The role of the Parliamentary defence committees in ensuring effective oversight: The South African experience

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Introduction

The question of oversight of the Department of Defence (DOD) in particular and the security apparatus in general, is an issue of critical importance to South Africans. It is particularly important given the history from which South Africa emerges; where the armed forces enjoyed considerable political and institutional influence with no clearly defined civil control and oversight mechanisms.

Given the fact that armed forces wield enormous power, in situations of internal threat or conflict this force may be used to protect and defend the country and its citizens. However, this force may also be used to undermine the government and threaten its inhabitants. As South Africa does not possess a history of a democratically entrenched civil-military relations culture, it is of cardinal importance that this culture is inculcated—in particular with respect to civil oversight of the military. There is consensus among scholars that the degree of success of new democracies in re-imposing civil control of the military and security agencies will form the cornerstone of democratic survival.1

The Constitution of the Republic of South Africa 1996, clearly outlines the hierarchy of authority on defence matters:

• The Chief of the SANDF enjoys executive military command of the armed forces. This command is exercised under the direction of the Minister of Defence in times of peace and under the direction of the President during a state of national defence; and the Minister is, in turn, accountable to Parliament and Cabinet for the SANDF.2
• The White Paper on Defence (1996) states that Parliament has a range of significant powers regarding military affairs in order to assert democratic control over the armed forces and defence policy. It has legislative powers, it approves the defence’s budget and it reviews the President’s decisions to deploy the SANDF in critical defence functions.3

According to Nathan4, there are a number of themes that underline the essential principle of separation of power and authority, namely:
• In a democracy it is accepted that there is a separation between the military and the civilian spheres. This distinction means that the military should refrain from involvement in politics (other than through constitutionally approved channels), and that politicians should refrain from interfering in purely operational matters. This does not mean that military leaders cannot
contribute to the formulation of policy, but rather that they should do so in such a way that it does not undermine the authority of the civilian decision-makers.

• The powers of the military are determined in terms of the law—specifically the Constitution and the Defence Act.

• In a democracy, all state institutions are accountable to Parliament. Parliament, as the elected representative body of the public, needs to ensure that the defence force operates within democratic and constitutional parameters and that it does not abuse its powers.

• In order for Parliament and other elected representatives to fulfil this oversight, it is vital that it has sufficient information to do so effectively. This necessitates a certain level of transparency and openness on the part of the armed forces with respect to the provision of information.

• The Government also has responsibilities that include the provision of sufficient funding, lack of interference in the military chain of command and an agreement not to abuse the military for partisan ends.

**Parliamentary committee system: Post 1994**

It is now generally accepted that before the advent of democracy in South Africa in 1994, there was never a well-defined parliamentary oversight committee. The 1961 Constitution of South Africa made very little mention of parliamentary committees. Ad hoc committees dealt with bills. Only four committees were in existence: the

• Public Accounts Committee;
• Committee on State-owned land;
• Committee on Irrigation matters; and
• Petitions Committee.

Although there were changes in the 1983 Constitution, these were minimal and inconsequential. The Constitution stated that the President’s Council may make rules and orders relating to the order and conduct of its business and proceedings and the establishment and constitution and powers of committees of the council.5

Neither the 1961 Constitution nor the 1983 Constitution specified the nature, content or scope of parliamentary control mechanisms or processes. The Defence Act, Act 44 of 1957, was the paramount legal framework controlling the military and, during the 1980s, the de facto framework within which civil-military relations was managed.

After 1994 there was a revolutionary change compared to previous practice both in the functioning of parliament and its committees. The Constitution (1996) stated that to give effect to the principles of transparency and account-
ability, multi-party parliamentary committees must have oversight of all security services in a manner determined by national legislation or the rules and orders of parliament. Further, the Constitution outlined other mechanisms to exercise accountability and oversight as specified in the section entitled “State Institutions Supporting Constitutional Democracy.” (namely, the Public Protector, Human Rights Commission, the Auditor General etc.)

