarantees them immediate payment of 80 per cent of the compensation due, with interest on the outstanding balance.

Under the Investment Bill, by contrast, expropriated owners will receive less than market value and will have no right to damages for consequential loss. They will also have to wait for the state to make payment in what it regards as “a timely manner”. One danger in the Investment Bill is that domestic property owners will be confined to “just and equitable” compensation falling somewhat short of market value. An even greater danger is that such property owners will receive no compensation at all.

This danger stems from a key clause in the Investment Bill stating that various actions “do not amount to acts of expropriation”. According to the bill, there will thus be no expropriation where the state’s actions result “in the deprivation of property”, but “the State does not acquire ownership” and “there is no permanent destruction of the economic value of the investment”.<sup>123</sup>

This situation could arise, for example, where the state takes commercial farmland under claim as “custodian” for land claimants, and then invite them to apply to it for licences to use portions of this land for specified periods. In these circumstances, commercial farmers would be deprived of their property, but the state would acquire it as custodian rather than as owner – and there would be “no permanent destruction of the economic value” of the land, which would continue to be farmed by others. This means there would be no “act of expropriation” under the principles established by the Investment Bill. As a result, no compensation would be payable.

120 <http://www.bdlive.co.za/national/2014/03/30/why-business-and-the-anc-fell-out-of-love>.

121 <http://www.bdlive.co.za/opinion/columnists/2014/04/15/anc-fights-on-against-its-worst-enemy-business?crm2>.

122 <http://www.bdlive.co.za/opinion/2013/06/10/bills-threaten-the-property-rights-of-all-south-africans>; <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71639/page71619?oid=579465&sn=Detail&pid=71619>.

123 <http://www.sabinetlaw.co.za/economic-affairs/legislation/promotion-and-protection-investment>; <http://www.saiia.org.za/opinion-analysis/draft-investment-bill-requires-amendment>; <http://www.bdlive.co.za/opinion/2013/06/10/bills-threaten-the-property-rights-of-all-south-africans>; <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71639/page71619?oid=579465&sn=Detail&pid=71619>.

## Constitutional Court neutralized property rights clause in Constitution

The wording of this provision can be traced back to a majority judgment of the Constitutional Court in April 2013. This ruling was made by Chief Justice Mogoeng Mogoeng, an appointee of President Jacob Zuma.<sup>124</sup> The ruling was concerned with whether expropriation had occurred when an unused and unconverted private mining right “ceased to exist” under the Mineral and Petroleum Resources Development Act (MPRDA) of 2002.

Judge Mogoeng found that Sebenza Property Limited, which used to own the coal mining right in issue, had suffered a “compulsory deprivation” of its right under the MPRDA. In addition, “the custodianship” of this resource was now “vested in the state on behalf of the people of South Africa”. However, the state had not acquired ownership of the mining right. Instead, it was simply a “custodian” or “conduit” through which “broader and equitable access to mineral resources could be realised”.

The Chief Justice ruled that since the deprivation of ownership from Sebenza had not been matched by the acquisition of ownership by the state, no expropriation had taken place. It followed that no compensation was payable. Echoing this judgment, a key provision in the Investment Bill states that various actions “do not amount to acts of expropriation”. Among the actions it lists are “measures which result in the deprivation of property, but where the State does not acquire ownership of such property”. One of two provisos must be fulfilled for this result to follow: either there must be “no permanent destruction of the economic value of the investment”, or “the investor’s ability to ... use or control his investment [must not be] unduly impeded”.<sup>125</sup>

When Chief Justice Mogoeng handed down the ruling on Sebenza’s rights, two judges of the Constitutional Court, Johan Froneman and Johann van der Westhuizen, disagreed with the majority’s conclusion that no expropriation had taken place. They also cautioned against the implications of Judge Mogoeng’s ruling. According to the judges, the ruling could lead to “the abolition of the private ownership of ... all property” without the payment of any compensation. “Any legislative transfer of property from existing property holders” would no longer be “recognised as expropriation” if it was “done by the State as custodian of the country’s resources”, they said. The warning sounded by these judges could become a reality if the Investment Bill were to be enacted into law in its current form.

Already during the consultation about the Mineral and Petroleum Resources Development Amendment Bill of 2013 (better known as the Mining Bill), the state petroleum company PetroSA used the Constitutional Court case to propose further amendments. In its written submission, PetroSA suggested the bill should designate it the custodian over all of South Africa’s allocation of petroleum rights. It also argued that where the rights to an oil block are relinquished, abandoned, lapsed or cancelled, PetroSA should be granted first right of refusal over the acreage or be allowed to determine its commercial value, before it could be released for bidding in the market.

### Investment Bill would disempower foreign and South African property owners

Once the Investment Bill becomes law, government could use its rules to take further measures to vest all mining land, mining equipment and other mining assets in the state as the custodian of the nation’s mineral resources. Simultaneously, it could invite black-owned businesses in particular to apply to the Department of Mineral Resources for a licence to use a portion of these assets for a specified period. If past experience is any guide, those businesses that benefit would usually be tied to supporters of the ANC, and not to political opponents of the ANC.

124 <http://mg.co.za/article/2011-08-16-zuma-picks-mogoeng-as-chief-justice>.

125 *AGRI South Africa v Minister of Minerals and Energy and Others 2013* at [www.northernlaw.co.za](http://www.northernlaw.co.za); <http://mg.co.za/article/2013-05-03-agrisa-case-vindicates-constitutions-subtlety-on-transformation>.

Similar measures, intended to generate a similar outcome, could be taken as regards all other “investments” covered by the Investment Bill. These are broadly defined to include companies; equities; land; movables; and intellectual property; along with mining rights and similar “licences, authorisations, or permits ... to carry out economic and commercial activities”. Moreover, the Investment Bill applies equally to domestic and foreign investors, for the need to ensure equal treatment for both categories of investor is a key theme of the measure.

