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Parliament is an unlikely champion of the Auditor General

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“Peoples’ money is being squandered by the executive and Parliament is complicit in this.”¹

- Ben Turok, November 2019

In October 2019, IFAA embarked on the “Checks and balances” project to investigate the relationships between Parliament and the Auditor General (AG). This was intended to be a rapid, 6-month process, based on consultation with civil society and stakeholders – and focused on producing constructive recommendations and proposals. The aim was outline a route for Parliament to do a better job of following up on the reports it receives from the AG.

Plans were disrupted, first by the death of Ben Turok in December 2019 (at the age of 92) and second by the coronavirus.

The national lockdown has created a space for research on the historic role of auditors-general across the world.

How do they get their recommendations implemented and – the focus of this article – what is the role of parliaments?

Background

The checks and balances project arose from the outrage of Prof Ben Turok at the scale of corruption in South Africa – as revealed in the hearings of the Zondo Commission – and in the repeated failures of the executive to act on the recommendations of the Auditor-General.

In the, most recent, 2018/19 AGSA *Annual Report*, the Deputy Auditor General, Ms Tsakane Maluleke, said in her overview:

“Our general reports indicate that audit outcomes for departments, public entities and municipalities had regressed. Irregular expenditure remained high, non-compliance with supply chain management (SCM) legislation continued to increase, and auditees’ financial health deteriorated.” [p.15]

Ben was sceptical that new powers granted to the AG by Parliament would have the impact needed.² “The AG said it is not for him to send people to prison. Why not?” Why is *the*

¹ Ben Turok - Notes from Checks and Balances project discussion, November 2019. [M4]

executive not doing its job? What part of the system is not working? Some people say that Parliament's committees can't do anything but send reports to the House. Parliament should be able to intervene, as in the Ethics Committee.³ If there is a problem, the Committee chair should call in the police.

The founding view for the project is that the problems of looting of public funds and massive corruption illustrate failure on the part of Parliament. Parliament has the constitutional responsibility to scrutinize executive action and to hold the executive to account.

The Relationship between the Auditor-General and the Government

The auditors of government finances and performance need have independence from the executive branch. Otherwise the AG (referred to internationally as the “supreme audit institution” – SAI) would soon find itself dependent on the government it is auditing. “The SAI would become nothing more than a puppet of the government”.⁴

Independence of the AG is the key point of the **Lima Declaration** of Guidelines on Auditing Precepts adopted by the international meeting of government auditors held in Lima, Peru in 1977.⁵ South Africa's Apartheid-era AG participated in the congress as a member, although the independence of its AG was not secured in law until the 1994 Interim Constitution.

South Africa's Auditor-General is one of the Chapter Nine Institutions all of which are guaranteed independence under the Constitution.

However, questions have been raised about the conduct of the AG since 1994. Most obvious and notorious was the arms deal, where the AG, ill-advisedly, participated in a “joint investigation team (JIT)” with the Office of the Public Protector. This JIT, in which the then AG Shauket Fakie participated, allowed the executive to edit their report in 2001, before it went to Parliament.⁶ There is no agreed version of what happened in the arms deal. The report of the Seriti Commission of Inquiry into the arms deal was overturned by the courts in 2019.⁷ Books by Terry Crawford Browne, Paul Holden and Hennie van Vuuren, and Andrew Feinstein⁸, make a more than plausible case that the AG allowed its independence to be severely compromised.

² From 1 April 2019, the AG can act directly against accounting officers who fail to address “material irregularities” reported in the AG's reports. This follows Parliament's amendments to the Public Audit Act, 2004. See Makwethu (2020) for an excellent explanation.

³ In 2013, Parliament's joint committee on ethics and members' interests (then under the chairmanship of Prof Turok who was then an MP) controversially sanctioned Ms Dina Pule MP who had abused her position as communications minister to benefit her boyfriend, Phosane Mngqibisa. < <https://ewn.co.za/topic/phosane-mngqibisa> >; Zapiro (2013); Public Protector (2013).

⁴ Fiedler (2003a) – parts of this chapter have been edited in below, adding South African characteristics.

