

**THE ROLE OF THE SOUTH AFRICAN CONSTITUTIONAL COURT IN SAFEGUARDING
DEMOCRACY BY ENSURING THE EFFECTIVE OPERATION OF
THE SEPARATION OF POWERS DOCTRINE**

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Abstract

This thesis presents an analysis of the effect of dominant party democracy on South Africa's traditional trilateral structures of government, with emphasis on the Constitutional Court. A dominant party democracy brings with it negative features, such as the blurring of boundaries of state and party, and the capturing of important institutions. In South Africa, it is specifically the capture of various independent institutions (state capture) by a dominant party and the placing of its members into these institutions to remove effective checks on the exercise of power by the government, which have been a worrying trend recently. This, in turn, spells rough weather ahead for our constitutional democracy, because it has the effect of withering down the effective system of checks and balances as part of the separation of powers doctrine in South Africa. The central question to explore in this thesis is thus, how the Constitutional Court can protect the democratic space by acknowledging the challenges posed by one-party dominance to democratic institutions and developing doctrines/strategies to deal with this, while not overstepping the mark and infringing on the separation of powers. This is not an easy task for the Constitutional Court to get exactly right. Thus, the Constitutional Court of South Africa has been widely criticised for avoiding any formal confrontation with the current government during its early years. Critics focused on cases such as the *UDM* floor crossing case and *Glenister I*. These two decisions have come under attack from constitutional law scholars, who labelled the Constitutional Court as a constrained court and argued that the court was not sufficiently pro-active in confronting the challenges of a dominant party democracy directly. This has led some scholars to the view that the South African Constitutional Court needs to develop a well thought through theory of the threat posed by the dominant party to the quality of South Africa's democracy. The argument is that there may be a need for the South African Constitutional Court to develop a formal jurisprudence to deal with the negative consequences of a dominant party democracy. In this thesis, I will argue that this critique against the South African Constitutional Court seems out-of-date and, to some extent, overdone. The Constitutional Court in recent years has altered its approach and now deals differently (and more effectively) with the problems posed by dominant party democracy. This is evident from recent decisions such as the *UDM* secret ballot and two *EFF* judgments and the *Glenister II* judgment. In my view, the Constitutional Court has become more forceful in protecting the democratic space in South Africa because of changing political circumstances and because of the weakening position and complex, and sometimes contradictory, responses

from the ruling party in South Africa. At the same time, the Constitutional Court has acted with appropriate deference, addressing problems associated with one-party dominance while also showing adequate respect for the separation of powers doctrine. By adopting this approach, and if one views the Constitutional Court's role through the lens of dominant party democracy, South African democracy – and South Africans themselves – have been better off. If the Court had taken a more forceful approach, it would have placed itself on a direct collision course with the ANC. That might have put the Court's very existence at risk, and our hard-fought democracy.

Chapter One

1.1 Introduction

After 20 years of democracy, the longstanding dominance of the ruling party over both the legislative and executive branches of government has become a matter of concern for South Africa.¹ Due to the fact that the African National Congress (ANC) has won every election since 1994, the debate surrounding a dominant party democracy has constantly been in the spotlight.² There are concerning pathologies that usually emerge with the one-party dominant system, which largely relate to the methods of consolidating and maintaining dominance, such as hampering checks and balances by deploying party members to independent institutions ‘to remove effective checks on the exercise of power by the government’.³ Furthermore, one-party dominant systems tend to be associated with increasing levels of corruption and mismanagement resulting from unchecked power. What is also a very common problem within one-party dominant systems is when the ruling party attempts to ignore the provisions of the Constitution and sets out to ignore or actively to undermine the checks and balances contained in the Constitution.⁴ This, in turn, spells rough weather ahead for constitutional democracy in a country.⁵ These pathologies or threats within a dominant party democracy mentioned above are evident in South Africa. Three constitutional law scholars aptly point out this situation:

‘In South Africa, there is a growing conflation of the state and ruling party, the African National Congress (ANC), political interference in independent state institutions like the National Prosecuting Authority (NPA) and the Police and the deployment of ANC cadres to key positions in public institutions like the South African Broadcasting Commission (SABC), the Public Protector, and a range of parastatals have all been used to adopt the ruling party’s position.’⁶

¹ S Sibanda ‘Parliament and the separation of powers :a critical analysis in relation to single-party dominance’ in Hugh Corder, Veronica Federico & Romano (eds) *The Quest for Constitutionalism in South Africa since 1994* (2014) 39-54 at 40.

² H Brooks ‘The dominant party system : challenges for South Africa’s second decade of democracy’ (2004) *Journal of African Elections* at 122.

³ P de Vos & W Freedman *South African Constitutional Law in Context* (2014) at 35.

⁴ P de Vos ‘Sometimes law fare is needed to protect democracy’ available at <https://constitutionallyspeaking.co.za/sometimes-law-fare-is-needed-to-protect-democracy/> [last accessed November 2017].

⁵ Ibid.

⁶ H Botha, N Schaks & D Steiger ‘The current state of democracy in South Africa’ (2015) 48 *Verfassung und Recht in Übersee VRÜ* at 260.

A one-party dominant system or single-party dominance – ‘in which one political party continuously wins overwhelming electoral victories in free and fair elections’⁷ and its associated pathologies – presents relatively new constitutional courts, including South Africa’s Constitutional Court, ‘with a distinct set of controversies that necessarily bring the judiciary into conflict with consolidating political power’.⁸ The question is whether the Constitutional Court can provide a counterweight to the negative effects that a dominant party democracy presents to the effective functioning of the constitutional democracy. To put it differently – How should the Constitutional Court respond when the ensuing constitutional democracy is threatened by an excess of concentrated political power? Some scholars and commentators have questioned the Constitutional Court’s role and have argued that the Constitutional Court has an inadequate understanding of the concept of a dominant party democracy, its pathologies and the pressure it exerts on what is otherwise a formally liberal democratic system.⁹ This is evident from the fact that the Constitutional Court has dismissed many arguments urging it to take into account the dominant status of the ANC when formulating its judgments.¹⁰ This approach is clearly demonstrated in *United Democratic Movement v President of the Republic of South Africa*¹¹ and *Glenister v President of the Republic of South Africa and Others*.¹² A close examination of these judgments reveals the Court’s inability to recognise and engage creatively with the effect of single-party dominance on our separation of powers doctrine. Even though in both of these cases, the litigants presented arguments about the link between the challenges of single-party dominance and the ANC’s dominant status on the traditional formal constitutional structures provided by the Constitution and the violation of the rule of law, the Constitutional Court did not take up their invitation to fully engage with this issue. In the *UDM* judgment – which dealt with floor crossing – the applicant argued that the legislation was intended, and had been designed, to serve the purpose of the ruling party, rather than to introduce a fair electoral system.¹³ In the *Glenister I* judgment, which dealt with constitutional challenges to the disbanding of the Directorate of Special Operations known as the Scorpions

⁷ De Vos and Freedman op cit (n3) 34.

⁸ S Issacharoff ‘Constitutional Courts and Consolidated Powers’ (2014) *New York University Public Law and Legal Theory Working Papers* Paper 459 at 1.

⁹ S Choudhry ‘He had a mandate’’: The South African Constitutional Court and the African National Congress in a dominant party democracy’ (2009) *Constitutional Court Review* at 11-12 and S Issacharoff ‘Constitutional Courts and Democratic Hedging’, (2011) 99 (4) *Georgetown Law Journal*.

¹⁰ See *United Democratic Movement v President of the Republic of South Africa* 2003 (1) SA 495 (CC) (‘UDM floor crossing case’) at para 34, also see *Glenister v President of the Republic of South Africa and Others* 2009 (1) SA 287 (CC) (‘Glenister I’) para 22.

¹¹ *UDM floor crossing case* supra (n10).

¹² *Glenister I* supra (n10) para 21-2.

¹³ *UDM floor crossing case* supra (n10) para 22.

(a special investigatory unit housed in the Department of Justice that reported to the Minister of Justice), the Court similarly did not develop a comprehensive theory of how to deal with one-party dominance.¹⁴ The Constitutional Court rejected the relevance of the ANC's dominant status in all the cases mentioned above. The reason for choosing these cases relates to the fact that they illustrate where the Constitutional Court took a deferential approach and compromised on principle to protect its own institutional independence.¹⁵ These two decisions have also led critics of the Court to the opinion that the Court showed too much deference to the two political branches of government and was not active enough in its approach to challenge the dominance of the ANC in order to protect the democratic space. This is so because 'constitutional courts should take every opportunity given to them to assert their democracy protecting role, instead of preserving their independence by signalling their sensitivity to democratic prerogatives.'¹⁶

One might argue that this critique mentioned above seems out-of-date and should be viewed in a different way now. There has been a major shift in the Constitutional Court's approach to the increased governance problems stemming from the firm hold on power of the ANC, since *Glenister I* and the *UDM* floor crossing case. The Constitutional Court has not been a submissive actor when dealing with the challenges presented by the dominance of a single party. Judgments such as *Glenister II*¹⁷, *Economic Freedom Fighters v Speaker of the National Assembly and Others*, *Democratic Alliance v Speaker of the National Assembly*¹⁸, *United Democratic Movement v Speaker of the National Assembly and Others*¹⁹ and *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another (EFF 2 judgment)*,²⁰ indicate that the Constitutional Court has altered its approach in dealing with the dominance of the ANC. These cases demonstrate that the Constitutional Court seems to be far more forceful in trying to protect the democratic space (protecting key institutions that need to promote and safeguard our democracy) and is more aware of the problems of the overbearing

¹⁴ *Glenister I* supra (n10).

¹⁵ T Roux *The politics of principle: the first South African Constitutional Court, 1995–2005* (2013) at 363. Roux op cit (n)2009 at 109. 'institutional security, is understood here to mean the Constitutional Court's capacity to survive political attacks on its independence'.

¹⁶ T Roux, 'The South African Constitutional Court's democratic rights jurisprudence' (2013) 635 *CONST. CT.REV.* 33 at 38. S Issacharoff op cit (n9) at 965.

¹⁷ *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC), [2011] ZACC 6 ('Glenister II').

¹⁸ CCT 143/15; CCT 171/15 [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC). ('EFF 1 judgment').

¹⁹ (CCT89/17) [2017] ZACC 21, 2017 (8) BCLR 1061 (CC) 1061 ('UDM secret ballot case').

²⁰ (CCT76/17) [2017] ZACC 47 (29 December 2017). ('EFF 2 judgment').

majority party. These cases suggest that the judiciary seems to be playing a more central role in protecting democracy and upholding the Constitution.

The central question to explore in this thesis is thus how the Constitutional Court can protect the democratic space by acknowledging the challenges posed by one-party dominance to democratic institutions and developing doctrines/strategies to deal with this, while not overstepping the mark and infringing on the separation of powers. It is important, in my view, that our Constitutional Court must recognise the institutional challenges which a dominant party democracy poses to the optimal functioning of democratic institutions and the system of checks and balances. The system of checks and balances as part of the separation of powers doctrine limits the ability of transient majorities to abuse their power and to exploit their majority position to close down democratic space. On the other hand, the Constitutional Court also needs to be wary of not encroaching on the domain of the two political branches of government. If the Court issues too many decisions that anger the dominant party, the political branches can weaken the Court in a variety of ways.²¹ In such cases, the courts are between a rock and a hard place. If they do not act, they acquiesce in the subversion of the law and, eventually, our democracy.²² If they do act, they will be accused of judicial overreach and making 'political' decisions.

This thesis will investigate some of the strategies a constitutional court in a dominant party democracy could use to play a more meaningful role in diminishing the pathologies of a dominant party democracy. In my view, it is important that new or newly transformed judiciaries, such as South Africa's, should constantly develop new strategies to check that governmental power is exercised appropriately, while respectfully coexisting with the other arms of government.²³ Until recently, the strategies developed by the Constitutional Court in dealing with the two political branches of government and the ruling party, the ANC, tended substantially towards a deferential or judicial self-restraint approach. The Court showed a momentous respect for the separation of powers doctrine, which meant that the Court would not trespass or encroach on the domain of the other two branches of government unless mandated by the Constitution to do so. A full discussion of the strategies developed by the

²¹ Samuel Issacharoff discusses South African Constitutional Court 9 October 2013, available at <http://www.constitutionaltransitions.org/samuel-issacharoff-summary/> [accessed 11 November 2017].

²² Ibid.

²³ O Sang 'The separation of powers and new judicial power: how the South African Constitutional Court plotted its course' (2013) *Elsa Malta Law Review* at 97.

Constitutional Court (its pragmatic approach and its pre-emptive tactic) will be discussed in more detail in Chapter Two.

1.2 Research Questions

The thesis will seek to answer the following three research questions:

- Has one-party dominance necessarily weakened the functioning of the system of separation of powers and the concomitant system of checks and balances in South Africa?
- Is it essential for the Constitutional Court to develop different strategies or a formal theoretical jurisprudence that can counteract the negative effects posed by a dominant party democracy?
- Should the Court take on a more activist approach to counter the problems associated with one-party dominance, or has it acted with appropriate deference, addressing problems associated with one-party dominance while also showing adequate respect for the separation of powers doctrine?

1.3 The aim of the thesis

The aim of this thesis is to determine what strategies the Constitutional Court could or has developed to play a meaningful role in reducing the pathologies of a dominant party democracy while protecting itself from political attack. There is a *lacuna* in the Constitutional Court's separation of powers jurisprudence which mitigates against offering a substantive theorisation of the threat posed by the governing party's continuing (for now) electoral dominance. This has led the Court in the past to take a more deferential approach in most sensitive and politically contentious cases, even in cases where our constitutional democracy was at great danger of being exploited by the dominant political party. This thesis seeks to explore whether the existing strategies carved out by the Court and its current approach in dealing with the challenges of a one-party dominant system are sufficient to protect the democratic space in South Africa.

1.4 Significance of the study

Why is this study important? Firstly, there is a lack of literature on the implications of one-party domination for constitutional adjudication in the South African context.²⁴ Choudhry offers an in-depth analysis of the South African Constitutional Court in the context of the dominant influence of the current governing party.²⁵ Roux also provides extensive literature on dominant party democracy in the context of constitutional law adjudication.²⁶ Landau has authored extensive comparative research on constitutional courts and dominant party democracies.²⁷ Issacharoff is another constitutional scholar who has written extensively on this subject, particularly the effect of a dominant party democracy on the Constitutional Court. However, the South African literature on the dominant party debate is largely silent on the role of the Constitutional Court and on how the Constitutional Court should deal with the effects of dominant party democracy.²⁸ In my view, there exists a need to study the effects of dominant party democracy and to consider the implications of this state of affairs on the proper model of the separation of powers doctrine that a court must adopt, and on the effective operation of the system of checks and balances.

Secondly, this thesis also seeks to contribute to certainty and clarity on the extent and scope of the powers, roles and functions of the judiciary in a dominant party democracy in South Africa. This thesis is an examination of the ways in which power and law, political parties and courts interact with each other. The research will provide insight and recommendations on how the judiciary, in particular the Constitutional Court, can nullify some of the negative challenges of a dominant party democracy in order to protect the democratic space without infringing on the separation of powers doctrine and concomitant checks and balances system.

²⁴ Choudhry op cit (n9) at 7.

²⁵ Ibid.

²⁶ T Roux op cit (n15) and T Roux, 'Constitutional Courts as democratic consolidators: insights from South Africa after 20 Years' (2016) 42 *Journal of Southern African Studies*.

²⁷ D Landau, 'Political institutions and judicial Role in comparative constitutional law', (2010) 51 *Harv. Int' L L.J.* 319 at 343 and D Landau, 'A dynamic theory of judicial role', (2014) 55 *B.C.L. Rev.* 1501, available at <http://lawdigitalcommons.bc.edu/bclr/vol55/iss5/4>, accessed on September 2016.

²⁸ S Issacharoff op cit (n9) at 965 and S Issacharoff op cit (n8) at 1.

1.5 Structure of the study

Chapter 1 provides the research question and the structural outline of the thesis. **Chapter 2** explores the doctrine of separation of powers with emphasis on the principle of checks and balances as part of the separation of powers. **Chapter 3** explores the concept of ‘dominant party democracy’ in South Africa. The argument is that the effects of a dominant party such as state capture and cadre deployment, negatively impact on the separation of powers and its main function to offer checks and balances. **Chapter 4** looks at the role of the Constitutional Court in South Africa’s dominant party democracy. This chapter will focus on the Constitutional Court’s role in protecting the democratic space in South Africa against the negative consequences of a dominant party democracy. It will also explore judicial strategies the Constitutional Court could consider developing (such as an *anti-capture doctrine*) to blunt some of the pathologies of a one-party dominant system. **Chapter 5** sets out the conclusion and a summary of the findings noted in the body of this thesis.

Chapter 2

Separation of powers in South Africa: The challenges and threats to an effective system of checks and balances

2.1 Introduction

In South Africa, one of the most important guiding constitutional principles ingrained in the new political system is the formal separation of powers between the executive, the legislature and the judiciary.²⁹ The Constitutional Court in *National Treasury v Opposition to Urban Tolling Alliance* pointed out that the doctrine of separation of powers is a ‘vital tenet of our constitutional democracy’.³⁰ However, it is contended that the fundamental value of the separation of powers doctrine does not lie in its rigid application; instead, it lies in its ability to provide for the constitutional checks and balances between the three arms of government.³¹ This is so because the principle of checks and balances ensures that each branch of government is entrusted with special powers designed to keep a check on the exercise of the functions of others.³² The system of checks and balances is an important mechanism for preventing the political organs of the state from consolidating their powers in undemocratic ways.

This chapter will focus on the principle of checks and balances. It offers a brief historical overview of the separation of powers and checks and balances. In addition, it discusses the principle of checks and balances as part of the separation of powers as being applied in the South African context. Furthermore, it considers some challenges and threats that have the effect of withering down an effective system of checks and balances in South Africa. Tensions do arise between the judiciary and the other arms of government as to the proper role of each governmental institution. In South Africa, the two political branches of government and, to some extent, the ruling party, the ANC, often have trouble in accepting that the Constitution is supreme and that the Constitutional Court has the power to override legislation and policies in order to uphold the Constitution.³³ The judiciary, empowered by the Constitution, plays a vital role in upholding the system of checks and balances necessary for the effective functioning of any democracy.

²⁹ GE Devenish, *A commentary on the South African Constitution* (2004) at 112.

³⁰ *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) para 44. (‘OUTA judgment’).

³¹ P Labuschagne ‘The doctrine of separation of powers and its application in South Africa’ (2004) 23 *Politeia* at 85.

³² *Ibid.*

³³ Section 172 of the Constitution.

The last part of this chapter examines how the system of checks and balances as part of the separation of powers doctrine has been developed by the Constitutional Court in terms of the interaction between the Constitutional Court, on the one hand, and the two political branches of government, on the other. Under South Africa's constitutional framework, the judiciary, and in particular the Constitutional Court, has a special role to monitor the separation of powers and ensure that the legislature and executive comply with the constitutional text.³⁴ At the same time, the judiciary must not unduly trespass on the terrain of other arms of the state (this would amount to judicial overreaching). The question is: How should the Constitutional Court deal with this predicament? Put differently: To what extent should the judiciary become more activist to ensure the system of checks and balances remains effective, while at the same time guarding its own institutional independence?

The South African Constitutional Court, as the architect of our separation of powers doctrine, has developed different judicial strategies to deal with this dilemma. One approach the Constitutional Court has created is the strategy of judicial self-restraint or deference. In terms of this approach, the Constitutional Court uses several different strategies to avoid coming into direct conflict with the two political branches of government. This chapter discusses two tactics the Constitutional Court has frequently utilised that are discernible from its judgments. The first approach is the pre-emptive domain approach and the second is the Court's pragmatic approach. Although the strategies developed by the Constitutional Court tend substantially towards a deferential approach (the judicial self-restraint approach) rather than an active approach, the Constitutional Court's judicial self-restraint approach has assisted the Court effectively when it had to deal with hard and sensitive political cases. To some extent, this approach has also invigorated a healthier relationship between the three branches of government. In my view, the judicial self-restraint approach has, to some extent, promoted and protected our constitutional democracy. The last part of this chapter will examine these matters in more detail. The fact that one party has been electorally dominant for the first 20 years of democracy has had a significant impact on the way the constitutional institutions within the separation of powers model relate to one another. It is therefore necessary to situate this thesis within a broader political context as it will be difficult to come to grips with the separation of

³⁴ Democratic Governance and Right's Unit – Draft (2014) 'Has the South African Constitutional Court overreached? A study of the Court's application of the separation of powers doctrine between 2009 and 2013.'

powers doctrine and the concomitant principle of checks and balances as they have been developed and applied in South Africa without having regard to such broader political context.

2.2 A brief history of the separation of powers doctrine and checks and balances system

There has been insistent debate over the centuries about the origins of the doctrine of separation of powers doctrine. According to Vile,

‘Western institutional theorists were concerned with the problem of ensuring that the exercise of governmental power, which is essential to the realization of the values of their societies, should be controlled in order that it should not itself be destructive of the values it was intended to promote.’³⁵

It was in 17th century England that the doctrine of separation of powers appeared ‘for the first time as a coherent theory of government, explicitly set out, and urged as the grand secret of liberty and good government’.³⁶ A discussion about the historical development of the separation of powers would be incomplete without making mention of two influential philosophers during that period, namely Locke and Montesquieu. The first modern design of the doctrine of the separation of powers was to be found in the constitutional theory of John Locke.³⁷ For him, the separation of powers was a means to counter the power-accumulating tendencies of human nature.³⁸ Thus, Locke, in his *Second Treatise of Civil Government* in 1690 argued that

‘[i]t may be too great a temptation for the human frailty, apt to grasp at powers, for the same persons who have power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from the law, both in its making and execution to their own private advantage.’³⁹

However, Locke neglected the idea of an independent judicial function. Instead he advocated the division of government functions into legislative, executive and foreign relations (departments) and thus never envisaged the separation of powers between the executive and the judiciary.⁴⁰

³⁵ MJC Vile *Constitutionalism and the separation of powers* (1967) at 6.

³⁶ Ibid at 7. Also see S Seedorf & S Sibanda ‘Separation of powers’ in Woolman and Bishop et al’ (2013) *Constitutional law of South Africa* loose-leaf 2ed at 12.1 – 12.2. De Vos and Freedman op cit (n3) at 60-62 where the authors question the oversimplification ascribed to the fact that the doctrine emerged in the 17th century Western Europe.

³⁷ Seedorf & Sibanda op cit (n36) at 12-2.

³⁸ Ibid at 12-4.

³⁹ J Locke *Two Treatises of Government II* (1688) *Chapter XI* para 143.

⁴⁰ Vile op cit (n35) at 49.

On the other hand, the French philosopher Montesquieu is generally known for devising the modern conception of separation of powers.⁴¹ Besides being the first to categorise governmental functions as legislative, executive and judicial, he is also renowned for his invention of postulating a link between the separation of powers doctrine on the one hand, and the idea, on the other hand, that a constitutional system should include in its design checks and balances between the three branches to ensure that no branch of government becomes all powerful.⁴² Montesquieu recognised that, in order ‘to make the separation of powers work, a constitution had to distribute power between different branches of government’⁴³ because abuse would occur when too much power was allocated to one institution. ‘To prevent this abuse,’ he wrote, ‘it is necessary from the very nature of things that power arrest power’.⁴⁴ Montesquieu excellently asserted the importance of the separation of powers in a democracy as follows:

‘When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because many apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.’⁴⁵

What both Montesquieu and Locke had in common was that they regarded separation of powers as a means directly to prevent the accumulation of power and, even more importantly, indirectly to ensure that every member of society enjoyed individual rights and freedoms.⁴⁶ The task of putting Montesquieu’s ideas into practice (especially the concept of checks and balances) was left to James Madison and his fellow founding fathers of the United States of America.⁴⁷ The framers of the American constitution took the ideas of Montesquieu a step further by adding another feature to the separation of powers, namely checks and balances that

⁴¹ Seedorf & Sibanda op cit (n36) at 12-4. See Vile op cit (n35) at 55 – 68 for a detailed discussion and historical narrative of Montesquieu.

⁴² Ibid.

⁴³ Ibid at 12 -5.

⁴⁴ Ibid.

⁴⁵ Montesquieu *The Spirit of the Laws* at 163. A 16 of the Rights of Man provides: ‘Any society in which the safeguarding of rights is not assured, and the separation of powers is not observed, has no constitution.’ Montesquieu cited in Kate O’Regan, ‘Checks and balances reflections on the development of the doctrine of separation of powers under the South African Constitution’ (2005) 8 *Per/Pelj* 120/150, 122/150.

⁴⁶ Seedorf & Sibanda op cit (n36) at 12-4.

⁴⁷ Ibid at 12-6.

required the different branches of government to control each other.⁴⁸ The idea of checks and balances as a complement to the mere separation of powers was the decisive innovation of the Americans.⁴⁹

The doctrine, notably mooted by ancient philosophers, medieval writers, Montesquieu, John Locke, James Madison and modern constitutional law scholars, embodies a number of principles that make up the modern conceptualisation of the doctrine today.⁵⁰ The first principle is the formal distinction between the legislative, executive and judicial branches of government.⁵¹ The second principle is the separation of functions, which entails that each branch of government exercises distinct powers although there is sometimes a slight overlap in functions.⁵² The third principle is that of separation of personnel, which requires that each of the different branches be staffed with different officials.⁵³ This principle is not adhered to in South Africa, because the Constitution does not provide for a strict separation of personnel between the legislature and the executive as a result of our parliamentary system.⁵⁴

These three mentioned principles of the separation of powers are often described as the pure or formal form of the doctrine. The ‘pure form’ of separation of powers could thus be said to represent a theoretical highpoint at which the doctrinal prescripts are achieved and governmental power is truly separated.⁵⁵ Seedorf and Sibanda point out that the problem with this pure understanding of separation of powers is that it does not provide for the situation when one of the branches of government (or the people who control it) nevertheless attempts to enlarge their power by encroaching upon the functions of another branch. This inadequacy has led to the modification of the separation of powers doctrine in line with the idea of checks and balances.⁵⁶ The principle of checks and balances is the fourth principle of the separation of powers, as mentioned in the introduction, and entails that each branch of government is entrusted with special powers designed to keep a check on the exercise of the functions of others as mentioned earlier in the introductory part of this chapter. The principle of checks and

⁴⁸ Currie and de Waal *The new constitutional and administrative law* (2001) at 92.

⁴⁹ Seedorf & Sibanda op cit (n36) at 12-6.

⁵⁰ D Moseneke ‘Separation of powers: have the courts crossed the line?’ Inaugural Annual Law Dean’s Distinguished Lecture University of the Western Cape 17 July 2015 at 5.

⁵¹ P Labuschagne, ‘The doctrine of separation of powers and its application in South Africa’ (2004) 23 *Politeia* 87. Also see Van der Vyver, JD ‘Separation of powers’ (1993) (8) *South African Public Law* 177 at 178.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Seedorf & Sibanda op cit (n36) at 12-11.

⁵⁶ Ibid.

balances brought about a significant change to the pure form of the doctrine of separation of powers as it required a partial separation of powers instead of an absolute one. The introduction of checks and balances brought positive elements to the doctrine of separation of powers, such as the right of the executive to veto legislation, the power of the legislature to impeach the (head of the) executive, or the power of the judiciary to declare both acts of the legislature and the executive to be unconstitutional and void.⁵⁷ I will discuss the concept of checks and balances as part of the separation of powers within the South African context in more detail below.

2.3 Separation of powers in South Africa: No absolute separation

After 1994, the drafters of our interim Constitution agreed that the structure of South Africa's final Constitution would not only be based on the separation of powers, but must contain effective checks and balances so that the branches of government could hold each other accountable.⁵⁸ This was entrenched in Constitutional Principle VI which provides as follows:

‘There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.’⁵⁹

It is well known that the final Constitution does not explicitly refer to the doctrine of separation of powers or the principle of checks and balances, but both these principles have been built into our Constitution.⁶⁰ The Constitutional Court confirmed this in *Justice Alliance of South Africa v President of the RSA*,⁶¹ when the Court stated:

‘The principle of the separation of powers emanates from the wording and structure of the Constitution. The Constitution delineates between the legislature, the executive and the judiciary. This Court recognised a fundamental principle of the new constitutional

⁵⁷ Seedorf & Sibanda op cit (n36) at 12-11.

⁵⁸ I Currie and J De Waal *Bill of Rights Handbook* (2005) 5ed at 18

⁵⁹ Constitution of the Republic of South Africa, Act 200 of 1993.

⁶⁰ *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC) (‘Heath judgment’) para 18-22. This was confirmed in *South African Association of Personal Injury Lawyers v Heath* where former Chief Justice Chaskalson explained:

‘In the *First Certification* judgment the Court held ‘that the provisions of our Constitution are structured in a way that makes provision for a separation of powers . . . There can be no doubt that our Constitution provides for such a separation (of powers), and that laws inconsistent with what the Constitution requires in that regard are invalid.’

Also see I Currie and J De Waal *New Constitutional and Administrative Law* (2001) at 96 and De Vos and Freedman op cit (n3) at 63-64.

