



IMPLICATIONS OF A VIRTUAL PARLIAMENT ON ITS CONSTITUTIONAL MANDATE

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Contents

Introduction	2
Parliament’s Role in South Africa’s Democracy.....	4
National Assembly and NCOP Rules	5
Parliamentary Oversight during the Pandemic	6
Digital Tools Used by Parliament during the Pandemic	8
Impact of the Digital Platforms.....	9
Procedural Impact.....	10
Accessibility.....	12
Voting in the Hybrid Setting.....	13
Case Study – the UK’s House of Commons	13
Case Study – Spain’s Cortes Generales.....	13
Intangibles.....	14
The Media and the Virtual Setting.....	15
Benefits of the Digital Platforms.....	16
Public Participation	18
Constituency Work.....	21
Parliamentary Output	23
Recommendations	24
Conclusion.....	25

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Introduction

In March 2020, the World Health Organisation (WHO) declared the novel coronavirus (Covid-19) a global pandemic.¹ Following this announcement, and consultation with the Executive, President Cyril Ramaphosa declared a State of National Disaster² in South Africa in terms of the Disaster Management Act.³ After the confirmation of just over 400 cases in South Africa,⁴ on 23 March 2020, the President instituted a nationwide lockdown⁵ in an attempt to limit the spread of the virus, which had begun to claim lives. The lockdown began as a 21-day period on 26 March 2020 and continues today, albeit at a different, less restrictive level.

The State of Disaster together with the lockdown limited the movement of people and the operation of innumerable businesses.⁶ This included government employees and their operations. In an unprecedented move, the declaration of the lockdown resulted in the curtailment and then suspension of the Legislature's business "until further notice".⁷ Fortunately, Parliament's first term of 2020 was to end on 20 March. This was to be followed by a constituency period until 13 April where MPs must be available to the public in the constituency to which they have been assigned. Some parliamentary committees managed to meet on 17 March 2020 but cancelled meetings for the rest of that final week. The National Assembly held its final sitting on 18 March as did the National Council of Provinces (NCOP) on 19 March 2020.

Initially, the Legislature issued several statements supporting the government's interventions and did not want to interfere while the national executive drafted and implemented disaster management regulations. It highlighted that the State of Disaster was a temporary measure, and that the responsibility to conduct oversight is not limited to committee meetings. Members of Parliament (MPs) can carry out constituency work in various communities and "hold the Executive accountable for implementing measures designed to overcome the state of disaster".⁸

During this constituency period, civil society organisations wrote to all ten legislatures highlighting their role during the State of Disaster, called for their early re-opening and made recommendations on how they could continue to function during this period.⁹ Parliament resumed business three weeks after the State of Disaster was announced as scheduled on 13 April 2020. In a statement, Parliament said:

"[t]he Constitution requires Parliament to scrutinise and oversee Executive action, to pass legislation, to provide a forum for public consideration of issues and to facilitate public involvement in its legislative and other processes. In this regard, it must be emphasised that the role of Parliament remains indispensable, during this period of national lockdown and the extended period of social distancing, which is expected to continue for months".¹⁰

At first, Parliament prioritised a schedule of virtual committee meetings, whose scope of oversight related to government departments driving COVID-19 response measures. This was soon expanded to other parliamentary business.

South Africa is not the only country that grappled with, and continues to grapple with the impact of the pandemic on its legislative functions. Across the globe, responses to the pandemic in legislative spaces have been primarily digital,¹¹ with jurisdictions that had well-

established and functional infrastructure adjusting much quicker than those whose infrastructure needed bolstering.¹² While the shift to “the new normal” has served to highlight how technology can be harnessed to deepen the impact of parliaments across the world, it has also shown that technology can exclude those who do not have access to it. The pandemic has also called attention to the complexity of facilitating inclusive and effective parliamentary processes in a time of disruption.

This paper examines the impact of the pandemic on Parliament’s legislative functions, including participation and oversight, and how these have changed because of the pandemic looking at the second and third parliamentary terms of 2020 (13 April to 4 September 2020). It assesses the virtual parliamentary setting and the complexity of facilitating inclusive and effective parliamentary processes in a time of disruption, in a country characterised by stark inequality, while seeking possible suggestions for a way forward for South Africa.

Parliament's Role in South Africa's Democracy

Section 42(3) and (4) of the Constitution outlines Parliament's functions and identifies a) representation, b) the provision of a forum for public participation in its processes, c) the passing of legislation and d) Executive oversight as some of those functions. Sections 59 and 72 of the Constitution oblige both the National Assembly and the NCOP to facilitate public participation in their processes with exceptions being permitted under reasonable and justifiable circumstances "in an open and democratic society".¹³ Due to these critical functions, the Disaster Management regulations of 25 March 2020 explicitly identified Parliament as an essential service¹⁴ whose operations could, and indeed should continue throughout the pandemic. This rings particularly true when it came to addressing "the pressing priorities of South Africa's communities"¹⁵, whose widespread poverty and structural exclusion left them especially vulnerable to the virus and its domino effects.

Upon re-opening, Parliament indicated that it had assessed how best to resume its business by investigating and co-opting certain best practices implemented by other legislatures across the world in response to the pandemic.¹⁶ Parliament's functions have been primarily effected through the introduction of digital platforms for both intra and extra parliamentary usage. Intra refers to committee meetings and their attendance by parliamentarians. Extra refers to the public's access to the functions of Parliament during this time.

National Assembly and NCOP Rules

Before the Legislature could resume its business, the existing Rules were amended¹⁷ to govern this “new normal” Parliament. The Rules were published on 15 April and the National Assembly adopted them officially in June 2020 following a vote - which came with its own disruptions.¹⁸ The new Rules were discussed at meetings of the Chief Whips Forum and the Programming Committee. All parties but one voted and accepted the rules.¹⁹ Similar amendments were made to the NCOP Rules.²⁰

The new Rules extend to virtual meetings the same powers, privileges and immunities to MPs as they would ordinarily have during parliamentary proceedings. The Presiding Officer of a House or the Chairperson of a committee was also granted all the powers in virtual meetings as provided for in existing Rules.²¹ The Rules govern voting procedure, facilitation of public participation and quorum among others.²²

These Rules, coupled with the digital platforms, facilitated a transition from the traditional physically attended meetings including those for the public participation element. In one fell swoop, the South African Parliament moved online. Parliament held its first official virtual committee meeting on 10 April 2020.²³ The pandemic had also swiftly accelerated digital access to parliamentary committee meetings – where the substantive work of Parliament is done.

