

Legislative Oversight and Executive Accountability in South Africa

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Abstract

A glance at political theory reveals a preoccupation with the corrosive nature of power, in particular with how to ensure that the governors are sufficiently accountable to the governed. Legislative oversight is a constitutional requirement in the South African system of government. However, poor performance, maladministration and a lack of accountability in various government institutions have continued to be a major challenge. In recent years the implementation of legislative oversight has proven to be a challenge, with findings of abuse of state power revealed by reports from the Office of the Public Protector as well as corruption scandals in procurement processes. This study examines the role of parliament in holding the executive accountable in line with the constitutional values of transparency, accountability and responsiveness. Apart from delineating the reach of parliament's powers and functions, the main thrust of the study, given the existing vicissitudes in our constitutional edifice, including the failure of parliament to hold the executive accountable, is on how to strengthen the institution of parliament in its oversight role.

Keywords

Separation of powers; legislative oversight; accountability

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1 Introduction

The abuse of state power extends to the social ill of bad governance. Like many other African countries, South Africa has not become immune to the social pathology of corruption, which occurs primarily in countries ruled by dominant political parties where party loyalism blurs the line of state accountability.¹ Although political corruption is a symptom of a bigger malaise, the danger to legislative independence is influenced by one party dominance. Legislative oversight plays an important role in ensuring that the executive is accountable to the people through their elected representatives in governments across the globe. This study seeks to investigate the role of the legislature in holding the executive accountable in line with the constitutional values enshrined in section 1 of the *Constitution of the Republic of South Africa, 1996* (the *Constitution*) which provides for the supremacy of the *Constitution*, the rule of law and a multi-party system of democratic government to ensure openness, transparency, and accountability.²

The constitutional value of transparency requires government officials to disclose information in their decision-making processes to answer to the public for their actions when exercising state power. The conduct of the executive must be transparent to ensure that the public is aware of decision-making processes that affect them. For example, the courts have pierced the veil of secrecy regarding Covid-19 regulations. The then Minister of Cooperative Governance and Traditional Affairs, Dr Nkosazana Dlamini Zuma, was given until 9 December 2022 to release the record of decisions which led to the implementation of several regulations during the Covid-19 lockdown that started in March 2020 and ended in April 2022.³ These records will amongst other things include the reasons for the extension of the state of disaster. The court's decision is a breakthrough towards the quest for greater accountability. The former Minister of Co-operative Governance is yet to comply with the court order and instead appointed a

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¹ Meirotti and Masterson *State Capture in Africa* 6.

² Section 1 of the *Constitution of the Republic of South Africa, 1996* (the *Constitution*). South Africa is one, sovereign, democratic state founded on the following values: the supremacy of the *Constitution* and the rule of law, universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

³ Ellis 2022 <https://www.dailymaverick.co.za/article/2022-12-01-court-orders-nkosazana-dlamini-zuma-to-release-records-on-rationale-behind-covid-19-lockdown-regulations/>.

legal team charged with rescinding the order. Transparency and accountability are important principles in any democratic state. Laws regulating access to information are put in place to ensure that the public has access to the decision-making processes of government officials in order to be able to hold them accountable for their actions.

To determine the challenges surrounding legislative oversight, this study investigates the issues which exist around the subject of government accountability and the implementation of effective legislative oversight tools. This study further investigates weaknesses in legislative oversight to provide possible solutions or recommendations intended to strengthen the legislature's role in holding the executive accountable.

2 Background to legislative oversight and executive accountability

An investigation into the issue of legislative oversight and accountability is rooted in the relationship between the executive and the legislature. The relationship between the two branches of government is founded on the background of the South African model of the separation of powers.⁴ When South Africa transitioned into a constitutional democracy with a separation of powers between the legislature, the executive and the judiciary, this signalled a new dawn for the people. However, the model of separation of powers which was adopted raised certain concerns which were emphasised in *Certification of the Constitution of the Republic of South Africa, 1996* (*Certification case*).⁵ Although the *Constitution* guaranteed a separation of powers, it was submitted in the *Certification case* that the failure to effect a full separation of powers between the executive and the legislature would undermine the basis of a representative democratic order.⁶ Further, this model empowers the executive through the legislature by allowing Cabinet members to be members of the legislature and therefore to be able to exercise a powerful influence over legislative decisions by virtue of their positions.⁷ The argument is not whether the *Constitution* has not provided an adequate separation of powers but rather that the relationship created between the legislature and the executive creates room for a lack of effective executive accountability.

⁴ Madue 2014 *Journal of Public Administration* 861.

⁵ *Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) (hereafter the *Certification case*).

⁶ *Certification case* para 106.

⁷ *Certification case* para 107.

The South African model of the separation of powers is a unique one. It creates a complex relationship between the legislature and the executive, more especially in terms of legislative oversight. The model creates a relationship of interdependence where the executive develops policies which it submits to the legislature for approval.⁸ The constitutional structure creates a fused relationship between the legislature and the executive which results in the dominance of centralised power in the system of governance.⁹ Although a constitutional democracy, South Africa has a legacy of the Westminster system of government. The system has characteristics of a parliamentary structure where members of cabinet including the President are elected from the National Assembly.¹⁰ This study argues that this model of the separation of powers creates an opportunity for both branches to hold an excessive amount of government power with few to no effective checks and balances, as members of the executive are essentially former parliamentarians.

The concept of holding government accountable has led to an interest in the study of legislative oversight and mechanisms which can be used to oversee government conduct.¹¹ Although there is limited literature on the study of oversight, there is still no consensus amongst scholars on the definition of legislative oversight. Like the concept of accountability, legislative oversight is focussed on several basic questions: what is legislative oversight, why is it good for a governmental system, and how can oversight be exercised?¹² These questions will be addressed below.

2.1 What is legislative oversight?

In relation to the question of what oversight is, legislative oversight does not only entail the scrutiny of what the executive branch of government has done but also includes supervision of the executive's legislative proposals.¹³ On the surface legislative oversight can be defined as the authority of the legislature to oversee the governmental activities of the executive. Oversight is concerned with holding the executive accountable by overseeing its exercise of public power. This includes oversight of the national budget and spending decisions made by the executive and ensuring that they are in line with the priorities of the state. According to Madue, legislative oversight is one of the most important functions of good

⁸ Shikyil "Legislative Executive Relations" 136.

⁹ Labuschagne 2004 *Politeia* 88.

¹⁰ Murray and Nakhjavani 2006 *Foreign Relations* 215.

¹¹ Pelizzo and Stapenhurst 2006 https://ink.library.smu.edu.sg/soss_research/130/ 1.

¹² Pelizzo and Stapenhurst 2006 https://ink.library.smu.edu.sg/soss_research/130/ 2.