⁶¹ 2011 (5) SA 388 (CC). (‘Justice Alliance’).

text as being a separation of powers between the Legislature, Executive and Judiciary with appropriate checks and balances to ensure accountability, responsiveness and openness.⁶²

Our Constitution set out the overall arrangement of checks and balances. The legislature has a constitutional duty to oversee the exercise of executive authority and to hold the executive accountable to it. This is explicitly provided in Chapters 4 and 5 of the Final Constitution. The power of the legislature to hold the executive accountable and provide a check on the exercise of its power is set out in sections 43(2) and 55(2) of the Constitution, respectively. On the other hand, the executive checks the legislature through presidential assent to make a bill law. And the legislature enacts laws to which the President must assent, and which are subsequently interpreted by the judiciary and whose orders must be enforced by the executive. The judiciary itself is appointed by the executive acting upon the advice of the Judicial Services Commission.⁶³ The executive and legislature check the judiciary through determining the appointment of the members of the judiciary. On the other hand, the judiciary on its part checks the executive and legislature through its power of review in terms of section 172 of the Constitution.

In the *First Certification* judgment the Constitutional Court declared that there was no universal model of separation of powers and that, in a democratic system of government in which checks and balances resulted in the imposition of restraints of one branch of government on another, there was no separation that was absolute.⁶⁴ The Court found that the separation of powers was an umbrella concept, but in different countries with different constitutions and contexts it could be interpreted and applied in different ways.⁶⁵ The Constitutional Court has thus signalled early on that South Africans would chart their own path in developing their own separation of powers doctrine and system of checks and balances that suited its own political and legal context.⁶⁶ The Constitutional Court made it clear in the *First Certification* judgment that, although there was functional independence in South Africa, there was no absolute separation.⁶⁷ The Court found that there was always partial separation; this is evident from case law and the

⁶² Ibid para 32.

⁶³ Section 177 of the Constitution.

⁶⁴ *In re: Certification of the Constitution of the Republic of South Africa*, 1996 (10) BCLR 1253 (CC); 1996 (4) SA 744 (CC). (*First Certification judgment*). Ibid para 108-109. Also see De Vos & Freedman op cit (n3) at 63.

⁶⁵ Ibid.

⁶⁶ K Klare 'Self-realization, human rights, and separation of powers: a democracy-seeking approach' (2015) *StellLR* 445 at 452.

⁶⁷ *First Certification judgment* supra (n64) at para 108-112.

Constitution itself.⁶⁸ This is why the Court held in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*⁶⁹ that the separation of powers in the Constitution is distinctively a South African design.⁷⁰ Former Deputy Chief Justice Moseneke stated:

‘It is now clear from a steady trickle of judgments that the doctrine of separation of powers is part of our constitutional architecture. Courts are carving out a distinctively South African design of separation of powers. It must be a design which in the first instance is authorised by our Constitution itself. In other words, it must sit comfortably with the democratic system of government we have chosen. It must find the careful equilibrium that is imposed on our constitutional arrangements by our peculiar history. For instance, it must ensure effective executive government to minister to the endemic deprivation of the poor and marginalised and yet all public power must be under constitutional control. Our system of separation of powers must give due recognition to the popular will as expressed legislatively provided that the laws and policies in issue are consistent with constitutional dictates.’⁷¹

Other distinctive features or innovations of our separation of powers doctrine, which are derived from the Constitution itself, show that a partial separation of powers is favoured. The Constitution provides for the ‘establishment of independent and impartial state institutions to “strengthen constitutional democracy”, including the so-called Chapter 9 bodies, an independent authority on municipal boundaries, and an independent and impartial Fiscal and Financial Commission’.⁷² Furthermore the ‘commitment to accountable, responsive, open and cooperative government based on mutual trust’ between the three branches of government is also a distinctive feature of the South African separation of powers and concomitant checks and balances system, which indicates that South Africa favours a partial separation of powers.⁷³ It is clear from the discussion above that South Africa favours a partial separation of powers. The South African Constitution requires that there must be effective checks and balances of power among the three branches of government in order to safeguard against and avoid an excessive concentration of power in one branch of government, which could lead to an abuse of power.⁷⁴ An effective system of checks and balances is thus a vital mechanism to prevent

⁶⁸ Ibid.

⁶⁹ *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* (CCT 59/09) 2010 ZACC 6; 2012 (4) SA 618 (CC); 2010 BCLR 457 (CC).

⁷⁰ Ibid para 91.

⁷¹ Ibid.

⁷² Klare op cit (n66) at 453.

⁷³ Ibid. Chapter 3 of the Constitution section 40 and 41 of the Constitution provides for Cooperative governance.

⁷⁴ Constitutional principle VI of the Interim Constitution, Act 200 of 1993 and section 1(d) of the final Constitution.

the abuse of state power within South Africa. An effective system of checks and balances also ensures the effective, efficient and constitutional discharge of power and functions by government as a whole.⁷⁵ The judiciary, empowered by the constitution, plays a vital role in upholding the system of checks and balances necessary for the effective functioning of any democracy. The judiciary's role in ensuring an effective system of checks and balances has not been without challenges. Former Deputy Chief Justice Moseneke contends in extra-curial writing that

‘[t]he tramlines of state power may be bright but not always certain and clear. Tension between branches of government is neither novel nor infrequent. Like all power struggles, they can be bitter and relentless.’⁷⁶

The political branches of government and the ruling party are not always pleased with the courts' findings and decisions against them, and often misconceive and question the courts' role within a constitutional democracy. In addition, the two political branches of government often called for a far stricter separation of powers, which would limit the ability of the court to check the exercise of power. There is also a great fear in South Africa that too much power is concentrated in the executive branch of government, especially the President's power of appointment and removal. As mentioned, an effective system of checks and balances is vital to prevent the abuse of state power within South Africa. In the next segment, I will outline two challenges that have the effect of diminishing our system of checks and balances in South Africa. I will discuss these two challenges in the context of a dominant party democracy.

2.4 The challenges and threats to an effective system of checks and balances in South Africa

In this section, two factors that significantly influence our system of checks and balances alluded to earlier in this chapter are discussed. Firstly, the section deals with the dominant executive branch in South Africa. The second part of the section deals with the challenge or threat relating to the misperception of the role of the judiciary by the two political branches of government, which is also sometimes referred to as the counter-majoritarian dilemma in South Africa.

2.4.1 Dominant executive branch in South Africa: Eliminating effective checks and oversight

⁷⁵ Ibid.

⁷⁶ Moseneke op cit (n50) at 15.

In his work, Devenish states that ‘South Africa’s 1996 Constitution has created an executive presidency, which is more powerful than any similar position under the previous constitutions’.⁷⁷ In modern democracies such as South Africa, in which governance decisions have increasingly become complex and often technical in nature, the executive is by far the most dangerous branch of government.⁷⁸ The question that should be borne in mind is whether these statements hold water in South Africa. Is the executive the most dominant and dangerous branch of government in South Africa or, to put it differently, is too much power concentrated in the executive branch of government in South Africa? To what extent does this implicate or disturb the system of checks and balances as indicated in this chapter?

The powers of the National Executive contained in Chapter 5 of the Constitution display a remarkable concentration of the President’s powers as head of the executive and head of state.⁷⁹ Section 85 of the Constitution states that executive authority is vested in the President. The executive branch of government in South Africa ‘controls policy making, parliament’s legislative agenda and the implementation of laws and policy’.⁸⁰ The President possesses an array of formal powers provided for by the Constitution. It can be summed up as follows:

‘He appoints ministers and influences the appointment of senior officials. He chairs the cabinet, steers some cabinet committees, and appoints the chairs of others. He can dominate foreign policy. And he can adopt any other policy area and make it his own. In addition, he can bypass full cabinet and terrify his ministers with the threat of dismissal. The president also appoints members of public bodies, giving him a huge realm of patronage. And he has access to state intelligence and communications resources.’⁸¹

It can be argued that, in practice, the President and his cabinet are far more powerful than either the national legislature or judiciary. This is because the President is empowered to appoint his or her cabinet and to shape the destiny of the country in ways which the other two branches of

⁷⁷ Devenish op cit (n29) at 148.

⁷⁸ Pde Vos ‘Who will protect our parliament against the president and his securocrats?’ available at <http://constitutionallyspeaking.co.za/who-will-protect-our-parliament-against-the-president-and-his-securocrats/>, [accessed on 20 May 2017].

⁷⁹ D Moseneke ‘Keynote Address – Reflections on South African constitutional democracy: transition and transformation’ presented at the Mistra-Tmali-Unisa Conference ‘20 years of South African democracy: so where to now?’ The University of South Africa, Wednesday 12 November 2014 at 16. Also see 17-18 for detailed outline of the President’s powers of appointment. Also see Chapter 5 of the Constitution, in particular, sections 83-102 of the Constitution.

⁸⁰ A Butler ‘The State of the South African Presidency’ (November 2013) 71 *The Journal of the Helen Suzman Foundation* at 5.

⁸¹ Ibid.

government cannot.⁸² Some scholars claim that ‘South Africa largely lacks a genuine separation of powers – at least in terms of where most power is wielded.’⁸³ Former Deputy Chief Justice Dikgang Moseneke has ‘brilliantly pointed out that a fundamental weakness of the Constitution is the way in which it allocates public power’.⁸⁴ He points out that the ‘vast powers of the national executive bring to the fore the debate whether the democratic project will be best served by a powerful central executive authority’.⁸⁵ This is in light of the fact that presidential decisions to appoint a number of key public functionaries to critical institutions that underpin our democracy have been subject to regular challenges before the courts.⁸⁶ I will deal with this issue in more detail in Chapter Three concerning the President’s decisions to appoint a number of key public functionaries to critical institutions such as the NPA, with the intention of eroding effective checks and oversight within those institutions. Certainly, concentrating so much power in the Office of the President must rank as one of the rarest, yet also gravest, shortcomings of the very capable drafters of the South African Constitution.⁸⁷ But why is this a problem? If the President and his cabinet have so much power, why is it a threat and how does this effect our system of checks and balances?

Firstly, South Africa’s history clearly demonstrates that abuse of public power is a real possibility when one political party remains in office indefinitely or for an extended period, as occurred with the National Party for a period of 46 years.⁸⁸ The governing party, the ANC, has been in power since 1994, and South Africa has been characterised by many as a dominant party democracy. In my view, the vast powers of the national executive are contrary to the separation of powers (checks and balances) ideal because an excessive concentration of power in a single organ or person is an invitation for abuse or mal-administration.⁸⁹ The problem of abuse of power by the executive is heightened in the South African system, in which citizens do not directly elect the executive.⁹⁰ There is clear evidence that the executive branch of

⁸² Ibid.

⁸³ S Woolman ‘Is there a separation of powers doctrine in South Africa and other democracies both old and new?’ (2016) 2 (6) *International Journal of Law and Legal Jurisprudence Studies* at 9.

⁸⁴ W Gumede ‘Too much power in one person’s hands’ (2015) available at <http://www.dispatchlive.co.za/news/too-much-power-in-one-persons-hands/>, [accessed on 23 May 2015].

⁸⁵ Moseneke op cit (n79) at 16.

⁸⁶ Ibid. Also see D Davis ‘Separation of powers: juristocracy or democracy’ (2016) *SALJ* 258 at 269. This is evident from cases such as *Democratic Alliance v President of South Africa and Others* (CCT 122/11) [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) (Simelane judgment).

⁸⁷ Gumede op cit (n84).

⁸⁸ P Labuschagne ‘Trias politica as guiding constitutional principle in the modern state: Obsolete relic or constitutional necessity?’ (2006) *Politeia* 25(1) at 27.

⁸⁹ GE Devenish ‘The doctrine of separation of powers with special reference to events in South Africa and Zimbabwe’ 2003 66 (1) *THHR* at 85.

⁹⁰ De Vos op cit (n78).

government under the guise of the ANC previously had no hesitation in using its extensive power if necessary, even if that meant undermining the separation of powers doctrine or the rule of law.⁹¹ A noticeable example is the Al-Bashir matter, which showed that the ANC government (executive) was perfectly capable of ignoring a court order and undermining the judiciary with little concern for the long-term consequences.⁹²

Secondly, another problem concerning the dominant executive's threat to our system of checks and balances is that our parliamentary system of government does not give full expression to the notion of separation of powers because of the close links between the legislature and the executive. Although our Constitution does not favour an absolute separation of powers between the three branches of government as mentioned earlier, the intermingling of the legislative and executive branches of government do pose challenges to an effective system of checks and balances. Pieter Labuschagne points out that 'the retention of the parliamentary system remained an insurmountable obstacle in the path of a substantive separation of powers' in South Africa.⁹³ He observed that

'[i]n the parliamentary system, there is neither principle of separation of powers nor one of checks and balances. Parliamentary systems are characterised by the fusion of powers, in other words, by the unification of the executive and legislative branches, which results in an overlap of persons who are in the executive and in the legislature.'⁹⁴

In a parliamentary system such as in South Africa, the fact that members of the legislature also serve on the executive defeats the purpose of the separation of powers that allows for checks and balances against the abuse of power.⁹⁵ This is an important aspect of South African separation of powers because

'the separation between judicial, legislative and executive organs – while not monolithic – underlies a structural and functional distinction between the arms of government which, in order to preserve their institutional integrity and their democratic function, need to be preserved from intrusion.'⁹⁶

⁹¹ P Labuschagne op cit (n88) at 100.

⁹² Judith February 'The judiciary and the executive: at peace, for now' available at <http://www.issafrica.org/iss-today/the-judiciary-and-the-executive-at-peace-for-now/> [accessed on 9 September 2016].

⁹³ P Labuschagne op cit (n88) at 27.

⁹⁴ Ibid.

⁹⁵ FM Daka 'Are the current Zambian constitutional provisions sufficient in preventing abuse of power by the executive organ of government?' (unpublished LLM thesis University of Cape Town, 2015).

⁹⁶ Kate O' Regan op cit (n 45) at 131.

However, the Constitutional Court in the *First Certification* judgment found that the overlap between the executive and legislature served the purpose of making the executive more directly answerable to the elected legislature.⁹⁷ Part of the reason was to enable the legislative assembly to call on the ministers, as members of the Assembly, to explain and account directly for the way in which a statute was executed and other executive functions performed.⁹⁸ This is to enable the legislative assembly to call up Ministers, as members of the Assembly.⁹⁹ In practice, this does not always happen and the executive often refuses to be held accountable by Parliament. To safeguard our democracy against the dangerous and overweening power of the President and other members of his or her executive, the Constitution subjects the executive to the control of the legislature – in particular the democratically elected National Assembly.¹⁰⁰ On paper, Parliament is the strongest branch of government because Parliament appoints the President and Parliament can fire the President. Parliament also, on paper, has power to hold the executive accountable. A great illustration of how this fusion and close relationship between the executive and the legislature can amount to a problem is the two *EFF* judgments – where both the executive and judiciary align with one another to seepage accountability, where the judiciary declares that the conduct of both the legislature and executive was unconstitutional. I will deal with the two *EFF* judgments in more detail in Chapter Four of this thesis – in particular, how the judiciary reminded the two political branches of government of its constitutional mandated role (checks and balances) within our constitutional democracy. De Vos points out that,

‘[i]f the other branches do not vigilantly check the exercise of executive power and hold it accountable, the executive will threaten the health of the democracy as well as the rights and well-being of every person who lives in South Africa’.¹⁰¹

Today the judiciary acts both as watchdog over the other branches’ adherence to the doctrine of separation of powers (checks and balances) and as primary protector of citizens’ rights within its confines.¹⁰² Where Parliament has faltered in its constitutional obligations as pointed out above, the judiciary has been far more instrumental in reviewing and curbing executive

⁹⁷ Currie & De Waal op cit (n48) at 97. The authors provide a sound reason why the Court took this stance. ‘What the Court seems to have in mind is that many of the checks, such as ministerial accountability and responsibility to Parliament, envisaged by section 92 of the Constitution will not work if Ministers of the cabinet are also members of the Assembly. De Vos and Freedman op cit (n3) at 65, question whether the Court was indeed correct.

⁹⁸ P Mojapelo ‘The doctrine of separation of powers (a South African perspective)’ April 2013 *The Advocate* at 39.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ De Vos op cit (n78).

¹⁰² Ibid.

power.¹⁰³ However, the growth of executive power unchecked by the legislature places increasing pressure on the judiciary to check dangerous exercise of executive power.¹⁰⁴ ‘This may not be a good thing, because the court has to balance its legal legitimacy, public support and institutional integrity.’¹⁰⁵ To quote Pieter Labuschagne yet again, he observed that

‘[t]he judiciary in South Africa was until recently able to maintain its distance from the centralising gravitational pull of the fused legislature and executive branches and was able to deliver objective decisions based on the interpretation of the law. However, the judiciary was not protected from criticism and it had to endure perpetual criticism for the “lack of transformation” and for reflecting the previous regime’s values.’¹⁰⁶

In South Africa, the judiciary is empowered in terms of the Constitution to review and set aside the actions of the other two branches of government.¹⁰⁷ In South Africa, the judiciary has been accused on numerous occasions of overreaching when it makes decisions that do not favour the two political branches of government and the governing party, the ANC. One commentator pointed out that ‘the people criticising the courts for meddling in politics are “deliberately misunderstanding” the role of the courts in a constitutional democracy’.¹⁰⁸ In the next section, I will discuss this problem to our system of checks and balances system in South Africa.

2.4.2 ‘Misperception of the role of the judiciary’ and the implication for the checks and balances system

What is a grave concern in South Africa is that vital role players within South Africa's democracy often lack a common understanding of what the implications of the doctrine of the separation of powers and concomitant system of checks and balances entail. This is so because the two political branches of government and ruling party wish for a far stricter separation of powers, which would limit the ability of the court to check exercise of power. Put in simple terms, the two political branches of government in South Africa do not like the checks and

¹⁰³ Ibid.

¹⁰⁴ Roux op cit (n 45) at 38-9.

¹⁰⁵ Ibid.

¹⁰⁶ P Labuschagne ‘Legislative immobility and judicial activism: the impact on the separation of powers in South Africa’ (2013) 38 (1) *Journal for Contemporary History* 126 - 14 at 135.

¹⁰⁷ Section 172 (1) (a) of the Constitution provides that –

‘[a] court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.’

¹⁰⁸ H Corder ‘Challenges to the rule of law in South Africa’ (September 2010) *UCT Law Review*.

balances, as discussed above, that go with the separation of powers. As one commentator so aptly put it:

‘As the guardian of the constitution, the [courts] from time to time disappoint the ambitions of legislators and governments. This is part of our system of checks and balances. People who exercise political power, and claim to represent the will of the people, do not like being checked or balanced.’¹⁰⁹

For example, in a speech by former President Zuma in 2011 during the third annual Access to Justice Conference in Pretoria, the President stated that

‘[t]he powers conferred on the courts cannot be superior to the powers resulting from the political and consequently administration mandate resulting from popular democratic election. Political disputes resulting from the exercise of powers that have been constitutionally conferred on the ruling party through a popular vote must not be subverted, simply because those who disagree with the ruling party politically, and who cannot win the popular vote during elections, feel [that] other arms of the State are avenues to help them co-govern the country.’¹¹⁰

The judiciary has also often been accused of being counter-majoritarian by the ANC, –. The ANC has regarded the Constitutional Court as being ‘counter-revolutionary’ and called for the mobilisation of the judiciary. On one occasion, the Secretary General of the ANC, Gwede Mantashe, made the following statement:

‘The independence of the judiciary and separation of powers must never be translated into hostility, where one of those arms becomes hostile to the other. My view is that there is a great deal of hostility that comes through from the judiciary against the executive and parliament, toward the position taken by the latter two institutions. Unless this issue is addressed deliberately it’s going to cause instability, it undermines the other arms of government and it could cause instability.’¹¹¹

¹⁰⁹ D Hulme & S Pete ‘Vox populi? vox humbug! rising tension between the South African executive and judiciary considered in historical context-part one’ (2012) 15 *PER/PELJ* 16 at 1, citing former Chief Justice of Australia, Murray Gleeson, as quoted by former Chief Justice of South Africa, Arthur Chaskalson (Chaskalson 2012 www.timeslive.co.za).

¹¹⁰ J Zuma ‘Keynote address to Access to Justice Conference’ available at <http://constitutionallyspeaking.co.za/presidents-zumas-keynote-addressed-to-access-to-justice-conference>, [accessed, June 2017].

¹¹¹ M Makhabela ‘Full interview: ANC’s Mantashe lambasts judges’ available at <http://www.sowetanlive.co.za/news/2011/08/18/full-interview-ancs-mantashe-lambast-judges> [accessed on 17 July 2017]. Also see ANC NEC member Ngoako Ramatlhodi’s attack on the judiciary. He stated:

‘I have seen now in our country the courts are being used to replace the executive . . . There is a tyranny, a minority tyranny, that is using state institutions to undermine democratic processes

The above two quotes illustrate that the key role players within South Africa's democracy lack a common understanding of the implications and functioning of the doctrine of the separation of powers, in particular the checks and balances, and what the role of the courts entails. These and other similar statements by politicians have created some concern amongst the general public and experts within the international law community, particularly because it reflects a contradictory understanding of the inherent characteristics and role of the judiciary in a constitutional state.¹¹² One legal academic pointed out: 'Zuma and the ANC's insistence on a rigid separation of the branches of government is contrary to the Constitutional Court's established jurisprudence and international academic consensus that the separation of powers is always only relative.'¹¹³ The South African system of checks and balances implies that it is the constitutional duty of all branches of government to scrutinise the exercise of power by any one particular branch, as indicated earlier in this chapter.¹¹⁴ A number of notable criticisms by senior ANC officials and even the President have shown their frustration with the courts' exercise of their power of review.

What makes the decision of a few unelected judges carry more weight than the choices of the majority?¹¹⁵ Such questions are commonly referred to as a counter-majoritarian dilemma or debate, when the courts are said to be taking undemocratic decisions that often go against the people's will.¹¹⁶ Such criticism and attacks on the judiciary's power centre mostly on the fact that the courts' powers to review and set aside legislative and executive conduct are too expensive and have been misapplied, leading to interference with the government's work.¹¹⁷ What does this criticism against the judiciary mean and what implications does it hold for the

at this juncture in our country,' he said in reference to court outcomes that did not favour the government.'

Ramatlhodi 2011 www.timeslive.co.za, [accessed on 17 July 2017].

¹¹² P Labuschagne op cit (n106) at 126.

¹¹³ J Barnard-Naude 'Zuma reignites separation of powers debate' available at <http://thoughtleader.co.za/jacobarnardnaude/2011/11/02/zuma-reignites-separation-of-powers-debate/>, [accessed on September 2016]. Also see Gilbert Marcus and Jason Brickhill 'Paper delivered to the South African Reading Group: The fall and Rise of Two Chief Justices' (Apr.5, 2012). The writers claim that:

'[t]he judiciary after all is a soft target. Many of the attacks have had a decided political flavour. Accusations of racism or, its euphemism lack of transformation, have abounded. And most concerning of all, senior political leaders have questioned the very idea of constitutional review.'

¹¹⁴ Ibid.

¹¹⁵ De Vos & Freedman op cit (n3) at 77.

¹¹⁶ Ibid.

¹¹⁷ M Olivier 'Competing notions of the judiciary's place in the post-apartheid constitutional dispensation' – in 'Hugh Corder, Veronica Federico & Romano Orru (eds) *The Quest for Constitutionalism in South Africa since 1994* (2014) at 40.

separation of powers' concomitant system of checks and balances? Does the criticism evince a misunderstanding of the courts' constitutionally prescribed role or is it a deliberate attempt to challenge the courts' power of reviewing legislation and executive conduct?¹¹⁸ These tensions are probably inevitable in any constitutional democracy that gives the courts the power to overrule the executive and legislative branches of government.¹¹⁹ Richard Calland points out that 'freely and fairly elected governments with big majorities don't much like being overturned by a small group of unelected judges.'¹²⁰ Why is it important 'that the two political branches of government, the legislature and the executive, appreciate the role of the judiciary within a constitutional democracy? It is apposite to recall the insight of Pieter Labuschagne, who contends that 'it is important that the political arm (legislature/executive) understands the critical role of the judiciary as custodian of the Constitution within the constitutional framework'.¹²¹ He provides a valuable reason why the other two branches of government should not misconceive the role of the judiciary. He claimed that

'[w]ithout the basic respect for and understanding of the role of the judiciary, politicians in the government can easily frustrate the judiciary's primary function to uphold the law and to establish the rule of law in a country. If the relationship deteriorates and the status of the judiciary is degraded by the ruling party it will in the long run tarnish the status of the constitutional state and that of the rule of law in the country.'¹²²

In addition, the independence of the judiciary is a constitutional principle widely regarded as an essential component of any democratic system of government.¹²³ The Constitution envisages that the judiciary should be politically insulated from the legislative and the executive power.¹²⁴ Thus courts should not be subject to any improper influence from the other

¹¹⁸ Ibid.

¹¹⁹ R Calland 'Are judges in SA under threat or do they complain too much?' 21 August 2015 available at <https://mg.co.za/article/2015-08-21-are-judges-in-sa-under-threat-or-do-they-complain-too-much> [accessed on 20 May 2017].

¹²⁰ Ibid.

¹²¹ P Labuschagne op cit (n106) at 1.

¹²² Ibid.

¹²³ *Heath judgment* op cit (n60) para 25:

'The Constitutional Court pointed out that the "under our Constitution it is the duty of the courts to ensure that the limits to the exercise of public power are not transgressed. Crucial to the discharge of this duty is that the courts be and be seen to be independent".'

¹²⁴ Section 165(4) of the Constitution provides that –

branches of government, or from private or partisan interests, according to the Constitution.¹²⁵ A healthy relationship between the judiciary, on the one hand, and the two political branches of government, on the other, are essential for our young constitutional democracy to thrive. In the following section, I will discuss the strategies the judiciary, in particular the Constitutional Court, has developed to avoid coming into conflict with the two political branches of government. I will suggest that the Constitutional Court has developed ‘a mode of judicial review that carves out space (for a separation of powers doctrine) designed to enhance, rather than subvert, the policies and the decisions made by co-ordinate branches’.¹²⁶ The Constitutional Court has created useful strategies to circumvent any direct conflict with the two political branches of government. The Constitutional Court of South Africa has, on frequent occasions, employed the idea of judicial restraint, a conscious decision based on separation of powers concerns not to interfere with decisions by the other branches of government, provided that they are in line with the Constitution.¹²⁷

2.5 Fashioning of adjudicative strategies by the Constitutional Court to avoid conflict with the political branches of government in South Africa

The Constitution grants the judiciary the responsibility of being the ultimate guardian of the Constitution.¹²⁸ The judiciary thus determines the pre-eminent domain of the relevant branches of government when there is a dispute, as it is the final arbiter in matters regarding the Constitution.¹²⁹ This duty goes hand in hand with its role of overseeing and ensuring that all exercise of governmental power is in line with the Constitution. The ultimate question to consider is how should courts carry out their role as the guardians of the Constitution, as well as the protector of democratic values, while adhering to the doctrine of separation of powers?¹³⁰ To put it differently: the dilemma that the Constitutional Court faces is that the separation of powers principle demands that the Court should respect the domains and powers of the other branches of government, while at the same time, ensuring that these branches act in accordance

‘no person or organ of state may interfere with the functioning of the courts and . . . organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.’

¹²⁶ Woolman op cit (n83) at 1.

¹²⁷ Seedorf & Sibanda op cit (n36) at 12-56.

¹²⁸ *Pharmaceutical Manufacturers Association of SA in re: Ex Parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC) para 55. Also see S Naidoo ‘Does the lack of sufficient formulation and articulation of the principles guiding the limits of the Constitutional Court undermine its legitimacy’ (unpublished LLM thesis, (UCT)University of Cape Town, 2014) at 4.

¹²⁹ Sang op cit (n23) at 98.

¹³⁰ Ibid.

with the Constitution. The judges of the Constitutional Court, of course, are aware of this challenge. This was aptly captured by Albie Sachs J when he stated in *Prince v Law Society and others*¹³¹—

‘[t]his Court may frequently find itself faced with complex problems as to what properly belongs to the discretionary sphere which the Constitution allocates to the legislature and the executive, and what falls squarely to be determined by the judiciary The search for an appropriate accommodation in this frontier legal territory accordingly imposes a particularly heavy responsibility on the courts to be sensitive to considerations of institutional competence and the separation of powers. Undue judicial adventurism can be as damaging as excessive judicial timidity Both extremes need to be avoided.’¹³²

Lenta in his seminal work, also aptly pointed out this predicament that the Constitutional Court faces; it is worth quoting him at length. He is of the view that

‘[I]n South Africa, judicial decisions are punctuated by a rhetoric of restraint that is intended to allay concerns about the court’s usurpation of political functions that fall properly within the domain of the legislature or the executive. But in exercising restraint, the Constitutional Court has frequently been excoriated for what critics perceive as a failure of nerve – a timid reluctance to scrutinise legislation with sufficient vigour and to provide meaningful and effective protection of rights – that is attributed to the Court’s need to manufacture legitimacy for itself. When, on the other hand, the Court overrides other branches of government by declaring their actions unconstitutional, it is charged by those either sympathetic to the government’s policy goals or concerned to preserve the separation of powers between the branches of government, with failing to demonstrate sufficient sensitivity to legitimate legislative decisions about the common good. *Contending calls for increased activism and greater restraint place the Court in a difficult position*, particularly since it cannot (candidly) justify its decisions as being required by the constitutional text itself, and because the reasons it offers in support of its verdicts are the subject of reasonable disagreement.’¹³³

Roux argues that the decisions of the Constitutional Court are strategic in order to minimise the Court coming into conflict with the executive and legislature (and the ruling party) in South Africa.¹³⁴ The judiciary has developed its separation of powers jurisprudence in a strategic way

¹³¹ 2002 (3) SA 794 (CC), 2002 (3) BCLR 231 (CC) para 155-56.