Parliamentary Oversight during the Pandemic

The State of Disaster is not mentioned in the Constitution and is governed purely by primary legislation, in this case, the Disaster Management Act. Section 26 of that Act stipulates that the national executive bears the primary responsibility for the coordination of any response to and management of a national disaster²⁴. The same provision states that this responsibility does not preclude the responsibilities of local and provincial levels of government from addressing the needs of the people they govern.

In the case of a State of Disaster, there is no express oversight function required from MPs.²⁵ However, as Nompumelelo Runji notes, the Minister remains accountable to Parliament.²⁶ This is because parliamentarians have the inherent oversight/scrutiny function. As a result, they are able to and indeed should exercise this function at all times, even where the Disaster Management Act is concerned. This would be done via various committees and other oversight mechanisms available to MPs. Further, the oversight function of Parliament is alluded to in section 24(2) of the Disaster Management Act which requires the Minister to submit the Disaster Management National Centre's annual reports to Parliament for scrutiny.

Members of Parliament fell under the category of essential services in South Africa's COVID-19 lockdown regulations. The Presiding Officers maintained that the decision to suspend Parliament's programme was taken a few days before the start of the constituency period. So, despite suspension of the programme, Members of Parliament continued to work in communities they represent from 23 March to 13 April.²⁷

Parliament's absence did not go unnoticed. Opposition parties and civil society accused the Legislature of abdicating its constitutional duty by failing to hold the Executive accountable as it made declaration after declaration about the nation's response to the pandemic. Others went as far as insinuating that by conferring legislative power on the Executive during a State of Disaster, Parliament and its legislative functions had been effectively usurped by Cabinet.²⁸ Whether or not this is accurate has been a bone of contention amongst academics and lawmakers alike.

This debate raised the question of whether Parliament should have passed Covid-19 specific legislation, thus laying the legislative responsibility squarely at Parliament's door and avoiding the grey area created by the provisions in the Disaster Management Act. The United Kingdom, for example, passed the *Coronavirus Act* by the end of March. It spanned over more than 300 pages (excluding schedules) and was amended numerous times within a short period.

While, in theory, it might have been prudent to draft and pass pandemic-specific legislation so as to address the impact of the virus holistically, the drafting process was not without its problems. As Natzler astutely notes, 'there was no way that in the time available the detailed provisions of the Bill – let alone the secondary legislation which was yet to be made under it – could be properly scrutinised'.²⁹ This leaves laws that are passed quickly, without effective scrutiny by the Legislature, open to legal challenge. Laws may also fail the very people they are intended to serve. The UK was not the only nation to pass Covid-19 specific legislation. The United States of America, Singapore, Japan and Australia are a few of the nations that chose to take the same route.³⁰

In October 2020, the High Court in Pretoria was approached by the Helen Suzman Foundation (HSF), seeking an order compelling Parliament to pass Covid-19 specific legislation.³¹ The HSF contended that the Disaster Management Act, under which government is managing the Covid-19 pandemic, is a short-term measure not suited to dealing with the pandemic and accordingly, triggered a duty on the part of the Executive and the Legislature to initiate and pass Covid-19 specific legislation. The High Court found that the Disaster Management Act's conference of power (upon the Minister of Cooperative Governance and Traditional Affairs) to make regulations and issue directions, coupled with the authority to extend the State of Disaster, was sufficiently extensive to address the effects of the pandemic. The High Court thus dismissed the application.

It must be noted that the process of passing laws is an arduous one, which, due to the many safeguards in place, can be protracted. When a State of Disaster has been declared, the normal path for law-making becomes impractical as quick, responsive and effective decision-making becomes imperative. Moreover, the absence of the express term "parliamentary oversight" from the text of the Disaster Management Act does not translate to the law excluding Parliament. As discussed above, there is room for Parliament to operate alongside the Executive during a State of Disaster.

Due to Parliament announcing at start of lockdown that MPs should continue with oversight work in their constituencies, the Democratic Alliance (DA) approached the Speaker with a request to establish an ad hoc committee dedicated to continuing oversight of the executive and the protection of civil liberties during lockdown. The request was not an unusual one considering the circumstances. The Australian Senate established a wide-ranging select committee to scrutinise its government's response to the pandemic.³² New Zealand did the same.³³ The request was denied on the grounds that oversight and accountability work must be done by existing parliamentary committees, in line with their areas of specialisation and it would not be feasible to expect a single ad hoc committee to perform this.³⁴

The sheer scale of COVID-19 means it touches almost every aspect of government - everywhere there are questions to be answered. As a result, the Legislature prioritised debates, ministerial statements, events and questions to Ministers who lead departments affected by the pandemic. These sessions presented the Executive with opportunities to update Parliament on government responses towards dealing with the challenges that accompany the COVID-19 pandemic.

After the initial lull of the three-week constituency period, once Parliament resumed session on 13 April 2020, it broke its record for convening the most committee meetings in second term – despite the pandemic.³⁵

Digital Tools Used by Parliament during the Pandemic

The pandemic means that Parliament has been limited in its operations. However, its classification as an essential service demanded innovative and expediently executed mechanisms to allow it to function. As Rosalyn Old astutely notes,

“digital tools can help keep parliaments and governments [thrive] in a way that enhances rather than threatens democracy. In fact, the lockdown is a key opportunity to experiment with digital methods to support democratic institutions and citizen engagement into the future”.³⁶

As with many jurisdictions, digital infrastructure was bolstered to facilitate Parliament’s functions.

