

‘HE HAD A MANDATE’;
THE SOUTH AFRICAN CONSTITUTIONAL COURT
AND THE AFRICAN NATIONAL CONGRESS
IN A DOMINANT PARTY DEMOCRACY*

*Sujit Choudhry***

1 Introduction: the Hlophe affair and the African National Congress

We may never learn what actually happened when Justice Hlophe visited the chambers of Acting Justice Jafta and Justice Nkabinde at the Constitutional Court in April 2008. These meetings took place after the Constitutional Court had heard the argument but before it had rendered judgment in *Zuma* and *Thint*,¹ two appeals arising out of the long-running legal-political saga of the arms deal that has dominated South African politics since 1999 and which directly involved the criminal investigation of Jacob Zuma.² The Constitutional Court’s complaint against Hlophe to the Judicial Services Commission (JSC) alleged that Hlophe discussed the appeals with both judges, and offered his views that Zuma had been a victim

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** Faculty of Law & Department of Political Science, University of Toronto.

¹ *Thint Holdings (Southern Africa) (Pty) Ltd & Another v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2009 1 SA 141 (CC); 2008 12 BCLR 1197 (CC).

² A Feinstein *After the party* (2007) and P Holden *The arms deal in your pocket* (2008).

2 SA Constitutional Court and the ANC in a dominant party democracy

of personal prosecution, that the judgments below were incorrect and Zuma's appeal before the Constitutional Court meritorious, that Jafta was Zuma's 'last hope', and that Hlophe 'had a mandate' to approach the Court, although he did not say from whom.³ Given the accusation that Hlophe attempted to influence the Court's decision in the Zuma matter, the barely unstated implication is that Hlophe was acting on behalf of a set of individuals, or a faction, within the African National Congress (ANC) allied with, or perhaps even directed by, Zuma.

It was originally thought that the decisions of the JSC in August 2009 to discontinue its investigation into the Court's complaint and to treat this matter as finalised had put an end to this episode.⁴ But a pair of constitutional challenges to the JSC's decisions will ensure that the issue remains alive for some time to come. The fact that these cases have been brought by Helen Zille, the Democratic Alliance Premier of the Western Cape, and former Constitutional Court judge Johann Kriegler (through his NGO, Freedom Under Law) – the latter supported by Kader Asmal, a former ANC cabinet minister, and veteran of the anti-*apartheid* struggle – has added political fuel to the legal fire.^{5,6} Thus the JSC may yet be ordered to make factual findings on the true nature of Hlophe's approach in a highly charged political environment, with potentially serious consequences for Zuma, the ANC and the Constitutional Court.

³ Chief Justice Pius Langa's statement to the Judicial Service Commission, 17 June 2008, paras 29 and 48, available online at <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71656?oid=92275&sn=Detail>. For Hlophe's response, see <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71656?oid=93311&sn=Detail>. Hlophe also launched a counter-complaint, the text of which is available online at <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71656?oid=91958&sn=Detail>.

⁴ Decision of the JSC, 15 August 2009. Reasons for the decision were given on 28 August in a 150-page document.

⁵ Zille has argued that the JSC was improperly constituted, since in 'considering matters relating to a specific High Court', sec 178(1)(k) of the Constitution of the Republic of South Africa, 1996 ('1996 Constitution'), requires the JSC to include 'the Premier of the province concerned' or an alternate designated by her, which it did not. Zille's constitutional challenge succeeded in the High Court, and the JSC has decided to appeal that judgment (*Premier of the Western Cape Province v Acting Chairperson: Judicial Service Commission & Others* (unreported, 25467/2009) [2010] ZAWCHC 80 (31 March 2010). Freedom under Law's (FUL) application for judicial review of the JSC's decisions proceeds on the basis that they are irrational, influenced by errors of fact and law, and procedurally unfair. It also argues that that the JSC has failed to comply with its constitutional duty to exercise its powers and determine that a case has been made out or not (implicit in sec 177) (FUL founding affidavit, paras 464-471). The full text of the affidavit is available online from the FUL website at http://www.freedomunderlaw.org/resources/FREEDOM_UNDER_LAW_Founding_Affidavit.pdf.

⁶ An additional layer of complexity was added by Hlophe's challenge to the constitutionality of the Constitutional Court's complaint, on the basis that the Court laid the complaint against him in its institutional capacity, and accordingly owed Hlophe a constitutional duty of procedural fairness that it breached. Hlophe's challenge succeeded in the High Court (*Hlophe v Constitutional Court of South Africa & Others* 2009 2 All SA 72 (W); 2009 2 BCLR 161 (W)). However,

But these legal-political skirmishes obscure the long-term significance of the Hlophe affair for the future of constitutional democracy in South Africa.⁷ The conduct that Hlophe is accused of is symptomatic of a set of politics whose constitutional design is liberal democratic, which provides an entrenched framework for multiparty democracy through universal suffrage and regular elections, and which contemplates political competition and the alternation of political parties in power, but in which one party enjoys electoral dominance and continues to win free and fair elections that are not tainted by force or fraud. This is a dominant party democracy. One of the pathologies of a dominant party democracy is the colonisation of independent institutions meant to check the exercise of political power by the dominant party, enmeshing them in webs of patronage. South Africa is emerging as a leading example of a dominant party democracy, with the ANC having won every national election since 1993, now in power in eight of nine provinces, and with no sign of a credible electoral competitor on the horizon. So whether Hlophe did what he is alleged to have done is beside the point. If the ANC's electoral dominance continues, it is safe to say that this type of incident *will* occur; the only question is when. The truly important question is how the South African constitutional order, and the Constitutional Court, will respond.

There is a link between the dominant status of the ANC and a scattered and otherwise disconnected set of cases across a range of substantive areas which have been decided by, and which could soon come before, the Constitutional Court. The first set arises out of the relationship between the design of the electoral system and the relationship between elected representatives and their parties – in particular, the relationship between proportional representation,

that decision was reversed (on an appeal by the justices of the Constitutional Court) by the Supreme Court of Appeal (*Langa & Others v Hlophe* 2009 3 All SA 417 (SCA); 2009 8 BCLR 823 (SCA)). Perhaps the most difficult issue this raised is that the ground of Hlophe's challenge is a constitutional question that falls within the Court's own jurisdiction. Hlophe's case accordingly raised the questions of whether the Court could constitute a quorum because of recusal due to conflict of interest, the power of the President to appoint acting judges, and whether the Court could even consider these preliminary questions. The fact that the judges' complaint alleged that Hlophe had championed Zuma's case before the Court further complicated matters, since Zuma as President was vested with the power to appoint acting judges of the Constitutional Court – making him far from disinterested in the appeal. Although the need to answer these questions seemingly disappeared with the JSC's decision not to proceed, the pending constitutional challenges to that decision means these questions may come before the Constitutional Court again.

7 Other scholars have begun to look beyond these legal puzzles to assess the broader implications of the Hlophe affair for South African constitutional politics. See T Roux 'The South African Constitutional Court and the Hlophe controversy' (paper presented at the Melbourne Law School Centre for Comparative Studies 21st Anniversary Celebration, *International and Comparative Perspectives on Constitutional Law*, Melbourne, 27 November 2009); J Klaaren 'Hlophe JP and the current politics of the South African judiciary' (unpublished).

floor-crossing and constitutional amendment, first addressed in the *Certification Case*, and later in *UDM*.⁸ The second set emerges from the relationship between independent institutions and the elected government, and raises for consideration the pressure on the constitutional guarantees of institutional independence created by the phenomenon of cadre deployment by the ANC. The now-terminated legal challenge brought by Vusi Pikoli to his dismissal as National Director of Public Prosecutions, and the constitutional challenge to the appointment of Menzi Simelane as his replacement by the opposition party Democratic Alliance, both raise this constitutional issue.⁹

A third set of cases includes those arising out of the constitutional imbroglio concerning trans-border municipalities – *Matatiele I*, *Matatiele II*, *Merafong*, and *Poverty Alleviation Network*.¹⁰ Although these appeals turn on the constitutional duty of provincial legislatures to facilitate public involvement in the legislative process, as well as claims of irrationality, they serve to highlight the manner in which democratic centralism and cadre deployment by the ANC to provincial legislatures and executives has undermined the structure of representative democracy in South Africa. The issue here is the relationship between the parliamentary and non-parliamentary wings of the ANC, and in particular, whether public office holders subject to electoral accountability or unelected party functionaries set the national government's policy priorities. This set of cases also includes *Glenister*, which arises out of the abolition of the Directorate of Special Operations, the special investigatory unit that conducted the investigation that led to criminal charges being laid against President

⁸ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 4 SA 744 (CC); 1996 10 BCLR 1253(CC), and *United Democratic Movement v President of the Republic of South Africa (No 2)* 2003 1 SA 495 (CC); 2002 10 BCLR 1086 (CC).

⁹ Pikoli was initially successful in interdicting the President from appointing a new NDPP in his stead (*Pikoli v President of the Republic of South Africa* 2010 1 SA 400 (GNP)). He abandoned legal attempts to be reinstated after a multi-million Rand settlement (K Brown & L Ensor 'Pikoli's R7,5m payout clears way for Zuma' *Business Day*, 23 November 2009). The founding papers of the Democratic Alliance's challenge to Simelane's appointment can be found on the DA's website at <http://www.da.org.za/campaigns.htm?action=view-page&category=7855&sub-page=7857>.

¹⁰ *Matatiele Municipality & Others v President of the RSA & Others* 2006 5 SA 47 (CC); 2006 5 BCLR 622 (CC) ('*Matatiele I*'); *Matatiele Municipality & Others v President of the RSA & Others (No 2)* 2007 6 SA 477 (CC); 2007 1 BCLR 47 (CC) ('*Matatiele II*'); *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others* 2008 5 SA 171 (CC); 2008 10 BCLR 969 (CC); and *Poverty Alleviation Network & Others v President of the Republic of South Africa & Others* (unreported, CCT86/08) [2010] ZACC 5 (24 February 2010).

Zuma, as well as the High Court's decision in *Mlokoti v Amathole District Municipality*.¹¹

A diverse set of constitutional doctrines is at play in these bodies of case law: irrationality, the dictation strand of non-delegation, the duty to facilitate public involvement, and constitutional amendments to the founding provisions of the South African Constitution. Despite their substantive and doctrinal diversity, I integrate and organise these cases around the common theme of ANC domination, by unearthing the implicit and explicit role that the notion of a dominant party democracy plays. Moreover, I want to suggest how a robust conception of dominant party democracy can assist the Constitutional Court. The task is both analytical and prescriptive, and brings to bear the insights of comparative politics on constitutional doctrine. This work is of pressing importance. On the four occasions thus far when the dominant status of the ANC has been raised before the Constitutional Court – in *UDM*, *Merafong*, *Poverty Alleviation Network*, and *Glenister* – the Court quickly dismissed the relevance of ANC domination to the constitutional challenge. This reflects the Court's inadequate understanding of the concept of a dominant party democracy, its pathologies, the pressure it puts on what it otherwise a formally liberal democratic system because of the lack of alternation of power between political parties, and how this pressure is generating constitutional challenges.

But this was not always the case. A counter-vision of South African constitutional jurisprudence which takes the phenomenon of dominant party democracy seriously is a central theme in the *Certification Case*, precisely with respect to many of the issues that I have enumerated above: floor-crossing, independent institutions, and federalism. With respect to these issues, the Court proceeded from the assumption of ANC dominance, which in turn shaped how it approached the certification exercise. The challenge is to harness the structural reasoning in the *Certification Case* – a function of the unique task assigned to the Court on that occasion – to the subsequent application of more traditional constitutional doctrines to cases in these same areas.

¹¹ *Mlokoti v Amathole District Municipality & Another* 2009 6 SA 354 (ECD). The *Glenister* matter has been through a number of courts. *Glenister* first approached the Constitutional Court for direct access, but was refused in *Glenister v President of the Republic of South Africa & Others* 2009 1 SA 287 (CC); 2009 2 BCLR 136 (CC) ('*Glenister I*'). *Glenister* then launched two applications in the Cape High Court, *Glenister v Speaker of the National Assembly & Others*, [2009] JOL 23012 (C) (seeking to interdict Parliament from considering the legislation) and *Glenister v President of the Republic of South Africa & Others*, unreported, ZAWCHC 7798/09, 26 February 2010 (challenging the constitutionality of the legislation itself) ('*Glenister II*'). The High Court rejected the constitutional challenge in *Glenister II*, and its decision is currently under appeal to the Constitutional Court, which will hear it in September 2010.