The bill’s reference to “investors” is also misleading, for it suggests that the new law will apply solely to companies and other commercial enterprises. In fact, the Investment Bill will apply to everyone, including “natural persons” and “regardless of nationality”. Any South African who owns a home; car; or unit trusts is vulnerable to the Investment Bill’s provisions. So, too, are enterprises of every size and in every sector of the economy, from mining to agriculture, banking, manufacturing, and services.

Once the Investment Bill is in place, the current Expropriation Act is likely to be overtaken or repealed. Instead, all South Africans will find that their rights on expropriation are already governed by the rules laid down in the Investment Bill.<sup>126</sup> The bill will give the state the power to take measures to acquire property of virtually any kind as “custodian” for the poor, and without the need to pay any compensation.

### Creeping state ownership in the mining and energy sectors

The Mineral and Petroleum Resources Development Amendment Bill of 2013 (the Mining Bill) was approved by the National Assembly in March 2014. The Mining Bill also applies to offshore oil and gas exploration and production.

The bill gives the minister unprecedented discretionary powers in many spheres, and threatens mining companies with maximum fines exceeding 10 per cent of annual turnover, plus jail terms of up to four years, for failing to fulfil the ambitious demands laid down in the revised mining charter of 2010.

The Mining Bill gives the state a 20 per cent “free carried interest” (or free stake) in all new ventures of this kind. It “entitles the state to a further participation interest” of an unspecified percentage, to be attained either via “acquisition at an agreed price” or through a “production sharing agreement” obliging the petroleum company in question to “share ... the extracted resource” with the state.

An earlier version of the bill put this additional interest at 30 per cent and expressly limited the state’s potential stake to a maximum of “50 per cent per petroleum operation”. Now, the state can demand as much as an 80 per cent additional share, over and above its 20 per cent free share.

Oil and gas companies will find it difficult to negotiate an accurate price. They will be required to pay 100 per cent of the costs of developing new projects, but will receive only 80 per cent of the profits. This means that only projects that can fund the government’s 20 per cent free ride will be developed.<sup>127</sup>

*Business Day*, the premier business publication in South Africa, commented on 31 March 2014<sup>128</sup>:

*The government’s right to increase its stake to 100 per cent of a project is much more damaging. Oil, gas and mining companies spend large sums of money exploring for new deposits. They do so believing these costs can be recouped when profitable projects are found and developed. Because it is difficult to accurately predict how much gas or minerals can practically be extracted, some projects are much less profitable than expected.*

126 “A new Expropriation Bill by another name”, *Liberty*, 25 February 2014, p 5; <http://www.bdlive.co.za/opinion/columnists/2014/04/07/on-the-money-mining-bill-terrible-for-new-entrants>; <http://www.bdlive.co.za/business/mining/2014/03/16/new-mine-law-may-cost-sa-billions>; <http://www.mining.com/south-africa-approves-law-that-gives-state-a-20-stake-in-oil-mining-firms-29312/>; <http://www.miningweekly.com/article/top-lawyers-warn-of-mining-bills-devastating-consequences-2013-09-13>.

127 <http://mg.co.za/article/2013-09-13-experts-stakeholders-grill-proposed-changes-to-mining-laws>.

128 <http://www.bdlive.co.za/opinion/columnists/2014/03/31/a-hard-ask-for-business-to-criticise-government>.

*Successful companies can absorb these costs because the profits made from very successful projects more than offset the earlier costs. If they do not, shareholder funds will have been wasted.*

*But the Mineral and Petroleum Resources Development Amendment Bill allows government to “cherry-pick”, forcing producers to sell all of their most profitable projects to the government. They must do this at an “agreed price” rather than a market price. This means companies can never recoup the costs of exploration or of unprofitable projects. The consequences are obvious. Under such conditions companies will not explore in South Africa. Nor will they develop projects they know the government will nationalise.*

According to the Mining Bill, the minister may also declare specified minerals to be “designated” or “strategic”. Strategic minerals may be subjected to both export and price controls. The bill empowers the mining minister to demand the beneficiation of a prescribed percentage of mineral products at “mine-gate” or “agreed” prices. Agreement on prices may not be easy in practice to achieve.

An export licensing system is effectively introduced through section 21(d) of the Mining Bill. It states that no one may export “designated” minerals or petroleum without permission from the minister, and subject to conditions. This potentially contravenes two international trade agreements: the General Agreement on Tariffs and Trade of 1994, under the World Trade Organisation; and the European Union and South Africa Trade, Development and Cooperation Agreement of 1999. Both of these treaties prohibit the imposition of measures which limits the amount of goods that may be exported between countries.

Designated minerals may not be exported, unless producers first supply the proportions prescribed for local beneficiation. This means they can be directed away from their most profitable use as ministers see fit. The criteria that will govern such decisions are not clear.

During consultations regarding the bill, Eskom, the struggling state-owned electricity company, made submissions that argued that coal be declared a strategic mineral and that coal exploration and mining rights should be awarded giving due consideration to “domestic coal supply power generation”. Eskom wanted the bill to ensure that it and other state utilities be given first right of refusal “on large coal resources, which were previously earmarked for domestic use”.

### **The weakening of foreign investor protection**

The new powers given to the state under the Mining Bill could amount to indirect expropriation under the bilateral investment treaties (BITs) South Africa signed with some thirteen European nations after 1994. The provisions also potentially contravene South Africa’s bilateral investment treaties, particularly the treaty between South Africa and the United Kingdom. This treaty requires, among other things, that South Africa and the UK afford investors and their investments “fair and equitable treatment”. This obliges South African public authorities to act transparently, reasonably and without ambiguity.

According to major South African law firms like Webber and Wentzel, South Africa will be in breach of a BIT where it has failed to protect investors’ legitimate expectations to rely on the host state’s earlier commitments, in that it has not provided a predictable regulatory framework for investments. These provisions could also be deemed unconstitutional, under section 25, which protects against the arbitrary deprivation of property.<sup>129</sup>

The proposed amendments permit interference with mining companies’ right to the use, enjoyment and exploitation of the minerals they have extracted, and thus constitute a deprivation. As there is no legal constraint on the minister’s discretion or clear rules of procedure in this regard, the deprivation is arbitrary and potentially unconstitutional.