¹³² Ibid.

¹³³ P Lenta ‘Judicial restraint and overreach’ (2004) 20 *SAJHR* at 544.

¹³⁴ T Roux ‘Principle and Pragmatism on the Constitutional Court of South Africa’ (2009) 7 *International Journal of Constitutional Law* 106 at 131.

to ensure that its decisions are indeed respected by the government and Parliament and the governing party. The Constitutional Court has thus devised ways in which to review decisions of a political nature without disrupting the separation of powers; one of these ways is the strategy of judicial self-restraint or deference, where the court sets out its own boundaries in order not to overstep its own authority.¹³⁵ In terms of this approach, the Constitutional Court uses a number of different strategies to determine how far it is willing to ~~hinder~~ ~~encroach~~ encroached on the functions that have been preserved for the political branches. According to Lenta:

‘Mindful of the need to manufacture its own institutional legitimacy and to gain the trust of the other branches of government, the Constitutional Court has affirmed the doctrine of separation of powers and proclaimed its allegiance to the principle of restraint.’¹³⁶

My focus will be on the concept of judicial self-restraint and not judicial activism, but it is necessary to explain the two concepts, because I will also refer to them in later chapters of this thesis. What is important to note is that these two concepts are widely used and often used in different contexts; the use of the terms is thus varied. For the context of this thesis, judicial activism means the action of the courts overruling the actions, policies and laws of the other arms of government in a way that unjustifiably disregards the doctrine of separation of powers.¹³⁷ Judicial restraint ‘is just the opposite [and] is often used as a claim that judges should minimise the discretion that they exercise by limiting their activity to the application of posited rules.’¹³⁸ The concept of judicial restraint will be discussed with reference to ‘separation of powers judicial self-restraint’ mandates that judges should limit the court’s power over other branches of government by deferring to the decisions of other branches of government.¹³⁹ In terms of the judicial self-restraint approach, the Constitutional Court has developed many strategies that illustrate this approach of judicial self-restraint or deference. I will discuss two strategies that demonstrate this approach: the pre-eminent domain approach and the Constitutional Court’s pragmatic approach. These two strategies allow the Constitutional Court to pronounce against the political branches without provoking too much of a retaliatory reply

¹³⁵ GK Manyika ‘The rule of law, the principle of legality and the right to procedural fairness: a critical analysis of the jurisprudence of the constitutional court of South Africa’ (unpublished LLM thesis, University of KwaZulu-Natal, 2016) at 83.

¹³⁶ Lenta op cit (n133) at 554.

¹³⁷ Lenta op cit (n133) at 547-8.

¹³⁸ Ibid.

¹³⁹ Ibid.

from the political branches and the ruling party, the ANC.¹⁴⁰ My contention is that these strategies developed by the Court err on the side of deference. One needs to question and consider whether the judicial self-restraint approach of the Constitutional Court will enhance and protect our constitutional democracy more adequately against the challenges and threats of a dominant party democracy.

¹⁴⁰ Manyika *op cit* (n135) at 73-81.

2.5.1 The principle of pre-eminent domain

The principle of pre-eminent domain is designed to ensure the functional separation of powers between the executive, the legislature and the judiciary.¹⁴¹ It is used when the Constitutional Court regards a contested power as being so closely related with the primary function of that particular branch of government that almost no interference by other branches of government may be justified.¹⁴² The principle of pre-eminent domain emphasises the separation of function and limits the attribution of certain powers to the wrong institution.¹⁴³ By following this approach, the Constitutional Court has in its decisions shown a keenness to maintain the (formal or pure) doctrine of separation of powers in South Africa, as mentioned earlier in this chapter. This is seen in the Constitutional Court's deference to the decisions of the other branches of government, when it has found that either the legislature or the executive is institutionally more competent to deal with an issue.¹⁴⁴ There is voluminous judgment of the Constitutional Court demonstrating the court's use of relying on the pre-emptive domain tactic. In *Doctors for Life*, 'a case that concerns, substantively, the powers of parliament and principles of democracy to which the constitution is committed'¹⁴⁵, the Constitutional Court stated:

'The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle has important consequences for the way in which and the institutions by which power can be exercised. Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution.'¹⁴⁶

¹⁴¹ Seedorf & Sibanda op cit (n36) at 12-39 -12.40.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ R N Daniels and J Brickhill 'The Counter-majoritarian difficulty and the South African Constitutional Court' (9-1-2006) 25 (2) *Penn State International Law Review* Article 2 at 396.

¹⁴⁶ *Doctors for life international v Speaker of the National Assembly and others* 2006 (6) SA 416, 2006 (12) BCLR 1399 (CC) ('Doctors for Life') para 37. Also see *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1075 (CC) para 98.

Additional support for this approach can be found in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others*¹⁴⁷; O'Regan J made a very important observation in terms of the separation of powers:

‘In doing so [judicial review] a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field.’¹⁴⁸

The *OUTA* judgment is a great illustration of this approach, where the separation of powers doctrine (in its pure form) was used as an express constitutional principle to avoid a direct clash with the two political branches of government. The *OUTA* case involved the legality of a controversial government decision to fund an upgrade to freeways in Gauteng through the collection of tolls from road-users.¹⁴⁹ The Respondents sought, and were granted, an interim interdict from the North Gauteng High Court.¹⁵⁰ The interdict prohibited the levying and collection of tolls pending further proceedings for final relief as to whether the government possessed the power to declare certain roads as toll roads.¹⁵¹ In overturning the High Court’s decision, the Constitutional Court stated:

‘Thus the duty of determining how public resources are to be drawn upon and re-ordered lies in the heartland of executive function and domain. What is more, absent of any proof of unlawfulness or fraud or corruption, the power and the prerogative to formulate and implement policy on how to finance public projects reside in the exclusive domain of the national executive subject to the budgetary appropriations by Parliament.’¹⁵²

Goggin and Swart, in their critique of the judgment, argue that the separation of powers doctrine is ‘best understood as a prudential doctrine invoked on an *ad hoc* basis as a way of managing the court’s relationship with the political branches.’¹⁵³ In this case, by labelling the e-tolling cases as falling in the heartland of the executive function, the majority judgment adopted a position of abstinence or judicial self-restraint.¹⁵⁴ Another Constitutional Court

¹⁴⁷2004 (4) SA 490 (CC). Also see *De Lange v Smuts NO and Others* 1998 (3) SA 785.

¹⁴⁸ *Ibid* para 48.

¹⁴⁹ *OUTA judgment* supra (n30).

¹⁵⁰ *Ibid* para 7.

¹⁵¹ *Ibid* para 8.

¹⁵² *Ibid* paragraph 67.

¹⁵³ M Swart and T Coggin ‘The road not taken: separation of powers, interim interdicts, rationality review and E-Tolling’ *Constitutional Court Review* (2014) 5 346 – 366 at 348.

¹⁵⁴ *Ibid* 365.

judgment that perfectly captures the principle of pre-eminent domain, that has a strong political dimension and may be classified as politically sensitive is the *My Vote Counts* judgment.¹⁵⁵ *My Vote Counts* case concerns the disclosure of political funding.¹⁵⁶ In this case, the Constitutional Court also adopted the pre-emptive domain tactic, to minimize the impact this case had on its institutional security.¹⁵⁷ The majority judgment found that, in terms of the doctrine of separation of powers, *My Vote Counts* was precluded from demanding the relief it sought.¹⁵⁸ The majority judgment held that

‘[w]hat the “applicant wants is but a thinly veiled attempt at prescribing to Parliament to legislate in a particular manner.” That attempt impermissibly trenches on Parliament’s terrain; and that is proscribed by the doctrine of separation of powers.’¹⁵⁹

Pre-eminent domain is, I would contend, a very useful mechanism to avoid conflict with the two political branches of government, and to some extent the governing party, the ANC. Although the South African jurisprudence does not recognise a strict separation of powers, as indicated earlier in this chapter, this notion of a pre-eminent domain has sought to maintain a meaningful division of powers between the three branches of government. An examination of some of the Constitutional Court’s major decisions, as shown above, reveals that the Court has used its separation of powers doctrine (in its pure form) as an express principle of constitutional law, to justify a deferential approach to avoid direct confrontation with the political branches.¹⁶⁰

2.5.2 Pragmatic approach of the Constitutional Court

Another strategy often employed by the Constitutional Court is the pragmatic approach, which Roux explains, ‘given the inherent weakness of their position, must perforce temper their commitment to principle with strategic calculations about how their decisions are likely to be received by the political branches of government.’¹⁶¹ This strategy has been very useful for the Constitutional Court. In cases that are likely to bring it in conflict with the elected branches of government, the Constitutional Court has chosen in principle to be pragmatic to maintain its institutional security.¹⁶² Thus, at least where the political stakes are high, the court is driven

¹⁵⁵ *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC) (‘My Vote Counts’).

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ Majority judgment para [154]- [157]. It prefers that the legislation should require the disclosure of the information as a matter of “continuous course, rather than once-off upon request”.

¹⁵⁹ *My Vote Counts* supra (n155) para 157.

¹⁶⁰ Ibid.

¹⁶¹ Roux op cit (n16) at 109.

¹⁶² Sang op cit (n129) at 120.

more by pragmatic than principled considerations.¹⁶³ An excellent example of this approach is the *UDM* floor crossing case, as briefly dealt with in the introduction and will be discussed in more detail in Chapter Four of this thesis. The case helps us to understand how the Constitutional Court has made use of this strategy to ensure that its decisions are respected by the government and Parliament and, to a certain extent, the ANC. Without explicit reference to the separation of powers, in this matter the Constitutional Court was able to find a way to allow the floor-crossing package of legislation to go through. Seedorf and Sibanda are of the view that the Constitutional Court does not always follow strict constitutional principles, but sometimes trades off principle against pragmatic considerations.¹⁶⁴ The authors are of the view that, due to the contested role of the judiciary in South Africa, it is not inconceivable that the Constitutional Court may, at times, take the possible reaction of other political players into account when deciding a case.¹⁶⁵ To illustrate this: for example, sometimes the Constitutional Court prevents the legislature from pursuing a particular policy by subjecting it to a strict constitutional standard and sometimes it defers to the legislature's policy choice—without any apparent logic or coherent legal justification connecting the two sets of cases.¹⁶⁶ Seedorf and Sibanda contend that 'this is hardly surprising, however, in a country dominated by a single political party in which the Constitutional Court needs to have regard to its institutional security and sociological legitimacy.'¹⁶⁷ The Constitutional Court's 'pragmatic approach should not be mistaken for abdication of the Constitutional Court's duty to uphold the Constitution.'¹⁶⁸ According to Sang, in contrast, this 'strategy has been helpful in promoting the institutional strength of the political branches of government [and to some extent the ruling party] in South Africa's young democracy.'¹⁶⁹ The Court's pragmatic approach has allowed it to formulate its separation of powers doctrine (checks and balances by not intruding or encroaching into the domain of the other two branches of government) that accurately captures the true relationship between the courts and other branches of government and the ruling party in South Africa.¹⁷⁰

¹⁶³ T Roux 'democracy' in *Woolman and Bishop et al* (2013) *Constitutional law of South Africa* loose-leaf 2ed 10.1-10.57. at 10 - 57.

¹⁶⁴ Seedorf & Sibanda op cit (n36) at 12-72.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ Sang op cit (n129) at 120.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

In my view, these two strategies mentioned above have assisted the Constitutional Court greatly in dealing with the two political branches of government and, to some extent, the governing party, the ANC. Although these two strategies developed by the Constitutional Court tend towards a deferential approach towards the two political branches of government, this strategic approach does ensure that the institutional security of the Constitutional Court is protected, and does provide for a more encouraging relationship between the judiciary, on the one hand, and the two political branches of government, on the other. Would our constitutional democracy have been stronger or weaker if the court had taken a more active and robust approach instead of a deferential approach? One commentator pertinently observed:

‘It could be argued that had the Constitutional Court not adopted some principle of deference to the other two branches of government the political branches would have perceived, rightly or wrongly, that the Constitutional Court was encroaching into its domain. This would have the risk of creating hostility between the courts and the political branches of government. This would not be healthy for the nascent South African democracy.’¹⁷¹

If the relationship between the three branches of government deteriorates and the status of the judiciary is degraded by the ruling party it will, in the long run, tarnish the status of the constitutional state and that of the rule of law in the country and our constitutional democracy.¹⁷²As demonstrated in this chapter, in South Africa, the two political branches of government and the ruling party tend to criticise the Courts and often misconceive the role of the judiciary within a constitutional democracy. Thus, one can argue that the Constitutional Court often takes into consideration the reaction of other political actors when deciding sensitive and hard cases, to protect the court’s independence and to ensure that it respects the separation of powers doctrine (not to overreach), and, in this way, our constitutional democracy is also safeguarded.

¹⁷¹ Sang op cit (n129) at 121.

¹⁷² Labusgane op cit (n106) at 1.

2.6 Conclusion

This chapter has underscored the importance of the separation of powers doctrine and concomitant system of checks and balances in South Africa. There is no doubt that the doctrine of separation of powers and principle of checks and balances form part of our constitutional system. As articulated above, our Constitution provides for a separation of powers between the three spheres of government but ‘[i]n conclusion it is safe to state that South Africa under the 1996 Constitution adheres only to the minimum standards of the separation of powers’.¹⁷³ In South Africa, the separation of powers is a ‘far cry from the structural and functional separation of powers that occurs for example in a presidential system such as the United States of America’.¹⁷⁴ The justification for this is that the South African courts have indicated early on that South Africa would chart its own path in developing its own separation of powers doctrine that suits its own political and legal context. This is clearly illustrated in the Constitutional Court’s jurisprudence and case law.¹⁷⁵ An effective system of checks and balances is a vital mechanism to prevent the abuse of state power within South Africa. The judiciary, in particular the Constitutional Court, plays an important part to ensure that there are effective checks and balances in place to ensure that our constitutional democracy is protected. This is not an easy task for the judiciary. In this chapter, I have identified some of the relevant threats and challenges to our checks and balances system. The dominant executive branch of government has posed a range of challenges to our system of checks and balances. Vast powers of the national executive bring to the fore the debate whether the democratic project will be best served by a powerful central executive authority in South Africa.¹⁷⁶ Another concern is the fact that the two political branches of government and the ruling party often misconceive the role of the judiciary in a constitutional state. Thus, the role of the judiciary in safeguarding the separation of powers and checks and balances has become an important function. The Constitutional Court’s development of strategies, such as pre-emptive domain and pragmatic approach, provide some leeway and flexibility to the Court not to encroach on the terrain of the other branches of government and to avoid tension with the two political branches of government. This approach and the two strategies (pre-emptive domain and pragmatic approach) alluded to in this chapter are also more frequently used by the Constitutional Court

¹⁷³ P Labuschagne ‘Trias politica as guiding constitutional principle in the modern state: Obsolete relic or constitutional necessity?’ (2006) 25 (1) *Politeia* Vol 18-29 at 25.

¹⁷⁴ *Ibid.*

¹⁷⁵ *First Certification judgment* para 108 -112. *De Lange v Smuts NO and Others* 1998 (3) SA 785 paras 60-1.

¹⁷⁶ *Moseneke op cit* (n79) at 16.

in more political sensitive cases, such as *My Vote Counts* case mentioned above. As noted earlier in the introduction, it is necessary to situate this thesis within a broader political context. The ANC is the ruling party in South Africa and is clear that it has a major influence on our tri-lateral structures of government. In this thesis, one of the research questions that I seek to explore is whether one-party dominance necessarily weakens the functioning of the separation of powers and checks and balances, as discussed in this chapter, in South Africa. The next chapter will look at the dominant party democracy in South Africa in more detail.

CHAPTER THREE

One-party dominant system: Assessing the impact of a one-party dominant system on South Africa's checks and balances system

3.1 Introduction

‘When multi-party electoral democracy was introduced on African continent in the early 1990s, observers of African politics were worried that the adoption of multiparty democracy would lead to highly fragmented party systems in Africa, due to the deep ethnic divisions on the continent. However, after more than twenty years of the second wave of democratization in Africa, political experts and observers were proved wrong. Instead of deeply rooted fragmented party systems, political systems with one major dominant party emerged and in many countries, such systems have become entrenched.’¹⁷⁷

South Africa is emerging as a leading example of a ‘dominant party democracy’, ‘with the ANC having won every national election since 1994 and now is in power in almost all of the provinces, with no sign of a credible electoral competitor on the horizon.’¹⁷⁸ As Stuart Woolman so aptly put it:

‘Over the past 20 years, the African National Congress has (save for a brief period of a government of national unity) determined through consistent 63% representation in the National Assembly (and equal control of the National Council of Provinces), the constitution of the Executive. Because a single party has been able to determine the identity and the constitution of the Executive, the National Executive Council of the African National Congress has largely had unfettered control of that decision-making process – and effectively all subsequent decision-making processes. We have, as a result, what so many commentators have described as a one-party dominant democracy.’¹⁷⁹

This chapter serves as an analysis of South Africa's dominant party system. The ultimate question that this chapter seeks to explore is whether the impact of the electoral dominance of the ANC, the ruling party, has adversely affected or diluted the functioning of the checks and balances system in South Africa as discussed in Chapter Two of this thesis. In this chapter, I will investigate some of the key challenges or

¹⁷⁷ PS Thovoethin and MS Avosetinyen ‘Democracy under emerging one-party dominant system in Africa’ (Jan 2016) 3 (1-2) *African Journal of Democracy and Governance*, 125 – 152 at 128.

¹⁷⁸ Choudhry op cit (n9) at 32.

¹⁷⁹ Woolman op cit (n83) at 9.

‘pathologies’ of a one-party dominant system within the South African context. The argument put forward in this chapter is that the pathologies associated with a one-party dominant democracy weakened our checks and balances system as discussed in Chapter Two of this thesis. The purpose of checks and balances is to make branches of government accountable to each other because the excessive concentration of power in a single organ or person is an invitation for abuse and maladministration.¹⁸⁰ In short, checks ensure that the different branches of government control one another internally, while balances serve as counterweights to the power possessed by the other branches.¹⁸¹ Checks and balances is one of the key components for an effective operation of the separation of powers doctrine. Geoff Budlender points out that ‘[a]ny shift of power away from the institutions of government and towards the ruling party should be a matter for concern’.¹⁸² He cautions that this can lead to ‘the decline of democracy’.¹⁸³ Thus it is important, in my view, that the checks and oversight roles of key institutions are upheld and safeguarded against the negative challenges that a dominant party democracy presents. This is so because a dominant party can successfully deploy party members to key institutions and call upon their loyalty to ensure those institutions are not used to damage the interest of the party. According to Schlemmer:

‘If a weakness in constitutional checks and balances existed at the time of a party’s early victories, a dominant party of the kind we are thinking of will surely try to weaken these checks and balances yet further. A familiar feature of dominant party systems is some degree of sanction, surveillance or influence over the watchdog functions in society, whether these are constitutional or informal.’¹⁸⁴

In order to understand how the effects of one-party domination impacts on the separation of powers, I shall start this chapter by explaining the idea of dominant party democracy. It must be acknowledged from the start that my argument is not how a one-party dominant system consolidates or affects democracy in South Africa. That question has been extensively researched and is beyond the purview of this thesis. Instead, my focus in this chapter is on whether the electoral dominance of one political

¹⁸⁰ Currie & de Waal *op cit* (n48) at 95.

¹⁸¹ *Ibid.*

¹⁸² G Budlender ‘People’s power and the courts’ – Bram Fischer Memorial Lecture (2011) 27 *SAJHR* 582 at 583.

¹⁸³ *Ibid.*

¹⁸⁴ L Schlemmer ‘Deformations of political culture by one-party dominance’ Challenges to democracy by one-party dominance: a comparative assessment 10 October 2005 Vineyard Hotel, Cape Town South Africa Konrad-Adenauer-Stiftung, Seminar Report, no 17, Johannesburg, October 2006 at 119.

party has the potential to negatively influence the manner in which various constitutional structures in a democracy operate. Furthermore, I will put forward that our electoral system also contributes to pathologies of a one-party dominant system.

3.2 Definition and understanding of a dominant party democracy

It is important to understand the concept of dominant party democracy for this thesis. Thus, I will provide a brief outline of what the concept entails and how it is applied within the South African context. The concept of dominant party democracy has proved very difficult to define in a singular manner, because many writers prefer to provide their own definitions or understanding of the concept. Giliomee and Simkins, in their influential work in *The Awkward Embrace: One Party-Domination and Democracy*, characterise dominant parties as those which

‘[e]stablish electoral dominance for an uninterrupted and prolonged period; Enjoy dominance in the formation of governments; Enjoy dominance in determining public agenda, notably with regard to pursuit of a historical project.’¹⁸⁵

For purposes of this thesis, I will rely on the definition of Sujit Choudhry. He defines a dominant party democracy as one

‘which provides an entrenched framework for multiparty democracy through universal suffrage and regular elections, and which contemplates political competition and the alternation of political parties in power, but in which one party enjoys electoral dominance and continues to win free and fair elections that are not tainted by force or fraud.’¹⁸⁶

This thesis focuses on a one-party dominant system, which operates within a multiparty political system in which opposition parties are not restricted, but where the governing party enjoys electoral dominance and continues to win overwhelming victories in free and fair election that are not tainted by fraud or force.¹⁸⁷ Political scientists have over the years developed certain criteria to identify and understand the concept of a one-party dominant system.¹⁸⁸ Criteria for classifying one-party dominant systems from other party systems have

¹⁸⁵ R Southall ‘Dominant party debate in South Africa’ (2005) *African Perspective* at 63.

¹⁸⁶ Choudhry op cit (n9) at 6.

¹⁸⁷ From the outset, I want to point out that it is important not to confuse a one-party dominant system with a one-party system. A one-party system does not operate in a multi-party political system and is known for its restriction on party competition. A one-party system is undemocratic and has only one party that has the legal right to participate in politics.

¹⁸⁸ P du Toit and N de Jager *Friend or foe? dominant party systems in Southern Africa: insights from the Developing World* (2013) at 7.

been identified and include: occurring in democracies (political system);¹⁸⁹ the ruling party's political and electoral power needs to be sufficient to dominate the political polity and public policy (threshold for dominance);¹⁹⁰ the dominant party has a significant, symbolic history (nature of the dominance);¹⁹¹ opposition parties compete in elections but are unlikely to win (oppositional features);¹⁹² and the dominant party is in power for a prolonged period of three or more consecutive elections (time span).¹⁹³ I will now discuss each criterion within the South African context to determine whether these criteria find application in South Africa.

3.2.1 Criteria for classifying one-party dominant system

I will rely on the study and criteria fashioned by of Pierre du Toit and Nicole de Jager in their textbook, *Friend or Foe? Dominant Party Systems in Southern Africa: Insights from the Developing World*, to substantiate my analysis in this section. The first criterion is that a one-party dominant system occurs in both liberal and illiberal democracies.¹⁹⁴ What is meant by this is that one-party dominance occurs in a democracy in which regular elections take place and opposition parties are largely free to organise and express themselves and civil liberties, for the most part, are respected.¹⁹⁵ It also occurs where this is not the case. According to Friedman, what distinguishes a one-party dominant system from other democracies is the monopoly on power by one party.¹⁹⁶

The second criterion is that the ruling party's political and electoral power needs to be sufficient to dominate the political polity and public policy agenda (threshold for dominance).¹⁹⁷ There is no set threshold for identifying dominance, but some political analysts point out that an absolute majority is required.¹⁹⁸ What this entails is that the dominant party has the majority of legislative seats and controls the national executive. In South Africa the ruling party, the ANC,

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Ibid at 8.

¹⁹⁵ S Friedman 'No easy stroll to dominance, opposition and civil society in South Africa' in H Giliomee and C Simkins (eds) *The awkward embrace one party domination and democracy* (1999) 97 at 101.

¹⁹⁶ Ibid.

¹⁹⁷ Du Toit & de Jager op cit (n188) at 8.

¹⁹⁸ Ibid.

has won the last five national elections with over 60 percent of the national vote, which means that it holds most of the seats in the legislature and controls the national executive.¹⁹⁹

The third criterion is that the dominant party has a significant symbolic history (nature of the dominance).²⁰⁰ Heidi Brooks points out that it is important that we view the one-party dominance of the ANC in its historical perspective.²⁰¹ She points out the following:

‘Of equal importance when applying particular theories of the dominant party debate to South Africa is to understand the specific nature of the ANC as ruling party and the origins of democracy in South Africa, from which we cannot divorce the country’s unique political history. The protracted struggle against apartheid means that the historical role of the ANC carries tremendous significance.’²⁰²

De Jager, in her thesis, argues that the ‘ANC’s role as a liberation movement helps it to command loyalty among the South African people and thus the single party’s dominance emanates from a symbolic history’.²⁰³

The fourth criterion relates to the fact that the opposition parties compete in free and fair elections but are unlikely to win whether the elections are competitive or semi-competitive (oppositional features).²⁰⁴ In other words, other parties may compete but they are unlikely to win.²⁰⁵ The ANC won its fifth consecutive national election in 2014, with 62.2 percent of the vote with no close competitor to challenge its dominance.²⁰⁶

The fifth criterion is that the dominant party is in power for a prolonged period of three or more consecutive elections (time span),²⁰⁷ and dominates both the legislature and the executive during this period (a ‘dominant party’ has the majority of legislative seats and controls the national executive).²⁰⁸ The ANC has won five consecutive national elections and thus meets this criterion.

¹⁹⁹ Independent electoral Commission of South Africa ‘National and Provincial election Results’ <http://www.elections.org.za/content/Elections/Results/2014-National-and-Provincial-Elections--National-results/>, accessed on 25 March 2017.

²⁰⁰ Du Toit & de Jager op cit (n188) at 9.

²⁰¹ H Brooks op cit (n2) at 130.

²⁰² Ibid.

²⁰³ N de Jager ‘Voice and accountability in one party dominant systems: a comparative case study of Mexico and South Africa’ (unpublished PhD thesis, University of Pretoria, 2010) at 28.

²⁰⁴ Du Toit & de Jager op cit (n181) at 9 -10.

²⁰⁵ Ibid.

²⁰⁶ Independent electoral Commission of South Africa ‘National and Provincial election op cit (n199)

²⁰⁷ Du Toit & de Jager op cit (n188) at 10 -11.

²⁰⁸ Ibid.

The ANC is a classic example of a dominant party and portrays most or all the above characteristics of a dominant party system; in applying these criteria of a one-party dominant system to the South African context, it will be established that South Africa is indeed a one-party dominant democracy. In the following section I will discuss the dominant party debate in South Africa.

3.3 Dominant party debate in South Africa

What is important to keep in mind in my discussion in this section is not to show whether there is a decline or upsurge in the ANC dominance. Instead, I want to unpack the main arguments proposed by two different schools of thoughts regarding how a dominant party democracy impacts on our system of checks and balances. There are two sides to the dominant party debate in South Africa. On the one side, there are scholars who reject the effect and consequences of a one-party dominant system. According to De Vos and Freedman, this group of scholars will argue that the ‘constitutional structures work well, that the executive remains accountable to the legislature and that the independent judiciary acts as a bulwark against the abuse of power by state officials and elected representatives of the people’.²⁰⁹ Furthermore, other arguments put forward by this group are that there are external checks on the ANC that operate outside the constitutional system and which serve as functional substitutes for the internal checks provided by the formal institutions of parliamentary democracy that the ANC’s dominance has eroded.²¹⁰ This group also contends that the ANC is a broad church and there is a high degree of internal democracy in the ANC; this provides not merely opportunities for debate, but for renewal of official policy.²¹¹ Roger Southall advanced a limited defence of the ANC’s dominance, arguing that the ANC is a broad church,

‘which is composed of diverse elements (nationalists, Africanists, Marxists, careerists and so on), and as a party which continues to have strong internal democratic traditions, which constrain centralizing tendencies’.²¹²

On the other hand, there are those who are of the view that South Africa is indeed a one-party dominant democracy and who have a more negative assessment of a one-party dominant system.²¹³ I also support the opinions of this group, because a central theme in this thesis is to view the dominant party democracy from a negative standpoint. Some of the main proponents

²⁰⁹ De Vos & Freedman op cit (n3) at 35-6.

²¹⁰ Ibid.

²¹¹ Ibid.

²¹² Southall op cit (n185) at 75.