The Rules and Orders of Parliament clearly stipulate the powers of the parliamentary committees. Rule 201 of the National Assembly gives the following powers to the parliamentary committees. A parliamentary committee:

- May deal with Bills and other matters falling within its portfolio.
- Must maintain oversight of:
  - The exercise within its portfolio of national executive authority, including the implementation of legislation;
  - Any executive organ of state falling within its portfolio;
  - Any constitutional institution falling within its portfolio; and
  - Any other body or institution related to its portfolio.
- May monitor, investigate, enquire into and make recommendations concerning any such organ of state, constitutional body, including the legislative programme, budget, rationalisation, restructuring, functioning, organisation, structure, staff and policies of such an organ.
- May consult and liaise with any executive organ of state or constitutional institution.
- Must perform any other function, task, or duty assigned to it in terms of the constitution, legislation, rules or resolutions of the Assembly.
- Subject to the constitution, legislation and rules, the committees have general powers to:
  - Summon any person or legal person to appear before it to give evidence on oath or affirmation or to produce a document;
  - Receive petitions, representations or submissions from interested bodies and persons;
  - Conduct public hearings;
  - Oral evidence on petitions, etc. before the committee;
  - Determine its own procedures; and
  - Meet on any day, anywhere any time when the House is in session, or in recess.

These powers and responsibilities illustrate the extent to which the present parliamentary committee system, particularly when it pertains to the management of the national defence function, is vastly different from the pre-1994 period.

As a result of these changes, the defence policy-making process is no longer carried out in a closed and secretive environment in which little public or
political consultation takes place but rather it is a broader participatory process in which a wide range of stakeholders are involved. In effect, parliamentary committees have shifted from being rubber stamps for the executive to being the actual engine rooms of Parliament.

**Parliamentary Committees**

In terms of defence oversight, there are two parliamentary committees charged with the task of managing the national defence function from a legislative perspective. These are the Joint Standing Committee on Defence (JSCD) and the Portfolio Committee on Defence (PCD) respectively. The JSCD deals with broader matters of oversight and is competent to investigate and make recommendations regarding budget, functioning organisations, armament policy and state of preparedness of the SANDF; and to perform other functions relating to parliamentary supervision of the armed forces as may be prescribed by law.8

The JSCD includes in its membership both members of the National Council of Provinces and the National Assembly. It has a specified threshold for membership. Not all thirteen parties that sit in Parliament today are necessarily represented in the JSCD.

It is important to stress that the creation of the JSCD was necessitated by the unique nature of the transition to democracy in South Africa. At the time of the transition there was a high level of mistrust of the defence force in general and the proposed management of the military integration process in particular (particularly during the pre-1994 period).

The culture, traditions and ethos of the various forces being integrated into the new South African National Defence Force (SANDF) were markedly different and required special oversight in addition to that being provided by the Ministry of Defence.

The PCD discharges similar functions to the JSCD although it is also empowered to deal with legislation tabled in Parliament. It is a multi-party committee comprising all thirteen political parties represented in parliament. The work of the JSCD and PCD is therefore complementary.

Some of the activities and challenges of the oversight committees on defence shall be outlined below. (Given the fact that the committees work in a complementary and mutually beneficial manner, the challenges facing the committees tend to be generic by nature).
Activities of defence parliamentary committees

• White Paper on Defence
When the Minister of Defence published the first draft of the White Paper in June 1995, he called for public comments. The defence committees who had been intimately involved in the formulation of the White Paper supported this call. A number of interested parties responded ranging from political parties, NGO’s, defence analysts, academics, and the public to members of the defence force itself. This resulted in four draft papers before the process was finalised in May 1996. The completion of the process was the result of the intimate involvement of the JSCD in the White Paper formulation process.