At the beginning, all MPs were working remotely and due to travel restrictions, were unable to travel to Cape Town, Parliament’s seat, to attend meetings. This restriction was seen across the world as Parliaments sought to play their part in limiting the transmission of the virus.³⁷ The South African Parliament primarily made use of two virtual platforms to facilitate the holding of meetings and plenaries - Microsoft Teams and Zoom. All MPs would log into the relevant platforms prior to the commencement of the meetings. Links to the meetings would be circulated beforehand via email and WhatsApp to ensure that all participants could gain access. Documents that were relevant to the meetings would also be shared among the participants, be they MPs, government representatives or members of the press and in certain cases, members of the public.

If a slide show was to be used in a presentation, the virtual platforms allowed for the sharing of screens so that those attendees who did not already have access to the documents could follow it on screen. Many meetings and plenaries were also simulcast via the Parliamentary channel on DStv and YouTube. The links to the live broadcast were shared by Parliament on its social media handles (Facebook, Twitter and WhatsApp).

The structure of the meetings remained relatively unchanged in that they were chaired by the same person, attended by the relevant Members and Parliament’s oversight function was executed in much the same way, and votes, where needed, were cast.

The first plenary sitting was held only in late May and a hybrid system was adopted. As the national lockdown restrictions were eased, the hybrid system allows some Members to be physically present in the Chamber, observing social distancing protocols, and others to join via the virtual platform. All Members who attend the sitting in person are required to go through mandatory screening, social distancing and masks are compulsory. We saw the trend of hybrid systems across the world with the United Kingdom’s House of Commons,³⁸ Brazil and Spain, for example. South Africa’s first hybrid sitting was conducted on 27 May 2020.³⁹ Question time was executed. However, due to the impact of the pandemic, questions to Ministers who lead departments most affected by the pandemic were prioritised, particularly just after plenary sittings resumed.⁴⁰

Impact of the Digital Platforms

Creating a virtual system capable of connecting lawmakers scattered across the country was not an easy undertaking. A significant amount of co-ordination was necessary to enable MPs' participation, support their use of technology and facilitate public involvement. Guidelines were developed and training was made available for staff members and MPs. Not every meeting went smoothly and it has been a learning curve for everyone. There has been criticism from political parties. The official opposition went as far as describing the virtual committee meetings as "rather shambolic in nature".⁴¹ The system, while imperfect, has worked well enough, according to any objective assessment.⁴²

While there was indeed pressure on Parliament to develop and present viable digital tools fast, so as to make up for lost time, it could be argued that more detailed research could have been conducted before favouring the popular Zoom and Microsoft Teams tools alone as these came with their limitations. According to a member of staff of the Inkatha Freedom Party (IFP), Parliament initially used Microsoft Teams due to existing Microsoft agreements. However, as time passed, Microsoft Teams was found to be too complicated and lacked sufficient security controls. Zoom was then selected as the preferred digital tool, to which Parliament now subscribes, although it is not without its own security loopholes.⁴³ The multiple security breaches led to a more guarded approach when it came to sharing links to meetings.

The sharing of meeting links widely on social media led to a security incident during a live meeting. Thereafter, this open sharing was stopped and Parliament has created a Whatsapp group to provide journalists with the links to meetings. According to Motlatsi Komote, from the Womxn and Democracy Initiative (WDI),⁴⁴ this limitation of link sharing meant that members of the public who may have been interested in participating were excluded. Hoodah Abrahams-Fayker, the Black Sash's National Advocacy Manager, noted that in her experience, the secretaries of committee meetings gate-keep the sharing of Zoom links to meetings and identified this to be one of the impediments to access to the meetings.

Participating in democratic processes should not be so onerous a process. This prompted the WDI to write to Parliament to remove unnecessary obstacles to access.⁴⁵ Komote rightly notes that access limitations affect the public's ability to pay attention to what Parliament is doing and to ask necessary questions.

Members of Parliament have remarked on the useful comments on the Zoom chat by observers such as the media and civil society organisations that have managed to gain access via committee secretaries who recognised them as regular meeting attendees before the pandemic.

The Chairperson of the Justice Portfolio Committee has commented that this type of public participation through Zoom chat is a difficult matter because when the new rules for virtual meetings were adopted, it did not cover the Zoom chats. Ordinarily, if the Committee were sitting in Cape Town, there would not be a situation where members of the public could simply send messages and those messages are considered. He said that the Rules Committee had to apply itself to the matter— and as such it had not been restricted. He told his Committee that they were welcome to read the chat; however, the comments on the chat should not interrupt the proceedings of the meeting. Until the Rules Committee deals

with this – as they had not anticipated its use – the Committee would take a less restrictive approach. He instructed Members that they can look at the messages, but should "raise the issues as their own" in the meeting.⁴⁶

Procedural Impact

The introduction of the virtual setting had a considerable effect on the procedural element of Parliament's business. For example, before the pandemic, all Members had to do to be recognised was to get the attention of the presiding officer/chairperson by raising their hands or notifying the Speaker of their intention to speak/pose a question using the microphones at their seats. The virtual setting means that Members may use the in-app "raise hand" function, in Zoom for example. However, practice has shown that not all Members follow that protocol, particularly during robust proceedings. This has led to some Members' microphones being turned off remotely should the presiding officer/chairperson so request. This was as a result of the greater impact of disruption on the virtual platform, as was discussed in a Rules Committee meeting.⁴⁷

This raises the question of whether the virtual setting allows for the kind of robust participation by Members that would normally be seen in the National Assembly. One must consider the similarities (however limited) between physical removal from the National Assembly as a form of sanction, and the remote silencing of a Member during a virtual setting. In both instances, the Member is no longer able to participate in the meeting as they would like to. Granted, the former will only take place when serious deviation from the Rules has taken place. However, the question must stand. Is it procedurally fair to remotely silence Members during a sitting when they are speaking?