<sup>129</sup> <http://mg.co.za/article/2013-09-13-experts-stakeholders-grill-proposed-changes-to-mining-laws>.

The Department of Trade and Industry (DTI) is now busy unilaterally terminating these treaties. The ANC government states that the BITs limit the country's sovereignty and play little part in attracting direct investment. The government also claims that the international arbitration to which foreign investors are entitled under these treaties yields unpredictable and often unfair results – and that foreign investors will be adequately protected by South Africa's own courts.

However, representatives of the European Union (EU) have broken their usual diplomatic silence to state their opposition. Where treaties are terminated, the foreign investors currently protected by them may have no remedy against damaging policy changes of the kind contained in the Mining Bill. They are also likely to receive less than the “prompt, adequate and effective” compensation promised by the treaties.<sup>130</sup>

South Africa is Germany's most important trading partner on the African continent. The response of the Southern Africa Initiative of German Business to the cancellation encapsulates the key objections of foreign business to the policy:<sup>131</sup>

- 1. Compared to the terminated BIT the PPIB does not provide a guarantee for the fair and equitable treatment of foreign investment. Changes in the legal framework conditions to the disadvantage of investors are possible at any time and might have the effect that both the investment protection and possible claims for compensation are cancelled.*
- 2. According to the wording of the bill the legal protection of investments only comprises such cases in which there is a direct expropriation. Measures having an equivalent effect to expropriation are, however, not comprised so that in such cases – contrary to the BIT – a claim for compensation is not provided for.*
- 3. In contrast to the BIT compensation payments in cases of expropriations can be below market value, as the basis for any decision is the general provision of fair and equitable compensation, which reflects the consideration of both public interests and the interests of the parties concerned, and not the market value.*
- 4. The PPIB envisages the recourse to national arbitral jurisdiction and arbitral tribunals, whereas the access to international arbitral tribunals is neither explicitly mentioned nor allowed. However, for international investors, the objective and neutral settlement of disputes according to international law is an important element in investment decisions.*

Foreign companies may in fact receive zero compensation if a taking of property by the state is not recognised as an “act of expropriation” under the Promotion and Protection of Investment Bill of 2013. The survival clauses in the agreements now being terminated were supposed to protect existing investments for between ten and twenty years after the relevant agreements had come to an end. However, this bill is also to have retroactive operation, in an attempt to bypass the “survival” clauses in the treaties.

### **The Investment Bill in the context of the Restitution Bill**

The Investment Bill also needs to be read in the context of the Restitution of Land Rights Amendment Bill of 2013 (better known as the Restitution Bill). The Restitution Bill extends the deadline for lodging land restitution claims from December 1998 to December 2018. In this extended period, some 379 000 new land claims are likely to be submitted, according to the Government's regulatory impact analysis. Some 8 000 existing claims have yet to be resolved.

Settling these claims could cost the state an estimated R179 billion, yet in the 2013/14 financial year, the restitution budget was roughly R3 billion only. It is unclear how the government will find the money to settle all these new claims.

130 <http://mg.co.za/article/2013-11-01-swiss-govt-reacts-to-termination-of-bilateral-investment-treaty-with-sa>; <http://www.bdlive.co.za/business/2014/03/09/diplomats-break-silence-on-investment-bill>.

131 Southern Africa Initiative of German Business, *South Africa: New Legal Framework for Direct Investments*, 2014, pp. 1-2 at [www.safri.de](http://www.safri.de).

However, if the state takes land under claim as a “custodian” for land claimants, there will be no expropriation flowing from this deprivation, and hence no compensation to be paid.

The new land claims lodged under the Restitution Bill could extend far beyond agricultural land. The Deputy Chief Land Claims Commissioner, Thami Mdontswa, stated in September 2013 that “people might think, ‘Hey, there’s a coal mine out there, let me place myself within its reach [by lodging] a claim’”. Given the limited investigative capacity of the Land Claims Commission and the police, false claims would be likely. The penalties referred to in the Restitution Bill will apply only where a person “lodges a claim with the intention of defrauding *the State*” [emphasis supplied], rather than the current property owner. Although the common law of fraud would still apply in this second situation, successful prosecutions would not be easy to secure. Nor would they compensate property owners for losses suffered due to false claims.

As a result, the Institute of Race Relations (IRR) has stated that the Investment Bill, in combination with the Restitution Bill, could “spell the end of private property rights in South Africa – not just in agriculture but across the economy”.

*We believe that the Government and the African National Congress (ANC) are preparing the ground to seize private property and distribute it to poor communities if and when they feel the need to do so. That time will come when the political pressure on the ANC is so great that it fears losing a future election.*<sup>132</sup>

The Property Valuation Bill of 2013 (also known as the Valuation Bill) has also been adopted by the National Assembly and soon is to become law. Under this bill, a Valuer-General will be responsible for determining the value of land needed for land reform purposes, as well as any movable property “contemplated to be acquired with the land” in question. The Valuer-General will be appointed by the Minister of Rural Development and Land Reform and will be accountable to him.

Valuations have to be based on market value, less the four “discount” factors listed in the Constitution. These factors include the current use of the property; the history of its acquisition and use; the extent of direct state subsidy in its acquisition or capital improvement; and the purpose of the expropriation. However, the Valuer-General can develop further “criteria” and “policies” to be applied, while the Minister is also empowered to make regulations laying down “the criteria for the determination of the value of property” expropriated by the state. An owner may “dispute the valuation” arrived at by the Valuer-General, but “that dispute may not be used to delay, postpone or in any other way frustrate” the expropriation.

Like the Expropriation Bill, which allows the state to take both ownership and possession of property before it pays any compensation, the Valuation Bill empowers the government to proceed with expropriation irrespective of any dispute over the compensation due.