¹³ Pelizzo and Stapenhurst 2006 https://ink.library.smu.edu.sg/soss_research/130/ 4.

governance and the legislature bears this responsibility because of its constitutional obligation to do so.¹⁴ Legislative oversight entails the watchful and structured scrutiny of the executive in respect of the implementation of and adherence to the law and the application and proper use of the state budget.¹⁵ It also necessitates the effective management of government departments by cabinet members to achieve good governance and public service delivery by making government activities and expenditure transparent to the public through published reports and question and answer sessions in parliament.¹⁶

Legislative oversight also entails the constitutional authority of the legislature to scrutinise and call the executive to account for public expenditure. Legislative oversight is not limited to the legislative supervision of policies and programmes implemented by government. It goes beyond the scrutiny of the activities of the executive branch to include supervision of its legislative proposals.¹⁷ Where the executive has the power to propose policies or legislation, this gives the legislature the power to oversee government's plans before they are enacted.¹⁸ That is what happens where Bills are scrutinised in committees before consideration by the whole house during the second and third readings. While the executive is tasked with proposing policies intended to address specific issues, parliaments also contribute towards this procedure even before the proposed laws are enacted.¹⁹ Whether legislative oversight consists of overseeing the activities of the executive before they are performed through policy review or after they are performed is not an issue. Effective oversight is beneficial for ensuring accountability because it contributes towards improving the value of service delivery.²⁰

The Municipal Public Accounts Committees Guide and Toolkit (hereafter the MPAC Guide) defines oversight as a process of watching someone; in this instance of watching the executive to ensure that it performs its tasks correctly and effectively.²¹ Legislative oversight entails overseeing

¹⁴ Madue 2013 *Loyola Journal of Social Sciences* 38.

¹⁵ Stapenhurst, Jacobs and Pelizzo 2014 *Public Integrity* 286.

¹⁶ Sachs *Strange Alchemy of Life and Law* 49.

¹⁷ Pelizzo, Stapenhurst and Olson 2006 <https://core.ac.uk/download/pdf/13249576.pdf> 3.

¹⁸ Pelizzo, Stapenhurst and Olson 2006 <https://core.ac.uk/download/pdf/13249576.pdf> 3.

¹⁹ Pelizzo and Stapenhurst *Tools for Legislative Oversight* 3.

²⁰ Pelizzo, Stapenhurst and Olson 2006 <https://core.ac.uk/download/pdf/13249576.pdf> 3.

²¹ National Treasury and Department of Cooperative Governance 2012 [http://www.salga.org.za/event/mmf/Documents/Guide%20and%20Toolkit%20for%](http://www.salga.org.za/event/mmf/Documents/Guide%20and%20Toolkit%20for%20)

executive conduct through supervision, control, monitoring, review, and evaluation through performance assessments.²² According to the MPAC Guide, oversight encompasses various elements such as ensuring that the executive does not allow maladministration, waste state resources, or engage in corrupt practices.²³ Parliament has also defined oversight in various reports and has done so effectively, but there is a gap between the theory and practice of oversight as the institution struggles with holding the executive accountable, as the court decided in *Economic Freedom Fighters v Speaker of the National Assembly (EFF 2)*.²⁴ The oversight model of the South African Legislative Sector (oversight model) defines legislative oversight as entailing the informal and formal, watchful, strategic, and structured scrutiny exercised by the legislature in respect of the implementation of laws, the application of the national budget, and the strict observance of the *Constitution*.²⁵ In addition, it entails overseeing the effective management of government departments by individual members of the relevant executive authority in pursuit of improved service delivery to ensure good governance and the improvement of the quality of life of South Africans.²⁶ According to the oversight model, legislative oversight is customarily perceived as a purview of opposition politicians in a South African political context. Simply put, although the duty of oversight falls on parliament, it is often exercised by members of the opposition calling for the executive to account for its actions. Due to the structure of parliament, where decisions are generally made by the majority party rather than the opposition, reliance on opposition parties to exercise legislative oversight is ineffective.

The lack of government accountability has led to members of opposition parties looking to the courts on several occasions to seek relief for the unlawful conduct of the executive. When parliament fails to hold the executive accountable as indicated in both EFF decisions, the judiciary is often faced with the challenging task of intervention as the guardian of democracy. However, the Court in *Mazibuko v Sisulu*²⁷ reminds us of the risks of relying on the judiciary to resolve political issues or matters that

20Municipal%20Public%20Accounts%20Committees.pdf (hereafter the MPAC Guide) 9.

²² MPAC Guide 9.

²³ MPAC Guide 9.

²⁴ *Economic Freedom Fighters v Speaker of the National Assembly* 2018 2 SA 571 (CC) para 208 (hereafter *EFF 2*).

²⁵ SALS 2012 https://sals.gov.za/research/oversight_model.pdf (hereafter *Oversight Model of the South African Legislative Sector*) 6.

²⁶ *Oversight Model of the South African Legislative Sector* 6.

²⁷ *Mazibuko v Sisulu* 2013 4 SA 243 (WWC).

should be determined in parliament by highlighting the politicisation of the judiciary. Drawing the judiciary into every political dispute as if there were no other governmental structure to deal with matters relating to accountability, policy making or disputes of a political nature is at least awkward.²⁸

The relationship between government and its citizens is maintained through legislative oversight.²⁹ According to Hudson and Wren, legislative oversight contributes to ensuring a transparent relationship between the state and its citizens based on accountability.³⁰ Effective legislative oversight contributes to an accountable government, which in turn results in knowledge and improved performance by government.³¹ The role of a representative assembly is to bring executive conduct to light for the benefit of the public and to compel the executive to account for actions which anyone considers questionable. To ensure effective oversight from government, parliament as the elected body must exercise oversight over unelected bodies such as government departments. Where the legislature finds that the relationship between government and its citizens has been abused through questionable and condemnable conduct by the members of the executive, it has the authority to expel such persons from office through the power of impeachment.³²

2.2 Why is legislative oversight good for a governmental system?

To ensure effective oversight and achieve good governance, legislatures employ several oversight tools to oversee government activities. These oversight tools include plenary sessions, hearings in committees and question and answer sessions.³³ The reliability and integrity of these accountability mechanisms is important in determining how effectively parliamentarians represent public interests at provincial and national level.³⁴ Although oversight tools are necessary for accountability, they are not sufficient for effective oversight. Effective accountability is also dependent on additional aspects such as political will, whether parliament can modify legislation and whether parliamentarians are given proper information to

²⁸ *Mazibuko v Sisulu* 2013 4 SA 243 (WWC) para 32.

²⁹ Madue 2013 *Loyola Journal of Social Sciences* 38.

³⁰ Hudson and Wren 2007 <https://odi.org/en/publications/parliamentary-strengthening-in-developing-countries/> 13.

³¹ Hudson and Wren 2007 <https://odi.org/en/publications/parliamentary-strengthening-in-developing-countries/> 14.

³² Madue 2013 *Loyola Journal of Social Sciences* 38.

³³ Pelizzo and Stapenhurst 2006 https://ink.library.smu.edu.sg/soass_research/130/ 5.

³⁴ Parliament 2019 https://static.pmg.org.za/5th_Parliament_Legacy_Report_-_07_May_2019.pdf 22.

perform their oversight tasks adequately.³⁵ There are various factors which influence the minds of those in power as individuals and these play a role in how they carry out their duty of oversight. Even though the personal intentions of those elected to power may not be easily ascertained, openness, transparency and integrity are the core elements of the trust that binds the state and its citizens. Therefore, those elected to power must always honour these constitutional values when discharging public power, despite of their political affiliations.