Moreover, if the current Constitutional Court takes the notion of ANC domination seriously, this yields a set of constitutional doctrines, some of which emerge from a recasting of the existing jurisprudence. I term these *anti-domination* (which arises out of the irrationality strand of the principle of legality), *anti-capture* (which comes from the case-law on independent institutions), *non-usurpation* (which is an extension of the dictation strand of the abdication of public power doctrine), *anti-seizure* and *anti-centralisation*. These doctrines will not ensure that South African democracy functions as it would were the ANC to lack political dominance. Rather, they serve to check the harms that flow from the ANC's dominant status, and that operate to reinforce its dominance.

I have three broader intellectual agendas. First, I want to change the way we read South Africa in the field of comparative constitutional law. The centre of gravity for comparative constitutional law is the institutionalisation through constitutional design of the relationship between universal human rights, democracy and judicial review within a liberal democratic constitutional order – ie the 'Rights Revolution'.¹² The broader preoccupations of the field have set the agenda for comparative studies of South Africa. As a consequence, most comparative analyses of the Constitutional Court's jurisprudence have focused on chapter 2, the Bill of Rights. Mark Kende's *Constitutional Rights in Two Worlds* is representative.¹³ The work is organised around chapters on the death penalty, gender equality, same sex rights, affirmative action, freedom of expression, freedom of religion, and socio-economic rights. Kende does mention the dominance of the ANC, but it is not a central part of his analysis. By placing the notion of the dominant political party at the heart of my account of South African jurisprudence, I situate South Africa in a different set of jurisdictions: the consolidating democracies of the developing world which embraced liberal democratic constitutionalism at the same time as South Africa as part of what Samuel Huntington termed the 'third wave' of democratisation.¹⁴ Moreover, this way of thinking about the South African experience deals much more with questions of constitutional structure than constitutional rights.

Second, the study of dominant party democracies has generated an interesting and growing literature in comparative politics. In cases as diverse as Botswana, India, Japan, Malaysia, Italy, Mexico, India,

¹² S Choudhry 'After the rights revolution: Bills of rights in the post-conflict state' (2010) 6 *Annual Review of Law and Social Science* 301.

¹³ MS Kende *Constitutional rights in two worlds: South Africa and the United States* (2009).

¹⁴ SP Huntington *The third wave: Democratization in the late twentieth century* (1991).

Israel, and Taiwan, a single party has won successive elections for a sufficient period of time to qualify as a dominant political party. There is also a sub-literature on South Africa, which explores whether the successive electoral victories of the ANC should lead South Africa to likewise be classified as a dominant party democracy. Indeed, the so-called ‘dominant party debate’ is one of the central themes in the study of South African politics. This body of work has failed to explore the implications of one-party domination for constitutional adjudication. The apparent assumption, as Beatriz Magaloni puts it, is that constitutions are ‘*endogenous*’ – ie ‘there is *no binding set of constitutional rules*’,¹⁵ because a dominant political party controls the power of constitutional amendment, and the content of a constitution reflects the fact of political party domination. The unstated implication is that constitutional courts are likewise casualties of political party domination. Thus, the South African literature on the dominant party debate is largely silent on the Constitutional Court. The idea that courts could act as bulwarks against a dominant political party – as the Supreme Court of India did in the 1970s, through the development of the basic structure doctrine – has not been explored. Comparative politics should inform our reading and the development of South African constitutional doctrine. Likewise, the South African jurisprudence can sharpen our understanding of how courts can respond to the phenomenon of the dominant party democracy.

Finally, this paper is a contribution to the emerging literature on the comparative law of democracy. As a field, the law of democracy originated in the United States. Sam Issacharoff and Rick Pildes have argued that the overriding concern of the courts in cases concerning the political process should be to protect and restore the constitutional framework for political competition from the efforts of governing parties to undermine it and ensure their ongoing electoral dominance.¹⁶ In their comparative work, Issacharoff and Pildes have referred to this phenomenon as the risk of ‘one-partyism’ and ‘the inherent authoritarianism in democratic regimes’, respectively.¹⁷ Although I too focus on electoral domination and political competition, my emphasis is somewhat different. First, while their

¹⁵ B Magaloni *Voting for autocracy: Hegemonic party survival and its demise in Mexico* (2006) 260-61, emphasis in original.

¹⁶ R Pildes ‘The theory of political competition’ (1999) 85 *Virginia Law Review* 1605; S Issacharoff ‘Gerrymandering and political cartels’ (2002) 116 *Harvard Law Review* 594; R Pildes & S Issacharoff ‘Politics as markets: partisan lockups of the democratic process’ (1998) 50 *Stanford Law Review* 643; R Pildes ‘Foreword: The constitutionalization of democratic politics’ (2004) 118 *Harvard Law Review* 28.

¹⁷ S Issacharoff ‘Constitutional courts and democratic hedging’ *Georgetown Law Journal* (forthcoming); R Pildes ‘The inherent authoritarianism in democratic regimes’ in A Sajo (ed) *Out of and Into Authoritarianism* (2002) 125. Also see R Pildes ‘Political parties and constitutionalism’ in R Dixon & T Ginsburg (eds) *Research Handbook in Comparative Constitutional Law* (forthcoming).

principal focus is on democratic structures that translate votes into legislative representation, *UDM* illustrates that dominant party democracy can be created or reinforced outside the electoral process through floor-crossing. Second, my examination of the constitutional protection of independent institutions draws attention to mechanisms to blunt the effect of, as opposed to preventing the rise of, dominant party democracy. Third, I examine the impact of the centralisation of political party structure on the operation of federalism, which in turn has important implications for political competition. Fourth, I examine the relationship between the parliamentary and non-parliamentary wings of political parties under conditions of party dominance.

2 The Dominant Party Debate: South African Democracy in Comparative Perspective

2.1 The Dominant Party Debate in South Africa

Is South Africa a democracy? An examination of the constitutional text would suggest that it obviously is.¹⁸ The preamble proclaims that the aims of the Constitution are to ‘establish a society based on democratic values’, to ‘lay the foundation for a democratic and open society in which government is based on the will of the people’ and to ‘build a united and democratic South Africa’.¹⁹ Section 1 provides that South Africa is a ‘democratic state’, and in subsection (d) spells out some of the specific design features of South African democracy – that it is based on ‘universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government’. These founding provisions are not merely declaratory – that they are operative provisions is underlined by section 74, which entrenches them and requires constitutional amendment to change them. Indeed, their elevated importance is reflected in the fact that their amendment requires recourse to the more onerous procedure of section 74(1), as opposed to the standard amending procedure in sections 74(2) and 74(3).

These founding provisions are then implemented in the rest of the Constitution. For example, in addition to the general liberal freedoms (expression, assembly and association), chapter 2 guarantees a specific set of rights that arise in the political process. There is a

¹⁸ T Roux ‘Democracy’ in S Woolman *et al* (eds) *Constitutional law of South Africa* (2nd ed, 2006) chapter 10.

¹⁹ Preamble to the 1996 Constitution.

general right to make political choices,²⁰ which includes the specific rights to form a political party, to participate in the activities of that party, and to campaign for a party or cause. Moreover, citizens have a right to ‘free, fair and regular elections for any legislative body’,²¹ and citizens have the right to stand for and hold public office and vote in those elections.²² The Constitution creates Parliament and the provincial legislatures.²³ Although the Constitution leaves the details of the design of the electoral system to legislation, it requires *inter alia* that these bodies be elected by a system that results in general in proportional representation for both the National Assembly and provincial legislatures.²⁴ In addition, schedule 6A to the Constitution further circumscribes elections legislation, specifying important details of the closed-list system of proportional representation. Moreover, the organisation and oversight of elections is vested with an Electoral Commission, whose existence is constitutionally required.²⁵ The maximum life of the National Assembly and provincial legislatures is five years.²⁶ The Constitution provides for the selection of the political executive by legislatures.²⁷ Finally, since its transition to majority-rule, South Africa has worked the gears of its democratic constitutions. It has had four elections according to the schedule set out in its two post-transition constitutions – in 1994, 1999, 2004 and 2009 – at the national and provincial levels. Numerous political parties have vigorously contested each of these elections, and (with the possible exception of voting in KwaZulu-Natal in the 1994 election), these elections have been free and fair and not tainted by fraud.

²⁰ Section 19(1) provides: ‘Every citizen is free to make political choices, which includes the right:

- (a) to form a political party;
- (b) to participate in the activities of, or recruit members for, a political party; and
- (c) to campaign for a political party or cause.’

²¹ Section 19(2) provides: ‘Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.’

²² Section 19(3) provides: ‘Every adult citizen has the right

- (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
- (b) to stand for public office and, if elected, to hold office.’

²³ Sections 42 and 104.

²⁴ Sections 46(1)(d) and 105(1)(d).

²⁵ Section 190 provides:

‘(1) The Electoral Commission must:

- (a) manage elections of national, provincial and municipal legislative bodies in accordance with national legislation;
- (b) ensure that those elections are free and fair; and
- (c) declare the results of those elections within a period that must be prescribed by national legislation and that is as short as reasonably possible.

(2) The Electoral Commission has the additional powers and functions prescribed by national legislation.’

²⁶ Sections 49(1) and 108(1).

²⁷ Sections 86(1) and 128(1).

Nonetheless, there is a lively debate among South African political scientists about whether South African democracy is imperfect, notwithstanding its apparent fidelity to constitutional form.²⁸ These misgivings were voiced at the outset of the South African transition. Writing in 1994, Roger Southall expressed the fear that South Africa would simply exchange one dominant party, the National Party, for the dominance of another, the ANC.²⁹ To be sure, the situations were profoundly disanalogous. The dominance of the National Party was ensured through the restriction of the vote to white South Africans, and the gerrymandering of electoral districts for the 1948 election to ensure the National Party's victory over the United Party.³⁰ Moreover, South Africa's pre-transition constitutions had few checks on legislative, and later, on executive power. By contrast, the ANC's electoral dominance has been secured under a liberal democratic constitution with universal suffrage, free and fair elections, and a range of constitutionally-mandated institutions specifically designed to check the power of political majorities. But Southall's deliberately provocative comparison was meant to highlight that notwithstanding these fundamental differences, the prospect of ANC dominance posed 'awkward dilemmas for making and sustaining the new democracy' that had hitherto been ignored in a complacent scholarly literature, which had confined itself to the celebration of South Africa's peaceful transition to democratic rule.³¹ And so was born what has come to be known as the South African 'dominant party debate', which has emerged as one of the central themes in the study of South African politics. The literature has three main strands.

²⁸ See (in chronological order): R Southall 'The South African elections of 1994: The remaking of a dominant-party state' (1994) 32 *Journal of Modern African Studies* 629; H Giliomee 'South Africa's emerging dominant-party regime' (1998) 9:4 *Journal of Democracy* 128; R Southall 'The centralization and fragmentation of South Africa's dominant party system' (1998) 97 *African Affairs* 443; S Friedman 'No easy stroll to dominance: Party dominance, opposition and civil society in South Africa' in H Giliomee & C Simkins (eds) *The awkward embrace: One party domination and democracy* (1999) 97; R Southall 'Opposition in South Africa: Issues and problems' (2001) 8 *Democratization* 1; H Giliomee, J Myburgh & L Schlemmer 'Dominant party rule, opposition parties and minorities in South Africa' (2001) 8 *Democratization* 161; R Southall 'Conclusion: Emergent perspectives on opposition in South Africa' (2001) 8 *Democratization* 275; R Alence 'South Africa after apartheid: The first decade' (2004) 15:3 *Journal of Democracy* 78; T Lodge 'The ANC and the development of party politics in modern South Africa' (2004) 42 *Journal of Modern African Studies* 189; J Hamill 'The elephant and the mice: Election 2004 and the future of opposition politics in South Africa' (2004) 93 *The Round Table: The Commonwealth Journal of International Affairs* 691; R Southall 'The "dominant party debate" in South Africa' (2005) 40 *Afrika Spectrum* 61; R Suttner 'Party dominance theory: Of what value?' (2006) 33 *Politikon* 277; A Handley, C Murray & R Simeon 'Learning to lose, learning to win: Government and opposition in South Africa's transition to democracy' in E Friedman & J Wong (eds) *Political transitions in dominant party systems: Learning to lose* (2008) 191.

²⁹ Southall 'The South African elections of 1994' (n 28 above).

³⁰ AJ Christopher *The atlas of changing South Africa* (2 ed, 2001) 59-61.

³¹ Southall 'The South African elections of 1994' (n 28 above) 629.

