

AN ACCIDENTAL GOOD: THE ROLE OF COMMISSIONS OF INQUIRY IN SOUTH AFRICAN DEMOCRACY

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“If you’re pestered by critics and hounded by faction
To take some precipitate, positive action
The proper procedure, to take my advice, is
Appoint a Commission and stave off the crisis.
By shelving the matter you daunt opposition
And blunt its impatience by months of attrition,
Replying meanwhile, with a shrug and a smile,
“The matter’s referred to a Royal Commission.”
Thus, once a Commission in session commences,
All you have to do is sit on your fences
No longer in danger of coming a cropper,
For prejudging its findings is highly improper.
When the subject’s been held for so long in suspension
That it ceases to call forth debate and dissension,
Announce without fuss “There’s no more to discuss.
The Royal Commission’s retired on a pension.”²

I INTRODUCTION

At one point in 2014 there were at least six commissions of inquiry in South Africa running simultaneously: A provincial commission into policing in Khayelitsha, presidential commissions into the arms deal and the massacre at Marikana, a ministerial commission into brutal evictions in Lwandle, a Competition Commission investigation into the private medical industry, and a

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² Geoffrey Parsons in *Punch* (August 1955), oft-quoted in writing on commissions of inquiry, including in Gregory Inwood & Carolyn Johns (eds) *Commissions of inquiry and Policy Change: A Comparative Analysis* (2014, Kindle Edition) location 164 (all references to Inwood & Johns are to locations in the Kindle edition which was the only edition available to me at the time of writing).

departmental commission into the collapse of a mall in Tongaat in KwaZulu-Natal. Former Justice Zak Yacoob recently recommended that the President establish another commission into the dysfunctional National Prosecuting Authority.³

These commissions are, according to one estimate, likely to cost the fiscus R300 million; the equivalent of 3 100 RDP houses.⁴ This proliferation has led to some skepticism about whether these commissions are worth the cost. At least one commentator has asked if South Africa needs a commission into commissions.⁵ While that may sound like a joke straight out of Yes Minister, both the United Kingdom⁶ and Canada (twice)⁷ have in fact held commissions into commissions. Anthony Butler – echoing Parsons’ sentiments – has explained his cynicism about the value of commissions: “If they set up an inquiry, the public is satisfied that something is being done, but then, four, five, six months later, sometimes two years later, when a report comes out, there is no public interest.”⁸

Although commissions have always had a place in South African politics – from colonial times, through the apartheid years and into democracy – their recent mushrooming raises some important questions. Is there a reason for the increased use of commissions? What role are they playing in our politics, and what is their effect on our constitutional democracy? Are they worth the cost, or are there alternative means for addressing these issues that would be more efficient? Do they indicate an increased commitment on the part of government to self-reflection, and independent problem-solving, or are they an attempt to avoid meaningful action? What, if anything, do they actually achieve?

³ See C du Plessis ‘Yacoob Calls for Judicial Commission into NPA’ *City Press* (2 November 2014), available at <http://www.citypress.co.za/politics/yacoob-calls-judicial-commission-npa/>.

⁴ Aphiwe Deklerk ‘Endless Inquiries Drain us of R300m’ *Times LIVE* (28 July 2014), available at <http://www.timeslive.co.za/thetimes/2014/07/28/endless-inquiries-drain-us-of-r300m>.

⁵ Dave Marrs ‘Letter from Cape Town: South Africa may need a Commission into Commissions’ *Business Day* (2 September 2014) available at <http://www.bdlive.co.za/opinion/columnists/2014/09/02/letter-from-cape-town-sa-may-need-a-commission-on-commissions>.

⁶ The Royal Commission on Tribunals of Inquiry *Report of the Commission under the Chairmanship of The Rt. Hon. Lord Justice Salmon* (1966), available at hillsborough.independent.gov.uk/repository/docs/LJT000000140001.pdf.

⁷ Law Reform Commission of Canada *Working Paper 17: Commissions of Inquiry* (1977); and Law Reform Commission of Canada *Advisory and Investigatory Commissions* (1979).

⁸ Deklerk (n 4 above).

As with most questions about complex matters, there are only complex answers. Commissions serve valuable public purposes that are not only consistent with constitutional principles of democracy, transparency and accountability, but promote it in ways that other comparable institutions struggle to emulate. At the same time, commissions are political tools that can be deployed for reasons entirely unrelated to finding the truth and taking action. And commissions can easily be manipulated by their staff and their participants to achieve goals unrelated to their initial mandate.

This paper considers the place of commissions of inquiry by examining the three most prominent of the recent spate of commissions: the Khayelitsha Commission, the Marikana Commission and the Arms Deal Commission. I argue that the three commissions – even the much-maligned Seriti Commission⁹ into the Arms Deal – have served to advance public understanding and government accountability. If its recommendations are even partially implemented, the Khayelitsha Commission (the only commission that has so far issued a report) will make a significant impact on the quality of policing in Khayelitsha, and quite possibly throughout South Africa.

But at the same time all three commissions serve naked political interests. In design and implementation, the commissions have been used to fight political battles between parties, hide government wrongdoing, and take the pressure off beleaguered state institutions. All three commissions have either resulted from, or been delayed by, litigation; and all three have attracted the attention of the Constitutional Court. But that they are sites of political contestation and manipulation does not denude them of their value – but it does force us to think of the role they play in different terms.

This paper unfolds in three parts: exposition, climax and dénouement. Part II of this paper describes the nature of commissions of inquiry: the legal framework, their purpose and their relation with other institutions. It also introduces the three commissions. Part III explains why the rationales often advanced for the establishment of commissions tell less than the whole truth. Commissions are also tools for political advantage, and can purposefully or unwittingly do more harm than good. The Marikana, Arms Deal and Khayelitsha Commissions all exhibit these flaws (although to vastly varying degrees). Part IV tries to find a beneficial effect of commissions, given their imperfections

⁹ Commissions routinely take the name of their chairperson. In this paper I refer to the three commissions interchangeably as: the Khayelitsha/O'Regan Commission; the Marikana/Farlam Commission; and the Arms Deal/Seriti Commission.

and vulnerability. It argues that, whatever the intention of their makers and manipulators, they almost always serve as a site for democratic struggle and political participation which is not easily replicated. That is true of the three commissions under review – even the much-maligned Arms Deal Commission. In that sense, they are an accidental good.

II COMMISSIONS OF INQUIRY: A FRAMEWORK

What are commissions of inquiry? This is a more complicated question than it sounds. I answer it in five sections. First, I briefly set out the South African framework governing the establishment of commissions. Second, I explain the purpose or role of commissions of inquiry in conventional constitutional discourse. Third, I discuss some basic characteristics of commissions. Fourth, I consider the types of commissions of inquiry that exist, and how they compare to other similar institutions. Fifth, I introduce the Khayelitsha, Marikana and Arms Deal Commissions, and explain how they fit within the framework.

South African Legal Framework

The Constitution affords the general power to appoint commissions of inquiry on the President,¹⁰ and the Premiers of the provinces.¹¹ There is no limit on why they may establish commissions, nor on what those commissions may be requested to investigate. When the President and the Premier establish commissions, they act as head of state and “head of province”, not as head of the national or provincial executives. This is a fine but important distinction because it means they act alone, not in concert with their cabinets,¹² and that their decisions are not administrative in nature.¹³ They are bound only by the weak chains of legality.

In addition to the President’s and the Premiers’ general powers to appoint commissions, the Constitution also creates a power to establish a commission for one specific purpose. Section 206(5)(a) allows “a province” to “appoint a commission of inquiry into ... any complaints of police

¹⁰ Constitution s 84(2)(f).

¹¹ Constitution s 127(2)(e).

¹² Compare Constitution s 82 to 84, or s 125 to 127.

¹³ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) (“SARFU”) at paras 146-147.

inefficiency or a breakdown in relations between the police and any community”.¹⁴ The power forms part of the basket of oversight powers the Constitution grants provinces with respect to the police.¹⁵

In addition to the original constitutional powers to appoint commissions of inquiry, there is also national and provincial legislation regulating the powers of those commissions. The Commissions Act¹⁶ affords presidential commissions to which it applies powers of subpoena and other coercive powers. There is similar legislation in some of the provinces.¹⁷ The legislation also allows the President to pass regulations to determine the procedure for commissions – although in practice the regulations are generally drafted by the commissioners, and then formally published by the President.

The Constitutional Court made it clear in *SARFU* that the decision to appoint a commission is distinct from the decision to afford that commission coercive powers through the Commissions Act.¹⁸ The President can therefore appoint a commission with or without coercive powers. However, as the Court noted in *Minister of Police v Premier of the Western Cape*, in many contexts – and particularly when the province investigates the police – “a commission without coercive powers would ... be unable to fulfil its mandate. It would be no different from an investigation.”¹⁹

In addition to the pure presidential or premier commission, there are a number of other bodies that closely resemble the traditional commission of inquiry. For example, the current inquiry into the private healthcare industry is a “market inquiry” under the recently enacted Chapter 4A of the Competition Act.²⁰ The inquiry into evictions in Lwandle was a “ministerial inquiry” set up by the Minister of Human Settlements without any particular constitutional or statutory authority. As a

¹⁴ Constitution s 206(5)(a).

¹⁵ See Constitution s 206(3)-(9).

¹⁶ Act 8 of 1947.

¹⁷ See, for example, the Western Cape Provincial Commissions Act 10 of 1998.

¹⁸ *SARFU* (n 13 above) at para 155. See also *Minister of Police and Others v Premier of the Western Cape and Others* [2013] ZACC 33; 2013 (12) BCLR 1365 (CC); 2014 (1) SA 1 (CC) at para 46.

¹⁹ *Minister of Police* (n 18 above) at para 50.

²⁰ Act 89 of 1998. Section 43A defines a market inquiry as: “a formal inquiry in respect of the general state of competition in a market for particular goods or services, without necessarily referring to the conduct or activities of any particular named firm.”

result, it did not have coercive powers and relied on the cooperation of the participants.²¹ While only the constitutional inquiries are true “commissions of inquiry”, the other variants closely resemble them and much of what I say in this paper applies to all such commissions, no matter their legal origin.

The Purpose of Commissions of Inquiry

What, in theory at least, is the purpose of a commission of inquiry? According to Sitze’s genealogical study of colonial and apartheid commissions, a commission of inquiry is “an administrative apparatus through which institutions of sovereign power pose questions to themselves about the scope, limits, and aims of governance, whether the governance in question be of populations, things, or goods.”²² While it evolved from ancient groups of advisors to kings, in its current form it is a distinctly modern institution; one that rests on the idea that we can better understand the world and how it works through careful study.