2.3 How can oversight be exercised?

To achieve accountability, section 55 of the *Constitution* empowers the National Assembly to maintain oversight over all organs of state, and section 92 enables parliament to hold the executive accountable. In the first decade of South Africa's democracy, parliament mostly focussed on ensuring the transformation of the country's legislative landscape in line with the *Constitution*.³⁶ The oversight role received less attention and this in turn drew attention to parliament's concentration on its legislative authority functions as opposed to its oversight role.³⁷ This does not mean that government was not held accountable at all, and as a starting point parliament institutionalised public participation as an integral part of its oversight role.³⁸ It established a Task Team on Oversight and Accountability which had the responsibility of oversight derived from the *Constitution* in terms of section 55(2) and 42(3).³⁹ The Task Team was established through the Joint Rules Committee by both Houses.⁴⁰ The Task Team presented the Oversight and Accountability Model report which consisted of legislative oversight tools aimed at enhancing executive accountability.⁴¹ The Task Team report found that legislative oversight could be effective when implemented with due regard for the provisions of co-operative government, which require all spheres of government and organs of state to provide effective, transparent, accountable and coherent administration for the country.⁴² The report recommended that Members of Parliament (MPs) must be trained on their role of oversight in accordance with the provisions

³⁵ Pelizzo and Stapenhurst 2006 https://ink.library.smu.edu.sg/soss_research/130/ 5.

³⁶ Parliament 2009 <https://www.gov.za/documents/oversight-and-accountability-model> (hereafter *Oversight and Accountability Model*) 4.

³⁷ Notshulwana and Lebakeng "Constraints and Prospects for Legislative Oversight" 180; *Oversight and Accountability Model* 4.

³⁸ *Oversight and Accountability Model* 4.

³⁹ Section 43 of the *Constitution* provides for legislative authority and s 55 provides for powers of the National Assembly.

⁴⁰ *Oversight and Accountability Model* 5.

⁴¹ *Oversight and Accountability Model* 5.

⁴² *Oversight and Accountability Model* 37; s 41(1)(c) of the *Constitution*.

of the *Constitution* and rules of parliament in order to improve their ability to pass legislation, and implement and improve their ability of oversight as public representatives.⁴³ To achieve effective legislative oversight, parliamentarians must thus be given proper information to perform their duties.⁴⁴ Although the Oversight and Accountability Model consists of significant recommendations aimed at enhancing legislative oversight, the implementation is still lacking, as will be shown later in this study.

3 Legislative oversight tools

Legislative oversight can be achieved through the employment of various oversight tools. Some of the popular tools include budget votes, question and answer sessions in parliament, Members' statements, notices of motion, plenary hearing sessions and constituency work.⁴⁵ Pelizzo and Stapenhurst postulate that oversight tools can be placed into two categories.⁴⁶ The first category relates to the timing of the oversight action. The timing is influenced by the fact that the oversight is performed prior to the enactment and implementation of policies where the legislature is involved in the security of the proposed policies.⁴⁷ The second category relates to whether oversight tools are established internally in parliament or externally. The internal tools include question and answer sessions, hearings, and public account committees while the external tools consist of public accountability institutions such as the offices of the Auditor General and the Public Protector. Internal oversight tools allow parliament to hold the executive accountable directly for its actions. Where members of the executive fail to account for what they do, external tools must assist the legislature through investigation and reporting. Although the law is clear on the role of external oversight mechanisms, the recommendations of these institutions are often neglected, thus leading to the courts being called upon to hold the executive accountable, thus leading to issues of judicial overreach and interference with the internal workings of parliament. In *UDM v Speaker of the National Assembly*⁴⁸ the argument before the Court was that in order to ensure that the vote of no confidence in the President was impartial and not diluted by party loyalty in the National Assembly, the vote had to be by secret ballot.⁴⁹ The Speaker rejected the secret ballot vote and

⁴³ *Oversight and Accountability Model* 41.

⁴⁴ Stapenhurst *et al. Legislative Oversight and Budgeting* 31.

⁴⁵ Pelizzo and Stapenhurst *Tools for Legislative Oversight* 4.

⁴⁶ Pelizzo and Stapenhurst *Tools for Legislative Oversight* 4.

⁴⁷ Pelizzo and Stapenhurst *Tools for Legislative Oversight* 5.

⁴⁸ *United Democratic Movement v Speaker of the National Assembly* 2017 5 SA 300 (CC) (hereafter *UDM v Speaker of the NA*).

⁴⁹ *UDM v Speaker of the NA* para 15.

stated that she did not have the authority to prescribe such a process.⁵⁰ The Court held that the Speaker had powers to prescribe the secret ballot vote.⁵¹ Although it may seem as though the Courts were interfering with the internal workings of parliament, Mogoeng CJ reminded us in *EFF 2* that the role of the courts is to interpret and enforce the provisions of the *Constitution* and as such the discharge of this judicial function cannot amount to the courts' overstepping their powers.⁵²

It is important to note that although oversight tools are necessary, they are not sufficient to achieve accountability on their own. The impartiality of every individual member of parliament as well as how aggressively the parliamentary committee chairs perform their role also contribute towards effective oversight.⁵³ Effective oversight depends on the powers given to parliament to perform its functions properly and whether parliament can modify legislation to hold the executive accountable. Parliament expanded the functions of the Office of the Auditor General based on the growing extent of irregular and wasteful expenditure which was reported by the office. Parliament expanded the functions of the Office to go beyond auditing and reporting through the *Public Audit Amendment Act*.⁵⁴ One of the key features of the *Public Audit Amendment Act* is the amendment of section 5 of the *Public Audit Act 25 of 2004*.⁵⁵ The amendment authorises the Auditor General to refer substantial irregularities to the relevant institutions for further investigations, to take remedial action, and to issue a certificate of debt for failure to implement the remedial action if financial loss is involved.⁵⁶ The amendment to the *Public Audit Act* has introduced a much-needed accountability feature that will ensure the implementation of the remedial action of audit reports and allow the office to hold those in power accountable. This will also increase transparency in the on-going journey towards strengthening legislative oversight.

3.1 The power of the purse as an oversight tool

The development of the power of the purse dates to medieval times when the knights and burgesses of England were summoned to confirm the

⁵⁰ *UDM v Speaker of the NA* para 18.

⁵¹ *UDM v Speaker of the NA* para 97. The UDM's request for a motion of no confidence in the President to be decided by secret ballot is remitted to the Speaker for her to make a fresh decision.

⁵² *EFF 2* para 219.

⁵³ Stapenhurst *et al. Legislative Oversight and Budgeting* 31.

⁵⁴ *Public Audit Amendment Act 5 of 2018*.

⁵⁵ *Public Audit Act 25 of 2004*.

⁵⁶ *Public Audit Amendment Act 5 of 2018*.

consent of the local communities to the raising additional taxes.⁵⁷ The English Parliament used its power to order the supply of funds on the acceptance and redress by the monarch to public petitions presented by Parliament in the 14th century.⁵⁸ The English parliament's power of the purse steadily progressed and grew stronger during the 16th century, when Tudor monarchs needed parliamentary support and the voting of funds for their various political and religious battles.⁵⁹ The role of the legislature is to scrutinise and authorise the income and expenditure of the state to ensure that the national budget is implemented properly.⁶⁰ This gives the legislature the power to withhold state funds where a certain government department is not able to account for its expenditure. There are various ways in which this power can be exercised. Stapenhurst posits that some legislatures write the budget while others tend to approve executive budget proposals.⁶¹ The South African process uses the latter process and in most instances the legislature approves the budget proposals without any changes.