In *Democratic Alliance v Speaker of the National Assembly and Others*,⁴⁸ the official opposition approached the Constitutional Court to seek confirmation of the High Court's order on the constitutional invalidity of section 11 of the *Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act*. This provision allows the National Assembly Speaker or NCOP Chairperson to have an MP removed from parliamentary proceedings for creating or taking part in a disturbance. This was due to the removal of EFF members from the House during the 2015 State of the Nation Address (SONA) at the instruction of the Speaker following persistent interruptions. The Western Cape High Court held that section 11 was constitutionally invalid as it allowed the arrest of a Member for conduct protected in sections 58(1) and 71(1) of the Constitution. These provisions protect the free speech of MPs and state that they cannot be arrested for utterances made in the House.

The Constitutional Court agreed the application of section 11 to Members limited their constitutionally guaranteed privilege of free speech in Parliament. The judgment acknowledged that the limitation of Members' free speech may be constitutionally permissible as otherwise Parliament might be incapacitated by unruly Members. But the limitation of the Members' free speech by an Act of Parliament was constitutionally impermissible. In terms of the Constitution, parliamentary free speech could be subject only to the Rules of Parliament.

Based on these findings, the silencing of Members or the prevention from complete participation is not an issue to be taken lightly. Further, it can be argued that the virtual

setting has placed limitations on the robust engagement by Members during committee meetings and plenaries.

Another matter to consider is that virtual committee meetings are under pressure not to extend their allotted time length for various reasons. One such reason, according to an administrative staff member, is that some Members have to log into other meetings of which they are members or alternate members. Where the primary Member is unable to participate for whatever reason, the alternate Member joins.

It must be noted that while the time limit does not automatically mean that subject matter is never dealt with effectively, it is definitely a consideration when examining the impact of the 'new normal'.

When the virtual committee meetings began, meetings were limited to two or three-hour slots spread throughout the day from 9am to 6pm ending at 8/9pm. It is PMG's observations that this was possibly due to limitations of the MS Teams platform, bandwidth limitations and also as a result of the Legislature adapting to the new way of working. MPs were encouraged to submit questions in writing beforehand for these to be addressed in the meeting – due to time limitations. However, by late third term as all committees were meeting and the Legislature was comfortable with virtual work, proceedings resembled pre-pandemic times where meetings began in the morning and lasted only until the start of plenary.

An added benefit of virtual meetings, as noted by Abrahams-Fayker, is the advent of parliamentary committees sometimes conducting meetings after work hours. The pandemic is a unique circumstance that allows Members to conduct urgent business after hours where it might not have been able to fit into the day programme, or during recess. Committees have met on weekends, public holidays and in the evenings. It is an unusual state of affairs, where late night meetings can take place, or that Members freely work during recess, yet are unable to extend committee meetings during scheduled parliamentary meetings. As the pandemic has progressed, meeting programming has returned to normal and after-hour meetings are much rarer.

Accessibility

The accessibility of committee meetings has also been an issue. The public may access a limited number of committee meetings streamed on Parliament's YouTube channel. With no access to the Zoom platform and only ten live-streamed meetings appearing on YouTube, this hampers civil society monitoring efforts. Parliament's broadcast service has been interrogated about its failure to stream all the committee meetings. The reason proffered for this is that Parliament only has ten broadcast slots to live-stream on its YouTube channel rendering it impossible to have all the meetings broadcast. These ten slots were sufficient when only a handful of parliamentary committees were active.⁴⁹ It became difficult to manage as more committees resumed their work. On average, there are 23 daily committee meetings on Tuesdays and Wednesdays.⁵⁰ Whilst it has been agreed that the entirety of Parliament's work is in the public interest, it remains to be seen what solution will be used to allow full broadcast of all committee meetings held by Parliament.

Laura Wellen, the WDI Project Administrator, noted there are technical difficulties with the streaming of parliamentary proceedings. The YouTube live feed is delayed, or worse, the meetings are broadcast without audio. In addition, one cannot engage as one can with Zoom chat.

Another important limitation to the virtual system is that MPs have to ensure that they have internet connectivity at times when they were required in meetings. The inequality and diversity of where Members and the public live (such as variability in infrastructure) affected consistent and reliable participation. There is a significant digital divide in South Africa, primarily because internet access is financially out of the reach of many. This renders the virtual setting classist insofar as it limits access to those with the means to connect. According to Statistics SA, in 2020, only 56.3% of the South African population were internet users.⁵¹ The 2016 General Household Survey, conducted by StatsSA, found that just under 60% of South Africans had access to the internet, and those in the poorer provinces are less likely to have access than those who live in the larger metros.⁵² This means that those MPs and members of the public who live in rural or poorer provinces may have a harder time staying connected.

All were affected by the country's energy problems which resulted in a period of consistent power outages throughout the lockdown. In some areas, there would not be any electricity supply for days at a time. It is common knowledge that power cuts are not limited to load-shedding, and some areas are perennially faced with lengthy power outages. This often affects the attainment of quorum and voting turnout.

Voting in the Hybrid Setting

Voting is an essential element of the parliamentary process. It is how Members show their support for or opposition against motions and legislation, for example. So fundamental is the right to cast one's vote during critical procedures in Parliament that in 2017, the right to vote (by secret ballot) on a motion of no confidence against former President Jacob Zuma, was deliberated upon by the Constitutional Court. In *United Democratic Movement (UDM) v Speaker of the National Assembly and Others*,⁵³ the UDM, an opposition party, approached the Constitutional Court for an order stating that the Speaker could indeed prescribe that a motion of no confidence be conducted by secret ballot where appropriate. This followed threats of violence and loss of membership if Members who were found to have voted in favour of the former President's removal.

The inability to cast votes at all at the beginning of the pandemic was seen across the globe. This is because, for most legislatures, the voting apparatus could be found and operated only at the physical seat of parliament. Much like in South Africa, remote voting cannot take place in Finland, France and Iceland, for example.⁵⁴ However, to allow the business of Parliament to proceed, voting is necessary.

The revised Rules for Virtual Meetings and Sittings⁵⁵ stipulate that Members who are present have the ability to cast their votes electronically or by voice in the Chamber or via the chief whips of their parties. While these were all indicated as options, to date, only voting by voice and proxy voting have been recorded in the South African Parliament.

