DOES A DOMINANT PARTY DEMOCRACY ERODE CONSTITUTIONAL LEGITIMACY? AN ANALYSIS OF THE AFRICAN NATIONAL CONGRESS AND THE SOUTH AFRICAN CONSTITUTION

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I hereby declare that I have read and understood the regulations governing the submission of Master of Law (LLM) dissertations/research papers, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations

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ABSTRACT

It has been twenty-five years that the ANC has enjoyed political hegemony and an investigation is required into whether the legitimacy of constitutional supremacy remains intact as a state functioning under a dominant political party. There are certain pathologies which develop in a dominant political party, pathologies which lead to autocratic rule and which has the potential to undermine the constitutional institutions such as that created by the South African Constitution. The first aspect considered is the weakened oversight role of Parliament over the executive on account of the democratic centralism policies practised by the ANC. Democratic centralism entails strict party discipline which means Parliament cannot fully exercise its role in holding the executive accountable as envisaged in the Constitution. Provisions of the Electoral Act and the Anti-defection clause in the Constitution further allows a concentration of power in the top hierarchy of the dominant political party, thus ensuring that political leaders have all the might to ensure that self-preservation is the order of the day. Parliament which is meant to represent the electorate can be considered as a mere formal or hypothetical construction as the decisions of the dominant political party affects parliamentary processes.

The second constitutional implication is that courts become overburdened to make decisions on matters which are better suited to another branch of government. Whilst constitutional review is a function of a thriving and working democracy, the argument presented here is that the judiciary has come to make decisions of a highly political nature. The reason for this is first the failure of Parliament to correctly exercise its oversight role and secondly the abuse of power by high ranking politicians in the dominant political party.

The unintended consequence of a dominant political party state is the expansion of the role of the courts as the courts perform the ultimate watchdog role due to the loss of accountability in a dominant party regime. Thus, trespassing onto the terrain of other branches of government and in so doing undermining the independence of the judiciary itself.

The last aspect which impedes constitutional legitimacy is the large-scale ‘capture’ of state institutions. This phenomenon is linked to the ANC practice of cadre deployment which is a means to safeguard policies and to ensure that promises to the electorate are carried out by party loyalists. This practice in a dominant-party political landscape has created a loophole whereby democratic values and constitutional safeguards are often compromised. Pliable cadres are deployed to key positions and reporting lines are blurred which in turn has facilitated certain corrupt tendencies, leading to the demise of accountability, transparency and the efficiency of government and state-owned enterprises.

Through analysing case law and party policies and considering the pathologies associated with dominant party rule which has developed under the ANC’s governance, it is aimed to determine whether a dominant political party erodes constitutional legitimacy in South Africa.
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2. INTRODUCTION

2.1. Introduction

Section 1(c) of the South African Constitution states that South Africa is a democratic state which is founded on the supremacy of the Constitution and the rule of law. This means that everyone’s actions must be in conformity with the Constitution. In a dominant-party state, however, where one political party has enjoyed political dominance for many years, it is said that autocratic styles of governance develop which are deeply at odds with the purpose of the Constitution. In South Africa, the African National Congress (the ANC) has come to dominate the political landscape after successfully winning six consecutive elections. The case of South Africa illustrates that a dominant political party system is not necessarily an authoritarian system. Therefore, the electorate has the constitutional right to vote for the opposition in free and fair elections held every five years. South African constitutional scholars have, since the inception of the constitutional dispensation, warned that a dominant political party might pose a threat to the very tenets of constitutional democracy. Problems might arise when one political party is guaranteed success in elections because such a party could misuse its power to erode important democratic values such as transparency, accountability and the principle of checks and balances by which all power must be checked by a different branch of government.

Many African countries have experienced a trend of one-party dominance since gaining independence from colonial rule during the late 1950s and the 1960s. It is therefore worrying to witness this hard-fought democracy dying in our neighbouring states. Zimbabwe’s ruling party, Zanu-PF, is one such example where a dominant political party has undermined multi-party democracy by interfering in elections and controlling key institutions such as the media and state security to crush the opposition and ensure electoral success. Although the ANC may not at present show signs of

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impairing the core principles of the constitutional framework, there have been alarming examples of abuse of state power and disregard for constitutional institutions (to be considered in greater detail later) that have raised alarm to those closely studying their nature, power and potential to erode constitutionalism. Constitutionalism, which has been defined as the doctrine that governs the legitimacy of government action, is said to feature the following core elements:

1. Popular sovereignty;
2. Separation of powers (checks and balances);
3. Responsible and accountable government;
4. Rule of law;
5. An independent judiciary;
6. Respect for individual rights;
7. Respect for self-determination;
8. Civilian control of the military;
9. Police governed by law and judicial control.\(^7\)

This thesis intends to determine how one-party dominant rule may erode certain of these core elements. Further to that, the South African constitutional design has created the three traditional systems of government:

- The legislative body, Parliament, which in addition to law making has an oversight power over the executive.
- The executive, which is made up of the cabinet; national and provincial government departments, *inter alia* responsible for implementing legislation.
- The judiciary, the only independent branch of government; in particular the Constitutional Court is obligated to adjudicate actions by government to determine whether they are in line with the Constitution. The courts may also rule on any other dispute which is brought by civil society and other institutions when there has been failure of accountability by the state. In addition to the traditional spheres of governmental power, Chapter 9 of the Constitution creates various independent institutions mandated to support democracy. These

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\(^7\) Maru Bazezew, Constitutionalism, (2009) 3(2) *Mizan L. Rev* 358.
institutions are empowered to exercise accountability and checks on state power.

This thesis will assess the influence that the dominant political party system may have had on these constitutional institutions. This particular problem statement will be discussed in greater detail below.

2.2. Problem Statement

The ANC has enjoyed political hegemony since 1994 and therefore certain pathologies have developed under its rule which have tended to undermine constitutional institutions. The first deficiency is the weakened oversight role of Parliament over the executive on account of the democratic centralism practised by the ANC. This was most recently illustrated by the eight motions of no confidence which were defeated in Parliament against the previous president, Jacob Zuma. Eventually Zuma was called on to resign after Cyril Ramaphosa defeated Nkosazana Dlamini-Zuma at the 54th ANC National Conference in December 2017. The leadership of the ANC afforded Zuma the option to resign from office in compliance with the decision taken by the ANC’s National Executive Committee (NEC). Had Zuma not exercised that option he would have faced another motion of no confidence against him in Parliament. In terms of section 86 of the Constitution a procedure is set out for the election of the President by the National Assembly (herein after referred to as the NA); the Constitution further sets out mechanisms by which the President can be relieved of office by the NA, either through a no confidence vote in terms of section 102 or a removal of the President in terms of section 89. Democratic centralism, which is defined and explained in following chapters, has greatly undermined the role of Parliament. MPs are often instructed to make decisions in Parliament in accordance with what has been decided by the NEC. When individual MPs need to follow strict party discipline, Parliament cannot fully exercise its role in holding the executive accountable as envisaged in the Constitution.

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The second issue which could potentially conflict with constitutionalism is that courts become so overburdened as to make decisions on matters which are better suited to another branch of government. Whilst constitutional review is a function of a thriving and working democracy, the argument presented here is that the judiciary has come to make decisions of a highly political nature. The reason for this is first the failure of Parliament to correctly exercise its oversight role and secondly the abuse of power by high ranking politicians in the dominant political party. The media often portrays the ANC as having become a law unto its own and so undermining the rule of law.\textsuperscript{10} This thesis explores the argument that in a dominant party democracy, the unintended consequence is the expansion of the role of the courts to make decisions with political consequences, trespassing in the terrain of other branches of government and so undermining the independence of the judiciary itself. This paper will illustrate that the politicisation of the judiciary is a further erosion of the separations of powers principle, and may also conflict with the constitutional principle (above) that courts are the unelected branch of government despite being relied upon to make decisions which impact the electorate.\textsuperscript{11}

The last issue which impedes constitutionalism is the large-scale ‘capture’ of state institutions. This phenomenon is linked to the ANC practice of cadre deployment to safeguard policies and ideals and to ensure that these policies are carried out by party loyalists. This practice in a dominant-party political landscape where democratic values and constitutional safeguards are often compromised, has facilitated certain corrupt tendencies, leading to the demise of accountability, transparency and the efficiency of government and state-owned enterprises.

This thesis will analyse these three main constitutional drawbacks and how they are exacerbated in a dominant political party democracy. The research questions and how they will be argued is set out below.

\textbf{2.3. Research questions and summary of arguments}

This study aims to look at pathologies linked to dominant party systems and how they impact on constitutional democracy. The South African Constitution is globally renowned for its advancement of political, human and socio-economic rights, but in a


\textsuperscript{11} Alexander M Bickel \textit{The Least Dangerous Branch} (1986) Yale University Press
dominant party system where there is no real competition for political power there are erosions of important principles of accountability and responsibility for fulfilling the hopes of the electorate. This study ultimately seeks to establish whether the dominant-party political system is compatible with the supremacy of the Constitution, considering the following questions:

2.3.1. How the ANC achieved dominance and whether it will retain dominance?

Before the three main constitutional vulnerabilities mentioned above are analysed, the theories and conceptions of dominant-party political science theory fall to be examined, creating a foundation and understanding as to why dominant political parties do as they do, because ultimately and in any event these parties aim to retain power and perpetuate their dominance. The study further examines which theory of dominance applies to the ANC and why. Comparative examples of other dominant political parties are considered to argue that the ANC fits into a certain typology. It also sets out to describe the ability of the ANC to utilise political tools to maintain its dominance.

2.3.2. Whether democratic centralism as practised by the ANC undermines accountability and oversight roles of Parliament over the executive?

Constitutional supremacy is based on the tenet of separation of powers between the executive, the legislature and the judiciary and that these branches of government have a role to play in checking other branches’ exercise power as conferred by the Constitution.  

The National Assembly is required to ‘ensure that all executive organs of state in the sphere of government are accountable to it and to maintain oversight of the exercise of national executive authority’.  

The legislature’s role in overseeing executive action and holding the executive accountable for the performance of its obligations is an important aspect of the separation of powers under our Constitution.  

It will therefore be argued that the oversight role which the National Assembly has over the executive is weakened as a result of the constitutional provision which states: ‘[t]hat . . . a member of Parliament loses its membership if he

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13 Section 55 (2) of Act 108 of 1996.
14 Kate O’Regan ‘Checks and Balances reflections on the development of the Doctrine of the Separation of Powers under the South African Constitution’ PER/PELJ 2005 8 (1) 128.
or she ceases to be a member of the party that nominated that person as a member of
the Assembly”\(^\text{15}\). This position is further exacerbated by ‘democratic centralism’, the
system by which political decisions reached by the party through its democratically
elected bodies are binding upon all members of the party. In the ANC, the National
Executive Council (NEC) is vested with the power to make all decisions regarding
public policy, and all-party members are then obliged to follow such instructions in
the name of democratic centralism. In consequence, the ultimate power lies in the party
leadership which is able to, and does, rid itself of members who do not follow party
instructions. This means that members of the National Assembly are fettered in their
decision-making abilities and cannot hold the executive to account when required to
do so because their position in the legislature could be threatened if they are seen to
rebel against authority within the dominant party organisation.

2.3.3. Due to the weak oversight role of Parliament over the executive and
abuse of state power, has the role of the courts expanded to deciding
matters mandated to other branches of government?
In a sound constitutional dispensation judges are bound to declare invalid any law,
policy or action by the state if it is not in line with the Constitution.\(^\text{16}\) Judge Dennis
Davis has cautioned that there is ‘[a] . . . danger in drawing the judiciary into every
and all political disputes, as if there is no other forum to deal with a political impasse
relating to policy, or disputes which clearly carry polycentric consequences beyond
the scope of adjudication’.\(^\text{17}\) Judges, as with other branches of government, are subject
to the rule of law and the Constitution. The principle of non-intrusion requires judges
to desist from interfering in the affairs of another branch of government, as this also
proves to be problematic for democracy. Courts, unlike Parliament and the executive
are the only unelected branch of government; not being answerable to the electorate
they should not make decisions that encumber the state.\(^\text{18}\) The parliamentary
dominance of the ANC, however, has left weaker opposition parties frustrated in their
attempts to hold the executive to account.\(^\text{19}\) The abuse of state power has also
contributed to an increased number of claimants approaching the courts for relief.

\(^{15}\text{Section 47(3)(c) of the Constitution, Act 108 1996.}\)
\(^{16}\text{Section 172(1).}\)
\(^{17}\text{Mazibuko v Sisulu MP Speaker of the National Assembly [2012] ZA WCHC 189;2013 (4) SA 243}
(WCC)\)
\(^{19}\text{United Democratic Movement v Speaker of the National Assembly and others [2017] ZACC 21}\)
The argument presented in this study is that in a dominant-party state there is a loss of accountability and a breach of the principle of separation of powers, and the judiciary, the only independent branch of government, has become overburdened.