Parliament can hold the executive accountable through the power of the purse. The Minister of Finance announces the budget projections for the next financial year as well as the budget votes of each department, and parliament must approve the budget through a budget vote. The role of committees in ensuring accountability comes into play following the presentation of budgets, after which each Committee has hearings with the respective government Department over which it exercises oversight. The process is a mechanism used to determine whether the said government department has kept to its duties of the previous year and spent taxpayers' money appropriately. Where a government department has failed to uphold its duties, parliament is able to hold it accountable and may decide not to approve its budget.

Parliament must not only hold the executive accountable for public expenditure, but the legislature also has a duty to ensure that the measures it authorises are fiscally sound and compatible with the needs of the people and the available resources.⁶² These measures must also be implemented properly and efficiently. Government budgets play an important role in the planning and control of the economic activities and development of the

⁵⁷ Stapenhurst *et al. Legislative Oversight and Budgeting* 51.

⁵⁸ Stapenhurst *et al. Legislative Oversight and Budgeting* 52.

⁵⁹ Stapenhurst *et al. Legislative Oversight and Budgeting* 52.

⁶⁰ Stapenhurst *et al. Legislative Oversight and Budgeting* 51.

⁶¹ Stapenhurst *et al. Legislative Oversight and Budgeting* 52.

⁶² Parliament 2011 <https://www.parliament.gov.za/storage/app/media/BusinessPubs/BudgetAnalysisManual.pdf> (hereafter *Budget Analysis Manual*) 30.

country.⁶³ The budget is governed by the founding values of the *Constitution*, which include accountability and transparency. The legislature requires information in order to hold the executive accountable. This can be achieved only through transparency from government on their policies, practices and expenditure; hence the principle of transparency is important.⁶⁴ Accountability is important in the budget process because the state derives public funds mainly from the contributions of citizens through tax and from public borrowings.⁶⁵ The burden of the repayment of public loans falls on the shoulders of taxpayers and as such the government must be held accountable for how it spends taxpayers' money.⁶⁶

3.2 Question and answer sessions

Question time allows MPs the opportunity to question the executive on service delivery, policy, and other executive action on behalf of both their political parties and the electorate. The question time is not limited to issues of service delivery but may pertain to governance and the financial management of government departments.⁶⁷ Question time is the most popular form of legislative oversight because it has the most media coverage and sparks public interest.⁶⁸ De Ayala postulates that question time is the most confrontational among the workings of parliament, and this is because the main aim of oral questions is far from seeking information. Rather it is usually to score political points.⁶⁹ This is evidenced from various occasions in parliament where members of the opposition, the EFF, in particular, are sometimes removed from parliament for "disruptive behaviour" in various parliamentary proceedings including the State of the Nation Address in February 2023.⁷⁰

Section 92 of the *Constitution* provides that members of the Cabinet are accountable collectively and individually to parliament for the exercise of their powers and the performance of their functions.⁷¹ The process of putting questions to the executive is one of the ways in which the legislature can hold them accountable. Questions can be put for oral or written response

⁶³ *Budget Analysis Manual* 10.

⁶⁴ *Budget Analysis Manual* 12.

⁶⁵ *Budget Analysis Manual* 13.

⁶⁶ *Budget Analysis Manual* 13.

⁶⁷ Parliament 2019 https://static.pmg.org.za/5th_Parliament_Legacy_Report_-_07_May_2019.pdf 25.

⁶⁸ De Ayala 2001 *Journal of Pragmatics* 144.

⁶⁹ De Ayala 2001 *Journal of Pragmatics* 144.

⁷⁰ White 2023 <https://ewn.co.za/2023/02/09/sona-2023-disruptive-eff-members-kicked-out-of-national-assembly>.

⁷¹ Section 92 of the *Constitution*.

by the President, the Deputy President, and the Cabinet Ministers on matters for which they are responsible.⁷² MPs ask questions and have a duty to follow up on the answers provided by members of the executive. The executive has a duty to answer the questions truthfully, and failure to do so would mean that they lied to parliament, which is illegal and hinders the process of accountability and good governance.

In *Public Protector v President of the Republic of South Africa*⁷³ a matter regarding the findings of the and remedial actions taken by the Public Protector against the President was brought before the Court. On 6 November 2018 former DA leader Mr Mmusi Maimane posed a question to the President Cyril Ramaphosa relating to the payment of an amount of R500 000 made into an account which allegedly belonged to the President's son, Andile Ramaphosa.⁷⁴ The payment was allegedly paid by Gavin Watson, who was the Chief Executive Officer (CEO) of Africa Global Operations, formerly known as Bosasa. The President replied to question in parliament and explained that his son was involved in business with Africa Global Operations and the payment was related to work which he had conducted for the company.⁷⁵ Approximately a week later the President wrote a letter to the Speaker explaining that the answer he had given in parliament in response to the question which was posed to him by Mr Maimane was incorrect.⁷⁶ He further explained that the payment made was in fact a donation made by Mr Watson towards the CR17 campaign and the management of the campaign also issued a public statement to the media which sought to clarify the matter.⁷⁷

The letter gave rise to complaints directed to the office of the Public Protector, one of which regarding the relationship between the President and the company Africa Global Operations, and the other regarding the alleged breach of the Executive Ethics Code by the President.⁷⁸ The Court held that the Public Protector misconceived the Executive Ethics Code by holding that the President's acknowledgement that he gave an incorrect answer in parliament was sufficient for the finding that he had violated the Ethics Code.⁷⁹ The Court held further that the Public Protector had changed

⁷² *Oversight and Accountability Model 20.*

⁷³ *Public Protector v President of the Republic of South Africa* 2021 6 SA 37 (CC) (hereafter *Public Protector v President*).

⁷⁴ *Public Protector v President* paras 27 and 28.

⁷⁵ *Public Protector v President* para 29.

⁷⁶ *Public Protector v President* para 30.

⁷⁷ *Public Protector v President* para 31.

⁷⁸ *Public Protector v President* para 33.

⁷⁹ *Public Protector v President* para 59.

the wording of the Executive Ethics Code from "wilfully" to "inadvertent" by finding that the President's response was a breach of paragraph 2.3(a) of the Executive Ethics Code.⁸⁰

In the dissenting judgment Mogoeng CJ concluded that former DA leader Mmusi Maimane had lodged a complaint which allowed the Public Protector to investigate all aspects of the CR 17 campaign which she considered to be potentially unethical. He held further that financial assistance from individual donors amounted to a personal benefit to the President and thus created a situation involving a risk of conflict between the President's private interests and his pursuit of the ANC presidency with assistance from private donors and his responsibilities as Deputy President of the country and a Member of Parliament.⁸¹ Mogoeng CJ reminded us of the founding values of the *Constitution* and what they meant in this instance, and held that transparency and openness demanded that the courts pierce through the veil of trust in order to disclose the culture of impunity and the level of government corruption in the country.⁸²

Although there are accountability tools in place, the implementation is lacking. The President made a false statement in parliament and later retracted it in a letter correcting himself. The Court ruled in his favour but the question remains, what are the consequences for members of the executive who mislead parliament when called to account? The *Executive Members Ethics Act* requires members to act in good faith and in the interests of good governance.⁸³ The duty to act in good faith requires members to be transparent and to account for their actions while in their capacity as state officials. However, the Act does not make provisions for the form of punishment where a member is found guilty of misleading parliament, leaving this to the discretion of the courts. This study argues for a reform in the South African legislative framework to provide for better accountability through enacting laws that hold the executive accountable for misleading parliament when called to account. This in turn would require the *Executive Members Ethics Act* and other legislation to provide accountability mechanisms where the executive is found guilty of infringing on the *Constitution*.