First, advocates of the dominant party thesis have enumerated a number of pathologies that are said to be the consequences of the ANC's electoral dominance. The unifying theme is that the ANC's dominant status has eroded the checks on the power of the executive created by the South African constitution, which are internal to democratic institutions and processes, and which are operated by political actors. The ANC's dominant status has undermined precisely those procedures and mechanisms that should operate through political means in these circumstances to check its power. For example, it has been suggested that an early casualty of the ANC's dominance was legislative oversight of the executive in Parliament, stymied by the ANC's strict enforcement of party discipline against its own MPs.³² Although ANC MPs are entitled to ask the majority of questions in the National Assembly, they rarely do so, and indeed, are prohibited by the ANC's 1994 caucus code of conduct from using parliamentary structures to undermine party policy.³³ The Standing Committee on Public Accounts – which is chaired by an opposition MP, and is designed to oversee governing spending – has been rendered largely ineffective by the ANC's decision to revoke the position of chair from the Democratic Alliance, because of the DA's refusal to be a 'constructive opposition'.³⁴ The parliamentary opposition has been unable to resist its marginalisation within the National Assembly, in the face of the ANC's commanding majority, because it is fragmented across a large number of parties (twelve), and is ideologically and racially divided.

In a parallel fashion, scholars have enumerated the erosion of other political checks created by the constitution on executive power, and attributed these to the ANC's dominant status. Thus, the domination of the ANC has been blamed for a reduction in the role of MPs in the legislative process. Although legislative authority formally vests within Parliament, its role has been reduced to approving bills drafted by the ANC-led executive. In particular, it is now argued that the enforcement of party discipline by the ANC ended alliances between opposition MPs and ANC backbenchers in parliamentary committees, who together could introduce amendments to government-sponsored legislation. The failure to replicate the power-sharing executive of the 1993 Interim Constitution – which constitutionally guaranteed cabinet representation to minority parties – in the 1996 Final Constitution is described as yet another consequence of ANC domination.³⁵ This erosion of political checks is

³² Southall, 'Centralization and fragmentation' (n 28 above) 453-55.

³³ Lodge, 'The ANC and the development of party politics' (n 28 above) 209; A Butler 'How democratic is the African National Congress?' (2005) 31 *Journal of Modern African Studies* 719, 720-21.

³⁴ T Lodge *Politics in South Africa: From Mandela to Mbeki* (2002) 166.

³⁵ Southall 'Centralization and fragmentation' (n 28 above) 447.

sometimes linked to the ANC's delegitimisation of the political opposition, which is routinely described as enemies of 'transformation', an accusation that charges the largely white opposition parties with unreasonably raising objections to the ANC on both ideological and racist grounds, and indeed, challenges the very legitimacy of the idea of a political opposition.³⁶

Second, an important debate has been joined over the degree of the ANC's dominance, with some scholars casting serious doubt on the dominant party thesis.³⁷ The question they have raised is whether there are external checks that operate outside the constitutional system on the ANC that serve as functional substitutes for the internal check provided by the formal institutions of parliamentary democracy that the ANC's dominance has corroded. Steven Friedman, for example has doubted the durability of the ANC's dominance.³⁸ The ANC's failure to deliver improved public services to its base of supporters will eventually jeopardise its electoral prospects; its lack of tolerance for internal dissent may eventually spark defections and perhaps even the fracturing of the party and the end of its dominant status. While Friedman challenges the dominant party thesis by questioning the ANC's future electoral prospects in the face of its current behaviour, Tom Lodge suggests that the ANC's dominance has not reduced the space for democratic politics. Thus, Lodge argues that the ANC enjoys a high degree of internal democracy that provides not merely opportunities for debate, but for the reversal of official policy. The vigorous debate within the ANC over HIV/AIDS policy is perhaps the most vivid example.³⁹ What has merely shifted is the locus of politics and political accountability, away from the formal institutions of parliamentary democracy into the party itself.

These criticisms have led Southall to reformulate the dominant party thesis, and to distinguish between 'strong' and 'weak' dominant party states.⁴⁰ South Africa is a weak dominant party state, on Southall's account, *inter alia*, because of (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. While this concedes some ground, the emerging consensus among students of South African politics is that South Africa remains a dominant party state of some variety. In particular, there is considerable scepticism that intra-party democracy is an adequate replacement for competition between political parties, properly functioning parliamentary oversight and legislative processes.

³⁶ Giliomee, Myburgh & Schlemmer 'Dominant party rule' (n 28 above) 171.

³⁷ See, for example, Suttner 'Party dominance theory' (n 28 above).

³⁸ Friedman, 'No easy stroll to dominance' (n 28 above).

³⁹ Lodge, 'The ANC and the development of party politics' (n 28 above) 205-7.

⁴⁰ Southall 'The "dominant party debate"' (n 28 above).

Reflecting on the lessons to be drawn from Zuma's successful 2007 challenge to Mbeki for the ANC leadership, Handley *et al* have observed that 'the electorate within the party is much smaller than the national electorate, or even the electoral base of the ANC' and '[t]he limitations of internal debate as a substitute for opposition are starkly portrayed by the mystery, attempts at secrecy, and confusion that surrounded the 2007 leadership battle'.⁴¹

Third, the South African literature is both descriptive and critical, but not analytical. In particular, it has largely avoided the identification of the factors that would explain the maintenance of dominant party democracy in South Africa, and therefore, which would enable predictions of what would lead to its decline. There are two exceptions to this general shortcoming. One line of analysis attributes the ANC's dominance to the lack of an opposition party that could credibly contend for power. Various reasons are proffered for the opposition parties' lack of electoral success. Some rely heavily on South Africa's racially polarised electorate, with black voters voting overwhelmingly for the ANC in all four post-transition elections. Elections, on this account, are a 'racial census'.⁴² The apparent unwillingness of black voters to support the opposition parties has led some to explain those parties' lack of success in racial terms. This is particularly true for the (now disbanded) National Party, which was thoroughly delegitimised by its central role in the creation of apartheid and the resistance to universal suffrage and majority rule.⁴³ The Democratic Alliance (DA), in its earlier incarnation as the Democratic Party, opposed apartheid but participated in its political institutions, and is therefore likewise tainted by association. Others focus on political strategy and identity. The DA has often played to its largely white base, rendering it less attractive to black voters. The Inkatha Freedom Party has self-identified as a regional party, which limits its national appeal. The United Democratic Movement (UDM) has thus far floundered on a combination of its ineptitude and the personalities of its leaders.

A second line of analysis links the maintenance of the ANC's dominant status to the structure of the ANC itself. The key factor here is the adoption of 'democratic centralism' as a central policy of the ANC dating to the Mafikeng policy conference, held in 1997. The premise of democratic centralism is to concentrate the making of all decisions regarding public policy in the ANC's highest decision-making body, the National Executive Council (NEC), and for those decisions to be adhered to by all office-holders who are members of the ANC. Democratic centralism is *democratic* in that it derives its legitimacy

⁴¹ Handley *et al* 'Learning to lose' (n 28 above) 199.

⁴² Giliomee, Myburgh & Schlemmer 'Dominant party rule' (n 28 above) 162.

⁴³ Hamill 'The elephant and the mice' (n 28 above) 697-98.

from the ANC's electoral mandate, and asserts its authority over a range of state institutions which historically, and under the South African Constitution, have enjoyed various degrees of independence from brute political control, and indeed, have served as checks on political power: 'the army, the police, the bureaucracy, intelligence structures, the judiciary, parastatals, and agencies such as regulatory bodies, the public broadcaster, the central bank and so on'.⁴⁴ Moreover, democratic centralism is *centralised* because it occurs in one institution at the national level (the ANC NEC) and is entirely indifferent to the federal structure of the South African constitution, which by its very logic, creates multiple centres of political decision-making.

The centrepiece of democratic centralism is the ANC's policy of cadre deployment. This involves the filling of a range of offices with supporters of the ANC, who wield their power in those institutional roles to implement the policies of the ANC, as determined by the ANC NEC. There is cadre deployment to the range of public institutions where office-holders are not elected and are not meant to be politically accountable. For example, cadres have been deployed to the senior-most ranks of the provincial and national bureaucracies, and as well to various parastatals, such as Eskom and the South African Broadcasting Corporation. There is also cadre deployment to the National Assembly and cabinet, and to the provincial legislatures and executive committees. South Africa's system of closed-list proportional representation assigns legislative seats to candidates based on their relative placement on a party list, and is determined by a party's vote share. The ANC NEC draws up these lists, which gives it enormous power over the electoral prospects of candidates. Moreover, once elected, MPs can be 'redeployed' at will by the ANC NEC and replaced with another ANC cadre, without further recourse to the electorate. This power (the legal framework for which I explain below in section 3.3.2), includes the appointment of provincial Premiers and the President, as occurred during the 'recall' of President Thabo Mbeki and deployment of his successor, Kgalema Motlanthe.

The ANC's stated objective is that cadre deployment is integral to achieving the 'transformation' of South Africa, and is rooted in the ANC's history as a liberation movement. The ANC campaigned for the radical overhaul of South Africa's political economy to unwind the effects of apartheid on the distribution of economic and political power. A barrier to transformation was office-holders in the broad range of public institutions, who had been appointed by the previous NP government, and who were accused of having had a vested interest

⁴⁴ Lodge *Politics in South Africa* (n 34 above) 167.

against implementing reforms that would undermine their power. Cadre deployment permits the ANC to change the occupants of these offices, to remove any roadblocks to the implementation of ANC policy.

Democratic centralism can also be traced to deep concerns over the quality of public administration, especially at the provincial level. The twin concerns have been capacity and corruption,⁴⁵ which are the legacy of the integration of homeland administrations into provincial bureaucracies, the result of the central role provinces play in the delivery of health care, education and welfare, and the transfer of large numbers of civil servants from the national bureaucracy to provincial payrolls, coupled with the difficulty of recruiting qualified personnel to senior positions in capitals which are often very remote.⁴⁶ Cadre deployment is justified as a mechanism whereby the ANC can deploy seasoned veterans to turn around a troubled provincial public administration, and can prevent 'the possible emergence of provincial empires within the party itself ... intertwined with webs of patronage and corruption centred on local capitals'.⁴⁷

The impact of cadre deployment on the operation of the South African Constitution has been profound. Elections do not determine who holds political office in the provinces. Rather, this power rests with the ANC, which shifts 'its personnel ... from one sphere or level to another according to the dictates of the moment' through deployment.⁴⁸ Cadre deployment has made it difficult for a provincial politics to get off the ground, since it undermines the development of a distinct provincial political identity, which is the prerequisite for provincial political institutions to work. For example, in both the 2004 and 2009 elections, the identity of the Premiers in many provinces was not known before the vote; the Premiers were deployed by the ANC NEC *after* the election, and in many cases, were not even the first-ranked candidate on the ANC's provincial lists.⁴⁹

In addition, at the national level, the power of deployment has shifted power within the ANC, from its Parliamentary wing to its non-Parliamentary wing, centred on the NEC. Cadre deployment has operated both to quell dissent and co-opt potential internal

⁴⁵ T Lodge 'Provincial government and state authority in South Africa' (2005) 31:4 *Journal of Southern African Studies* 737.

⁴⁶ R Simeon & C Murray 'Multi-sphere governance in South Africa: An interim assessment' (2001) 31 *Publius* 65, 81.

⁴⁷ Southall 'Centralization and fragmentation' (n 28 above) 469.

⁴⁸ Southall 'Centralization and fragmentation' (n 28 above) 469.

⁴⁹ C Murray & A Pillay 'Equality and democracy: Are civil and political rights for all guaranteed?' in R Calland & P Graham (eds) *Democracy in the time of Mbeki* (2005) 189, 203; and the press statement issued by ANC Spokesperson Jessie Duarte, 3 March 2009, available from the ANC website at <http://www.anc.org.za/show.php?doc=ancdocs/pr/2009/pr0303.html>.

opposition from the Parliamentary caucus of the ANC. MPs are obliged under the ANC constitution to vote in accordance with the strictures of the NEC. If they do not, they face a range of penalties, up to and including removal from public office through redeployment. As Giliomee *et al* write:

Ostensible authority resides in the constitution, parliament and cabinet, but real authority resides in the party. Real decision making occurs outside of formal constitutional structures such as Parliament and is instead conducted behind the closed doors of party forums.⁵⁰

Deployment has also undermined the institutional role of the National Council of Provinces (NCOP), the upper chamber of Parliament. The NCOP was designed to represent provincial interests in the national level process, by constituting the chamber on the basis of delegations consisting both of members of the provincial executive and legislatures who were appointed by, and accountable to the provinces. But ‘the hegemony of the ANC discourages the expression of strong provincial views in national politics’.⁵¹

Finally, there is also the concern that bureaucrats see themselves not as civil servants, independent of the governing party, but as ANC deployees. Indeed, the ANC began to appoint party stalwarts to senior posts in the civil service immediately after it took power in 1994, prior to the adoption of the policy of democratic centralism in 1997. After the Mafikeng policy conference, the practice was extended to a range of independent bodies, such that ‘senior ANC politicians were deployed to head most state institutions including the Reserve Bank, the prosecution service, the government information service, the revenue service, and so on’, all in principle subject to control by the ANC NEC.⁵² The route to a ‘glittering and rewarding career in the civil service lies through affiliation to the ruling party’ and it is small wonder then that the lines of accountability in government run back to the ANC rather than to constitutional oversight structures or the public.⁵³ In sum, cadre deployment has transformed the South African constitutional system from one with provincial and national office-holders that each hold office because of an electoral mandate received from their constituents, and with an independent bureaucracy, into one which views ‘the highest levels of the state and

⁵⁰ Giliomee, Myburgh & Schlemmer ‘Dominant party rule’ (n 28 above) 173.