2.3.4. Whether cadre deployment facilitates state capture?

The broader question is whether the ANC’s policy of cadre deployment undermines the rule of law when implemented irregularly? Cadre deployment allows for members of the ANC to be placed in various governmental structures to ensure that the organisation’s obligations are strategically aligned to the governance framework or political ideology of the ruling party. Cadre deployment was adopted in good faith; however, certain questionable appointments to various state entities have attracted criticism for providing leeway to compromising the independence of state institutions.

Cadre deployment is problematic when ‘party loyalty trumps qualifications, relevant experience and competence’ This much has been proved in the controversy around all the appointments made to the post of National Director of Public Prosecutions. The independence of the National Prosecuting Authority is a necessary requirement of a functioning constitutional democracy. This study examines how democratic institutions flounder if the executive ensures that the National Director of Public Prosecutions places loyalty to the dominant political party above his or her sworn constitutional duty to carry out their duties without fear, favour or prejudice.

This study further explores the argument whether cadre deployment is the underlying cause of state capture. State capture can be broadly defined as ‘...a distinct network structure in which corrupt actors cluster around parts of the state allowing them to act collectively in pursuance of their private goals to the detriment of the public good’. On 20 August 2018 the Zondo Commission (as it is popularly termed) began its inquiry into the allegations of state capture, corruption and fraud in the public sector as well as state organisations. The commission was established after Thuli Madonsela, the

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21 Ibid at 59.
22 Section 179 (4) of Act 108, 1996
23 Fazekas, Mihály; Tóth, István János ‘From corruption to State Capture’ , (2016) 69(2) Political Research Quarterly 320-334
24 The Commission of Inquiry into Allegations of State Capture (Zondo Commission) was formally appointed by way of Proclamation 3 of 2018 published on the Government Gazette on 25 January 2018.
former Public Protector, published her report titled State of Capture in 2016. In this report Madonsela investigated certain allegations into:

[C]omplaints of alleged improper and unethical conduct by the President and other state functionaries relating to alleged improper relationships and involvement of the Gupta family in the removal and appointment of ministers and directors of State-Owned Entities (SOEs) resulting in improper and possibly corrupt award of state contracts and benefits to the Gupta family’s businesses.25

Pursuant to the remedial action recommended in this report and as confirmed by the North Gauteng High Court26, the commission has since its inception held hearings with a view to making a determination on the allegations of corruption and fraud facilitated by former president Zuma and others. Although no findings have been made at the time this thesis is to be concluded, the investigation reveals the difficulties and contradictions in the cadre deployment policy. Strict loyalty in adhering to democratic centralist dictates and disregard for constitutional oaths has paved the way for democracies to revert to dictatorships. The issue is dealt with in detail below.

Although cadre deployment is a policy with noble intentions, its abuse can lead to the demise of public institutions and create public perceptions that it is employed for reprehensible purposes. When appointing party loyalists to a position to drive objectives other than the efficient functioning of government and delivering services to the people, it is in direct conflict of the independence and accountability of state institutions as required by the Constitution.

Choudhry has written that the ANC’s policy of deployment is deeply at odds with constitutional supremacy and the separation of powers, in that the powers of deployment and redeployment are a function of the Electoral Act 73 of 1998, which is subject to the Constitution.27 He argues that the statutory powers given to the ANC allow it to undermine constitutional structures.28 He proposes a solution by arguing that ‘one constitutional strategy for checking the power of political parties is for the

25 State of Capture report by the office of the Public Protector, 14 October 2016, 4.
26 Ex Parte Application: The Chairperson of the Judicial Commission of enquiry into allegations of state capture, corruption and fraud in the public sector including organs of State. 50590/2018
28 Ibid 73.
constitution to align the political programme and structure of political parties with the ideals and structure of the constitutional order’. 29

This study aims to analyse the policy and calls for strict regulation thereof through legislation to ensure better adherence to constitutional imperatives.

2.4. Literature review
Giliomee and Simkins (1999) warned at the time that although dominance can only be achieved over time, South Africa was heading towards a dominant political party democracy. Reference is made to the earlier works of Pempel (1990) which set forth the criteria qualifying the existence of dominant party democracies, which criteria are the preferred theoretical base in this thesis. Giovani Sartori (1976) one of the first political scientists to explore dominant party theory presents an opposing theory to that of Pempel (1990).

De Jager and Du Toit (2013) revisit the theory in relation to dominant party rule in South Africa and their thesis relies on the distinguished variables and typologies of dominant party rule as supported by the authors. Suttner (2006) writes on how the theory of dominant party rule was developed in his critique of Giliomee and Simkins; Southall (1998) advances the views on what democracy entails and how democracy is consolidated. The theory of Greene (2013) on what makes dominant parties persist or fail after they have achieved dominance is applied to the ANC in the current political landscape. The list of political resources as stated by Du Toit and De Jager (2014) is measured against the ANC’s political strategies and its strengths versus other opposition parties to determine how the ANC will continue to dominate elections.

The findings based on this literature are used in the study to objectively analyse the behaviour, practices and party regulations of the ANC and how the internal politics of the party may not necessarily adhere to the constitutional design of South Africa. Moreover, that due to its legislative strength in government such internal party regulations have vast consequences for the quality of constitutional democracy.

2.5. Methodology
The research methodology employed in this study is a desk-orientated research approach. The primary sources reviewed are the South African Constitution and the

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29 Ibid 78.
Electoral Act as well as internal party regulations and policies. A comparative analysis will be conducted in respect of primary and secondary sources and reference will be made to case law to illustrate the arguments presented in this paper. Great reliance is placed on academic articles and books and a qualitative approach to these sources will be employed to gain a better understanding of the underlying objectives of this study. Furthermore, due to the contemporary nature of this thesis, certain references are drawn from media articles and opinion writings from various academics and experts.

2.6. Scope and limitations of the study
This study aims to illustrate the contemporary position of the current law and written theories, and takes cognisance of the fact that a comprehensive account of all matters which may find relevance to this thesis-question cannot be resolved in such a limited space. The study is restricted to determining the consequences of a liberal dominant-party political system to a constitutionally supreme state. A comparative analysis will be briefly addressed to determine the typologies of a dominant party and how dominant party systems prevail and subsist. International and continental examples of dominant political party systems are referred to throughout the thesis to strengthen and hone in on the arguments presented. However, it does not mention all comparative literature on dominant political party theories in relation to all such systems as they exist in the world today. The reason is that this thesis has narrowed its focus on the styles and dominant party related practices of the ANC and how they may threaten South Africa’s constitutional legitimacy.

2.7. The structure of the thesis
The structure of the thesis will be as follows:

**Chapter 2** sets out the characteristics of a dominant party theory.

**Chapter 3** analyses the theory of what makes dominant parties persist or fail. The political strategies used by the ANC are examined to determine whether the ANC will continue to dominate the electoral polls.

**Chapter 4** will explore whether a dominant party system could be the root cause of the weak oversight role of the legislature over the executive.
Chapter 5 analyses the role of the judiciary in a dominant political party system and whether that very system is threatening the independence of the judiciary and the separation of powers.

Chapter 6 will consider the cadre deployment policy and its practise by the ANC. This paper aims to draw the link between cadre deployment and state capture of various institutions.

Chapter 7 will contain the conclusion of this thesis.
3. THE THEORY OF DOMINANT PARTY SYSTEMS

3.1. Introduction

In this chapter I propose to provide an overview of the theories and conceptions of a so-called ‘dominant party’ state. It is in no way a comprehensive discussion and I simply wish to frame the analysis that follows, to enable an appropriate classification of the ‘dominance’ of the ANC in order to answer the question of whether in a dominant political state such as South Africa’s, constitutional principles are threatened and/or weakened.

The initial theorising of dominant political parties is based on countries such as Mexico and India where a single political party ruled for 71 years and 49 years respectively.\textsuperscript{30} Political theorists began to concern themselves with how such political parties come into being and how they retain power for such a long time. The view portrayed in this thesis is that where countries have such vastly different social, cultural, ethnic and political cleavages, these theories on dominant party regimes will not find a blanket application in all regions of the world. Each country has a unique story, especially in Africa, where the dominance of a political party has emanated from regime change in the form of decolonisation or an important historical event.

Further in this chapter I wish to look at the different characteristics of a dominant party regime. I also investigate the origin of the theories of a dominant party regime. The writings on dominant party states came about as a test or theory which determined whether a state’s democracy had been consolidated. The theory states that for democratic consolidation to occur there must be a change of hands of power in government. Where there is a lack of change in government, certain autocratic tendencies develop in the functioning of a state and result in failure of democratic consolidation. I critically analyse this test because the consequences of failing to meet it implies that those states which are functioning as a dominant party state could never be considered a fully-fledged democracy.

It is also important to distinguish between dominant regimes in which dominance is reinforced within the parameters of rule of law from those dominant political party

states that reinforce their dominance by unlawful means through the use of violence and threats. In this thesis this distinction is classified as between liberal and illiberal. A comparison is drawn between South Africa, which is falls in the category of a liberal dominant party state, as opposed to Zimbabwe and Cameroon which have become illiberal dominant party states.

This analysis is important because the founding provisions of the South African Constitution state:

> The Republic of South Africa is one, sovereign, democratic state founded on the following values:

> (d) Universal adult suffrage, a national common voters’ roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.  

It is therefore necessary to consider whether the dominance of the ANC after winning six consecutive national elections has failed to meet the democratic consolidation test. Does it mean that the above constitutional provisions have been flouted?

The following chapter will look at the literature on the different categories of dominant political parties and the further sub-categorisation of ‘weak’ and ‘strong’ dominant political parties. This will enable us to determine into which paradigm of these pathologies the ANC fits.

### 3.2. Defining the characteristics of a dominant party State

De Jager writes that there remains a difficulty in defining and setting out the characteristics which would presuppose that a dominant political party system has come into being. The difficulty emanates from the literature in which various criteria are used to identify dominance; most theorists differ on these criteria and for that reason there is not a fixed set of criteria which can be applied to determine dominance.  

The term predominant party systems was first explored by Italian political scientist, Giovanni Sartori. His theory stipulates that a party achieves

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dominant status in a parliamentary system after winning three consecutive elections as well as 50% of the parliamentary seat allocation.

There are varying thresholds for dominance. Sartori is the only writer who has identified that an absolute majority is required to qualify as a dominant regime. Pempel on the other hand opines that ‘only a party that receives at least a plurality should qualify as a dominant party’. Greene identifies dominant party systems ‘as hybrids that combine meaningful electoral competition with continuous executive and legislative rule by a single party for at least 20 years or at least four consecutive elections’.

Due to the inconsistent framework amongst political scientists, De Jager notes that the strength of a party in the legislature cannot be the sole determinant of dominance. It is rather the power and influence it exerts over other parties when utilising such dominance that is important. It is for this reason that Giliomee and Simkins’ endorsement of Pempel’s criteria for dominant rule is the preferred identifying theory in this thesis, stipulating that ‘dominant party must dominate the electorate for an uninterrupted and prolonged period, [i]t must dominate other political parties, the formation of governments, and the public policy agenda’.

It is important to note that not all dominant parties fit into the same paradigm. Often these parties label their states as democracies and function under the rule of law yet many writers are sceptical about the quality of democracy practised by these states. Giliomee and Simkins have argued that dominant party rule and democracy are at odds with each other. The headings to follow will analyse this scepticism.

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34 Ibid
35 Doorenspleet op cit (no5), 3
38 De Jager and Du Toit op cit (no 32) 8.
39 Giliomee and Simkins op cit (no 4), xvi
40 Ibid
3.3. The impact of a dominant party state on the quality of democracy

According to Suttner\(^{41}\), the dominant party debate has emanated from political theories used to determine whether a state meets democratic principles or whether there has been a consolidation of democracy. There are strong objections to dominant party rule because it appears to threaten the sustainability of democracy and could possibly result in a reversion to some form of authoritarian rule. Before considering the test for democratic consolidation, it is necessary to take a look at what democracy means theoretically:

3.3.1. What does democracy entail?

A liberal definition of democracy states:

\[\text{Regular, free, and fair electoral competition and universal suffrage, the absence of reserved domains of power for the military or other social and political forces that are not either directly or indirectly accountable to the electorate . . . in addition to the vertical accountability of rulers to the ruled . . .}\]

Writers, Przeworski and Limongi\(^{43}\), however, contend that alternation in office is required before classifying a regime as democratic. This position which calls for free and fair elections yet requires a rotation in power is an extreme form of liberalism because, as we shall note, whilst a few dominant political party states do conduct free and fair elections, the rotation of the hands of power is not always the result. The argument these theorists have advanced is that alternation in government is necessary because a one-party state is synonymous with a dictatorship and democracy cannot be fully developed and realised as the dominant party makes self-preservation the priority.