Case Study – the UK's House of Commons

Natzler points out how complex the establishment of a functional and trusted voting system was at the beginning of the lockdown in the UK.⁵⁶ The House of Commons used remote voting to conclude an array of business for a short period. However, in early May 2020, that government announced remote voting would be replaced by in-person voting as MPs were summoned to House on voting days. This was regardless of concerns raised by Members about safety and social distancing. After much trial and error, remote voting was re-introduced, but not for substantial matters. In-person voting for substantial matters was conducted for the first time in mid-June 2020, at machines in the two lobbies. This resulted in a long queue at times.

Later, proxy voting was normalised⁵⁷, particularly where a Member was unable to be present to vote due to, for example, having taken parental leave. In such cases, the Members' votes were cast by the chief whips of the relevant parties. As time passed, the rules for proxy voting became stricter and Members could only vote via proxy if the reason was coronavirus. Voting via the machines in the lobby takes significantly longer than voting by proxy or voting in the House.

Case Study – Spain's Cortes Generales

Other jurisdictions made use of existing technologies that allowed for remote voting to be cast with a similar level of privacy and credibility for Members. The Spanish Parliament – the *Cortes Generales* – held its first plenary in late March 2020. Video-conferencing was available and remote voting was set up for those who were unable to attend. The remote voting function had already been available for Members who could not physically attend sittings due

to pregnancy, maternity or paternity leave or serious illness.⁵⁸ Even when these circumstances prevailed, a Member could make use of these parliamentary functions remotely only if the *Bureau* – the parliamentary governing body – considered it sufficiently justified. The privileges were then extended to all those Members who, due to Covid-19, were unable to attend Parliament.⁵⁹

The *Cortes Generales* managed to adapt swiftly because the country's Chamber of Deputies had already developed the app that allows for secure extra-parliamentary voting. The system had seen little use over the seven years it had been active, but it became an essential tool when the pandemic began. Meetings continue to be held via Zoom and document sharing takes place through existing internal systems.

The case of Spain is a prime example of how some Parliaments make use of their technological support teams. Waiting for an emergency such as the pandemic to develop digital support leaves nations on the back foot. To date, South Africa's parliamentarians continue to vote via proxy and no indication of the development of independent tools to facilitate secure and remote voting has been noted.

Intangibles

There are also intangibles that DA MP, Leon Schreiber, identified as having been lost to the hybrid system. A certain robustness in interaction that seemingly cannot be replicated virtually was mentioned. This can be coupled with human interaction. The idea that Members are able to build relationships with Members from across the aisle through regular physical interaction has also been raised.⁶⁰ Time spent serving on committees builds the necessary rapport for cooperation when legislating. Another intangible that has been raised numerous times is the implied and established respect for Parliament. Members log in late, dressed casually and sometimes connecting from what can be conceived as 'improper' spaces.⁶¹

The nature of the virtual setting has resulted in public representatives such as Ministers not facing the kind of pressure they would normally encounter from Members. The element of spontaneity is also lost.

The concerns expressed by Schreiber find further cross-party support in sentiments expressed in committee meetings – an EFF MP appealed for the meetings on the amendment of section 25 of the Constitution to be in person to bolster the "vitality and quality of the process" and avoid the technical challenges accompanying the virtual platform.⁶² An ANC MP requested that a committee meeting with Eskom be a physical one as "the Committee wanted eye contact" with the officials it was interacting with.⁶³

Some in civil society say that they miss the informal contact and access they had to MPs. They were able to lobby MPs across party lines and this connection was lost due to virtual meetings.

The Media and the Virtual Setting

The loss of intangibles is applicable to the media as well. Mark D’Arcy notes that the virtual setting changed the dynamics of parliamentary politics and nuance. For example, ‘backbencher dissent’ is lost to parliamentary reporters as online meeting platforms do not allow one to read body language.⁶⁴ Some Members log in late, others do not turn their cameras on and more often than not, reporters cannot see all the faces of the participants at once. D’Arcy further states that disturbances from the environments Members dial in from also serve to pull the attention of reporters from the content.⁶⁵

While reporters can still request comment from Ministers’ and other attendees’ offices or via WhatsApp, members of the press can no longer approach participants in person after sessions within the parliamentary precinct and its surrounds. Journalist Linda Ensor says that this freedom allowed for further interrogation that would be shared with readers of various publications, further cementing the media’s role in buttressing South Africa’s democracy.

Pam Saxby, a journalist and public policy monitor under Policy Watch SA, notes that the virtual setting has made committee meetings more accessible, particularly for journalists. This is primarily because they can revisit the recordings of meetings when it is more convenient, enabling journalists to report accurately on more than one meeting. Saxby says that the virtual setting could be improved by making the documents presented at meetings more widely available.

D’Arcy states that variables such as poor sound quality, connectivity issues or the failure to include the press in meetings leads to the omission of critical information.⁶⁶ This means that members of the press must paraphrase content or wait until the meeting content has been uploaded in order to accurately report on the events. Finally, what seems to be a global occurrence is that the news relating to the pandemic effectively crowded out other news-worthy parliamentary happenings. Policy developments received anecdotal mention as footnotes to the virus or as sound bites in broadcast media.⁶⁷

Benefits of the Digital Platforms

The pandemic has in many ways forced Parliament to embrace the potential of the technology it has at its disposal. While Parliament arguably has yet to exploit its full potential, the work done so far is encouraging. It is an indication of the reach that Parliament could have - a positive for the fulfilment of its constitutional mandate.

Indeed, in its end of the year statement, Parliament acknowledges this fact. It notes that the pandemic has created an opportunity to expedite the process of “achieving the baseline for e-Parliaments, set by the world body of parliaments, the Inter-Parliamentary Union (IPU) and the United Nations, on the use of information and communication technologies (ICT) by parliaments”.⁶⁸ An e-Parliament is described as a legislature that makes use of ICT to facilitate more efficient “law-making, representation, and oversight”.⁶⁹ This is made possible via the use of technology, the application of the relevant standards and development of supporting policies, with the intention of creating an “equitable and inclusive information society”.⁷⁰

As large department and state owned enterprise delegations no longer need to travel physically to Cape Town to account, given the constrained fiscus, the travel and subsistence savings must be immense.⁷¹ Further, Members no longer need to fly frequently to join meetings and plenaries. More savings were made in the catering department. Finally, the digitisation meant that money was saved on printing costs (which also contributes to a sustainable approach to communication).