Thus, the primary rationale for a commission is to serve as a “truth-finding” device. It is intended to find out what happened when things went wrong, and advise the government on how to make things right. According to the Constitutional Court, commissions of inquiry are “an adjunct to the policy formation responsibility” of the executive of the President, and a mechanism “whereby [it] can obtain information and advice.”²³

But Commissions also serve an additional, vital purpose. The questions put to commissions of inquiry are not run-of-the-mill questions, but questions about, “above all, why and how it was that, in a particular case, government may have failed to govern.”²⁴ Commissions of inquiry are –

²¹ It did not get that participation. The City of Cape Town and the Western Cape Province – key role-players in the evictions – refused to participate in the inquiry because it regarded the investigation as a “political hit squad”. Jenna Etheridge “Zille likens Lwandle inquiry to a ‘hit squad’” *Mail & Guardian* (15 July 2014), available at <http://mg.co.za/article/2014-07-15-zille-likens-lwandle-inquiry-to-a-hit-squad>. I return to the “pot-calling-the-kettle-black” irony of Premier Zille’s statement below.

²² Adam Sitze *The Impossible Machine: A Genealogy of South Africa’s Truth and Reconciliation Commission* (2013) at 132 (my emphasis).

²³ *SARFU III* (n 13 above) at para 47, quoted with approval in *Minister of Police* (n 18 above) at para 44.

²⁴ Sitze (n 22 above) at 137 (my emphasis).

particularly in the South African context²⁵ – generally established “on the occasion of some governmental scandal or crisis” and are intended, either implicitly or explicitly, “to restore public confidence in government.”²⁶

This was recognized in *Minister of Police*, where the Court held that commissions can also serve “a deeper public purpose, particularly at times of widespread disquiet and discontent.”²⁷ Moseneke DCJ quoted the following passage from the Supreme Court of Canada’s decision in *Phillips v Nova Scotia*:

In times of public questioning, stress and concern they provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem. Both the status and high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence not only in the institution or situation investigated but also in the process of government as a whole.²⁸

There are, thus, two primary rationales: truth finding and restoring public confidence. The Court repeated this dual role in *Madigimana v President of the Republic of South Africa*:

It is open to the President to search for the truth through a commission. The truth so established could inform corrective measures, if any are recommended, influence future policy, executive action or even the initiation of legislation. A commission’s search for truth also serves indispensable accountability and transparency purposes. Not only do the victims of the events investigated and those closely affected need to know the truth: the country at large does, too. So ordinarily, a functionary setting up a commission has to ensure an adequate opportunity to all who should be

²⁵ In Canada, and to some extent the United Kingdom, there seems to be greater use of commissions of inquiry for policy advice purposes without any underlying scandal or catastrophe.

²⁶ Sitze (n 22 above) at 137-138.

²⁷ *Minister of Police* (n 18 above) at para 45.

²⁸ [1995] 2 SCR 97 at 137-8, quoted in *Minister of Police* (n 18 above) at para 45.

heard by it. Absent a fair opportunity, the search for truth and the purpose of the Commission may be compromised.²⁹

In addition to these two primary functions, commissions also serve a number of legitimate subsidiary purposes. They serve to educate the public, sample public opinion, and facilitate political compromise between opposing factions.³⁰

Characteristics

There are two vital characteristics of commissions: independence and openness. In order to achieve the goals of truth-finding and restoring confidence, it is vital that the people appointed to lead the commission are independent. If a report is going to actually find truth, soothe a troubled public while also educating them, the commissioners must in fact be independent (in order to enable them to fairly evaluate the facts) and appear to be independent (so that the community accepts their findings).³¹

That is why sitting and retired judges are so often used as commissioners. They have both institutional and financial independence, as they cannot be easily removed from their position, and are guaranteed a salary for life. And, they have the forensic skills necessary to gather and evaluate large quantities of evidence.³² Of course, an independent commissioner is not enough to guarantee

²⁹ [2013] ZACC 27; 2013 (11) BCLR 1251 (CC) at para 15.

³⁰ See Inwood & Johns (n 2 above) at 320, citing G Doern 'The Role of Royal Commissions in the General Policy Process and in Federal-Provincial Relations' 1967 (10(4) *Canadian Public Administration* 417 at 421 and Patrik Marier 'The Power of Institutionalized Learning: The Uses and Practices of Commissions to Generate Policy Change' (2009) 16(8) *Journal of European Public Policy* 1204 at 1206. See also Frank Iacobucci (1989-1990) 12 *Dalhousie Law Journal* 21 at 26.

³¹ Indeed, as Drache and Cameron note, actual independence is often secondary: "In contrast to the theoretical purpose of producing a consensus through a formal process of fact-finding, the job of a royal commission is to appear to have produced consensus." Daniel Drache & Duncan Cameron *The Other MacDonald Report: The Consensus on Canada's Future that the MacDonald Commission left out* (1985) at xi.

³² Stephen Sedley 'Public Inquiries: A Cure or a Disease?' (1989) 52 *Modern Law Review* 469 at 472 ("Why is it overwhelmingly judges and senior lawyers who are called on to conduct or preside over these and other inquiries? First of all, the use of lawyers plays a significant part in what I have suggested is a major function of inquiries: the organising of controversy into a form more catholic than litigation but less anarchic than street fighting. Secondly, in areas of high controversy a judge offers a seal of credibility.")

that the commission will be effective, or that its work will be accepted. As I discuss in more detail later, the processes that a commission establishes (or fails to establish) are equally important to ensure a commission achieves its noble goals.

Commissioners, though, need to be more than independent. Managing a commission is an extremely challenging task: “A public inquiry commissioner may combine a number of roles: that of a fact-finder, like a judge; a proposer for policy reform; a healer for traumatized communities; and a manager with responsibility for budgets and an administrative and legal staff”³³ The staff of the commission – the evidence leaders, the administrators, the researchers, the experts – all play a vital role not only in the efficiency or otherwise of a commission’s work, but in directing its inquiry.³⁴

In addition to independence, commissions are by their nature open. Their sittings occur in public.³⁵ The documents that they rely on are generally publicly available. They welcome submissions from any interested party, and call widely on experts to testify. In addition, they produce reports that are, as a general rule, publicly available and are expected to justify their findings and recommendations. In this sense they are similar to both court proceedings and parliamentary proceedings which are naturally open. But, as I try to demonstrate in what follows, commissions have important advantages over both those institutions.

Typologies and comparable institutions

There are various ways to distinguish between commissions of inquiry. Perhaps the most common is to differentiate between advisory and investigatory commissions. This was the line drawn by the Law Reform Commission of Canada:

[C]ommissions of inquiry are of two general types. There are commissions which advise. They address themselves to a broad issue of policy and gather information relevant to that issue. And

³³ Dennis O’Connor ‘Some Observations on Public Inquiries’ Presentation to the Canadian Institute for the Administration of Justice (10 October 2007), quoted in Inwood & Johns (n 2 above) at 853.

³⁴ See generally, Inwood & Johns (n 2 above) at 850-890.

³⁵ Commissions Act s 4 (“All the evidence and addresses heard by a commission shall be heard in public: Provided that the chairman of the commission may, in his discretion, exclude from the place where such evidence is to be given or such address is to be delivered any class of persons or all persons whose presence at the hearing of such evidence or address is, in his opinion not necessary or desirable.”)

there are commissions which investigate. They address themselves primarily to the facts of a particular alleged problem, generally a problem associated with the functioning of government.³⁶

While acknowledging the possibility that some commissions perform both roles, it affirmed that “almost every inquiry either primarily advises or primarily investigates.”³⁷

Salter rejects this dichotomy and prefers to locate commissions along a spectrum between advising and investigating.³⁸ Other academics stress the importance of maintaining the distinction because the two types require different skills and different processes.³⁹ While few commissions will be purely advisory or purely investigative, the distinction between the two is a useful heuristic that helps us to focus on the multiple – and not always compatible – purposes that commissions are intended to serve. The more investigative a commission is, the more likely it will need stringent cross-examination and strong protections for witnesses who may face civil or criminal liability as a result of the commission’s findings. The more advisory a commission is, the more it is likely to be open to hearsay evidence, curtail cross examination, and allow more interested parties to participate.

Commissions are, obviously, not the only government institution that can perform the task of independent fact-finding. Nor are they the only institutions capable of restoring public confidence in the state. Indeed, they have certain limitations compared to the two most obvious competitors: courts and parliament. As a former justice of the Supreme Court of Canada has noted, “[c]ommissions of inquiry are not courts, structured to reach the most reliable final conclusions about facts, nor can they make the representative decisions about values which Parliament may be required to make.”⁴⁰ Many tasks can be performed better by courts, or legislative committees.

Yet commissions operate in a way that neither courts nor legislatures can. Sedley explains why commissions are better suited than courts for some problems:

³⁶ LRCC *Advisory and Investigatory* (n 7 above) at 3.

³⁷ *Ibid.*

³⁸ L Salter ‘The Two Contradictions in Public Inquiries’ (1990) 12 *Dalhousie Law Journal* 173 at 176. Godsoe argues that “[v]irtually every commission turns into a policy commission because, with investigative commissions, not only are the specific questions responded to, but most investigative commissions place their answers in a broader policy context.” JG Godsoe ‘Comment on Inquiry Management’ in A Paul Pross, I Christie & J Yogis *Commissions of Inquiry* (1990) 71 at 72.

³⁹ See Bryan Schwartz ‘Public Inquiries’ (1997) 40(1) *Canadian Public Administration* 72 at 80; Inwood & Johns at 378.

⁴⁰ Frank Iacobucci ‘Commissions of Inquiry and Public Policy in Canada’ (1989-1990) 12 *Dalhousie Law Journal* 21 at 24.

By being public [a public inquiry] borrows one of the strengths of the legal system, funnelling the arguments away from the anarchy and subjectivity of public debate and into the apparently objective and orderly forum of a proceeding which the world can watch but in which nobody speaks unless spoken to. By taking the form of an inquiry it escapes the constrictions of subject-matter and procedure which make litigation an inapt solution. There are now no parties, only those whose legitimate interest has gained them entry on sufferance; no isolated issue to be resolved; no predefined questions of fact to be answered or body of statute or common law to be applied to them like acid to litmus paper. The matter, as lawyers like to say, is at large.⁴¹

A commission's advantage over a legislative body is obvious – its independence. If the purpose of a commission is to conduct impartial fact-finding, a commission dominated by the ruling party will not be trusted to perform that task. A commission chaired by a retired judge will. Moreover, commissions of inquiry permits “longer-term reflective thinking in a more neutral atmosphere and can incorporate voices not usually present in the legislative realm.”⁴²

Similarly, in some instances, executive institutions may also be effective if they are investigating other departments or spheres of government where they can legitimately claim to be independent. But, many issues that commissions consider cannot be properly addressed by the executive branch because of “the need for open public input or a perceived need for an independent and impartial approach, cannot be resolved internally by government. The issue may involve an inquiry into the other elements of government or of the bureaucracy itself. Sometimes the issues may be too controversial.”⁴³ It is exactly those “hot potato” issues that call out for a commission of inquiry.