²¹³ De Vos & Freedman op cit (n3) at 35 -6.

analysing the negative consequences of a one-party dominant system are Giliomee and Simkins . These authors argue that the ‘separation of powers and rights of minorities are being negated by the ANC’s capture of the state – for instance, the ANC is destroying the autonomy of watchdog committees in Parliament.²¹⁴ Other arguments advanced by the authors are that the real decision making occurs outside of formal constitutional structures, such as Parliament and the executive, and is, instead, conducted behind the closed doors of party forums.²¹⁵ De Vos and Freedman point out that this group worries about ‘the capture of the judiciary and whether it remains independent and warns against the abuse of power by the executive and that the legislature does not always hold the executive to account’.²¹⁶ Other germane arguments advanced by this group are that the dominant party thesis has enumerated a number of pathologies that are said to be the consequences of the ANC’s electoral dominance. These include the ‘elimination of the dividing line between the ruling party and the state with the result that the ruling party comes to be seen as the state rather than as a temporary government’.²¹⁷ In addition, this group contends that, often, the ruling party’s ‘arbitrary decision making undermines the integrity of democratic institutions such as the legislature, as well as abusing public institutions and resources’.²¹⁸In the following section, I will look at some of these negative pathologies that a one-party dominant system presents for South Africa’s checks and balances system in more detail.

3.4 Implications of one-party dominant system on the system of checks and balances in South Africa

One of the main pathologies of a one-party dominant system relates to the fact that too much power is given to the non-parliamentary wing of the ruling party (in South Africa, the ANC) thereby shifting politics into the party and out of the legislature. Another negative consequence of a dominant party system is the effect of state capture, which has become a much publicised phenomenon in South Africa; and finally, the blurring of the line between the state and the ruling party and the cadre deployment policy of the ANC. These are some of the pathologies of a one-party dominant system that I will discuss in this thesis within the South African context. I will now talk about each of these challenges or ‘pathologies’.

²¹⁴ Southall op cit (n185) at 69.

²¹⁵ H Giliomee, J Myburgh & L Schlemmer ‘Dominant party rule, opposition parties and minorities in South Africa’ (2001) *Democratization* 161-182 at 173.

²¹⁶ De Vos & Freedman op cit (n3) at 35 -7.

²¹⁷ Giliomee, Myburgh & Schlemmer op cit (n215) at 171 – 4.

²¹⁸ Ibid.

3.4.1 ‘The subordination of the parliamentary wing of a dominant political party to its non-parliamentary wing, thereby shifting politics into the party and out of the legislature’

The debate centred on the relationship between the parliamentary wing and the non-parliamentary wing of the ruling party in South Africa; the ultimate question is which of the two is the custodian of political power in South Africa?²¹⁹ Before answering this question, I will first explain how parliamentary and non-parliamentary wings operate in South Africa. In straightforward terms, the parliamentary wing consists of individuals who hold public office in the legislature and the non-parliamentary wing consists of individuals who hold office within a political party, but not necessarily the state.²²⁰ For example, members of the ANC parliamentary wing represent the interests of the electorate in the National Assembly and members of the non-parliamentary wing hold office as a result of their political affiliations.²²¹ The argument put forward is that the non-parliamentary wing influences our constitutional structures and checks and balances system in South Africa. Our Constitution does not explicitly regulate the relationship between the extra-parliamentary wing of the political party and the intra-parliamentary and intra-executive wings of the party.²²² However, the non-parliamentary wing plays a vital role within our constitutional democracy. It is responsible for deploying members to the National Assembly, as well as other senior positions in various other institutions, with the aim of ensuring that the party’s policy directives are implemented correctly.²²³ De Vos points out that

‘[s]hould a Member of the ruling party’s parliamentary wing speak out against an adopted directive, or should s/he vote in a manner not reflected on the ANC directive papers – the NEC has the authority to redeploy a Member to another position, or even expel a Member from the party.’²²⁴

Thus, all members of the party are obliged to toe the party line once the party has spoken.²²⁵ The idea of strict political party discipline and provisions in party constitutions requires

²¹⁹ Choudhry op cit (n9) at 15. Also see W Graham ‘The Speaker of the National Assembly: Ways to strengthen and enhance the independence of the Speaker’s office’ (unpublished LLM thesis, University of Cape Town, 2016).

²²⁰ De Vos ‘Political parties v constitutional democracy’ available at <http://constitutionallyspeaking.co.za/political-parties-vs-constitutional-democracy/>, accessed on March 2017.

²²¹ Choudhry op cit (n9) at 80.

²²² De Vos op cit (n220).

²²³ Ibid.

²²⁴ Ibid.

²²⁵ Ibid.

members of Parliament to obey the party and not the Constitution. This topic is beyond the scope of this thesis for discussion; I only want to demonstrate how strict political party discipline contributes to the dominance of the non-parliamentary wing over the parliamentary wing. South Africa inherited the convention of strict party discipline from the Westminster system associated with the system of parliamentary government.²²⁶ According to De Vos and Freedman, this convention places severe restrictions on individual Members of Parliament (MPs) to disobey party leaders when they engage in legislative and executive action.²²⁷ The constitutions of both the ANC and the Democratic Alliance (DA), for example, contain provisions that allow the party to discipline, and even expel, public representatives of the parties who fail to toe the party line.²²⁸ What this means is that, ‘in the context of a culture of strict party discipline, elected representatives are not free agents and may well be heavily influenced by decisions taken by the extra-parliamentary leadership of the party when they engage in their constitutionally mandated activities as part of legislatures or as members of national or provincial executives’; the consequence is that this compromises MPs’ capacity to exercise independent judgement.²²⁹ The so-called *UDM secret ballot* case serves as an apt, and welcome, illustration of this. In this case, the Constitutional Court found that the Constitution read with the Rules of the National Assembly gave the Speaker the power to prescribe voting by secret ballot in a motion of no confidence in the President. The *UDM secret ballot* case demonstrates that the Constitutional Court is aware of the challenges (strict political party discipline) that political parties imposed on the legislature in South Africa. In Chapter Four of this thesis, I will deal with this case in more detail. To return to my discussion of the influence of the non-parliamentary wing of the ANC. It is trite that the non-parliamentary wing of the ANC is ‘not afraid to summon any member, regardless of office and the obligations therein, to its party headquarters should s/he make a decision that contradicts a decision taken by the structures of the ANC.’²³⁰ This now happens commonly where cabinet ministers are summoned to Luthuli House; for example, Lynn Brown, the Public Enterprises Minister, was summoned to Luthuli House concerning the Eskom saga about the reappointment of Brian Molefe.²³¹

²²⁶ Ibid.

²²⁷ Ibid.

²²⁸ P de Vos ‘Can political parties’ expell [sic] MP’s who disobey orders?’ available at <https://constitutionallyspeaking.co.za/can-political-parties-expell-mps-who-disobey-orders/> [last accessed 9 September 2017].

²²⁹ Ibid.

²³⁰ Ibid.

²³¹ ‘Minister Lynne Brown summoned to Luthuli House over Molefe's return to Eskom’ available at <http://www.rnews.co.za/article/14471/minister-lynne-brown-summoned-to-luthuli-house-over-molefes-return-to-eskom>, [accessed on 15 May 2017].

Furthermore, former Minister of Finance, Pravin Gordhan, was also summoned to Luthuli House and was thereafter removed from his post by President Zuma.²³²The non-parliamentary wing clearly has a huge influence on our constitutional structures and our constitutional checks and balances. Why is this a problem? De Vos encapsulates it excellently in his observation:

‘There is a real danger lurking in this development. The fact that the ANC adheres to the principle of democratic centralism (itself a highly dubious and undemocratic principle), which requires all members to toe the party line once the party has spoken, coupled with the infighting and factionalism within the ANC which leads to a tendency of representatives not to want to make any decision or take any public position until the official line has been communicated from Luthuli House, inevitably leads to a hollowing out of the constitutional institutions such as the national legislature and the national executive.’²³³

What is important to consider is that ‘where members of the legislature or the executive do not in fact make any independent decisions but only execute decisions of the extra-parliamentary leadership of the political party, the formal structures of the constitutional state are fatally undermined’.²³⁴Thus it is safe to conclude that the ANC has managed to capture and influence the executive and the legislature where its decisions and policies are determined by Luthuli House, and thus in the process has weakened the system of checks and balances between the executive and legislative branches of government. De Vos raised an important point by arguing that

‘[t]he heart of our democratic system is supposed to be the National Assembly, but if the ANC members of the National Assembly as well as the Cabinet Ministers are mere appendages of the extra-Parliamentary wing of the ANC then the National Assembly and the Executive become mere rubber stamps for decisions taken by a body that is not democratically elected.’²³⁵

He cautions that, if this happens, ‘then we do not have a fully functioning constitutional democracy anymore but rather we are veering towards becoming a party autocracy’.²³⁶ Thus

²³² J February ‘ISS Today: South Africa pays the price of state capture’ available at <https://www.dailymaverick.co.za/article/2017-04-11-iss-today-south-africa-pays-the-price-of-state-capture/>, [accessed on 15 June 2017].

²³³ De Vos op cit (n228).

²³⁴ Ibid.

²³⁵ Ibid.

²³⁶ Ibid.

one can argumentatively conclude that the custodian of political power is with the non-parliamentary wing in South Africa.

3.4.2 The blurring line between party and state and cadre deployment

Another key problem of one-party dominance is that it can muddy the difference between the state and the dominant party. One way of doing this is through the means of cadre deployment. Welsh and Sadie argue that in a dominant party system the distinction between that which is the state and that which is the ruling party begins to erode.²³⁷ The writers warn that the consequences of this are that elements such as corruption and a weak and inefficient opposition begin to emerge, and with time, the electorate begins to fear change.²³⁸ Furthermore, the dominant party may begin to increasingly concentrate power in the executive and central party structures.²³⁹ The separation of powers in order to provide for checks and balances on the abuse of power is then no longer useful in such a system.²⁴⁰ In South Africa, these tendencies or the characteristic of the blurring of the line between the state and party are also emerging. Giliomee and Simkins point out that

‘[w]ith a comprehension of this reality in mind, the ruling ANC has sought to entrench its dominance by eliminating the dividing line between party and the state. Rather than be regarded as a temporary government, the ruling party in South Africa has slowly become synonymous to the state.’²⁴¹

This is a creeping tendency of the ANC, blurring lines between party and the state, even officially, the ANC has a policy that places ANC officials in all the important positions and institutions.²⁴² Cadre deployment is one mechanism that a dominant party can use to blur the line between the party and the state. Deployment of ANC cadres in strategic positions played an important role in the ANC’s taking control of the post-liberation state. Choudhry provides a useful explanation of cadre deployment; he observed that cadre deployment

‘. . . involves the filling of a range of offices with supporters of the ANC, who wield their power in those institutional roles to implement the policies of the ANC, as determined by the ANC NEC. There is cadre deployment to the range of public

²³⁷ Sadie ‘Political parties and interest groups’ in: A Venter (ed.) *Government and politics in the new South Africa* (2001) at 276-314.

²³⁸ Ibid.

²³⁹ Ibid.

²⁴⁰ Ibid.

²⁴¹ Giliomee, Myburgh & Schlemmer op cit (n215) at 171-4.

²⁴² C Twala ‘The African National Congress (ANC) and the cadre deployment policy in the post-apartheid South Africa: a product of democratic centralisation or a recipe for a constitutional crisis?’ (2014) 41 (2) *Journal of Social Science – Interdisciplinary reflection of contemporary society* 159 -165 at 160.

institutions where office-holders are not elected and are not meant to be politically accountable. For example, cadres have been deployed to the senior-most ranks of the provincial and national bureaucracies, and as well to various parastatals such as Eskom and the South African Broadcasting Corporation. There is also cadre deployment to the National Assembly and cabinet, and to the provincial legislatures and executive committees'.²⁴³

The governing party contends that there is nothing wrong with its cadre deployment policy and has often strongly defended the policy. 'The ANC's stated objective is that cadre deployment is integral to achieving the "transformation" of South Africa, and is rooted in the ANC's history as a liberation movement.'²⁴⁴ For example, to illustrate this, in August 2012, Gwede Mantashe, the ANC secretary general stated the following to the *Daily Maverick*:

'Concerns about ANC deployment of cadres are unfounded. The blackmail of thinking that cadreship is a sin is something that we should not entertain. To be a cadre of a movement is not a sin. Opponents of cadre deployment they confuse it with wrong deployment. It's not the same.'²⁴⁵

There have been several criticisms against cadre deployment, attacking it as unconstitutional and blurring the line between the state and party further.²⁴⁶ For the purpose of this thesis, the impact of cadre deployment on the operation of the South African Constitution has been profound, mainly at the national level. Many leaders and cadres of the ANC are found in positions of substantial influence in the executive, the legislatures and state institutions. Choudhry argues that, at the national level, the power of deployment has shifted power within the ANC from its parliamentary wing to its non-parliamentary wing as discussed earlier, and 'the focus on cadre deployment has operated both to quell dissent and co-opt potential internal opposition from the parliamentary caucus of the ANC.'²⁴⁷ Furthermore, MPs are obliged under the ANC constitution to vote in accordance with the strictures of the NEC. If they do not, they face a range of penalties, up to, and including, removal from public office through redeployment.²⁴⁸ Another concern with cadre deployment is that bureaucrats see themselves not as civil servants independent of the governing party but as ANC deployees, such that

²⁴³ Choudhry op cit (n9) at 16.

²⁴⁴ Ibid.

²⁴⁵ Twala op cit (n242) at 162.

²⁴⁶ Ibid. Also see 'Cadre deployment: denialism is to the disadvantage of South Africans' available at <https://www.da.org.za/archive/cadre-deployment-denialism-is-to-the-disadvantage-of-south-africans/> march 29, 2010 in news, [accessed on May 2017].

²⁴⁷ Choudhry op cit (n9) at 16 -20.

²⁴⁸ Ibid.

‘[s]enior ANC politicians were deployed to head most state institutions, including the Reserve Bank, the prosecution service, the government information service, the revenue service, and so on’, all, in principle, subject to control by the ANC NEC.²⁴⁹ This has led some scholars to argue that the accountability in government runs back to the ANC rather than to constitutional oversight structures. The ANC’s policy of cadre deployment has also come under attack from other opposition parties. Helen Zille (Democratic Alliance) said that ‘the implementation of the cadre deployment policy was the beginning of the end of the separation of party and state and the demise of the constitutional state’,²⁵⁰ while other commentators suggested that it was time for the Constitutional Court to evaluate this policy and declare it unconstitutional, because it was the only way to prevent ANC’s manipulation of state institutions and it was the only way to restore the rule of law in South Africa.²⁵¹ In sum, cadre deployment has transformed the South African constitutional system, especially at a national level, by employing cadres to key state institutions and cabinet and executive and legislative positions with the purpose of removing effective checks and oversight; and this is a grave concern. One may argue that, at the root of many of the problems facing South Africa currently, is a lack of appreciation of the difference between party and state.

3.4.3 State capture in South Africa

‘The term ‘state capture’ is suddenly omnipresent in political and social commentary in South Africa. It has become the description of choice in numerous reports of businessmen, the Gupta brothers for example, associated with the South African President, Jacob Zuma and his family, influencing the appointment of cabinet ministers and senior officials and also benefitting from huge state tenders.’²⁵²

One of the dangers of a dominant party is that it captures various independent institutions, such as the prosecuting authority, the police service and other corruption-busting agencies, by deploying its members to these institutions to remove effective checks on the exercise of power by the government.²⁵³ These developments are also present in South Africa. The concept of state capture is very broad; for the purposes of this thesis, I will thus narrow my discussion on state capture by focusing only on the political capture of key institutions such as the Directorate for Priority Crime Investigation (known as the HAWKS) and the National Prosecuting

²⁴⁹ Choudhry op cit (n9) at 16.

²⁵⁰ Twala op cit (n242) at 162 -3.

²⁵¹ Ibid.

²⁵² I Chipkin ‘The state, capture and revolution in contemporary South Africa’ public affairs research institute (University of the Witwatersrand) / working paper, July 2016 at 1.

²⁵³ De Vos & Freedman op cit (n3) at 35-6.

Authority (NPA). It is important to define the concept of state capture. In a recent report drafted by academics entitled ‘Betrayal of the Promise: How the Nation is Being Stolen’ they define state capture as follows:

‘State capture is systemic and well-organised by people with established relations. It involves repeated transactions, often on an increasing scale. The focus is not on small-scale looting, but on accessing and redirecting rents away from their intended targets into private hands. To succeed, this needs high-level political protection, including from law enforcement agencies, intense loyalty and a climate of fear; and competitors need to be eliminated.’²⁵⁴

Anne Lugon-Moulin claims that state capture can be ‘further refined by distinguishing between types of institutions subject to capture (legislature, executive, judiciary, regulatory agencies, public works ministries) and the types of actors actively seeking to capture (large private firms, political leaders, high ranking officials, interest groups).’²⁵⁵ I will discuss only two key institutions that have been ‘captured’ in South Africa that are explanatory examples of how key institutions are apprehended; these are the NPA and the Hawks.

The North Gauteng High Court recently described the situation at the NPA as ‘paralysing instability’. There have been countless cases before our courts concerning the appointment or competence of the head of this organisation.²⁵⁶ The reputation of the NPA, for example, has been shredded by its decision to appeal against a High Court ruling to reinstate the 783 counts of corruption fraud, racketeering and money laundering levelled against President Zuma.²⁵⁷ The charges were dropped in suspicious circumstances in 2009. This paved the way for Zuma to become President. In a recent ventilating decision, the Supreme Court of Appeal found that the decision not to prosecute former President Zuma by the National Director of Public

²⁵⁴ ‘Betrayal of the promise: how South Africa is being stolen’ May 2017 available at <http://pari.org.za/wp-content/uploads/2017/05/Betrayal-of-the-Promise-25052017.pdf>, [accessed on 15 June 2017].

²⁵⁵ J February ‘ISS today: South Africa pays the price of state capture’ available at <https://www.dailymaverick.co.za/article/2017-04-11-iss-today-south-africa-pays-the-price-of-state-capture/>, [accessed on June 2017].

²⁵⁶ These cases evinced severe criticism against the NPA. *Pikoli v President and Others* (8550/09) [2009] ZAGPPHC 99; 2010 (1) SA 400 (GNP) (11 August 2009); *Democratic Alliance v President of South Africa and Others* (CCT 122/11) [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC); *Freedom Under Law v National Director of Public Prosecutions and Others* (26912/12) [2013] ZAGPPHC 271; [2013] 4 All SA 657 (GNP); 2014 (1) SA 254 (GNP); 2014 (1) SACR 111 (GNP); *National Director of Public Prosecutions and Others v Freedom Under Law* (67/2014) [2014] ZASCA 58; 2014 (4) SA 298 (SCA); 2014 (2) SACR 107 (SCA); [2014] 4 All SA 147 (SCA) and *Freedom Under Law (RF) NPC v National Director of Public Prosecutions and Others* (89849/2015) [2015] ZAGPPHC 759.

²⁵⁷ P de Vos ‘NPA problems part of larger one party dominant pathology’ 5 September 2012 available at <http://constitutionallyspeaking.co.za/npa-problems-part-of-larger-one-party-dominant-pathology/>, accessed on 15 May 2017.

Prosecutions (NDPP) was irrational.²⁵⁸ ‘It has emerged through court cases and legal processes’ that high-ranking officials in the NPA ‘seemed to use their powers to protect various individuals facing serious criminal allegations; rather than in the public interest.’²⁵⁹ A recent North Gauteng High Court judgment excellently set out the morass in this institution in the matter of *Corruption Watch (RF) NPC and Another v President of the Republic of South Africa and Others; Council for the Advancement of the South African Constitution v President of the Republic of South Africa and Others*.²⁶⁰ The issue in this case was whether Adv Shaun Abrahams’ predecessor, Mxolisi Nxasana, requested Zuma to leave the National Prosecuting Authority (NPA), or whether Zuma approached Nxasana with a lucrative R17,3m settlement offer. The Court found the settlement agreement invalid because Mr Nxasana did not request to be allowed to vacate the office of the NDPP, but rather because he was persuaded to vacate the office by the unlawful payment of an amount of money substantially greater than that permitted by law.²⁶¹ The Court described the President and the former NDPP conduct as reckless.²⁶² The Court thus refused to reinstate the former NDPP, Mr Nxasana. The Court made two further significant findings that are worth mentioning. Firstly, the Court declared that Adv Shaun Abrahams’ NDPP appointment was invalid and set it aside. The Court found that, if the vindication of the Constitution is paramount, an order which leaves Adv Abrahams’ position intact does not served that objective.²⁶³ The High Court held further that ‘the President [then] will have achieved, through unlawful means, precisely what he had wished to attain all along’.²⁶⁴ Secondly, the court ordered that the Deputy President, not the President, appoint the next NDPP. The Court found that the President would be clearly conflicted in having to appoint a NDPP, particularly in light of the ever-present spectre of the many criminal charges against him that had not gone away.²⁶⁵ The High Court stated that

‘[t]he President told the SCA that he ‘...*had every intention in the future to continue to use such processes as are available to him to resist prosecution,*’ in other words not to stand trial at all, and this would place the incumbent NDPP firmly on the spot. It seems

²⁵⁸ *Zuma v Democratic Alliance and Others; Acting National Director of Public Prosecutions and Another v Democratic Alliance and Another* (771/2016, 1170/2016) [2017] ZASCA 146.

²⁵⁹ J Burger ‘Political interference weakening the rule of law in SA’ 27 September 2016 available at <https://issafrica.org/iss-today/political-interference-weakening-the-rule-of-law-in-sa> , [accessed on September 2017].

²⁶⁰ (62470/2015) [2017] ZAGPPHC 743 (8 December 2017).

²⁶¹ *Ibid* para 82.

²⁶² *Ibid*.

²⁶³ *Ibid* para 95.

²⁶⁴ *Ibid*.

²⁶⁵ *Ibid* para 114.

incongruous that under those circumstances President Zuma should then be seen to be appointing the NDPP, since his conflict both actual and perceived is self-evident.²⁶⁶

This judgment indicates that the courts are well aware of the apprehending and political interference in the functioning of this institution. This case is a classic example how a Court can protect the constitutional space against the dangers of a dominant executive branch, as mentioned in Chapter Two, as one of the threats to an effective system of checks and balances. In Chapter Four, I will deal with this theme in more detail, but with specific focus on the Constitutional Court.

Another key institution in South Africa to fight crime and corruption that has also come under public scrutiny is the Hawks. Similarly, to the NPA, various cases have come before the courts also challenging the appointment or lack of independence of this institution.²⁶⁷ An incident that questions the Hawks' independence from political interference is when it accused 'former finance Minister Gordhan of acting corruptly for granting early retirement to former deputy head of Sars Ivan Pillay and the creation of an intelligence unit within Sars'.²⁶⁸ The charges against the Minister were later dropped – many commentators describe the alleged charges as bogus and as a poignant reality that an institution such as the Hawks has come under capture and has been used in such a manner.²⁶⁹ These scenarios not only illustrate how key institutions are captured by the state but also how strategically a dominant party in democratic society operates by capturing and controlling key institutions. 'South Africa's constitution places primacy on the independence of these institutions but the conduct of various prominent officials within the criminal justice system has severely undermined this constitutional principle and the very foundation of our democracy.'²⁷⁰

There are other examples of state capture that have also attracted much attention in South Africa, such as the capturing of members of the cabinet, national executive, and the economy. I will briefly mention these issues to point out that state capture (one of the pathologies of a dominant party) are ever-present in South Africa. In 2016, former Public Protector, Thuli

²⁶⁶ Ibid paras 114-5.

²⁶⁷ *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others* (CCT 07/14, CCT 09/14) [2014] ZACC 32; 2015 (1) BCLR 1 (CC); 2015 (2) SA 1 (CC). Also see *Glenister I* supra (n10) and *Glenister II* supra (n17). Also see *Ntsemeza v Helen Suzman Foundation and Another* (402/2017) [2017] ZASCA 93; [2017] 3 All SA 589 (SCA); 2017 (5) SA 402 (SCA).

²⁶⁸ K Ngoepe 'Hawks allegations against Gordhan baseless - former top judge' available at <https://www.news24.com/SouthAfrica/News/hawks-allegations-against-gordhan-baseless-former-top-judge->, [accessed on September 2017].

²⁶⁹ February op cit (n255).

²⁷⁰ Burger op cit n (259).

Madonsela's State of Capture report was published²⁷¹, which described the investigation of the conduct of President Zuma and other state officials, as well as the awarding of state contracts to companies linked to the Gupta family.²⁷² The report described how 'former deputy finance minister Mcebisi Jonas made the startling claim that President Zuma's associates, the Guptas, had offered him the position of Finance Minister and R600 million'.²⁷³ In addition, the report also detailed instances of the Guptas' interaction with then Eskom CEO Brian Molefe and others, such as former ANC Member of Parliament Vytjie Mentor, who also blew the whistle on the Guptas.²⁷⁴ Former President Zuma challenged the remedial action in the Public Protector's Report in court. The remedial action directed the President to appoint a commission of inquiry to investigate the matters identified in the report and that the Chief Justice was to select the Judge who was to preside over the commission of inquiry. In a much publicised judgment, the North Gauteng High Court rejected the President grounds of review.²⁷⁵ Regarding whether the remedial action was appropriate, the High Court held that there was compelling *prima facie* evidence that the relationship between the President and the Gupta family had evolved into "'state capture' and that the matter was of great public concern.²⁷⁶ The Court also found that, as a result of the budgetary constraint and the scale of the investigation to be done, the judicial commission of inquiry was suitable to carry out the investigation.²⁷⁷ In regard to the direction that the Chief Justice was to select the Judge who was to preside over the commission of inquiry, the Court held that the President had a clear interest in the outcome of the commission and that there was no reason why the recusal principle should not apply to the President.²⁷⁸ The Public Protector foresaw that the credibility of the process might be compromised and she was aware of the public perception in the matter and that it was not only appropriate but necessary that someone other than the President select the head of the commission.²⁷⁹ At the time of writing, former President Zuma had appointed a commission of

²⁷¹Public Protector South Africa (2016) *State of Capture* [Online] available at <http://cdn.24.co.za/files/Cms/General/d/4666/3f63a8b78d2b495d88f10ed060997f76.pdf>, [accessed on 15 May 2017].

²⁷² Ibid.

²⁷³ Ibid.

²⁷⁴ Ibid.

²⁷⁵ *President of the Republic of South Africa v Office of the Public Protector and Others* (91139/2016) [2017] ZAGPPHC 747 (13 December 2017).

²⁷⁶ Ibid para 129.

²⁷⁷ Ibid para 130 -140.

²⁷⁸ Ibid para 141- 150.

²⁷⁹ Ibid.

inquiry into state capture, and the Chief Justice had selected the Deputy Chief Justice to lead the commission.

These examples mentioned above illustrate that state capture is a reality in South Africa. The focal point of this segment was to illustrate how key institutions, such as the NPA and Hawks, are captured in South Africa. One commentator so pertinently observed why there is a need to protect the independence of these two institutions in South Africa, he claimed that:

‘[t]he criminal justice system is the cornerstone for ensuring the rule of law functions in an effective and healthy way ... this principle is critically important for the success of any country. It provides a clear national system that is to be applied fairly to every group and person. Without this, the system will increasingly lose credibility and public trust. Criminality and instability increase; putting everyone at risk.’²⁸⁰

South Africa has reached a critical point; and if the patronage politicians win the battle within the ANC and complete the capture of the state, the country will slip from stagnation into the abyss and this poses a great threat to our constitutional democracy.²⁸¹ Despite the threat of state capture in South Africa, the judiciary has been a bastion to protect the democratic space to prevent the country from tottering into dismay. The two recent judgments of the North Gauteng High Court are excellent examples of how a court can prevent the capture of independent institutions by the governing party through its manipulation of the process governing appointments.²⁸² Choudhry is of the view that

‘[t]he integrity of the mechanism for appointments is the most fundamental question, because if that process is politicised, the financial and administrative dimensions of institutional independence (*Langeberg*), no matter how well designed, will be largely meaningless. If the individuals who hold office in independent institutions view themselves as agents of the governing party, it is far less likely that they will behave independently.’²⁸³

Choudhry also observed that, although the power of appointment is the primary vehicle for the capture of independent institutions by the dominant party, the power of removal plays an important role as well.²⁸⁴ The *Corruption Watch* case mentioned above is an excellent example of this. The High Court was well aware of dangers associated with a

²⁸⁰ Burger op cit (n 259).

²⁸¹ February op cit (n255).

²⁸² Choudhry op cit (n9) at 56-7.

²⁸³ Ibid.

²⁸⁴ Ibid.

dominant party democracy and left the vacancy open for the NDPP and held that the Deputy President elects the next NDPP and not the President because the President was conflicted. The two judgments also canvassed how the judiciary can blunt some of the pathologies (in this instance state capture) of a dominant party democracy. I will deal with this theme in more detail in Chapter Four of this thesis with emphasis on how the Constitutional Court can negate some of the challenges of dominant party democracy in South Africa.

