

Where was parliament while the state was being captured?

By Lawson Naidoo

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While Parliament simply failed to hold the state to account, it was the independent judiciary, the media and a vibrant civil society that came together in the end to halt attempts to erode our democracy and to defend our rule of law, while at the time being demonised as ‘counter-revolutionaries’. Above all, it was the courts, in particular the Constitutional Court, that demanded that Parliament uphold its

constitutional responsibilities. The term ‘lawfare’ was coined to describe this political strategy of bringing diverse stakeholders together in the fight against state capture and corruption.

Deputy Chief Justice Raymond Zondo, presiding over and hearing evidence at the Commission of Inquiry into State Capture, has in an exasperated tone posed the question, initially rhetorically: how have we allowed this to come to pass? He has more recently said that he will establish a task team to look specifically at the acts, or perhaps more pertinently the omissions, of Parliament that facilitated the state capture project.

As the primary institution, composed of democratically elected public representatives, designed to hold the executive and organs of state to account, it simply failed to do so. If our Constitution is equated to the much-lauded Rolls Royce car, then Parliament is its chassis, its basic frame. When that structure has weaknesses most of the rest of the vehicle will not function as it should.

Yet, despite the failings of Parliament the Constitution held firm in the onslaught of state capture. The Constitution itself was stress-tested

in the Zuma years and enabled us to resist the deliberate attempts to erode democracy and impose a culture of impunity. The rule of law prevailed.

It is now generally accepted that this was due to the combined efforts of an independent judiciary, a robust media and a vibrant, vocal civil society sector. The former is part of the intrinsic design of our model of constitutional democracy – the Constitutional Court being the final arbiter of constitutional and legal disputes – while the latter two have proven to be equally critical, albeit without the same status. They are components that are often taken for granted by many of us.

All three have attracted the moniker of ‘counter-revolutionaries’ ironically by the very forces that seek to undermine our democracy and the revolution that delivered it. Those forces seek to impose a simplistic majoritarianism, where rule by the mob becomes the order of the day. Some of them would like to see a Parliament unhampered by the constraints imposed by the Constitution. The handling of the Public Protector’s report on Nkandla being a case in point – the majority party opted to review the Public Protector’s report, amend its remedial action, and let former president Jacob Zuma off the hook. It was a clumsy exercise, later exemplified by a sweaty Nathi Nhleko (then Minister of Police) blundering >>

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through a media briefing trying to justify the unjustifiable.

Ultimately it was the Constitutional Court, in an application brought by the Economic Freedom Fighters (EFF), that confirmed the report of the Public Protector and declared that Parliament had failed to uphold its constitutional responsibility to hold the president to account. The judgment, delivered in sermon-like fashion by Chief Justice Mogoeng Mogoeng, was a defining moment – it awakened a belief that the Constitution is indeed supreme, and heralded the intensification of the fight against state capture. Lawfare, a term that gained currency and entered our political lexicon, was empowered. The use of the legal process to uphold and protect basic constitutional principles and practices blossomed.

This era of lawfare was fuelled by the media, driven by political parties and civil society organisations, and adjudicated by the courts. Each played important but separate and distinct roles.

The independent media that cut its teeth in the apartheid era, exposing the atrocities of the crimes against humanity and brutal repression, has grown in the democratic era, and has now spawned a vibrant, world class investigative sector. Through



painstaking digging and questioning they have placed before the nation details of corrupt deeds, money laundering schemes and patronage networks. The publication of the trove of #GuptaLeaks emails was the high point of this endeavour.

It provided the grist to the mill for academics and non-governmental organisations (NGOs) working to expose state capture and systemic corruption. Then Minister of Finance, Pravin Gordhan, beseeched us to ‘join the dots’, to follow the money, so that the ultimate beneficiaries and architects could be identified and held accountable.

The information that became available could not be ignored – the fog had lifted. In 2017 even Parliament was forced to sit up and take note – it mandated its committees to enquire into the rot at various state-owned enterprises, including Eskom and Transnet as well as the public broadcaster, the SABC.

Civil society organisations (CSOs) also woke up to smell the coffee. Whilst many had been painstakingly plodding away to protect the vulnerable, promote socio-economic rights, defend freedom of expression, demand the right to information and advance good governance, they were often doing

so in silos. Recognising the danger that was being posed to our very democracy they began engaging among themselves to develop strategies and initiate campaigns to confront the Zuma regime. It was out of such an endeavour, initiated by the Council for the Advancement of the South African Constitution (CASAC), that the ‘Save South Africa’ campaign was born. It mobilised not only the NGO sector, but other components of civil society such as business, faith-based organisations and labour unions in a formidable united front. They were joined by opposition political parties, as well as veterans and stalwarts from the ANC.

Some sectoral collaboration continues now, with organisations co-ordinating their submissions to the Zondo Commission, developing strategies to continue the fight against state capture and corruption and promoting integrity in public life, while working together to assist the National Prosecuting Authority (NPA) to restore its reputation and credibility.

Despite the awakening of civil society and public outrage at the desecration of our democratic order by Zuma and his minions, Parliament still failed to act on many issues. With the institutions of state failing to provide ►►

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the checks and balances that the Constitution envisages, other means to challenge the state capture project and protect our democracy had to be found.

This led to CSOs and political parties heading to the courts to challenge the appointment and removal of key personnel at institutions such as the Directorate for Priority Crime Investigation (Hawks), the Independent Police Investigating Directorate (IPID) and the NPA, as well as the nuclear deal and government's attempts to withdraw from the International Criminal Court

without the support of Parliament. The courts also demanded that Parliament put in place mechanisms for the impeachment of a President, and provided guidance on the use of a secret ballot in respect of a motion of no confidence in the President.

Zuma also sought to review the Public Protector's *State of Capture* report, and CASAC was among the parties that opposed his application, and succeeded. There was also the long-running saga of the Democratic Alliance's challenge to the dropping of fraud, corruption and racketeering charges against Jacob Zuma – Zuma is now facing those charges in the Pietermaritzburg High Court.

Our jurisprudence was significantly enhanced by these cases, even though some complained of judicial overreach. It is clear that the courts were wary of their role, carefully traversing the matters before them with full respect for the separation of powers. They did not choose the cases that came before them but dealt with them to ensure constitutional compliance. They

ensured a level of accountability in a sea of impunity.

We now have, in addition to the Zondo Commission, inquiries into the functioning of the SA Revenue Service (the Nugent Commission), the Public Investment Corporation (the Mpati Commission) as well as an enquiry under the National Prosecuting Authority Act into the fitness of Advocates Nomgcobo Jiba and Lawrence Mwebi to hold office at the NPA. We are finding ways to investigate what went wrong, why it did so and who was responsible?

But ultimately it will be a revived NPA and Hawks that will ensure that those guilty of crimes are charged and brought to court, an effective SARS that will collect the tax revenue that is due, and the Public Investment Corporation (PIC) that will invest funds responsibly and prudently. But above all Parliament must restore public confidence in its ability “to represent the people and to ensure government by the people under the Constitution”. **NA**