In the South African context, there are also the Chapter 9 Institutions: the Public Protector, the Auditor General, the South African Human Rights Commission and others. These bodies share many of the characteristics of commissions of inquiry: independence, investigative capacity, and the power to make representations. Where they differ is that their investigations are, generally, not directed by the executive branch, but by complaints received from individuals, or perceived by the institution. While this is obviously an advantage because it prevents the executive from diverting their attention from potentially embarrassing issues, it also means that the executive cannot deploy those resources when it truly wants independent policy advice or an independent investigation. As

⁴¹ Sedley (n 32 above) at 470.

⁴² Inwood & Johns (n 2 above) at 293.

⁴³ Iacobucci (n 40 above) at 25.

Sedley notes, “no individual has a right to [a public inquiry] – only the central or local state can in practice mount it, and whether or not to do so lies entirely in its discretion.”⁴⁴

In short, while commissions have strengths and weaknesses, their functions cannot be fully replicated by any other existing institution.

The Three Commissions

These noble goals of truth finding and restoration through independent commissions, plainly motivated the establishment of the Marikana, Khayelitsha and Arms Deal Commissions. When one considers the documents establishing the various commissions and that the three commissions have, thus far, produced, they fit directly into the mould described above. In this section, I briefly describe the purpose of each commission and the rationale proffered for its creation. I delve more deeply into the real purposes behind the commissions in Part III.

Marikana

On 16 August 2012, 34 (mostly) unarmed strikers were gunned down by police outside Marikana in the North West. The events at the first koppie – where 17 people lost their lives – were captured by several local and international news crews and almost immediately broadcast across the world. The events at the second koppie were far more disturbing. The miners who had fled there to hide were surrounded, hunted down and shot, many while trying to surrender. The event is undoubtedly a watershed moment in post-democratic South Africa. And it is exactly the type of event that a commission of inquiry is traditionally designed to deal with: one that requires both findings of fact, and the healing of wounds.

It was therefore unsurprising when, on 12 September 2012, President Zuma announced the establishment of the Marikana Commission to investigate the massacre. The Commission was, from the outset, welcomed by organisations representing the families of the victims, and those who were arrested and injured on the 16th of August. It was staffed by heavyweight lawyers. Chaired by retired judge Ian Farlam (sitting with two senior advocates), and with three well-respected senior

⁴⁴ Sedley (n 32 above) at 470.

counsel leading the team of evidence leaders, it was expected that the Commission would be independent and efficient. In terms of its initial terms of reference, it was expected to complete its work by February 2013.

The Commission is instructed to “inquire into, make findings, report on and make recommendations concerning” the conduct of a variety of responsible entities. On the continuum of commissions, the Marikana Commission lies far towards the investigatory end. While it was also intended to investigate deeper underlying causes and make policy proposals about the regulation of mining, that goal was always secondary and has largely disappeared from the Commission’s radar.

But it was always about more than fact finding. The Commission’s motto is “Truth, Restoration and Justice”. Early on, there was a demand that the state cover the cost of the transport and accommodation of the families of the deceased miners – most of whom lived in the Eastern Cape – which was quickly acceded to.⁴⁵ The families themselves brought little to the Commission in terms of evidence, but a great deal towards the legitimacy of the Commission and its broader purposes of “Restoration and Justice”. And the Evidence Leaders’ final recommendation was the establishment of a “some form of heritage project which will have a healing effect.”⁴⁶ The Farlam Commission has been self-consciously about healing the wounds and recognizing the horror of what occurred at Marikana.

Arms Deal Commission

The so-called Arms Deal has had repercussions for South Africa’s young democracy far beyond the value of the arms that were purchased. The conviction of his former financial advisor for corruption in the Arms Deal led to the firing of Jacob Zuma as Deputy President in 2006. It led to the institution of corruption charges against Zuma, the dropping of those charges, and the DA’s current review of the decision to drop those charges. The charges against Zuma also, indirectly, led

⁴⁵ 2012.11.14: GG 35875, P 66.

⁴⁶ Evidence Leaders’ HoA at para 1347 (“The essence of any such project must be that it is more than some kind of formal memorial: it must be the result of a process which brings people together to decide, jointly, what heritage project should be undertaken, and how this should be done. If the parties affected are able to come together to reach agreement on a project aimed at memorialising what has happened, that would be a very important step in achieving the goals of truth, restoration and justice.”)

to the ANC's decision to "recall" Thabo Mbeki as President in 2008.⁴⁷ The Arms Deal is largely to blame for the dissolution of the Scorpions, the establishment of the Hawks, the *Glenister* Judgment,⁴⁸ the current sorry state of the National Prosecuting Authority, and the recent inquiry by former Justice Zak Yacoob.

The genesis of the Arms Deal Commission is a case brought to the Constitutional Court by retired bank-manager and anti-arms deal activist, Terry Crawford-Browne. On 1 December 2008, FW De Klerk and Archbishop Desmond Tutu made a joint request to the then President Motlanthe asking him to institute a commission of inquiry into the arms deal. The President, unsurprisingly, refused. Crawford-Browne took it on himself to approach the Constitutional Court⁴⁹ for an order reviewing the decision not to institute the inquiry and compelling the President – now President Zuma – to institute an inquiry.

The case was initially set down for hearing on 5 May 2011 but was postponed to November to allow further evidence and argument to be submitted. On 15 September 2011, before the matter could be heard again, the President unexpectedly offered to establish a commission (although he refused to concede the Applicant had any right to demand he do so). The Applicant eventually accepted the offer, setting the stage for the Arms Deal Commission.

The "Commission of Inquiry into Allegations of Fraud, Corruption, Impropriety or Irregularity in the Strategic Defence Procurement Package" was established on 4 November 2011. The terms of reference require the Commission to investigate the (under)utilization of the arms and equipment, and "[w]hether any person/s, within or outside the Government of South Africa, improperly influenced the award or conclusion of any of the contracts awarded and concluded".⁵⁰ The President appointed Judge Willie Seriti – a sitting judge of the Supreme Court of Appeal – to head the Commission.

⁴⁷ See the description of events in *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA); 2009 (4) BCLR 393 (SCA).

⁴⁸ *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC).

⁴⁹ Crawford-Browne initially approached the High Court for relief. However, the President excepted to the application on the basis that the case fell within the exclusive jurisdiction of the Constitutional Court. Crawford-Browne accepted that the exception was well taken and approached the Constitutional Court.

⁵⁰ GG 34731, Notice R926, available at <http://armscomm.org.za/docs/20111104-gg34731-r926-terms-comms.pdf>.

To understand the purported rationale for the Commission, it is particularly interesting to look at the statement made by the then Minister of Justice Jeff Radebe when he announced the details of the Commission on 27 October 2011. Minister Radebe assured the public that the commissioners were all “senior judges of high standing and integrity, who have impeccable track records in the legal and judicial work. They are judges of independent minds, who command respect from their peers and have exhibited leadership attributes in their added responsibilities other than presiding in court.”⁵¹ A later passage again asserts the independence of the inquiry, while strongly suggesting exactly what outcome the executive hoped the Commission would reach:

The establishment of this Commission and the commencement of its work, represent a watershed moment in the history of democratic South Africa, in a quest to rid our nation of what has become an albatross that must now cease to blemish the reputation of our government and the image of our country. As we cross the Arms Deal Rubicon, we wish to assure all South Africans that this Commission will work independently of everyone, including the Executive.⁵²

With hindsight, the repeated assertions of the Commission’s independence seem to be a case where the Minister “doth protest too much.”⁵³

In addition to the assertions of independence, the Minister’s statement also directly asserted truth-finding and – somewhat strangely given the context – wound-healing properties of the new Commission. The Minister asserted that “the Inquiry will enable us collectively as a nation to reach closure on this otherwise contentious matter. We are hopeful that we will emerge from the Commission as a stronger nation glued together by values of social cohesion and nation building in a common endeavour to build a united and prosperous South Africa.”⁵⁴ The allegations of corruption

⁵¹ *Announcement of the details of the Commission of Inquiry into allegations of fraud, corruption, impropriety or irregularity in the Strategic Defence Procurement Packages* (27 October 2011), available at http://www.justice.gov.za/m_statements/2011/20111027_armscomms.html.

⁵² *Ibid.* The reference to the Rubicon is rather ironic considering South Africa’s history of previously disappointing crossings of that same infamous river. PW Botha’s Rubicon Speech is available at <http://www.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01600/05lv01638/06lv01639.htm>.

⁵³ William Shakespeare *Hamlet* (1602).

⁵⁴ *Announcement of Arms Deal Commission* (n 51 above). The statement continues in similar vein: “We believe that the work of the Commission will ensure that we sustain the momentum on the integrity of our national democratic

in the arms deal are presented as a traumatic event from which the public need to recover, and the Commission will help in that process. As we will see, this description of the role of the Commission sets it up for a finding that there was “no one to blame”.⁵⁵

The Arms Deal Commission, too, is primarily investigatory. It is intended to find out the truth of what happened. While it will advise the President on what steps to take to address its findings – and those may well include general policy proposals to prevent repeats of similar events – that purpose is secondary.

Khayelitsha Commission

The Khayelitsha Commission was set up by Premier Helen Zille – the only non-ANC leader provincial leader – on 24 August 2012. Zille chose former Constitutional Court Justice Catherine O’Regan and former National Director of Public Prosecutions Vusi Pikoli to head the Commission.⁵⁶

The establishment of the Commission followed a long process of complaints by non-governmental organisations operating in Khayelitsha⁵⁷ – led by the Social Justice Coalition (SJC). The Complainant Organisations lodged their initial complaint, calling for the establishment of a commission of inquiry, on 28 November 2011. The complaint alleged “widespread inefficiencies, apathy, incompetence and systemic failures of policing routinely experienced by Khayelitsha residents.”⁵⁸ Some of the inefficiencies they identified included: “insufficient visible policing in the community, lack of witness protection, lack of co-ordination between the police and prosecuting services and poor treatment of victims of crimes”.⁵⁹ The Complainant Organisations also identified

transformation. In contrast, the seriousness of these allegations threaten to undermine this hard earned integrity of our constitutional democracy which is perceived as exemplary to be emulated even on the international scene.”

⁵⁵ To steal George Bizos SC’s phrase.

⁵⁶ The Commissioners appointed Nazreen Bawa and Tembahlile Sidaki – advocates at the Cape Bar – to serve as their evidence leaders.