⁵ This was the 9th Congress – INCOSAI – of the International Organization of Supreme Audit Institutions (INTOSAI). See INTOSAI (1998).

⁶ See Feinstein (2007: 213-215).

⁷ *Corruption Watch and Another v Arms Procurement Commission and Others* (81368/2016) [2019] ZAGPPHC 351; [2019] 4 All SA 53 (GP); 2019 (10) BCLR 1218 (GP); 2020 (2) SA 165 (GP) (21 August 2019)

⁸ Crawford-Browne, T. (2020); Holden, P. & van Vuuren, H. (2011); Feinstein (2007).

The AG maintains that it was vindicated of responsibility for the Oilgate Scandal. In 2003, the state oil company PetroSA made an unusual “advance payment” to a company called Imvume Holdings. Imvume immediately donated R11-million of the money to the ANC to assist with expenses for the 2004 elections.⁹ The AG maintains that the Oilgate Scandal was a “good test of the new professionalism in the AG’s office. The scandal, it says, “raised the status of the AG’s office” and enhanced its “reputation for integrity and no-holds-barred reporting, which was recognised and respected by all politicians”.¹⁰

In all countries the auditor-general has to wage a continuous struggle to preserve its independence from the executive power. The AGSA diplomatically describes this as “audit contestations” or “push back” from auditees when they disagree with the AG on whether the financial accounts submitted for audit have been properly prepared.¹¹

But the natural tension between auditor and auditee does not exclude cooperation with the government. In fact, such cooperation is considered normal in a democratic state under the rule of law. Cooperation is in the interest of making the most efficient use of public funds and meeting the concerns of the taxpayers.¹²

The Relationship of the Auditor General with Parliament

1. The Importance of Relations Between the AGSA and Parliament

The AGs relationship with the executive branch of government is always ambivalent. This is because the impairment of the AG’s independence is always a possibility, as was seen in the Arms Deal saga.

In contrast, the relations between AG and the legislature are unlikely to be affected by the same degree of tension because they both ultimately pursue the same goal – exercising scrutiny over the way that public funds are managed. The power to exercise control over the manner in which the government implements the budget is a necessary complement to the power of budget appropriation. A democratic state, like South Africa, ultimately vests these rights in Parliament, the body acting as the true and constitutionally legitimized auditor.

However, while Parliament exercises its right of budget appropriation, it does not have the human and administrative resources to exercise control over budget implementation. For this task, Parliament depends on a separate monitoring body, i.e., the AGSA. Hence, there is a close relationship between the AG and Parliament in South Africa, as in all democratic states.

The AG’s importance to Parliament derives primarily from the information which Parliament gets from the AG on the government’s use of the funds voted in the budget each year. Constitutionally, all revenue the government collects, including taxes, has to be

⁹ AGSA (2014:26). >

¹⁰ AGSA (2014:26).

¹¹ AGSA (2019b:74) The Annual Report records 55 national departments and SOE “audit contestations” and 33 municipal-level contestations in 2017/18. “Some officials tried to intimidate the audit teams into changing their audit findings” because they were concerned to lose a ‘clean audit’ status or because auditees rejected the AGSA audit findings or technical consultations. AGSA has a protocol for reporting potential contestations early and resolving them if possible.

¹² See Fiedler (2003a).

deposited in the National Revenue Fund. Government can only access this money for its activities when Parliament has voted it approval. For this reason, legislation¹³ provides for the AG's reports about its audit activities to be tabled in Parliament. This corresponds to the requirement in the Lima Declaration that the SAI be empowered and required by the Constitution to independently report its findings to Parliament (Sect. 16.1).

If it were not for the AG's reports on the use of public funds, Parliament would be unable to exercise its power of scrutiny over the government, which would ultimately impair its budgetary sovereignty. This demonstrates that the AG is an essential pillar of parliamentary democracy. By exercising its government audit function on behalf of Parliament as the holder of the supreme control prerogative, the AG strengthens Parliament's budgetary authority.

For the AG itself, the right to report to Parliament implies – or should imply – a greater chance of having its recommendations put into practice.