Their arguments hold water because in some states which function under a dominant political party there has been a curtailment of democratic values whereby elections are no longer contested as free or fair. In Zimbabwe, a neighbour of South Africa whose political destiny exudes a powerful emotive force, the Zimbabwe African National Union (Zanu-PF) has historically been intolerant and hostile towards opposition

\(^{41}\) Suttner op cit (no 30), 280.
parties which it views as political enemies. When the Movement for Democratic change (MDC) emerged in the late 1990s, the Zanu-PF used violent intimidation and suppression to hinder its support and success. Its control over state resources, its agencies and the media, which controls all broadcasting, rendered it impossible for the opposition parties to gain support.

Thus, when the democratic value of fair electoral competition is threatened, the dominant party may create conditions of oppression which impede an electoral breakthrough for any other opposition party. By manipulating fair competition in elections – for example sabotaging the campaigning of opposition parties – citizens are not in a position to exercise their vote in a free and informed manner and this essentially undermines the democratic rights of the citizens.

In order to further assess how democracy is consolidated I will now consider the various definitions and criteria which have been deployed by writers:

3.3.2. When is democracy consolidated?

Democratic consolidation refers to the sustainability of democracy in which there must be strong opposing institutions capable of causing a regular turnover of government. According to Linz and Stepan, a working definition for democratic consolidation is when:

[A] democratic regime in a territory is consolidated when no significant national, social, economic, political, or institutional actors attempt to achieve their objectives by creating a nondemocratic regime or by seceding from the state. [C]consolidation also means when a strong majority of public opinion, even in the midst of major economic problems and deep dissatisfaction with incumbents, holds the belief that democratic procedures and institutions are the most appropriate way to govern collective life. Constitutionally, a democratic regime is consolidated when governmental and nongovernmental forces alike

\[\text{References}\]

44 De Jager and Du Toit op cit 178.
45 De Jager and Du Toit op cit 180.
become subject to the resolution of conflict within the bounds of the specific laws, procedures, and institutions sanctioned by the new democratic process.\textsuperscript{48}

This thesis finds consensus with the above definition for democratic consolidation, the reason being that the requirement noted by Przeworski and Limongi which necessitates a turnover in government cannot be the hallmark for establishing the consolidation of democracies.

Suttner argues convincingly that the test for democratic consolidation is inherently flawed when the only requirement is turnover in government.\textsuperscript{49} There are other democratic institutions outside of the traditional electoral sphere to check the power of dominant parties. Judicial and constitutional review, the separation of powers and civil society, too, have an important role to play in realising a democratic presence in a country. Therefore, as Linz and Stepan indicate, the perception of the electorate carries strong weight. In South Africa there has been no change in the hands of power since 1994 and the turnover requirement for democracy would mean that South Africa is not developing democratically. However, the public and all societal actors have accepted that South Africa has conducted uncontested elections and that the ANC has come to rule through the majority voting for the party without electoral fraud or coercion taking place.

Giliomee counter-argues that the fear of losing elections serves as a greater mechanism to ensure accountability, an important aspect of democracy, as opposed to other legal and institutional safeguards.\textsuperscript{50} Therefore, one-party dominance inevitably leads to some form of dictatorship. Under the following heading I consider how such dominance is used to undermine democratic ideals.

3.3.3. How do democratically elected dominant parties succumb to autocratic conduct?

In the South African Constitution, for example section 74, states that a Bill to amend the Constitution can only be passed if at least two-thirds of the members of the National


\textsuperscript{49} Raymond Suttner op cit (no 47).

Assembly (that is, at least 267 of the 400 members) vote in favour of it. In the 2004 elections the ANC obtained nearly 70% of the overall vote share and a total of 279 seats in Parliament, meaning that the ANC could have easily amended the Constitution which would have allowed the then-president Thabo Mbeki to run a third term as President of South Africa. Opposition leaders like Tony Leon of the Democratic Alliance, at the time appealed to Mbeki not to use this advantage.

The reason for these warnings stemmed from examples such as the Democratic Republic of Cameroon. Ferim has written that the Cameroon People’s Democratic Movement (CPDM) which has been in power since 1960 had prolonged its dominance by manipulating the constitution. In 1996, for example, the constitution was amended to extend the presidential term from five to seven years and which was renewable after the first term. These provisions as Ferim argues played a key role in perpetuating the party’s dominance.

The stark difference between the conduct of the CPDM and the ANC proves that not all dominant political parties share the same model for consolidating their dominance. It is for this reason that writers have distinguished between different types of dominant regimes to analyse the quality of democracy and whether the regime is oppressive or not. The paper will now consider these variables.

3.4. Different types of dominant regimes
Dominant party systems occur in both liberal and illiberal democracies. A liberal democracy is defined as one with free and fair elections together with the presence of the rule of law, a separation of powers and where civil and political rights are recognised. An illiberal democracy allows multi-party elections but the other principles are flouted. Dominant systems are distinguished between democratic dominant party systems and authoritarian dominant party systems. In South Africa the ANC represents a democratic dominant party system because the constitution recognises a multi-party system of democracy and free and fair elections have been held every five years. Freedom House, an independent watchdog organisation

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31 Southall op cit (no 3) 62.
33 Ibid 31
34 De Jager and Du Toit op cit (no 32), 10.
35 Sartori op cit
dedicated to the expansion of freedom and democracy around the world, scores South Africa 78 out 100 with 0 being least free and 100 being most free in terms of political rights and civil liberties.

An authoritarian dominant party system is one in which there is no fair competitive basis on which elections are held and the possibility of defeat is only theoretically probable. In the Democratic Republic of Congo opponents have classified the regime as competitively authoritarian. Competitive authoritarian regimes are summed up by Levitsky et al:

> Although elections are regularly held and are generally free of massive fraud, incumbents routinely abuse state resources, deny the opposition adequate media coverage, harass opposition candidates and their supporters, and in some cases manipulate electoral result. Journalists, opposition politicians and other government critics may be spied on, threatened, harassed or arrested. Members of the Opposition may be jailed, exiled, or – less frequently – even assaulted or murdered.

The categorisation of dominant political systems is therefore important as it allows a comparative analysis in terms of whether the dominance is perpetuated by the party itself or simply by the particular time and regime in which the state finds itself. In other words, does the party dominate the electoral sphere within the boundaries and means of the law or through unlawful and irregular means? It is for this reason that the study of the ANC is interesting because it owes its dominance to the role it played during South Africa’s transition phase and has still managed to maintain its popularity despite vast challenges such as inequality, poverty and crime which South Africa has experienced as a nation.

3.4.1. Weak or strong dominant regimes

Southall goes on to distinguish between weak and strong dominant party systems. The writer does not, *per se*, define what would render a dominant party weak

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59 Southall op cit (no 3)
or strong; however, the inference drawn is that a strong dominant party is not subject to constitutional, political and economic limitations. The examples of Cameroon, Congo and Zimbabwe illustrate a strong dominant party, a party which initially came into power through fair and democratic means and later reinforced its power to undermine the rule of law, amend the constitution to perpetuate its rule, rig elections and abandon accountability to the electorate.

Southall concludes that the ANC is a weak dominant party based on the notion that the ANC is not hell-bent on extinguishing democracy. Instead it is rendered weak by the following factors:

(a) The existence of internal opposition within the ANC;
(b) the lack of a totalitarian state in South Africa; and
(c) the fact that much of the economy is not dependent on the state.  

Now that it has been established that South Africa has a weak dominant party system, it falls to determine the effect of the dominant party system on the quality of the South African democracy.

3.5. Has the dominance of the ANC affected the quality of South African democracy?

The view that democracy is not consolidated when there is no competitive opposition appears to be incorrect and there are various reasons for this argument which has been articulated below.

Although citizens still largely identify with and vote for the ANC, they have resorted to protesting in order to show their frustration with the government. South Africa has the highest number of protests in the world, illustrating that the public’s romantic attraction to the ANC and their national project after 1994 has dwindled.  

Citizens may continue to vote for the ANC; however, the voting trends show that support is falling substantially. Their approximately 70% of the national voter share in 2009 fell to 62% in the 2014 national elections. In the recent 2019 elections the ANC obtained a vote share of 57.50%. Similarly, in the municipal elections conducted during 2011 and 2016, there was a decrease of support for the ANC from 62% to

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60 Choudhry op cit (no 27) 12; Southall op cit (no 3) 629
53.91%. The fall in support and an increase in votes for the opposition parties has opened space for a more competitive parliament. The ANC cannot for example pass a constitutional amendment with a two thirds majority on its own as it only holds 230 seats in the new Parliament.

Opposition parties have also been robust in holding the majority ANC to account during parliamentary sessions. The Economic Freedom Fighters (the EFF) has been labelled as South Africa’s first left wing political party and has stirred up the nature of South African politics.\textsuperscript{62} It was during a question and answer session in 2013 that Julius Malema, the former youth league president of the ANC and now the Commander in Chief of the EFF, demanded that then-president Zuma pay back the money for upgrading his Nkandla homestead through irregular funding. The EFF chants of ‘pay back the money!’ during the 2015 State of the Nation address resulted in the first disruption to such an important parliamentary session that the Speaker called in security forces and members of the South African Police Service (SAPS) to remove members of the EFF from Parliament. The other main opposition party, the Democratic Alliance (DA) objected to the use of the SAPS and accused the Speaker of breaching parliamentary rules and more importantly breaching the separation of powers principle. The matter ended up in court, and the provision in the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act\textsuperscript{63} which allowed the Speaker of the NA to summon security forces to enter the chambers of Parliament and deter public debate was found to be unconstitutional.\textsuperscript{64} There have been many instances, discussed below, in which smaller opposition parties have taken the majority ANC MPs to court for its failing to hold the executive accountable in terms of parliamentary processes.

In August 2018, a formal commission of inquiry chaired by Deputy Chief Justice Raymond Zondo was instituted, tasked with investigating claims of state capture, corruption, and public-sector fraud with focus on Zuma’s relationship with members of the wealthy Gupta family. Opposition parties, the Public Protector, civil society organisations, the judiciary and the media played an important role in ensuring that

\textsuperscript{63} 4 of 2004
\textsuperscript{64} Democratic Alliance v Speaker of the National Assembly and Others (2792/2015) [2015] ZAWCHC 60; 2015 (4) SA 351 (WCC); [2015] 3 All SA 72 (WCC) (12 May 2015)
South Africa did not follow the trajectories of neighbouring states by turning a blind eye to such alleged transgressions. The events surrounding this political scandal portray the strong presence of a democratic culture in South Africa.

Therefore, this study argues that South Africa may be functioning under a dominant party system, but the ever-strong democratic presence means that it is a liberal dominant party system.

3.6. Conclusion

The emergence of one-party dominant states in southern Africa is not surprising. Liberation movements, now turned political parties, played a significant role in emancipating African countries from colonial rule and assisted in the gaining of independence. Their heroic reputations have resulted in overwhelming popularity, which in turn has rendered their electoral defeat nearly impossible. The concerns of many writers that dominant-party states pave the way for an autocratic government to surface remain valid. The examples of the Zanu PF and CPDM have illustrated as much. The writers proclaim that it is in the nature of liberation movements to seek a hegemonic form of control after being voted into power. During the struggle for independence many liberation movements in Africa viewed themselves as representing the nation. Thus, when gaining political control this notion prevailed despite the end of oppression. Whether the ANC has come to develop certain authoritarian tendencies similar to that in other dominant authoritarian systems will be examined in the sections that follow.

66 Suttner op cit (no 47) 760.
4. THE ANC AS A DOMINANT POLITICAL PARTY

4.1. Introduction
In this chapter I will examine Kenneth Greene’s theory on how dominant political parties persist in their dominance mainly by using political resources to suppress the threats posed by opposition parties. Added to this, Du Toit and De Jager have identified a number of political resources which a political party may employ to sway the attitudes of voters. I will analyse those resources which I consider most important in demonstrating how the ANC has reinforced its dominance over the years. By analysing Greene’s theory in relation to the ANC, I attempt to answer the question: Will the ANC continue its electoral dominance?

4.2. What makes dominant parties endure?
Greene deals with what makes dominant party systems persist or fail.67 His theory is founded on the extent to which dominant parties adequately utilise economic or political resources to inhibit the performance of opposition parties. His theory is based on the foundation that less focus should be placed on how dominant parties are established, as this does not explain how they retain dominance. His argument is that the way in which dominant political parties use political and economic resources to their advantage is what essentially allows them to hold on to electoral power.

Du Toit and De Jager have identified the following as political resources:

[H]istoric events that serve as a source of symbolic imagery by which to mobilize popular support and gain the sustained support of a “historic block” of voters; culture, as a marker of in group solidarity and a source of symbols to describe and represent social identity; charismatic leaders, often linked to a particular era, or historically significant events; constitutional rules that favour one party over others; power of appointment and patronage; and control over the distribution of material goods, whether public or private.68

This chapter hones in on those political resources which have been strategically used by the ANC to strengthen its support and extinguish rivalry from opposition parties.

67 De Jager & Du Toit op cit (no 32) 24
Therefore, not all the resources noted by Du Toit and De Jager will be critically evaluated due to lack of space in this thesis. The first political resource is the history and credentials of the ANC as a liberation movement.