⁵⁷ The organisations included: the Treatment Action Campaign, Equal Education, Free Gender, Triangle Project and Ndifuna Ukwazi. Like the Commission, I refer to all these organisations as “the Complainant Organisations”.

⁵⁸ *Minister of Police* (n 18 above) at para 3.

⁵⁹ *Ibid* at para 4. See also *Towards a Safer Khayelitsha: Report of the Commission of Inquiry into Allegations of Police Inefficiency and a Breakdown in Relations between SAPS and the Community of Khayelitsha* (2014) (“*Khayelitsha Report*”) at 13.

eight individual cases which “provided representative examples of the consequences of those deep systemic inefficiencies.”⁶⁰

When she first received the complaints, Premier Zille forwarded them to the Provincial and National Commissioners of SAPS, as well as the Minister of Police. Despite repeated correspondence between the Premier and the Commissioners and Minister, she received no meaningful response. As a result, nearly nine months after receiving the complaint, she established the Commission.

The Commission’s terms of reference stated that it was established in terms of the Premier’s special powers under s 206(5) of the Constitution to create a commission to investigate allegations of inefficiency and a breakdown of relations between the police and the community. Accordingly, the terms of reference instructed the Commission to determine whether those two facts exist in Khayelitsha.⁶¹

The terms of reference also required the Commission to investigate “the reasons for, and causes of, the inefficiency and breakdown in relations”, and to make “recommendations as to how any inefficiency in the delivery of police services, or a breakdown in relations between the community of Khayelitsha and the South African Police Service ... may be alleviated or remedied.”⁶² The Khayelitsha Commission therefore fell far closer to the advisory side of the spectrum: while it was required to investigate the state of affairs in Khayelitsha, it was concerned with systemic problems, not individual incidents.

In its report, the Commission described how it saw its role as follows:

The Commission approached its mandate on the basis that its task was investigative in character, not adjudicative. Moreover, the Commission considered that its work was primarily forward-looking in that, if it did identify inefficiencies or a breakdown, it was to provide recommendations to remedy the inefficiencies or breakdown. In this sense the task of the Commission was quite different from a criminal or civil trial that seeks to determine whether the conduct of a person or organisation gives

⁶⁰ *Khayelitsha Report* (n 59 above) at 13.

⁶¹ Provincial Gazette 7026 (24 August 2012).

⁶² *Ibid* at paras 4(2)-4(3).

rise to criminal or civil liability. The investigative and forward-looking character of the Commission's mandate was key in determining the processes adopted by the Commission.⁶³

As I recount in detail in the next part, the O'Regan Commission was subject to significant political and legal contestation. In an explicit attempt to de-politicize itself and its Report, when the Commissioners handed over the report to the Premier, Commissioner O'Regan made the following statement:

The Commission also requests that those people who read this report, in the first place, you Madam Premier and the members of your provincial Cabinet and provincial legislature, as well as members of the opposition in the province, as well as the national Minister of Police, members of the national Cabinet, and Parliament, to remember, as you formulate your response to the report, that the most important consideration in assessing this report is the need to improve the safety of people who live and work in Khayelitsha. This is a strategic goal of both national and provincial government. It is unlikely that those strategic goals will be advanced if those who read and comment on this report, forget that its recommendations are aimed solely at improving the quality of life of the people of Khayelitsha, and instead comment on the report in a manner that engages in a transient dialogue focused on political point-scoring.⁶⁴

By attempting to frame the Report not as a win for the provincial over the national government (or the DA over the ANC) the Commission was attempting to confirm that its report was fair and independent.

Lastly, as one of the issues the Khayelitsha Commission had to address widespread violence, police brutality, vigilante killings and the breakdown of relations between the community and the police, it is unsurprising that many of its recommendations focused on rebuilding that relationship. Still, it is interesting that the Commission's very first recommendation is that each police station in Khayelitsha should, after consultation with the community, adopt a "community policing

⁶³ *Khayelitsha Report* (n 59 above) at xxii. The phrase "forward-looking" appears four times in the Report.

⁶⁴ *Handover Statement by Commissioners* at para 27, available at http://www.khayelitshacommission.org.za/images/towards_khaye_docs/Commissioners_Handover_statement_25_August_2014.docx. See also, *Khayelitsha Report* (n 59 above) at xxvii (similar statement in the Report itself).

commitment”.⁶⁵ This combined with its attempt to de-politicize its report supports the idea that the Commission saw its task as more than truth-finding, but also building co-operation between the relevant organs of state, and the community involved.

III THE PROBLEM WITH COMMISSIONS

The previous part gave the “official” view of commissions as independent, impartial fact-finding, reconciliators. This Part asks why commissions are really established. I do not mean deny the high-minded goals discussed above. Nor, as I make clear, in the next Part, do I believe that commissions never serve those goals. But commissions do not emerge onto the political landscape pure and unblemished to search for truth, promote restoration and demand justice. They are political tools, used for political ends. Sometimes those ends are laudatory, and sometimes they are not. To have a full understanding of the role of commissions of inquiry in the constitutional framework, we need to understand how they can be employed – whether actively or inadvertently – to achieve ends other than truth, restoration and justice.

This Part begins by listing the naked political motives to which commissions can be put. It then considers some of the inherent limitations of commissions that prevent them from achieving their purported goals. Next, I explain how the process by which a commission operates can affect its ability to achieve its ends. I then explain how the language and grammar of commissions – particularly investigatory commissions into the police – tend to anticipate particular outcomes. Last, I identify all these deficiencies in the three commissions under consideration.

Delay, obfuscate, defuse and attack

Salter neatly summarises the way that politicians can use commissions of inquiry for narrow political ends: “[I]nquiries provide governments with the opportunity to delay, obfuscate and defuse political controversy, and with advice that they are free to ignore.”⁶⁶ Or, as the Law Reform Commission of Canada puts it:

⁶⁵ *Khayelitsha Report* (n 59 above) at 439. See also recommendation 8 at 451 (other steps to improve relations, including a “community-based mediation initiative”).

⁶⁶ Salter (n 38 above) at 174.

We recognize that commissions of inquiry may often be put to political use. It has been suggested, for example, that commissions may be established to stave off pressure, to postpone an awkward issue, to back up (hopefully) a government decision already made, or to make the man-on-the-street so sick of a particular issue that he will accept any resolution so long as the subject ceases to appear on the pages of his favourite newspaper.⁶⁷

It is no secret that the executive can and does use commissions of inquiry to divert attention or criticism. This happens in at least three ways. First, as the poem at the beginning of this paper suggests, the establishment of the commission itself is a form of action that allows the executive to avoid taking more serious and meaningful action, such as disciplining or prosecuting wrongdoers, enacting new policy, or proposing fresh legislation. The executive is forced to take action, and establishing a commission is the action least likely to produce prompt or effective results, while still giving the appearance that the government is taking the problem seriously. In the context of what he calls “Tumult Commissions” into riots or disturbances in colonial and apartheid South Africa, Sitze explains the effect that the mere creation of the commission can have:

by publicly signaling a government’s intention to air any and all of the powerful grievances that typically were associated with tumult, doubled as a preemptive strike against the political energy latent in those grievances: the very creation of a formal governmental space where passionate grievances could be aired, prior even to any formal inquiry into the facts surrounding those grievances, was an administrative gesture that, by deferring, dissipating, and redirecting passions of hatred and anger, itself participated in the governmental work of restoring a normal state of affairs following a riot, rebellion, strike, or disturbance.⁶⁸

⁶⁷ *Immunity from Prosecution* (1992) at 20-21.

⁶⁸ Sitze (n 22 above) at 178-179.

As a result, commissions were often “substitutes for prosecutions”, rather than precursors to prosecution.⁶⁹ Indeed, the nature of the inquiry process often makes subsequent prosecutions more difficult than if there had been no prosecution at all.⁷⁰

Second, by delaying, or drawing out the resolution of a scandal, the executive diffuses the public criticism. In an episode of *Yes Minister*, Minister Hacker is reading a report on cutting down the size of the civil service ... written by the civil service. He notes that, unsurprisingly, it contains various reasons not to take that course of action that are expressed in civil-service doublespeak. One of those reasons is: “[T]his is an urgent problem and we therefore propose setting up a Royal Commission. Translation: This problem is a bloody nuisance, but we hope that by the time a Royal Commission reports, four years from now, everyone will have forgotten about it or we can find someone else to blame.”⁷¹

It is not only the executive who establish the commission who may have an interest in delay. A commission may be established with the intent of a speedy conclusion, but be hijacked by the subjects of the inquiry. A commission into the conduct of a private company – a mining company perhaps – could be delayed as much by the commission itself, as by an obstinate party who knows that an adverse finding three years from now will be better than an adverse finding in three months. If it withholds documents, refuses to make witnesses available or, takes procedural points, the company can significantly delay the conclusion of the inquiry.

Third, by drafting the terms of reference in a particular way, the executive can divert attention from the most incriminating issues, seek to spread the blame, or focus attention on political opponents. For example, if the police are accused of killing unarmed civilians, the terms of reference would ask not only whether the police acted unlawfully, but also whether the civilians were to blame. It is no exaggeration that the terms of reference often “foretell[] the types of proposals that will be evaluated in response to them.”⁷²

In federal or semi-federal jurisdictions – like South Africa – where different parties can control different spheres of government, and those spheres each have the power to establish commissions of inquiry, there is room to use commissions as pure political attacks. A national commission can be

⁶⁹ Ibid at 152.

⁷⁰ Ibid.

⁷¹ *The Complete Yes Minister* (1989) at 106.

⁷² Salter (n 38 above) at 180.

used to target a particular municipality or province controlled by the opposition – as the Democratic Alliance alleged occurred in the Lwandle inquiry. Similarly, a provincial commission can be used to target a national institution, while skirting problems with organs of state controlled by party that controls the Premier’s seat.

Inherent limitations

In addition to Commissions being purposefully established or designed for political advantage, there are inherent limitations in the institution that limits what it can achieve. “By their very nature,” Simeon argues, “[commissions] can be no more than meliorative and reformist, rather than revolutionary.”⁷³ They are staffed by “representatives of established elites” and can often achieve little more than to “express ... a shifting conventional wisdom, tilting it in one direction or other way but working well within the bounds of the existing order.”⁷⁴

Moreover, when a commission is discussing its findings and recommendations, it is always doing so with its audience – the executive – in the back of its mind. The executive becomes a “silent member” of the commission because the question is always asked: how will the government react? Will they accept a certain recommendation? How should a negative finding be framed so as not to dissuade the state from accepting them? The appeal to the “silent partner” serves to limit and constrain what the inquiry report will contain and the scope of the recommendations it will make. It creates the classic situation of self-censorship.”⁷⁵

Commissions, Inwood and Johns explain, are “Janus-faced. They ostensibly seek change but are embedded in the prevailing political, economic, social, cultural, ideological, environmental, and institutional context of the times. The potential for policy change is thus related to the broader political system in which they are embedded.”⁷⁶ As much as commissions are formally independent, at a deeper structural level they are not entirely free to speak truth to power. They are limited to nudging power in the right direction.