⁸⁰ *Public Protector v President* para 59.

⁸¹ *Public Protector v President* para 163.

⁸² *Public Protector v President* para 169.

⁸³ Section 2 of the *Executive Members Ethics Act* 84 of 1998.

3.3 Vote of no confidence in the President as a form of accountability

Removal from office is the most drastic step which parliament can take where it is found that the President failed to perform according to his/her constitutional duties.⁸⁴ A motion of no confidence in the president may be moved by any Member of Parliament by giving a notice of a motion, or a member of any political party can bring up issues for debate in parliament, thereby helping to fulfil parliament's oversight duties. In *UDM v Speaker of the National Assembly* the court held that:⁸⁵

When all the regular checks and balances seem to be ineffective or a serious accountability breach is thought to have occurred, then the citizens' best interests could at times demand a resort to the ultimate accountability-ensuring mechanisms. These measures range from being voted out of office by the electorate to removal by Parliament through a motion of no confidence or impeachment. These are crucial accountability-enhancing instruments that forever remind the President and Cabinet of the worst repercussions that could be visited upon them, for a perceived or actual mismanagement of the people's best interests.

During former President Jacob Zuma's administration there had been several attempts to hold him and his government accountable including votes of no confidence following the Public Protector's reports on his allegedly inappropriate conduct.⁸⁶ Prior to the vote of no confidence, there are various procedures which the legislature can apply to hold the executive accountable. In *Mazibuko v Sisulu*⁸⁷ the Court held that the motion of no confidence plays a significant role in giving effect to the principle of checks and balances of the South African model of the separation of powers.⁸⁸ It is thus important that the process be applied in instances where it is found that the executive failed to fulfil its constitutional duties.

Following multiple unsuccessful votes of no confidence in former President Zuma, the sixth attempt to remove him from office through a secret ballot revealed divisions in the majority party as he narrowly escaped removal

⁸⁴ Section 83(b) of the *Constitution*.

⁸⁵ *UDM v Speaker of the NA* para 10.

⁸⁶ Madonsela 2014 <https://www.asclibrary.nl/docs/374716307.pdf>; Madonsela 2016 <https://www.sahistory.org.za/archive/state-capture-report-public-protector-14-october-2016>.

⁸⁷ *Mazibuko v Sisulu* 2013 6 SA 249 (CC) para 21.

⁸⁸ *Mazibuko v Sisulu* 2013 6 SA 249 (CC) para 21.

from office.⁸⁹ After the sixth vote Zuma went to parliament to thank the members of the ANC and said the following:

I've just come to say thank you to all of you. Those comrades who are in parliament needed the support from the membership. You came in your numbers to demonstrate that the ANC is there, is powerful, is big. It is difficult to defeat the ANC, but you can try.⁹⁰

The power of the majority party in parliament hinders accountability. In the recent Section 89 Report⁹¹ it was found that the President may have violated the *Constitution* and committed serious misconduct in relation to the Phala Phala farm. Where it is found that the executive has infringed on the *Constitution* an investigation into such allegations to hold the member accountable would be appropriate. However, parliament elected not to adopt the Section 89 Report, based on a majority vote.⁹²

It is evident from the above that the executive needs the legislature if it wishes to stay in office. The legislature holds enough power to remove the executive from office as an accountability measure when it abuses its power and state resources. Even though the legislature holds the power of removal of the executive, it has never succeeded in exercising it. This is due to the challenge of one-party dominance in parliament. The power of the majority party was seen through these multiple votes of no confidence. A party which governs the country with enough power to control both the legislature and the executive is a threat to democracy and the founding values on which the *Constitution* was built. The doctrine of the separation of powers becomes a myth when those in power control the branch that is supposed to check their authority, as it removes room for any form of accountability.

3.4 Plenary debate sessions and constituency work

Committees engage with the public through plenary debates to bring important information to the attention of the government regarding specific government programmes or legislation required to improve service delivery. The appropriate use of plenary sessions as an oversight mechanism is

⁸⁹ Allison 2017 <https://www.theguardian.com/world/2017/aug/08/jacob-zuma-survives-no-confidence-vote-south-african-president>.

⁹⁰ Allison 2017 <https://www.theguardian.com/world/2017/aug/08/jacob-zuma-survives-no-confidence-vote-south-african-president>.

⁹¹ Parliament 2022 <https://www.parliament.gov.za/storage/app/media/Links/2022/november/30-11-2022/33659%20SECTION%2089%20INDEPENDENT%20PANEL%20Volume%201.pdf>.

⁹² Parliament 2022 <https://www.parliament.gov.za/press-releases/media-release-speaker-declines-request-secret-ballot-panel-report-debate>.

critical in strengthening legislative oversight because these sittings are the most frequently broadcast parliamentary proceedings on media platforms.⁹³ In plenary debates certain mechanisms for conducting oversight are used.⁹⁴ These include question time, the consideration of committee reports, showcasing, scrutinising and debating the implementation of policy and budget votes, members' statements, and questions by members, which draw the attention of the executive to the concerns of members' constituents.⁹⁵ In addition to these mechanisms, parliamentary committees also have the authority to interact with civil society organisations, experts and professional bodies to enhance accountability.⁹⁶ In addition, committees may also call Ministers and departmental heads to account on any matter which they are effecting accountability over in terms of section 56 of the *Constitution*.⁹⁷

Constituency work allows MPs an opportunity to conduct individual oversight. It provides the closest form of interaction between MPs and the public.⁹⁸ MPs have a duty to alert parliament to any issues identified during such oversight interventions. MPs assist with access to services such as housing, healthcare, and social grants. During the constituency work, issues of concern to the public are brought to the attention of MPs. Constituency work and debates are held in offices located across the country, where the public can approach elected representatives for assistance related to accessing basic services. These issues can be formally channelled through the parliamentary processes for executive response, once introduced.⁹⁹

3.5 Committee systems, the role of Portfolio Committees in the National Assembly and Select Committees in the NCOP

Parliament can be described as the face of politics, where political parties and their leaders confront one another.¹⁰⁰ However, this not the only work of the legislature. Much of the work done by MPs is in committees. Committees carry out most of the work in parliament and their meetings are open to the public. The committees are intended to bridge the gap between government and the people. These structures allow the public to express

⁹³ Parliament 2019 https://static.pmg.org.za/5th_Parliament_Legacy_Report_-_07_May_2019.pdf 23.