4.3. The use of political resources to garner popular support

4.3.1. Historical importance of the ANC

The history of the ANC is pertinent to its rule as a dominant party; due to its struggle credentials many citizens feel that they owe their allegiance to the ANC. The ANC was founded in 1912 after the promulgation of the South African Union Act of 1909 which limited the rights, movement and labour of black people. The South African Native National Congress as it was known then was founded with the aim of fighting for the rights of black South Africans. At its 1923 conference, due to change of influence through new leaders and new ideas, it adopted the name African National Congress. The ANC is known as the oldest liberation movement on the continent and hence has attained a strong legitimacy in the eyes of the South African electorate compared to other political parties. The ANC, formed due to dissatisfaction with how the then British Parliament set out to revoke citizenship of many Africans and went about passing segregation laws to establish ethnic homelands which limited the freedoms of those of African descent. It was a dark time which saw gross violations of human rights, even more so when Afrikaner nationalist apartheid legislation was initiated after 1948. The ANC came into power with the historic dismantling of apartheid and the establishment of the new democratic dispensation. It is very difficult to divorce the heroic contributions of activists and fighters from their right and ability to govern, and it has resulted in a fierce loyalty to the organisation amongst most South Africans.

Liberation on the African continent during the 1990s has been labelled as part of the third wave of democratisation, a phrase coined by Huntington to describe the global transformation of countries in Europe, Latin America, Asia and Africa from non-democratic to democratic regimes. In African states parties identified with the

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71 Edward Roux Time longer than rope: The History of the Black man’s struggle for Freedom in South Africa 2 ed (1972) University of Wisconsin Press,
72 Samuel P Huntington The Third Wave: Democratization in the Late Twentieth Century (1991) University of Oklahoma Press
liberation struggle emerged as the dominant political party in the election. There is a common view amongst critics that dominant political parties equate themselves with the voice of the nation and therefore the nation owes a strong allegiance towards them. These views are problematic because a democracy espouses the voices of all, the majority and minorities. The ANC has been criticised for not fully transitioning from a liberation movement to a political party in a fully-fledged democratic environment. It is for this reason that civil society, opposition or even the judicial admonitions are dismissed by leaders of the ruling party as anti-transformation. It is as though their contributions as a liberation movement absolve them from any form of criticism.

4.3.2. Constitutional rules that favor one party over the other

This heading examines how the ANC has tended to use its legislative strength to sway popular attitudes before the 2019 national elections. The power to influence public policy is inherently a political resource and this translates into the ANC’s decision-making power within the higher structures of the executive. An example is the decision to amend section 25 of the Constitution at the ANC NEC’s 5th national policy conference late in 2017. Shortly after the media announcement was made by the ANC’s NEC, the EFF tabled a draft resolution in the National Assembly on expropriation of land without compensation. Although the EFF has since its inception as a political party in 2013 campaigned for expropriation of land without compensation, it remained a revolutionary idea for the young political party which did not have the legislative strength to influence policy nor effect a constitutional amendment.

After the EFF tabled the aforesaid motion, the majority led ANC parliament approved a process of deliberations for a section 25 constitutional amendment. The distribution of land in South Africa is a contentious issue due to the apartheid legacy of unequal

73 Suttner op cit (no 47), 755.
75 https://politicalinequality.org/2008/06/04/defining-and-measuring-political-resources/ accessed on 5 November 2018
77 https://www.politicsweb.co.za/documents/the-effs-draft-resolution-on-ewc accessed on 25 June 2019
ownership of land, causing many of black descent to continue to suffer in inequality. Land policies and legislation on a speedier redistribution of land would appeal strongly to the majority of the electorate and can thus be identified as an economic and political resource used to sway votes. This particular event displays how a constitutional rule favouring a majority-led decision, played to the advantage of the ANC as a dominant party.

4.3.3. **Power of appointment and patronage**

This political resource as identified by Du Toit and De Jager is directly translated into the ANC’s policy called cadre deployment. An in-depth discussion on the origins and its practice is dealt with later in this study. The use of political patronage as a power of appointment is a means by a political party to appoint those who are loyal to the organisation in strategic roles across various tiers of government and parastatals. The dominant political party may use this political resource as a strategy to ensure that the political ideals and legacies of the party are maintained at root levels in state departments. In South Africa, ANC the policy was implemented post 1994 to ensure transformation and representativity in government. At that stage the implementation of the policy appeared attractive to the larger demographic of South Africa who under apartheid did not have equal access to employment opportunities in the governmental sector; however, recently the policy has come under fire for being used by elite politicians to evade justice. Thus the policy cannot be viewed as a resource which has been used to seek the favour of the electorate. In fact, in chapter six, I discuss how this policy is a transgression of section 195 of the Constitution.

4.3.4. **Control over the distribution of material goods**

Social grants are another political resource which falls under the national government’s competence. In accordance with a survey by Paret ‘the probability of an ANC vote was 10 percentage points higher for recipients of a social grant, compared with those not receiving a grant’. The social grant policy, promoted by the executive, meets the requirements of being a political resource because it has the power to

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79 Du Toit & de Jager op cit (no 68) 97.
80 Booysen op cit (no20) 397.
81 Choudhry op cit (no 27) 13,14.
82 Ibid 73.
influence certain political outcomes, albeit narrowly. Such resource advantages derived from the public budget are examples of what Greene argues are political resources and can be mobilised by dominant political parties to retain dominance.

4.4. Conclusion: Will the ANC continue with its wave of electoral dominance?
In analysing the political theories on what makes dominant parties persist or fail the ANC uses its plurality in numbers as a legislative strength; as a means to inform policy; its practise of political patronage in the form of cadre deployment and its control over the distribution of material goods are means to ensure that it stays in power.

The party’s strategic power to make big decisions ensures that the electorate realises that not voting for the ANC might mean that certain national programmes could be debilitated if a different party came into power. Although electoral fraud has never played a part in South African politics, the political resources available to the popular ANC enable it to create an unequal playing field over opposition parties. This advantage, coupled with the party’s remarkable history, means that South Africa will remain a dominant political party system. Having established that South Africa will remain a dominant party democracy, I proceed to investigate the conduct of the ANC to determine whether the force of one-party dominance could undermine and compromise the constitutional institutions of South Africa.
5. THE CHECKS AND BALANCES BETWEEN PARLIAMENT AND THE EXECUTIVE

5.1. Introduction
In this chapter I investigate the constitutional provisions by which Parliament has an oversight role over the executive and whether this function of checks and balances has been weakened by the dominance of one political party. I discuss the enabling provisions of the Electoral Act, the Constitution and the ANC’s constitution which assist the ANC in forming hegemonic control and undermining the Constitution’s principles.

5.2. Understanding accountability
Accountability is a constitutional principle, and the oversight provision between the legislature and the executive is provided for in section 55 of the Constitution:

‘(2) The National Assembly must provide for mechanisms—

(a) to ensure that all executive organs of state in the national sphere of government is accountable to it; and

(b) to maintain oversight of—

(i) the exercise of national executive authority.’ 84

These checks and balances requirement flow directly from the profound principles of the separation of powers doctrine of constitutional theory, of. A summation of the doctrine is as follows:

The separation of powers doctrine as thus seen does not stand up as a symmetrical allocation of powers clearly defined. Rather it is a distribution of the tasks of government to the different organs of government according to the agency best designed to carry them out, with provision for controls by means of checks and balances against the usurpation of full power by any one of the agencies of government. It is thus primarily a political doctrine and, in that context, retains vitality.85

85 Milton M. Carrow. The Background of Administrative Law (1948) 58
Although our constitution does not explicitly mention the separation of powers doctrine it is implied through the provisions of checks and balances between the different branches of government.\textsuperscript{86}

In South Africa members of the executive are appointed as members of Parliament, and the problem which arises is how these members can call to account their colleagues without bringing into disrepute the very party they belong to.\textsuperscript{87} Ideally there should be no cross-membership between the executive and the legislature. Nevertheless, because it is recognised that separation powers is not absolute\textsuperscript{88}, it is not considered necessary to limit this clear conflict of interest whereby members serve in the national assembly as well as the executive structures of government. It is for this reason that members of the legislature will remain reluctant to call to account a government that is largely made up of the leaders of the ruling party.\textsuperscript{89}

5.3. The impediments to oversight and accountability mechanisms

5.3.1. Electoral Act

As members of Parliament do not have any guarantee as to their future in Parliament, their ability to make decisions independent of the ANC leadership cabal is distorted. This position is enabled by the Electoral Act\textsuperscript{90} as well as the electoral system which functions on a closed list proportional representation (PR) system. The Electoral Act empowers political parties to review their party lists annually, and thereby representatives are deployed and redeployed at the will of the party.\textsuperscript{91} With the PR system ‘the party chooses its candidates [a]nd as a result elected MPs are more accountable to their party than to the voter, and voters do not have a direct relationship with members of Parliament because there are not electoral constituencies’.\textsuperscript{92} A political party nominates candidates for election to Parliament via its electoral lists and according to rank. In the ANC, the NEC (the highest decision-making body within the

\textsuperscript{87} Luvuyo Mbete An evaluation of oversight and accountability by the fourth Parliament of the Republic of South Africa (LLM thesis Stellenbosch University (2016) 21.
\textsuperscript{90} 73 of 1998
\textsuperscript{91} Item 21 to Schedule 1A of the Electoral Act 73 of 1998
ANC), for example, will make a final selection of candidates after having received a list of the nominees. The internal process leading to the recruitment of parliamentarians is deeply political and lies entirely in the hands of the leadership of the party organisation.

The consequence of such an electoral system means that when a voter has cast his or her vote a heavy reliance is placed on those elected to hold the executive government to account. As there is no security of tenure for members of Parliament, any action prejudicial to leaders of the party might make them liable to redeployment or dismissal. This leads to the key provision in the Constitution which ensures strict party discipline.

5.3.2. The Anti-defection clause

The anti-defection clause in the Constitution provides that members of Parliament lose their seat if they lose membership of the party that nominated them via their party lists to the Electoral Commission. It has been argued that these provisions stifle rights to freedom of speech and association of those very members. Calland has also stated that these provisions give the leadership of the political party ‘a large amount of power and makes holding the line and maintaining discipline within the parliamentary party a relatively easy task’.

In the ‘floor-crossing’ judgment, the Constitutional Court had an opportunity, *inter alia*, to more deeply analyse the anti-defection clause and its compatibility with democracy. The applicants in this matter argued that:

[A]n anti-defection provision is an essential component of an electoral system based on proportional representation. This, so the contention goes, is necessary to ensure that the results of an election are not affected by the defection of persons who gained their seats in a legislature solely because of their position on the party list. It is the party, and not the

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95 S 47(3)(c) of the Constitution, Act 108 1996; See also Paragraph 13 of Annexure A to Schedule 6 of the Constitution
96 Steytler op cit (no 9), 1
97 Richard Calland, ‘Discussion on South Africa’ in *Comparing Political Finance Worldwide*, The Electoral Integrity Project 5.
members, which is entitled to the seats, and if a member is allowed to
defect, that distorts the proportionality that the system was designed to
achieve.\textsuperscript{99}

The court then referred to the certification judgment in which the submission had been
made that the electorate makes a political choice to vote for the party and it is thus the
party that is accountable to them and not the individual members. For this reason the
court decided that ‘an anti-defection clause enables a political party to prevent
defections of its elected members, thus ensuring that they continue to support the party
under whose aegis they were elected’.\textsuperscript{100} The rationale is that should the party fail to
maintain its promises to the electorate, voters then have the right to vote it out of power
at the next election.

An interesting objection to the anti-defection clause in the first certification judgment
was that the requirements of accountability and responsiveness in constitutional
principle VI\textsuperscript{101} were breached. The objectors were concerned that parliamentary
members would have to follow the directives of the party leadership even if the party
‘had unequivocally abandoned its electoral manifesto and directed its MPs to vote,
speak and act against the policies expressed in that manifesto . . . which legislators
sincerely and reasonably believed to be wrong.’\textsuperscript{102} They submitted that the
responsibility of accountability and responsiveness of legislators to the electorate
would be seriously compromised. The court did not agree and reiterated that in
accordance with the proportional representation system, the party would remain
responsible for any abandonment of its promises and went on to say that the party
would then probably lose in the next election.\textsuperscript{103} Whilst it can be appreciated that a
court of law is not obliged to take cognisance of the intersection of law and political
science, note must be taken of its prediction that a political party which abandons its
manifesto, \textit{inter alia}, by failing to abide by constitutional values would probably be
voted out of power. However, the fact that a dominant political party which may have
failed to fulfil its promises could remain in power (a likely trajectory as seen earlier)

\begin{flushleft}99\textit{UDM v President of the Republic of South Africa and others supra (no 15) para 30.}
100\textit{Ex Parte Chairperson of the Constitutional Assembly, In re: Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) para 82.}
101\textit{Interim Constitution Act 200 of 1993}
102\textit{Ex Parte Chairperson of the Constitutional Assembly, In re: Certification of the Constitution of the Republic of South Africa supra (no17) para 186}
103\textit{Ibid}\end{flushleft}
provokes the argument that accountability and responsiveness are diluted by the anti-defection clause if there is no change in the hands of power.