3.4.4 Does South Africa's electoral system also contribute to the pathologies of one-party dominance?

There is a great debate in South Africa concerning the central criteria which an electoral system should meet and whether strong and accountable government is more or less important than the inclusion of minority political parties and the simplistic, fair and inclusive characteristics of a proportional representation (PR) system.²⁸⁵ The South African Constitution contains only one section that stipulates requirements for the electoral system, and it includes the provision in section 46(d) that the electoral system 'results, in general in proportional representation'.²⁸⁶ Members of the National Assembly are elected in terms of a closed-list proportional representation system. This system requires each political party, before an election, to nominate a list of candidates, ranking them in order of preference.²⁸⁷ In a pure proportional system with closed lists, voters are expected to vote for a particular party and the seats are allocated to the parties in proportion to the voters polled by them.²⁸⁸ The entire country or an entire province comprises a single constituency and the electoral system is therefore party- and not candidate-orientated.²⁸⁹ In his work, Solik vigorously criticises our electoral system, he claims that

[i]n the wake of party political scandals and a lack of political alternatives, electoral reform has been cited as a much-needed intervention, because the PR System for national and provincial elections does not enable us to hold individuals to account. We are fed up with many politicians, especially in the ruling party, who simply toe the

²⁸⁵ G Solik 'Is South Africa's Electoral System in Urgent Need of Change?' (April 2014) 72 *The Journal of the Helen Suzman Foundation* at 39.

²⁸⁶ P du Toit and N de Jager 'South Africa's Dominant-Party System in Comparative Perspective' (10) 2 *Taiwan Journal of Democracy*, 93-113 at 97.

²⁸⁷ L Wolf 'Democratic representation: a critical assessment of the current South African electoral system' (2015) 780 *SALJ* at 802-3.

²⁸⁸ *Ibid.*

²⁸⁹ *Ibid.*

party line; politicians at the end of the day are accountable to party bosses and we have no way to influence party lists.²⁹⁰

There have been endless calls by academics and scholars that our electoral system requires reform, but to no avail.²⁹¹ One of the main shortcomings of the South African electoral system, as mentioned above, is that it remains weak on the key democratic value of accountability.²⁹²

Judith February is of the following view:

‘The current electoral system might espouse democratic values of fairness and inclusivity, while maintaining its simplicity, but it remains weak on the key democratic value of accountability. The lack of accountability in the electoral system has weakened key institutions and has enabled the emergence of a one-party dominant system and, more importantly, the dominance of party executives.’²⁹³

There is a widely held view that party bosses hold too much power under the closed list system.²⁹⁴ Party leaders control the lists; deciding who will be placed on the list, and at what ranking.²⁹⁵ This is so because the electoral system in South Africa assists party leaders to enforce strict discipline among members of the legislature, as mentioned earlier in this chapter.²⁹⁶ De Vos and Freedman point out that the reason for this is that the legislature depends on the support of the various political parties to be elected to the legislature and can also be easily removed from the legislature by their respective political fitness to fulfil their various duties as members of the National Assembly or National Council of Provinces, as discussed earlier in this section.²⁹⁷ Thus ordinary MPs, even those belonging to a party holding an overwhelming majority in the National Assembly, simply have ‘little incentive to rebel’.²⁹⁸ Kohn, in her thesis, argues that

²⁹⁰ Solik op cit (n 285) at 40.

²⁹¹ W James and A Hadland ‘Shared aspirations: the imperative of accountability in South Africa's electoral system’ Electoral Models for South Africa: Reflections and Options Electoral Task Team Review Roundtable 9–10 September 2002 Vineyard Hotel, Cape Town. L Wolf op cit (n287) at 780. R Southall ‘Post-election South Africa the Continuing Case for Electoral Reform’ (December 2004) 3 (2) *JAE* Special Issue: South African Elections at 158. Also see Electoral Models for South Africa: Reflections and Options Electoral Task Team Review Roundtable 9–10 September 2002 Vineyard Hotel, Cape Town for a more in-depth discussion.

²⁹² J February ‘Can changing the electoral system increase political accountability?’ available at 30 June 2015 <https://issafrika.org/iss-today/can-changing-the-electoral-system-increase-political-accountability>, [accessed on July 2017].

²⁹³ Ibid.

²⁹⁴ James & Hadland op cit (n291).

²⁹⁵ Du Toit & De Jager op cit (n286) at 97.

²⁹⁶ De Vos & Freedman op cit (n3) at 111.

²⁹⁷ Ibid.

²⁹⁸ James & Hadland op cit (n291) at 23.

‘[a]s a result of the design of our electoral system, power is shifted from the constitutional structures into the party structures outside the system, thereby upsetting the delicate power balance in a way that defeats the very fundamentals of our constitutional system – including our commitment to the separation of powers.’²⁹⁹

Despite many attempts at electoral reform, the ANC appears content with the existing rules.³⁰⁰ The party-list PR system suits the ANC well by virtue of the fact that it accurately reflects the party’s numerical dominance at the ballot box.³⁰¹ Southall is of the view that the probable reason that the ANC chooses to reject reform would seem to lie in a reluctance of the senior party hierarchy to reduce its ability to manipulate who is elected to Parliament.³⁰² Sensing the challenges imposed by the party-list electoral system as discussed above, it is safe to conclude that our electoral system also contributes to the pathologies of one-party dominance.

3.5 Conclusion

The ANC has won all democratic elections in South Africa, as indicated earlier in this chapter, and, in terms of the criteria for dominant party democracy, the ANC as the governing party in South Africa meets most of the criteria. One can therefore conclude that South Africa has become a dominant party democracy. I have also highlighted the dangers and pathologies of a one-party dominant system, such as state capture, blurring the line between the state and political party, and the ANC non-parliamentary wing’s stranglehold over the legislative branch of government. In addition, I have pointed out the influence and effect of a one-party dominant system in weakening and eroding a country’s system of checks and balances. Given this possibility, how can South Africa address these drawbacks of one-party domination? One scholar suggests that it is obviously a very difficult thing to achieve, because the primary objective of any political party is to ensure its survival by capturing and consolidating political power.³⁰³ That notwithstanding, a starting point could be to address those defects or pathologies of one-party domination. In the next chapter, I will set out how the Constitutional Court can safeguard the democratic space by acknowledging the challenges posed by one-party dominance to democratic institutions, and counteract some of the challenges or pathologies that a one-party dominant system presents, as mentioned in this chapter.

²⁹⁹ L Kohn ‘The burgeoning constitutional requirement of rationality and the separation of power: Has rationality review gone too far?’ (unpublished LLM thesis, University of Cape Town, 2013) at 13.

³⁰⁰ Wolf op cit (n287).

³⁰¹ Du Toit & De Jager op cit (n286) at 97.

³⁰² R Southall op cit (n291) at 158.

³⁰³ V Ferim ‘Flaws in Africa’s one-party democracies: the case of Cameroon and South Africa’ (2013) 7 (7) *Cameroon African Journal of Political Science and International Relations* 304 at 305.

CHAPTER FOUR

The role of the South African Constitutional Court in protecting the democratic space in the context of a one-party dominant system

4.1 Introduction

The South African Constitutional Court has always been concerned about its own role in the new political order.³⁰⁴ Heinz Klug points out that the Constitutional Court is

[a]ware of their unique status within the new constitutional order, the justices of the constitutional court have been careful to define their own interventions as merely upholding the law and have denied claims that they might be substituting their own political decisions for those elected officials in their roles as interpreters of the Constitution.³⁰⁵

The role of constitutional courts should be to secure democracy, rather than restricting it, even if their task includes defending the rules of democracy against the will of a ruling majority.³⁰⁶ When the other institutions of democracy fail to respond to matters, such as corruption and state capture and other dangers to our constitutional democracy, the courts should move in to fill the vacuum. In South Africa, the Constitutional Court is one of the institutions created to protect our constitutional democracy.³⁰⁷ Geoff Budlender observed thus:

The challenge to all of us, both inside and outside the legal arena, is how the courts can be a means of enhancing democratic practice rather than a mechanism for the depoliticisation of what are fundamentally political questions. That is not an easy question. We need to open our eyes and minds to how courts have functioned in other societies – India and Columbia strike me as particularly interesting examples – and find ways of using the courts as a means of opening up and deepening our democracy. We need to think hard about other ways of using the courts to open up and facilitate democratic practice.³⁰⁸

³⁰⁴ H Klug 'The Constitution of South Africa: a contextual analysis' (2010) at 242.

³⁰⁵ Ibid.

³⁰⁶ Gertrude Lübbe-Wolff (2016) 'Constitutional Courts and Democracy. facets of an ambivalent relationship' in K Meberschmidt and DO Lalana (eds) *Rational law making under review legisprudence according to the German federal Constitutional Court* at 19-20.

³⁰⁷ This is evident from the provision of section 172 of the Constitution and several constitutional court judgments confirming this stance.

³⁰⁸ Budlender op cit (n182) at 15-6.

The question to be dealt with in this chapter is how and to what extent the South African Constitutional Court should protect the quality of South Africa's democracy in the context of a dominant party democracy. More importantly, there is a need to consider which mechanisms and strategies the Court has adopted, or should develop, to protect the democratic space in South Africa. Why the Constitutional Court is the correct and legitimate institution from a constitutional design perspective to give effect to the mandate of protecting the democratic space in South Africa? Firstly in the twenty-two years after the end of apartheid, South Africa's Constitutional Court is one of the few meaningfully independent public institutions left in the country. Secondly, its decisions on political and social rights in particular have helped to counteract the worst effects of the governing African National Congress' political dominance. In this way it has contributed to the consolidation of South Africa's democracy.

This chapter has two parts. The first provides a brief outline of the role of the Constitutional Court in South Africa with emphasis on the interaction between the Constitutional Court and the ruling party, the ANC. Roux and Dixon are of the view that, during the early years of the Court's existence, the Constitutional Court tried to enlist the ANC as a partner in constitutional implementation.³⁰⁹ It is contended that the Constitutional Court adopted a restrained role that avoided direct confrontations with the ANC government, and sought to encourage legislative and executive responsibility for constitutional implementation.³¹⁰ However, as the ANC became less committed to the constitutional project, the Constitutional Court gradually assumed a more active role in encouraging political pluralism and accountability, both within the ANC and more broadly.³¹¹ These two approaches of the Constitutional Court towards the ruling party will be dealt with in detail.

In the second part of this chapter, the role of the Constitutional Court in protecting the democratic space (democracy) in South Africa will be considered. This segment is further divided into two parts. In the first part, cases in which the Constitutional Court has compromised and failed to protect the democratic space against the threat of a dominant party democracy are discussed. The main criticism against the Constitutional Court for failing to

³⁰⁹ R Dixon & T Roux 'Marking constitutional transitions: the law and politics of constitutional implementation' in R Dixon and T Roux (eds) *South Africa constitutional triumphs, constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Local and International influence* available at https://www.law.uchicago.edu/files/Session%20III_Dixon.pdf at 3 [accessed on November 2017].

³¹⁰ Ibid at 1.

³¹¹ Ibid.

protect the democratic space against the dangers of a dominant party democracy will be considered. In the second part, case law which shows that the Constitutional Court has altered its approach in dealing with the challenges of a dominant party democracy is analysed. The Court has become increasingly forceful and attentive in acknowledging the threats and consequences of a dominant party democracy. Being aware of the challenges of a dominant party and citing the associated dangers in judgments is not enough to prevent the associated pathologies of a dominant party democracy from wearing down our constitutional democracy. Thus, I will analyse case law where the Court has shown that it can be an effective tool to protect our democracy against the dangers of a dominant party democracy. Judgments such as *EFF (Public Protector)* and *Glenister II (Hawks)* illustrate how this can be achieved. These cases concern the ‘standards that need to be met when making appointments to, or organisationally restructuring, independent constitutional institutions and the protection from political influence.’³¹² The Constitutional Court’s vigorous role in protecting key state institutions (that need to check and oversee state power in South Africa) from political interference and the extent to which such entities could be undermined by a dominant political party is one way the Constitutional Court can be used to protect the democratic space against the dangers of a dominant party.

4.2 Debating the role of the Constitutional Court in a dominant party democracy

In South Africa, there have been divergent views concerning the role of its Constitutional Court. Most of these debates have centred around the issue of whether the role of the judiciary is of a legal or political nature. In the *First Certification* judgment, the Constitutional Court made it clear that

‘it had a ‘judicial not a political mandate’, that ‘the wisdom or correctness’ of the new text of the Final Constitution was left to the Constitutional Assembly, and that it had ‘no power, ... and no right to express any view on the political choices made by the (Constitutional Assembly) in drafting the (New Text)’.³¹³

Roux argues that, despite the fact that the Constitutional Court was created during a period of great political uncertainty, the Chaskalson Court (a term coined by the author to describe the Court’s first bench of judges) judgments did not result in political interference – nor did politics

³¹² Roux op cit (n) at 17.

³¹³ S Woolman and J Swanepoel ‘Constitutional History’ in *Woolman and Bishop et al* (2013) *Constitutional law of South Africa* loose-leaf 2ed 2-42. *First Certificate judgment* supra (n95) para 27 and 39.

influence the court's decision-making processes.³¹⁴ This approach of the Constitutional Court in the *First Certification* judgment, as indicated above, has also been followed in many other judgments such as the *UDM floor crossing case* and *Glenister I*.³¹⁵ In these judgments, the Court strongly pointed out that politics do not influence the Court's decision-making processes. By following this approach, the Court was able to shirk the need to deal with the dominance of the ANC and also avoided becoming entangled in politics. Stu Woolman and Jonathan Swanepoel point out that,

‘[b]y focusing strictly on the text of the CPs and their relationship to the new text, the Court undertook every conceivable effort to demonstrate that its decisions were not an exercise of political judgment, but simply the application of careful analytic legal reasoning.’³¹⁶

Further support can be found in the writing of Sebastian Seedorf, who observes that the Constitutional Court is ‘first and foremost a court of law’.³¹⁷ Seedorf is of the opinion that a decision that has political implications does not prevent the Court from making a decision, but only requires the Court to apply a legal standard in making the decision.³¹⁸ In other words, the Constitutional Court is not asked to make political decisions, it is asked to ensure that political decisions comply with the (at times, limited) standards the Final Constitution sets.³¹⁹ Seedorf and Sibanda point out that

‘the distinction between political and legal questions not with regard to the subject matter of the dispute but with regard to the judiciary’s function to adjudicate disputes that can be resolved through the application of law. The key to judicial review — and therefore the function of the courts in contrast to other branches of government — is not what the dispute is about, but the review standard or the yardstick that is applied. Any criterion of political expediency is irrelevant in the judicial decision-making process. Instead, the Court, in applying the Final Constitution as the sole review

³¹⁴ T Roux ‘The Langa Court: its distinctive character and legacy’ (2015) *Acta Juridica* 33.

³¹⁵ This was confirmed in the *First Certification judgment* op cit (n67) at para 27 and *UDM floor crossing case* supra (n8) para 11. In *UDM* the Court stated that:

‘[t]his case is not about the merits or demerits of the provisions of the disputed legislation. That is a political question and is of no concern to this Court. What has to be decided is not whether the disputed provisions are appropriate or inappropriate, but whether they are constitutional or unconstitutional’

³¹⁶ Woolman & Swanepoel op cit (n305) at 2-43.

³¹⁷ S Seedorf ‘Jurisdiction’ in *Woolman and Bishop et al* (2013) *Constitutional law of South Africa* loose-leaf 2ed 4 – 4.128 at 4.7.

³¹⁸ *Ibid.*

³¹⁹ *Ibid.*

standard, determines the constitutional framework for political decision-making. In this respect, the distinction between political and legal questions is related to the Constitution's threshold criterion for access to courts, ie that the dispute can be resolved by the application of law.³²⁰

However, to expect 'a constitutional order to be pure and separate from political developments is an illusion, and to hope that a Constitutional Court will 'stay out of politics' is futile.'³²¹ Roux contends that political decision-making is a systemic function of the Constitutional Court in South Africa.³²² This was confirmed in *President of the RSA v SARFU*, where the Court held

'That one of its functions was to exercise exclusive jurisdiction 'in a number of crucial political areas...in respect of issues which would inevitably have important political consequences.'³²³

Some scholars are of the view that the role of the Constitutional Court is of a political nature. Venter contends that 'when it comes to the adjudication of a variety of disputes and the interpretation of constitutions and the law, the courts, as depositories of the judicial authority of the state, cannot escape from politics.'³²⁴ In addition, Mendes is of the view that

'constitutional courts are seen as political by virtue of their inherent function, beyond resolving particular legal disputes, in shaping the boundaries of the political, which is their function in defining, in conjunction with the other branches, the way a constitution should be understood.'³²⁵

He further provides two additional reasons why he believes a constitutional court's role is political. Firstly, Mendes contends that 'by speaking on behalf of and towards all the members of the political community, constitutional courts help to define their community's very political identity.'³²⁶ According to Mendes, on this approach, a Constitutional Court is political because it participates in the complex process of law-making that springs from the constantly shifting

³²⁰ Seedorf & Sibanda op cit (n36) at 12-54.

³²¹ Seedorf op cit (n317) at 4-8.

³²² Roux op cit (n15).

³²³ *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) at paras 72-3. Also, see para 19 of the *EFF 1 judgment* where the Constitutional Court stated:

'Also to be factored into this process is the utmost importance of the highest court in the land being the one to deal with disputes that have crucial and sensitive political implications. This is necessary to preserve the comity between the judicial branch and the executive and legislative branches of government'

³²⁴ F Venter 'The politics of constitutional adjudication' (2005) *ZaöRV*, 129-166 at 130.

³²⁵ CH Mendes 'Fighting for their place: constitutional courts as political actors. A reply to Heinz Klug' (January 2010) 3 (1) *Constitutional Court Review*, p. 33 – 43 at 34-35.

³²⁶ *Ibid.*

division of labour between the branches within the separation of powers.³²⁷ Secondly, Mendes posits that a court may be perceived also as political because it must perforce respond to the political constraints that surround each decision, calculate the impact of its decisions, and anticipate the likely reactions of other political actors, which may jeopardise its effectiveness.³²⁸ In addition, section 164 of the Constitution also allows the Constitutional Court exclusively to decide constitutional disputes in which the other spheres of government are directly involved.³²⁹ In this way, the Constitutional Court is tasked with ensuring that the structural principles of the South African political system as envisaged in the Constitution are upheld.³³⁰ Thus it can be concluded that the role of the Court is first and foremost legal, but it will be difficult to dispute that it does not have a political function to exercise ‘because law and politics are inevitably intertwined, and constitutional courts are seen in political theory, at least, as pre-eminently political institutions.’³³¹

4.2.1 The Constitutional Court and its confrontation of the dominant party democracy in South Africa

The Constitutional Court, in the early years of its existence, was able to deal with the dominance of the ANC quite well. According to Roux, the Constitutional Court as a collective actor managed to establish an effective working relationship with the ANC by enlisting it as a partner in the implementation of the constitutional project.³³² This is evident from many early judgments of the Constitutional Court which show the Court paying respectful homage to the ANC as the driving force behind the establishment of democracy and as integral to the success of the constitutional project.³³³ Judgements such as *Grootboom* and the *UDM* floor crossing case illustrate this point perfectly. Dixon and Roux are of the view that

‘[t]he Court resisted the invitation to adopt a minimum-core approach in *Grootboom* and instead opted for reasonableness review – an approach that explicitly opened up a co-operative dialogue with the ANC about how to implement the Constitution’s vision for social and economic transformation.’³³⁴

³²⁷ Ibid.

³²⁸ Ibid.

³²⁹ Section 164 (4) of the Constitution.

³³⁰ Seedorf op cit (n317) at 4-23.

³³¹ T Roux ‘Democracy’ in *Woolman and Bishop et al* (2013) *Constitutional law of South Africa* loose-leaf 2ed 10.1-10.57 at10-29.

³³² Roux op cit (n314) at 42.

³³³ Roux and Dixon op cit (n309) at 5.

³³⁴ Ibid at 6. *Government of the Republic of South Africa v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) (‘Grootboom’).

The authors are of the opinion that the review standard adopted in *Grootboom* was a deferential one, but deliberately so, leaving space for the ANC to ‘own’ the constitutional project and take charge of it.³³⁵ In addition, the Constitutional Court was also assisted by Nelson Mandela's outspoken support for judicial review, and the political branches of government respected the Court's decision and complied with court orders.³³⁶ However, in the early 2000s, the political situation in South Africa took a different direction. During this time, criticism of the judiciary by the ruling party also became fiercer, as discussed in Chapter Two of this thesis. This was because of the removal of Deputy President Jacob Zuma from office and his election as President of the country. More importantly, the Court progressively lost confidence in the ANC as a central partner in the constitutional project.³³⁷ It is during this period that the Constitutional Court found itself presented with more complex challenges than those that had confronted its predecessor.³³⁸ The difficult, politically sensitive cases that came before it, such as *Shaik*³³⁹, *Thint* and *Zuma*³⁴⁰ and *Hlope*,³⁴¹ served as proof of this. To quote Roux:

‘What had seemed at first like a potential positive for the prospects of democratic consolidation in South Africa – a dominant political party with a proud human rights tradition – had, by the end of Langa's Chief Justiceship, turned into the most significant threat to that enterprise.’³⁴²

How did the Constitutional Court manage to survive the dominance and threat of the ANC during this period of great political turmoil? In answering this question, it is apposite to recall the insight of Theunis Roux. Roux claims that what the Constitutional Court did was to broaden its constituency by seeking out a more direct relationship with the South African public and by forging partnerships with committed officials in regional and local government.³⁴³ Furthermore, ‘the Court also needed to take a strong stand against corruption and maladministration, while fostering a vibrant civil society capable of counter-balancing, and eventually providing the basis for an effective political opposition to, the ANC.’³⁴⁴ Roux is of the view that the Constitutional Court during Chief Justice Langa's term of office ‘used a direct

³³⁵ Ibid.

³³⁶ Roux op cit (n331) at 10 -29.

³³⁷ Dixon & Roux op cit (n309) at 7.

³³⁸ Roux op cit (n309) at 50.

³³⁹ *S v Shaik and Others* [2008] ZACC7; 2008 (5) SA 354 (CC); 2008 (8) BCLR 834 (CC).

³⁴⁰ *Thint (Pty) Ltd v National Director of Public Prosecutions & Others*; *Zuma v National Director of Public Prosecutions* (8652/08) [2008] ZAKZHC 71; [2009] 1 All SA 54 (N); 2009 (1) BCLR 62 (N).

³⁴¹ *Hlope v Constitutional Court of South Africa and Others* (08/22932) [2008] ZAGPHC 289.

³⁴² Roux op cit (n314) at 59.

³⁴³ Ibid.

³⁴⁴ Ibid at 60.

approach in targeting pathologies of nepotism and corruption for example, by insisting on proper qualifications for senior appointees and challenging the ANC's policy of cadre deployment to that extent'.³⁴⁵ It is safe to say that the Constitutional Court was able to deal with the dominance of the ANC during the Langa tenure and difficult political period from 2007 moderately well by altering its strategy and approach in dealing with the dominance of the ANC – by taking a more forceful and robust stance against the negative challenges of a dominant party democracy by preventing key state institutions from being captured by a dominant political party. More importantly, this approach of the Constitutional Court is also noticeable in the current Constitutional Court's approach in dealing with the challenges of a dominant party democracy as indicated in Chapter Three of this thesis. This brings me to my next discussion on the role of the Constitutional Court in safeguarding democracy against the challenges and threats of a dominant party democracy.

4.3 The Constitutional Court's democracy protecting role in South Africa

In this section I will discuss two cases where the Constitutional Court failed to acknowledge the consequences and threat of a dominant party democracy and decided to take a deferential approach. In both the *UDM* floor crossing case and *Glenister I*, the Court perceived the ANC as a partner in the constitutional project and could afford to protect its own institutional concerns. The Constitutional Court has been criticised for adopting this approach. However, the Constitutional Court has, over time, altered its approach and adopted a more forceful and robust approach to protect our constitutional democracy against the threats and pathologies of a dominant party democracy. One way the South African Constitutional Court has done this is through protecting key state institutions, such as the NPA and Public Protector and corruption fighting agencies (Hawks), that are tasked to oversee and check executive and legislative power. The *Glenister II* and *EFF I* judgments demonstrate how a Constitutional Court can wear down this specific pathology of a dominant party democracy and will also be discussed in this section. In addition, a useful strategy or doctrine that can greatly support the Constitutional Court in contesting some of the pathologies of a dominant party democracy, namely the anti-capture doctrine proposed by Choudhry, will be discussed.

³⁴⁵ Roux op cit (n314).

4.3.1. *UDM* (floor crossing case) and *Glenister I* (Scorpions case): Reluctance of the Constitutional Court to acknowledge the threat of a one-party dominant system to our constitutional democracy

In this segment, I will discuss two key cases where the litigants have pointed out the effect of the dominant party democracy but the Constitutional Court refused to deal with, or even acknowledge, the consequences and effect of a one-party dominant system. The South African Constitutional Court has delivered two decisions that stand out from the rest as compromising on principle. In the *UDM* floor crossing judgment, which dealt with the structure of the electoral system, and *Glenister I*, which dealt with the removal of a corruption fighting agency, the Scorpions, the Constitutional Court took a deferential approach by limiting its interference with the exercise of power by the executive. The cases and the criticisms against the Constitutional Court will be discussed below.

4.3.1.1 *United Democratic Movement v President of the Republic of South Africa: Floor crossing case*

In 2002, a set of laws was passed by Parliament that amended the anti-defection clause at the local, provincial and national levels and that aimed to allow members of national, provincial and local government to change parties without losing their seats.³⁴⁶ This case became known as the floor crossing case in South Africa. In June 2002, the United Democratic Front (UDM) – a splinter party of the ANC – challenged the legislation. For the purpose of this thesis, what is of particular importance is UDM’s argument concerning the impact of a dominant party democracy. It was argued in this case that the anti-defection clause was inconsistent with the values of the Constitution, as the legislation was not passed in order to serve a specific governmental purpose, but rather to serve the purposes of the ruling party who maintained an enviable majority in Parliament.³⁴⁷ Why is this case so important? At the heart of the challenge was the issue that the provision for floor-crossing undermined democracy when considered in the context of South Africa’s proportional representation system.³⁴⁸ By allowing stronger parties to lure away representatives from weaker parties, it was argued, the legislative package threatened the political pluralism on which South Africa’s multi-party democratic system depends.³⁴⁹ The Constitutional Court, in a judgment penned by all eleven judges as ‘the Court’,

³⁴⁶*UDM floor crossing case* supra (n10) para 3.

³⁴⁷ *Ibid* para 1 - 22.

³⁴⁸ *Ibid*

³⁴⁹ *Ibid* para 24 and 39.

dismissed the UDM's argument and the Court refused to deal with the effect of dominant party democracy. The Constitutional Court, instead, rejected the UDM's argument on a strategic point. The Constitutional Court took a pragmatic approach, as discussed in Chapter Two of the thesis. The discussion in this chapter is different in that it points out the Constitutional Court's failure to protect the democratic space. The Constitutional Court's principal response to the UDM's argument was to draw a sharp distinction between legislative purpose and motive, as the Court put it:

'[c]ourts are not ... concerned with the motives of the members of the legislature who vote in favour of particular legislation. On the Court's account, the purpose was merely to make provision for members of legislatures to change their party allegiances without losing their seats in the legislature.'³⁵⁰

In dismissing the UDM's argument on democracy the Court had this to say:

'The frustration of the will of the electorate, for its part, does not infringe FC s 19 (political rights), because all the rights in this section 'are directed to elections, to voting and to participation in political activities. Between elections, however, voters have no control over the conduct of their representatives.' And multi-party democracy is not undermined because FC s 1(d) does not prescribe a particular kind of electoral system.'³⁵¹

Should the Constitutional Court have done more to protect the democratic space and to probe deeper into the underlying cause of the floor crossing legislation? Was the floor crossing legislation enacted to favour the dominant party – and to advanced the prerogatives of the governing party further? There are scholars that are of the view that the *UDM* judgment is disappointing, because the Court repeatedly fails to engage with the values underlying democracy in South Africa, and because the decision, uncharacteristically for the Court, too frequently relied on the assertion rather than reasoned argument.³⁵² According to Brickhill and Daniels, the *UDM* floor crossing judgment provides an excellent example of a judicial approach that, on the face of it, is highly deferential to Parliament, but the outcome of which nevertheless, arguably fails to promote or protect democratic principles.³⁵³ Furthermore, the authors point out that

³⁵⁰ Ibid para 56.

³⁵¹ Ibid para 49.

³⁵² Roux op cit (n16).

³⁵³ R N Daniels & J Brickhill op cit (n146) at 395.

