

# PARLIAMENTARY OVERSIGHT OF THE SOUTH AFRICAN DEPARTMENT OF DEFENCE: 1994 TO 2003

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## Introduction

When in 1995 the Minister of Defence – a senior member of the African National Congress (ANC) and a veteran of the Freedom Struggle – presented his plans to buy secondhand ships and submarines for the South African Navy, the Joint Standing Committee on Defence (JSCD) politely refused to endorse his plans. The committee not only questioned his decision to buy secondhand ships and submarines, but also declared that the very legitimacy of the defence force needed to be tested before new acquisitions of this scale could be approved. A little later, the language preference of command-and-control became the focus of the South African defence debate. After much deliberation the committee recommended that English be used, as most members of the newly integrated South African National Defence Force (SANDF) could understand it. This was challenged by the Department of Defence and the chief of the SANDF requested the president to overrule Parliament. President Mandela tried to get the chairperson of the JSCD to back down, only to be told that the decision rested with the committee as a whole, and not with the chairperson. Ultimately the president discussed the matter with the committee. The result is that the decision of the JSCD remains unchanged until today. The Minister of Defence and the department learned that Parliament could use its powers, without fear, if it wanted to. These events led to Africa's most comprehensive defence transformation in modern times, culminating in the South African White Paper on Defence (1996) and the Defence Review (1998).

Much later, in 2000, when the Conventional Arms Control Bill was tabled in Parliament, the National Convention Arms Control Committee (NCACC) preferred that the bill be discussed by the Foreign Affairs Committee. The Portfolio Committee on Defence considered the matter, studied the rules, and decided that in fact the bill fell directly within its scope of work and therefore invited the Committee on Foreign Affairs to consider the bill together with it. After the first meeting, the committee mandated the chairperson to have discussions with the minister and the chairperson of the NCACC, who sponsored the bill. He was asked to withdraw the bill as it was, in the opinion of

the committee, badly drafted. Other than grammatical errors, the constitutionality of the bill and adherence to policy guidelines were challenged. In the end the bill was withdrawn.

When the new version was tabled the committee decided that, as the drafters still failed to present a bill that was constitutionally and politically correct, it could be rejected within the Rules of Parliament. The National Convention Arms Control (NCAC) Bill was the first of its kind and the committee argued that as public representatives they had a duty to control South Africa's choice of clients and partners for defence related trade and cooperation. As the committee had participated in the formulation and approval of security and defence policy they were adamant to see it reflected in legislation. They refused to pass any law they could not live with. They took the position that as elected public representatives, they had an obligation to reflect the aspirations of South Africans in the policies and laws of the country.

### **The constitutional framework**

Chapter 4 of the South African Constitution, 1996 sets out the functions of the National Assembly and the National Council of Provinces, and Section 42(3) provides that:

*“The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinising and overseeing executive action.”<sup>1</sup>*

Like most countries, South Africa gives its security establishments the duty to defend and protect the Republic against threats from within and outside our society. At an international expert meeting organised by the Commonwealth Policy Studies Unit (CPSU) it was observed that these structures are given powers to apply a range of tools coercively in the pursuit of this objective, often in conditions of secrecy. It is this very capacity for the use of force that makes it so important that parliamentarians must be able to control the agenda and character of these structures to ensure that these tools of coercion are not abused.

When in 1994, at the end of apartheid, South Africa integrated seven armed forces to form a single new national defence force this required a complete transformation from the way in which defence was conducted in the previous era. The legitimacy of the force, equitable race and gender representation, a non-provocative defence posture, appropriate and affordable force design, a culture aligned with the norms and values of the nation and the subordination of the armed forces to civil authority became the focus of the new defence

debate in South Africa. These issues were considered of prime importance and required the attention of Parliament to ensure a new defence force that was aligned with the principles of defence in the new South African democracy.