The owner may lodge an objection with the office of the Valuer-General within thirty days. The valuer responsible for the particular valuation must “promptly” (no time limit is laid down) decide on the objection, adjust the valuation if he thinks it necessary and provide written reasons for his decision. An objector who remains dissatisfied cannot approach the courts at this point, but must instead apply for a review of this decision to a “valuation review committee”, to be appointed by the Minister on conditions to be decided by him/her. The review committee, which in practice will function under significant ministerial control, will be able to “determine its internal procedures” in disposing of reviews. This could raise further procedural hurdles to fair assessment and adjudication – especially as the committee will be able to close its meetings to the public “when deliberating on an issue before it”.

No time limit is laid down within which the review committee must decide on an objection. The Valuation Bill does, however, state that “a decision of the review committee is final and binding on the parties and subject

<sup>132</sup> “A new Expropriation Bill by another name”, *Liberty*, 25 February 2014, p 5.

only to review by a court of law”. This proviso has presumably been included to prevent the Valuation Bill from being struck down as unconstitutional for seeking to oust the jurisdiction of the courts.

In practice, the right to apply to court is likely to benefit only those few who can afford litigation to contest a valuation following a prolonged review procedure and the loss of both ownership and possession of their property to the state.

The Expropriation Bill of 2013 (the Expropriation Bill) allows the state to take ownership and possession of property of virtually all kinds by notice to the owner. Compensation is to be based on market value, less the four discount factors in the Constitution. However, no compensation will be payable at all until its amount has been agreed with the state or decided by the courts.

This measure will put great pressure on expropriated owners to agree to the amount of compensation offered by the state, rather than remain without the benefit of either the property or its value in money. In practice, this means that the option of applying to court to decide a different measure of compensation is likely to benefit only those few actors who can afford the cost of lengthy litigation with no guarantee of success. The Expropriation Act has encountered stiff resistance from opposition parties and interest groups. However, if the Investment Bill is adopted in its current form, the government is likely to abandon the Expropriation Bill as the Investment Bill will give it more extensive powers.

### **Land reform as part of the National Democratic Revolution (NDR)**

The Department of Rural Development and Land Reform (DRDLR) recently published its final policy proposals on land reform entitled *Strengthening the Relative Rights of People Working the Land*.<sup>133</sup> After consultation with role players in the agricultural sector, a final version will be submitted to the new cabinet. The proposals state that all farmers would be required to hand 50 per cent of their farms to their workers. The farmworkers’ share “will be allotted to them, proportional to their contribution to the development of the land, based on the number of years they had worked on the land”.

Labourers who have worked for ten years on the farm, will be granted 10 per cent of the workers’ land allocation; those who have worked for twenty-five years, will receive 25 per cent of the land allocation and those who have worked for fifty years, will be entitled to 50 per cent of the land allocation. The state will buy the 50 per cent of the farm that will be allocated to the farmworkers. However, it will not pay the proceeds to the farmer but “into an investment and development fund (IDF) to be jointly owned by the parties constituting the new ownership regime. The Fund will be used to develop the managerial and production capacity of the new entrants to land ownership, to further invest on the farm as well as to buy out people who wish to opt out of the new regime”.

According to the proposals, “the acquisition of equity by farmworkers” ... “introduces co-management of the farm, based on relative equity-holdings and the capacity of each participant in production and management”. Present farmers would be allowed to retain a 50 per cent stake in their farms without any compensation for the other 50 per cent. However, farmers would be required “by law” to train farmworkers in management skills and would retain responsibility for the farm’s “up-keep and maintenance, including ensuring that workers on the land have decent living conditions, are paid decent wages”. They would pay rates and income tax, “while the farmworker does not carry such legal burdens”.

In removing the principle of established property rights, nothing prevents an increase of workers’ share to 60, 80 or even 100 per cent. The proposals reflect the ANC’s policy of a National Democratic Revolution.

133 [http://www.plaas.org.za/bibliography/sa-farmworkers-drdlr?utm\\_source=buffer&utm\\_campaign=Buffer&utm\\_content=buffer9bfce&utm\\_medium=twitter](http://www.plaas.org.za/bibliography/sa-farmworkers-drdlr?utm_source=buffer&utm_campaign=Buffer&utm_content=buffer9bfce&utm_medium=twitter); <http://fwdeklerk.org/index.php/en/latest/news/248-article-50-50-down-on-the-farms>.

## Increased state ownership and control of the lucrative security industry

The Private Security Regulation Amendment Bill of 2013 (alias the Security Bill) was adopted by Parliament in February 2014 and is soon to be signed into law. A provision reintroduced in the closing stages of the parliamentary process requires that “at least 51 per cent of the ownership and control” of security companies must be “exercised by South African citizens”. Foreign-owned companies will be forced to sell 51 per cent of their shares to South Africans. According to the Security Bill, the disposal of any excess shareholding is to be carried out “in accordance with” the Investment Bill. The clause on expropriation speaks of a minimum of 51 per cent local ownership, but leaves it up to the minister to decide on a higher figure. Both the South African Chamber of Commerce and Industry (SACCI) and the Security Industry Alliance (SIA) have requested President Zuma not to sign this bill.<sup>134</sup>

The government says that the 445 000 guards employed by the industry far outnumber the country’s 270 000 policemen and soldiers, making foreign control of security companies a threat to national security. However, the guards in fact employed by foreign companies number fewer than 45 000. The growth of the private security industry is directly linked to high levels of crime and violence, as well as public perceptions that the government in general and the police specifically are unable to provide adequate security.

According to a 2011 report by the United Nations Office on Drugs and Crime (UNODC) that compares civilian private security services internationally, South Africa is not that different to many other countries. South Africa’s ratio of private security officers to police officers (2.87:1) does not differ much from that of developed countries (the USA has a ratio of 2.26:1 and Australia 2.19:1). It also compares favourably to other middle-income or developing countries (Honduras has a ratio of 4.88:1, India 4.98:1 and Guatemala 6.01:1).

