ASSESSING AND PROMOTING HUMAN RIGHTS IN SOUTH AFRICA

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Democratic decline and state capture in South Africa

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Democratic decline and state capture in South Africa

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.¹

The key dynamics of the executive are especially 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.² 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

The tripartite alliance comprising the African National Congress (ANC), the much smaller South African Communist Party and the trade union federation COSATU won in four general elections in South Africa between 1994 and 2009. While the ANC participated in elections, its leadership’s rootedness in an armed struggle still permeated its political culture.

As Economist has reviewed the study of the ANC in exile of prominent Africanist scholar, Prof. 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.³ 

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 have become the dominant pattern of the ANC in government: centralised decision-making, unquestioned loyalty, sycophancy, and no public criticism, not the open debate of a dynamic democracy.⁴

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.⁵

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.⁶

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. 

Prof 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 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.  

Especially since about 2011, the ANC has increasingly had to rely on its control of government and state institutions. This was due to the combined effect of the 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 Prof Booysen 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.*

*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.*

Prof Booysen states:

*In government and in the public institutions of state the ANC was on continuous improvement quests, even if some crucial projects was insufficiently*

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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.¹⁰

The factional infighting has increased and remains at high levels. During the past few years, this has also taken the shape of political intimidation and worse. 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.¹¹

**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 accounts on average 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. 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).

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According to data supplied by the Minister of Public Service and Administration, Lindiwe Sisulu, South Africa has an extensive group of 34 ministers, 33 deputy ministers, 159 directors-general, 642 deputy directors-general, 2,501 chief directors and 7,782 directors. Stephen Mulholland, the former Editor-in-Chief of *Financial Mail* and *Business Day*, and 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 Prof 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 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 tax-payers – the state delivers pensions, child-support grants and disability payments to about 18 million people per month.

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.

- 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;
- 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 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.15

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.16 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. Prof 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.*

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 policymaking 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.\textsuperscript{17}

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.

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, and the latter will be 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 organizations by informal networks, the use of informal power, and the lack of accountability and representativeness.

As William Gumede indicates,

\textit{In the last local elections, deployment committees pre-selected candidates that would be ANC local councilor 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.}\textsuperscript{18}

\begin{flushright}
\textsuperscript{17} William Mervin Gumede, \textit{Thabo Mbeki and the Battle for the Soul of the ANC} (Zebra Press, Cape Town, 2005), p. 305.
\textsuperscript{18} http://pambazuka.org/en/category/features/85518.
\end{flushright}
Democracy and the legislature

Cadre deployment weakens representative democracy

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 rules.

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 and the President is accountable to Parliament for the performance of his functions. However, the NEC can remove a 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. 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 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 NEC, instead of provincial voters, can remove members of the provincial legislature. The ANC NEC can also remove a provincial premier, even if he has not lost the confidence of the provincial legislature. In addition, the ANC NEC can also remove a provincial member of the executive, even if he or she has not been dismissed by the Premier.

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and the provincial legislature has not passed a motion of no-confidence in the Executive Council.22

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.

**No political alternation prevents democratic consolidation**

The ANC 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 NEC and replaced by another ANC cadre. The non-parliamentary wing of the ANC dominates the parliamentary wing.23 Unelected party functionaries thus set the national government’s policy priorities. The public officials subject to electoral accountability tend to be subordinated to the unelected party functionaries.24 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

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22. For Zuma’s agreement with this approach, see http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=108130&sn=Detail.
loss, coupled with a transfer of power.\textsuperscript{25} 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.\textsuperscript{26}

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 Khayelisha:

\begin{quote}
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.\textsuperscript{27}
\end{quote}

He made similar statements in 2004, 2006, 2009 and 2012.\textsuperscript{28} In April 2011, President Zuma remarked:

\begin{quote}
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.\textsuperscript{29}
\end{quote}

Previously he had said that “only those with ANC membership will go to heaven”.\textsuperscript{30} 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.

\begin{quote}
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.\textsuperscript{31}
\end{quote}


\textsuperscript{29} http://152.111.1.87/argief/berigte/citypress/2011/04/11/CP/2/snZuma.html.

\textsuperscript{30} http://www.timeslive.co.za/sundaytimes/article/895148.ece/God-is-on-the-ANCs-side-Zuma-tells-crowd.

\textsuperscript{31} http://mg.co.za/article/2011-05-14-zuma-vote-anc-or-face-ancestral-wrath.
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.

**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.

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 ANC President Jacob Zuma. In 2008 Pikoli was suspended from his duties by President Thabo Mbeki, a close confidant of Selebi, and then subsequently fired by Mbeki’s successor, Kgalema Motlanthe.

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.

**The increased role of the 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 guerilla war (1960-1990), is still permeated by a conspiratorial mindset.32

Ronnie Kasrils, a founding member of the ANC’s military wing, Umkhonto we Sizwe (MK), and former Minister of Intelligence from 2004 to 2008, responded as follows to the question

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whether the ANC has taken a reversible step towards authoritarianism, as illustrated by the Protection of Information Bill\textsuperscript{33} and other initiatives of the Zuma administration:

\begin{quote}
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.
\end{quote}

Prof 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.\textsuperscript{34}

Zuma, an ethnic Zulu who used to be the head of intelligence of the ANC’s guerilla army, 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 Dr Siyabonga Cwele and Justice Minister Jeff Radebe. This process also occurred while the Zulus came to form the strongest component (almost 25 per cent) of the ANC’s increased membership.