Members could engage with the Executive more consistently as travelling was no longer taking place. The Executive just had to streamline schedules and log in. This frees up large chunks of time taken up by travelling, making them more available. Further, it means that Members should be able to engage more with their constituencies.

The benefits of the virtual platforms are well illustrated in the Portfolio Committee on Cooperative Governance and Traditional Affairs. Working virtually has allowed the Committee to meet with provinces, metros and even rural municipalities as the organisation of a meeting takes a mere Zoom invite. Had this been pre-pandemic times, the Committee would not have had the benefit of engaging with all these stakeholders at the same time. The Committee often holds meetings twice a day – presentations and discussion in the morning session and then follow up on outstanding matters from the morning session in the evening session or a completely new engagement in the evening. In the constituency period, the Committee received permission to conduct constituency work during the day and then meet with various municipalities in the evening.

An aspect of the hybrid setting that has been unexpected but welcome, is the presentation of MPs as regular South Africans – people with family responsibility and relationships outside of parliamentary ones. It has also allowed parliamentarians to participate where they may not have been able in pre-Covid times. For example, where physical illness prevented an MP from participating in a committee meeting before, now, one can log in remotely from the comfort of one's home.⁷²

Above and beyond allowing Members to have their say in absentia, through proxy voting for example, the hybrid setting has created “a window of opportunity for progressive reform”.^{73A}

continued virtual setting would allow for a more inclusive and diverse legislature. Individuals who may not have considered a career in public office may now do so. For example, people with disabilities who may have been precluded from safe and/or comfortable travel can now consider having their voices heard, along with those of their communities.

Further, in a Parliament that has 44% women,⁷⁴ the possibilities become endless for women who wish to start families and are often primary caregivers. Other MPs who are parents, wish to start families or have young families can now also realistically consider a healthy work-life balance. It places the power to decide how to participate in Parliament squarely in the hands of the Members.⁷⁵

A continuation of the virtual setting will position South Africa as a modern, accessible Parliament.⁷⁶

A large increase in the number of meetings held as a result of the lack of physical limitations that virtual platforms provide has been observed. In addition, a digital archive is being created via the broadcast and recording of meetings. This will be invaluable for monitoring as well as general educational initiatives.

Public Participation

The digital divide has negative implications for regular South Africans. Public participation is a fundamental part of our democracy and speaks to the constitutional principles of transparency, accountability and responsiveness.⁷⁷ Public participation is primarily conducted by allowing the public to physically access and observe parliamentary committee meetings, supplemented by television broadcasting and the publication of the relevant reports, by inviting interested parties to make written submissions to committees and holding hearings at Parliament as well as country-wide public hearings when a topic generates widespread interest, among other mechanisms.

There must be an acknowledgment of the long history of exclusion during the law-making process in South Africa. So serious is the matter that it was an issue for consideration before the Constitutional Court in the *Doctors for Life International v The Speaker of the National Assembly*⁷⁸ matter. There, the Court highlighted the importance of meaningful and inclusive engagement with the public when considering legislation and making policy. Failure to execute the public participation element of law-making renders that law unlawful and open to constitutional challenge.

The Legislature passed numerous laws during the pandemic. As a result, there were attempts to fulfil the public participation element under the restrictions. Bills were gazetted as usual, and calls for comments and submissions were sent out as per norm. The virtual hearings held included and involved contributions from business, civil society and members of the public. In some cases, notably in the public participation process where the *Upgrading of Land Tenure Rights Amendment (ULTRA) Bill* was concerned, virtual public participation in remote areas was piloted in the five days of hearings. Although connectivity was patchy, this is an inexpensive tool that can be used in the future to ensure the voice of rural people is heard.

To assess the public participation process during the lockdown, one must assess the process prior to the pandemic. Numerous factors meant that there was still a significant amount of exclusion of communities before the lockdown. Lack of access to the relevant legislation, language and literacy barriers, ineffective communication methods on the part of Parliament and the general elitism that accompanies law-making and the legal fraternity, are compounded by the digital divide. These factors persist despite Constitutional Court precedent and effort on the part of the Legislature. Further, far flung rural areas receive less inclusion, and even when they are consulted, the time might be limited, rendering the process insufficiently meaningful.

The pandemic has served to further hamper this public participation problem. This means that rural communities are excluded. Alternatively, they can rely on civil society which has proven instrumental in picking up the slack when it comes to the dissemination of information and assisting with public participation during this period.

Significantly, the Public Education Office of Parliament has developed a *Public Participation Strategy in Support of the Houses of Parliament and its Committees during Covid-19 Level 1*. This is so its Public Participation Model (PPM) can continue during the pandemic. The Strategy states:

“The PPM seeks to ensure that all initiatives are effectively implemented by adopting a multi-sectorial approach, using a range of key stakeholders to reach different target audiences. Due to COVID-19, communication platforms such as TV, Radio (community and African language radio stations) needs particular focus as a medium to reach vulnerable communities including the poor and rural populations as well as social media platforms.”⁷⁹

The ULTRA Bill hearings were the pilot for this strategy. Key to this strategy is data provision. Data is provided to participants to engage in virtual briefing workshops on the Bill; participants are then able to use SMSes, WhatsApp, or a website page to submit comments. Thereafter a virtual public hearing allows data-provided participants to make oral submissions. Of course, collaboration with organised formations in civil society is important for the success of this.