‘[t]he statement that, ‘[b]etween elections voters have no control over the conduct of their representatives’, simply asserts a shallow, pluralist conception of democracy that is out of kilter with some of the Court’s other decisions in this area and with the Final Constitution’s vision for South African democracy.’³⁵⁴

Some constitutional law scholars are of the view that the Court’s failure to counteract the threat (floor crossing) to protect the democratic system against an electoral rule change, which it acknowledges would likely entrench the ANC’s dominant position, can only be attributed to its extreme reluctance, for what we must assume were institutional reasons, to pierce the veil of South Africa’s dominant party democracy.³⁵⁵ Choudhry excellently put this stance into perspective:

‘The genesis for the repeal of the ban on floor-crossing was a move by the ANC to take power in the Western Cape, the one province under opposition control. This gave the ANC control over all nine provinces, and undermined the ability of the DA to use political resources available to it in the Western Cape to compete nationally. As well, the repeal of the ban on floor-crossing took place against the backdrop of the ANC’s domination at the national level. The ANC possessed all the political resources of incumbency, which it could use to entice opposition MPs to cross the floor and enmesh them in a network of patronage.’³⁵⁶

On the other hand there are scholars that are of the view that the critique against the Constitutional Court may have been a little overdone. Roux believes that, at the time the *UDM* floor crossing case was decided, the pathologies associated with the ANC’s electoral dominance were not as apparent as they are today.³⁵⁷ Roux is of the opinion that the Court’s overarching strategy was aimed at enlisting the ANC as a partner in the constitutional project – as mentioned earlier in this chapter.³⁵⁸ According to Roux, from this standpoint, it was important for the Court not to signal its distrust of the governing party, particularly since the case for the ANC’s abusing its electoral dominance was speculative rather than iron-clad.³⁵⁹ Roux defends the Constitutional Court’s approach and put forward arguments why he thinks the Constitutional Court took this position. Firstly, Roux contends that one has to look at the broader political context in which the Court was operating, namely a dominant party

³⁵⁴ Ibid.

³⁵⁵ Choudhry op cit (n9).

³⁵⁶ Choudhry op cit (n9) at 40.

³⁵⁷ Roux op cit (n314) at 70.

³⁵⁸ Ibid.

³⁵⁹ Ibid.

democracy and the influence that the dominant party had on the Court.³⁶⁰ Secondly, Roux is of the opinion that the fact that the ANC has almost complete control of the judicial appointment process – the judges needed to think carefully about the long-term institutional repercussions of a bold, substantively-reasoned decision.³⁶¹ The third reason advanced by Roux is that, if the Court did intervene, ‘a decision like that would have exposed the judges to the charge of judicial activism – of handing down a politically motivated decision to block a democratically sanctioned constitutional amendment.’³⁶² In addition, the Court’s decision *not* to strike down the floor-crossing legislation had potential knock-on consequences for its independence, too.³⁶³ These are some of the views expressed by scholars concerning why the Court took a more deferential approach in the *UDM* floor crossing case.

The importance of this judgment for this thesis is the illustration of the reluctance of the Constitutional Court to acknowledge the consequences of dominant party democracy. In this case, the Constitutional Court ‘compromised on principle, in part because it perceived a real risk to its institutional security, given the tight link between the amendments and the partisan political agenda of the ANC.’³⁶⁴ Perhaps the Court took this decision because it needed to protect our constitutional democracy; in the end, it did work out because the ANC themselves deserted the floor crossing legislation and our constitutional democracy was undamaged in the process. The position adopted by Roux above as to why the Court took a more deferential approach is deserving of support. In the following section, another case is discussed where the Court also failed to acknowledge the consequences of dominant party democracy and its effects on our constitutional democracy.

4.3.1.2 *Glenister v President of the Republic of South Africa & Others 2009 (Glenister I)*

The Directorate of Special Operations (popularly known as the Scorpions) (DSO) came into existence in 2001. The Scorpions were a specialised organised crime fighting unit with the with an extremely high conviction rate.³⁶⁵ The Scorpions also earned the ire of elements within the ANC because of its involvement in a series of high-profile investigations involving prominent members of the ANC.³⁶⁶ It was the Scorpions that conducted the investigation that led to

³⁶⁰ T Roux ‘Constitutional Courts as democratic consolidators: insights from South Africa after 20 years’ (2016) 42 (1) *Journal of Southern African Studies* at 13.

³⁶¹ *Ibid.*

³⁶² *Ibid.*

³⁶³ *Ibid.*

³⁶⁴ Choudhry *supra* (n9) 51.

³⁶⁵ *Glenister I* *supra* (n10) para 1.

³⁶⁶ *Ibid* at para 1.

criminal charges being laid against Jacob Zuma for corruption in connection with the arms deal.³⁶⁷ In April 2008, Cabinet approved draft legislation which, among other things, proposed to relocate the DSO and amalgamate it with the South African Police Service (SAPS).³⁶⁸ This came after the ANC resolved at its National Policy Conference in Polokwane that the Scorpions be dissolved, and incorporated into the South African Police Service.³⁶⁹ A draft resolution proposing that the DSO be moved from the jurisdiction of the NPA to the SAPS was prepared at the ANC's national policy conference in June 2007.³⁷⁰ Six months later, in December 2007, the ANC adopted a resolution calling for a single police service and the dissolution of the DSO at its 52nd national conference held in Polokwane.³⁷¹ The applicant sought to have Cabinet's decision to initiate the legislation set aside as unconstitutional and invalid and the withdrawal of the Bills from Parliament. One of the central issues for determination was whether, in view of the principle of separation of powers, the circumstances of this case permitted the Court to consider the validity of the decision taken by Cabinet while the Bills were still before Parliament and the legislative process still underway.³⁷² In the High Court, a number of political parties were admitted as *amici curiae* (friends of the court) and were cited as respondents in the Constitutional Court. One of them, the United Democratic Movement (UDM), presented argument in support of the contention that the Constitutional Court should intervene in the matter. For the purpose of this thesis, what is of particular importance is the UDM's arguments concerning the impact of a dominant party democracy on the trilateral structures of government and the consequences of a dominant party democracy. UDM submitted that

‘...since the separation of powers doctrine is dynamic, it should be adapted to the prevailing conditions (in which there is a danger of “one-party domination”) and accommodate institutional developments that have crucially shifted the balance of power between the branches of government. The relative marginalisation of the legislature, argues the UDM, has a disastrous impact on the ability of opposition parties to make their voices heard in policy formulation. The Court should act as a counterweight if the ruling party overreaches itself and, it contends, if the Court does not act, it is unlikely anyone else will.’³⁷³

³⁶⁷ M Bishop & N Raboshakga ‘National Legislative Authority’ in *Woolman and Bishop et al* (2013) *Constitutional law of South Africa* loose-leaf 2ed 17 -17-at 17 -114.

³⁶⁸ *Glenister I* supra (n10) para 1.

³⁶⁹ *Ibid* para 14.

³⁷⁰ *Ibid* para 14-16.

³⁷¹ *Ibid*.

³⁷² *Ibid* para 9.

³⁷³ *Ibid* para 22.

The UDM also submitted that Cabinet had acted unconstitutionally because it was operating under dictation from the ANC, and had thereby ‘abdicated its constitutional responsibility’.³⁷⁴

The UDM argued that,

‘...acting under the dictates of the ANC meant that cabinet “substituted for its accountability to Parliament accountability to the governing party”, which itself was a reflection of “the blurring of the line between government and party” and “the identification of the ruling party with state power” that is associated with “the phenomenon of one-party domination.’³⁷⁵

The respondent opposed the submissions and highlighted the duty of Cabinet to account to the legislature for policies, decisions and actions, and the concomitant powers of Parliament to ensure the accountability of the executive.³⁷⁶ Furthermore, they submitted that the Constitution has created checks and balances to maintain the delicate balance in the power wielded by the executive, legislature and judiciary.³⁷⁷ In a unanimous judgment by Langa CJ, the Court dismissed the application. The Court discussed the importance of the separation of powers doctrine implicitly recognised in our Constitution.³⁷⁸ The Court found that the doctrine ensures that each branch of government – the executive, legislature and judiciary – is able to fulfil its constitutional mandate without interference by either of the other branches.³⁷⁹ In addition, the Court also found that the executive had carried out its constitutionally mandated task of initiating and preparing legislation.³⁸⁰ The Constitutional Court found that the draft legislation was before Parliament, the body which has the primary responsibility of overseeing the executive’s actions.³⁸¹ Furthermore, the Court found that there may be circumstances in which a court will intervene where draft legislation is still being considered by Parliament, but the circumstances that warrant judicial intervention would have to be exceptional and an applicant would need to demonstrate material and irreversible harm in the sense that no effective remedy would be available once the legislative process was complete.³⁸² The applicant failed to establish that material and irreversible harm had arisen.³⁸³

³⁷⁴ Ibid para 21.

³⁷⁵ Ibid.

³⁷⁶ Ibid para 25 and 26.

³⁷⁷ Ibid.

³⁷⁸ Ibid para 29- 37.

³⁷⁹ Ibid.

³⁸⁰ Ibid para 55-56.

³⁸¹ Ibid.

³⁸² Ibid para 47.

³⁸³ Ibid para 56.

In dismissing the applicant's case and the UDM submissions (as indicated above) concerning the dangers associated with a dominant party democracy, Chief Justice Langa had the following to say:

‘The UDM also argues that, having regard to what it refers to as “the relative marginalisation of the legislature” and the dangers of one-party domination, the Court should act because no-one else will. I cannot agree. *The role of this Court is established in the Constitution. It may not assume powers that are not conferred upon it.*’³⁸⁴

In addition, the Court also found that there was nothing wrong, in our multi-party democracy, with Cabinet seeking to give effect to the policy of the ruling party.³⁸⁵ The Constitutional Court held that Cabinet must observe its constitutional obligations and may not breach the Constitution.³⁸⁶ The Court relied on the fact that, because South Africa is a liberal democracy, there are other checks and balances to negate the challenges that a dominant party democracy presents.³⁸⁷

De Vos points out that what this case does highlight is the complex and problematic nature of the relationship between the government of the day and the ruling party.³⁸⁸ Our Constitution is silent on what exactly this relationship should be.³⁸⁹ Instead, the Court relied on formalistic reasoning and legal strategies (separation of powers) to avoid becoming entangled in a political conundrum and confronting the ANC dominance directly. One commentator put forward that ‘the argument, as originally presented, did not precisely assert that the Court should assume powers not conferred upon it—a stark proposition that would likely be anathema to most judges’.³⁹⁰ Ellmann is of the view that *Glenister’s* argument could be read to

‘urge that the powers conferred upon the Court should be understood in a flexible way considering current circumstances—a kind of interpretation by no means alien to South African law. But the Court chose not to embrace that invitation to expand its domain.’³⁹¹

Both the *UDM* floor crossing and *Glenister I* judgments demonstrate the South African Constitutional Court's reluctance to acknowledge the influence and threat of a dominant party

³⁸⁴ Ibid para 55.

³⁸⁵ Ibid para 56.

³⁸⁶ Ibid.

³⁸⁷ P de Vos ‘The scorpions’ saga continues, but to no avail’ available at

<https://constitutionallyspeaking.co.za/the-scorpions-saga-continues-but-to-no-avail/>, [accessed on May 2017].

³⁸⁸ Ibid.

³⁸⁹ Ibid.

³⁹⁰ S Ellmann ‘The struggle for the rule of law in South Africa’ (2015 -2016) 60 *N.Y.L. SCH. L. REV.* 57 (at 67.

³⁹¹ Ibid.

democracy. In rejecting the constitutional challenge regarding the influence of a dominant party democracy on our trilateral structures of government and our democracy, did the Court get that assessment, right? You have to wonder why the South African Constitutional Court was unwilling to confront the dominance of the ANC directly in these two cases. Is it because of the Court's lack of understanding of the effect of a dominant political party or the Court's inability to developed strategies and doctrines that can deal with the consequence and negative effects of a dominant party democracy, as indicated in Chapter Three of this thesis?

The *UDM* floor crossing and *Glenister I* judgments have come under much criticism from constitutional law scholars who labelled the Constitutional Court as a constrained court and not active enough to protect the democratic space at all costs and to confront the dominance of the ANC and one-party dominant government. Instead, the Court took a self-restrictive approach to avoid dealing with the issue. Mclean contends that a greater level of deference is shown by a court where an action is characterised by greater political discretion and thus it is thought that courts will tend to be more deferential in such a situation.³⁹² This view expressed by Mclean is also supported by other constitutional scholars and case law, where the Constitutional Court has shown judicial self-restraint.³⁹³

4.4 Criticism against the Constitutional Court regarding protection of the quality of South Africa's democracy against the challenges of a dominant party democracy

For many constitutional scholars, the Constitutional Court has been too slow in reacting to the changing political context in South Africa. Sujit Choudhry and Samuel Issacharoff are two of the main advocates proposing that the South African Constitutional Court should take a more robust approach in protecting the democratic space in South Africa. They have even gone so far as to recommend that the Constitutional Court develop a formal jurisprudence or doctrines into its jurisprudence to deal with the effect of a dominant party democracy. In a 2009 paper, for example, Sujit Choudhry called for the Constitutional Court to develop a series of 'doctrines to counter the pathological effects of the ANC's political dominance'.³⁹⁴ Samuel Issacharoff, too, in various publications, has called for the Court to adopt a more robust and creative approach to its mandate, on the model of the Indian Supreme Court and the Colombian

³⁹² Ibid at 78.

³⁹³ H Klug op cit (n304) makes this argument in relation to *AParty and Others v Minister of Home Affairs and Others* [2009] ZACC 4. Also see Roux op cit (n15) at 362 (arguing that the *NNP* and *UDM* cases are unconvincing and overly deferential outliers in the Court's record on political rights).

³⁹⁴ Dixon & Roux op cit (n309) at 11.

Constitutional Court.³⁹⁵ In Choudhry's and Issacharoff's view, 'the Court should have renounced formalism and engaged in substantive constitutional policy analysis of the problems facing the country, and the pathologies of South Africa's dominant-party democracy in particular'.³⁹⁶

Choudhry proposed and recommended a set of constitutional doctrines that the Constitutional Court may invoke against the institutional challenges which a dominant party democracy poses. These so-called doctrines are explained 'through legal principles such as anti-domination³⁹⁷, derived from the principle of legality; anti-capture³⁹⁸, derived from various cases setting the independence of institutions; non-usurpation³⁹⁹, which is based on existing public power doctrines and including anti-seizure and anti-centralisation.'⁴⁰⁰ These are doctrines coined by the writer. Choudhry argues that the Constitutional Court should take a more proactive approach and explains that the Constitutional Court needs to adopt the following approach:

'In discharging its constitutional function as the ultimate interpreter of the Constitution, the Court should draw upon a set of background assumptions about the nature of South African politics, derive its constitutional role from that broader understanding, and craft constitutional doctrine to give effect to that role.'⁴⁰¹

For Choudhry, these doctrines should be considered as a factor in the Court's analysis.⁴⁰² For the purpose of this thesis, the doctrines proposed by Choudhry are highlighted to show my contention that some scholars advocate and recommend that the South African Constitutional

³⁹⁵ Ibid.

³⁹⁶ Ibid.

³⁹⁷ J McEldowney 'One party dominance and democratic constitutionalism in South Africa' (2013) *TSAR* 1. 269 at 271. Choudhry op cit (n9) at 34-43. According to Choudhry the *Anti-domination doctrine* is a 'doctrine that would render illegitimate any exercise of public power that has as its principal goal the preservation, enhancement or entrenchment of the dominant status of a dominant political party'.

³⁹⁸ Choudhry op cit (n9) at 48-53. The *Anti-capture doctrine*, originate from various cases setting the independence of institutions. Choudhry argues that courts should not permit the dominant party to capture independent institutions.

³⁹⁹ Ibid at 66. According to Choudhry, the non-usurpation doctrine aims to prevent elected representatives from having all of their actions determined by unelected structures and members of the party. The purpose of the doctrine is to protect public officials who are democratically elected, and through them, the democratic process, from unelected party officials who lack democratic legitimacy and attempt to usurp and wield public power.

⁴⁰⁰ Ibid at 70-80. The anti-seizure doctrine would find the ANC's statutory power to deploy MPs unconstitutional. The anti-centralisation doctrine on the other hand applies to the provinces. The anti-centralisation doctrine recognises that the Constitution's commitment to 'co-operative government' between distinct spheres or levels of government is undermined by the concentration of power that should be held by the majorities of provincial legislatures in a single, unelected, national body: the ANC NEC.

⁴⁰¹ Ibid at 33.

⁴⁰² Ibid.

Court should consider developing an alternative formal theoretical framework to counteract the dominant party democracy. I will discuss Choudhry's *anti-capture doctrine* in more depth below; in my view, this doctrine is a useful mechanism that can help negate some of the challenges and threats of a dominant party democracy.

Samuel Issacharoff, another American scholar contends that, because the Constitutional Court is one of the few public institutions so far to have escaped the stranglehold of a dominant party democracy, the Court has a crucial role to play in keeping alive the possibility of a flourishing multi-party democracy.⁴⁰³ He is of the view that for the court to play this role,

‘[i]t needs to act much more forcefully, instead of sending diplomatically worded missives, it needs to offer a substantive political theorisation of the threat posed by the ANC to the quality of South Africa’s democracy, and then justify its enforcement of democratic rights accordingly.’⁴⁰⁴

His criticism emanates mostly from earlier decisions of the Court such as the *UDM* floor crossing case and *Glenister I* and other constitutional court judgments. Issacharoff argues that the Court has been too cautious.⁴⁰⁵ In his widespread writings on this topic, Issacharoff critiques several constitutional court judgments ‘which he sees as a missed opportunity for the Court to have protected the democratic system.’⁴⁰⁶ He argues that the Constitutional Court in *UDM* floor crossing was ‘faced with the indeterminacy of the term “democracy” what the Court should have done, he argues, was to offer a substantive political theorisation of the problems confronting South African democracy.’⁴⁰⁷ This is so, he contends, because the enforcement of an anti-floor-crossing right could then have been justified as part of its general mandate to protect the democratic system.⁴⁰⁸ His critique of the Constitutional Court does not end at this juncture; he is also not very fond of the Constitutional Court’s rationality review to address the excess power claims of the ANC. He is of the view that, to an outside observer, the South African rational relations standard of review seems a poor institutional choice for addressing the distinct problems presented by the entrenchment of a dominant political party.⁴⁰⁹ He makes the following remarks on the Court’s decision in *Democratic Alliance*:

⁴⁰³ S Issacharoff ‘The democratic risk to democratic constitutions’(2014) 5 *Constitutional Court Review*, pp.1–31. Roux op cit (n158) at 6.

⁴⁰⁴ Roux op cit (n163) at 40.

⁴⁰⁵ Ibid.

⁴⁰⁶ Ibid.

⁴⁰⁷ Ibid at 12.

⁴⁰⁸ Ibid.

⁴⁰⁹ Issacharoff op cit (n403) at 23.

‘The Court lacked doctrinal mooring for assessing what seemed to be a power grab by the Executive, eroding one of the few checking sources on political power. The Court agonised over the standard of review, seeking guidance in cases such as *Affordable Medicines*.’⁴¹⁰

For Issacharoff, cases such as *Democratic Alliance* and *Glenister I* concerning the protection of key institutions show a renewed pushback against the ANC on many issues where governance threatens to collapse to the whim of the powerful.⁴¹¹ He cautions that, despite the need for renewed judicial assertion,

‘the Court’s doctrinal hesitation to explain clearly both the problem it faces and the theory underlying its response may ultimately hamper its success in resisting the entrenchment of unaccountable one-party rule.’⁴¹²

This criticism of Issacharoff against the Constitutional Court might, in my view, be overcooked because the Constitutional Court record concerning the protection of key institutions against the threats of a dominant party democracy is rather satisfactory. I will demonstrate this in the next section.

Dixon and Roux, in their recent work on this topic, provide a different insight and approach to this debate.⁴¹³ The authors in part support Choudhry and Issacharoff’s ‘analysis that the Court should have responded more creatively and robustly to the ANC’s dominant position’.⁴¹⁴ However, Dixon and Roux take a slightly different approach. According to them, given the constraints of South Africa’s legal tradition, the Court could not, and should not, have engaged in the sort of substantive constitutional policy analysis in which the Indian Supreme Court and Colombian Constitutional Court have engaged.⁴¹⁵ The writers are of the view that the South African Constitutional Court ‘might have begun earlier to lay down doctrinal markers that would have smoothed the transition to the new political context it faced after 2007’.⁴¹⁶ They argue that the South African Constitutional Court, in early cases concerning the democratic process (during Chief Justice Chaskalson’s term of office), focused largely on rights-based violations, without taking the opportunity to lay down (doctrinal) markers for a more *structural*

⁴¹⁰ Ibid.

⁴¹¹ Ibid at 31.

⁴¹² Ibid.

⁴¹³ Dixon & Roux op cit (n309).

⁴¹⁴ Ibid at 11 -12.

⁴¹⁵ Ibid.

⁴¹⁶ Ibid.

approach to the defence of democracy.⁴¹⁷ The writers put forward two possible important doctrinal markers that were available to the Constitutional Court in the first period (during Chaskalson's term), which could arguably have helped lay the ground-work for a more rapid and effective transition to the second period: first, a greater emphasis on transparency and good process in cases that gave the Court broad substantive freedom to define the scope of relevant government programmes (such as *Grootboom*); and second, an emphasis on some form of 'democratic minimum core', not capable of being altered by either legislation or constitutional amendment.⁴¹⁸

The South African Constitutional Court's disinclination in developing a formal theoretical jurisprudence to confront the pathologies of a dominant party democracy is often unfavourably compared by some scholars to the Indian Supreme Court and the Colombian Constitutional Court, as mentioned above.⁴¹⁹ These two courts have developed substantial theoretical frameworks to deal with the challenges of a dominant party democracy and dominant executive power to protect their democratic space. For example, the Indian Supreme Court developed the basic structure doctrine in 1973 in an attempt to prohibit the dominant Congress Party from abusing its power to amend the Indian Constitution.⁴²⁰ The basic structure doctrine 'determines that an amendment is unconstitutional if it infringes, negates or substitutes the basic structure of the Constitution, regardless of whether all the formal and procedural requirements for the amendment are met.'⁴²¹ The Colombian Constitutional Court developed the legislative substitution doctrine. This 'doctrine involves substantively checking the executive's policy choices itself, rather than relying on the legislature to do so.'⁴²² I will not consider a comparative analysis between these three constitutional courts in this thesis; there is extensive literature and research on this topic. Safe to say that the political situation in South Africa is

⁴¹⁷ Ibid at 14.

⁴¹⁸ Ibid. The authors rely on a range of cases to illustrate their point.

⁴¹⁹ Roux op cit (n16) at 18.

⁴²⁰ W Partlett 'Courts and constitution-making' (2015) 50 *Wake Forest L. Rev.* 921 at 931.

⁴²¹ *Kesavananda Bharti v Union of India* (1973) 4 SCC 225 (India). In *Kesavananda v State of Kerala* the court held:

'We may now deal with the question as to what is the scope of the power of amendment under Article 368. This would depend upon the connotation of the word 'amendment'. Question has been posed during arguments as to whether the power to amend under the above article includes the power to completely abrogate the Constitution and replace it by an entirely new Constitution. The answer to the above question, in my opinion, should be in the negative. ... Although it is permissible under the power of amendment to effect changes, howsoever important, and to adapt the system to the requirements of changing conditions, it is not permissible to touch the foundation or to alter the basic institutional pattern.'

⁴²² Ibid.

somewhat different to that of the Colombian and Indian Constitutional Courts and how these courts treat the separation of powers doctrine in their respective countries. According to Theunis Roux, the critique against the Constitutional Court

‘must now be restricted to a single failing, that the absence in the Court’s reasoning of a fully worked out theorisation of the pathologies attendant on South Africa’s dominant-party democracy and the development of doctrines explicitly directed at addressing those pathologies.’⁴²³

It is particularly ‘the absence of any substantive theorisation of the pathologies attendant on South Africa’s dominant-party democracy that has enabled the Court to be so successful.’⁴²⁴ The very existence of a dominant party at the centre of South African politics and the Court’s development of its separation of powers doctrine (as indicated in Chapter Two, the Constitutional Court tends towards judicial deference to respect the domains of the two political branches of government) puts strict limits on what the Court can do.⁴²⁵ Thus, in my view, there is no need for the Constitutional Court to develop a formal theoretical jurisprudence to deal with the dangers of a dominant party democracy at this stage. What is also important to reflect is that the Constitutional Court has changed its approach in varying degrees in confronting the challenges of a dominant party democracy. The Constitutional Court is now more prepared to acknowledge the potential problems attendant on South Africa’s dominant-party democracy; I will analyse case law to demonstrate this point in the next section.

4.5. Change in approach by the Constitutional Court to safeguard democracy in South Africa in the context of a dominant party democracy

There has been a major shift in the Constitutional Court’s approach to the increased governance problems stemming from the firm hold on power of the ANC, since *Glenister I* and *UDM* floor crossing cases discussed above. The criticism mentioned above against the Constitutional Court also seems to be outdated now. In this section, I will analyse four cases that illustrate that there is a great shift in the Constitutional Court’s approach in dealing with the problems associated with a dominant party democracy. The first case I will investigate is

⁴²³ T Roux, *The South African Constitutional Court’s Democratic Rights Jurisprudence*, 5 *CONST. CT.REV.* 33, 63 (2013).

at 71-2.

⁴²⁴ *Ibid.*

⁴²⁵ *Ibid* at 65.

Glenister II, which was decided almost a decade ago. The *Glenister II* judgment is an apt illustration of how a Constitutional Court can protect democracy against the dangers of a dominant party democracy. The other three judgments are more recent decisions of the Constitutional Court. These include the two *EFF* judgments and the *UDM* secret ballot case. These three cases excellently acknowledge the potential threats and dangers of a dominant party democracy in their judgments. In these three judgments, the Constitutional Court adopts a rather deferential approach towards the other two branches of government and explicitly recognises the importance of the separation of powers doctrine. I will put forward that the *Glenister II* judgment and the *EFF I* judgment show that the Constitutional Court can be an effective tool to blunt some of the negative challenges of a dominant party democracy. The Court has been very successful in protecting key state institutions that it needs to protect to promote South Africa's constitutional democracy, such as the Office of the Public Protector, NPA and the Hawks. In this way, the Constitutional Court is able to protect our constitutional democracy against the pathologies of a dominant party democracy.

4.5.1 *Glenister II*

Glenister II followed *Glenister I*. I have already sketched out the facts of this case in detail in my discussion above on *Glenister I*. The Constitutional Court was faced with the same set of facts in *Glenister II*.⁴²⁶ The difference between *Glenister I* and *Glenister II* is that the legislation that had the effect of disbanding the Scorpions was duly passed by Parliament in *Glenister II*. Unlike in *Glenister I*, discussed above, where the Court strongly relied on the separation of powers doctrine to dismiss the application, in *Glenister II*, the majority judgment took a different approach by being alert to the possible dangers of a dominant party democracy. The relevance of this judgment for purposes of this thesis is the majority judgment's finding that the requirement of independence of the Hawks (from political interference) was not met and consequently, that the impugned legislation was thus unconstitutional.⁴²⁷ The majority judgment was wary of the dangers of a dominant party democracy to influence and capture key institutions: one of the pathologies of a dominant party democracy that I have discussed earlier in Chapter Three of this thesis. To prove this, I will point out crucial paragraphs of the majority judgment that show how the Court was mindful of the risk of a dominant party democracy implicating the independence of the Hawks. In the *Glenister II* majority judgment, the Court held that the Constitution imposed a duty on the legislature to enact an independent corruption-

⁴²⁶*Glenister II* supra (n 17) at para 3.

⁴²⁷Ibid para 163.

fighting body.⁴²⁸ The Court pointed out that ‘we have further found that the appointment of its members is not sufficiently shielded from political influence.’⁴²⁹ The majority judgment cautiously stated:

‘It cannot be disputed that those very political executives [on the Ministerial Committee] could themselves, were the circumstances to require, be the subject of anti-corruption investigations. They “oversee” an anti-corruption entity when of necessity they are themselves part of the operational field within which it is supposed to function.’⁴³⁰

In addition, the Constitutional Court also found:

‘We find this impossible to square with the requirement of independence. We accept that financial and political accountability of executive and administrative functions requires ultimate oversight by the executive. But the power given to senior political executives to determine policy guidelines, and to oversee the functioning of the DPCI, goes far further than ultimate oversight. It lays the ground for an almost inevitable intrusion into the core function of the new entity by senior politicians, when that intrusion is itself inimical to independence.’⁴³¹

In *Glenister II* the Constitutional Court stated that ‘heightened suspicion can best be explained by a fear that the political elite would exploit the power for its own ends.’⁴³² The majority judgment in *Glenister II* robustly pointed out that ‘what is required is not insulation from political accountability, but only insulation from a degree of management by political actors that threatens imminently to stifle the independent functioning and operations of the unit.’⁴³³ One of the overriding implications of the majority judgment in *Glenister II* is its approach of ‘constitutional principles of good governance and accountability within the fabric of rights

⁴²⁸ Ibid para 163.

‘The main difference between the majority judgment and main judgment: at para 163 - However, two crucial questions remain for determination. The first is whether the Constitution imposes an obligation on the state to establish and maintain an independent body to combat corruption and organised crime. And if it does, the second is whether the specialised unit which the impugned legislation has established, the DPCI, meets the requirement of independence. In answer to the first question, unlike the main judgment, we conclude unequivocally that the Constitution itself imposes that obligation on the state. To the second question, we hold, unlike the main judgment, that the requirement of independence has not been met and consequently that the impugned legislation does not pass constitutional muster.’