⁹⁴ *Oversight and Accountability Model* 21.

⁹⁵ *Oversight and Accountability Model* 21.

⁹⁶ *Oversight and Accountability Model* 17.

⁹⁷ Section 56 of the *Constitution*.

⁹⁸ *Oversight and Accountability Model* 31.

⁹⁹ *Oversight and Accountability Model* 31.

¹⁰⁰ De Ayala 2001 *Journal of Pragmatics* 143.

their opinions directly to try and influence the outcome of parliament's decisions.¹⁰¹ Parliament must carry out the task of legislative oversight by working in structured committees which give it an opportunity to maximise its performance. Committees are also intended to increase the participation of MPs in discussions and enable them to develop their expertise through in-depth knowledge of the committees and their specific areas of work. Committees act as the bridge between the people and government as they provide the public with opportunities to present their views directly to MPs by allowing a forum for parliament to hear evidence which is relevant to the work of the committee concerned.

Parliamentary committees are an extension of the House, and much of the work encompasses considering the wording of legislation, hearing presentations on the work of government departments, and the deliberation of evidence which is given by those departments. The legislature has a constitutional duty to ensure efficient public administration through the establishment of committees. Madue describes the committees as specialist bodies of the legislature that play an important role in formulating laws and policies of certain government departments and scrutinising the actions of those departments and other organs of state.¹⁰² The work of government departments headed by Ministers is shadowed by committees in the National Assembly at national level and they are referred to as Portfolio Committees. At provincial level, there are Select Committees in the National Council of Provinces which focus on provincial issues, and they include numerous departments. In addition to these committees, there are Standing Committees which focus on financial matters and ad hoc committees established to deal with specific issues brought before parliament. These include reports from the office of the Public Protector.

Committees conduct their business on behalf of the House of Parliament and have a duty to report back to the House on matters which were referred to it for consideration. They may also report any other matter they deem necessary, provided the matter is within the scope of its mandate.¹⁰³ The committees are required to file reports which are published on the Parliamentary website in a document named the Announcements Tablings and Committee Reports.¹⁰⁴ The National Assembly makes decisions based on the adoption of the reports provided by the committees, with their

¹⁰¹ Nicol 2019 https://pmg.org.za/static/resources/docs/Martin_Nicol-Engine_Rooms_of_Parliament.pdf.

¹⁰² Madue 2013 *Loyola Journal of Social Sciences* 43.

¹⁰³ *Oversight and Accountability Model* 18.

¹⁰⁴ Parliament date unknown <https://www.parliament.gov.za/atc>.

recommendations. The committees provide a platform for the public to present their views directly to members of parliament, as their meetings are open to the public.¹⁰⁵ They have different functions, including monitoring the work and budget of national government and holding it to account.

Parliamentary committees have the authority to summon any person to appear before them to give evidence or produce documents. They may also require any person or institution to report to them. They derive their authority from the *Constitution* and the Rules of Parliament. Section 42(3) of the *Constitution* provides that the National Assembly is elected to represent the people and to ensure a government by the people. However, the credibility and public confidence of parliament has declined due to one instance of inaction by one of its committees. In *EFF 1*¹⁰⁶ the Court held that parliament had failed to exercise its executive oversight role by not holding the President accountable by ensuring that he complied with the remedial action taken against him by the Public Protector's report.¹⁰⁷ The decision of the Court was a result of the endorsement of the Ad Hoc Committee on the Police Minister's Report on Nkandla by most of the members of the National Assembly.¹⁰⁸ The Court in *EFF 1* held further that section 42(3) of the *Constitution* does not define structures within which the National Assembly must operate in its attempt to fulfil its duties but that it has been afforded the flexibility to determine the best way to carry out its legal mandate.¹⁰⁹

Committees are a new feature in governments worldwide. They are a significant development in parliamentary accountability.¹¹⁰ These institutions consist of members of the legislature and promote a detailed investigation into matters which encourage debate on public policy and as such have gained a positive reputation over the years.¹¹¹ Halligan and Reid believe that parliamentary committees allow for the existence of a non-partisan area in the political field to allow members to deal with questions that may be considered unsuitable for parliamentary debate.¹¹² They argue that these agencies give members of political parties, including the governing party, an opportunity to hold government accountable without the burden of having to be loyal to the parties they are affiliated with. However,

¹⁰⁵ *Oversight and Accountability Model* 18.

¹⁰⁶ *Economic Freedom Fighters v Speaker of the National Assembly* 2016 3 SA 580 (CC) (hereafter *EFF 1*).

¹⁰⁷ *EFF 1* para 104.

¹⁰⁸ *EFF 1* para 12.

¹⁰⁹ *EFF 1* para 87.

¹¹⁰ Halligan and Reid 2016 *Parliamentary Affairs* 230.

¹¹¹ Halligan and Reid 2016 *Parliamentary Affairs* 230.

¹¹² Halligan and Reid 2016 *Parliamentary Affairs* 231.

the issue of party loyalty and the lack of accountability even in these committees in South Africa have proven this theory to be dubious.¹¹³

High-ranking political party members exercise their power over MPs, making it difficult for them to exercise their oversight role. This challenge is due to South Africa's electoral system which is based on a party-list and a proportional representation system. The electoral system has allowed the ANC to hold the majority in parliament since the advent of democracy in 1994 due to the party's popularity. The majority party chairs all the portfolio committees except for the Public Accounts Committee, which is chaired by a member of an opposition party. Due to political party dominance in parliament, members of the majority party in committees miss their opportunity to ask the relevant questions of government officials to prove their loyalty to their political affiliations. An example is the evidence given by former Transport Committee Chairperson Dikeledi Magadzi at the State Capture Commission that she had never questioned the decisions of the ruling party when voting.¹¹⁴

In theory, parliament has a constitutional duty to hold the executive to account, but it is not an easy task to carry out in practice. According to Martin Nicol, who worked as a non-partisan parliamentary researcher for the Portfolio Committee on Mineral Resources during the fifth parliament, all political parties in the committee expressed their frustration at the executive for not answering their questions and instead making promises to provide information regarding issues brought up, which they failed to keep.¹¹⁵ The recommendations made by the committee in reports were often ignored by what seemed to be an overbearing treasury.¹¹⁶ The lack of accountability shows a culture of impunity by the executive and suggests that the legislative oversight role needs strengthening.

State Capture Commission Chairperson, Zondo DCJ (at the time) raised concerns regarding legislative oversight after hearing parliamentary

¹¹³ Nicol 2019 https://pmg.org.za/static/resources/docs/Martin_Nicol-Engine_Rooms_of_Parliament.pdf 8.

¹¹⁴ Gerber 2021 https://www.news24.com/news24/southafrica/news/i-represent-the-anc-and-i-will-always-toe-the-party-line-magadzi-tells-zondo-commission-20210208?utm_source=ground.news&utm_medium=referral.

¹¹⁵ Nicol 2019 https://pmg.org.za/static/resources/docs/Martin_Nicol-Engine_Rooms_of_Parliament.pdf 13.