The product of the process was a White Paper, which was comprehensively anti-militarist in ethos, and consistent with the principles of international law on armed conflict and the requirements of the new democratic dispensation. This was a dramatic shift away from the historically securocrat definition of security to a new paradigm of ‘human security’ in South Africa.

• SANDF Acquisition plans
The years 1994/95 saw the then Minister of Defence proposing to the JSCD the new acquisition plans to equip the national defence force. The parliamentary defence committees, however, felt that there were limitations in the proposed re-equipment strategy. The acquisition plans were not based on a particular philosophy or doctrine and the JSCD felt that this was an inappropriate approach to the re-equipping of the SANDF.

Parliament called for a comprehensive review of the national defence requirements of the country and this led to the Ministry of Defence initiating a Defence Review (which was also a broadly consultative process). It covered, inter alia, defence posture and doctrine, force design options, force structure, acquisition management process etc. The JSCD played a central role in this process—literally going through piles of documents with a fine toothcomb. This approach was beginning to define the workings of the JSCD and the PCD.

• Defence Bill process
Parliament is busy revising and rewriting the 1957 Defence Act because it is not consistent with the requirements of the new dispensation and it has been found to be unconstitutional and/or contrary to the democratic precepts in many respects. In 1998, the Cape Town High Court found the criminal justice system in the defence force in general and in particular court martial to be unconstitutional and infringing on the rights of soldiers to a fair trial. This led to the rethink on the labour rights of soldiers and their being defined by the court as workers of a special type needing to be pro-
tected with certain rights. This gave rise to military trade unions and Military Bargaining Councils. The committee played a central role, once again, in the formulation of these bodies. A strong view emerged from the JSCD, that there should be circumspection on the question of trade unions in the defence force—they recommended that the military rather allow for associations. The final view was that the courts and constitutionality of our actions should guide the work of the parliamentary committees.

The JSCD and the PCD called for public hearings on the question of granting police powers to the SANDF because of the sensitivity of the issue. There was a good response and the committee heard many differing views. The general perspective was that it would be inadvisable to grant all police powers to the SANDF and the committee members across the political divide shared this view. The Committee had not completed the finalisation of the Defence Bill for a variety of reasons. One of the delays in the Bill was around the question of the Defence Intelligence Act. An agreement was later reached with the Minister of Defence that the process must be completed without the Defence Intelligence Act, which will be finalised at a later date. This compromise meant that the Defence Bill could be developed and there is now a legal framework for the new Defence Act.

• National Conventional Arms Control Committee (NCACC) Bill
The National Conventional Arms Control Committee (NCACC) Bill is also still in the development stage. The initial process of the Bill was handled rather clumsily when it was drafted and tabled in parliament without the involvement of the committee. The normal procedure is for a bill to be submitted to the Speaker who forwards it to the relevant committee. The committees are then required to discuss the bill with the drafters for general clarification. The process was confused further by speculation as to whether the Bill should also be considered by the parliamentary committees on Foreign Affairs or Defence. The defence committees argued that the matters of the Bill are matters for Defence even though there were elements relating to foreign affairs (the intersection between defence and foreign affairs being a key feature of the management of the national defence function in most countries). After working on the NCACC Bill, it was established that there were serious shortcomings and constitutional problems, which required further processing. The Minister of Defence agreed to withdraw the NCACC Bill and table it again in February 2001. It was also agreed that the revised NCACC Bill would have to go through public hearings given the magnitude of the issues that it deals with.

• Lesotho Intervention
This was another area where the parliamentary oversight committees needed to be vigilant and astute. The constitution is clear on the channels to be followed when deploying the SANDF outside of our borders. The Constitution
states that when the defence force is employed for any purpose (in fulfilment of an international obligation), the President must inform Parliament, promptly and in appropriate detail of:
– the reasons for the employment of the defence force;
– place where the force is being employed;
– the number of people involved; and
– the period for which the force is expected to be employed.