In response, Axel Pougine de la Maisonneuve, the Head of Economics and Trade at the EU delegation, addressed a letter to the ANC Chief Whip and the Chairperson of the Select Committee on Security and Constitutional Development in the National Council of Provinces in February 2014. The letter stated that foreign equity caps would violate South Africa’s commitment to unbounded market access under the General Agreement on Trade in Services (GATS) – a World Trade Organisation treaty to which South Africa is a signatory.<sup>135</sup>

The delegation’s letter also stated that the cap would contravene bilateral investment treaties. For example, the agreement between South Africa and the United Kingdom obliges the South African government not to impair the investments of British nationals or companies. The government should not offer treatment less favourable than what it accords to its own nationals or companies. In addition, the investments of British companies “shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation”.

The American Ambassador to South Africa, Patrick Gaspard, also wrote a letter dated 28 February 2014, warning that the ownership requirement would violate South Africa’s GATS commitments. Gaspard said almost all security technology is manufactured and distributed by international companies like Bosch and Sony, and “the proposed amendments could compel many of these companies to divest”.<sup>136</sup>

The Infrastructure Development Bill of 2013 (known as the Infrastructure Bill) was adopted by the National Assembly in February 2014 and also soon is to become law. It gives statutory authority to the earlier creation of a Presidential Infrastructure Coordinating Commission, which has identified eighteen “strategic integrated projects” aimed at speeding up the development of vital energy, logistics, and social infrastructure.

134 <http://www.bdlive.co.za/national/2014/06/19/business-groups-urge-zuma-not-to-sign-disputed-bill-on-private-security>; <http://www.issafrica.org/iss-today/are-foreign-owned-private-security-companies-a-threat-to-south-africas-national-security>; <http://www.prweb.com/releases/2014/06/prweb11907317.htm>.

135 <http://mg.co.za/article/2014-04-10-private-security-bill-spells-trouble>.

136 <http://mg.co.za/article/2014-04-10-private-security-bill-spells-trouble>; <http://www.issafrica.org/iss-today/are-foreign-owned-private-security-companies-a-threat-to-south-africas-national-security>; <http://www.economist.com/news/middle-east-and-africa/21600176-some-recent-business-bills-pander-populists-deterring-foreign-investors-why>.

To fast-track implementation and remove obstacles to progress, this commission (acting through its council) has been given the power to expropriate land or rights in it. This power is governed by the Expropriation Act of 1975, which currently guarantees expropriated owners full market value and additional damages for consequential loss – but is likely soon to be overtaken by the Investment and/or Expropriation Bills.

### **Employment discrimination against coloureds, whites and Asians**

The Employment Equity Amendment Act of 2013 was signed into law by President Zuma in January 2014, however, it has yet to be brought into operation. The act removes many of the defences on which designated employers who failed to meet racial targets at management levels could previously rely. Designated employers are those with fifty employees or more, or an annual turnover above specified thresholds. The act shifts the onus to them to prove they have acted “reasonably”, cuts short enforcement processes and increases the penalties that can be imposed on firms that fail to discharge this onus. At worst, firms can be fined 10 per cent of their annual turnover, a penalty high enough to close down many businesses.

Under the amended act, draft regulations have been produced stating that larger employers must use national demographics “as a guide” in setting racial targets for top and senior managers, plus professional employees. The regulations affect businesses with 150 employees or more. Targets must be based on the average of the regional and national profiles. For employers with 149 employees or less, national demographics are to be used for top and senior management, and regional demographics elsewhere.

These measures will disadvantage coloured people in the Western Cape, who make up 51 per cent of the economically active population (EAP) in the province, but only 11 per cent of the national EAP. Under these new rules, companies in the Western Cape might have to “import” black people to meet national targets, while coloured people will often be in “over-supply”, especially in senior posts. This will put pressure on them to move elsewhere if they want such jobs.

The regulations will also harm Indians in KwaZulu-Natal, where they make up 11 per cent of the provincial EAP, but only 3 per cent of the national one. Indians throughout South Africa may also battle to find management and professional posts, as they already hold more of these than their share of national demographics would allow. For example, they hold 6.6 per cent of the positions at senior management level. This is one of the factors driving a high percentage of Indians to consider emigration.<sup>137</sup>

Many small to medium size businesses in South Africa, numbering hundreds of thousands, are owned by foreigners from African countries, Asia and a few from the Middle East. Most of these traders came to South Africa shortly after the new political system had been established in 1994. ANC Secretary-General Gwede Mantashe announced on 12 April 2014 that it would restrict small foreign-owned businesses from being opened in the country’s townships and rural areas, so as to create opportunities for South Africans. He added:

*If you go to Soweto corner shops have been taken over by foreigners. We must do something about it. If you see all the malls here, who is in those malls? Who owns shops there? Why can't our people pull their resources together and own business opportunities in their back yards?*<sup>138</sup>

### **Black Economic Empowerment (BEE)**

The Broad-Based Black Economic Empowerment Act of 2013 has been signed into law by President Zuma, but is yet to be made operative. The act criminalises “fronting”, or the misrepresentation of BEE status, while defining “fronting practices” in very broad terms. Those convicted of fronting may be imprisoned for up to ten years or, in the case of companies, fined up to 10 per cent of their annual turnover. They may also be barred from doing business with the state for up to ten years.

137 [http://articles.economicstimes.indiatimes.com/2012-09-03/news/33563480\\_1\\_indian-origin-survey-brain-drain](http://articles.economicstimes.indiatimes.com/2012-09-03/news/33563480_1_indian-origin-survey-brain-drain).

138 <http://www.worldbulletin.net/news/133623/s-africas-anc-to-restrict-small-foreign-businesses>.

The Department of Trade and Industry has gazetted new generic codes, which will come into full effect in April 2015. These codes require all companies to comply with all elements of BEE, including ownership. The act will have an extensive reach, also covering small enterprises with an annual turnover of between R10 and R50 million. Changes to BEE requirements will make it much harder for firms to gain good BEE scores, which will affect their capacity to do business with the state and other companies.