As a young democracy, representatives of the people need constant mandates from the people. As a country that did not previously allow public participation on security issues, the opinion and will of the people had not been accommodated. In the young, new South African democracy, respect for human rights and the rule of law become paramount; that is why South Africa elected to provide for an Oversight Committee on Defence in the Constitution. Chapter 14 of the Interim Constitution (1993) and Chapter 11 of the Constitution (1996) are devoted to South Africa's security services and civil-military relations.<sup>2</sup>

The constitution provides that the president is the commander-in-chief of the SANDF, the minister of defence, who is appointed by the president, is accountable to Parliament and Parliament is given a range of powers to exercise effective democratic control over the military. Parliament authorises policy, has legislative powers, approves the budget and can endorse, alter or cancel the president's decision to employ the SANDF. The secretary for defence (a civilian) is the head of department and accounting officer as well as chief policy advisor to the minister, while the chief of the defence force has executive military powers under the direction of the minister.

### **The Joint Standing Committee on Defence in the transition phase**

The JSCD was established in terms of the South African constitution and is mandated:

“to investigate and make recommendations on the budget, functioning, organisation, armaments, policy, morale and state of preparedness of the National Defence Force and to perform such other functions relating to parliamentary supervision of the Force as may be prescribed by law.”<sup>3</sup>

The JSCD has since 1994 monitored the integration and transformation of the SANDF. It has made some recommendations, criticised and given praise when this was due. To monitor the transformation process the committee had to grapple with:

- the need to provide decisive and strategic leadership to guide the transformation process;
- the capacity to direct and monitor transformation of the organisation's culture, traditions, leadership styles and racial and gender compositions. The requirement for a civic education programme was identified very early on during the integration process. The programme is ongoing and is used to re-orientate all members and to cultivate shared values within the organisation;

- the need for the public representatives to 'sell' the SANDF to the people to obtain the largest possible degree of 'national consensus on defence' and to ensure the people's ownership of the defence force;
- the need to balance the public interest with the need for confidentiality if this is in the interest of the safety and protection of operatives and the overall security of the country; and
- the importance of establishing a common understanding of concepts and definitions. The major issues were civil as opposed to civilian authority, non-partisan versus apolitical service men and women and the meaning of control (was it managing, interfering or monitoring?). It was necessary for the JSCD not to allow itself to end up micro managing the Defence Department, but to establish and maintain a healthy civil–military relationship. The committee recognised that civilians were not necessarily better or more efficient in holding the military to account. A quick study of Africa's security forces will show that civilians have not always been better at the oversight of security forces. PW Botha is one such example for under his rule (1978–89) the South African armed forces become politicised. Nigeria's many military administrations were always supported by or run with the connivance of civilians who would 'invite' the military into politics. In the current South African case, the JSCD tries to provide clear, unambiguous guidance to enable the military to achieve its defined mandate and objectives within the allocated resources. Committee consensus is important to build trust amongst committee members and between the committee and the military forces.

There is uncertainty and questions are often asked as to why South Africa needed, and still needs, the Parliamentary Defence Committee. This must be put into perspective:

- South Africa needed to integrate previous enemies into one national defence force. The emphasis was on real integration and not simply absorption into the old South African Defence Force. Political oversight was required to ensure that all interests were served.
- Due to the history of the country, the civilian population had neither the knowledge of, nor acceptance, confidence or respect for, the military. They would not accept or trust a non-transparent solution.
- Negotiations before the formal integration had not gone particularly smoothly. Many matters remained unsolved and only the peoples' representatives could adjudicate these issues.
- The transformation of the SANDF is an ongoing issue and still needs parliamentary oversight. Furthermore, the requirement for transparency, accountability and democratic control is fundamental to defence in a democracy and requires the continued functioning of the committee.

## **The powers and functions of parliamentary committees**

The JSCD straddles the National Assembly and the National Council of Provinces and was therefore seen as a mechanism for multiparty supervision over integration and related matters.

The Portfolio Defence Committee is a committee of the National Assembly with membership that allows all parties to participate. Rule 201 of the National Assembly provides that:

“A portfolio committee;

- Must deal with Bills and other matters falling within its portfolio as are referred to in terms of the Constitution, these Rules, the Joint Rules or by resolutions of the Assembly;
- Must maintain oversight of (i) the exercise within its portfolio of national executive authority, including the implementation of legislation; (ii) any executive organ of State falling within its portfolio; (iii) any constitutional institution falling within its portfolio; and (iv) any other body or institution in respect of which oversight was assigned to it;
- May monitor, investigate, enquire into and make recommendations concerning any such executive organ of state, constitutional institution or other body or institution, including the legislative programme, budget, rationalisation, restructuring, functioning, organisation, structure, staff and policies of such organ of state, institution or other body or institution;
- May consult and liaise with any executive organ of State or constitutional institution;
- Must perform any other function, tasks or duties assigned to it in terms of the Constitution, legislation, these Rules, the Joint Rules or resolutions of the Assembly including functions, tasks and duties concerning parliamentary oversight or supervision of such executive organs of state, constitutional institutions or other bodies or institutions.”<sup>4</sup>