If Parliament does not sit during the first seven days after the defence force is employed, the President must provide the information required to the appropriate oversight committee. However, during this intervention, the committees were not informed, perhaps because both the President and the Deputy President were out of the country at the time on official duties and it was the acting President who decided to send the SANDF to Lesotho. The situation was explained to the relevant members of the executive, who acknowledged the error that had been made.

Subsequently however, during the humanitarian support efforts in Mozambique and the employment of the SANDF in compliance with other international obligations, parliament has been promptly informed of the employment of the SANDF outside South Africa. On 5 February 2001, in the parliamentary document, *Announcements, Tabling, and Committee Reports* (ATC), a letter was circulated by the President informing parliament of the employment of the SANDF in compliance with the international obligations of the Republic of South Africa towards the UN and the OAU.

**Procurement Programmes**

The Defence Review, Clause 67, states that the JSCD will have an oversight function to assist the Department of Defence (DOD) in its acquisition programmes. This oversight function will include guidance to the DOD with respect to the timing of tenders, submission of requests for proposals, counter-trade obligations, value-systems, affirmative procurement, acquisition, prioritisation and acquisition master plan. The DOD will submit annual and ad hoc reports to the JSCD on all acquisition activities. However, there has not been much progress in this regard and the matter needs further focus. With the benefit of hindsight there is a realisation that this is a rather difficult and complex process with a number of sensitivities.

**Structure of the SANDF**

The White Paper on Defence and Rules of the National Assembly state categorically that the parliamentary committees have a role to play in the restructuring process of the defence force. However, the JSCD only learned about the new structure of the SANDF after it had been finalised and that the committee did not play a role in the review of and proposal of changes to the SANDF structure. It is not clear whether the changes in the SANDF
structure were informed by the Defence Review or by other considerations that the committee has not been made aware of.

• Budget
  This is an area with which parliament is still grappling. For any effective oversight to be exercised, the bodies that have responsibility for that oversight must be able to control the Budget. The South African government introduced the Medium Term Expenditure Framework (MTEF), which is a multi-year budgeting process over three years. Thus far the parliamentary committees, perhaps with the exception of the Finance Committee, deal with the budget as a fait accompli. The JSCD does not play any meaningful role in influencing the direction of the budget. This matter is receiving some attention. There is a need to equip parliamentarians with the necessary skills to deal with the intricacies of budgeting. To further illustrate my point that parliamentary committees are not equipped to influence the direction of budgets, I will cite the example of the preparation of the financial year 2001/02 to 2003/04 budget. Below is an outline of the process that was followed in terms of the budgeting cycle:
  – Budgeting guidelines from Arms of Service in November 1999.
  – Top level Budget Holders submit estimates of expenditure in April 2000.
  – Budget briefing for JSCD by DOD officials– October 2000.
  – Cabinet meeting to approve national MTEF – November 2000.
  – Letter of allocation received – November 2000.
  – Budget Day – February 2001

The JSCD had very little input or influence on the budget. By the time the DOD briefed the JSCD in October 2000, everything had been finalised already. It appears that the JSCD is engaged in a futile exercise. There is a need for some measures to be designed to rectify this situation.

Challenges facing parliamentary defence committees

It is clear from some of the activities of the Defence Committee outlined previously that there are a number of areas that still need to be firmed up. It has been shown that oversight is a process and not an event. It is incumbent on practitioners to exercise constant vigilance and deftness in establishing and maintaining civil-military relations. Oversight functions of parliamentary committees should be both proactive and reactive. Proactive, in as far as it can anticipate issues and take its own initiatives. For example, if the committees wish to visit certain military bases and then use the information gathered to advise the executive and parliament on measures to be adopted to correct a particular situation, then this should be allowed.
For instance, in 1997, the British Military Advisor Training Team (BMATT) made certain observations regarding a number of problems affecting the SANDF. BMATT in its report observed that:

“Ground level commanding officers were ignoring problems and that ex-non statutory force (NSF) members were not receiving fair treatment with regards to course nominations, pay problems, problems around appeal boards, courts martial affected, and assaults of ex-NSF were not taken as serious.” 12