⁵¹ C Murray ‘South Africa’ in C Saunders & K Le Roy (eds) *Legislative, executive and judicial governance in federal countries* (2006) 258-288, at 270.

⁵² Giliomee, Myburgh & Schlemmer ‘Dominant party rule’ (n 28 above) 172.

⁵³ A Habib & C Schulz-Herzenberg ‘Accountability and democracy: Is the ruling elite responsive to the citizenry?’ in Calland & Graham (eds) *Democracy in the time of Mbeki* (2005) 184.

party machinery, and the different levels of government, as but one employment matrix'.⁵⁴

The notion that South Africa is a dominant party democracy is difficult to dispute. However, the literature suffers from shortcomings. One is its failure to fully account for the ongoing electoral success of the ANC. While the literature elucidates the lack of success of existing political parties, it fails to explain why the ANC has not fractured, producing an opposition party from within that would eventually contend for power. However, the dismal performance of the Congress of the People (COPE) – formed by dissenting elements in the ANC – in the 2009 elections cries out for more systematic explanation. An answer might be found if we link the lack of a credible alternative to the ANC, to the ANC's dominance, the pathologies that flow from that dominance, and the ANC's policy of democratic centralism. The literature seems to suggest the following causal chain: a range of factors (eg race, identity, political strategy) have led to the lack of a credible electoral alternative, which in turn contributes to the ANC's dominant status, which combined with democratic centralism has produced a series of pathologies.

On its own terms, the literature is incomplete, because it emphasises pathologies linked to the growth of executive power at the national level. But democratic centralism has also diminished the independence of the bureaucracy and other independent institutions, and has prevented the emergence of a real federalism in South Africa. We should broaden the pathologies associated with ANC dominance to include these developments as well. The next step in the argument would be to suggest a different causal chain – in which these pathologies are not only the consequences of the ANC's domination, but may also contribute to the absence of a credible alternative and hence cement the ANC's domination. This interpretation of the South African case is informed by the comparative politics literature on dominant democracy, from which the South African sub-literature emerged, but from which it is oddly disconnected. I draw some lessons from that literature in the next section (2.2).

The second shortcoming is the relatively minimal attention given to the role of the Constitutional Court and the independent institutions created by the Constitution itself or whose creation the Constitution requires. From the very outset of the dominant party debate, it was foreseen that in the absence of alternation, these institutions would have a heavy burden to bear in checking the abuse of public power by the ANC.⁵⁵ The record of the independent

⁵⁴ Southall 'Centralization and fragmentation' (n 28 above) 451.

⁵⁵ See, for example, Southall 'The South African elections of 1994' (n 28 above) 654.

institutions has yet to attract sustained analysis, although concerns have been expressed that in high profile cases involving allegations of executive misconduct, these institutions have failed to fulfil their constitutional mandates. On oft-cited example is the joint report of the Auditor-General, the Public Protector and the National Director of Public Prosecutions in 2001, which found that there had been no unlawful conduct on the part of the government in the arms scandal, notwithstanding widespread irregularities and improprieties.⁵⁶ Another is the failure of the Public Protector to sanction the government for directing a contract from the state oil company, PetroSA, to a company that diverted the bulk of the payment to the ANC.⁵⁷

The Constitutional Court has fared somewhat better. For example, Rod Alence has sought to document how the Court has traversed the gap in accountability created by the ANC's dominant status.⁵⁸ He rightly notes that the constitutional entrenchment of a broad set of positive, socio-economic rights has provided the Court with the legal opening to review an array of government policy – including government inaction – that would also serve as the substance of electoral politics. Perhaps the most celebrated example is the Court's intervention in the area of HIV/AIDS policy, where it ordered the government to make available to pregnant mothers antiretroviral medication.⁵⁹

However, commentators have failed to distinguish between two different ways in which courts can check the power of dominant parties, which Issacharoff and Pildes have helpfully termed first-order and second-order approaches to constitutional judicial review.⁶⁰ On their account, first-order judicial review is directed at the 'foreground' of constitutional rights, whereas second-order judicial review tackles the 'background rules that structure partisan political competition'.⁶¹ The rationale is that abuses of human rights are often a product of background failures in the market for political control. By enforcing constitutional rights, courts may be attacking the symptom, as opposed to the underlying cause. Targeting judicial intervention in order to prevent attempts to limit political competition may be a more effective means at securing the very interests that rights seek to protect than the direct enforcement of those rights themselves.

⁵⁶ Feinstein *After the party* (n 2 above) chapters 13 and 14.

⁵⁷ R Southall 'The ANC for sale? Money, morality and business in South Africa' (2008) 35 *Review of African Political Economy* 281, 290-91.

⁵⁸ Alence 'South Africa after apartheid' (n 28 above) 87-88.

⁵⁹ *Minister of Health & Others v Treatment Action Campaign & Others (No 2)* 2002 5 SA 721 (CC); 2002 10 BCLR 1033 (CC).

⁶⁰ Issacharoff & Pildes 'Politics as markets' (n 16 above) 647-48.

⁶¹ Issacharoff & Pildes 'Politics as markets' (n 16 above) 648.

In the South African context, one can draw a similar distinction between first-order and second-order frameworks for constitutional adjudication. A first-order approach would check those consequences of the ANC's political domination that manifest themselves as violations of rights. This has been the nearly exclusive focus of assessments of the jurisprudence of the Constitutional Court in the context of the ANC's dominant status. By contrast, a second-order approach would look for constitutional openings to address the pathologies that are the consequence of, and contribute to, the ANC's domination. Aside from a discussion of the constitutional litigation surrounding floor-crossing and its role in fragmenting the opposition to the ANC (addressed in detail below in section 3.1), this question has not been addressed. In particular, the constitutionality of democratic centralism has been presupposed, notwithstanding its distorting effects on the South African constitutional structure. This may be a function of the first shortcoming I described above: the failure to grasp the causal relationship between democratic centralism and the ANC's dominant status. So to get a handle on what role the Court could play, we need to first to turn to the comparative politics literature on dominant democracy.

2.2 Dominant party democracy in comparative politics: typologies and pathologies

The comparative politics literature on dominant political parties derives from the theory of political competition. Joseph Schumpeter famously argued that democracy was best understood not as a practice of collective self-government by the 'people', but rather, the selection by the people of representatives to govern on their behalf. Elections, on this account, are a process whereby 'individuals acquire the power to decide by means of a competitive struggle for the people's vote'.⁶² The participants in this competition are not individual candidates, but political parties to which those candidates belong. As he wrote, 'a party is a group whose members propose to act in concert in the competitive struggle for political power'.⁶³ Schumpeter asserted the priority of the party over individual candidates in an electoral system with constituency-based representation. His point would even have more force in a closed-list system of proportional representation, where votes are cast for parties, not for candidates. To be democratic, the elections must consist of 'free competition for a free vote' among parties. But the corollary of electoral competition is not just the right 'to produce a government' but 'also the function of evicting it' through the

⁶² J Schumpeter *Capitalism, socialism and democracy* (1943) 269.

⁶³ Schumpeter (n 62 above) 283.

electoral process.⁶⁴ Thus, competition between political parties entails the possibility of *alternation* through regular, free and fair elections. A hallmark of democracy, in Theodore Pempel's memorable turn of phrase, is the ability to 'throw the rascals out'.⁶⁵

To be sure, as Robert Dahl argued, to jettison political participation in favour of political competition overlooks the important ways in which the two are mutually reinforcing.⁶⁶ Thus, while the existence of '[p]ublic contestation and inclusiveness vary somewhat independently',⁶⁷ 'in the absence of the right to oppose, the right to "participate" is stripped of a very large part of the significance it has in a country where public contestation exists'.⁶⁸ In other words, competition makes participation real. Moreover, competition combined with participation *inter alia* provides additional support for political freedoms, dissolves political oligarchies, makes government more responsive to a broader segment of society, promotes the conversion of parties into mass organisations, and increases rates of political participation. Schumpeter thus likely overstated the priority of competition over participation. But the fact that participation combines with competition to yield many of the virtues of democratic regimes, should not detract from specific benefits of competition itself. At its core, political competition lowers the risk of the abuse of political power by the governing party. If there is genuine uncertainty whether a governing party will win the subsequent election and return to power, that party is less likely to abuse its power while in office, because the same abuses could be perpetrated against it once it returns to opposition. As Ethan Scheiner puts it:

the presence of a viable opposition and party competition provides the ultimate check against unrestrained power. As long as a party fears loss of office, it will be much less likely to act arbitrarily.⁶⁹

It is this intuition – ie that alternation is integral to preventing the abuse of political power – that has led scholars of democratisation to build alternation into the most widely used definitions of democratic consolidation. For example, Samuel Huntington proposed the 'two-turnover test', according to which

a democracy may be viewed as consolidated if the party or group that takes power in the initial election at the time of transition loses a

⁶⁴ Schumpeter (n 62 above) 272.

⁶⁵ TJ Pempel *Uncommon democracies: The one-party dominant regimes* (1990) 7.

⁶⁶ R Dahl *Polyarchy: Participation and opposition* (1971).

⁶⁷ Dahl (n 66 above) 4.

⁶⁸ Dahl (n 66 above) 5.

⁶⁹ E Scheiner *Democracy without competition in Japan: Opposition failure in a one-party dominant state* (2006) 7-8.

subsequent election and turns over power to those election winners, and if those elections winners then peacefully turn over power to the winners of a later election.⁷⁰

A second example is offered by Adam Przeworski *et al*, who define alternation negatively as *not* occurring where an incumbent 'either held office by virtue of elections for more than two terms or initially held office without being elected'.⁷¹ A third example is Greene, who defines dominance as rule by a single party for at least 20 years or four consecutive elections.⁷² These tests are clearly different, because Huntington requires two peaceful transfers of power, whereas Przeworski *et al* and Greene are satisfied with one. Huntington's criterion is more demanding, because it requires there to be not just one, but two major political parties to be committed to democratic procedures for transfers of power.

But putting these differences to one side, what unites these measures of alternation is that they assess the existence of a constitutional democracy not merely on the basis of constitutional *form*, but also on the basis of observed political *behaviour* within that constitutional structure. There is the behaviour of political parties, who view elections through constitutional procedures as the mechanism for choosing governments, and there is the behaviour of the public, which understands elections in the same way, and thereby does not conflate a change in government with a change in the constitutional order. Moreover, there are two kinds of behaviour that count. The first is compliance with the constitutional framework of electoral democracy for political competition; the second is at least one electoral loss, coupled with the transfer of power.

Regarding a practice of alternation as a component of democratic consolidation raises the prospect that a state may be a constitutional democracy in a formal-legal sense, and where political actors comply with the constitutional-legal framework for democracy, but nonetheless may not be a democracy. Writing in 2000, Przeworski *et al* provided the example of Botswana, a state in which

[g]overnment offices are filled by elections, more than one party competes, there is little repression, and there are no exceptional allegations of fraud ... Yet the same party has ruled Botswana since independence, always controlling an overwhelming majority in the legislature.⁷³

⁷⁰ Huntington *The third wave* (n 15 above) 267.

⁷¹ A Przeworski, ME Alvarez, JA Cheibub & F Limongi *Democracy and development: Political institutions and well-being in the world, 1950-1990* (2000) 27.

⁷² KF Greene *Why dominant parties lose: Mexico's democratization in comparative perspective* (2007).

⁷³ Greene *Why dominant parties lose* (n 72 above) 23.

Botswana is far from unique. Dominant party democracies include Botswana under the Botswana Democratic Party (BDP), Gambia under the People's Progressive Party, Italy under the Christian Democrats, India under the Congress Party, Israel under Labour/Mapai, Japan under the Liberal Democratic Party, Malaysia under the United Malays National Organisation/Barisan Nasional (UMNO/NB), Mexico under the Institutional Revolutionary Party (PRI), Senegal under the Socialist Party, Singapore under the People's Action Party, Sweden under the Social Democratic Party, and Taiwan under the Kuomintang (KMT). To this list, we should now add South Africa under the ANC, although it has not yet been classified as such. This may simply be a function of the interaction of coding rules, the date of most studies, and the length of tenure of the ANC. Huntington and Przeworski *et al* relied on data as of 1990, prior to the democratic transition in South Africa. For Greene, who adopts a 20-year criterion, the ANC has not yet governed for twenty years, although by 2014, it will have done so. However, On Huntington's 'two turnover' test, South Africa is not yet a consolidated democracy.