## **The requirement for parliamentary oversight**

Understanding the role of parliament and oversight has not been easy in South Africa. It took time before members of Parliament (MPs) began to internalise the separation of powers and to expect the executive to justify their decisions to Parliament and not the other way round. Oversight is generally weak in countries where the executive is strong and the legislature is weak. In fact if one

were to analyse the Southern African Development Community (SADC) alone during the past three years, one would find that the region suffers from weak legislatures and that loyalty to the party hierarchy is sometimes confused with loyalty to the people.

Capacity building is essential if parliaments are to exercise effective oversight over the military. There is great need to understand and reconfigure the relationship between the executive and parliament on the other hand, and to ensure that a healthy and expert relationship is built between the military and parliament on the other. There must be no confusion between the roles played by the Ministry of Defence and the parliamentary committees. The ministry has 'executive oversight and control'; it must 'manage' defence force policy and keep a tight reign over the defence budget and acquisition cycles. South Africa allows for public input and sometimes the committee actually finances disadvantaged public members who wish to appear before the committee. Public hearings are a standing budget item for the committee.

This public involvement and consultation is not without its own problems, for example, how far can one go in public consultations? Resources and time become important issues to be dealt with. Parliament cannot be biased; it must treat everybody in the same manner and avail the same information to everyone be they radical, extremist, pacifist, rural or sophisticated. It is not possible to know why people are interested but often women, religious groups and the aged are marginalised from the defence debates because of lack of organisational and institutional capacity.

It is necessary, but difficult, to assess the capacity of the public to influence national debates on security and to monitor the readiness of the public to engage, and the extent to which this engagement is constructive or destructive. When there is public engagement, parliament is not absolved from its responsibility to represent the will of the electorate and the majority. Parliament is the legitimate guarantor of majority will. It is therefore crucial for parliamentarians to develop and maintain the capacity required to understand defence policy, planning, programming and budgeting procedures as well as general military matters. They must develop the knowledge and skills needed to analyse, interrogate and promote defence and security policy.

During the defence transformation process in South Africa and to date, the defence committees have had the motto: 'defence is not a party political matter'. All members get the same speaking time and all members can present options and are consulted and lobbied in the same manner. Thus far neither committee has experienced any 'leaks' although some meetings take place away from the public. This has built trust and respect among members. Sometimes there are, of course, disagreements and arguments that require committees to even vote on issues. This is fortunately very rare. When there are disagreements, these are approached from the perspective of the interests of defence and not of the political parties.

## Challenges to parliamentary oversight

Obviously all is not always plain sailing and often oversight committees run into challenges for which no easy, ready-made answers exist. Some of these are:

- *Limits of transparency.* The South African White Paper on Defence states that: "Defence policy and military activities shall be sufficiently transparent to ensure meaningful parliamentary and public scrutiny and debate, insofar as this does not endanger the lives of military personnel or jeopardise the success of military operations".<sup>5</sup> It is not always easy to define clearly when this position has been reached and it is therefore important that there be good and open relations between the committees and the department to reach amicable and acceptable compromises. South Africa has also promulgated an Access to Information Act, to provide a legal basis for solving such disputes.
- *The Members' Bill instrument.* This facility allows MPs to identify policy and legislation gaps and to draft recommendations to remedy such gaps. This helps alleviate the perception that the executive carries the sole responsibility for policy and legislative formulation and tabling. The challenge is to create enough capacity and confidence among members so that they actually utilise this instrument.
- *Policy as opposed to operations.* Convention holds that MPs should not meddle in operational matters. There is obviously a fine line between policy and operational practice. When elected civilians do not extend or exercise their oversight and control far enough, human rights and other abuses may occur. The executive often gives the security forces mandates with general objectives. Those mandates are often valid from the national security perspective but may end up being unconstitutional. For example, the South African Constitution prohibits torture and therefore any result or information obtained by means of torture would not be acceptable.
- *Budget.* The defence budget system is complicated. Committees need to understand these processes and must therefore develop enough skills to analyse, monitor and advise on defence expenditure. In theory, parliament can exercise its control over the executive because it controls the budget. Reality could not be further from the truth. Clear guidelines for expenditure must be set and understood by both the military and those who exercise control over the military. What role do parliamentary committees play when defence spending continues to be below the required amount to execute and sustain defence policy? Is it not their duty to be concerned with the functioning, state of readiness and morale of the military? Should they not guide the balance between social, developmental and defence expenditure?
- *Regional integration and cooperation.* The New Partnership for Africa's Development (NEPAD) is premised on the regional integration of policies, systems and structures. Should parliaments in the region not be looking at