These problems were highlighted in the BMATT report to the Minister of Defence in 1997. Yet the unfortunate and tragic event at the Tempe military base, in Bloemfontein in 1999, took everybody by surprise. The Setai Commission of Inquiry’s interim report highlighted the same problems raised in the BMATT report, which sounded new to both the committee and to Parliament. This issue reflects the problems related to reactive oversight. Reactive oversight is necessary and in certain cases unavoidable, more so when it comes to monitoring whether legislation is effective and meeting the desired results. Sometimes legislation is passed and pilot policies implemented, the practical efficacy of which has to be evaluated. This allows for the parliamentary oversight committees to be proactive when, through monitoring and reviewing policy, they are able to analyse the problems and propose amendments.

A difficulty that the parliamentary oversight committees also have to contend with is that the oversight work of defence committees does not start and end with legislation. It goes beyond that to the actual exercise of their influence on organs of state that fall within the portfolio, and the implementation and impact monitoring of the legislation and policies that are passed. It involves monitoring, investigating and making recommendations to the executive and Parliament on how problems in the arena of defence and security could be resolved or attended to.

A further challenge to the committees is how to exercise oversight responsibilities. Misconceptions, such as committees thinking they can bypass a minister responsible and go straight to the management of the department are dangerous and should be discouraged. It is better to exercise oversight primarily via the minister because it is the minister who is ultimately responsible for the policy and direction of the department. The minister is also accountable, by definition in the Constitution, to the elected representatives, i.e. Parliament. If the need arises to call on the officials of a department, it is wise to ensure that the minister is aware of it and sanctions the consultation. We should not confuse the role of oversight with micro-management. It is the minister who will have to explain, justify and defend the department and its policies to parliament.

The ruling party also has a role to play in oversight in a robust and critical manner. Oversight and calls for accountability are not the sole responsibility
of the opposition. If oversight is to be meaningful and effective it must take place in a constructive and non-adversarial manner. Oversight is not simply about exposing problems and failures but also about accountability and good governance.

Civil society, including the media has an important role to play in ensuring effective oversight. However, it is my submission that most of the media in South Africa is not well informed, but that it is trapped in an archaic paradigm of sensation and is scandal driven. Notwithstanding, it is important to have the media play a role in oversight functions. It is also incumbent on the oversight committees to equip civil society to participate in matters of defence and security. The effects of apartheid are pronounced when it comes to submissions and even public hearings, since there is always a preponderance of views from white people. This is easy to explain given the result of the socio-economic handicaps we have inherited. Some creative and proactive measures should be devised to address this situation.

A topical issue of late is the notion of independent members of parliament (MPs) feeling they should be free from party discipline. I would argue that irrespective of whether the parliamentary system is based on the proportional representation system or the constituency based system, there could be no independent public representative from a political party. In other words, each MP pursues a party line and is guided by the ideological position of his/her political party. However, this is not exercised in a manner that makes parliamentarians automatons but instead creative and critical thinkers who use their party line as a guide and not as dogma. It needs to be stressed that when they are criticising, parliamentarians should not be disruptive but instead strive to be constructive and consensual. This approach has been tried in the defence committees and it has mainly worked well.

### Conclusion

I have attempted to indicate, briefly, the oversight mechanisms in our new democracy. Though this is not conclusive in the least, I am certain that the issues raised will provide a window on the events taking place in the defence parliamentary committees. I have not dwelt on some of the other mechanisms of accountability such as the Public Protector, Auditor-General or the limitations of the military ombudsperson since this was not the main focus of my paper. It is generally clear that there is a lot of work to be done. With each development, new challenges arise and it is the duty of members of parliament to grapple with these.

Looking back, South Africans can be proud that much has been achieved, however, there is still much that needs to be done. Vigilance should guide us when meeting those challenges.
Endnotes

6. Ibid.