⁴²⁹ Ibid.

⁴³⁰ Ibid para 232.

⁴³¹ Ibid para 236.

⁴³² M Bishop & N Raboshakga op ct (n366) at 17-115.

⁴³³ *Genister II* supra (n426) at para 216.

based constitutional order'.⁴³⁴ *Glenister II* also laid the groundwork for other cases that followed to protect key state institutions from political interference. Judgments such as *Justice Alliance*⁴³⁵ and *Democratic Alliance*⁴³⁶ also show this approach of the Court. In *Justice Alliance* and *Democratic Alliance*, the Constitutional Court has alerted us to the 'standards that need to be respected when making appointments to, or organisationally restructuring, independent institutions established under, or necessarily required by, the Constitution to protect the integrity of South Africa's democracy.'⁴³⁷ The Constitutional Court in these cases took a more direct approach in targeting the pathologies of nepotism and corruption (for example, by insisting on proper qualifications for senior appointees and challenging the ANC's policy of cadre deployment).⁴³⁸

Choudhry expounds a set of doctrines, as mentioned earlier in this chapter, that can aid the Constitutional Court to negate some of the consequences of a dominant party democracy. It is particularly his recommendation of an *anti-capture doctrine* that are worth mentioning and illustrate how this doctrine can assist the Constitutional Court greatly in dealing with the challenges of a one-party dominant system. According to Choudhry the *anti-capture doctrine*, originates from various cases setting the independence of institutions. Choudhry argues that courts should not permit the dominant party to capture independent institutions, thus his proposal of this doctrine. Choudhry is of the view that the

'[c]ourts should focus their efforts on strengthening and buttressing the institutional structures that check partisan abuse in dominant party democracies, as opposed to checking those individual abuses themselves. When engaging in constitutional adjudication with respect to the powers and status of independent institutions, the courts should be acutely alert to the fact that they operate within a dominant party democracy and that independent institutions have an additional burden to bear because of the absence of alternation.'⁴³⁹

⁴³⁴ KJ Sing (2014) 'Fighting Corruption a constitutional imperative -the case of Hugh Glenister v the President of South Africa' –(unpublished LLM thesis, University of Pretoria, 2014) at 44.

⁴³⁵ *Justice Alliance* supra (n61), the issue was whether parliament could delegate to the President its power to extend the Chief Justice's term of office.

⁴³⁶ *Simelane judgment* supra (n86). The Court unanimously rescinded the appointment of Menzi Simelane as National Director of Public Prosecutions (NDPP), basing its decision on the constitutional specifications for the position and on incidental findings made by a commission of inquiry about Simelane's reliability as a witness.

⁴³⁷ Roux op cit (n24) at 17.

⁴³⁸ Ibid.

⁴³⁹ Choudhry op cit (n9) at 52-54.

For Choudhry, if the Constitutional Court adopts this approach, it will provide the Court the basis to develop the jurisprudential architecture surrounding independent institutions to ensure they can play their role in checking the partisan abuses of a dominant party democracy, by protecting them from capture by the ANC.⁴⁴⁰ I will suggest that Choudhry's *anti-capture doctrine* is a useful mechanism, or at least a starting point, if the Constitutional Court considers building a formal theoretical framework into its jurisprudence to negate some of the dangers associated with a dominant party. For a Court in a dominant-party democracy to play an effective role in democratic consolidation, it must necessarily theorise the pathologies of one-party dominance and justify its decisions as emanating from its general constitutional mandate to protect the democratic system.⁴⁴¹ The *Glenister II* decision, in my view, is a classic example of how this *anti-capture doctrine* works, because the majority in *Glenister II* was well aware that the political elite would exploit the power for its own ends. It is important to take into account that I do not suggest that the court should adopt Choudhry's anti capture doctrine, because South Africa legal culture does not support this approach. Another judgment that also demonstrates this approach of the Constitutional Court is the *EFF I* judgment, where the Constitutional Court meticulously sets out the important role which the Office of the Public Protector has within our constitutional democracy.

4.5.2 *EFF I* judgment

In this case, the Public Protector investigated allegations of improper conduct or irregular expenditure relating to the security upgrades at the Nkandla private residence of the President of the Republic.⁴⁴² The Public Protector concluded that the President failed to act in line with certain of his constitutional and ethical obligations by knowingly deriving undue benefit from the irregular deployment of State resources.⁴⁴³ She directed that the President, as assisted by certain State organs, should work out and pay a proportionate amount that had unduly accrued to him and his family.⁴⁴⁴ The Public Protector's report was duly submitted to the National Assembly to enable it to exercise its responsibility for oversight over the President and the executive, and to ensure the report's implementation. Instead, the National Assembly appeared to shield the President from having to answer questions on accountability. The National Assembly then created two *ad hoc* committees comprising its members to examine the Public

⁴⁴⁰ Ibid at 56-7.

⁴⁴¹ Roux and Dixon op cit (n309).

⁴⁴² *EFF I* judgment supra (n18) at para 5.

⁴⁴³ Ibid para 10.

⁴⁴⁴ Ibid.

Protector's report, as well as other reports, including the one compiled, also at its insistence, by the Minister of Police. Members of opposition parties in the committee refused to participate in the proceedings.⁴⁴⁵ After endorsing the report by the Minister of Police exonerating the President from liability, and a report to the same effect by its second *ad hoc* committee, the National Assembly resolved to absolve the President of all liability.⁴⁴⁶ As a result, the President did not comply with the remedial action ordered by the Public Protector. The Economic Freedom Fighters (EFF) and other political parties took the matter to the Constitutional Court. The Constitutional Court declared the President's refusal to comply with the steps taken by the Public Protector in respect of certain security upgrades at his private home at Nkandla and the decision of the National Assembly to absolve the President from complying with the steps to be unconstitutional. For the Constitutional Court, the executive led by the President and Parliament bears very important responsibilities and plays a crucial role in the affairs of our country. The Court, in its introductory paragraphs, strongly reminded the other branches of government of its role within our constitutional democracy by stating that

[c]ertain values in the Constitution have been designated as foundational to our democracy. This in turn means that as pillar-stones of this democracy, they must be observed scrupulously. If these values are not observed and their precepts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude. In a State predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our democracy.⁴⁴⁷

The Constitutional Court, at the same time, displayed some respect for the separation of powers doctrine by acknowledging the importance of allowing the other branches of government – in this case the legislature – to fulfil its mandate. The Court thus noted that ‘they [members of the legislature] deserve the space to discharge their constitutional obligations unimpeded by the Judiciary, save where the Constitution otherwise permits.’⁴⁴⁸ One commentator observed that the ‘real test of a country’s prospects is not merely that it adopts a good Constitution, as we did, but whether the constitution’s checks and balances work when the rubber hits the road’.⁴⁴⁹

⁴⁴⁵ Ibid para 12.

⁴⁴⁶ Ibid.

⁴⁴⁷ *EFFI* judgment at para 1.

⁴⁴⁸ Ibid para 90.

⁴⁴⁹ M Maimane ‘Protecting South Africa’s fragile democracy’ 22 June 2016 available at <https://www.da.org.za/2016/06/protecting-south-africas-fragile-democracy/>, [accessed on September 2017].

In reminding the other two branches of government what will happen if they failed to uphold the Constitution, the Constitutional Court pointed out cautiously:

‘For this reason, public office-bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck.’⁴⁵⁰

What was alarming in this case was the President’s and Parliament’s conduct. In Chapter Two of this thesis, I have mentioned the threat that a powerful executive branch of government holds for the separation of powers’ concomitant checks and balances system. The Constitutional Court, in its order, found that the President had failed to ‘uphold, defend and respect the Constitution as the supreme law of the Republic’ and that he acted in breach of the Constitution.⁴⁵¹ The Court held that this failure was manifest from the substantial disregard for the remedial action taken against him by the Public Protector in terms of her constitutional powers.⁴⁵² What is also important to take in from this case is, in particular, how the Constitutional Court reminded the National Assembly of its constitutional obligation to hold members of the executive accountable and to put effective mechanisms in place to achieve that objective and maintain oversight of their exercise of executive authority.⁴⁵³

What makes this case different compared to *UDM* floor crossing and *Glenister I* above, for example, is the ‘extent to which the Court’s attention has been directed at the conduct of *particular* individuals and the taking of *particular* political-branch decisions’.⁴⁵⁴ Roux and Dixon observed that

‘[t]he significance of the *Nkandla judgment* is that it ‘signalled a clear shift towards enlisting the Chapter 9 institutions’ (institutions supporting constitutional democracy) as partners in the enforcement of the Constitution; and showed that the Court was prepared to directly criticize a senior national leader and identify his behaviour as a threat to constitutional democracy’.⁴⁵⁵

This case shows how the Constitutional Court is prepared to protect the democratic space more forcefully by holding the other two branches of government to account and describing in detail

⁴⁵⁰ *EFF I judgment* at para 1.

⁴⁵¹ *EFF I judgment* at para 83.

⁴⁵² *Ibid.*

⁴⁵³ *UDM secret ballot case* supra (n19) at para 40.

⁴⁵⁴ Roux & Dixon supra (n309) at 8.

⁴⁵⁵ *Ibid.*

the appropriate role that each should fulfil within the separation of powers scheme to comply with their constitutionally-imposed checks and balance duties, while at the same time taking care not to overstep its judicial mandate.

4.5.3 *UDM secret ballot judgment*

The case has its origins in a decision by the President to remove the Minister of Finance and his deputy. Immediately after their removal, South Africa's economy was downgraded by certain ratings agencies to sub-investment or 'junk' status.⁴⁵⁶ These events prompted three opposition political parties, the United Democratic Movement (UDM), Economic Freedom Fighters (EFF), and Democratic Alliance (DA), to propose a motion of no confidence in the President. The UDM asked the Speaker to prescribe a secret ballot, concerned that ruling party MPs would otherwise come under pressure.⁴⁵⁷ The Speaker declined, claiming she had no power to order a secret ballot.⁴⁵⁸ The applicants sought to persuade the Constitutional Court that the Speaker not only had the power, but that she was obliged to exercise it.

In a strongly worded unanimous judgment penned by Chief Justice Mogoeng, the Constitutional Court found that the Speaker of the National Assembly has the constitutional power to prescribe that voting in a motion of no confidence in the President of the Republic of South Africa be conducted by secret ballot.⁴⁵⁹ A prominent aspect of the judgment, pertinent for this thesis, is that the *UDM* case can be viewed as an example of how the Court responded very positively to the one-party dominance by trying to strengthen the legislature *vis-à-vis* the party and *vis-à-vis* the executive, thus enhancing the possibility of a more effective system of checks and balances in South Africa. The South African Constitution does not contain any provisions regulating the relationship between political parties and their public representatives who serve in the various legislatures and executives.⁴⁶⁰ In this case, the Constitutional Court provided considerable insight of the importance of a dominant political party's relationship

⁴⁵⁶ *UDM secret ballot judgment* supra (n19) at para 13.

⁴⁵⁷ *Ibid* para 15.

⁴⁵⁸ *Ibid* para 17.

⁴⁵⁹ *Ibid* para 90. The Court held the following:

‘Our interpretation of the relevant provisions of the Constitution and the rules makes it clear that the Speaker does have the power to authorise a vote by a secret ballot in motion of no confidence proceedings against the President, in appropriate circumstances. The exercise of that power must be duly guided by the need to enable effective accountability, what is in the best interests of the people and obedience to the Constitution.’

⁴⁶⁰ *Ibid* at 41.

with the executive and legislature understood in light of our current electoral system. The Constitutional Court held that

‘[a] political party virtually determines who goes to Parliament and who is no longer allowed to represent it in Parliament. Members’ fate or future in office depends largely on the party. The Deputy President, Ministers and Deputy Ministers who are also Members of Parliament, are presidential appointees. *The ruling party has a great influence on, or dictates, who gets appointed or elected as senior office-bearers in Parliament.* Almost invariably the President – although not a Member of Parliament – is the leader of the ruling party. It would be quite surprising if the senior office bearers in Parliament were not appointed or elected with a significant input by the President and other senior party officials. *There are therefore institutional and other risks that Members, particularly of any ruling party, are likely to get exposed to when they openly question or challenge the suitability of their leader(s) for the position of President.* I say leaders advisedly because the logical trend has been to give the highest positions in governance structures to most senior leaders.⁴⁶¹

This paragraph of the judgment is crucial because it shows that the Court is aware of the dangers associated with a dominant party democracy and the influence that a dominant party can have on our trilateral structures of government. Another key aspect in the judgment is the Court’s observation ‘that while all politicians may be expected to be loyal to their political parties, such loyalty should remain compatible with the Constitution.’⁴⁶² The Constitutional Court pointed out that the Constitution takes preference over party loyalty; to demonstrate this point, it is necessary to quote the Constitutional Court at length once more. The Constitutional Court held that:

‘... Members are required to swear or affirm faithfulness to the Republic and obedience to the Constitution and laws. Nowhere does the supreme law provide for them to swear allegiance to their political parties, important players though they are in our constitutional scheme. Meaning, in the event of conflict between upholding constitutional values and party loyalty, their irrevocable undertaking to in effect serve the people and do only what is in their best interests must prevail. This is so not only

⁴⁶¹ Ibid para 76.

⁴⁶² I Rautenbach ‘Vonnisbespreking: Teenmaat reëls vir die uitvoerendegesag se kaping van wetgewendekontrolefunksies in ’n parlementêre uitvoerende stelsel *Economic Freedom Fighters v Speaker of the National Assembly* 2016 5 BCLR 618 (KH)’ (2016) *Litnet Akademies* – (English translation of title, ‘Measures to counter the executive’s capturing of legislative control functions in a Parliamentary executive system’) at 762.

because they were elected through their parties to represent the people, but also to enable the people to govern through them, in terms of the Constitution.⁴⁶³

This paragraph also highlights the Court's awareness of the challenges of a dominant party democracy, specifically the issue of strict political party discipline. What is evident from the two passages quoted is that the Constitutional Court is more aware and alive to the challenges of a dominant party democracy. Some analysts warn that the judgment may, in time, be seen as impelled by the current political crises, but creating its own constitutional risk.⁴⁶⁴ This is so because the judgment may in time be shown to have diminished the openness of parliamentary proceedings and the role of political parties in South Africa's proportional representation system.⁴⁶⁵ As mentioned earlier in this chapter, the Langa Court also took this approach when it had to deal with a dominant ANC in very uncertain political period in South Africa. The Court needed to take a strong stand against corruption and maladministration, while fostering a vibrant civil society capable of counter-balancing, and eventually providing the basis for an effective political opposition to, the ANC. This judgment is a pertinent illustration of a result of the current political situation in which the present Constitutional Court exists, and which, in my view, also called for a more forceful approach of the Constitutional Court against the political branches of government and the ruling party to protect the democratic and constitutional project in South Africa.

⁴⁶³ Ibid para 79.

⁴⁶⁴ J Brickhill 'South African Constitutional Court allows secret ballot for motion of no confidence in the president' available at <http://ohrh.law.ox.ac.uk/south-african-constitutional-court-allows-secret-ballot-for-motion-of-no-confidence-in-president/>, [accessed on 10 August 2017].

⁴⁶⁵ Ibid.

4.5.4 *EFF 2* judgment (Impeachment judgment)

The *EFF 2* judgment follows the *EFF 1* judgment. The matter is connected with the *EFF 1* judgment and the President's failure to implement the Public Protector's remedial action for some time after the Public Protector had released her report on the Nkandla project. The *EFF 2* case was centred around the interpretation of section 89 of the Constitution, that regulates the President's removal from office. Four judgments were written in this case, a majority judgment and minority judgment and two concurring judgments. The minority judgment penned by Zondo DCJ, found that the National Assembly had not failed to put in place mechanisms that could be used to hold the President accountable for his failure to implement the Public Protector's remedial action.⁴⁶⁶ The minority judgment also argued that the National Assembly had put in place a mechanism that could be used effectively for the removal of a President in terms of section 89.⁴⁶⁷ With regard to the issue whether the National Assembly had failed to hold the President accountable for his failure to implement the Public Protector's remedial action, Zondo DCJ took the view that the National Assembly had held the President accountable in this regard.⁴⁶⁸

My focus will be on the approach adopted by the majority judgment written by Justice Jafta. The majority judgment accurately highlights the dangers associated with a dominant party democracy, a similar position adopted in the *UDM* secret ballot judgment discussed above. The majority judgment concludes that the National Assembly failed to hold the President to account as was required by section 89(1) of the Constitution.⁴⁶⁹ The majority judgment ordered the National Assembly to make such rules regulating the section 89(1) procedure within 120 days.⁴⁷⁰ Furthermore, the majority judgment directed the National Assembly to initiate a process under section 89(1) in terms of the newly developed rules within 180 days. The majority judgment made an interesting observation concerning the ANC dominance in the impeachment process. The majority judgment observed that:

'[t]he majority party would have majority representation. This raises the risk of an impeachment complaint not reaching the Assembly, even if the resolution establishing the committee were to stipulate that what was before the committee may not be decided by consensus, as provided in rule 255. A decision by members of the majority party in

⁴⁶⁶ Ibid para 29-39.

⁴⁶⁷ Ibid.

⁴⁶⁸ Ibid..

⁴⁶⁹ Ibid para 208.

⁴⁷⁰ Ibid.

the ad hoc Committee may prevent an impeachment process from proceeding beyond the committee, to shield a President who is their party leader.⁴⁷¹

The majority judgment, in my view, meticulously highlights the influence of political parties on the legislature and also relying on the *UDM* secret ballot judgment, discussed above, to support its stance. I have extensively dealt with this pathology of a dominant party with reference to the influence of a non-parliamentary wing on the parliamentary wing of Parliament in Chapter Three. To illustrate this point, I will cite some relevant paragraphs of the judgment to demonstrate the Court's awareness of the dangers associated with a dominant party democracy. The majority found that

‘[t]he fact that members of the Assembly assume office through nomination by political parties ought to have a limited influence on how they exercise the institutional power of the Assembly. Where the interests of the political parties are inconsistent with the Assembly's objectives, members must exercise the Assembly's power for the achievement of the Assembly's objectives. For example, members may not frustrate the realisation of ensuring a government by the people if its attainment would harm their political party. If they were to do so, they would be using the institutional power of the Assembly for a purpose other than the one for which the power was conferred. This would be inconsistent with the Constitution.

Political parties themselves derive their existence and power from the Constitution, first and foremost. Section 19 affords every citizen the right to form a political party and the right to participate in the activities of a party of his or her choice, including the right to campaign for a political party or its causes. But all these rights must be exercised in a manner that is consistent with other provisions of the Constitution. They cannot be invoked to undermine the powers and functions of the Assembly. This is the backdrop against which the claims made by the applicants must be assessed.⁴⁷²

This judgment also strongly echoed the importance of the National Assembly to fulfil its constitutional obligation without outside influence from the political parties and that the Constitution takes preference over the interest of a political party – a similar view as adopted in the *UDM* secret ballot case. A much publicised issue was that the judiciary had overreached in this matter; on the contrary, the majority judgment did not breach the separation of powers doctrine and such a contention was correctly dismissed by Justice Jafta and Justice Froneman. The majority judgment aptly points out that ‘this cannot be and is not

⁴⁷¹ Ibid para 192.

⁴⁷² Ibid para 144 -145.

a breach of the principle of separation of powers but consists in no more than the Court fulfilling its constitutionally assigned duty.⁴⁷³

4.6 Conclusion

Glenister II and *EFF I* judgments show that the Constitutional Court can ‘reach deeper’ when it wants to and indicate that the judges are only just beginning to grasp the challenges and threats of a dominant party democracy. In my view, these two judgments clearly indicate that the ‘South African Constitutional Court can be an effective tool to manage the ANC’s continued political dominance nationally’⁴⁷⁴ and that it is prepared to protect the democratic space at all costs against corruption and the capturing of key institutions that are needed to protect our democracy. In the two *EFF* judgments and the *UDM* secret ballot case, on the other hand, the Constitutional Court meticulously reminded the two political branches of its constitutional role and mandate in our constitutional democracy. More importantly, the Constitutional Court also provided a stern warning of what the consequences will be if the executive and legislature do not uphold their constitutional obligation. What the Constitutional Court should do is to be ‘alive to the ways in which constitutional structures could be manipulated by a political party’; the Constitutional Court thoroughly did this in all these judgments mentioned above. In addition, these cases illustrate that the Constitutional Court of South Africa is moving in the right direction by at least acknowledging the challenges that a dominant party democracy poses to our constitutional democracy.⁴⁷⁵ Previously the Court was not prepared to become involved in political situations, as mentioned earlier in other judgments – *Glenister I* and *UDM* floor crossing case.

Although the Court, in all of these judgments acknowledges the dangers linked to a dominant party democracy, the Constitutional Court displays considerable respect for the separation of powers doctrine. The judges still pepper their decisions with references to the constitutional text and the reasons for its adoption, and still avoid describing the ANC’s dominance of South

⁴⁷³ Ibid para 220. Also see para 285, where Justice Froneman in his concurring judgment states:

‘Thus the second judgment does nothing more than interpret section 89(1) and direct the National Assembly to act in accordance with the Constitution. It attempts to provide the National Assembly with guidance on the tools necessary to enable it to fulfil its constitutional duty, to hold the President to account in the direst of situations. It does not seek to tell the National Assembly how to use those tools.’

⁴⁷⁴ Bishop & Raboshakga op cit (n366) at 17-115.

⁴⁷⁵ J Klaaren ‘Dominant democracy in South Africa? A response to Choudhry’ (2009) *Constitutional Court Review* at 87 at 94.

African politics as the central threat to the constitutionally prescribed democratic system. In the *UDM secret ballot case*, the Court took a self-restrictive approach: the Court made it clear that it was open to the Speaker adopting a process of this kind, and that the Speaker had a constitutional duty to uphold the values of the Constitution – including openness – in this context, but that it was ultimately for the Speaker and not the Court to stipulate the relevant voting procedure.⁴⁷⁶ In the *EFF 2* judgment, the Court adopted a similar stance.

The *Glenister II* judgment, in my view, is characteristic of judicial activism as a result of the Court's direct and robust approach to protecting the democratic space against the threats of a dominant party democracy. This case illustrates that constitutional courts, even those that work in a fairly formalist legal culture, do possess some measure of agency. The Constitutional Court has been very successful in protecting the independence of key institutions in South Africa. The South African jurisprudence on independent institutions has been good and seems to suggest that the courts understand the special importance that those institutions play in a dominant party democracy.⁴⁷⁷ Choudhry, in his 2009 article, proposes that the Constitutional Court should look at developing an *anti-capture doctrine*, which comes from the case law on independent institutions. The *Glenister 2* judgment is an apt illustration of how this doctrine can be used to check the harms that flow from the ANC'S dominant status.

⁴⁷⁶ *UDM secret ballot case* supra (n19) para 93.

⁴⁷⁷ Choudhry op cit (n9) at 53.

CHAPTER FIVE: CONCLUSION

Would South African democracy, and South Africans themselves, have been better off had the Court taken a more active and forceful approach or developed a formal theoretical framework in dealing with the dangers of a dominant party democracy?⁴⁷⁸ In my view, as argued throughout this thesis, the answer must be in the negative. I feel that, by not taking an active role or confrontational approach to the dominance of the ANC, the Constitutional Court of South Africa has managed to keep its legitimacy and integrity intact. In Chapter Two of this thesis, I have argued that the judiciary's, in particular the Constitutional Court's, judicial self-restraint approach provides a very useful method to the Court to avoid any conflict or confrontation with the two political branches of government. This is indicative of a very formalist legal culture and a conservative approach by the Constitutional Court to the separation of powers, which are evident from some of the cases mentioned in this thesis.⁴⁷⁹ What is important to bear in mind is that the very existence of a dominant party at the centre of South African politics (as outlined in Chapter Three) has also greatly influenced the Constitutional Court's approach towards the political branches and the ruling party, the ANC, in particular, regarding how confrontational the court should be.⁴⁸⁰ The South African Constitutional Court plays an important role in democratic politics, but one that is far more deferential to the elected branches, and this approach suits South Africa, in my view.⁴⁸¹ Thus is so because, in a single-party system or dominant party system such as South Africa, the ruling party (the ANC in South Africa) specifically targets key institutions and employs strategies used by dominant party democracies, such as, blurring the line between the State and Party, state capture and cadre deployment, as mentioned in Chapter Three of this thesis, and, where coherent political forces exist, such a role is both possible and more appropriate.⁴⁸² If the Court has to take a more forceful approach, it would place itself on a direct collision course with the ANC,⁴⁸³ which may put the Court's very existence at risk – and our hard-fought democracy.⁴⁸⁴

⁴⁷⁸ Ibid.

⁴⁷⁹ Ibid.

⁴⁸⁰ Ibid at 365.

⁴⁸¹ Ibid.

⁴⁸² Ibid.

⁴⁸³ Bishop & Raboshakga op cit (n366) at 17-113.

⁴⁸³ Ibid.

⁴⁸⁴ Ibid.

In Chapter Four of this thesis I have outlined the criticism of scholars concerning this deferential and constrained approach adopted by the Constitutional Court in protecting the democratic space. In cases that turn on substantive principles related to democracy, such as the *UDM* floor crossing case and *Glenister I*, the Court failed to ‘act counter-majoritarian’ in order to protect the majoritarian democracy that the constitution creates by striking down laws that threaten that democracy.⁴⁸⁵ This approach of the South African Constitutional Court has led these scholars to the belief that the Court should develop substantial theoretical frameworks to deal with the challenges of a dominant party democracy, such as the Indian and Colombian Constitutional Courts have done. As highlighted in Chapter Four, a formal theoretical jurisprudence is not a feasible option for the South African Constitutional Court at this stage. Roux is of the view that it ‘is significant that the [South African Constitutional] Court operates in a legal tradition that generally disfavours resort to substantive political assessments of the kind’ that Issacharoff and Choudhry and others advocate.⁴⁸⁶ More importantly, South African ‘legal culture does not support substantive political analyses of the problems confronting constitutionalism as a basis for judicial decision-making.’⁴⁸⁷ Importantly, this does not mean that the Court will never engage in developing a formal theoretical jurisprudence to counter the negative consequences of a dominant party democracy. I have pointed out in Chapter Four that Choudhry’s *anti-capture doctrine*, in my view, is a very useful mechanism that can aid the Constitutional Court to counterweigh the challenges and threats associated with a dominant party democracy but for the reasons set out above South Africa’s legal culture does not support this doctrine.

In my view, the Constitutional Court has not been a passive actor as most scholars contend. In Chapter Four of this thesis, I have put forward that, as the threat of a dominant party democracy has become more noticeable now and an ever-great threat to our hard-fought democracy, the Constitutional Court has altered its approach in dealing with the challenges and dangers of a dominant party democracy. ‘The [South African Constitutional] Court has aimed to improve the quality of democratic institutions by working on some of the characteristic problems with dominant-party systems.’⁴⁸⁸ The Constitutional Court has, at times, taken actions to prop up other institutions that are needed to provide accountability.⁴⁸⁹

⁴⁸⁵ Daniels & Brickhill op cit (n145) at 404.

⁴⁸⁶ Roux op cit (n15).

⁴⁸⁷ Ibid.

⁴⁸⁸ D Landau, *A Dynamic Theory of Judicial Role*, (2014) 55 *B.C.L. Rev.* 1501 (2014), available at <http://lawdigitalcommons.bc.edu/bclr/vol55/iss5/4> at 1525, [accessed on 10 August 2017].

⁴⁸⁹ Roux op cit (n352) at 1.

For example, the Court imposed limits on the ANC's ability to assert control over an independent institution, the National Prosecution Authority, charged with investigating cases of political corruption.⁴⁹⁰ *Glenister II*, *EFF I* and the two North Gauteng High Court decisions discussed in Chapter Three of this thesis, are apt illustration of this approach. It is particularly the Court's role in protecting key institutions from being captured by a dominant party that shows that the judiciary can play a crucial role to counterweigh some of the challenges of a dominant party democracy. The Constitutional Court should continue to find and create other avenues to negate the threats associated with a dominant party democracy as canvassed in Chapter Three of this thesis. One way the Constitutional Court can do this is to develop a formal theoretical framework surrounding independent institutions (such as the *anti-capture doctrine*) to ensure they can play their role in checking the partisan abuses of a dominant party democracy. The *Glenister II* judgment and the more recent *EFF I* judgment show how this can be realised. The recent North Gauteng High Court cases are perhaps a much more excellent demonstration of how the anti-capture doctrine works in practice. In these two judgments discussed in Chapter Three, the High Court made significant findings and had to reach deep in protecting the democratic space against the abuse and threats of a dominant executive branch and the dangers associated with a dominant party democracy, such as state capture. Some commentators encourage us to look at the idea of dominant party democracy

*'less as a zero-sum game, but rather as a manifestation of democracy that poses particular institutional challenges that demand deeper, more deliberate examination and creativity to respond to the resultant situation as is, rather than lamenting the lack of other idealised notions of what a liberal democracy ought to be.'*⁴⁹¹

In my view, the judiciary are steering towards that direction. The Court's role as upholder of the Constitution (including the upholder of constitutional democratic principles) often requires its intrusion into the terrain of the other two branches of government to protect the democratic space' the Constitutional Court hardly ever does this. What is evident from all the cases canvassed in this thesis is that the judiciary has been alive to the tension between its intervention to protect democracy and the potential threat to democracy that its intrusion presents. Theunis Roux, while not always satisfied with the work of the Court, contends that, overall, the Court has deftly negotiated a very

⁴⁹⁰ Ibid.