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. Although Parliament is expected to vote on the appropriation of more than

\textsuperscript{33} 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:

\textsuperscript{34} http://www.academia.edu/1798769/Voice_political_mobilisation_and_repression_under_Jacob_Zuma;
R36 billion for the defence department, Parliament has never been briefed on the combat readiness of the defence force. 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, and 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.35

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 State Security Minister Siyabonga Cwele. 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 the 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 balanced those of the Minister, to a functionary reporting to the Minister.

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

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. Dr Nicola de Jager, political scientist at the University of Stellenbosch, 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.  

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.

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:

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

37. 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.
38. http://mg.co.za/article/2012-08-17-00-zuma-why-were-not-laughing-any-more.
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 Mzi 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.

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 Manguang 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**

Political 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:

(Wholesale assassinations have become a regularised way of deciding on leadership and access to wealth within the ANC and its allies.

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.

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39. [http://www.bdlive.co.za/opinion/columnists/2013/08/12/political-assassinations-how-the-anc-is-killing-its-own](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://www.ft.com/intl/cms/s/0/b8a413ee-f855-11e2-92f0-00144feabdc0.html#axzz2dl5TbrWy);

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.

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

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 Zanufication, 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.

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 and the heads of security agencies and the illegal domain, and 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

41. http://mg.co.za/article/2012-08-17-00-zuma-why-were-not-laughing-any-more.
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.43 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.44

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. The African National Congress also held a ten percent 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.45

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, Prof 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-

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client norms of mutual obligation and exchange. 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 than on average, more than 40 people are murdered each day and an average of more than 140 raped.

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.

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.

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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 nationwide 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.*

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, 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.*

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.*

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 organized syndicates. 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. 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.

In black communities, those who have protested against gaps in service delivery have experienced forms of police intimidation. 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.

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 Service (SAPS), violent crime was costing the country dearly due to loss of productivity and foreign investment.  

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.

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. Amnesty International has (as has been stated above) expressed serious concerns about brutality, including torture and extrajudicial killings, at the hands of the police in its Annual Report 2012 on South Africa. 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 2011.61 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.62

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. 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.63

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.64 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 organization 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 pointed at 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

http://www.iol.co.za/news/crime-courts/criminal-cops-have-rights-phiyega-1.1568980#.UmuqtlIRJxMs;
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-Nkabinda, 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.65

ANC influence and cadre deployment in the police

Due 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 the current President, Jacob 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 sample drawn from ANC heavyweight Tony Yengeni, who had been caught driving under the influence of alcohol, is another.66

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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.67

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”.68

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.69 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.70

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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 have 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. 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. The court in effect also compelled the NPA to prosecute Mdluli. It is exceptionally rare for a court (in most common law countries) to compel a prosecution service to prosecute, so this is quite significant.

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. Still, at present, moves and lobbying are underway to pave the way back for Mdluli as a Zuma ally into the SAPS.

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.\textsuperscript{71} 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:

\begin{quote}
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 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.\textsuperscript{72}
\end{quote}

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


\textsuperscript{72} http://www.issafrica.org/iss-today/whither-integrity-and-independence-in-the-npa.
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.*

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.

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.\(^{74}\)

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.\(^{75}\)

**The NDR and withholding protection from farmers**

Under Zuma, the police has been expanded by 70,000 members and its budgets 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.\(^{76}\)

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.\(^{77}\)

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

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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.\(^{78}\)

Even the organisation Genocide Watch of US Prof Gregory Stanton voices concerns about farm attacks and murders. However the South African Minister of Police refuses to categorise this as a priority crime, deserving of special police strategies to prevent such incidents.\(^{79}\) The unwillingness to prioritise farm murders comes after the ANC government had disbanded the rural commandos 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.\(^{80}\) 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.\(^{81}\)

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:

    http://www.citypress.co.za/news/farms-are-not-special-areas-minister/
    http://www.iol.co.za/business/companies/brics-event-nets-r2-3m-for-zuma-relative-1.1577779#.UnPVA6gVD4
    http://mg.co.za/article/2013-02-08-00-zumas-most-trusted-lieutenants.
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.\textsuperscript{82}

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”.\textsuperscript{83}

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 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.\textsuperscript{84}

Dr Johan Burger of the Institute for Security Studies states:

\textit{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.}

\textit{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.\textsuperscript{85} Similarly, proper protection of the farmers whose property is

\textsuperscript{82}http://mg.co.za/article/2012-06-05-ancyl-land-reform.


coveted and who are not seen as part of the ruling faction, is being withheld. In contrast, when faced with attention from international actors and media during the World Cup 2010, the ANC government actively intervened to ensure security at important venues.

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.

For partisan political reasons, the ANC cadres in state structures have not used their ability to improve the protection of the small commercial farming community, the key actor that ensures food security in South Africa. As Africanist Prof Patrick Chabal has noted in some cases elsewhere in Africa, the ANC is in effect allowing violent crime to restructure the political environment in its favour.