The lack of alternation in democracies that as a matter of constitutional form provide for political competition has generated an extensive literature on dominant party democracies. One strand has sought to identify a number of factors or political techniques that explain their maintenance over time in the context of a constitutional order that permits alternation through elections. These factors are also commonly identified pathologies of dominant party democracy. Although this research agenda is still underway, it has yielded a number of suggestive propositions that potentially have important implications for constitutional design and constitutional doctrine. Three caveats are in order. First, there is a complex relationship between cause and effect. These factors increase the likelihood that a dominant party democracy will persist. However, dominance in turn also furnishes the motivation, the opportunity and the means to deploy these factors to protect a dominant position. Second, these various factors are present not only in dominant party democracies, but in consolidated democracies well. However, while they may be found occasionally in consolidated democracies, they are persistent features of political life in dominant party democracies. Moreover, on average, the number of factors at play in a dominant party democracy is higher than in consolidated democracies. Third, the issue here is not the origin of dominant party democracies, which have been long-recognised as tied to important moments of polity-foundation or transformation – eg decolonisation, democratisation after

authoritarian rule, and revolution.⁷⁴ Rather, the question is their maintenance, survival, and decline.

2.2.1 *Public resources as political resources*

As Kenneth Greene has shown, there is a fundamental link between monopolies over public resources and the maintenance and decline of political monopolies by dominant political parties.⁷⁵ Dominant political parties politicise public resources over which government has a monopoly and deploy them for partisan purposes, which gives them an electoral advantage which opposition parties lack, precisely because they do not wield governmental authority. Public resources can be put to partisan ends in a number of ways. There is the traditional style of pork barrel politics common to liberal democracies, consisting of ‘subsidies, tax breaks, licenses, contracts price supports, loans, ... economic protection’, and contracts for public works projects that are directed to political supporters, in exchange for votes or political contributions.⁷⁶ Moreover, public resources are used for partisan ends through the appointment of party-insiders to director and executive positions in publicly owned corporations, which then divert funds illegally to the dominant political party; through party-owned businesses which contract with the state, which amounts to a transfer of public resources to party coffers; through the politicisation of hiring in the bureaucracy and public corporations to reward party faithful and punish opposition members; through the politicisation of public procurement in exchange for political contributions; and by using public employees and supplies for narrow electoral purposes during election campaigns. The diversion of public resources to partisan ends is possible because of the lack of external and internal restraints. The external restraint is the prospect of alternation – ie alternation serves as a deterrent to the partisan diversion of public resources. The internal restraints within governments on such expenditures that are lacking are an independent bureaucracy, because it ‘is politically controlled through non merit-based hiring, firing, and career advancement’, and independent electoral commissions which have complete oversight over political party finance.⁷⁷

As Greene explains, the use of public resources to establish and reinforce political monopolies in a context where an independent

⁷⁴ SP Huntington & CH Moore ‘Conclusion: authoritarianism, democracy and one-party politics’ in *Authoritarian politics in modern society* (1970) 509-17.

⁷⁵ Greene *Why dominant parties lose* (n 72 above); KF Greene ‘The political economy of authoritarian single-party dominance’ (2010) 43 *Comparative Political Studies* [forthcoming].

⁷⁶ Greene *Why dominant parties lose* (n 72 above) 281.

⁷⁷ Greene ‘The political economy’ (n 75 above) 6.

bureaucracy is absent explains why the authoritarian tools of repression and electoral fraud, while used occasionally, need not be relied on in dominant party democracies. Moreover, on this theory, the decline of party dominance is largely a function of declining access to public resources. The principal reason for such a decline is the shrinking of the size of the state sector and consequently the resources for patronage because of the privatisation of publicly owned corporations. But the process of privatisation itself creates the possibility for the politicisation of public resources, by creating a one-time-only opportunity for public resources to be used as a patronage good – ie directed to powerful individuals and interests in exchange for political and financial support.

Greene provides two illustrative examples, Mexico and Botswana. Mexico's PRI enjoyed electoral dominance from 1929 and 1997. Electoral fraud did not play an important role in keeping the PRI in power. Rather, its dominance relied heavily on politicisation of public resources and a politically quiescent bureaucracy. The PRI

routinely appropriated ... public funds for partisan campaigning, distributed massive amounts of patronage goods through its allied sectoral organisations, forced public servants to contribute to the party's coffers, and turned public offices into virtual campaign headquarters during elections.⁷⁸

The state-owned oil monopoly, Pemex, was a huge source of resources. The end of Mexico's dominant party democracy and the rise of competitive politics occurred because of the shrinking size of state sector. The turning point came in 1982, because of a debt crisis that forced the government to privatise state-owned enterprises. The round of privatisations in the 1980s provided the last round of financial support to the PRI through kickbacks and patronage. Afterward, its access to patronage goods declined significantly, and it eventually lost power.

By contrast, in Botswana, the dominant party (the BDP) has remained in power since 1966, notwithstanding a system of open political competition. The BDP has maintained its dominant status through a combination of access to politicised public resources and a weak bureaucracy. The principal source of resources has been parastatals in a variety of sectors. The most lucrative is mining, where the state has extensive interests in coal, copper, nickel, gold and particularly diamonds (through Debswana, a joint venture with De Beers). A sharp drop in electoral support in 1984 coincided with a steep fall in the price of diamonds. A multivariate regression of Botswana, Mexico, Malaysia, Senegal, Singapore, Taiwan and the

⁷⁸ Greene 'The political economy' (n 75 above) 19 (internal citation omitted).

Gambia confirms these results; the magnitude of public ownership interacting with civil service corruption are the best predictors of political party domination.

2.2.2 *Opposition party fragmentation*

Electoral systems are assessed according to their ability to realise a number of different objectives, including: providing representation, making elections accessible and meaningful, providing incentives for conciliation, facilitating stable and efficient government, holding the government accountable, holding individual representatives accountable, encouraging political parties, and promoting legislative opposition and oversight.⁷⁹ One of the central insights of the literature on electoral design is that not every one of these goals can be optimised in every situation, and so there are important and unavoidable trade-offs. Consider the formation of political parties. One of the classic dilemmas in the choice between systems of constituency-based representation combined with plurality voting, and the family of electoral systems based on proportional representation, is that the former provides the incentives for party aggregation and yields hence fewer but stronger opposition parties, whereas the latter produces more opposition parties and hence promotes political inclusion. The fewer the number of opposition parties, the more likely it is that one will be sufficiently large to offer a credible alternative to the government. Thus, political competition comes at the expense of inclusion, and vice versa.

For Dahl, the former was more important than the latter. It was for this reason that Dahl argued that in the context of the ‘liberalisation of a hegemonic regime’, ‘a rational strategy’ would provide that ‘the number of parties can and should be regulated’.⁸⁰ Indeed, he argued that constitutional designers should opt for one that ‘might ultimately produce a political system roughly on the model of the classic two-party parliamentary system’ – ie, constituency-based representation as opposed to a system of proportional representation.⁸¹ Although Dahl did not deal specifically with the problem of a dominant party democracy, his point is applicable. Dominant parties have an incentive to fragment opposition parties, in order to increase the difficulty of opposition politicians coordinating in elections and mounting a credible and viable alternative, and thereby to diminish the prospect of alternation.

⁷⁹ International IDEA *Electoral system design: The new International IDEA Handbook* (2005), available online at http://www.idea.int/publications/esd/upload/ESD_Handb_low.pdf.

⁸⁰ Dahl *Polyarchy* (n 66 above) 225.

⁸¹ Dahl *Polyarchy* (n 66 above) 222.

There are numerous mechanisms in which opposition party fragmentation can occur in dominant party democracies. One is through low thresholds of representation under proportional representation. In the literature on the comparative law of democracy, low thresholds have sometimes been advanced as measures to promote political competition by broadening access to the electoral arena to include a broader range of political parties, and high thresholds criticised as measures that limit political competition because they have the effect of excluding small parties. For example, Tamir Moustafa argues that in Egypt ‘an 8 percent minimum threshold posed a formidable barrier to most opposition parties’.⁸² The same objection has been raised to the 10% threshold in Turkey. Indeed, based on the view that low thresholds promote political competition, the German Constitutional Court struck down an increase in the threshold from 5% to 7%.⁸³ Issacharoff and Pildes commend this judgment, because the change in threshold was a form of ‘partisan lock-up’ that supported political monopolies or duopolies.⁸⁴ On this view, the trade-off has been described as between promoting political competition (favouring lower thresholds) and stability (favouring higher thresholds).

However, the above argument suggests that the opposite may in fact be true – that is, it is low thresholds that hamper political competition because they dampen the incentives toward aggregation. Moreover, there is evidence to support this argument. Greene has reported that in dominant party democracies, the threshold is 0.2%, whereas it is 1.7% in fully competitive democracies.⁸⁵ Although Greene does not do so, it is possible to draw the inference that low thresholds can be used strategically to further political fragmentation and entrench political party dominance. Indeed, rather than being imposed, low thresholds can be used to divide and co-opt an opposition. In this way, the trade-off between inclusion and aggregation can be recast as one between the short-term political interest of the opposition in securing legislative representation and the long-term interest in offering a credible alternative to the government.

But manipulating thresholds is not the only way to fragment the opposition. The precise mechanism depends on the features of the electoral system. Consider the case of Mexico.⁸⁶ Elections to Mexico’s lower house were originally based solely on plurality voting, and

⁸² Tamir Moustafa *The Struggle for constitutional power: Law, politics, and economic development in Egypt* (2007) 96.

⁸³ *Schleswig-Holstein Voters Association Case* 1 BVerfGE 208 (1952).

⁸⁴ Issacharoff & Pildes ‘Politics as Markets’ (n 16 above) 692.

⁸⁵ Greene *Why dominant parties lose* (n 72 above).

⁸⁶ A Diaz-Cayeros & B Magaloni ‘Party dominance and the logic of electoral design in Mexico’s transition to democracy’ (2001) 13 *Journal of Theoretical Politics* 271.

produced disproportionate results in which the PRI dominated all elected offices in Mexico. Beginning in 1963, the governing PRI introduced a series of changes to the electoral system to provide for a greater degree of proportionality, and hence increased representation for opposition parties. This culminated in a system whereby 75% of the seats in the chamber of deputies are allocated on the basis of plurality voting, and the remaining according to the results in multi-member districts. Diaz-Cayeros and Magaloni argue that these changes actually ‘protected the dominance of the ruling party’⁸⁷ because they were a ‘divide-and-rule strategy’ which made it more difficult to dislodge the PRI. The critical design feature was a ban on split-ticketing, which would permit opposition parties to support a single candidate for plurality voting while running their own candidates for multi-member districts. This created strong incentives for opposition parties to compete instead of coordinate, and had the effect of ensuring ongoing victories by the PRI in single member districts, notwithstanding a declining vote share. Moreover, these rules ‘were not imposed through undemocratic means’, but rather, often with the agreement of major opposition parties.⁸⁸ Parties were co-opted because the reforms lowered the barriers to entry into the legislature; but in catering to this short-term interest, the reforms ‘created perverse incentives in the longer-term’.⁸⁹

2.2.3 Eroding federalism to thwart political competition

A federal constitutional structure may enhance political competition at the national level and may accordingly serve as a check on the rise of, and may precipitate the decline, of dominant political parties. The reason is that federalism multiplies the opportunities for electoral choice and political competition in two ways. First, federalism increases the number of governments that must be democratically elected. In this respect, it is no different, for example, than a horizontal separation of powers, where institutions (eg a President and Congress) are elected separately, according to different decision-rules, and on different time-lines. Secondly, it creates different political majorities empowered to elect different governments – a national majority, and two or more provincial majorities. The proliferation of opportunities to wield power creates the space for political parties that lose at the national level and are relegated to opposition status nationally to win at the provincial level through the support of a different political majority. Moreover, provincial governments provide important political resources to parties that strengthen their ability to compete at the national level. The

⁸⁷ Diaz-Cayeros & Magaloni (n 86 above) 272.

⁸⁸ Diaz-Cayeros & Magaloni (n 86 above) 291.

⁸⁹ Diaz-Cayeros & Magaloni (n 86 above) 284.

possibility of wielding power enhances the ability of parties to recruit and train political elites. The expertise developed from mass political mobilisation at the provincial level during provincial elections can be transferred to national elections.

Finally, governing at the provincial level provides parties with the advantages of incumbency, such as greater public profile and the ability to shape public policy to enhance their base of political support. Thus, wielding provincial government power provides resources for competition at the national level, and counters the incumbency advantage of the dominant party drawn from the national government. Indeed, because provincial elections distribute political resources which ultimately bear on the competitiveness of national elections, dominant parties have an incentive to intervene politically and fiscally in provincial politics to thwart the rise of potential competitors on the national stage, for example, by promoting the election of a provincial-branch of a national party and securing those provincial resources themselves, or as a second-best, by supporting a provincial ally who will deploy provincial resources in national campaigns.