⁷³ Richard Simeon ‘Inside the MacDonald Commission’ (1987) 22 *Studies in Political Economy* 167 at 169, quoted in Salter (n 38 above) at 178.

⁷⁴ Ibid.

⁷⁵ Salter (n 38 above) at 183.

⁷⁶ Inwood & Johns (n 2 above) at 632.

The Process

While the executive decides to establish a commission, who will staff it and what it will investigate, the commissioners usually determine the process that will be followed. Which parties will be allowed to participate? Which witnesses will be called? How long will they testify for? Will cross-examination be permitted and, if so, how will it be regulated? What documents will be admitted into evidence? When and how will those documents be made available to the parties?

The process a commission follows will, intentionally or not, affect its legitimacy, and the outcome of its investigation. Salter makes the powerful point that there is an inherent danger or contradiction in the process followed by a commission of inquiry and its relationship with the legal process, particularly in investigative commissions. The power of commissions over other alternative problem-solving mechanisms is their “capacity to investigate problems in a manner that is appropriate to the problem, the participants and the type of information being sought.”⁷⁷ Yet the type of process a commission follows affects who participates in the commission and how they do so.

The more a commission is investigating matters that raise potential civil or criminal liability, the more closely its procedures need to resemble traditional legal proceedings in order to remain fair, and for its findings to be seen as legitimate. Yet as it approaches court proceedings, the participants in the commission start acting like litigants. They become less co-operative and more defensive. They become less interested in problem-solving, and more interested in blame-shifting. The focus of the inquiry shifts away from the systemic problem that motivated the creation of the inquiry, and on to individuals.⁷⁸

That is why, Salter argues, “inquiries cannot become court-like in their approach”.⁷⁹ But at the same time, the failure to employ some of the techniques of legal process can equally limit the ability of a commission to reach the truth. Cross-examination, subpoenas, rules about the admissibility of evidence and so on all exist so that courts can be confident of their findings. Without those procedural checks, a commission’s work may be easier – gathering evidence will be simpler and

⁷⁷ Salter (n 38 above) at 190.

⁷⁸ Ibid.

⁷⁹ Ibid.

speedier – but its ultimate conclusions will be less reliable. Commissioners are required to strike the correct balance for the particular type of inquiry they are required to conduct. A miscalibration, as we will see, can have serious consequences.

A related concern is how the commission is funded. If a commission is to be effective and legitimate, it will need all the relevant role-players to take part. But participating in a commission generally requires legal representation, a commodity easily available to the state and large private companies, but seldom within the reach of the average citizen, or even community organisations. Who participates in a commission, and whether they do so on an equal footing with other participants, will influence the outcome of the commission. If only government agencies, corporations and well-funded lobby groups are represented, a commission risks not only being unable to find the truth, but being profoundly anti-democratic.⁸⁰

Discourse of commissions

So far, we have looked at how the establishment, design and process of commissions can undermine their ability to achieve their purpose. But commissions also operate within a discursive framework, a history of “commission language” that has the potential to subtly determine findings by framing issues in particular ways.

Sitze explains that during colonialism and apartheid, the role of Tumult Commissions was largely determined by a discourse of tragedy. Commissioners would describe massacres “as a tragedy in which violence enacted or permitted by the police could be called both intolerable and unavoidable.”⁸¹ The use of the word “tragedy” is vital because, as Sitze notes, tragedy is unavoidable – in the very deepest sense, we are all to blame and no one is to blame because the tragedy could not be avoided:

[T]ragedy is a fatalistic discourse that functions to establish insuperable limits to the possibility of determining human responsibility for grievous actions. ... [T]he discourse of tragedy becomes a powerful way for colonial government to admit to the illegality and inhumanity of imperial slaughter

⁸⁰ Salter (n 38 above) at 195.

⁸¹ Sitze (n 22 above) at 165.

while at the same time articulating the impossibility of accepting legal guilt or even just legal responsibility for that slaughter.⁸²

The Wessels Commission into the Sharpeville massacre, for example, reached a “balanced” conclusion that found fault both with individual policemen and with the protestors for inciting their one murders. According to the Commission, “Sharpeville was ... less a crime than a lamentable and regrettable tragedy”.⁸³

Sitze argues, compellingly, that the manner in which commissions were used under apartheid South Africa served – contrary to their supposed purpose – to reduce public debate, by obfuscating or even concealing altogether the ways and means of state crime. Here, the Commission of Inquiry was not a fact-finding device; it was a “whitewashing” machine.⁸⁴

These long-honoured roles for commissions – what Sitze calls their “grammar and a logic”⁸⁵ – cannot be easily abandoned merely because South Africa has moved from authoritarianism to democracy. When a commission today investigates the role of police in the killing of civilians, it does so against the background of all the commissions that came before it; commissions that found that everyone had a role to play, and therefore that no institution could be blamed. In addition, the basic structure and role of commissions of inquiry has not changed. We should be alive to the possibility that it could fail in the same way.

The Three Commissions

Having set out the theoretical framework for how commissions operate in practice, the scene is set to look at how the Khayelitsha, Arms Deal and Marikana Commissions have played out. It is a story of legal contestation, mistakes made, and principles abandoned. But as I hope to show in the last part, it is not a story without hope.

⁸² Ibid at 166.

⁸³ Sitze (n 22 above) at 181. See also ibid at 180 (“As G. J. Suttor said of the final report of the Wessels Commission, during Senate debates over the Indemnity Act of 1961: ‘I sit, Sir, with a report that leaves me no better off than I was. The Judge does not say the police were right or the police were wrong. He does not say the Natives asked for it or they did not ask for it.’”)

⁸⁴ Ibid at 157.

⁸⁵ Ibid at 164.

The Khayelitsha Commission

When we left the Khayelitsha Commission, it had just been established as a result of the failure of the Minister of Police or the National Commissioner to respond to the Premier's requests. The Minister and the Commissioner (I refer to them together as SAPS) were not pleased by the Premier's decision. The Minister requested the Premier to postpone the work of the Commission to allow further discussions between the parties. The Premier refused.

Meanwhile, the Commission had started its work. It began taking statements from members of the Khayelitsha Community, and attempting to gather documents from SAPS. But SAPS was not in the mood to cooperate; it refused to provide documents requested by the Commission. So the Commission issued subpoenas to the Provincial Commissioner and the station commanders of the three police stations in Khayelitsha. Unamused, the Minister and SAPS immediately launched an application in the Western Cape High Court to suspend the work of the Commission pending a review of the legality of its existence.

It is worth pausing to note an important gap in the Khayelitsha Commission's terms of reference. The Complainant Organisations had not limited their complaints to SAPS – the national police force. They had complained about the criminal justice system as a whole, including the prosecutors, the courts and the Metro Police controlled by the DA-run City of Cape Town, including the controversial Anti-Land Invasions Unit. The complainants had also argued that the socio-economic conditions in Khayelitsha contributed to the extent of crime in the township and SAPS's failure to adequately address it. Yet, the terms of reference were carefully limited to an investigation of SAPS. There is no mention of the Metro Police, or the role that the City and the Province play in making crime easier by failing to improve housing, provide schooling, and create employment.

That omission was one of the gripes SAPS raised with the High Court. The terms of reference, they argued, were irrational because they excluded the City. SAPS also complained about several other elements of the way the Commission had been established, and the ambit of the work it was required to perform. They argued that the Premier had no power to establish a commission with powers of subpoena (or at least no power to suspend members of SAPS), that the complaints did not justify the establishment of a commission of inquiry, that the Premier had failed to comply with

the process for dealing with intergovernmental disputes,⁸⁶ and that the terms of reference were vague, overbroad. Three High Court judges heard the case. Two dismissed all the Minister's grievances. The third would have upheld the complaint about the Premier's alleged shortcomings in intergovernmental relations.

Unsatisfied, the police appealed against the refusal of interim relief, and applied for direct access to the Constitutional Court to attack the validity of the Commission. The Constitutional Court agreed to hear the direct access application. But there the police's success ended. Moseneke DCJ upheld the validity of the Commission – confirming the power of the Premier to appoint the Commission, the Commission's power to issue subpoenas against members of SAPS, and the rationality of the Commission's terms of reference.⁸⁷ The Court issued its judgment on 1 October 2013.

The Commission – which had been quietly going about its work during the year-long delay – immediately got up and running. Chastened by the Constitutional Court's rejection, SAPS now reluctantly began to work with the Commission. Slowly but steadily, it began to hand over the extensive list of documents the Commission had requested. The Commission eventually received tens of thousands of pages from SAPS. This treasure trove of information about SAPS' functioning in Khayelitsha included internal inspection reports, technical documents about their internal monitoring and evaluation systems, minutes of internal meetings and Community Police Forums, copies of occurrence books, sector policing plans, complaints by members of the public and statistics of internal disciplinary procedures.

The Khayelitsha Commission finally got under way on 23 January 2014. It decided to split its work into two phases. The first phase lasted 31 days and addressed the veracity of the allegations of inefficiency and breakdown of relations with the community. It included testimony from Khayelitsha residents, members of the complainant organisations, members of SAPS,⁸⁸ and various experts or members of related institutions.⁸⁹

⁸⁶ As set out in the Intergovernmental Framework Relations Act 13 of 2005.

⁸⁷ *Minister of Police*.

⁸⁸ The Provincial Commissioner, the three station commanders, the three detective commanders, the three visible policing commanders, and the provincial heads of physical resources, human resources and performance management – amongst many others – all testified at the Commission.

⁸⁹ The Commission heard from prosecutors, pathologists, demographers, geographers,

What was notable about the Commission was the way that SAPS constantly tried to shift the blame to other organs of state – primarily the City and the Province for allowing conditions conducive to crime. They led an expert, Dr Barbara Holtmann, who emphasized that crime prevention required a whole of society approach, incorporating all organs of state, not only the police. The complainant organisations were supportive of these attempts. One of the SJC’s biggest complaints was the way that the City’s failure to provide adequate sanitation made it easier for criminals to assault and rape resident while they were walking to and from public toilets. While they focused on the shortcomings of the police, they also sought recommendations that would somehow address the role of the other participants.

The City however argued, successfully, that the Commission could not (subject to a few minor exceptions⁹⁰) consider the extent to which its conduct contributed to the inefficiencies in policing, or the breakdown of relations. The Commission’s Report is limited entirely to the conduct of SAPS. Other organs of state are relevant only insofar as they are required to interact with SAPS.