¹¹⁶ Nicol 2019 https://pmg.org.za/static/resources/docs/Martin_Nicol-Engine_Rooms_of_Parliament.pdf 13.

oversight-related evidence during the inquiry.¹¹⁷ He stated that based on the evidence that was being given, it was as if there was no oversight in parliament, even though some of the parliamentary committees had attempted to call the executive to account.¹¹⁸ The Standing Committee on Public Accounts (SCOPA) is the only committee with a member of the opposition party as chairperson and seems to be one of the most successful in exercising oversight over executive conduct.¹¹⁹ Zondo DCJ stated that parliamentary oversight seemed to be exercised by members of opposition parties whereas there could be a vast difference in terms of corruption and good governance if all MPs took the role of legislative oversight seriously.¹²⁰ He further stated that it seemed as though the majority party in parliament had created study groups with Cabinet Ministers who were also members of the governing party where they would discuss issues of oversight and Ministers would suggest that committee members should not exercise their oversight role properly by not asking questions that were relevant in holding the executive accountable.¹²¹

4 Weaknesses in legislative oversight in South Africa

There are various challenges which exist around the issue of government accountability and the relevant legislative oversight tools. It is important to identify the challenges to legislative oversight to determine mechanisms which may assist in strengthening the role of parliament in holding the executive accountable.¹²² Due to various factors, the political sphere where MPs must carry out their oversight functions may sometimes be limited due to political party loyalty.

¹¹⁷ Erasmus 2021 <https://www.dailymaverick.co.za/article/2021-02-18-state-of-corruption-commission-weighs-up-the-failure-of-parliamentary-oversight-in-south-africa/>.

¹¹⁸ Erasmus 2021 <https://www.dailymaverick.co.za/article/2021-02-18-state-of-corruption-commission-weighs-up-the-failure-of-parliamentary-oversight-in-south-africa/>.

¹¹⁹ Erasmus 2021 <https://www.dailymaverick.co.za/article/2021-02-18-state-of-corruption-commission-weighs-up-the-failure-of-parliamentary-oversight-in-south-africa/>.

¹²⁰ SABC News 2021 <https://www.youtube.com/watch?v=pSSsqfYeICE&t=3327s>.

¹²¹ SABC News 2021 <https://www.youtube.com/watch?v=pSSsqfYeICE&t=3327s>.

¹²² IPU and UNDP 2017 <https://www.ipu.org/resources/publications/reports/2017-10/global-parliamentary-report-2017-parliamentary-oversight-parliaments-power-hold-government-account> 25.

4.1 *The challenge to freedom of expression by MPs in parliament*

Freedom of expression is an important element of legislative oversight.¹²³ A particular challenge regarding legislative oversight is the fact that MPs are not able to act or speak freely when performing their parliamentary duties. The freedom of expression of MPs must be protected as it is fundamental to their ability to carry out their oversight activities without prejudice.¹²⁴ An instance where MPs were not able to freely express themselves in South Africa would be the issue of the secret ballot which was rejected in *UDM v Speaker of the National Assembly*.¹²⁵ The UDM described what it termed the ostensible importance of the matter, the public interest imperative that a truly democratic outcome be guaranteed, and the high probability that the vote would be tainted by the perceived fear on the part of MPs of career-limiting consequences, which would prevent them from exercising their free will. The oath or affirmation taken by Members and considerations of accountability were also added by the UDM to the motivation in support of the secret ballot as the preferred voting procedure.¹²⁶ The Speaker of the National Assembly, Ms Nosiviwe Mapisa-Nqakula declined the request, just as she declined the request made by various political parties to reconsider her decision not to allow the voting process on the adoption of the Section 89 Independent Panel's Report to take place through a secret ballot.¹²⁷ While this was the request from various opposition parties, the majority party wrote to the Speaker requesting that she upheld her previous decision not to allow the process to be through a secret ballot. The Speaker has the discretion to determine the voting method to be utilised when deciding on questions or motions before the House where the Rules of the National Assembly make no such prescription. Due to the challenge of party loyalty in parliament, MPs are not able to exercise political their will when deciding on matters that require voting. This prevents them from being impartial on matters concerning holding the executive accountable. MPs must be free to

¹²³ IPU and UNDP 2017 <https://www.ipu.org/resources/publications/reports/2017-10/global-parliamentary-report-2017-parliamentary-oversight-parliaments-power-hold-government-account> 25.

¹²⁴ IPU and UNDP 2017 <https://www.ipu.org/resources/publications/reports/2017-10/global-parliamentary-report-2017-parliamentary-oversight-parliaments-power-hold-government-account> 25.

¹²⁵ *UDM v Speaker of the NA* para 15.

¹²⁶ *UDM v Speaker of the NA* para 15.

¹²⁷ Parliament 2022 <https://www.parliament.gov.za/press-releases/media-release-speaker-declines-request-secret-ballot-panel-report-debate>.

seek, receive and communicate information and ideas without fear of punishment by the political parties they are affiliated to.¹²⁸

4.2 Lack of support in parliament

Where the general political environment is not supportive, the desire to scrutinise government conduct is not particularly strong. In certain instances the general political environment is hostile to any attempt to hold the executive accountable. Members of the EFF have been physically removed from parliament for disruption during the State of the Nation Address where they asked the former President questions to hold him accountable. The then Speaker, Baleka Mbete, asked the EFF leader to leave the chamber after insisting that questions regarding the President's address be asked at the official debate which would take place a week later.¹²⁹ Due to the lack of support, MPs from opposition parties are likely to express harsher judgements than their peers in the governing party. The old culture of one-party dominance perpetuates the character of a rubber-stamp parliament where decisions are made by the majority party, thus making the votes of the opposition in important matters inconsequential.¹³⁰

There are institutional risks that MPs, particularly those of the ruling party, are likely to be exposed to when they openly question or challenge the suitability of the appointment of particular colleagues to certain positions or the decisions they've made in their official capacity as public office bearers.¹³¹ MPs of the ruling party also often vote in favour of the majority party as opposed to putting the interests of the public first, and they must ensure that the majority party has the full support of parliament, thus limiting legislative oversight.¹³² The issue of corruption over the past decade not only revealed the lack of legislative oversight but also the power of the executive and how its relationship with the legislature contributes to a lack

¹²⁸ IPU and UNDP 2017 <https://www.ipu.org/resources/publications/reports/2017-10/global-parliamentary-report-2017-parliamentary-oversight-parliaments-power-hold-government-account> 25.

¹²⁹ Pillay 2016 <https://mg.co.za/article/2016-02-11-eff-chants-zupta-must-fall-as-they-exit-sona/>.

¹³⁰ IPU and UNDP 2017 <https://www.ipu.org/resources/publications/reports/2017-10/global-parliamentary-report-2017-parliamentary-oversight-parliaments-power-hold-government-account> 26.

¹³¹ *UDM v Speaker of the NA* para 76.

¹³² IPU and UNDP 2017 <https://www.ipu.org/resources/publications/reports/2017-10/global-parliamentary-report-2017-parliamentary-oversight-parliaments-power-hold-government-account> 26.

of government accountability. South Africa's party list system may also contribute to the lack of legislative oversight.