Perhaps the most dramatic example of the effect of federalism to increase political competition at the national level and precipitate the decline of a dominant political party is India.⁹⁰ The Congress Party dominated Indian politics for the two decades after independence, winning continuous majorities at the national level as well as majorities in most states. In large part, the success of the Congress Party turned on its internal structure, which in turn was a function of India's electoral system. India's system of single-member constituencies elected by plurality placed great importance on state-level political organisations. As a consequence, the Congress Party was heavily reliant on state-level political elites.

In the 1967 elections, Congress faced a successful challenge from new regional parties at the state level, and lost power in eight states. These new parties were organised on the intersecting bases of language and caste, and were themselves the product of a complex interplay of institutional and socio-economic forces, including the linguistic reorganisation of Indian states in the 1950s and 1960s, and the conferral of official language status on and rising levels of literacy in regional vernaculars, which fostered the rise of new regional elites that had hitherto not been part of the Congress Party system of recruitment and promotion. Victories by regional parties deprived the Congress Party of 'the power of patronage that also limited its ability

⁹⁰ P Chhibber 'Political parties, electoral competition, government expenditures and economic reform in India' (1995) 32 *Journal of Development Studies* 74.

to mobilise support for Congress in the national elections'.⁹¹ Ultimately, this culminated in outright losses by Congress in the 1977, 1989 and 1996 national elections. The Congress Party never again obtained an outright majority of seats, and has relied on an increasingly broad set of coalition partners in government.

The negative impact of the rise of state-level parties on the Congress Party's performance in national elections led the Congress Party to interfere with increasing frequency in state politics. The principal political mechanism was Article 356 of the Indian Constitution, which authorises the President to suspend the state government and establish direct central rule, on the advice of the cabinet, which in turn acts on the basis of a report issued by the state's Governor that the state cannot be governed in accordance with the constitution. The fact that state governors were political appointees of the national government, and that for many years the constitutional position was that the President was bound by convention to accept the advice of the cabinet, meant that Article 356 was vulnerable to partisan abuse.

It is striking that the use of Article 356 rose dramatically *after* the 1967 elections, predominantly at the hands of Congress Party governments for one of two purposes: to transfer power to the state-level Congress Party, to bring a regional ally to power. Prior to 1967, Article 356 was used ten times. By contrast, between 1967 and 1987, it was used 72 times; on 45 of these occasions

the power of the central government was invoked by the ruling national party to undermine a state government which was in the hands of a party or coalition that was opposed to the national party.⁹²

Pradeep Chhibber argues that these interventions were successful on a political level – the Congress Party 'did much better electorally in almost three-fourths of the elections held to state assemblies subsequent to central rule'.⁹³ The Supreme Court of India's decision in *Bommai v Union of India*,⁹⁴ which set limits on the use of Article 356 to check partisan abuses, appears to have altered the dynamics of political competition at the state level, and has empowered states relative to the national government.

⁹¹ Chhibber 'Political parties' (n 90 above) 78.

⁹² Chhibber, 'Political parties' (n 90 above) 81.

⁹³ Chhibber, 'Political parties' (n 90 above) 81.

⁹⁴ AIR 1994 SC 1918 (1994).

2.2.4 Subordinating parliamentary to non-parliamentary wings of dominant political party

Every political party consists of a parliamentary wing and a non-parliamentary wing. The parliamentary wing consists of individuals who hold public office in the legislature. The non-parliamentary wing consists of individuals who hold office within a political party but not necessarily the state. Now consider two abstract, simplified models of the relationship between the two wings of the party.⁹⁵ On the first model, the parliamentary wing enjoys primacy over the non-parliamentary wing. Members of the parliamentary wing are elected in competitive elections based on universal suffrage, and would therefore claim to enjoy a democratic mandate. This model would generally hold true in multiparty democracies marked by political competition. Officials in the non-parliamentary wing are elected by party members, not citizens at-large. The parliamentary wing determines the party's political platform, because it possesses democratic legitimacy. The non-parliamentary wing lacks democratic legitimacy, and is largely confined to a financial and organisational role, to ensure the electoral success of the parliamentary wing.

On the second model, the non-parliamentary wing enjoys primacy over the parliamentary wing. This model is closely identified with party-states in which the constitution vests the power to govern in a single party. Although once prevalent in Africa and Eastern and Central Europe, this form of political organisation is now relatively rare. A contemporary example would be the Peoples' Republic of China. Members of the parliamentary wing may be elected, but these elections are not competitive. Hence, they cannot make a credible claim to democratic legitimacy. The non-parliamentary wing determines the party's political platform, which is then faithfully implemented by the parliamentary wing, acting under its direction.

The difference between these two models turns on where real politics happens, where power actually lies, and what are the precise lines of accountability and control. On the first model, political power is wielded by elected officials who are ultimately accountable to the electorate, and is located in the legislature, which for that reason is the centre of political life. On the second model, political power is wielded by party officials, and political decisions are made within the party, and elected officials are accountable to the party. A dominant party democracy lies in between these two extremes. On the one hand, the members of the parliamentary wing are elected in elections, and possess democratic legitimacy. This establishes a

⁹⁵ I adapt this account from R Kothari 'The Congress system revisited: A decennial review' (1974) 14 *Asian Survey* 1035.

strong constitutional presumption in favour of the primacy of the parliamentary wing. But on the other hand, the party's electoral dominance is a function of the fact that it enjoys widespread support – that is, it is an umbrella party that encompasses many different social and economic interests. The party must adjudicate among these different interests in order to retain power. This has the effect of pulling politics into the party, and into processes that lie outside constitutionally created institutions of liberal democracy, and which need not comply with the same norms of transparency and participation. The relative importance of Parliament, and through it, electoral democracy, declines.

What this means is that in a dominant party democracy, the relationship between the parliamentary and non-parliamentary wings is a point of political dispute. Moreover, the structure of this relationship is a constitutional issue of the highest importance – indeed, a moment of high constitutional politics. The experience of post-independence India illustrates this dynamic. Prior to independence, for decades, the Congress Party was principally a mass political movement, and its principal goal was to replace British rule and achieve Indian independence.⁹⁶ Until shortly before independence, Indians could not hold political office in British India. The Congress Party was by definition a non-parliamentary party, and as a consequence, the issue of the relationship between its parliamentary and non-parliamentary wings did not arise. When the British offered limited self-government prior to independence, this presented the party with a dilemma. Hitherto, it had worked outside, not within the formal institutions of British India, because it did not wish to be co-opted by a system that violated India's right to self-determination. It therefore accepted office in seven provinces of British India, but the non-parliamentary wing of the party kept 'strict control over the ministerial wing'.⁹⁷

After independence, this hierarchical relationship between the two came under strain.⁹⁸ The parliamentary wing could now lay claim to democratic legitimacy, because it held office under a constitution adopted by the Indian Constituent Assembly, and had secured victory in elections based on universal suffrage. This sparked '[o]ne of the most important power struggles' of the immediate post-independence era, in which, as Granville Austin put it:

The issue was whether government in the country should be directed by constitutionally elected officials – the council of ministers and

⁹⁶ R Kothari 'The "Congress" system in India' (1964) 4 *Asian Survey* 1161.

⁹⁷ R Roy 'Dynamics of one-party dominance in an Indian state' (1968) 8 *Asian Survey* 568.

⁹⁸ See generally SA Kochanek *The Congress Party in India* (1968).

Parliament at the centre and analogously, state ministries and legislatures – or from behind the scenes by political functionaries and the party apparatus.⁹⁹

The major clash took place in 1951, and was sparked by the election of a Congress Party president who differed with Prime Minister Jawaharlal Nehru on important questions of public policy. Upon his election, the Congress president wrote to Nehru to assert that ‘the Prime Minister and his cabinet are responsible to the Congress and have to carry out policies laid down by the Congress from time to time’.¹⁰⁰ Nehru took the view that ‘the legislative [ie parliamentary] wing dominated the organisational [ie non-parliamentary] wing’ and that the non-parliamentary wing ‘was to serve the legislative [ie parliamentary] wing, not the other way around’. Nehru resolved this impasse by forcing the Congress president’s resignation and assuming the position himself. The Congress Party then passed resolutions which affirmed

the preeminent role of the Prime Minister and reinforced the boundaries of the office of Congress president, which had been revealed once more as limited strictly to organisational affairs with no special responsibility for policy-making.¹⁰¹

2.3 Implications for South African constitutional doctrine

What is the relevance of this comparative excursus to South Africa? Dominant party democracies display a characteristic set of pathologies: the use of public resources by dominant political parties as political to distort electoral competition; deliberate attempts by dominant parties to change the rules of electoral competition to fragment opposition parties and diminish their ability to offer a credible alternative; the erosion of federalism to undermine the ability of opposition parties to form governments at the sub-national level and deploy the political resources provided by incumbency to enhance their competitiveness at the national level; the subordination of the parliamentary wing of a dominant political party to its non-parliamentary wing, thereby shifting politics into the party and out of the legislature, diminishing the central role of the legislature in national political life. The presence of a dominant political party has predictive value – if these pathologies do not yet exist, they are likely eventually to emerge. Moreover, although these pathologies are distinct, they are connected. Where one sees one,

⁹⁹ G Austin *Working a democratic constitution: The Indian experience* (2000) 33-34.

¹⁰⁰ Austin *Working a democratic constitution* (n 99 above) 35 (quoting letter from Congress Party President Purushotamdas Tandon to Prime Minister Jawaharlal Nehru, 6 August 1951).

¹⁰¹ Kochanek *The Congress Party* (n 98 above) 53.

others are likely present as well, or will soon follow. Finally, these pathologies do not merely arise as a consequence of party dominance; they are factors that contribute to its maintenance.

What are the implications for South African constitutional law? South Africa is a dominant party democracy. Some, if not all of the pathologies closely associated with dominant party democracies are present. These pathologies have already generated a wide variety of constitutional cases that have come before the Court (*UDM*,¹⁰² *Merafong*,¹⁰³ *Poverty Alleviation Network*,¹⁰⁴ and *Glenister*¹⁰⁵), and are likely to generate more. The link between these pathologies and the ANC's dominant status has been made explicitly in legal argument. The ANC's dominant status is now squarely on the Court's docket.

How should the Court respond? In discharging its constitutional function as the ultimate interpreter of the Constitution, the Court should draw upon a set of background assumptions about the nature of South African politics, derive its constitutional role from that broader understanding, and craft constitutional doctrine to give effect to that role. Indeed, the Court already has. The Court assumes that because the formal structure of the South African constitution is liberal democratic, South Africa is therefore a consolidated liberal democracy, in which political competition and alternation serve as an additional – and indeed, perhaps the primary – check on the abuse of political power. Two pieces of evidence support this view. First, there are the relatively rare occasions on which the Court has expressly set out that it presupposes political competition and the possibility of alternation. One is Justice Skweyiya's statement in *Merafong* that the more appropriate remedy for the wrong claimed was to express disapproval at the ballot box, since '[a] democracy such as ours provides a powerful method for voters to hold politicians accountable when they engage in bad or dishonest politics: regular, free and fair elections'.¹⁰⁶ Second, there is the fact that in *UDM*, *Merafong*, *Poverty Alleviation Network*, and *Glenister* the Court summarily rejected the relevance of the ANC's dominant status to the disposition of the appeals before it.

This assumption is clearly mistaken. Situating these cases in a broader comparative context should hopefully prompt the Court to be particularly alert to the dangers of a dominant party democracy. Although the South African Constitution is most certainly that of a

¹⁰² *UDM* (n 8 above).

¹⁰³ *Merafong* (n 10 above).

¹⁰⁴ *Poverty Alleviation Network* (n 10 above).

¹⁰⁵ *Glenister* (n 11 above).

¹⁰⁶ *Merafong* (n 10 above) para 309.

liberal democracy, the domination of the ANC means that the Court cannot rely on the risk of losing power as a check on the abuse of public authority. But the Court does not appear to grasp this point. In large part, this has been a function of the fact that the phenomenon of a dominant party democracy has not been systematically presented to the Court. The Court lacks the conceptual resources to question the assumption of political competition and alternation that underlies its jurisprudence. The Court has an inadequate understanding of the concept of a dominant party democracy, its pathologies, the pressure it puts on what is otherwise a formally liberal democratic system because of the lack of alternation of power between political parties, and how this pressure is generating constitutional challenges.