It is difficult to fault the Commissioners for their approach – given the terms of reference, they could hardly have acted differently. Yet it is also true that the ambit of the Commission was constructed so that blame could only be laid at one door: the police’s. All the institutions controlled by the DA were insulated from interrogation at the outset. While the Commission recognized the difficulty of policing in the conditions of Khayelitsha, it was precluded from finding that any organ of state was to blame for those conditions. It accepted them as a given and then found the police had failed to adequately adapt to policing in those conditions.

The *Khayelitsha Report* is an extremely valuable document – and I do not wish to undermine its importance for the future regulation of policing in Khayelitsha and elsewhere. But it is also an incomplete document – it tells only part of the story of violence in Khayelitsha.

Arms Deal Commission

When the Commission was first established, it was greeted by Crawford-Browne and other critics of the deal with cautious optimism. But virtually from the outset, the Arms Deal Commission has been dogged by scandal. On 7 January 2013, several months before the first hearing was held,

⁹⁰ The City’s conduct was considered in the operation of CCTV cameras.

Norman Moabi, a Senior Investigator and Attorney, resigned. In an explosive resignation letter,⁹¹ he alleged that the Commission had “two agendas” – the official agenda set out in the terms of reference, and a second agenda to obscure the truth. According to Moabi, there were “unknown person(s) who dictate which Evidence Leaders will deal with which witnesses and why”, the Commission’s administration was “managed by extended family relationships”, and that any input that did not advance the “second agenda” was ignored. He concluded his letter as follows:

I came to the Commission to serve with integrity, dignity and truthfulness. I cannot with a clear conscience pretend to be blind to what is going on at the Commission. I am unable to be part of this Commission since I have satisfied myself that the Chairperson seem[s] to have other ideas and *modus operandi* to achieve with the Commission what is not the clear mandate of the enabling Government Gazette.

Despite Moabi’s revelations, Crawford-Browne and several other activists continued to participate in the Commission in the hope that it could – despite the second agenda – serve some good.

Depressingly, Moabi was not the last to leave the Seriti Commission. On 22 July 2014, Barry Skinner SC and Carol Sibiyi resigned as evidence leaders.⁹² Much of their complaint revolved around the Commission’s poor treatment of a key witness – Dr Richard Young. They were repeatedly sidelined, and used as scapegoats. The position was so bleak that they felt the “role of evidence leaders ha[d] been diminished to the point where they are serving little purpose and are not independent.” Like Moabi, they felt compelled to resign because their “integrity [was] being compromised by the approach which the Commission appears intent on adopting.”

The reservations of Skinner and Sibiyi seemed to dissolve any faith that detractors of the arms deal still had in the Seriti Commission. On 29 September 2014, 32 disillusioned organisations – including several that had supported and participated in the Commission – issued a statement calling for the Commission to be dissolved. They identified four key flaws in the way the Commission had conducted its inquiry. First, it had refused to make thousands of documents publicly available.

⁹¹ Available at <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71656?oid=351406&sn=Detail>.

⁹² Their letter of resignation is available at <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71651?oid=679137&sn=Detail>.

Second, it had refused to admit vital documents, including the Debevoise & Plimpton Report: A report by a law firm detailing its own role in corruption during the deal. Third, the Commission had ruled that it would not accept documents unless they were presented by the author herself. As the organisations note, this renders it virtually impossible to uncover corruption: “[O]nly those with direct personal knowledge of corruption in the Arms Deal – effectively those who were party to it – would be in a position to give evidence of that corruption.” Obviously those parties would have no incentive to incriminate themselves. Fourth, the Commission had failed to call relevant witnesses from the arms companies, the suspected middlemen and foreign law enforcement agencies who had investigated the deal. The organisations argued that the Commission should be replaced by full and transparent criminal investigation that would prosecute those implicated in wrong doing.

Following the statement, several key arms deal critics – Hennie Van Vuuren, Paul Holden and Andrew Feinstein – decided to withdraw from the Commission. The three had played an important role in challenging the state witnesses, and were scheduled to testify in the upcoming “critique” section of the Commission’s work. They advanced the same flaws identified by the 32 organisations as the basis for their withdrawal.

The Commission reacted by subpoenaing them to testify. Van Vuuren bravely refused to participate. While he appeared at the Commission, he refused to testify because he did not want to lend legitimacy to the tainted Commission. In his words:

Commissioners, I am now faced with a difficult choice. How should I respond to your subpoena?

I am mindful of the fact that the arms deal has wrought havoc on the lives of ordinary South Africans and corrupted our politics for the past 15 years. It has profited international arms corporations while weakening our democratic state institutions. It has profited the rich at the expense of the poor.

I am also mindful that the cover-up that followed the arms deal has put in place a system of patronage with the purpose of keeping alleged corrupt elites out of prison. It allows them to continue benefiting from the spoils of an unequal society. I have regretfully come to the conclusion that this Commission will provide no remedy to this situation.⁹³

⁹³ *Statement by Hennie Van Vuuren to the Arms Procurement Commission on 20 October 2014* available at <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=749553&sn=Detail>.

The Commission has indicated that it intends to pursue criminal penalties against Van Vuuren for his refusal to testify.

Not all the arms deal critics refused to testify. Despite also calling for the Commission to be disbanded, Crawford-Browne elected to give evidence. In doing so, he made some controversial statements that forced Van Vuuren, Holden and Feinstein to issue a statement distancing themselves from it.⁹⁴

To say that the Commission has degenerated into farce is to understate the case. It is almost universally regarded as a whitewash. Given its conduct, it hardly seems necessary to wait for its report to know what conclusions it will reach. When one reads Minister Radebe's statement now, it is difficult not to see that the government had already pre-determined that the Commission would conclude that there had been very little wrong with the Commission.

In hindsight, the fate of the Commission is hardly surprising. If there is any truth to the allegations that the arms deal reached into the highest levels of the ANC, the chances that President Zuma would establish a commission that would actually reveal that corruption – including his own role – were non-existent. Instead, the Commission was used as a clever tactic to divert, delay, and ultimately discredit the substantial body of evidence establishing corruption in the deal. Its internal processes served to advance that nefarious purpose. Yet, paradoxically the very brazenness of the Seriti Commission's cover-up is good for democracy – or, at least, it is better than no commission at all.

Marikana Commission

While the Khayelitsha Commission was marred primarily by the limits on its investigation, and the Arms Deal Commission by blatant bias, the Marikana Commission has struggled throughout to get on top of how to deal with its procedure, and to focus its investigation on the real culprits. Unlike the Seriti Commission, nobody has seriously questioned the independence of Judge Farlam or the other commissioners, or alleged that the Commission has an alternative agenda. But the process it

⁹⁴ See 'Do not let fantasies detract from the depth of corruption' *Business Day* (16 October 2014) available at <http://www.bdlive.co.za/opinion/2014/10/16/do-not-let-fantasies-detract-from-the-depth-of-corruption>.

has followed has led to serious concerns about whether, despite its best intentions, it will be able to fulfil its mandate. There are really four parts to the problems with the Marikana Commission: Delay, omissions, funding and the discourse of tragedy.

Delays

When the Commission was established in September 2012, it was initially given four months to complete its hearings, and one month to write its report. With hindsight, that was widely optimistic. Twenty-six months later, the Commission is finally hearing closing arguments. Its period has been extended seven times – several of which have been “final” extensions. The Commission’s deadline to complete its hearings was first extended from 31 January 2013 to 31 May 2013.⁹⁵ When that proved insufficient, it was extended again to 31 October 2013,⁹⁶ 30 April 2014,⁹⁷ 31 July 2014,⁹⁸ 30 September 2014,⁹⁹ and, finally, 14 November 2014 (this Friday).¹⁰⁰

Why were there so many delays? And why was the Commission unable to make a realistic assessment of how long it would actually need to complete its task? This is not the place to make a full analysis of the Marikana Commission’s shortcomings, but there are three factors worth mentioning: the inherent nature of the inquiry, the uncontrolled cross-examination, and the mendacity of SAPS.

Firstly, the nature of the Commission was always going to make it both lengthy and unpredictable. It involved the investigation of specific events, primarily with an eye to recommendations of criminal and civil liability. And, as noted above, there were at least eight actively involved parties. While the Khayelitsha Commission – which was concerned only with systemic issues could paint in broad brush strokes – the Farlam Commission required detailed investigation and intensive cross-examination. This necessarily meant it lasted longer. But it also begs a question: if one of the purposes of the Commission is to make it easier to pursue civil and criminal liability, why repeat a

⁹⁵ Government Gazette 36154 (12 February 2013) 4.

⁹⁶ 2013.05.31: G 36526, P 15

⁹⁷ 2013.11.01: GG 37001, P 48

⁹⁸ Presidential Minute 123 (25 April 2014).

⁹⁹ 2014.07.04: GG 37798, P 40

¹⁰⁰ 2014.09.26: GG 38030 Proc 66

court-like process? Wouldn't a rough-and-readier process which finished far faster have been more appropriate?

Second, the Commissioners still failed to impose the necessary discipline on the participants, particularly with regard to cross-examination. Parties were allowed to ask repetitive and irrelevant questions. Presumably Farlam did not want to unduly curtail the investigation at the start, but once he set a precedent for the nature of cross-examination, it was difficult to change it as parties would argue they were being prejudiced relative to others. The practice was eventually changed in the second half of 2013, to require submission of topics beforehand, and stricter timelines. According to one participant, this cut cross-examination time almost in half. But much ground had already been lost. The Commissioners should not take all the blame for this – the parties took full advantage of the free reign they had been granted and often used cross-examination for grandstanding and political posturing, rather than forensic evidence gathering.¹⁰¹

Third, the police deliberately misled the Commission. After the massacre, SAPS assembled a meeting at Potchefstroom to “debrief” about the incident. However, according to the Evidence Leaders, “[w]hat was intended to be a debriefing exercise seems to have turned into an exculpatory exercise. ... Where necessary, documents were fabricated to support this version, and documents incompatible with this version were kept undisclosed. ... In short, the Roots exercise involved a concerted attempt to mislead this Commission.”¹⁰² This duplicity inevitably delayed the work of the Commission. Not only did it have to investigate an already complicated series of events, the primary roleplayer – and the one with the most direct and relevant evidence – was withholding relevant information, and lying to the Commission.

Omissions

Given the long delays, one would have thought that the Marikana Commission would have thoroughly covered the ground assigned to it. Not so. There are two major omissions in the Commission's work. First, only one of policemen who fired a shot at scene one has been called to

¹⁰¹ It is also difficult to entirely discount the possibility that – at least once funding was secured – that the legal representatives had an interest in extending the work of the Commission in order to increase their fees.