common policies and concepts and at the rationalisation of these? Should common concerns like civilian support roles (e.g. support to the police), peacekeeping and humanitarian employment not be issues parliamentarians agree about?

- *Balance.* As parliamentary committees play their respective oversight roles, they need to share on strategies regarding grievance procedures, demobilisation, gender balancing, professionalisation and, importantly, race and ethnic balances within the forces of the region. They cannot exercise oversight properly if they ignore the balance of power within militaries.
- *Committee priorities.* Priorities change over time. In 1994 South Africa's priority was integration and civil control over the military. This later changed to demobilisation, right sizing, equal opportunities and civic education. The parliamentary committees have also given attention to defence industry policies and are considering South Africa's international role within the reality of restricted resources and available finances to defence. Health and fitness levels remain a constant consideration for the committees.
- *Reconsidering the strength of parliaments.* Countries with stronger legislature traditions tend to emphasise the role of the legislative mechanisms entrusted with oversight roles, such as committees of parliament, the ombudsman, the approval of budgets, etc. Countries with stronger executive cultures rely more on the regulatory role of civil servants, the finance ministries and presidential control to ensure the subordination of security to civil power.

## Conclusion

The South Africa experience of establishing and entrenching healthy, democratic civil–military relations and parliamentary oversight of the military was a long process and required commitment and conviction. It is often stated that this transformation was a process and not an event. Fortunately the process was anchored in the constitution that was itself the product of fundamental and inclusive negotiations. During the development of a new defence policy in the form of the White Paper on Defence and the Defence Review and the later development of a new Defence Act and other legislation, the JSCD insisted on transparent, consultative and inclusive processes and was willing to contribute at all levels in these processes. The JSCD refused to act as a rubber stamp on work done by officials but served in sub-committees and workgroups involved in the actual research and drafting of policy. This was met with some resistance initially and was seen as an interference, but with time it was accepted and in fact welcomed. This approach set a precedent that has lasted till today.

It is clear that empowerment of parliamentary committees is a function both of legal power entrenched in legislation and the capacity and resolve to exercise such power. This requires that committee members enhance their knowledge of defence matters and build their capacity to exercise their oversight functions.



This is best achieved by developing good cooperative relations between parliamentarians, defence officials and civil society involved in the defence sector to ensure a partnership to the benefit of all. Such a partnership should be built on mutual learning, respect for one another and the building of trust.

There is nothing as dangerous to democracy as an ignorant MP; let us keep on learning.

## Notes

- 1 Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), Republic of South Africa, *Government Gazette* 378(17678), Cape Town, 18 December 1996, Chapter 4, Section 42(3), p 23.
- 2 Interim Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), Republic of South Africa, *Government Gazette* 343(15466), Cape Town, 28 January 1994, Chapter 14, Sections 224 to 228, pp 146-150; Constitution of the Republic of South Africa, 1996, op cit, Chapter 11, Sections 200 to 204, pp 88-89. [Note: Schedule 6 - Transitional Arrangements to the Constitution (1996), Section 24(1) provides that "sections 224 to 228 of the previous Constitution continue in force as if the previous Constitution had not been replaced, subject to ... ."]
- 3 Interim Constitution of the Republic of South Africa, op cit, Chapter 14, Section 228(3)(d), p 150.
- 4 Rules of the National Assembly, Chapter 12: Committee System, Rule 201(1) [www.parliament.gov.za](http://www.parliament.gov.za).
- 5 South African White Paper on Defence, 1996, Chapter 1, p 4.