But this was not always the case. Soon after its inception, the Court demonstrated a keen awareness of the dangers posed by a dominant democracy, in its landmark judgment in the *Certification Case*.¹⁰⁷ The Court proceeded from the assumption of ANC dominance, which in turn shaped how it approached the certification exercise. The *Certification Case* is now rarely cited. This likely reflects the view that the task assigned to the Court on that occasion was utterly unique and had little bearing on the subsequent interpretation of the document. The doctrinal challenge is to harness the structural reasoning in the *Certification Case* to the subsequent interpretation of the Final Constitution. In the next section, I argue that taking the notion of ANC domination seriously would yield a set of constitutional doctrines that emerge from a recasting of the existing jurisprudence: *anti-domination*, *anti-capture*, *non-usurpation*, *anti-seizure*, and *anti-centralisation*. While these doctrines would not ensure that South African democracy will function as it would were the ANC to not be dominant, they would serve to check the harms that flow from the ANC's dominant status and that operate to reinforce its dominance.

3 The Constitutional Court encounters dominant party democracy

3.1 Anti-domination: floor-crossing and opposition fragmentation

Anti-domination is a doctrine that would render illegitimate any exercise of public power that has as its principal goal the preservation, enhancement or entrenchment of the dominant status of a dominant political party. Deliberate attempts to co-opt and

¹⁰⁷ *Certification Case* (note 8 above).

fragment the opposition are two examples of measures that would trigger the operation of the doctrine, although a range of different policies might achieve the same end. The focus is on the purpose underlying the challenged measure.¹⁰⁸

The doctrinal roots of the anti-domination doctrine accordingly lie in the doctrine of rationality. In brief, the doctrine of rationality emerged from the jurisprudence on the principle of legality, which holds that ‘the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law’.¹⁰⁹ Although originally set out by the Constitutional Court under the Interim Constitution, the principle of legality was later held to operate under the Final Constitution as well.¹¹⁰ As set out by the Court, it applies to both the legislature and the executive – that is, to primary legislation and the whole range of exercises of public power (eg promulgation of secondary legislation, exercise of statutory discretion) undertaken by the executive.¹¹¹

The doctrine of rationality is one limb of the principle of legality, and at its core, bars arbitrary action. The requirement of rationality, or non-arbitrariness, holds that all public power must be rationally related to a legitimate government purpose.¹¹² The doctrine has two limbs. The first is a requirement of means-ends rationality: that a public power be exercised for the purpose for which it was given. If the means chosen do not further the stated objective, then the measure is arbitrary or irrational. The second is a requirement that the purpose for which power has been exercised itself be legitimate. These two limbs are analytically distinct. The means chosen may further an end that is illegitimate; or the means may fail to further a legitimate end. But the two dimensions of arbitrariness are closely related in practice. In situations where there is a poor fit between means and ends, this is often because the reason proffered in support of measure is pretextual, and that the true reason for the measure is

¹⁰⁸ For the same terminology and a similar argument rooted in republican political theory and American constitutional doctrine, see Yasmin Dawood ‘The antidomination model and the judicial oversight of democracy’ (2008) 96 *Georgetown Law Journal* 1411.

¹⁰⁹ *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 1 SA 374 (CC); 1998 12 BCLR 1458 (CC) para 58.

¹¹⁰ *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 2000 1 SA 1 (CC); 1999 10 BCLR 1059 (CC) (‘SARFU’).

¹¹¹ See *Fedsure* (n 109 above) para 58 for the application of the principle of legality to ‘the legislature ... in every sphere’; and (b) for each kind of administrative decision to which applicable.

¹¹² See *Affordable Medicines Trust & Others v Minister of Health & Another* 2006 3 SA 247 (CC); 2005 6 BCLR 529 (CC) at para 73; *New National Party v Government of the Republic of South Africa & Others* 1999 3 SA 191; 1999 5 BCLR 489 at para 19.

to be found elsewhere. This true reason has been concealed, because it is illegitimate.¹¹³ The search for a rational relationship between means and ends often culminates in exposing an ulterior motive.

The facts of *NICRO* provide a good example.¹¹⁴ At issue was a denial of the right to vote to prisoners who were imprisoned without the option of a fine. The reasons advanced in support of the denial of the right to vote were the logistical challenges and expense involved in arranging for special voting facilities (eg mobile voting stations) for those prisoners. But as the Court pointed out, there were two categories of prisoners who retained the right to vote – those who were incarcerated because of their failure to pay a fine, and those awaiting sentence – on whose behalf precisely such arrangements had to be made at the same facilities which housed the excluded prisoners. The government failed to adduce evidence regarding the *additional* logistical and financial hurdles associated with expanding these arrangements to encompass the excluded prisoners. The objective offered by the government was a pretext. The real justification for the measure was to dispel the ‘concern that if prisoners are allowed to vote that will send a message to the public that the government is soft on crime’, which the Court rightly deemed to be an illegitimate purpose.¹¹⁵

So although the doctrine of rationality purports to be about both the relationship between means and ends, and those ends themselves, it is in practice principally about the latter. The purposes for which public power is exercised are central to the doctrine. The anti-domination doctrine derives from this starting point. It focuses on a specific kind of purpose, and declares it to be *per se* unconstitutional: the preservation, enhancement or entrenchment of the dominant status of a dominant political party. As with the doctrine of rationality generally, non-domination applies to a whole range of possible exercises of public power, extending from

¹¹³ See, for example, *Larbi-Odam & Others v Member of the Executive Council for Education (North-West Province) & Another* 1998 1 SA 745 (CC); 1997 12 BCLR 1655 (CC) and the powerful dissenting judgments in *New National Party of South Africa v Government of the RSA & Others* (n 112 above) and *Union of Refugee Women & Others v Director: Private Security Industry Regulatory Authority & Others* 2007 4 SA 395 (CC); 2007 4 BCLR 339 (CC). See also *Van Der Merwe v Road Accident Fund & Others (Women’s Legal Centre Trust as Amicus Curiae)* 2006 4 SA 230 (CC); 2006 6 BCLR 682 (CC), *Hassam v Jacobs NO & Others* 2009 5 SA 572 (CC); 2009 11 BCLR 1148 (CC), *City Council of Pretoria v Walker* 1998 2 SA 363 (CC); 1998 3 BCLR 257 (CC).

¹¹⁴ *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) & Others* 2005 3 SA 280 (CC); 2004 5 BCLR 445 (CC). This case was resolved on the basis of the right to vote, and the considerations discussed in this paragraph were raised under the Court’s sec 36 limitations analysis. However, I reframe those considerations around the doctrine of rationality to illustrate how the Court could have used that doctrine to find the legislation unconstitutional.

¹¹⁵ *NICRO* (n 114 above) para 55.

administrative decisions (eg those regarding the administration of the electoral system), to legislation and even to constitutional amendments. However, as I argue below, the scope of the anti-domination doctrine is narrower than that of rationality, which should deflect some of the concerns that have been raised against the latter.

I illustrate the application of the anti-domination doctrine through a case-study: the repeal of the ban on floor-crossing, which was constitutionally challenged in *UDM*. Floor-crossing is a practice that occurs in legislatures, where members who belong to one party leave it to join another party. In many cases, this literally involves crossing the floor, whence the practice gets its name. The practice is closely identified with parliamentary democracies in the Westminster tradition, with constituency-based representation based on single-member ridings. Moreover, this link is not merely contingent, but conceptual. On the theory of representation implicit in Westminster parliamentary systems, a member represents, first and foremost, the residents of a geographic constituency. A party identity confers no electoral mandate *per se*, although it might have been critical in obtaining it. Thus, if that member crosses the floor, she has not lost her mandate to sit in the legislature, since that came not from her party, but the electorate. Moreover, constituency-based systems of representation provide a mechanism for electors to hold members accountable for floor-crossing and to check abuse: in subsequent elections, where representatives who have crossed the floor seek re-election, they will be forced to defend their decisions.

Party-list systems of proportional representation fit poorly, at a conceptual level, with floor-crossing, because electoral mandates flow from voters to parties, not to individual members, who only sit in the legislature because of their membership in a party and relative placement on a party list. South Africa opted for closed-list proportional representation under the Interim Constitution, in large part because an important strategy under apartheid had been to geographically segregate areas on the basis of race, under the Group Areas Act 41 of 1950. It was reasoned that against this backdrop, any system of constituency-based representation would be unavoidably tainted by racism and would institutionalise racial differences as the basis of electoral politics, when the whole point of the democratic transition was to transcend such divides.¹¹⁶ This seemed to demand party-list proportional representation. So it is not surprising that the Interim Constitution banned floor-crossing, linking membership in the National Assembly to ongoing membership in ‘the party which nominated him or her’ as a member of the National Assembly.¹¹⁷

¹¹⁶ T Sisk *Democratization in South Africa* (1995) 266.

¹¹⁷ Constitution of the Republic of South Africa, Act 200 of 1993 (the ‘Interim Constitution’) sec 43(b).

Membership in provincial legislatures was made conditional in an identical fashion.¹¹⁸ These provisions were carried over into the Final Constitution.¹¹⁹

The constitutional ban on floor-crossing – also known as the anti-defection provision – was controversial. List-based systems of proportional representation empower parties relative to representatives, who lack an independent electoral basis for and legal entitlement to legislative membership. Commentators were generally critical. For example, Ian Shapiro and Courtney Jung, writing during the negotiation of the 1996 Constitution, argued that the power of exit – through floor-crossing – was an important and vital mechanism to give parliamentary backbenchers leverage over party leadership.¹²⁰ The ban on floor-crossing was accordingly the ‘most powerful whip system in the parliamentary world’.¹²¹ Moreover, they argued that the possibility of floor-crossing was particularly important in light of the electoral dominance of the ANC. In the absence of real political competition, the main prospect for the emergence of a viable opposition was ‘the breakup of the ANC into several parties’.¹²² Jung and Shapiro’s criticisms were echoed by others.¹²³ They confidently predicted that if the ban on floor-crossing were lifted,

it is hard to see how this could not happen to what is, after all, an umbrella organisation consisting of a great diversity of groups that were held together by their shared opposition to *apartheid*.¹²⁴

The political events that ultimately culminated in the constitutional amendments which repealed the ban on floor-crossing began in 1999.¹²⁵ The focus was the contest for power in the Western Cape and Cape Town. In the post-apartheid period, it is these two governments that have served as opposition strongholds. Although the ANC has formed the government in both for short periods of time, for the most part, their governments have been led by parties that have been in opposition nationally. The National Party – renamed the New National Party (NNP) – won the first post-transition election in 1994. However, it placed second to the ANC in 1999, and was only able to retain power with the support of the Democratic Party (DP). The two

¹¹⁸ Interim Constitution sec 133(1)(b).

¹¹⁹ 1996 Constitution, sec 46(1) read with item 23A, Annexure A, Schedule 6.

¹²⁰ C Jung & I Shapiro ‘South Africa’s negotiated transition: Democracy, opposition, and the new constitutional order’ (1995) 23 *Politics and Society* 269.

¹²¹ Jung & Shapiro ‘South Africa’s negotiated transition’ (n 120 above) 277.

¹²² Jung & Shapiro ‘South Africa’s negotiated transition’ (n 120 above) 301.

¹²³ N Steytler ‘Parliamentary democracy – The anti-defection clause’ (1997) 1 *Law, Democracy and Development* 221; Giliomee ‘South Africa’s emerging dominant-party regime’ (n 28 above).

¹²⁴ Jung & Shapiro ‘South Africa’s negotiated transition’ (n 120 above) 301.

¹²⁵ For a good overview, see S Booysen ‘The will of the parties versus the will of the people? Defections, elections and alliances in South Africa’ (2006) 12 *Party Politics* 727.

parties began to govern together under the banner of the Democratic Alliance (DA), although the constitutional ban on floor-crossing prevented them from formalising this arrangement in the Western Cape provincial legislature.

Soon after it was formed, the DA began to fray due to a variety of internal conflicts. The ANC saw an opportunity to split the DA, partner with NNP, and take control of both the Western Cape and Cape Town. In addition, by encouraging the fracture of the NNP, the ANC would be able to undermine the ability of the DA to offer itself as a credible alternative government at the national level. In the Western Cape provincial legislature, the pact would simply require the NNP to withdraw its support from the DA, vote a motion of no-confidence, and support the formation of an ANC government. Likewise, in the National Assembly, NNP MPs could simply shift their support to the ANC, without joining it. The principal roadblock to the pact was at the local level, where councillors had been elected under the banner of the DA and no longer held their seats as members of the NNP.¹²⁶ Were these councillors to declare their support for the ANC, they would have been expelled by the DA and therefore lost their seats, since they were no longer members of the party that had nominated them. The only way to allow the shift in allegiance was to repeal the ban on floor-crossing.

The centrepiece of the ANC-NNP pact was a legislative package that would make this possible, which was adopted in 2002. There were four statutes in total – a mixture of constitutional amendments and ordinary statutes which taken together had the effect of permitting floor-crossing at the national, provincial and municipal levels.¹²⁷ This legislative package shared three core characteristics. First, floor-crossing would only be permitted during a fifteen-day period during the second and fourth year after an election. Second, for floor-crossing to be effective, at least 10% of the members of the party had to leave. Third, there was a once-off fifteen-day period of floor-crossing that began immediately after the amendments came into force (during which the 10% threshold was not effective).