⁴⁹¹ Sibanda op cit (n1) at 45-6. Also see Choudhry op cit (n9) at 1-86.

challenging political environment while effectively shaping law to address the nation's difficulties.⁴⁹² Roux argues that the Court has

‘stuck closely to the constitutional text and never once suggested that the problems it was asked to address were symptomatic of some more general breakdown in the ANC's capacity to govern associated with its ongoing dominance of South African politics.’⁴⁹³

Most scholars who have criticised and labelled the Court as a constrained court often failed to take into the account the political and legal context in South Africa, within which the Court operates, and downplayed the legal-institutional and political constraints affecting the Constitutional Court when it decided the case.⁴⁹⁴ This is the main reason that I undertook to do this research – to investigate the role of the Constitutional Court in the context of a dominant party democracy. By viewing the role of the Court within this context, it becomes clear why the court took a more deferential and less active approach. In South Africa, the capturing of key institutions by a dominant party democracy is a grave concern, as highlighted in this thesis. However, the recent judgments mentioned in Chapter Four do signal a willingness on the part of the Constitutional Court to push back against the two political branches of government and the ruling party, the ANC, ‘rightly beleaguered by charges of rampant corruption and a failure to make good on the promise of liberation.’⁴⁹⁵ In my view this is an encouraging approach of the Constitutional Court that indicates that the Constitutional Court can be an effective tool to counterweigh the challenges of a dominant party democracy without encroaching on the terrain of the two political branches of government.

⁴⁹² Ellman op cit (n390) at 90. Roux op cit (n16) at 220-31.

⁴⁹³ Roux op cit (n15) at 63.

⁴⁹⁴ Roux op cit (n16) at 12.

⁴⁹⁵ Stu Woolman ‘Security Services’ in *Woolman and Bishop et al* (2013) *Constitutional law of South Africa* loose-leaf 2ed 23 at 23B -91.

6. Bibliography

PRIMARY SOURCES:

LEGISLATION:

Constitution of the Republic of South Africa Act, 200 of 1993.

Constitution of the Republic of South Africa, 1996.

The National Prosecuting Authority Act 32 of 1998.

CASES:

AParty and Another v The Minister for Home Affairs and Others, Moloko and Others v The

Minister for Home Affairs and Another (CCT 06/09, CCT 10/09) [2009] ZACC 4; 2009 (3)

SA 649 (CC); 2009 (6) BCLR 611 (CC).

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others

(CCT 27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).

Corruption Watch (RF) NPC and Another v President of the Republic of South Africa and Others; Council for the Advancement of the South African Constitution v President of the Republic of South Africa and Others (62470/2015) [2017] ZAGPPHC 743.

De Lange v Smuts NO and Others 1998 (3) SA 785 (CC).

Democratic Alliance v President of South Africa and Others (CCT 122/11) [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC).

Doctors for life international v Speaker of the National Assembly and others 2006 (6) SA 416, 2006 (12) BCLR 1399 (CC).

Economic Freedom Fighters v Speaker of the National Assembly & Others; Democratic Alliance v Speaker of the National Assembly (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC).

Economic Freedom Fighters and Others v Speaker of the National Assembly and Another (CCT76/17) [2017] ZACC 47.

Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744 (CC).

Freedom Under Law v National Director of Public Prosecutions and Others (26912/12)

[2013] ZAGPPHC 271; [2013] 4 All SA 657 (GNP); 2014 (1) SA 254 (GNP); 2014 (1)

SACR 111 (GNP).

Freedom Under Law (RF) NPC v National Director of Public Prosecutions and Others

(89849/2015) [2015] ZAGPPHC 759.

Glenister v President of the Republic of South Africa & Others 2009 (1) SA 287 (CC).

Glenister v President of the Republic of South Africa & Others 2011 (3) SA 378 (CC).

Hlophe v Constitutional Court of South Africa and Others (08/22932) [2008] ZAGPHC 289.

International Trade Administration Commission v SCAW South Africa (Pty) Ltd (CCT 59/09)

[2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC).

Justice Alliance of South Africa v President of the RSA 2011 (5) SA 388 (CC).

My Vote Counts NPC v Speaker of the National Assembly and Others 2016 (1) SA 132 (CC).

National Treasury v Opposition to Urban Tolling Alliance 2012 (6) SA 223 (CC).

National Director of Public Prosecutions and Others v Freedom Under Law (67/2014)

[2014] ZASCA 58; 2014 (4) SA 298 (SCA); 2014 (2) SACR 107 (SCA); [2014] 4 All SA 147 (SCA)

Nilemeza v Helen Suzman Foundation and Another (402/2017) [2017] ZASCA 93; [2017] 3

All SA 589 (SCA); 2017 (5) SA 402 (SCA).

Pharmaceutical Manufacturers Association of SA in re: Ex Parte President of the

Republic of South Africa & Others 2000 (2) SA 674 (CC).

Pikoli v President and Others (8550/09) [2009] ZAGPPHC 99; 2010 (1) SA 400 (GNP).

President of the Republic of South Africa v South African Rugby Football Union 2000 (1) SA 1 (CC).

President of the Republic of South Africa v Office of the Public Protector and Others

(91139/2016) [2017] ZAGPPHC 747.

Prince v Law Society and Others 2002 (3) SA 794 (CC), 2002 (3) BCLR 231 (CC).

S v Shaik and Others [2008] ZACC7; 2008 (5) SA 354 (CC); 2008 (8) BCLR 834 (CC).

South African Association of Personal Injury Lawyers v Heath 2001 (1) SA 883 (CC).

United Democratic Movement v President of the Republic of South Africa 2003 (1) 495 (CC).

United Democratic Movement v Speaker of the National Assembly and Others (CCT89/17)

[2017] ZACC 21.

Zuma v National Director of Public Prosecutions (8652/08) [2008] ZAKZHC 71; [2009] 1

All SA 54 (N); 2009 (1) BCLR 62 (N).

Zuma v Democratic Alliance and Others; Acting National Director of Public Prosecutions

and Another v Democratic Alliance and Another (771/2016, 1170/2016) [2017] ZASCA 146.

FOREIGN CASES:

Kesavananda Bharti v Union of India (1973) 4 SCC 225 (India).

Vriend v Alberta [1998] 1 SCR 493.

SECONDARY SOURCES:

BOOKS:

Bishop, M and Raboshakga, N ‘National Legislative Authority’ in *Woolman and Bishop et al*

(2013) 17 -17. *Constitutional law of South Africa* loose-leaf 2ed (2013) Juta, Cape Town,

Chapter 17.

Currie, I and de Waal, J 'The New Constitutional and Administrative Law' (2001)

Lansdowne: Juta.

Currie, I and De Waal J 'The Bill of Rights Handbook' (2005) 5th ed (Juta Cape Town).

De Vos, P and Freedman W 'South African Constitutional Law in Context' (2014) Oxford

University Press, South Africa.

Devenish, G. E. 'A commentary on the South African Constitution' (2004) Reprinted ed.

Durban: Butterworths.

Du Toit, P and de Jager, N 'Friend or Foe? Dominant Party Systems in Southern Africa:

Insights from the Developing World' (2013) 149-170. Cape Town: UCT Press.

Friedman, S 'No easy stroll to dominance, opposition and civil society in South Africa' in H

Gilliomee and C Simkins (eds) *The Awkward Embrace One Party domination and democracy*

(1999).

Gilliomee, H, Myburgh, J and Schlemmer, L (2001) 'Dominant Party Rule, Opposition

Politics and Minorities in "South Africa"', in ed. Roger Southall, *Opposition in South*

Africa's New Democracy, p. 161 <[http://www.kas.de/wf/doc/kas_5086-1522-2-](http://www.kas.de/wf/doc/kas_5086-1522-2-30.pdf?040723124840)

30.pdf?040723124840> [accessed 30 June 2017].

Hoexter, C and Olivier, M 'The Judiciary in South Africa' (2014) Juta and Co Ltd, Cape Town.

Klug, H 'The Constitution of South Africa. A Contextual Analysis' (2010) Portland, OR and Oxford: Hart Publishing.

Locke, J 'Two Treaties of Government II' (1688) Chapter XI.

Lodge, T 'Which criteria are more important in choosing an electoral system in the post-1999 South Africa?' in *EISA* (ed) and R Southall post-election south Africa The Continuing Case for Electoral Reform at 158 *JAE* Volume 3 Number 2, December 2004 Special Issue: South African Elections, 2004.

Montesquieu, CDS 'The Spirit of the Laws Book XI', translated from the original French by T Nugent (1878) Bell & Sons, London.

Mclean, K *Constitutional deference, Courts and socio-economic rights in South Africa* (2009) Pretoria University Law Press, Pretoria.

Olivier, M 'Competing Notions of the Judiciary's Place in the Post –Apartheid Constitutional dispensation' – In 'The Quest for Constitutionalism South Africa since 1994' (2014) Hugh Corder, Veronica Federico and Romano Orru.

Roux, T 'The Politics of Principle: The first South African Constitutional Court 1995- 2005'

(2013) Cambridge University Press, United Kingdom.

Sadie 'Political parties and interest groups' in Venter A (ed.) *Government and politics in the new South Africa*, 2nd ed. Pretoria: Van Schaik Publishers.

Seedorf, S 'Jurisdiction' in *Woolman and Bishop et al* (2013) 4 – 4.128. *Constitutional law of South Africa* loose-leaf 2ed (2013) Juta, Cape Town, and Chapter 4.

Sibanda, S 'Parliament and the Separation of Powers – A Critical Analysis in Relation to Single – Party Dominance' – In 'The Quest for Constitutionalism South Africa since 1994' (2014) Hugh Corder, Veronica Federico and Romano Orru, Dorset Press, Dorchester.

Seedorf, S and Sibanda, S 'Separation of powers' in Woolman et al(eds) *Constitutional law of South Africa* loose-leaf 2ed (2013) Juta, Cape Town, Chapter 12.

Sunstein, CR 'Designing democracy: What Constitutions do' (2001) Oxford University Press, Oxford.

Vile, MJC *Constitutionalism and the Separation of powers* (1967) Liberty Fund, Indianapolis.

Wolff, GL ‘Constitutional Courts and Democracy. Facets of an Ambivalent Relationship’ in K Meberschmidt and DO Lalana eds *Rational law making under review Legisprudence according to the German federal Constitutional Court*, 2016 – Switzerland springer, New York NY springer international publishing 2016.

Woolman, S and Swanepoel, J ‘Constitutional History’ in *Woolman and Bishop et al* (2013) 2 – 2.48. *Constitutional law of South Africa* loose-leaf 2ed (2013) Juta, Cape Town, Chapter 2.

Woolman S ‘Security Services’ in *Woolman and Bishop et al* (2013) 17 -17. *Constitutional law of South Africa* loose-leaf 2ed (2013) Juta, Cape Town, Chapter 23.

JOURNALS:

Botha, H, Schaks, N and D Steiger ‘The Current State of Democracy in South Africa’ *Verfassung und Recht in Übersee VRÜ* 48 (2015).

Brooks, H ‘The Dominant Party System: Challenges for South Africa’s Second Decade of Democracy’ (2004) *EISA Occasional Paper* n. 25 (accessed at <http://www.eisa.org.za/PDF/OP25.pdf%20December%202013>”).

Budlender, G ‘People’s power and the courts’ – Bram Fischer Memorial Lecture (2011) *27 South African Journal on Human Rights* 582.

Butler, A 'The State of the South African Presidency', *The Journal of the Helen Suzman foundation*, Issue 71, November 2013.

Choudhry, S "'He had a mandate": The South African Constitutional Court and the African National Congress in a dominant party democracy' (2009) *Constitutional Court Review* 1.

Daniels, RN and Brickhill, J 'The Counter-Majoritarian Difficulty and the South African Constitutional Court' Volume 25 Number 2 *Penn State International Law Review* Article 2 9-1-2006.

Davis, D 'Separation of powers: Juristocracy or democracy' 2016 *SALJ* 258.

De Vos, P 'It's my party (and I'll do what I want to)? Internal party democracy and section 19 of the South African Constitution' 2015 *SAJHR* 30.

Dent, K and Kroetze, I 'Minority Rights in the South African Context: An exploration of the counter-majoritarian dilemma' *Stellenbosch Law Review* 2015: Volume 26 Part 3, 445-69.

Devenish, GE 2003 'the doctrine of separation of powers with special reference to events in South Africa and Zimbabwe' *THHR* 66 (1).

Du Toit, P and De Jager, N 'South Africa's Dominant-Party System in Comparative Perspective' (2013) *Taiwan Journal of Democracy*, Volume 10, No. 2: 93-113.

Ellmann, S 'The struggle for the rule of law in South Africa' 60 *N.Y.L. SCH. L. REV.* 57 (2015-2016).

Ferim, V 'Flaws in Africa's one-party democracies: the case of Cameroon and South Africa' (2013) Vol 7 (7) *Cameroon African Journal of Political Science and International Relations* 304.

Hulme, D and Stephen Pete, 'Vox Populi? Vox Humbug! Rising Tension between the South African Executive and Judiciary Considered in Historical Context-Part One' (2012) 15 *PER/PELJ* 16.

Issacharoff, S 'Constitutional Courts and Consolidated Powers' (2014) *New York University Public Law and legal Theory Working Papers*, Paper 459.

Issacharoff, S 'Constitutional Courts and Democratic Hedging', *Georgetown Law Journal*, 99, 4 (2011).

Klaaren, J 'Dominant democracy in South Africa? A response to Choudhry' (2009) *Constitutional Court Review* at 87 at 94.

Klare, K 'Self – realization, human rights, and separation of powers: A democracy – seeking approach' 2015 *Stell LR* 445 at 452.

Labuschagne, P 'The Doctrine of Separation of Powers and Its Application in South Africa' (2004) 23 *Politeia* 87.

Labuschagne, P 'Trias politica as guiding constitutional principle in the modern state: Obsolete relic or constitutional necessity?' (2006) *Politeia* Vol 25 No1 pp18-29 at 25.

Labuschagne, P 'Legislative immobility and judicial activism: the impact on the separation of powers in South Africa' Volume 38, Issue 1, Jun 2013, p. 126 – 141 *Journal for Contemporary History*.

Landau, D *A Dynamic Theory of Judicial Role*, 55 *B.C.L. Rev.* 1501 (2014), available at <http://lawdigitalcommons.bc.edu/bclr/vol55/iss5/4> at 1525 [accessed on 10 August 2017].

Landau, D 'Political Institutions and Judicial Role in Comparative Constitutional Law', 51 *Harv. Int'l L.J.* 319 (2010).

D Landau, 'A Dynamic Theory of Judicial Role', 55 *B.C.L. Rev.* 1501 (2014), available at <http://lawdigitalcommons.bc.edu/bclr/vol55/iss5/4> [accessed on September 2016].

Langa, PN 'The separation of powers in the South African Constitution' – A delicate balance:

The place of the judiciary in a constitutional democracy (2006) 22 *SAJHR*.

McCeldowney, J 'One party dominance and democratic constitutionalism in South Africa'

2013 *TSAR* 1. 269.

Moseneke, D 'Striking a Balance between the Will of the People and the Supremacy of the

Constitution' (2012) 129 *South African Law Journal* 9.

Mojapelo, P 'The doctrine of separation of powers (a South African perspective)' April 2013

The Advocate at 39.

Mendes, CH 'Fighting for their place: constitutional courts as political actors. A reply to

Heinz Klug' (2010) 3 (1) *Constitutional Court Review*.

Ngcobo, S 'South Africa's transformative Constitution: Towards an appropriate doctrine of

separation of powers' (2011) 22 *Stell LR*37.

O'Regan, K 'Checks and Balances Reflections on the Development of The Doctrine of

Separation of Powers under the South African Constitution' (2005) 8 *PER/PELJ* 120/150,

122/150.

Pieterse, M 'Coming to terms with the judicial enforcement of socio-economic rights'

(2004) 20 *South African Journal on Human Rights* 383.

Roux, T 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009)

International Journal of Constitutional Law, 7: 106–38.

Roux, T 'The South African Constitutional Court's Democratic Rights Jurisprudence'

(2013)5 *CONST. CT.REV.* 33, 63.

Roux, T 'Constitutional Courts as Democratic Consolidators: Insights from South Africa after

20 Years', *Journal of Southern African Studies*, (2016) 42:1, 5-18,

Roux, T 'The Langa Court: Its distinctive character and legacy' 2015 *Acta Juridica* 33.

Sang, O 'The Separation of Powers and New Judicial Power: How the South African

Constitutional Court plotted its course' *Elsa Malta Law Review*

http://www.elsamaltalawreview.com/sites/elsamaltalawreview.com/files/imce_uploadDs/09b.p

df - [accessed on 20 August 2017].

Solik G 'Is South Africa's Electoral System in Urgent Need of Change?' *The Journal of the*

Helen Suzman Foundation Issue 72 April 2014.

Southall, R 'Dominant party debate in South Africa' (2005) *African Perspective*.

M Swart and T Coggin 'The Road Not Taken: Separation of Powers, Interim Interdicts, Rationality Review and E-Tolling' *Constitutional Court Review* 5 (2014) 346 – 366.

Twala, C 'The African National Congress (ANC) and the Cadre Deployment Policy in the Post-Apartheid South Africa: A Product of Democratic Centralisation or a Recipe for a Constitutional Crisis?' (2014) *Journal of Social Science – Interdisciplinary reflection of contemporary society* Vol 41 (2) 159 -165.

Van der Vyver, JD 'Separation of Powers' (1993) (8) *South African Public Law* 177.

Venter, F 'The Politics of Constitutional Adjudication' (2005) *ZaöRV*, 129-166.

Wolf, L 'Democratic representation: A critical assessment of the current South African electoral system' (2015) *SALJ* 780 at 802-3.

INTERNET RESOURCES:

Brickhill, J 'South African Constitutional Court Allows Secret Ballot for Motion of No

Confidence in the President' available at [http://ohrh.law.ox.ac.uk/south-african-](http://ohrh.law.ox.ac.uk/south-african-constitutional-court-allows-secret-ballot-for-motion-of-no-confidence-in-president/)

[constitutional-court-allows-secret-ballot-for-motion-of-no-confidence-in-president/](http://ohrh.law.ox.ac.uk/south-african-constitutional-court-allows-secret-ballot-for-motion-of-no-confidence-in-president/) [accessed

on 10 August 2017].

Burger J ‘Political interference weakening the rule of law in SA’ 27 September 2016

available at [https://issafrica.org/iss-today/political-interference-weakening-the-rule-of-law-](https://issafrica.org/iss-today/political-interference-weakening-the-rule-of-law-in-sa)

in-sa 27 September 2016, accessed on September 2017.

Barnard-Naude, J ‘Zuma reignites separation of powers debate’ available at

[http://thoughtleader.co.za/jacobarnardnaude/2011/11/02/zuma-reignites-separation-of-](http://thoughtleader.co.za/jacobarnardnaude/2011/11/02/zuma-reignites-separation-of-powers-debate/)

powers-debate/ [accessed on September 2016].

‘Betrayal of the promise: How South Africa is being stolen’ May 2017 [http://pari.org.za/wp-](http://pari.org.za/wp-content/uploads/2017/05/Betrayal-of-the-Promise-25052017.pdf)

content/uploads/2017/05/Betrayal-of-the-Promise-25052017.pdf [accessed on 15 June 2017].

‘Cadre deployment: denialism is to the disadvantage of South Africans’

Available at [https://www.da.org.za/archive/cadre-deployment-denialism-is-to-the-](https://www.da.org.za/archive/cadre-deployment-denialism-is-to-the-disadvantage-of-south-africans/)

disadvantage-of-south-africans/ March 29, 2010 *in news* [accessed on May 2017].

Calland, R ‘Are judges in SA under threat or do they complain too much?’ 21 August 2015

available at [https://mg.co.za/article/2015-08-21-are-judges-in-sa-under-threat-or-do-they-](https://mg.co.za/article/2015-08-21-are-judges-in-sa-under-threat-or-do-they-complain-too-much)

complain-too-much – *Mail and Guardian* [accessed on 20 May 2017].

De Vos, P ‘On the State, The Party and the Scorpions’ available at

<https://constitutionallyspeaking.co.za/on-the-state-the-party-and-the-scorpions/> [

accessed on 2 July 2016].

De Vos ‘Who will protect our parliament against the president and his scorecards?’ available

at *constitutionally speaking*: *[http://constitutionallyspeaking.co.za/who-will-protect-our-](http://constitutionallyspeaking.co.za/who-will-protect-our-parliament-against-the-president-and-his-securocrats/)*

parliament-against-the-president-and-his-securocrats/ [accessed on 20 May 2017].

De Vos, P ‘Political Parties v Constitutional Democracy’ available at

<http://constitutionallyspeaking.co.za/political-parties-vs-constitutional-democracy/> [accessed

on March 2017].

De Vos ‘NPA problems part of larger one party dominant pathology’ 5 September 2012

available at *[http://constitutionallyspeaking.co.za/npa-problems-part-of-larger-one-party-](http://constitutionallyspeaking.co.za/npa-problems-part-of-larger-one-party-dominant-pathology/)*

dominant-pathology/ [accessed on 15 May 2017].

De Vos ‘Secret ballot judgment: Constitutional Court Schools Members of Parliament on

their obligations’ 22 June 2017 *[http://constitutionallyspeaking.co.za/secret-ballot-judgment-](http://constitutionallyspeaking.co.za/secret-ballot-judgment-constitutional-court-schools-members-of-Parliament-on-their-obligations/)*

constitutional-court-schools-members-of-Parliament-on-their-obligations/ [accessed on July

2017].

De Vos, P 'The scorpion's saga continues, but to no avail' available at 30 April 2009

<https://constitutionallyspeaking.co.za/the-scorpions-saga-continues-but-to-no-avail/>

[accessed on May 2017].

February, J 'ISS Today: South Africa pays the price of state capture' available at

<https://www.dailymaverick.co.za/article/2017-04-11-iss-today-south-africa-pays-the-price-of-state-capture/> [accessed on 15 June 2017].

February, J 'ISS Today: South Africa pays the price of state capture' available at

<https://www.dailymaverick.co.za/article/2017-04-11-iss-today-south-africa-pays-the-price-of-state-capture/> [accessed on June 2017].

February, J 'Can changing the electoral system increase political accountability?' available at

30 June 2015 *<https://issafrica.org/iss-today/can-changing-the-electoral-system-increase-political-accountability>* [accessed on July 2017].

February J 'The judiciary and the executive: at peace, for now' available at

<http://www.issafrica.org/iss-today/the-judiciary-and-the-executive-at-peace-for-now/>

[accessed on 9 September 2016].

Gumede, W 'Too much power in one person's hands' (2015) Dispatch Live, available at <http://www.dispatchlive.co.za/news/too-much-power-in-one-persons-hands/> [accessed on 23 May 2015].

Johnson, JK and Nakamura, RT 'A concept paper on legislatures and good governance' (1999) available at <http://www.pogar.org/publications/other/undp/legis/conceptpaper.pdf>, [accessed July 2017].

Maimane, M 'Protecting South Africa's Fragile Democracy' 22 June 2016 available at <https://www.da.org.za/2016/06/protecting-south-africas-fragile-democracy/>, [accessed on September 2017].

Makhabela, M 'Full interview: ANC's Mantashe lambast Judges' available at <http://www.sowetanlive.co.za/news/2011/08/18/full-interview-ancs-mantashe-lambast-judges> [accessed on 17 July 2017].

'Minister Lynne Brown summoned to Luthuli House over Molefe's return to Eskom' – 15 May 2017 – available at <http://www.rnews.co.za/article/14471/minister-lynne-brown-summoned-to-luthuli-house-over-molefes-return-to-eskom>, [accessed on 15 May 2017].

Ngoepe, K ‘Hawks allegations against Gordhan baseless - former top judge ‘ 25 August 2016

available at [https://www.news24.com/SouthAfrica/News/hawks-allegations-against-gordhan-](https://www.news24.com/SouthAfrica/News/hawks-allegations-against-gordhan-baseless-former-top-judge-)

[baseless-former-top-judge-](https://www.news24.com/SouthAfrica/News/hawks-allegations-against-gordhan-baseless-former-top-judge-) ,[accessed on September 2017].

On 28-29 May 2015, a number of scholars from around the world gathered in Johannesburg,

South Africa for a roundtable on the ‘new’ separation of powers: can the doctrine evolve to

meet the 21st Century context? Available at

[https://ukconstitutionallaw.org/2015/06/16/david-landau-report-on-iacl-roundtable-on-the-](https://ukconstitutionallaw.org/2015/06/16/david-landau-report-on-iacl-roundtable-on-the-new-separation-of-powers/)

[new-separation-of-powers/](https://ukconstitutionallaw.org/2015/06/16/david-landau-report-on-iacl-roundtable-on-the-new-separation-of-powers/) [accessed on 20 May 2017].

Phephelaphi, D ‘Nkandla and the national assembly with egg on its face – a constitutional

crisis?’ available at [http://www.cfcf.org.za/index.php/latest/533-article-nkandla-and-the-](http://www.cfcf.org.za/index.php/latest/533-article-nkandla-and-the-national-assembly-with-egg-on-its-face-a-constitutional-crisis)

[national-assembly-with-egg-on-its-face-a-constitutional-crisis,](http://www.cfcf.org.za/index.php/latest/533-article-nkandla-and-the-national-assembly-with-egg-on-its-face-a-constitutional-crisis) [accessed July 2017].

Public Protector South Africa (2016) *State of Capture* [Online] Available:

[http://cdn.24.co.za/files/Cms/General/d/4666/3f63a8b78d2b495d88f10ed060997f76.pdf,](http://cdn.24.co.za/files/Cms/General/d/4666/3f63a8b78d2b495d88f10ed060997f76.pdf)

[accessed on 15 May 2017].

Ramatlhodi 2011 www.timeslive.co.za [accessed on 17 July 2017].

Van Schalkwyk, C 'The basic structure doctrine: a basis for application in South Africa, or a violation of the separation of powers?' available at [http://www.litnet.co.za/the basic-structure -doctrine-a-basis-for-the-application-in south -africa-or-a-violation-of the separation of powers/](http://www.litnet.co.za/the-basic-structure-doctrine-a-basis-for-the-application-in-south-africa-or-a-violation-of-the-separation-of-powers/), accessed on 15 September 2016.

Zuma, J 'Keynote address to Access to Justice Conference' available at [http://constitutionally speaking.co.za/presidents -zumas-keynote-addressed to access to justice – conference](http://constitutionallyspeaking.co.za/presidents-zumas-keynote-addressed-to-access-to-justice-conference) [accessed June 2017].

<http://www.elections.org.za/content/Elections/Results/2014-National-and-Provincial-Elections--National-results/>, [accessed on 25 March 2017].

OTHER:

Butler, A 'The Politics of the Public Protector: Political Accountability in post-apartheid South Africa': paper for PARI symposium on public sector reform 19 January 2011.

Chipkin, I 'The State, Capture and Revolution in Contemporary South Africa' Public Affairs Research Institute (University of the Witwatersrand) / working paper, July 2016.

Corder, H 'Challenges to the rule of law in South Africa' *UCT Law Review* -September 2010.

Daka, FM 'Are the current Zambian constitutional provisions sufficient in preventing abuse of power by the executive organ of government?' LLM (UCT) 2015.

De Jager, N 'Voice and accountability in one party dominant systems: a comparative case study of Mexico and South Africa' (unpublished PHD thesis, University of Pretoria, 2010).

Democratic Governance and Right's Unit -Draft (2014) 'Has the South African Constitutional Court Over-reached? A study of the Court's Application of the separation of powers doctrine between 2009

James, W and Hadland,A 'Shared aspirations: the imperative of accountability in South Africa's electoral system' (2002) Electoral Models for South Africa: Reflections and Options Electoral Task Team Review Roundtable 9–10 September 2002 Vineyard Hotel, Cape Town.

Kohn, L *The burgeoning constitutional requirement of rationality and the separation of power: Has rationality review gone too far?* LLM (UCT) (2013).

Manyika, GK 'The rule of law, the principle of legality and the right to procedural fairness: a critical analysis of the jurisprudence of the constitutional court of South Africa' (2016) LLM – thesis-University of Kwa -Zulu Natal.

Moseneke, D 'Separation of Powers: Have the Courts Crossed the Line?' Inaugural Annual Law Dean 's Distinguished Lecture University of the Western Cape 17 July 2015.

Moseneke, D 'Keynote Address-Reflections on South African constitutional democracy – transition and transformation the Mistra-Tmali-Unisa Conference 20 years of South African democracy: so where to now?' The University of South Africa, Wednesday 12 November 2014 at 16.

Naidoo, S 'Does that lack of sufficient formulation and articulation of the principles guiding