The issue with the anti-defection clause is that although members are required to uphold an oath to serve the people of South Africa and therefore to conduct themselves in a manner which is befitting to their own conscience, belief and opinion mindful of our constitutional values, it has come to pass that MPs pander to the whims of the leadership camp in the ruling party without due regard for the aforementioned. Does this position thwart the will of the people? Surely if the party has been voted into power it is democratically correct for that party to ensure that a unanimous decision is made and to snuff out dissenting views from one or two individuals in the organisation? If the heads of the political party did not practise this form of control, a broad church such as that of the ANC would surely disintegrate? The answers to these questions will be unpacked in analysing whether the ANC’s practise of democratic centralisation has the ability to further impinge on accountability and weaken the role of Parliament.

5.3.3. The ANC majority and its power to influence legislation

In a closed-list proportional representation system, the number of seats which a political party occupies in the National Assembly is directly translated from the votes it received during elections. The ANC currently holds 230 seats and the remaining 170 are shared amongst the smaller political parties. The result of the ANC having a majority in Parliament, means that a motion or a Bill which is tabled by a member of the opposition for example, would probably not succeed unless ANC members assented to it. This has been illustrated with motions to remove the President or to amend the Constitution introduced by members of opposition parties. If, hypothetically, there had been an even distribution of seats between three of the major political parties in South Africa, the voting processes would have less predictable outcomes. Democratic centralism means that party members must vote in accordance

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105 In terms of section 74 of the Constitution, a Bill amending section 1 requires a 75% vote in the NA and six provinces to assent in the NCOP, Chapter 2 requires a 2/3rds majority vote and a supporting vote of six of the provinces in the NCOP. In terms of section 89 of the Constitution the president may be removed after a resolution is adopted in the NA with 2/3rds majority; Section 102 provides that a motion of no confidence in the president may be passed if majority of the members in the NA support such a motion.
with instructions given by the ANC caucus before parliamentary sittings. This practice thwarts the independent thinking of members and prevents open debate and discussion. Senior politicians who seek to preserve their own interests may use the advantage of the party holding the majority of seats to influence the outcome of legislative approval in parliament. In 2013, for example, a member of the opposition introduced a private member bill which sought to amend the Constitution pertaining to matters regarding the appointment of the head of the National Prosecuting Authority. The submission stated that the President should appoint the National Director on the recommendation and approval of the National Assembly and, *inter alia*, with the participation of civil society in the nomination of persons for the position of National Director.\(^{106}\) The National Prosecuting Authority (the NPA) has faced claims of political meddling and controversy at the hand of the executive for a long time in order to prevent its members being prosecuted for abuse of state power. The NPA is required to carry out its duties without fear, favour or prejudice, an impossible task if the appointment of the National Director is not made in the most scrupulous manner. Currently the appointment of the National Director of Public Prosecutions (NDPP) is the prerogative of the President in terms of section 179 of the Constitution. The proposed constitutional amendment would have ensured that the head of the NPA was chosen in a more stringent and careful manner, which in turn would ensure greater independence for the office of the prosecuting authority. Such an amendment could have restored the public’s faith in the NPA, but the Bill was defeated in the portfolio committee on justice and constitutional development. The Bill was rejected for further consideration by Parliament because the prevailing constitutional/legislative framework relating to the appointment of the NDPP was found to be sound in law;\(^{107}\) however, in the light of the tainted history of the NPA it would be prudent for Bills which are introduced by the opposition that are in the interest of the public and the Constitution should at least progress to the stage whereby public debate is facilitated. Democratic centralism therefore has the potential to undermine the integrity of parliamentary processes and impede the notion of multi-party democracy whereby both the voices of the majority and minority are heard.


107 Input by the Department of Justice and Constitutional Development to the Portfolio Committee on Justice and Constitutional development on the 18th Constitutional Amendment Bill
The following section examines the origins of democratic centralism and how it is practised by the ANC.

5.4. Democratic centralism and its meaning

Democratic centralism has characteristics of decision-making practice and party disciplinary policy which originated in the Communist Party of the Soviet Union. Centralism signifies that ‘all organs of state power and state administration form a single system and work on the basis of the subordination of lower organs to the leadership and control of higher organs.’

5.4.1. Democratic centralism and how it is practised by the ANC

Democratic centralism is regulated in the ANC constitution adopted at its 2012 Mangaung conference, affirming that the NEC ‘is the highest organ of the ANC between national conferences and has the authority to lead the organisation’. Rule 11.2C of the ANC constitution provides that the NEC has the power to ‘supervise and direct the work of the ANC and all its organs, including national, provincial and local government caucuses’. It further stipulates that ‘ANC members who hold elective office in any sphere of governance at national, provincial or local level are required to be members of the appropriate caucus, to function within its rules and to abide by its decisions under the general provisions of this Constitution and the constitutional structures of the ANC.’ According to Choudhry ‘democratic centralism is democratic in that it derives its legitimacy from the ANC’s electoral mandate . . .’ (Author’s emphasis)

In practical terms the ANC NEC makes decisions regarding public policy or any other matter and members must adhere to them. It also creates motivation for members wishing to advance their political careers within the organisation to follow the party line even when they disagree with such rulings. The following section explains how the aforementioned statutory provisions and party regulations in a dominant party regime result in failure by Parliament to hold the executive to account and how the intended constitutional balance is undone when the executive usurps Parliament’s role.

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109 Section 5.2 K of the ANC Constitution
110 Choudhry op cit (no 27) 14.
5.4.2. Parliament’s failures to hold the executive to account

During the Zuma presidency, eight motions of no confidence were tabled in terms of section 102 of the Constitution in the NA by opposition parties in the period 2010 until late 2017. These motions were moved on the basis, inter alia, that Zuma had conducted himself recklessly as the leader of Parliament and the executive; that he had done immeasurable damage to the economy and that important institutions had been captured by the state for private interests.

A turning point came about in the history of Parliament when Zuma failed to abide by the remedial action ordered by the Public Protector in a report which investigated and found that certain upgrades at his personal home were illegitimately funded from the public purse. The report was submitted to the NA to ensure that Zuma complied with the remedial action and that it took the necessary steps to hold the President accountable. The NA proceeded to set up an ad hoc committee comprised of members of the NA, which committee deliberated on the report together with a report received from the Minister of Police. The committee then approved the report submitted by the Minister of Police which absolved Zuma of wrongdoing. These actions by the NA and the Minister of Police presented a clear conflict of interest. Statutory provisions and party regulations set forth above call for strict party discipline, with the result that members of the political party are prevented from thinking independently when faced with instructions from the ANC cabal. Parliament’s integrity cannot remain intact if the head of the executive is found to have violated constitutional rules and then the same political leader appoints members of his cabinet over which he has great influence to advise him whether he is liable or not to comply with the said remedial action. When constitution rules are subverted during such processes the dominant political party crosses the line into an authoritarian state.

Members of opposition parties grew frustrated at the President and Parliament’s failures to comply, and the EFF sought satisfaction in the Constitutional Court which ruled that Zuma and the National Assembly had breached their constitutional obligations by failing to implement the recommendations and remedial action in the Public Protector’s report.

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112 Economic Freedom Fighters and Others v Speaker of the National Assembly and Another (CCT76/17) [2017] ZACC 47; 2018 (3) BCLR 259 (CC); 2018 (2) SA 571 (CC) (29 December 2017)
The Democratic Alliance then moved another motion of no confidence on 10 November 2016 which was heavily defeated. In an attempt to facilitate autonomy and freedom for those ANC members who had feared to vote in favour of the motion, the United Democratic Movement (UDM), a smaller party, applied to court for an order that Baleka Mbete, then Speaker in the NA, direct that voting take place by secret ballot. On 7 August 2017, the Speaker announced that a motion of no confidence would proceed in the NA via secret ballot. The motion was defeated 198–177, with 25 abstentions. In accordance with this calculation an estimated 20 ANC MPs voted in favour of the measure. Even though the motion failed, the power of democratic centralism is well illustrated in that, under the guise of a secret ballot, more ANC MPs enjoyed freedom to vote for the motion even when they might have been instructed otherwise. In the previous motion, despite Parliament having been reprimanded by the Constitutional Court, only 126 members were in favour and 214 were against it.

5.4.3. When the executive usurps the role of Parliament

Arguably, the ANC’s NEC usurped the powers of Parliament in 2018 when it called on Zuma to resign – a prime example of the democratic centralism referred to above, with top-down political control and management of the ruling party usurping constitutional rules. In accordance with the Constitution the President is elected in terms of section 86(1) by the National Assembly and therefore should be removed or dismissed by the same democratically elected Parliament. However, as stated earlier, the system of deployment and redeployment has ousted Parliament’s role in effectively removing the President from his position. After the NEC voted for the new ANC leader, Zuma, due to party pressure, either had to resign or be voted out of his presidency by the National Assembly through a motion of no confidence.

The Constitution has clearly provided procedures and mechanisms should the elected president fail to adhere to his obligations. Yet these provisions were not utilised by MPs to remove Zuma. The inference which can be drawn is that at the time when these

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113 United Democratic Movement v Speaker of the National Assembly and Others [2017] ZACC 21
motions were first tabled, MPs’ instructions were not to vote for the motion. Then after the ‘Zuma faction’ or alliance had been fragmented after the 2017 ANC NEC conference, there would have been an instruction to vote in favour of the motion had Zuma not resigned. The change in political leadership meant that Parliament would have been finally able to hold Zuma accountable because the ANC with its majority provided the final dictate to its members in Parliament.

In 1999, writers Giliomee and Simkins predicted that acute tension would develop between the sovereignty of the Constitution and the ‘sovereignty’ claimed by a party with an overwhelming majority. The case discussed below presents a chain of the events in which the ANC, as a dominant political party, felt the strain of constitutional supremacy when attempting to use its dominance to undermine the mandate given to Parliament by usurping its power.

In 2015, the controversial Sudanese president, Omar al-Bashir, headed to South Africa to attend the African Union Summit. The International Criminal Court (hereinafter the ICC) had issued a warrant of arrest against the state leader for genocide and other gross human rights violations. South Africa had ratified the Rome Statute in terms of Act 27 of 2002, which meant that the government, in terms of the treaty, was required to arrest al-Bashir. A civil organisation approached court for an order of the arrest of al-Bashir and the state requested a postponement of the hearing. In allowing the postponement, the court ordered governmental agencies to prevent al-Bashir from leaving the country until the return date. On the day of the hearing, representatives of the state misled the court in argument and during this time al-Bashir was secretly allowed to leave in contravention of the court order. An issue of pertinence was that the ANC executive then usurped the power of Parliament by deciding to withdraw from the Rome Statute. Further to that the notice of withdrawal was delivered to the United Nations Secretary-General without prior parliamentary approval. Various reasons were cited for this decision; one of the main contentions was that South Africa was party to the African Union constitution which afforded immunity to heads of state. Those in the higher ranks of the ANC criticised the ICC by saying it was prejudiced in

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117 Giliomee and Simkins op cit (no) xvii
its aim to exert regime change in African states. The DA and others challenged in court the ability of the executive to withdraw from the Rome Statute without parliamentary approval. The state submitted that international relations were an executive competence and therefore it was within the domain of the relevant department to decide to withdraw from the Rome Statute without parliamentary approval. The court decided that ‘the power to bind the country to the Rome Statute is expressly conferred on parliament. It must therefore, perforce, be parliament which has the power to decide whether an international agreement ceases to bind the country’.

This grave disregard for the rule of law by the ANC-led government can be attributed to the theories underpinning dominant political party theory, to the effect that the dominant party views itself as synonymous with the state. Upon receiving a reprimand from the judiciary for being in contempt of a court order, senior members of the ANC stated that the decision to allow al-Bashir to leave was a highly political decision and the right decision had been made. The response of the ANC portrayed a genuine belief that the actions of government were in South Africa’s best interest, despite this decision not only being in contravention of a court order but also an Act of Parliament. The decision to unilaterally withdraw from the Rome Statute further illustrates the dominant political party view that parliament’s approval was but a theoretical formality.

5.5. Conclusion
Parliament is the heart of representative democracy. If the integrity of Parliament is compromised, then constitutional democracy diminishes. In a regime where parliamentary supremacy is practised, the theory is that the people give their consent to be governed as part of a social contract whereby all their affairs are governed. In a constitutionally supreme state the contract referred to above between parliament and the electorate embodies the rules and obligations which flow from the Constitution.

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120 Davis and Le Roux op cit 254-255
121 Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening) (83145/2016) [2017] ZAGPPHC 53; 2017 (3) SA 212 (GP); [2017] 2 All SA 123 (GP); 2017 (1) SACR 623 (GP) (22 February 2017)
122 Democratic Alliance v Minister of International Relations supra (no 36) at 53.
123 Giliomee and Simkins op cit (no) xv.
124 Davis and Le Roux op cit 254
Therefore, whilst parliamentary members may follow through instructions in the name of democratic centralism, democratic centralism should be premised on what the Constitution informs.