It is important to note that Parliament did make provision for rural South Africans to participate in the ULTRA Bill hearings process – the efforts may have been perceived to have been more impactful than they should or could have been. Parliament by its own admission stated that provision of data to participants was done very late into the mobilization and these teething problems remained a challenge.⁸⁰

According to Nokwanda Sihlali⁸¹ from the Land and Accountability Research Centre (LARC), the Centre has been a fundamental source of information for the rural communities that they work with. By her estimation, the virtual public hearings on the ULTRA Bill excluded the very people who have a vested interest in its contents. She stressed that rural citizens have limited funds to access data for internet use, or the Government Gazette. LARC has taken it upon themselves to relay the information to their community partners. It is worth noting that during the ULTRA Bill hearings, MPs themselves raised these problems. This intermediary process is echoed by Abrahams-Fayker who noted that organisations and individuals like the Black Sash and herself, who have access to electronic versions of the presentations and other pertinent information, ensure that they share these with their community partners.

Sihlali’s difference in observation on the success of the virtual hearings could be chalked up to a difference in perception, or it could be a note to Parliament to do and spend more time and finances on executing a more far reaching process than was concluded under these circumstances.

Sihlali chided Parliament for being unimaginative when executing the public participation process. She suggested socially distanced town halls where proceedings could be screened and Parliament could bear the cost. She mentioned the provision of airtime to interested individuals so they could join streamed proceedings – an activity LARC took upon itself, at its own cost, during these hearings. Further, the renting of audio-visual equipment for the hearings at a nominal cost and the public’s comments could be recorded by a nominated representative.

Exclusion due to the digital divide is not unique to South Africa. While exploring the communication and technological exclusion of the indigenous people of Australia, Papandrea says that “[e]quitable access to a range of communication services is enshrined in public policies”,⁸² laying the responsibility of the change at the feet of the policymakers. This means

that it is not just Parliament that must accept its responsibility to mitigate the exclusion that takes place, and where it fails, seek assistance from government.

In South Africa, collaborative governance could easily alleviate the digital divide. For example, the Departments of Public Works and Infrastructure, and Communications are both imperative to the facilitation of effective and inclusive parliamentary processes that meet constitutional muster. The missing element is political will.

The use of traditional media has always been instrumental in information dissemination in South Africa, with radio having “borne a huge share of this responsibility, because the medium is pervasive, local, extensive, flexible, available, readily understood, personal, portable, speedy, and efficient”.⁸³ The manipulation of and inclusion of formal and informal media in the African context cannot be understated. Where resources are limited, looking to existing mechanisms to buttress constitutionalism is necessary.

Parliament must be commended in its response to the apparent gaps in the public participation process during COVID-19. Parliament acknowledges that the virtual setting has presented a unique opportunity to accelerate the use and access to technology to facilitate a more meaningful and inclusive public participation process beyond the pandemic.

It remains to be seen how the Public Participation Strategy with its emphasis on bridging the digital divide will evolve and positively impact public participation.

Constituency Work

Constituency work is an integral part of the parliamentary mandate and involves connecting with and being held accountable by the electorate. Constituency work can be executed in various ways including being available to the public for queries, solving problems and reporting back to constituents on parliamentary developments.⁸⁴ The parliamentary programme blocks out certain days and weeks to allow Members to account to their communities; however, ideally, constituency work should be considered a daily part of an MP's duties.

When Parliament is in session, Mondays are reserved for constituency work. Initially, the Legislature had to suspend constituency work on Mondays owing to lockdown, and committee meetings would be held on the day instead. However, a decision to revert to the norm was taken in late May, such that MPs were expected to engage with their constituencies every first day of the week, as was the case pre-COVID-19.

Constituency offices are the first point of contact for people on the ground, and by virtue of this fact, they should be well-staffed, kitted out with information and be easily accessible to constituents. This has been particularly true for the period under review. Unfortunately, in South Africa, the constituency system does not have a good reputation.

Despite it being almost two years since the Sixth Parliament started, the Parliamentary Monitoring Group (PMG) has struggled to get constituency office information from nine of the 14 political parties currently represented in the National Assembly. Three parties submitted partial or outdated information, and others did not submit any of this information at all.⁸⁵ It is concerning that the largest party has failed to submit this information. This does not bode well for their constituents as they are unlikely to know where to go or who to approach for solutions. We saw how instrumental constituency offices are during the early days of the pandemic. Some examples include assistance in accessing food parcels in KwaZulu-Natal, and assistance in accessing the Unemployment Insurance Fund (UIF) and registering for the Temporary Employer-Employee Relief Scheme (TERS) benefits.

An honest conversation must be had about the funding allocated to parties for the establishment and sustainment of functional, effective and accessible constituency offices. Hundreds of millions of public funds are earmarked for the constituency system annually, yet there seems to be a gap in the monitoring and evaluation of these funds. It is inexcusable that political parties can collect cheques that are intended to serve the public yet we see no openness in that arena.

MP constituency work is opaque with limited information at hand. The 2019 Legacy Report of the Joint Standing Committee on Financial Management of Parliament noted that "constituency offices, which are funded by Parliament, were inadequately monitored. This has been confirmed by the administration. This has made it impossible to confirm whether the offices exist as indicated, and where they *did* exist, whether they were operational. Oversight visits rarely, if ever, emanated from the work parliamentarians performed in their constituencies. This could be indicative of constituency offices being under-utilised".⁸⁶

The temporary closure of Parliament coincided with a constituency period that, ideally, should have allowed Members and other elected officials to come to the aid of their communities in an uncertain period. For some, this period was used for just that, and as time progressed, a healthy, safe and effective constituent-representative relationship developed. It is accepted that when the pandemic hit and countries instituted hard lockdowns, the primary reactions of most legislatures were, unsurprisingly, about emergency powers and Covid-19 legislation. This had the impact of side-lining the critical role that constituency work could play, especially during a period of crisis.⁸⁷ Leston-Bandeira and Prior are accurate in noting that “If there was ever a time to engage with citizens – to inform, consult, and work with them – it is during a crisis like COVID-19”.⁸⁸

One UK MP’s office experienced a deluge of requests for assistance, information and advice in the first two weeks of the lockdown – five times more than they usually received per day.⁸⁹ This is indicative of the critical role that constituency offices play, along with working and open channels of communication between MPs and the people who elected them, particularly during crises.