To date, especially former ANC activists and the nepotist networks of decision makers have benefited from BEE programmes. Family members of President Zuma at mining companies Goldfields and Arcelor Mittal could be counted among these. According to the economist Moeletsi Mbeki, brother of former President Thabo Mbeki, BEE has not benefited black business people, but in fact inflicted them a fatal blow. Those who have benefited are a small group of unproductive black capitalists with enormous political influence. Other black business people almost had no chance.<sup>139</sup>

## Part IV: Freedom of expression and the media

Press freedom in South Africa is said to date back to 1829, when journalist John Fairbairn founded *The South African Commercial Advertiser* in the Cape Colony. Repeated efforts by Cape Governor Lord Charles Somerset to censor the newspaper, led Fairbairn to petition the British government, gaining the right to publish without government interference. This led to what became known as the ‘Magna Carta’ of press freedom in South Africa.<sup>140</sup>

In post-1994 South Africa, press freedom is guaranteed by section 16 of the Bill of Rights. According to this section, everyone has the right to freedom of expression, which includes freedom of the press and other media, the freedom to impart or receive information or ideas, and freedom of artistic expression. Section 16 is further entrenched by Constitutional Court judgments. In the 1999 case of the South African National Defence Union versus the Minister of Defence, the Constitutional Court declared that:

*Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.*<sup>141</sup>

Thus, freedom of the press is well safeguarded by law. Together with parts of the judiciary, the media has been considered to be one of the most important remaining checks on the power of the ruling party, since the ANC government has largely neutralised other potentially independent watchdog institutions through its policy of cadre deployment and other measures such as intimidation.

However, it is important also to scrutinise the *de facto* realities of media freedom in South Africa. In recent years, prominent journalist and non-governmental organisations have expressed their concerns regarding increased government interference and regulation, censorship and the treatment of journalists. These organisations include the Right2Know Campaign, as well as the Freedom of Expression Institute.<sup>142</sup> A recent example involves the ANC using the national broadcaster (the SABC) in the run-up to the 2014 elections to distort the national debate and influence voting, as outlined by Caxton Professor of Journalism, Anton Harber.<sup>143</sup>

139 <http://www.faz.net/aktuell/wirtschaft/wirtschaftspolitik/suedafrika-schwarze-buerger-werden-gezielt-bevorzugt-12911281.html>.

140 South African History, Freedom of press is established at the Cape, available online at <http://www.sahistory.org.za/dated-event/freedom-press-established-cape>.

141 South African National Defence Union versus Minister of Defence 1999 (4) SA 469 (CC) at paragraphs 7-8.

142 <http://www.r2k.org.za/>; <http://fxi.org.za/home/>.

143 <http://www.bdlive.co.za/opinion/columnists/2014/04/17/sabc-shows-anc-colours-in-run-up-to-elections>.

## Public broadcaster too close to ANC

As has been said above, the South African Broadcasting Corporation (SABC) is the South African public broadcaster. The Public Service Broadcaster's mandate requires of the SABC to educate, inform and entertain. A very high premium is placed on educational and informative programmes across all of the SABC's platforms.<sup>144</sup> As illustrated by *figure 2*, eight of South Africa's ten most popular radio stations are owned by the SABC. Thus, the SABC decisively control radio broadcasting in South Africa.

SABC television stations, 2012	Number of viewers
SABC 1	27 522 551
SABC 2	24 798 901
SABC 3	20 118 535

Figure 1 – SABC television stations.<sup>145</sup>

Although the public broadcaster's mandate articulates that the SABC should reflect South African attitudes, opinions, ideas and values, the mandate also states that it should advance national and public interest. The latter statement is problematic, as it is subject to interpretations as to whose interest is considered to be the public interest.

Top ten radio stations by listenership, 2012	Number of listeners
Ukhozi FM (Zulu)	6 956 818
Metro FM	5 880 213
Umhlobo Wenene FM	4 192 364
Lesedi FM (South Sotho)	3 884 195
Motsweding FM (Tswana)	3 277 113
Thobela FM (Northern Sotho)	2 963 234
5FM	2 949 813
East Coast Radio	2 085 521
Gagasi FM	2 073 748
Radio Sonder Grense (Afrikaans)	2 004 611

Figure 2 – Top ten radio stations.<sup>146</sup>

For instance, during the 2014 elections the SABC was criticised for refusing to air the campaign adverts of two main opposition parties, namely the Democratic Alliance (DA), as well as the Economic Freedom Fighters (EFF).<sup>147</sup> As stated by Professor Nicola de Jager, political scientist at the University of Stellenbosch,

*Reporters, analysts and others within the public broadcaster who are considered to operate out of line are slowly moved out, examples include Eusebius McKaiser and John Perlman.*<sup>148</sup>

The ANC's policy of cadre deployment has also reshaped the environment of the SABC. Furthermore the role of the Independent Communication Authority of South Africa (ICASA), which is responsible for regulating the telecommunication, broadcasting and postal industries in the public interest,<sup>149</sup> has also been brought into question.

144 [http://www.sabc.co.za/wps/portal/SABC/SABCARTICLE?id=5c5fc9804c9afedb8cbcff39f3bc9014&page\\_from=CSI](http://www.sabc.co.za/wps/portal/SABC/SABCARTICLE?id=5c5fc9804c9afedb8cbcff39f3bc9014&page_from=CSI).

145 SAIRR, *Eighty20* (SAIRR, Pretoria, 2013), p 729. According to the official census, Census 2011, the country's population in 2011 stood at 51.77-million.

146 SAIRR, *Eighty20* (SAIRR, Pretoria, 2013), p 726.

147 <http://www.sowetanlive.co.za/news/2014/04/22/sabc-bans-eff-advert---video>; <http://www.timeslive.co.za/politics/2014/04/30/da-cries-political-censorship-as-sabc-refuses-to-air-second-advert>.

148 [http://paperroom.ipasa.org/papers/paper\\_10054.pdf](http://paperroom.ipasa.org/papers/paper_10054.pdf).

149 <http://www.icasa.org.za/AboutUs/tabid/55/>.