This chapter therefore concludes that a majoritarian parliament creates much difficulty in a state which subscribes to constitutionalism. Whilst it is appreciated that all political parties’ function with internal party regulations such as democratic centralism, it is harmful when it is practised in a sense that individual members of Parliament cannot uphold their oath made in terms of the Constitution. The events described above paint a picture of the dominant political party seeking a hegemonic form of control by using its parliamentary strength and its key position within the state to suppress all forms of dissent against the state’s actions.
6. THE EXPANSION OF THE ROLE OF COURTS IN A DOMINANT PARTY REGIME

6.1. Introduction
In the previous chapter the weak oversight role of Parliament over the executive was discussed. In a dominant-party political sphere the executive has an all-powerful role in the two structures since it holds the majority of seats in Parliament, and the independence of party members is thwarted by party regulations and policies demanding strict party discipline. The danger which unfolds is when the leadership of the dominant political party seeks to obtain a hegemonic form of control over government and its resources. In doing so, whatever constitutional constraints may manifest, the executive attempts to curtail them by buttressing the strength of the dominant party in the legislature and undermining the role of constitutional institutions.

Therefore, Parliament’s weak ‘checks and balances’ role over the executive and the abuse of state power has resulted in the judiciary often being called upon to decide matters of a highly political nature. Often it is not only the minority political parties but civil society organisations which have resorted to the courts to fight corruption, abuse of power and the state’s service delivery failures. A classic example is the suit by the Treatment Action Campaign against the Mbeki administration for failing to administer anti-retroviral drugs to pregnant women with HIV and Aids.126 Davis and Le Roux describe the migration of politics to the courts as an exponential increase in ‘lawfare’ because all sectors of society had lost confidence in the integrity of state institutions and had come to rely on using the law to realise their basic rights and freedoms.127

For this reason, judges have become the ultimate watchdog in the defence of the Constitution against abuse of state power. In a constitutionally supreme state, an overactive role foisted on the judiciary is problematic and offends democratic principles. Parliament, which is elected and must represent the will of the people, is rendered powerless and unelected judges are expected to make political decisions which may have great consequences on the functions of the state. This conundrum,

126 Minister of Health v Treatment Action Campaign (TAC) (2002) 5 SA 721 (CC)
Davis and Le Roux op cit 4.
known as the ‘counter-majoritarian difficulty’ appears to be exacerbated in a dominant-party political state in which authoritarian governance principles are adopted. Many constitutional scholars the world over have suggested possible solutions for the danger of the courts being used to run the state with the creation of a legal doctrine which would establish a less irregular method for judges to conduct constitutional review. In essence the view taken, however, is that judicial review is a necessary function of a working democracy. Thus, it is argued that courts are being drawn into highly political matters not through their own accord or to attain ultimate power over the executive, but rather as a direct consequence of the dominance of one political party in a state as a result of the erosion on accountability.

In the following section I aim to discuss how a dominant-party political state has resulted in the expansion of the role of the judiciary by analysing various decisions by our courts and how they have been drawn into deciding matters of a highly political nature.

6.2. The role of the courts in a constitutionally supreme regime

The basic tenets of a Constitutionally Supreme system of governance are:

- a) A separation of powers;
- b) Checks and balances between the three branches of government;
- c) A justifiable Bill of Rights; and
- d) The judiciary’s power to review conduct by the executive branch of government. 128

The role of the judiciary is to interpret the Constitution and to declare invalid conduct or law by Government which is inconsistent with it. 129 In terms of Chapter 8 of the Constitution the judicial authority of the country is vested in the courts with guaranteed independence subject to applying the Constitution and the law without fear, favour or prejudice. The Constitution also prohibits any person or organ of state from interfering with the functioning of the courts, and so ensuring its status as an independent branch of government. 130

128 Klug op cit (no 12) 23–43
130 165(2) & (3) Ibid.
Judicial and constitutional review of legislation and other government action is underpinned by the above-mentioned principles to ensure accountability, responsiveness and openness.

6.3. Principles of non-intrusion

In a constitutional dispensation, the role of the judiciary is limited and subject to the Constitution; the courts, too, need to respect the boundaries between itself and the legislature and the executive. These boundaries flow from the principle of separation of powers and non-intrusion into the affairs of the other branches of government. Therefore the courts are bound not to usurp the powers bestowed on the legislature and the executive. Kate O’Reagan offers a framework for non-intrusion or deference as it is coined by constitutional scholars:

‘The role of the courts under our Constitution is to protect the Constitution, and in particular individual fundamental rights. At times, in asserting this function, courts will have to intrude to some extent on the terrain of the legislature and the executive. In doing so, however, it is clear from the jurisprudence that is emerging that courts must remain sensitive to the legitimate constitutional interests of the other arms of government and seek to ensure that the manner of their intrusion, while protecting fundamental rights, intrudes as little as possible in the terrain of the executive and the legislature.’

Despite the balance of power devised in the Constitution, Parliament has been rendered weak in holding the executive to account. The reason as previously discussed is because South Africa is functioning under a dominant party state and as such various opposition parties and civil society have turned to the courts to do the very job which Parliament is unable to do. This has resulted in the courts having to intervene or usurp the powers which have been specifically ordained for other branches of government.

6.4. The counter-majoritarian difficulty explained

The analysis of case law below illustrates the extent to which the judiciary has over-reached into the legislative sphere of government by dictating to Parliament the very rules by which it can conduct itself. This criticism is not against the decisions, but the

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131 O’Regan op cit (no 14) 133
132 Ibid 132
compatibility of such decisions with the separation of powers doctrine which ensures constitutional legitimacy. The argument is founded in Alexander Bickel’s theory of the counter-majoritarian difficulty. It is a theory which has evolved to test the democratic legitimacy of a state. Bickel presented the following argument:

‘The root difficulty is that judicial review is a counter-majoritarian force in our system . . . [W]hen the Supreme Court declares unconstitutional a legislative act or action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not on behalf of the prevailing majority but against it. That, without mystic overtones, is what actually happens . . . and it is the reason the charge can be made that judicial review is undemocratic.’

The national spokesperson of the ANC made the following statement about the ‘cabinet reshuffle’ judgment which is discussed in greater detail below:

This judgment signifies unfettered encroachment of the judiciary into the realms of the executive – pandering to the whims of the opposition who want to co-govern with the popularly elected government through the courts.’

This kind of criticism of the judiciary finds its basis in Bickel’s theory, a theory which questions to whom judges are accountable, because in effect they are encroaching on the terrain of a popularly elected government. In chapter one it was mentioned that a core element of constitutionalism is popular sovereignty.

[I]s the principle that the authority of a state and its government are created and sustained by the consent of its people, through their elected representatives (Rule by the People). . . . the source of all political power.

There is an obvious tension between popular sovereignty and judicial review of state action as both concepts which fall under the blanket of constitutionalism. When

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134 Le Roux & Davis op cit (no 119) 1.
135 Friedman Dialogue op cit (no 18),589
deciding on issues deeply rooted in politics there is a very thin line which judges may innocent overstep. Therefore, this thesis argues that in a dominant party democracy in which constitutional values are eroded to such an extent that the strength of the judiciary is the only weapon to guard against abuse of state power, inevitably its independence and legitimacy will be called to question.

In the case of *Primedia Broadcasting* v *The Speaker of the National Assembly* Judge Dlodlo issued the following warning:

> Courts should guard against the conduct which amounts to what can be described as an intrusion into the constitutional domain of Parliament which is not only unprecedented, but which has obvious major constitutional implications. If I were to grant the order sought by the Applicants herein, standing rules and procedures established by the Houses of Parliament in terms of their constitutional obligation to control their internal arrangements, proceedings and procedures would have to be amended. This would certainly amount to the court usurping the constitutional powers of not only Parliament but Houses of Parliament including Provincial Legislatures. ¹³⁷

Further, what appears to aggravate the matter is that there is no alternative means by which higher organs of state may resolve disputes, despite section 41 (2) of the Constitution which provides that an Act of Parliament must be passed to embrace intergovernmental relations and disputes. Therefore, weaker opposition parties and civil society have no alternative but to check the abuse of power (ie the integrity of the Public Protector as in the *Nkandla* judgment). Approaching the courts has proved to be the only effective method thus far in holding the executive accountable.

I will now consider case law in which the judiciary has been drawn into adjudication of matters of a heavily political nature which should ordinarily have been taken care of politically.

¹³⁷ *Primedia Broadcasting* vs *The Speaker of the National Assembly* supra (no14) at para 612749/2015.
Case law which illustrates how the role of the judiciary has been overburdened: Democratic Alliance v Speaker of the National Assembly

This decision arose out of events which transpired during the February 2015 State of the Nation Address. President Zuma sought to address the chambers of Parliament, but certain members of the EFF rose and addressed certain questions to him. The Speaker of the National Assembly advised the members of the EFF that the current session was not a question and answer session but one for the President to deliver a key address to the nation. EFF members continued to interject and the Speaker called security forces as well as the South African Police force to arrest the said EFF members in terms of section 11 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004.  

The DA argued that that:

[T]o allow the Speaker or the Chairperson the power to call upon the police and or army to arrest and remove members of Parliament from the House and to allow the Executive branch of government to enter the heart of the Legislative domain, is a serious and fundamental breach of the Constitution, entirely inconsistent with the basic notion of the separation of powers, and as such, section 11 should be struck down.

The Western Cape High Court declared the provision relied on by the Speaker to be inconsistent with the Constitution, and that declaratory order was brought before the Constitutional Court for confirmation. The court decided that section 11 [of the said act] was constitutionally invalid to the extent that it applied to members of Parliament’. The court did not, as urged by the DA, confirm the constitutional invalidity of the provision for infringing the separation of powers doctrine. The provision was held to be constitutionally compliant on the basis that ordering the arrest of a member or removal from chambers would only infringe parliament member’s rights to freedom of speech as contained in sections 58 and 71 of the Constitution which afforded members of Parliament freedom of speech in the Assembly and

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139 Democratic Alliance v Speaker of the National Assembly and Others supra (no 7) 8.
140 Democratic Alliance v Speaker of the National Assembly and Others (CCT86/15) [2016] ZACC 8; 2016 (5) BCLR 577 (CC); 2016 (3) SA 487 (CC) (18 March 2016)
141 Supra at 52.
immunity from civil or criminal proceedings, arrest or imprisonment for anything said in the Assembly.

It is therefore noted that ‘Constitutional review of legislation is the most sensitive form of judicial review’\(^{142}\) because it is deemed that judges are overreaching when interfering with the legislator’s law-making mandate.

*President of the Republic of SA v Democratic Alliance and Others\(^{143}\)*

The case related to the infamous cabinet reshuffle which was announced late on the eve of 31 March 2017, in which the President Zuma decided to dismiss several ministers and replace them with ministers of different portfolios. The DA, once again, launched an urgent application in the North Gauteng High Court in terms of rule 53 of the High Court Rules, seeking to be provided with an intelligence report which allegedly prompted the President to effect the cabinet reshuffle.\(^{144}\) The aim of the application was to establish the reasoning behind the President’s decision, to enable the DA to determine whether the decision could be taken on review on the ground of illegality or irrationality. Vally J conceded that there was no precedent which extended Rule 53 to executive decisions, yet he relied on a purposive method of interpretation to conclude that rule 53 did in fact extend to executive decisions and the President was ordered to make available the records requested.\(^{145}\) On appeal, the Supreme Court of Appeal (SCA) found that the extension of rule 53 to executive decisions was not unprecedented.\(^{146}\) However, the circumstances of the Cabinet reshuffle constituted a unique executive decision, a decision which was founded on section 91 of the Constitution and which was highly discretionary in nature. The submissions made by the President’s counsel argued that the interpretation of rule 53 and the extension of its ambit was strictly within the mandate of the Rules Board\(^{147}\) and the decision made in the North Gauteng High Court was a breach of the separation of powers doctrine as


\(^{143}\) (24396/2017) [2017] ZAGPJHC 168 (2 June 2017)

\(^{144}\) *The President of the RSA v DA & others* (664/17) [2018] ZASCA 79 (31 May 2018) para 5.

\(^{145}\) *The President of the RSA v DA & others* supra 17 para 6

\(^{146}\) The court made reference to *Van Zyl and others v Government of the Republic of South Africa and Others* 2008 (3) SA 294 (SCA); *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8 (24 April 2018)

a result. The SCA ruled that since the decision was not unprecedented and that there were decisions of a similar nature by the SCA the appeal should be dismissed.

This judgment did not truly address the distinction between the different types of possible executive decisions, although it was roundly accepted that when the President exercises his discretion to appoint ministers, such decisions must be made lawfully and rationally. However, the court held that extending the ambit of the said rule should have been remitted to the Rules Board which formed part of the legislature. The lower court made a decision in the law on a political issue and entered a forbidden terrain. The SCA did not consider implications for future cabinet reshuffles or appointments of ministers, as this was exclusive executive function could not be the subject of judicial scrutiny and constitutionally not within the ambit of the courts.