The audit reports of the AGSA enable Parliament to demand that public bodies, above all the government, assume their political responsibility and ensure that AG recommendations are implemented. Parliament can resort to several instruments of control—such as portfolio committee hearings, questions, resolutions, or votes of no confidence—in the pursuit of this goal. Each portfolio committee can make use of its annual Budgetary Review and Recommendation Report (BRRR) to send direct messages from the National Assembly to departments and entities on any concerns it has with the way the executive in managing money and performance. The Treasury is obliged to respond to BRR Reports under the Money Bills Act. A committee can schedule hearings/meetings with departments and entities to get evidence on how they are implementing AG and committee recommendations.

Thus, both the effectiveness of government audit and the scrutiny and oversight duties of Parliament clearly depend to a large extent on the AG and Parliament cooperating in a spirit of mutual confidence. If Parliament and the AG take a common position vis-à-vis the administration, the recommendations issued by the AG might be put into practice more easily and Parliament is in a better position to effectively exercise its oversight responsibilities.

Government auditors and the legislature both benefit from responsible cooperation in the taxpayers' interests.

In many states, including South Africa, the existence of this relationship between the auditor-general and the legislature manifests itself in the right of the legislature to participate in the appointment of and/or removal from office of the Auditor-General. The responsible committee in this regard is the Select Committee on the Auditor-General (SCoAG).¹⁴ The AGSA reports to Parliament¹⁵ and all its audit reports of departments and

¹³ The Constitution and the Public Audit Act (PAA), along with the Public Finance Management Act (PFMA) and the Money Bills Act.

¹⁴ The procedure for the participation of SCoAG in the appointment of the AG is set out in the Public Audit Act, 2004. SCoAG also considers the annual strategic plan and budget of the AG and reviews the AG's annual report and financial statements. SCoAG is responsible for the appointment of the private sector auditing firm that audits the AGSA.

¹⁵ See the example list below, after the References, of the substantial annual reports to Parliament by the AG.

entities have to be tabled in Parliament. These are tabled by the responsible ministry according to deadlines set in the Public Finance Management Act and other legislation. AGSA representatives brief all the portfolio committees at length on the findings and concerns raised in audits. The AG has powers to decide which public entities to audit and to receive the evidence it requires.

2. Parliament as a Potential Source of Danger for the effectiveness of the AG

In South Africa, unlike in many other countries, the independence of the AG is absolute. The AG is independent of the government and independent of Parliament itself. This status is protected by the Constitution. Maybe there would be a danger if a renegade accountant like Brian Molefe were appointed AG, through the offices of Parliament and the executive. He would, however, still have to convince a court that he was “a fit and proper person” to hold the office of AG.¹⁶

Parliament does not pose a threat to the independence of the AG. But Parliament can undermine the *effectiveness* of the AG. It does this by failing to hold the executive to account. It is the executive who are supposed to implement the recommendations of the AG. Parliament lets the executive get away with a lot of repeated poor performance. This poor performance is documented in the reports of the AG and also in the reports of portfolio committees themselves, as reproduced by Parliament in the voluminous *Announcements, Tablings and Committee reports* (ATC) publication available on Parliament’s web-site.

Parliament’s weakness flows from the system that is in place to select Members of Parliament.

South Africa’s electoral system is based on the election of parties. It is the parties who decide who represents each party in Parliament, not the voters. Internal party processes for selecting potential MPs and ordering the ranked lists of party nominees that go to the Electoral Commission are not subject to effective oversight.

The party that is entitled to the majority of seats in Parliament appoints the President who, in turn, forms the government. Members of Parliament owe their positions to their parties. The overriding interest of MPs for the majority party lies in keeping the government in power and in expressing their solidarity with it. So when the reports of an Auditor-General highlight material inconsistencies in the financial statements of government departments or entities, political considerations come into play. The government has to weigh the implications of doing “what is right”¹⁷ against the implications of delaying action because “no one has been found at fault in a court of law” or of suspending CEOs from duty (on full pay). Governments invariably undertake a balancing act of satisfying different internal factions. President Jacob Zuma expanded the Cabinet and the cohort of deputy ministers to number over 60 people, so as to include all of the warring factions in the ANC. The balancing goes far down into the officials who manage departments and public entities, their

¹⁶ Constitution Section 193 (3). Just one instance: Times Live report by Zingisa Mvumvu “Transnet was being robbed under Brian Molefe: Judge Raymond Zondo”. 24 January 2020 <<https://www.timeslive.co.za/politics/2020-01-24-transnet-was-being-robbed-under-brian-molefe-judge-raymond-zondo/>>.