Critical analysis has found that ICASA tends to take a problematic stance by limiting its regulatory mandate to monitor license conditions only.<sup>150</sup>

In the thesis entitled *Toothless regulator? A critical analysis of Icasas regulation of the SABC so that it functions as a public service broadcaster*,<sup>151</sup> Prinola Govenden analyses the failure of ICASA to monitor and regulate the SABC's abuses because of cadre deployment within its ranks. Govenden concludes that the primary reason why institutional deterioration, or more specially lack of oversight occurs, is because cadres are loyal to their political party and not to the state bureaucracy that employs them. Thus, it is difficult for poor work and corruption to come to light.

Recently, President Zuma announced the creation of a new ministry of telecommunications and postal services. The new ministry is headed by former State Security Minister Siyabonga Cwele. Prominent journalists have mentioned that the new ministry will simply function as a propaganda machine. The *Mail & Guardian* reported in early May 2014 that President Zuma was rumoured to be considering an information ministry based on Zimbabwean, Chinese and Russian models, with the intent to re-shape the image of his administration and to leave behind a legacy not defined by scandals.<sup>152</sup> When announcing his new Cabinet after the national elections in May 2014, President Zuma announced that a new communications ministry would be "formed out of components" including the SABC, Brand SA, the Media Development and Diversity Agency (MDDA), the Government Communications and Information System (GCIS) and the Independent Communications Authority of South Africa (ICASA). He stated that the ministry would be responsible for communication strategy and the "branding of the country abroad".

Industry experts and the opposition have decried the government's decision to group the public broadcaster and state communication entities under one ministry. This, they argue, raises concern about the independence of the SABC in particular.<sup>153</sup> It will continue to be susceptible to government interference, especially related to the contents of its news and current affairs programmes.

### Media ownership and regulation

The developments in media consumption, listenership and readership in South Africa appear to correspond to socio-economic, restricted time and literacy levels. TV and radio media are dominated by the public broadcaster, and these also are the services that reach the majority of the population. The newspaper industry is dominated by four main players, namely Media24 (daily circulation of over 500 000 and a readership of 7.7 million), Independent Newspapers, the Times Media Group, and CaxtonCTP.<sup>154</sup> According to the Audit Bureau of Circulation of South Africa (ABC), the Four Year Category Trend by Quarter from 2010 to the first quarter of 2014 is as follows:

- Daily newspapers: Circulation has declined annually by 4.5 per cent since 2010, equivalent to 304 000 copies.
- Weekly newspapers: Circulation has declined annually by 5 per cent (485 000 copies) over the period.
- Local newspapers: Circulation has declined by 2.8 per cent (63 000 copies) over the period.<sup>155</sup>

As has been stated above, print and online media ownership is dominated by a handful of large corporations.<sup>156</sup> The major print and online media represent large corporative interests and sometimes neglect different voices from minority communities. However, due to both global and local economic and cultural factors, print media is in decline.

150 Prinola Govenden, "Toothless regulator?" *A critical analysis of ICASA's regulation of the SABC so that it functions as a public service broadcaster* (University of the Witwatersrand, Johannesburg, 2009).

151 <http://www.bizcommunity.com/Article/196/466/112510.html>.

152 <http://mg.co.za/article/2014-05-26-propaganda-ministry-is-a-go-without-mac>.

153 <http://www.bdlive.co.za/national/media/2014/05/27/reconfigured-ministry-raises-worries-over-sabc>.

154 <http://www.southafrica.info>.

155 <http://www.abc.org.za/Notices.aspx>.

156 <http://www.southafrica.info>.

Nevertheless, the print media in South Africa is also under increased pressure by the ANC government to transform its ownership structure. The government established the Media Development and Diversity Agency (MDDA) in 2003 by means of the MDDA Act of 2002, in partnership with the major print and broadcast media industry, to encourage the ownership, control and access to media by historically disadvantaged communities, as well as indigenous language and cultural groups.<sup>157</sup> According to the MDDA's report of 2014, black ownership of the print media is currently below the threshold proposed in the BEE guidelines.<sup>158</sup>

## Access to information

Access to information is an indispensable right that needs to be protected in order to safeguard democracy. The right of access to information is provided for in section 32 of the Bill of Rights of the South African Constitution. Without transparency and accountability in government, democracy is at risk – if citizens do not have access to information, the government cannot be held accountable for its actions and the media's role as whistleblower becomes dormant. Without transparency and accountability, the risk of corruption increases considerably.

The Promotion of Access to Information Act of 2000 (known as Paia) places obligations on the public and the private sector to provide access to information and to report on their compliance with the act. The objective of the act is to increase transparency and accountability specifically in the public sector. The act is not very effective, since the government remains reluctant to provide requested information and to report on its compliance with the act.

The Protection of State Information Bill was introduced in 2010 and passed by the National Assembly. The Bill is aimed at replacing the Protection of Information Act of 1982 that still dates from the apartheid era. The bill allows for heavy penalties for those who disclose or possess material classified as secret, even if such disclosure can be deemed as being in the public interest.

In November 2011, the ANC-dominated National Assembly passed the legislation, even though the opposition parties all voted against it. Many civil rights groups protested vigorously. As a consequence, favourable changes regarding the bill have been introduced. These changes include the scrapping of a clause that would have made the legislation trump the Promotion of Access to Information Act and would have given Chapter 9 institutions the right to be in possession of classified information. However, there still are legal loopholes.<sup>159</sup>

During October 2013, President Zuma referred the bill back to Parliament for consideration. In turn, the National Assembly referred the bill to the ad hoc committee that had drafted the legislation.<sup>160</sup> The National Assembly has since adopted the revised bill and it will now be referred back to the President for his decision.<sup>161</sup>

In another development, the former Minister of Police, Nathi Mthethwa, agreed to review the constitutionality of the National Key Points Act of 1980. The act contains wide secrecy provisions that contradict the spirit of openness that the Constitution demands. A study by the Right2Know Campaign found that the list of National Key Points to be covered by the secrecy provisions has increased by 54 per cent.<sup>162</sup>

## A decline in freedom of belief and expression

As press freedom is protected under section 16 of the Bill of Rights, the use of Facebook and Twitter where people can write blogs and give opinions on many issues occurs without state intervention. Newspapers, radio stations and magazines also allow individuals to voice their opinions.