Economic Freedom Fighters and others v Speaker of the National Assembly and Another[^148]

The facts of this matter, which received wide public attention, have been mentioned in previous chapters. The case illustrates the extent to which judicial intervention is required to hold the executive to account. In the first decision in the matter the President fell afoul of his constitutional obligations by ignoring a Public Protector’s report; and in the second ordering that the remedial action by the Public Protector must be carried out where the National Assembly could not effectively hold the President to account despite a ruling by the Constitutional Court. The decision emanated from the first judgement handed down on 31 March 2016 in which the President was ordered to pay back money for the non-security upgrades at his Nkandla homestead. The Constitutional Court was approached in the second instance by the opposition parties for relief on the grounds that the National Assembly had done nothing to hold the President to account after the initial judgment was handed down.

This case illustrates how the dominance of the ANC can render the National Assembly ineffective in its oversight role. After the Constitutional Court found in the EFF 1 case[^149] that the President was in violation of his constitutional obligations in failing to implement the remedial action imposed by the Public Protector, opposition parties still

[^148]: [2017] ZACC 47
[^149]: Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11
continued to suffer defeats in passing motions of no confidence in the President in terms of section 102 of the Constitution. It was submitted that section 89 of the Constitution allowed the National Assembly to remove the President with a two thirds majority vote on the grounds of a serious violation of the Constitution or the law, and that the NA had failed to do so. The respondent contended that motions were tabled, debated on and voted on which meant that the NA did not fail in its obligations and that it had attempted to hold the President accountable. Judge Zondo asserted the following:

It cannot be, and I think the applicants accept this, that, if the motion of no confidence in the President succeeds, the National Assembly will be said to have held the President to account but, if the motion is defeated, it would be said that the National Assembly has not held the President to account. Whether the National Assembly has held the President to account through a motion of no confidence in him or not cannot depend upon the result of the vote. If this is correct, then the fact that motions of no confidence in the President were moved, deliberated and voted upon on 10 November 2016 and 8 August 2017 means that the National Assembly did hold the President to account through such motions. This, therefore, means that the foundation of the applicant’s case on this issue, namely, that the National Assembly has done nothing since the judgment of this Court in EFF 1 to hold the President accountable has been shown to be untrue and unjustified.151

If ANC MPs were instructed to vote in accordance with the motion or could have exercised their discretion within the parliamentary chambers, the various motions could possibly have succeeded and NA could not be accused of being incapable of holding the executive to account. The example reinforces my argument that, by virtue of holding majority seats in parliament, the ANC through its democratic centralist principles and strict party discipline renders Parliament no more than a mere hypothetical construction.

150 Economic Freedom Fighters and Others v Speaker of the National Assembly and another supra 21, para 89.
151 Ibid para 93.
6.5. Conclusion

Although constitutional review as described above can be in conflict with democratic or representative accountability,\(^{152}\) the judiciary has served a primary and exemplary role in ensuring that the values in our Constitution remains intact. Moreover, it is the strength of the judiciary as an institution which has assisted in reducing the ANC-led government to a weak dominant party state as South Africa is still widely considered by the international community as a thriving liberal democracy (author’s emphasis). To the credit of the ANC, as Davis and Le Roux have mentioned, the ANC has, without demur, accepted adverse decisions against state misconduct.\(^{153}\) This commitment in accepting decisions contrary to their political objectives may be attributed to the legacy of former president Nelson Mandela; in 1995 the Constitutional Court found that Mr Mandela’s actions, and the statute which authorised such actions were in violation of the Constitution.\(^{154}\) In a response Mr Mandela announced that it was ‘not the first nor will it be the last, in which the Constitutional Court assists both the government and society to ensure constitutionality and effective governance’.\(^{155}\)

The analysis of the case law in this chapter reveals that the courts have increasingly been turned to for the resolution of politics, thus expanding its role in holding the executive to account on behalf of parliament. Further the break down in accountability to the electorate has led civil society to use the courts to air their frustrations at a State which has failed to fulfil its constitutional promises. It is disappointing to note that the Ruling party or that certain high-ranking politicians require a court order before fulfilling their oath to society. However, as has been stated earlier and throughout this thesis, the concentration of power in the very top hierarchy of the dominant political party leads to a certain air of an all-encompassing power to make decisions, whether those decision are good or bad is irrelevant. It is after all in terms of its electoral mandate that the ANC has been given all this power.


\(^{153}\) Davis and Le Roux op cit (no 119) 14.

\(^{154}\) *Executive Council of the Western Cape Legislature vs. President of the Republic of South Africa* 1995 (4) SA 877 (CC) at para 101.

It must therefore be concluded that the courts have had and will continue to have a difficult task in society’s continuing quest to achieve a just, open and democratic society in the face of a dominant political party whose party regulations and practices may undermine the constitutional mandates of democratic institutions.
7. CADRE DEPLOYMENT

7.1 Introduction
The previous sections dealt with how the inability of the legislature to effectively hold the executive to account caused its role to spill over to the judiciary, thus expanding the role of the courts. I have argued that these constitutional shortcomings are a product of the ANC’s dominance. However, it is necessary to consider the other important branches of Government – the administration of public services, parastatals or other statutory bodies. The functions of these offices have a huge bearing on society at large and the day-to-day lives of the citizens. Has the ANC as a dominant party ensured the efficient and effective functioning of these state institutions or has dominant-party lack of accountability seeped through to the administrative tiers of government as well?

In this chapter I analyse the ANC policy of cadre deployment and how it influences other branches of government such as the National Prosecuting Authority or state-owned enterprises (although cadre deployment is utilised at all levels of the state).156

First, I will look at the meaning of cadre deployment and the reason for its utilisation within the ANC. Thereafter I will consider how it is practised in other parts of the world and will conclude by determining whether, through its dominance, the ANC has wielded its power to use cadre deployment in its national programme to assert such state patronage to continue and grow its dominance, or whether it is simply a façade to disguise the career advancement for the political elite and party loyalists?

The second question is whether cadre deployment is viable in a constitutional setting.

7.2 Cadre deployment defined
Cadre deployment is better known in most parts of the world as political patronage; simply put it is the appointment of a person to a government post based on their loyalty to the party in question. Cadre deployment is more specific in that it refers only to a career path within governmental structures, whereas political patronage could take the form of any reward which is a state resource which the political party has control of, be it a government contract or illegal gift.157 Whilst political patronage is utilised by executive branches the world over, in those states which subscribe to

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constitutionalism, senior appointments (ie judicial) are subject to legislative approval. In the United States the Constitution has no provision to determine the qualification of a justice to the Supreme Court and it allows the President to nominate anyone subject to the Senate’s approval. In South Africa, the executive exercises a strong discretionary role in appointing various senior or high-ranking officials. Some of these appointments are prescribed in the Constitution: for example, the National Director of Public Prosecutions is appointed by the President, albeit subject to a few requirements in the National Prosecuting Authority Act. Although the executive is free to make senior appointments, such decisions may be taken on review on grounds of illegality or irrationality. Under the next heading I will consider how cadre deployment is interpreted and practised by the ANC.

7.3 How deployment is practised by the ANC

Cadre deployment is a long-standing practice of the ANC; at its national consultative conference in 1985 it formalised the ideological framework of deploying cadres. The movement at the time was burdened with the crucial task of revolutionising the masses within South Africa in order break the apartheid regime. The movement also set out to mobilise the international community to further sanction and isolate the apartheid state. Strict loyalty, discipline and commitment was required of a cadre to do whatever tasks were allocated to them. Cadre deployment corresponds with the democratic centralisation policies of the ruling party because cadres were acting on instructions made by the highest-ranking body within the organisation. ANC spokesman J. Netshitenzhe wrote in an ANC publication:

We must have a clear understanding of the system of supervision and decision-direction . . . to ensure that our army of cadres discharge their

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159 Section 179 (1) of the Constitution
160 Section 9 of Act 32 of 1998
161 Democratic Alliance v The President of the RSA & others (263/11) [2011] ZASCA 241
163 Netshitenzhe J ‘The National Democratic Revolution– Is it still on track?’ 1996(1) Umrabulo,
responsibilities in accordance with decisions which the movement has made. \(^{164}\)

Since coming into power after the 1994 elections the ANC continued to utilise its cadre deployment policy to ensure the transformation of the public service and the implementation the new government policies in line with their historical transformation project. Members of the organisation would be deployed across sectors of the state, as reflected in an extract from a presidential report:

> With regard to the matter of the better deployment of our cadres, we must ensure that we achieve the proper balance among the various demands on our pool of cadres, which includes the local, provincial and national legislatures and governments, the ANC structures at all these levels, the public service and the economy.' \(^{165}\)

At the 53\(^{rd}\) annual conference of the ANC in 2012, a resolution was taken to declare the next decade as ‘The Decade of the Cadre’. \(^{166}\) Reference was made to the neglect of the cadre policy and how it had resulted in the weaknesses and challenges faced by the movement, and therefore in the new phase of the national democratic revolution the ANC would ensure that much preparation was done systematically, academically, ethically and ideologically before deploying cadres. \(^{167}\)

The policy has been widely criticised by opposition parties and society who claim that it is a means by the ruling party to centralise control over the economy, \(^{168}\) that it bypasses merit requirements so that those with political ties to the party can advance their careers. It is also argued that state institutions were compromised because cadres

\(^{164}\) Chitja 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?’ 41(2) *Journal of Social Sciences* 160


\(^{167}\) Ibid.

became irresponsible and answered to the party instead of the organisation by which they were employed or Parliament.  

The policy itself is strategic in nature – a way of mobilising political resources to maintain power and carry out policies and ideals of the party. It is also a means of exercising influence at various state institutions; the cadres are in a position to revive memories of the legacy of the ANC and its liberation struggles.

The next section will explore cadre deployment as a political tool to maintain dominance by investigating its practice in other countries.

7.4 Deployment and patronage to preserve dominance

In accordance with Greene’s theory which is discussed in Chapter 3, political parties use the power of appointment and other political resources to maintain their dominance. This resource-based theory has proposed that the fall of dominant parties is directly linked to their loss of control over political resources and state-owned enterprises. De Jager uses the example of Mexico where the dominant political party, the Institutional Revolutionary Party (PRI), filled all decision-making positions with affiliates who were unquestionably loyal to the party. De Jager notes:

This power of appointment was also one of the mainstays of its corporatist arrangements with labour, civil society and the peasantry. In return for demonstrations of their loyalty through turning out their members to vote for the PRI, they could gain access to political appointments.

Bay writes: ‘The elites of the PRI ruled the police and the judicial system, and justice was only available if purchased with bribes.’ The PRI had through its means of utilising political patronage and electoral fraud ensured its dominance for 71 years and

170 Nicola De Jager & Pierre Du Toit op cit (no 32) 27.
171 Ibid 200
172 Ibid 200
gradually lost votes due economic decline and the privatisation of state-owned entities. 174

Today, in Russia, cadre deployment is practised by distributing leadership posts in the legislature to the political elite in order to maintain regime stability. 175 Reuter is of the view that in dominant party regimes which practise elite cohesion, there is more stability because ‘cadres who have institutional guarantees about their career advancement opportunities are more likely to have a vested interest in supporting the current regime than cadres in regimes where such institutional guarantees are lacking’. 176

These examples show that political patronage is perhaps the only way by which the party can ensure centralisation of control throughout government and prolong its dominance. Under the following heading we explore the question whether cadre deployment is out of place in a constitutional setting?

7.5 Cadre deployment: unconstitutional?

Section 195 of the Constitution places the following obligation on the state and its administration in terms of good governance principles:

a. A high standard of professional ethics must be promoted and maintained.
b. Efficient, economic and effective use of resources must be promoted.
c. Public administration must be development-oriented.
d. Services must be provided impartially, fairly, equitably and without bias.
e. People’s needs must be responded to, and the public must be encouraged to participate in policy-making.
f. Public administration must be accountable.
g. Transparency must be fostered by providing the public with timely, accessible and accurate information.”

Headings (c) and (d) above note that cadre deployment is a means for the ruling political party in any regime to pursue its national project. Bearing in mind the provisions set out in section 195 of the Constitution, as long at the rules pertaining to

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176 Ibid 663
the administration of a state entity are not compromised, cadre deployment could not be considered unconstitutional since it is not unique to the ANC but a political tool which is practised by any political party. When employing individuals to high ranking positions there are various legislative requirements which need to be adhered to that include the recruitment policies of the state entity.

The cadre deployment policy has, however, come under fire when the cadres do not meet the job requirements of the government office. Following sections deal with appointments made by the ANC executive and how merit requirements are disregarded in favour of political affiliation. Furthermore, the argument against cadre deployment is not always that the recommended candidates do not have the necessary qualifications, but rather that their decisions in that position appear clouded, biased and irrational. The office bearers are deemed not to honour their oath of office in terms of the Constitution but rather surrender to a perceived obligation to demonstrate loyalty to the dominant political party. These arguments will be presented by considering the appointments of the National Director of Public Prosecutions. The last criticism submitted is that cadre deployment allows scope for corrupt politicians to place pliant party loyalists in senior positions in state portfolios which exercise some form of control over state coffers. In doing so various diversions are created by way of regulation and policies to do business which is beneficial to the politicians’ own interest.