The lack of political will by MPs poses a challenge to effective legislative oversight. MPs must demonstrate the will and commitment to be prepared to question and challenge the executive, even when doing so may be politically challenging.¹³³ While parliament may have the constitutional authority to hold government accountable, putting those powers into practice is rarely straightforward due to various challenges which MPs are faced with.¹³⁴ There is a need for commitment from MPs to carry out their oversight role and ensure the implementation of the law to impact on and improve the lives of citizens. While there may be many other factors, these are just some of the factors that have an impact on the will of MPs to carry out legislative oversight. These challenges prevent the exercise of effective accountability by parliament. Legislative oversight also provides an opportunity to correct policy that is not working and to rebuild the trust of people in parliament and MPs as well as to develop parliament's capacity for change.¹³⁵

4.3 Political party loyalism and dominance

Political party loyalty is shown when members of political parties use their positions in government to benefit the party which they are affiliated to because they are beholden to the party. Party loyalty is detrimental to democracy and good governance as one political party holds a majority in parliament with no possibility of change in the future. This form of majoritarian authority results in a lack of accountability where parliament is undermined because the very same people who must hold the government accountable act in the interests of their political parties and not in those of the people who elected them to parliament.¹³⁶ MPs have a duty to promote the values of the *Constitution* first before they are loyal to their political parties. However, it is not always that simple. This is because MPs who defy their political party may face serious consequences, including being expelled from their party and losing their seats in parliament. MPs who have

¹³³ IPU and UNDP 2017 <https://www.ipu.org/resources/publications/reports/2017-10/global-parliamentary-report-2017-parliamentary-oversight-parliaments-power-hold-government-account> 27.

¹³⁴ IPU and UNDP 2017 <https://www.ipu.org/resources/publications/reports/2017-10/global-parliamentary-report-2017-parliamentary-oversight-parliaments-power-hold-government-account> 27.

¹³⁵ IPU and UNDP 2017 <https://www.ipu.org/resources/publications/reports/2017-10/global-parliamentary-report-2017-parliamentary-oversight-parliaments-power-hold-government-account> 27.

¹³⁶ Southall 2005 *Africa Spectrum* 65.

a constitutional duty to hold the executive accountable while being required to toe the party line face various difficulties.¹³⁷

5 Possible solutions to strengthening legislative oversight in South Africa

This study has identified various weaknesses in the legislature's oversight role as such. This section proposes possible responses to these challenges to strengthen legislative oversight.

Parliament has attempted to strengthen its legislative oversight and accountability role through the development of the Oversight and Accountability Model.¹³⁸ The model was established to ensure the implementation of government's objectives and to improve the quality of life of the people. Most importantly, the model was established to improve the capacity of MPs to perform their constitutional obligations.¹³⁹ The accountability model was finalised in 2009 and was reviewed to align it with the Oversight Model of the South African Legislative Sector.¹⁴⁰ The Oversight and Accountability Model was also reviewed to incorporate lessons from court decisions and historical research done by parliament. Although the objectives of the model are clear, there are still issues regarding a lack of oversight as evidenced in various events, including state capture. To enhance accountability the model must include a detailed consideration of the constituency system and the obligations of constituency work.¹⁴¹

This study recommends enhancing the individual oversight of MPs to strengthen legislative oversight as a whole. The role of individual oversight is performed through asking questions, debating, making member statements, proposing motions without notice, and constituency work. Interventions made by individual members are among the most effective forms of legislative oversight. This form of oversight empowers committee members to interact directly with government departments under each organ of state, and members have a duty to report the findings from their interventions to parliament. In strengthening political will, this study recommends that individual oversight be improved through encouraging

¹³⁷ De Vos "Separation of Powers and the National Legislature" 124.

¹³⁸ *Oversight and Accountability Model 4.*

¹³⁹ *Oversight and Accountability Model 4.*

¹⁴⁰ *Oversight Model of the South African Legislative Sector.*

¹⁴¹ Parliament 2009 https://www.gov.za/sites/default/files/gcis_document/201409/panelassessparl.pdf 62.

motions such as votes of no confidence to be passed through a secret ballot. In *UDM v Speaker of the National Assembly* the court reiterated that the Speaker had the authority to conduct secret ballots.¹⁴² This form of accountability enhances the individual oversight of MPs by allowing them to hold the executive accountable without the fear of being punished by their political parties.

This study recommends that chairpersons of portfolio committees must be appointed based on merit. The requirements could include but not be limited to qualifications and experience. Instead of appointing members from the majority party as they have the most seats in parliament, chairpersons of portfolio committees must be appointed based on a selection process, to ensure impartiality and independence.

The time allocated to opposition political parties during debates and question time in parliament should be increased. The work of the legislature is government driven. It is focussed on the actual workings of the executive. Although MPs are given an opportunity to ask questions during parliamentary sessions, this study suggests that the way time is allocated for MPs to speak during question-and-answer sessions may be one of the challenges to effective oversight. The time allocated to each MP is determined by the number of seats the MP's political party holds in parliament. The ANC holds the greatest number of seats, which gives them the most time and the most control over the sessions meant to hold the executive accountable. The degree of control which the ANC has over the business of the legislature is the norm in parliamentary systems where there is a majority ruling party. This poses a threat to democracy.¹⁴³ This study argues that opposition political parties must be allowed enough time to pose important questions to the executive to hold them accountable for their actions.

The current electoral system forces MPs to do the bidding of their political parties and not of the citizens they purport to represent. This study recommends the reform of the current electoral system to address the issue of weaknesses in legislative oversight. Legislative oversight can be strengthened through individual and collective accountability.¹⁴⁴ Although collective accountability is easier to achieve through general elections where the public can vote out of power those who fail to fulfil their duties,

¹⁴² See *UDM v Speaker of the NA* para 92.

¹⁴³ Murray and Nakhjavani 2006 *Foreign Relations* 216.

¹⁴⁴ Van Zyl Slabbert 2003 https://www.gov.za/sites/default/files/gcis_document/201409/electt1.pdf 18-19.

individual accountability is not easily achievable. However, individual accountability could be achieved through a multi-member constituency system where political parties suggest a certain number of candidates in a certain constituency where voters select those with the qualities they deem fit.¹⁴⁵

6 Conclusion

South Africa's move to a constitutional democracy means that the action of all three branches of government will be subject to scrutiny under the principle of checks and balances. However, the implementation of oversight between the legislature and the executive has proven to be a challenge in recent years with the findings of abuse of state power revealed by the reports emanating from the Office of the Public Protector. The issue of party loyalty and dominance in parliament has proven to be one of the major challenges to effective legislative oversight. The executive can escape accountability due to members being beholden to their political parties and thus not asking the relevant questions during the question-and-answer sessions in parliament. Effective legislative oversight requires the exercise of will on the part of individual members of parliament to make use of the oversight mechanisms at their disposal to the best of their ability. Committees could assist parliament in its oversight role but their effectiveness is dependent on their members, who are appointed for political reasons. This may serve as an obstacle to achieving oversight, where they decide to act in favour of their political party rather than to execute their constitutional mandate. The success of legislative oversight also depends on the extent to which committees and individual members of parliament actively exercise their oversight duty.

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List of Abbreviations

IPU	Inter-Parliamentary Union
MPAC	Municipal Public Accounts Committees
SALS	South African Legislative Sector
UNDP	United Nations Development Programme