One of the benefits of working remotely for MPs, according to a member of the official opposition in South Africa, was the ability to be closer to their constituencies and serve them in a more visible and accessible way for a period more consistent than had ever been experienced. The barrier of travelling between Parliament and his constituency was removed. This MP was able (and continues to be able) to attend to more issues by managing his schedule well. This virtual setting means that an MP can log out of a meeting and walk out into their constituency and respond to community issues in real time.

However, because there is a history of poor fulfilment of constituency duty in South Africa by MPs, in some cases, being at home did little to change the relationship between representatives and their electorate. There is a myriad of variables at play here, one of which, as Saxby notes, is connectivity. She says that given the conditions in which most South Africans live and their generally low-income levels, technology is not yet a workable alternative (for the majority of South Africans) when it comes to constituency work. Other variables, including the availability of PPE and movement restrictions must also be considered. As Runji writes, while a pandemic demands out-of-the-box thinking, it is not impossible and can be conducted in various forms outside of the confines of the committee meeting.⁹⁰

Parliamentary Output

There is a reasonable expectation that due to the disruptions caused by the pandemic, Parliament's productivity would have been significantly hampered and that we would see a marked decline in output and attendance compared to similar periods in previous years. However, the evidence indicates that the virtual setting has allowed for the far more frequent presence of the Minister and/or Deputy Minister at meetings - a welcome development.

As this research is limited to the second and third parliamentary terms, during this period, Parliament held a total of 644 meetings. In the second term, there were 470 meetings – a record for Parliament – indicating rigorous oversight once Parliament found its footing.⁹¹

The Portfolio Committee on Cooperative Governance and Traditional Affairs (COGTA) was the busiest during the second and third terms with 52 meetings conducted - more than four times its usual number. The Portfolio Committee on Human Settlements, Water and Sanitation met 32 times - a three-fold increase, followed by Justice and Correctional Services at 25 - this was unchanged. The Portfolio Committee on Social Development met 18 times - double the number, 9 of which were strictly related to Covid-19. We saw a high number of meetings for the Appropriations Committee as they grappled with reappropriation of funds to departments that were at the frontline of Covid-19 response and those who experienced major expenditure during this period.

During this period, Parliament's output was significant, not just in relation to Covid-19. 16 bills were introduced to Parliament over these two terms. 10 bills were passed, including the *Prescription in Civil and Criminal Matters (Sexual Offences) Amendment Bill* and the *Civil Union Amendment Bill*. Parliament also passed the *Disaster Management Tax Relief Bill* and the *Adjustments Appropriation Bill* which were critical to the pandemic response mechanism. Four Bills were returned to the National Assembly by the President on account of reservations related to their constitutionality. These include the controversial *Protection of State Information Bill*. The President signed 13 Bills including the *Promotion of Access to Information Amendment Bill* and the *National Minimum Wage Amendment Bill*. Parliament passed the main and supplementary budget in the period under review. The latter was necessitated by the historic nature of the pandemic.

When it comes to legislative proceedings, the question of scrutiny is important. Was the necessary deliberation exercised in the passing of the numerous Bills? Was the passage of laws faster or slower than usual, thus allowing for less or more effective scrutiny – the kind that would meet constitutional muster? The procedural impact of the pandemic on Parliament must be assessed.

Recommendations

Notwithstanding the identified challenges, for the most part, the business of Parliament proceeded in a satisfactory manner since the advent of COVID-19, both from a technological and participatory point of view. The virtual and hybrid Parliament can be limiting and imperfect but experimenting with technology has enabled the Legislature to fulfil its essential function during the pandemic. Important lessons have been learned and some practices can be sustained and built on.

- The hybrid parliament should continue post-lockdown and be integrated as part of the programme as it gives flexibility and saves costs.
- Now that Zoom has improved its security, consideration should be given by Parliament to relax its media-only ruling and permit committee secretaries to allow interested members of the public to attend.
- Live-streaming of parliamentary committee meetings should continue post-pandemic and those recordings that cannot be live-streamed should be uploaded onto YouTube timeously.
- Even when Parliament returns to normal, the Legislature must continue to innovate and adopt digital tools that will improve its performance and operations. A dedicated team should be put together to conduct research. One specific example is to develop tools that can improve public engagement between lawmakers and their constituents.
- When considering facilitating access to Parliament's digital resources, zero rating is an option – not just of the Parliament website, but of all channels that carry parliamentary content. It would mean eliminating the financial barrier to data for accessing recordings and other parliamentary content.
- To overcome the public participation hurdles, Parliament must engage with civil society and use existing infrastructure⁹² to expand its reach to be a Parliament of the people, not just of the privileged. Parliament's "Public Participation Strategy" with its recognition of data provision, WhatsApp and web platforms is definitely a step in the right direction and will play a critical role in positioning Parliament to listen to the people in a more encompassing manner in an ever-increasing digital age.
- The disabled community is often overlooked. The use of free or affordable automatic close captioning applications will include citizens with auditory impairment. Consistent use of South African sign language will do the same in plenaries. Means permitting, the use of translation services to make material available in as many official languages will also meet Parliament's accessibility mandate, along with the requirements of the *Use of Official Languages Act*.
- Finally, for the long term, a review of the constitutional/civic education element of the school curriculum would serve to create an informed and more engaged citizenry – one that will interact with Parliament in a way that demands continuous responsiveness.

Conclusion

The impetus given by the Covid-19 pandemic forced Parliament to review its procedures and tools. Parliament was able to modernise its processes, make better use of technological advancement, and cut unnecessary costs.

While the establishment of a virtual Parliament has not been without its obstacles, these, as we have seen, are not insurmountable. Parliament is encouraged to forge ahead in the quest for a more inclusive and effective legislature that reflects the digital age in which we live. It would be a grave mistake to return to the status quo prior to the onset of the pandemic.

It took the pandemic to force the establishment of a hybrid Parliament. Some of the benefits that have been discussed can be transformed to long-term ones that would allow Parliament to streamline its activities while expanding its reach, thus fulfilling a crucial element of its constitutional mandate.

At the foundation of this reimagined legislature lies political will. It remains to be seen whether lessons from during Covid-19 pandemic will spur Parliament to deliver a more effective, inclusive legislature that meets its constitutional task.

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