7.5.1. When deployment flouts merit requirements

In Vuyo Mlokoti v Amathole District Municipality and Others 177 the Eastern Cape High Court reviewed the decision of the executive mayoral committee to appoint an inferior candidate over the applicant as Municipal Manager. During the proceedings a letter surfaced from the Executive Mayor to the ANC regional committee in the Eastern Cape, advising that, despite the preferred candidate far outweighing the other candidate in terms of qualifications and experience, the ANC approved the appointment of the inferior candidate. The applicant, being the rejected candidate, approached court and the judge held the following on the undue involvement by the

ANC as a political party in intervening in a process which was clearly prescribed by legislation as well as human resource policies:

\[\ldots\] The Regional Executive Committee of the ANC instructed the caucus to appoint the second respondent and the caucus carried out this instruction. This is not an example of democracy in action [\ldots], certainly not of constitutional democracy. It, rather than the two legal opinions, amounted to a usurpation of the powers of first respondent’s council by a political body which, on the papers, does not appear even to have had sight of the documents relevant to the selection process including the findings of the interview panel. In my view, the involvement of the Regional Executive Council of the ANC in the circumstances described in VM23 constituted an unauthorised and unwarranted intervention in the affairs of first respondent’s council. It is clear that the councillors of the ANC supinely abdicated to their political party their responsibility to fill the position of the Municipal Manager with the best qualified and best suited candidate on the basis of qualifications, suitability and with due regard to the provisions of the pertinent employment legislation as set out in paragraph 1 of the recruitment policy. This was a responsibility owed to the electorate as a whole and not just to the sectarian interests of their political masters.\(^{178}\)

The court’s decision to review and set aside the appointment of the candidate preferred by the ANC means that no political party should interfere in processes which have been set out by policies and legislation. This is the first example of how cadre deployment subverts the margins of the constitution as provided for in section 195; the second example below purports to show how cadre deployment can create leeway for the political elite to exercise undue influence over the officer-bearer’s decisions.

### 7.5.2. Deployment compromises the independence of state institutions

The controversiality of cadre deployment can be assessed by the appointments made to the role of the National Director of Public Prosecutions (the NDPP). It is the prerogative of the President to appoint the NDPP in terms of section 179 of the

\(^{178}\) Vuyo Mlokoti v Amathole District Municipality supra, 36.
Constitution. The politicisation of the prosecuting authority started with the very first appointment, that of BT Ngcuka. During the Schabir Shaik investigations Ngcuka had found a *prima facie* case against Zuma in the corrupt arms deal saga; however, he could not prosecute Zuma because of insufficient evidence. Those in the ‘Zuma alliance’ felt that Ngcuka’s statement about Zuma’s involvement in the saga brought his character into disrepute and as a result Ngcuka was later accused of being an apartheid-era spy.\(^{179}\) A commission of inquiry was then appointed by President Mbeki in which Ngcuka’s name was cleared.\(^{180}\) Shortly thereafter, Ngcuka resigned from his position as NDPP after a period of six years – it is likely that the arms deal debacle and the accusations which followed contributed to his reasons for leaving. The NPA has since then and to date entered a period of ‘instability, infighting and public controversy’.\(^{181}\) Six Directors have since been appointed – two in an acting capacity and another had to be suspended after being struck from the roll of advocates.\(^{182}\) It has long been speculated that former President Zuma used his discretionary powers to appoint the NDPP based on political affiliation and loyalty to him, in order to avoid prosecution for the corruption charges.\(^{183}\) When Mokotedi Mpshe was appointed acting NDPP, he decided to withdraw all charges against Zuma and all roadblocks were dismantled in order for Zuma to assume the presidency of South Africa.\(^{184}\)

Another Director of Public Prosecutions, Mr. Nxasana, was requested by the executive to resign as the National Director after serving only nine months in office, but he refused on the basis that there was no factual nor legal ground for him to do so. President Zuma then informed Nxasana of his intention to institute an inquiry into his fitness to hold office.\(^{185}\) The reason cited was that he had a previous criminal conviction for violent conduct. During the preliminary stages of the commission hearing Nxasana entered into a settlement agreement with Mr. Zuma and received payment for the remainder of his contract. A civil organisation, Corruption Watch,
brought an application to the court to set aside the settlement agreement and order Nxasana to repay the money. The pivotal question before the Constitutional Court was whether Nxasana’s removal from office was compliant with the provisions of the National Prosecuting Authority Act. The court noted that Zuma, through his attorney had been very persuasive in getting Nxasana to step down. Zuma’s lawyer had sent a blank cheque to Nxasana to note down any figure he deemed appropriate for compensation. The court decided that the manner in which Nxasana vacated the office was unconstitutional and as a result the appointment of ‘successor’ Shaun Abrahams, too, became null and void and was set aside.

The political meddling in appointing the NDPP meant that none of the appointed NDPPs served his 10-year term of office. The court concluded:

The NPA plays a pivotal role in the administration of criminal justice. With a malleable, corrupt or dysfunctional prosecuting authority, many criminals – especially those holding positions of influence – will rarely, if ever, answer for their criminal deeds.

Shortly after Zuma resigned as President and was succeeded by Cyril Ramaphosa, it was announced by Shaun Abrahams (before his appointment was set aside) that corruption charges would be reinstated against Zuma. This raises the question why the NDPP decided to reinstate charges only after Zuma’s presidency ended, suggesting a case of not biting the hand that feeds you. The history of the NDPP is a key example of how cadre deployment can serve the interests of the political elite. The independence of the NDPP must be established to guard against corruption by high ranking politicians.

The final example to consider of is how cadre deployment can facilitate the expropriation of state resources for private interests.

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186 Section 12(8)  
187 Corruption Watch NPC and Others v President of the Republic of South Africa and Others supra (no 187) at para 26  
188 Corruption Watch NPC and Others v President of the Republic of South Africa and Others supra (no 187) at para 19  
189 Onishi, Norimitsu ‘Zuma to Be Tried on Corruption Charges.’ The New York Times, March 17, 2018, A7 (L)
7.5.3. Deployment creates a leeway to state capture

The Commission of Inquiry into Allegations of State Capture headed by Judge Zondo (Zondo Commission) which is investigating state capture, corruption and fraud at public enterprises and state organisations is continuing and will not be completed by the time this thesis is submitted. However, evidence suggests that state capture has seeped poisonously into various tiers of government, with office bearers pursuing their own interests rather than contributing to the growth and development of South Africa. Cadre deployment plays a key role in the capturing of state institutions because it facilitates digression from the classical objectives of government entities. By placing party loyalists in top management positions, lines of authority and accountability are quickly and easily diverted. The Zondo Commission has revealed to the South African public the grave magnitude of state capture and its detrimental consequences.\textsuperscript{190}

The commission began its work during August 2018 and nearly a year later former president Zuma has and will continue to answer the serious allegations made against him in July 2019 hearings. He has been implicated by several witnesses, including former Government Communication and Information System head Themba Maseko; former ANC MP Vytjie Mentor; former finance minister Nhlanhla Nene; current Ministers Pravin Gordhan and Fikile Mbalula; and former Bosasa (now African Global Operations) operations chief Angelo Agrizzi.\textsuperscript{191}

The claims against Mr. Zuma are that allowed members of the Gupta family to influence the appointment of ministers to certain cabinet portfolios to facilitate business between the state and themselves. The Gupta family has long been speculated in the media to have had strong ties with the former president.\textsuperscript{192}

By using the policy of cadre deployment those in the higher ranks of the dominant political party seek to appoint pliable cadres into key positions which directly or indirectly control the public purse. The previous chapter detailed the ‘cabinet reshuffle’ judgment in which opposition parties demanded to know why the sudden changes in the cabinet were necessary. The move discounted South Africa to near junk status by the rating agency S&P Global – a blow to an economy with already slow

\textsuperscript{190} Davis and Le Roux op cit (no 119) at 296.
GDP growth and high unemployment. Evidence at the Zondo Commission reveals the likely purpose of the cabinet reshuffle; Praveen Gordhan testified that his axing could have been influenced by his refusal, as Minister of Finance, to sanction deals that would have placed the South African economy at risk. Nhlanhla Nene also testified that on the eve of 9 December 2015 he was replaced by backbench MP, Desmond Van Rooyen, because he refused to agree to a nuclear deal with Russia. His reasons for refusal were that it was not feasible or fiscally affordable. It has been alleged that Zuma had a personal interest in these contentious matters. The testimonies create the perception that those in the political alliance who are willing to appease political leaders are easily promoted to high positions within the state. On the other hand, ministers who make decisions in accordance with their constitutional mandates and block dishonest deals are discharged by the executive in terms of the powers they hold of deployment and redeployment. The further danger revealed by this chain of events is that if those in the highest ranks of the dominant political party are easily lured by fiscal arrangements and are controlled by actors outside of the political arena, then democracy itself deteriorates. As previously indicated, popular sovereignty means ‘ruled by the people for the people’; if actors outside of the political arena have powers to appoint ministers in order to conclude profitable dealings with the state, then the state falls foul of its constitutional obligations to represent the interest of the electorate.

If these allegations regarding the reshuffling of cabinet ministers are true, then cadre deployment should be regulated by national legislation.

The conclusion of this chapter follows.

7.6 Conclusion

The example of the PRI in Mexico in heading four above provides insight into how a policy like cadre deployment can ensure self-preservation for any political party wishing to maintain dominance. It has been employed by the ANC since the liberation struggle days to have loyal party members perform their tasks in line with the ideals and objectives of the party. After 1994, cadre deployment remained a useful tool for

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195 State Capture Inquiry transcripts, day 25, 19 November 2018, 15. See also Choudhry op cit (no 27) at 14.
the ruling party to pursue its national transformation projects by entrusting these goals in government hierarchies to those who were loyal and best understood the policies of the ANC. In recent years, however, as illustrated by the case law and the Zondo Commission, cadre deployment has been abused by high-ranking ANC members. Under the guise of cadre deployment, ANC members have facilitated corruption and capture of state institutions, which is detrimental to the transformation-building intended by the Constitution. Cadre deployment must surely be regulated through legislation which passes constitutional muster, so as to ensure that the policy is not undermined by a few unscrupulous politicians. Cadre deployment is not absolutely unconstitutional – it is a legitimate means for the ruling party to deliver on its promises to those voters who subscribe to their policies. The policy, however, can enable corrupt politicians to compromise the constitutional efficacy of state institutions under the cloak of legal appointment.
8. CONCLUSION OF THE THESIS

This thesis aimed to determine whether a dominant political party in a state can erode the legitimacy of its constitution; in doing so various pathologies were considered to distinguish between liberal and illiberal democracies. When it was established that South Africa is a liberal democracy, it was aimed to determine which practices by the ANC could border on the line of illiberal and whether such actions have eroded the core values of Constitutionalism.

The ANC receives its mandate via popular vote and therefore holds majority seats in Parliament which represents the will of the people. However, due to the Electoral Act, the anti-defection clause in the Constitution and democratic centralism, all the power given by the people is concentrated in the very top hierarchy of the ANC. These provisions, which have passed constitutional muster, weaken the independence of members representing the political party resulting in failure to hold the executive to account through parliamentary measures. When the ANC is unhappy with its political leaders, these leaders are ‘recalled’ or requested to resign by the ANC NEC; the opinions of other political parties which also represent a demographic of society in Parliament are not considered.

When accountability is eroded, civil society, opposition parties and the media place a strong reliance on the courts as the independent branch of government to uphold the values of the Constitution. The separation of powers and the checks and balances between the three branches of government are, as a result, weakened and an imbalance is created which expands the role of the judiciary to enter the terrain of politics. The executive holds all the power and the judiciary is regularly called to check that power, which renders Parliament, the only constitutional institution which represents the people, a mere hypothetical construction.

With all the power concentrated in the executive arm of government, policies like cadre deployment may be utilised to exercise undue influence over high ranking state officials heading important portfolios. Transparency in various institutions is distorted, resulting in the loss of billions of rand.

Can the dominance of the ANC be blamed for these constitutional challenges? The answer is yes – as a more equal distribution of seats in parliament between political
parties would have prevented the problems faced by the fifth South African Parliament. The compromise of state institutions would also be prevented if members of different political parties headed various cabinet portfolios making the political landscape more competitive as political parties strive to deliver services and impress the electorate and garner more support in the following elections. The constitutional model which centralises power in the executive arm means that the various institutions and appointments created by it will always remain controversial or tenuous. It is therefore necessary for all those wielding power in the top hierarchies of the political organisation in a dominant party system to respect the Constitution and uphold the rule of law. In doing so the ANC may retain its dominance, the people will be empowered and constitutional legitimacy protected.
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