157 [http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71656?oid=138118&sn=Detail#\\_ftn1](http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71656?oid=138118&sn=Detail#_ftn1).

158 <http://www.mdda.org.za/Transformation%20of%20Print%20Media%20in%20South%20Africa%20Final.pdf>.

159 <http://www.iol.co.za/news/politics/ncop-sees-raucous-debate-on-info-bill-1.1433225>.

160 <http://mg.co.za/article/2013-10-22-info-bill-sent-back-to-ad-hoc-committee>.

161 <http://www.fwdeklerk.org/index.php/en/latest/news/260-article-world-press-freedom-day-2014-stopping-the-presses>.

162 <http://www.r2k.org.za/2013/06/03/national-key-points-act-review/>.

Even though everyone has the right to freedom of expression, this right is also limited, the right in subsection (1) does not extend to propaganda for war; incitement of imminent violence; or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

At present, South Africa is ranked 42nd in the world with respect to press freedom according to the World Press Freedom Index of 2014. This constitutes a considerable improvement from position 52 in 2013. The low position in 2013 was mainly due to fear that if the Protection of State Information Bill were to be passed and implemented, it would infringe severely upon the right to freedom of expression. The improvement in 2014 is ascribed to the President's referral of this bill back to Parliament for further amendment.<sup>163</sup> Once this bill is passed however, the position of South Africa might change dramatically once again.

The performance of songs that included the phrase "shoot the Boer" by various members and supporters of the ANC, particularly during 2012, clearly violated constitutional provisions on the right to freedom of expression. Firstly, it constituted incitement of imminent violence and, secondly, it advocated hatred based on race and ethnicity. Even though the courts ruled that the songs constitute hate speech, certain members and supporters of the ANC continued singing them without being repudiated by the ANC leadership. This proved the executive's reluctance to enforce court rulings they do not agree with.

Later in 2012, the ANC, Julius Malema (then ANC Youth League President), civil rights organisation AfriForum and an agricultural interest grouping, the Transvaal Agricultural Union of South Africa signed a historic settlement agreement following a high court ruling in a hate speech case regarding the singing of this phrase. In the agreement, the ANC and Malema acknowledged that certain words in certain struggle songs could be experienced as hurtful by minority communities. They undertook to encourage their supporters to refrain from hurtful phrases and actions of this nature.<sup>164</sup>

### Strained relations between the ANC and critical journalists

Another significant factor in establishing the position of the media in South Africa is the treatment of and protection accorded to journalists. Although no serious instances regarding government authorisation to actively target journalist have been reported, the ANC's relationship with the media is generally strained.

Incidents of harassment have been reported, especially with regard to coverage surrounding President Zuma. In 2010, a Skynews journalist confirmed that she was harassed by the President's bodyguards while reporting.<sup>165</sup> In addition, Zuma's bodyguards or VIP Protection Unit have gained notoriety as a result of their behaviour towards journalists<sup>166</sup> and the general public.

They have been labelled the 'blue light bullies'.<sup>167</sup> Cases where journalists have been arrested in the course of their work have also been reported.<sup>168</sup> The South African National Editor's Forum (Sanef) has identified at least sixteen cases of wrongful arrest or physical threat/assault by the police against journalists since 2011.

One of the most recent cases involved a VIP policeman guarding President Zuma ordering the removal of photographs from an eNCA journalist's cellphone while Zuma was pursuing his election campaign near Duduza. The photographs showed ANC election posters being transported by vehicles belonging to the civil service.<sup>169</sup>

163 [http://rsf.org/index2014/data/index2014\\_en.pdf](http://rsf.org/index2014/data/index2014_en.pdf) on page 7.

164 <http://www.afriforum.co.za/english/2012-10-31-anc-malema-afriforum-en-tlu-sa-bereik-historiese-skikking-in-malema-haatspraaksak/>.

165 <http://www.thesouthafrican.com/news/zuma-guards-attack-sa-and-uk-journalists.htm>.

166 <http://citizen.co.za/140363/media-favoured-anc/>.

167 [http://www.news24.com/Tags/Topics/blue\\_light\\_incidents](http://www.news24.com/Tags/Topics/blue_light_incidents).

168 <http://www.fcasa.org/news/>.

169 <http://www.fwdeklerk.org/index.php/en/latest/news/260-article-world-press-freedom-day-2014-stopping-the-presses>.

In 2008, Sanef citing the *ANC Today Online*, stated that President Zuma's newsletter, revealed a "hostile state of mind towards the media", and contained "wild generalisations encompassing the media as a whole."<sup>170</sup> Given the prominent media coverage since 2012 with regard to public funds used for security upgrades to President Zuma's private homestead, the ANC's strained and sometimes hostile relationship with the print media is likely to continue for some time.

Even in his 'victory speech' after the announcement of the 2014 election results, the President made several hostile remarks regarding the media in general. As veteran political journalist Stephen Grootes comments:

*It may seem like good short-term politics to go to war with the media, but in the long run it could prove to be a bad direction to take.*<sup>171</sup>

Professor Nicola de Jager adds:

*Media access is a key resource in any democracy, and with the Freedom House's Freedom of the Press rating of South Africa falling to 'partly free' in 2010, the worst score since 1995, it is an area of concern in South Africa's democracy.*<sup>172</sup>

Various actors from civil society have played an important role in maintaining the constitutional space for freedom of the media and expression against ANC pressure. However, it is clear that the ruling party will continue to be suspicious when it comes to media entities that do not align themselves with ANC objectives and policies. The constitutional space for freedom of the media will therefore continue to be under pressure in the foreseeable future.

170 <http://mg.co.za/article/2008-01-18-zuma-is-hostile-towards-media-says-sanef>.

171 <http://www.dailymaverick.co.za/article/2014-05-13-analysis-zuma-vs.-the-media/#.U6bxE7mKDIU>.

172 [http://paperroom.ipsa.org/papers/paper\\_10054.pdf](http://paperroom.ipsa.org/papers/paper_10054.pdf).