¹⁰² Evidence Leaders' Heads of Argument at para 917, available at <http://www.marikanacomm.org.za/docs/201411-HoA-EvidenceLeaders.pdf>.

testify: General Naidoo. The Police's primary defence for the killings at Scene One is self defence, yet none of the rank-and-file members who opened fire have testified as to their state of mind at the time. It is, therefore, impossible to make any meaningful finding on the central question of the Commission: Were the police justified in opening fire? While many related issues have been fully canvassed – the plan that led to the events at Scene One, the second-by-second breakdown of the shooting at Scene One, and the events at Scene Two – the state of mind of the policemen remains a mystery.

Second, the Commission was initially meant to investigate not only the direct responsibility for the killings, but also the deeper, underlying causes – the socio-economic factors that led to the strike in the first place. This involved investigating the system of migrant labour, the effectiveness of mining legislation, the conditions of mine workers, the obligation of mines to provide housing, the wages that mines pay and other related issues. The Commission envisaged dividing its work into two phases: phase one would look at the events in the week of 16 August 2012, and phase 2 at these underlying causes. Phase two was gradually pushed to the side and then almost completely abandoned. The Evidence Leaders summarized the position as follows:

[A]s a result of an amendment to the Commission's terms of reference, it is no longer the function of the Commission to address matters such as the migrant labour system, the labour relations system on the mines, and the performance by the Department of mineral resources of its functions. Those are pressing issues, which require to be addressed urgently outside the processes of the Commission.¹⁰³

All that remains of Phase Two is a limited investigation into the extent to which Lonmin complied with its obligations under the mining charter and implemented its social and labour plan. Like the Khayelitsha Commission, the scope of the commission was narrowed so that the full picture could not emerge. Obviously, the decision to drop these issues is understandable; the Commission was already running far over time and even one of the Phase 2 issues would take months to address properly. Yet there were ways for the Commission to adapt its procedure to address the Phase 2 issues at least partially. Its failure to do so can be blamed at least in part on its failure to properly curtail Phase 1 from the beginning.

Funding

¹⁰³ Evidence Leaders' HoA at para 2.

The state parties at the Marikana Commission were, naturally, all fully-funded by the state, as was the Commission itself. The private parties participating in the Commission – primarily the families, the arrested and injured strikers, and AMCU – all had to rely on private funding to support their participation in the Commission. The majority secured funding for the original proposed duration of the Commission; up to December 2012. When it became clear that the Commission would not complete its work in time, the parties sought other funding. Legal Aid South Africa (LASA) agreed to fund the families of the deceased strikers. But LASA refused to fund the arrested and injured miners, citing resource constraints and the stronger interest the families had in the Commission.

When their funding ran out the arrested and injured miners – represented at the Commission by Dali Mpofu, former head of the SABC, and current head of the EFF in Gauteng – approached the High Court for interim relief to compel LASA to fund them. They threatened to withdraw from the Commission if they were not funded. When funding did not arise, they indeed withdrew from the Commission. The other complainant parties – AMCU, the families, the LRC and the Human Rights Commission – also withdrew in solidarity. While the Commission initially postponed, for several weeks it proceeded without the participation of several of the most important actors.

It was accepted by the majority of participants in the Commission that if Mpofu and his team could not return, it would seriously affect the validity of the Commission’s work. Nonetheless, on 18 July 2013, the High Court refused to order LASA to fund them.¹⁰⁴ The arrested and injured applied for leave to appeal directly to the Constitutional Court. The Court dismissed the application, because of the general rule against appeal courts interfering with the grant or refusal of interim relief.¹⁰⁵ But the Court took the fairly unusual step of issuing a written judgment justifying its decision. The judgment provided covert support for the arrested and injured persons’ dual substantive complaint: that the Commission would be jeopardized if the miners did not participate, and they could not meaningfully participate without legal representation.¹⁰⁶

¹⁰⁴ *Magidivana and Another v President of the Republic of SA and Others* [2013] ZAGPPHC 220; [2014] 1 All SA 61 (GNP).

¹⁰⁵ *Magidivana and Others v President of the Republic of South Africa and Others* [2013] ZACC 27; 2013 (11) BCLR 1251 (CC). But see, *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) and *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) (where the Court was willing to overturn the grant of interim relief on appeal).

¹⁰⁶ *Magidivana CC* (n 105 above) at paras 15-16.

The matter returned to the High Court for the determination of the final relief. In a groundbreaking judgment, Makgoka J ordered LASA to fund the continued participation of the arrested and injured at the Commission.¹⁰⁷ It held that the distinction between the deceased miners and the arrested and injured persons was irrational, and violated both the right to equality and the right of access to court.¹⁰⁸

Although it ultimately had a successful outcome, the crisis of funding threatened to completely undermine the Commission. Without the participation of all the parties representing the victims, the Commission would have had no legitimacy. What is particularly interesting about the fight over funding is that the President consistently asserted that he had no power to fund the arrested and injured. This argument was upheld by the High Court. While it may well be that LASA was a more appropriate funder, if the validity of a Commission the President decided to establish was at risk, he certainly had the power to devote more funds to it and to direct how those funds should be spent. It is telling that the President decided to throw up his arms rather than to step in to ensure that the Commission proceeded with all interested parties' participation.

The Discourse of Tragedy

I explained above the way that the discourse of tragedy affects the outcome of commissions like Marikana. That discourse has pervaded the Marikana Commission. Although the initial terms of reference refer quite neutrally to “the events at the area commonly known as the Marikana Mine”, that quickly changes. In a notice issued only nine days later indicating that the Commissions Act would apply, the President now refers to “the tragic incidents at or near the area commonly known as the Marikana Mine”.¹⁰⁹ That same description is used whenever the duration of the Commission was extended.

¹⁰⁷ *Magidivana and Another v President of the Republic of South Africa and Others* [2013] ZAGPPHC 292; [2014] 1 All SA 76 (GNP).

¹⁰⁸ LASA appealed against the order, but agreed to comply with it in the meantime so that the Commission could proceed. This generosity returned to bite them. On appeal, the Supreme Court of Appeal found that, since LASA was providing funding and had indicated it would not withdraw it even if the appeal was successful, the matter was moot. *Legal-Aid South Africa v Magidivana and Others* [2014] ZASCA 141. It therefore dismissed the appeal. LASA recently sought leave to appeal to the Constitutional Court, which is yet to decide whether to hear the matter.

¹⁰⁹ 2012.09.28: GG 35730, P 59

SAPS too employed the discourse of tragedy. In its opening statement, it said:

The Marikana Tragedy was a first for the country. There was no history of protesters with such large number bearing arms posing immediate threat to life and property, armed with dangerous weapons, sabre rattling with an intent to engage the police in a mortal duel.¹¹⁰

When Deputy President Cyril Ramaphosa testified at the Commission, he said:

the tragedy that has occurred at Marikana has to be approached as a collective failure, by many role players, many stakeholders. And I don't think that many who had some role to play can say that they do not bear any form of responsibility. I think the responsibility has to be collective and as a nation we should dip our heads and accept that we did fail the people of Marikana, particularly the families and the workers and those who died. We did fail them.

That is the quote with SAPS' legal representatives chose to begin their heads of argument.

But it is not only that SAPS has tried to paint the massacre as a tragedy, the terms of reference encourage that approach. They require the Commission to investigate: Lonmin, SAPS, AMCU, NUM, the Department of Mineral Resources and “[t]he conduct of individuals and loose groupings in fermenting and/or otherwise promoting a situation of conflict and confrontation which may have given rise to the tragic incident, whether directly or indirectly.” The way the Commission was established pushed it to find that we are all to blame, and therefore nobody really has to take responsibility.

That is exactly what Sitze has pointed out happened after Sharpeville and the Soweto uprising. Indeed, he notes that the Wessels and Cillie Commissions were specifically designed to quell investor concern in apartheid police tactics. It is hard not to read a similar motive into the establishment of the Farlam Commission. The weakness of a commission is that it is bound by those terms of references, and also bound by a history that encourages commissions to see all sides,

¹¹⁰ SAPS Opening Statement at para 57 (my emphasis).

and therefore sometimes be blind to the obvious. We will have to wait and see whether Judge Farlam and his fellow commissioners prove history wrong.

IV AN ACCIDENTAL GOOD

I argued in the previous Part that the three Commissions under discussion deviated significantly from the ideal form. The Marikana Commission was significantly delayed by poor process, and party manipulation. Its terms of reference set it up to fit into the unhappy mould of apartheid Tumult Commissions. And it has failed to call the witnesses necessary to answer the central question it needs to answer. The Arms Deal is simply a farce – it is not believed to be independent; several officials have resigned; and some of the primary critics have called for the commission to be disestablished. Even the Khayelitsha Commission – the closest any commission has come to the ideal – was plainly established at least partially for political ends. It excluded the majority of the criminal justice system, preventing any criticism of DA-controlled institutions.

Despite these serious shortcomings, all the commissions have served a valuable purpose. To understand why such flawed bodies can, nonetheless, produce positive outcomes we need to carefully consider what the effect of commissions is, independent of their purpose, and despite their procedural shortcomings.

To begin with, it is necessary to be clear what we expect from a commission – what should it achieve to qualify as a success? We should not judge it by whether or not its recommendations are implemented and those recommendations change society for the good. Sedley makes the point thusly: “If public inquiries are to be known by their fruits, and if their proper fruits are reforms and improvements in law and practice, there is probably not a great deal to be said for them.”¹¹¹ Commissions have no control over whether or how their recommendations are implemented. Measuring implementation is an evaluation of the executive, not the commission.

Nor can commissions ordinarily be judged on whether they found the “truth”. While a commission could certainly be said to fail because it ignored obvious evidence, it is more difficult to determine whether it has found the truth and is therefore successful. The truth is likely to be a contested issue;

¹¹¹ Sedley (n 32 above) at 469.

otherwise a commission would hardly be necessary. And the truth will remain contested after the commission has sat. Whatever conclusions the Arms Deal Commission reaches, there will be those who believe that the deal was riddled with corruption, and those who believe (or at least, those who publicly assert they believe) that the deal was vital for the good of the country.

To some extent commissions can fairly be judged on how effectively they restore public confidence in government, or contribute to restoration between previously fractured communities. But it will often be difficult to measure the impact of the commission, and even more difficult to measure the extent to which the conduct of the commission had any effect, above and beyond the simple act of establishing the commission.

Alternatively, one could measure a commission on “the degree to which it meshes with other instruments of government”, that is, the extent to which the commission makes “intelligent and informed decisions about the extent to which it should leave certain issues and choices to other institutions.”¹¹² Or perhaps, as Iacobucci suggests, the key test is whether the commission was able to define a question, not answer it.¹¹³ These are more hopeful measures of success which gel with what I argue is the accidental good of commissions of inquiry.

