

NARNIA BOHLER- MULLER ON LEGAL ISSUES SURROUNDING THE SONA CHAOS



On 12 February 2015, South Africans watched as President Jacob Zuma's State of the Nation Address (SONA) dissolved into chaos in parliament.

Communication clampdown

First, tensions rose over what appeared to be a deliberately blocked cellphone signal within the parliamentary chamber. Journalists and MPs voiced their displeasure by chanting, 'bring back the signal' while waving their cellphones above their heads.

Meanwhile, outside parliament, the spokesperson for the Democratic Alliance (DA) and an MP, Marius Redelinghuis, was assaulted by police in Adderley Street for challenging the harassment of DA supporters by police. He was forcefully bundled into the back of a police van and taken to prison where he had to be bailed out by friends.

Once the cellphone signal had returned, the president welcomed a whole host of VIPs and guests. After the formalities had been dispensed with, he began his speech by referring to the 60th anniversary of the Freedom Charter. As soon as he uttered this phrase, members of the EFF stood up one at a time to ask 'questions of privilege', to which national assembly speaker Baleka Mbete responded with a prepared statement – that questions were not permitted at SONA.

EFF presses its point home

It was not surprising that Julius Malema and the Economic Freedom Fighters (EFF) disrupted the president's speech. The party was not dishonest or shy about its frustrations over Zuma's refusal to answer questions in parliament prior to SONA, related to whether he would 'pay back the money' for the upgrades to his Nkandla residence.

The EFF MPs did not back down and soon they were violently removed from the legislature by men referred to as the 'white shirts', some of whom were subsequently identified as public order police.

Then came the somewhat unexpected: after not receiving a straight answer from the speaker of the house as to the identity of the armed men who were removing members of the EFF with force, DA parliamentary leader, Mmusi Maimane, led the black-clad DA MPs out of parliament,

claiming that allowing armed police into parliament was unconstitutional and a threat to democracy and the principle of separation of powers.

Against this background, let's unpack the issues of legality related to two of the controversial occurrences that in the end, delayed the president's speech by more than an hour, namely the jamming of mobile phone signals and the use of public order police to remove EFF MPs from parliament.

Signal jamming of mobile devices by private or public entities is illegal.



The permitted use of cellphone blockers

The Independent Communications Authority of South Africa (ICASA) initially confirmed that the signal jamming of mobile devices by private or public entities was illegal. A day later this statement was qualified by the fact that it emerged it was unlawful for an entity 'outside the security cluster' to use cellphone blocking devices.

In a statement released on 13 February 2015, ICASA stated that the authority's position with regards to the use of jamming devices was outlined in the Findings and Conclusions Document on the Enquiry into Mobile Telephone Blocking Devices (Government Gazette No. 24123, Notice 3266 of 28 November 2002), which is as follows:

- The use of jamming devices by any entity other than national security cluster departments is not authorised and or permitted.
- The national security cluster departments may, where supported by relevant security legislation, deploy the use of jammers in relation to, among others, state security functions.

No explanation was offered as to what amounted to 'state security functions', and whether what happened in parliament constituted a threat to state security. Despite the qualifier, ICASA welcomed the speaker's announcement that

parliament would investigate this matter, but also stated that should it be deemed necessary, it may also institute its own investigation into the matter, which may then be referred to the courts for resolution.

The constitution provides for freedom of the press and the right to receive and impart information.



The South African National Editor's Forum (Sanef) will also approach the courts to prevent future attempts to block the cellphone signal in the national assembly, based on the fact that it is both illegal and unconstitutional to do so. Section 16 of the 1996 constitution provides for freedom of expression, which includes freedom of the press and the right to receive and impart information.

In addition, Section 32 protects South Africans' right of access to information, including all information held by the government. Sanef will also ask the courts to compel parliament to allow broadcast media to install their own cameras in the legislature so that visual and audio feeds cannot be restricted as they were on 12 February 2015, which constitutes censorship in its view.

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The use of police or security forces in parliament

Secondly, the Council for the Advancement of the South African Constitution (CASAC) has stated that if any of the officials who removed the EFF MPs were from the police services or state security, this represented a transgression of parliamentary sovereignty. Under these circumstances, the response of the security officials would appear to be entirely disproportionate to the problem of recalcitrant MPs, who were being disruptive, albeit peacefully.

Judicial sources have also noted that the questions raised by the EFF MPs may have been 'disruptive', but that it was not unlawful for them to seek a ruling from the speaker on an issue of interest to millions of South African citizens. The speaker was then obliged to accede to the request or to deny it. She was then also responsible, as an adjudicator in this matter, to explain why she had made her decision, in this case to deny the request. Formulistic following of rules and procedures is reminiscent of apartheid-era tactics. Post-1994 we need to justify the decisions that we make.

Neither Mbete nor National Council of Provinces (NCOP) chairperson, Thandi Modise, provided any rules-based reason as to why an application being made in terms of the rules

was being denied, except to reiterate that SONA was not the right occasion for asking questions, without quoting any parliamentary rule to justify their decision. Therefore, it could be argued that the EFF was entitled to insist that the speaker and NCOP chair act in terms of the rules and cite the rule(s) that supported the denial of their democratic right to pose questions in a joint sitting of parliament.

With regard to the invasion of parliament by the 'white shirts' summoned by the speaker, the Powers Privileges and Immunities of Parliament and Provincial Legislatures Act 2004 defines 'security services' as defined by Section 199 of the constitution, as a 'single defence force, a single police service and any intelligence services established in terms of the constitution'.

The 2004 act states that members of these 'security services' may enter the parliamentary precincts and perform 'any policing function in the precincts' under two circumstances. The first is with the permission – and under the authority – of the speaker or chair. The second is when there is immediate danger to life or safety, or a threat of damage to property. In the latter case, security forces can enter parliament without permission, although they have to report to the speaker and the chairperson 'as soon as possible'.

This latter provision is problematic in that it confers too much power on security forces and could be found to be unconstitutional as it infringes unreasonably and unjustifiably on the democratic principle of separation of power among the three arms of government – legislature, executive and judiciary.

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Thus, claims that it is illegal for security services to enter parliament appear to be unfounded as per national legislation. But of course, such requests for extreme intervention such as that witnessed on 12 February should be made cautiously and not in the heat of the moment. In addition, the security forces that entered the venue were not identified by their uniforms or insignia, which is problematic, and it can be convincingly argued that they used excessive force to remove EFF MPs.

Calls have been made from many quarters to investigate these occurrences and it is hoped that the truth prevails. Political problems cannot be solved by recourse to administrative rules and laws alone. Political problems require mature political solutions, reached through dialogue. It is necessary for the leadership of the ruling party to acknowledge the sadness of the events that unfolded in one of our most important democratic institutions. It is sad for us, for our democracy, that voices can be silenced so easily. ■

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