¹⁷ i.e. Insisting that accounting officers are held to account and that AG recommendations are implemented forthwith.

“special advisors” and often departmental staff. If AG recommendations are followed, this could destabilise the government itself.

Members of the governing party, as they sit in the portfolio committees, are acutely aware of the political ramifications of seriously setting out to hold the executive to account. Often they are unwilling to make use of the arsenal of parliamentary instruments to control and/or sanction the government. Sometimes, always being the majority in each committee, they try to hold sensitive discussions “in camera” or choose not to allow participation in committee meetings by government critics. At other times, they edit committee reports to soften or even remove criticism and transmit them to the National Assembly under recorded protest from opposition members.

It is no surprise that MPs representing the governing party (and its allies) only support criticism voiced by the Auditor-General¹⁸ up to a point.

But this cannot be the end of the comment. What is surprising – given the structural and theoretical disincentives for ANC committee members to defend the government – is the robust and focused way that portfolio committees often engage with departmental officials when findings are reported by the AG.

The meeting reports (and audio recordings) assembled and published by the Parliamentary Monitoring Group¹⁹ provide clear evidence of the anger roused in Members (across all parties) when the AG reports instances of irregular expenditure and fruitless and wasteful expenditure. The smallness of some of the amounts of money is no defence against the indignation expressed by Members! And often the numbers have been large.

The problem is that the indignation is only expressed. It is rare for portfolio committees to follow up effectively – beyond receiving assurances that the findings are being, or have been, dealt with. Committees may note that the previous year’s qualifications of financial statements have recurred – something which can happen sometimes year after year. The annual BRR Reports regularly recommend that the department or entity implement the recommendations of the AG. But that is as far as it goes.

When Ben Turok said that Parliament was complicit in the failure of government to implement the recommendations of the AG, this is what he meant.

Parliament spends a huge amount of time scrutinizing the finances and performance of departments and entities. It publishes lengthy committee reports detailing MPs observations, findings and recommendations.

But Parliament, in practice, lacks the ability/willingness to hold the executive accountable.

South Africa: world class government audit – but Parliament leaves it at that!

¹⁸ Cf. The reference by Andrew Feinstein to an “unconstitutional attack on the Auditor-General” made by Penuell Maduna MP of the ANC. (Feinstein 2007:186) This is outlined twice – but in general terms. Maduna was not censured by the ANC.

¹⁹ <https://pmg.org.za/committees/>

South Africa is a world leader when it comes to the powers and protections granted to its Auditor General under the law and the Constitution.²⁰

The Lima Declaration requires that the independence of SAIs be preserved vis-à-vis Parliament. The principle of the SAIs autonomy and responsibility for the selection of its audit subjects, audit methods, and reporting also applies to its relations with the legislator. This is the case in SA.

In 2007, the international public sector external auditing community adopted the **Mexico Declaration on SAI Independence**,²¹ building further on the basic requirements of the Lima Declaration.

South Africa meets all of the principles, except for number 7!

INTOSAI 2007 Mexico Declaration: Core Principles for an effective government audit	SA compliant?
1. The existence of an appropriate and effective constitutional/statutory/legal framework for independence and the corresponding provisions for <i>de facto</i> implementation.	YES
2. The independence of SAI heads and members of collegial institutions, including security of tenure and legal immunity in the normal discharge of their duties.	YES
3. A sufficiently broad mandate and full discretion in the discharge of SAI functions.	YES
4. Unrestricted access to information.	YES
5. The right and the obligation of the SAI to report on their work.	YES
6. The freedom of the SAI to decide on the content and timing of its reports and to publish and disseminate them.	YES – with some legislated timelines
7. The existence of effective follow-up mechanisms on SAI recommendations.	NO
8. Financial and managerial/administrative autonomy and the availability of appropriate human, material, and monetary resources.	YES

Concluding summary

²⁰ See AGSA (2014), an enthusiastic, but reflective, book that establishes the real achievements of AGSA in terms of its independence, professionalism and communication/education outreach.