The real value of commissions of inquiry is their inevitable contribution to direct and participatory democracy; to openness and transparency; to state accountability. An inquiry is “an exceptionally public process.”¹¹⁴ It can have the effect of promoting or enabling “new kinds of public participation in public life and to debate issues in greater detail than is possible in parliament, within government or in the normal course of media coverage.”¹¹⁵ As Salter explains, “inquiries offer the possibility of a discussion about public policy that knows few limits in terms of its participants, the information it can gather or the proposals it can entertain. This is not a false promise, although many inquiries fail to deliver upon it.”¹¹⁶

¹¹² Iacobucci (n 40 above) at 27.

¹¹³ Ibid at 26 (“it may be that the role of the commission was more to give definition to a question or issue than to resolve it. It may be that the problem was not capable of resolution or that the necessary facts could not be established.”)

¹¹⁴ Salter (n 38 above) at 181.

¹¹⁵ Ibid.

¹¹⁶ Ibid at 181-182.

It is the conduct of the commission – the act of sitting in hearings, calling witnesses, disclosing documents and allowing the space for public discussion and debate – that is the real value of a commission of inquiry. They achieve that goal even if none of their recommendations are accepted or implemented.

This value is not replicated by other institutions. Other investigatory bodies are either not independent or are not held in public. Parliamentary inquiries, while public, are not independent and their inquiries are generally limited to narrow political agendas. Courts are public and impartial, but not interested in policy; they are not inquiries “at large” as Sedley puts it.

Sedley makes the further, insightful observation about the fate of Royal Commissions in the UK in the late 1980s. There was, at the time, a significant decrease in the number of Royal Commissions – while 400 had been appointed in the 19th century, and 140 in the first 75 years of the 20th century, no commissions were appointed between 1977 and 1989 when Sedley wrote. He puts this down to the fact that what had been “perceived as the virtues of royal commissions – their ubiquity, their adaptability, their non-bureaucratic character and the opportunity they gave for individuals and interest groups to participate in the formation of public policy have become vices. Parliamentary and departmental committees and the charade of formal consultation do the job more briskly without any longer fostering the illusion that the formation of public policy is anything to do with the public.”¹¹⁷ Commissions had been replaced by other forms of inquiry not because they were more effective, but because they were less effective.

Commissions are the type of “participatory bubble” that Woolman refers to as one of a number of elements or characteristics of experimental constitutionalism (and of experimentalism or ne governance more generally). Bubbles are small-scale “moments” that allow participation and contestation over the meaning of constitutional norms. For Woolman, constitutional remedies where the court requires a state institution to report back on its compliance with an order, or to engage meaningfully with the citizens that have brought it to court are examples of participatory bubbles.

¹¹⁷ Sedley (n 32 above) at 474.

The metaphor of a bubble conveys three qualities of these “small-scale institutional processes.”¹¹⁸ First, a bubble appears “when challenges to a given institutional authority accumulate and finally come to a boil”.¹¹⁹ That is exactly how commissions of inquiry are formed – pressure is placed on the executive and it forms a commission to release that pressure. Second, bubbles “only enclose a small amount of space – both in terms of the issues raised and the number of actors involved.”¹²⁰ Commissions, too, are limited in their scope and in who can participate – although as we noted earlier, how widely they read their terms of reference, and how freely they allow entrance will affect the use of the commission. Third, once “the *raison d’être* for the bubble” ends, the “bubble bursts” and [p]articipants can ... return to their more routine lives.”¹²¹ The same is true of commissions – they are by definition temporary (although they often last far longer than planned). As Woolman notes, while bubbles burst, the value of the bubble lies in what is learnt from it – not how it directly changes policy (although that would be nice) – but whether it was a successful experiment that “alter[ed] our understanding of the norms that frame them.”¹²²

The idea of a participatory bubble is similar to the language used by Inwood and Johns to describe Commission. Using the language of policy change, they refer to commissions as “institutionalized ‘punctuations’ inserted into the policy process, as sites of potential for policy change, and also as ‘sites of resistance’ to change.”¹²³ Or, as they put it elsewhere, commissions are “sites for contestation over meaning”:¹²⁴ “state-sanctioned institutions with the potential for policy change in which different interpretations, problem definitions, and policy solutions are debated”.¹²⁵ Commissions are often able to break down partisan divides that often prevent progress in

¹¹⁸ Stu Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa’s Basic Law* (2013) at 208.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ Inwood & Johns (n 2 above) at 611.

¹²⁴ Inwood & Johns at 701.

¹²⁵ *Ibid.* See also Inwood & Johns at 765 (“COIs as “sense-making processes” rather than quasi-judicial or evidence-based attempts. ‘[U]nderstanding the role of such moments or events is central to understanding ‘unsettled lives. Where a set of assumptions that has become so unself-conscious as to seem a natural, transparent, undeniable part of the structure of the world becomes disrupted in ways unpredicted by their accumulated knowledge, people will require new interpretations ... belief and ritual systems aspiring to offer a unified answer to problems of social action.’”)

conventional sites for political debate.¹²⁶ That is precisely the role that participatory bubbles play in the theory of experimental constitutionalism.

Commissions of inquiry provide a unique space that for public contestation about meaning and value. While they may be set up for ulterior purpose and for political advantage, and while they may be limited by flaws in their processes and deficiencies in their personnel, they will almost inevitably enrich rather than impoverish our democracy. We can see that in the functioning of all three of the commissions.

The Khayelitsha Commission, despite its politically-crafted terms of reference, conducted a ruthlessly efficient commission. It covered an immense amount of ground in under five months of hearings. The second phase, consisting of expert testimony, was completed in five days. The Commissioners insisted, against all objections and the common perception that postponements were inevitable, that the Commission would run on time. Hearings were run on a strict schedule. Parties were given set times to examine or cross-examine witnesses, and these were enforced by the Commissioners. In addition, if a party wished to cross-examine a witness, it had to apply in advance to the Commission, with a list of the questions it intended to ask.¹²⁷ The teams representing the various parties¹²⁸ worked under extreme pressure to meet the often extreme timelines.

At the same time as sticking strictly to time, the Commissioners were also extremely flexible. This practice had the dual benefit of curtailing the lengthy cross-examination that plagued the Marikana Commission, and allowing witnesses to prepare answers so that they would not legitimately say they

¹²⁶ Ibid at 824 (“COIs offer an institutional policy space, although temporary, that is apart from the confines of the conventional policy development process facilitating interactions between government and social actors to engage in policy change.”).

¹²⁷ This practice had the dual benefit of curtailing the lengthy cross-examination that plagued the Marikana Commission, and allowing witnesses to prepare answers so that they would not legitimately say they had no warning of the question. However, cross-examiners were not kept strictly to the questions they asked; they were allowed to ask new questions arising from the witness’s testimony. The practice also had the effect that parties would try not to cover the same ground in order to make the best use of their time. When cross-examining a police witness, for example, the evidence leaders and the lawyers for the complainant organisations would often divide the areas of cross-examination between them.

¹²⁸ The following parties were legally represented at the Commission: SAPS, the Complainant Organisations, the provincial Department of Community Safety and the City of Cape Town.

had no warning of the question. As long as a delay in producing a statement or proposed set of questions would not unduly delay the work of the Commission, those delays were allowed.

As a result it produced a report which provides recommendations not only for better policing in Khayelitsha, but proposes a new model for policing in South Africa. One of its primary suggestions is that SAPS should adopt a procedural justice model of policing which focuses on treating members of the public with respect, and measuring police members on that, rather than only on reduction of crime or arrest targets. That is a powerful idea, prompted by expert testimony that could not have come out of litigation or parliamentary process. Whether it will have any immediate effect is unknown. But it will undoubtedly shift the debate about what police do and how we measure them.

Marikana, too, has already had positive outcomes, even without its report. It has revealed that SAPS was willing to lie, repeatedly, about what it did in Marikana and why. It has revealed, beyond doubt, the brutality of the killings at scene two, even if the justification of the killings at scene one remain in doubt. By ensuring that the families were there and that they could tell their stories it has also, hopefully, contributed to some degree of restoration. A full analysis of the successes or failures of Marikana must await its report. But the publicity of the hearings, and the fact that the Deputy President and the National Commissioner could be cross-examined in detail by representatives of those who suffered undoubtedly contributes to accountability of the state. That may well not have been possible in any other form of proceedings.

To some extent, even commissions like the Arms Deal Commission that lack even the appearance of impartiality can contribute to democracy. The gradual disintegration of the Arms Deal Commission – the resignations, the refusal to admit evidence, the withdrawal of key complainants – happened in full public view. The public can easily assess the impartiality of the Commission and the value of its findings. That would not be the case of other similar bodies that could have investigated the Arms Deal. A decision by the SIU, the police or the prosecutors is not taken in public. When they interview witnesses, it does not do so on live TV. They do not encourage the participation of critics and allow them even limited access to (and influence on) the decision-making process. They conduct a closed investigation and then reach a decision which they have no obligation to explain publicly. It is far more difficult for the public to evaluate the legitimacy of a finding by other bodies, compared to the findings of a commission of inquiry.

In addition, while the findings of the Commission are likely to exonerate the state, much evidence about the flaws in the arms deal has been led, and will be preserved for future generations. The

flaws in the process – and the evidence that has wrongly been excluded from the public arena – does not entirely detract from the benefits of the evidence and testimony that has been led, and would not otherwise have been led. The continued hearings of the Commission also kept the public and media gaze and attention on an issue that the government might otherwise have preferred them to forget.

While the Commission may be a whitewash, it is probably the most intense public investigation that could reasonably have been hoped for. At least with the current leadership of the ANC, a full police investigation and prosecution for wrongdoing in the arms deal. A commission, however deficient, is perhaps better than nothing at all.

V CONCLUSION

The possible benefits of commissions do not necessarily justify their costs. While it is possible to find a silver lining to any cloud, when those lining cost millions of Rands, we could quite reasonably conclude that South African democracy would be better off with some houses than the accidental benefits commissions offer.

There is also reason for deeper concern in the trend of commissions, particularly if there are more that are so blatantly intent on covering up wrongdoing as the Arms Deal Commission. Sitze points out that the failure of commissions under apartheid – their failure to quell public concern and to find truth – represents was symptomatic of a failure of the state itself. Commissions, recall, are a device the government uses to pose difficult questions to itself. “[T]hat the apartheid government could not pose and answer the question of governmentality with its full force” was a sign that government itself was breaking down.¹²⁹

If the new democratic government cannot establish independent commissions to fairly answer questions of great national moment, we should be concerned about its continued authority and legitimacy. I certainly do not suggest South Africa is at that point. As I hope I have made clear, governments all over the world use commissions for reasons other than purely seeking truth. But the way that commissions are used or misused in South Africa in the future could provide a signal that our government is no longer able to engage in rational self-criticism. That, too, would be an accidental good.

¹²⁹ Sitze (n 22 above) at 183.