²¹ AGSA (2014:94)

Parliament should be part of the follow-up mechanisms to ensure that AG recommendations are all implemented.

- There is ample evidence that Parliament considers the recommendations of the AG – and that it endorses them. Parliament cross questions Ministers, Deputy Ministers, Directors General, Chief Financial Officers and Deputy Directors General to interrogate the reported findings of the AG and ask about progress in implementation.
- But Parliament does not take strong steps to hold the executive to account when the executive does not ensure the AG recommendations are followed in practice.
Parliament is thus not an effective champion for the AG.
- Parliament is aware of the problem – and, in particular, how the findings of the AG illustrate the risks of corruption or the fact that public money has been wasted, and no one held to account.
- Parliament’s response has not been to put pressure on the executive, but to “expand the mandate” of the AG. From April 2019, Parliament gave the AG itself the additional burden of following up on individual accounting officers who have not done their jobs.²²
 - Parliament, in an exceptional move, has voted R50-million from the National Revenue Fund directly to AGSA to fund, amongst others, “the cost of conducting further work on material irregularities”.²³ The AGSA – in order to ensure its independence from government, raises its own revenue by charging fees to auditees. This new R50-million appropriation, small as it is, is a step away from full AGSA independence. The government is paying the AGSA to do its dirty work, in pursuing accounting officers (as individuals) who fail to recover money lost through maladministration and corruption.
 - The AGSA, in another exceptional move, increased its Employee Wellness budget for 2020/21 by 282.2%, to a total of R15.288 million, to factor in “additional emotional support programmes for employees affected by threats and intimidation.”²⁴ Serious threats and intimidation against audit staff were highlighted in the 2018/19 Annual Report.²⁵ Audit staff are placed in danger by the expanded mandate as corrupt officials fear being issued with a personal certificate of debt.²⁶

Why does government not act when is told of “rampant abuse of public resources” by the Auditor General?

How can this situation be changed?

²² Makwethu (2020) sets out and explains the expanded mandate excellently.

²³ AGSA (2020:35 and 45) Note 1.5 to the Detailed Budget shows the annual R50-m appropriation included in the AGSA budget forecasts to 2022/23.

²⁴ AGSA (2020:63)

²⁵ “Some officials tried to intimidate the audit teams into changing their audit findings” AGSA (2020b: 74); Serious incidents in 2018/19 included death threats and a hostage incident. AGSA (2020b: 75)

²⁶ See one example presented by the AGSA to SCoAG in December 2019 when the AG had to withdraw an audit team from the Nelson Mandela Bay Municipality because of intimidation by municipal officials. (AGSA 2019c). SCoAG failed to take any effective action in the three months after being made aware of the situation.

This is the investigation that IFAA will take forward in the coming months

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services for the hosting of the ICT Indaba held in Cape Town from 4 - 7 June 2012. 05 December. <<http://www.pprotect.org>>.

Zapiro (2013) Dina Pule guilty of lying to Parliament's Joint Committee on Ethics and Members Interests. *Sunday Times*. 11 August 2013. <<https://www.zapiro.com/130811st>>.

[This article makes free use of parts of the 2003 analysis by Dr Fiedler, adding some South African characteristics.]

Most recent reports of the AGSA to Parliament (at May 2020)

AGSA (2020) *2020-23 Strategic Plan and Budget of the Auditor-General of South Africa*. RP 55/2020. 92 pages

AGSA (2019b) *Integrated Annual Report 2018/19*. RP 346-2019. 194 pages

AGSA (2019c) *Consolidated General Report on national and provincial audit outcomes PFMA 2018-19*. RP 372-2019. (About 200 unnumbered pages)

AGSA (2019a) *Consolidated General Report on the local government audit outcomes MFMA 2017-18* RP 136-2019. (About 200 unnumbered pages)

[All AG reports on departments and their entities have to be tabled by the responsible ministry – all in all several thousand pages of AG reports are tabled annually in Parliament – these are usually included within departmental and entity annual reports].