The United Democratic Movement (UDM), an opposition party, constitutionally challenged the legislative package. The most

¹²⁶ GE Devenish 'Political musical chairs – the saga of floor-crossing and the Constitution' (2004) 15 *Stellenbosch Law Review* 52.

¹²⁷ This legislation was composed of the Constitution of the Republic of South Africa Amendment Act 18 of 2002 (the first Amendment Act) and the Constitution of the Republic of South Africa Second Amendment Act 21 of 2002 (the second Amendment Act); one statute amending ordinary legislation: the Local Government: Municipal Structures Amendment Act 20 of 2002; and the legislation contemplated by item 23A(3): the Loss or Retention of Membership of National and Provincial Legislatures Act 22 of 2002.

interesting argument concerned whether one component of the package – the Membership Act, an ordinary statute – should have in fact been framed as a constitutional amendment and adopted according to the appropriate procedures. Under the South African Constitution, the default rule for constitutional amendment requires, *inter alia*, a supporting vote of at least two-thirds of the members of the National Assembly.¹²⁸ However, a more onerous procedure, requiring a supporting vote of least 75% of the National Assembly members, is required for amendments to section 1, which entrenches the founding values of the Constitution,¹²⁹ including ‘a multi-party system of democratic government’.¹³⁰ The UDM argued that the Membership Act collided with constitutional commitment to multi-party democracy, in purpose and effect, and therefore could have been adopted only as a constitutional amendment pursuant to section 74(1).

In *UDM*, the Constitutional Court rejected this argument. Consider UDM’s argument that the *purpose* of the repeal of the ban on floor-crossing collided with the constitutional commitment to multi-party democracy. As the Court put it, the UDM’s contention was ‘that the legislation is designed to and in fact serves the interests of the ANC, which is the governing party in the National Assembly’.¹³¹ In other words, the allegation was that the repeal of the ban was an illegitimate attempt by the ANC to abuse its dominant position, by encouraging the fragmentation and cooptation of the opposition. Whatever public-regarding reasons were offered by the ANC for the amendments were pretextual. This was an argument from irrationality, alleging that the purpose underlying the repeal was illegitimate. Although rationality was raised as a separate ground of constitutional challenge, the Court resolved the section 74(1) rationality claims together.

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

¹²⁸ 1996 Constitution, sec 74(3).

¹²⁹ 1996 Constitution, sec 74(1).

¹³⁰ 1996 Constitution, sec 1(d).

¹³¹ *UDM* (n 8 above) para 54.

The design of the new provisions buttressed these suspicions. The 10% threshold meant that small parties were much more vulnerable to the threat of defection than larger parties, such as the ANC, because the coordinated action of fewer MPs was required to cross the floor. In addition, defections during the initial period were not subject to the 10% threshold, which it was alleged was expressly designed to facilitate floor-crossing by municipal councillors formerly part of the NNP who were now sitting as members of the DA. Finally, as a comparative matter, floor-crossing was – and remains – highly unusual in countries where elections are held under closed-list proportional representation.

The Court's principal response to this argument was to draw a sharp distinction between legislative purpose and motive, to rule the latter off-limits for the purposes of constitutional adjudication. As the Court put it: '[c]ourts are not ... concerned with the motives of the members of the legislature who vote in favour of particular legislation'.¹³² On the Court's account, the purpose was merely 'to make provision for members of legislatures to change their party allegiances without losing their seats in the legislature'.¹³³ As a doctrinal matter, the distinction drawn by the Court is open to serious question. Inquiries into legislative motive are routine in jurisdictions with purpose-based constitutional restrictions on legislative power. The comparative experience of the United States is telling. Purpose-based review of legislation has become a fixture of American constitutional jurisprudence with respect to the interpretation of many different constitutional provisions, including the Equal Protection Clause and the equal-protection component of the Fifth Amendment (both on the basis of race and sex), the Anti-Establishment Clause, and the Commerce Clause.¹³⁴ If an unconstitutional purpose is not manifest on the face of legislation, courts have nonetheless attributed an unconstitutional purpose on the basis of an examination of extrinsic evidence, including 'internal legislative history ... to unearth the hidden motivations behind the legislative acts'.¹³⁵

So the Court's distinction between purpose and motive was not a doctrinal necessity. Some explanation for what may underlie it is suggested by the Court's jurisprudence on the doctrine of rationality. There is a gap between the doctrine of rationality and its application in fact. In theory, the doctrine is applicable to constitutional

¹³² *UDM* (n 8 above) para 56.

¹³³ *UDM* (n 8 above) para 57.

¹³⁴ C Nelson 'Judicial review of legislative purpose' (2008) 83 *New York University Law Review* 1784.

¹³⁵ Nelson 'Judicial review of legislative purpose' (n 134 above) 1851.

amendments¹³⁶ and primary legislation. It has been invoked in a large number of cases. But these claims have only succeeded on two occasions, both with respect to apartheid-era legislation.¹³⁷ The reluctance of the Court to deploy the doctrine of rationality against legislation may be a function of the doctrine's vast scope. The doctrine invites the Court to second-guess the stated objective of legislation. In principle, it is a requirement that must be met by all legislation – as opposed to a narrower role that, for example, circumscribed it to limitations analysis under the bill of rights. The doctrine raises evident dangers of over-enforcement – ie, that a court would find irrational not merely those laws that in fact lack a legitimate purpose, but those laws with which it disagrees on policy grounds. This danger is particularly acute for those cases – which may be a majority – where there is a plausible legitimate objective for the challenged law. It may be that the Constitutional Court has responded to this concern by systematically under-enforcing the doctrine in challenges to legislation. Indeed, the same pattern happened in the United States in the immediate aftermath of the *Lochner*-era, where as part of its across-the-board demobilisation of judicial review, the US Supreme Court reverted to a form of rationality review that declined to find that legislation had been enacted for unconstitutional purposes as long as a plausible purpose was available.

The anti-domination doctrine responds to this concern by narrowing dramatically the scope of the doctrine of rationality to cases that concern the design of the democratic process. The Court is on safest political ground in checking majoritarian decision-making in precisely those cases where a majority seeks to insulate itself from democratic accountability. As Issacharoff and Pildes have explained, the German Federal Constitutional Court, in particular, has been particularly aggressive in flushing out illicit legislative motives in a wide variety of cases involving the political process, precisely in order to check measures enacted by parties when in power that would operate to the disadvantage of minority parties.¹³⁸ The German jurisprudence has guarded against the partisan manipulation of a variety of features of the democratic process: ballot access and campaign financing regimes, internal parliamentary rights of minority parties, and electoral thresholds under proportional representation. It has done so by requiring a particularly compelling justification for measures that are enacted by dominant parties to the disadvantage of smaller political parties – which requires that there be a legitimate purpose.¹³⁹

¹³⁶ *UDM* (n 8 above) para 68 and *Merafong* (n 10 above) para 64.

¹³⁷ *Van Der Merwe v Road Accident Fund* and *Hassam v Jacobs NO & Others* (n 108 above).

¹³⁸ Issacharoff & Pildes 'Politics as markets' (n 16 above) 692-97.

¹³⁹ Pildes 'Political parties and constitutionalism' (n 17 above).

So the Constitutional Court's distinction between purpose and motive was a function of the fact that the Court was not presented with the right kind of argument on illegitimate legislative motive. The Court's analysis of the *effect* of the amendment likewise demonstrates the limitations of the existing doctrine. It was argued that even if the motive underlying the amendments was not illicit, the combined effect of (a) the domination of the ANC, which give it access to inducements to cross the floor, and (b) the 10% threshold, which meant that defections would be much more likely from a large number of small political parties in the National Assembly but not from the ANC (from which at least 26 members would need to defect), meant that the amendments in operation would undermine multi-party democracy.¹⁴⁰ The Court did not deny that such an effect could occur. Rather, it simply responded by stating that these effects were irrelevant – ie '[t]he fact that a particular system operates to the disadvantage of particular parties does not mean it is unconstitutional'.¹⁴¹ But the anti-domination doctrine understands effects in a different way. The effects of a law are evidence of the actual motive underlying it. If the stated objective of a law is not that it benefits the dominant party, but the law has effects that operate to the manifest disadvantage of opposition political parties, and which principally benefits the dominant political party, then these effects may assist in challenging that stated purpose as pretextual.

Indeed, perhaps the clearest statement that the effects of the law should be used to treat with considerable scepticism the public-regarding reason offered to justify it comes from the *Certification Case*, precisely in its treatment of the issue of floor-crossing. During the certification exercise, it was objected that the ban on floor-crossing in the Final Constitution did not comply with Constitutional Principle (CP) 8, which required the Final Constitution to provide the framework for a representative 'multi-party democracy'. The Court summarily rejected this argument, and reached exactly the opposite conclusion - that far from undermining multi-party democracy, the ban in fact preserved it. The Court stated that the ban 'prevents parties in power from enticing members of small parties to defect from the party upon whose list they were elected to join the governing party'.¹⁴² Now it is not clear from this sentence whether the Court had a particular governing party in mind, or was referring to the threat posed by governing parties in general to multi-party

¹⁴⁰ For scholarly support for this position, see S Issacharoff 'Democracy and collective decision making' (2008) 6 *International Journal of Constitutional Law* 231, 252; D K Kadima 'Party regulations, nation-building and party systems in Southern and East Africa' in B Reilly & P Nordlund (eds) *Political parties in conflict-prone societies: Regulation, engineering and democratic development* (2008) 201, 215.

¹⁴¹ *UDM* (n 8 above) para 47.

¹⁴² *UDM* (n 8 above) para 187.

democracy should floor-crossing be permitted. But the next sentence leaves no doubt:

If this were permitted it could enable the governing party to obtain a special majority which it might not otherwise be able to muster and which is not a reflection of the views of the electorate.¹⁴³

Here, the Court was clearly referring to the ANC and its level of representation in the National Assembly. At the time of the hearing in the *Certification Case* in 1996, the ANC held 252 out of 400 seats in the National Assembly, just shy of a two-thirds majority. Against this backdrop, the Court's barely unstated concern is that the probable effect of permitting floor-crossing would be that the ANC could pass the two-thirds threshold required to enact constitutional amendments, which could further entrench its dominant status. These effects would fuel the suspicion that this would be the real motive for lifting the ban.

UDM should have followed the same line of argument to find that the likely effects of the floor-crossing amendments rendered suspect the motives underlying the amendments. The history of floor-crossing subsequent to the repeals of the ban bears this fear out.¹⁴⁴ At the national level, the ANC emerged as the big winner. It consolidated its majority in Parliament and obtained a super-majority that permitted it to amend the Constitution at will. The Democratic Alliance emerged as a net victor as well. However, most opposition parties – the IFP, the UDM and the PAC lost members. Moreover, in addition to enhancing the dominance of the ANC, floor-crossing contributed to the fragmentation of the opposition. A number of opposition MPs left to create new, smaller parties – five in total. At the provincial level, floor-crossing changed the balance of power in the two provinces where the ANC was not in power. In Western Cape, the ANC took power in a governing coalition with the NNP. In KwaZulu-Natal, the ANC acquired a majority, but allowed the IFP to continue to govern. In sum, floor-crossing enhanced the ANC's dominant status at the national level and in all nine provinces.

Theunis Roux has persuasively argued that in *UDM*, the Court 'compromised on principle', in part because it perceived a real risk to its institutional security, given the tight link between the amend-

¹⁴³ *UDM* (n 8 above) para 187.

¹⁴⁴ Booyesen 'The will of the parties' (n 120 above) 739-40; T Hoeane 'Floor-crossing in South Africa: Entrenching or undermining democracy?' (2008) 27 *Politeia* 70; L Nijzink & J Piombo 'Parliament and the electoral system: How are South Africans being represented?' in J Piombo & L Nijzink (eds) *Electoral politics in South Africa* (2005).

ments and the partisan political agenda of the ANC.¹⁴⁵ My analysis adds that the risk to the Court's institutional security – which may have been real – could potentially have been offset by a better set of legal arguments. Rather than relying on the doctrine of rationality – which is weak because of its breadth – the Court would have been better equipped with the anti-domination doctrine, which is narrow but strong. But in the end this may have not been enough to overcome a critical piece of evidence: that the legislation was supported by 280 of the 324 MPs who voted – a majority of 86%. Moreover, the support came not just from the ANC and NNP, but from the DA (DP), which subsequently changed its mind and opposed the legislation before the Court in *UDM*. This contingent fact gave the Court political cover. It was also a strategic disaster for the opposition parties, especially the DA. If the DA and the opposition had uniformly voted against the amendments in Parliament, the Court would have been forced to confront the fact that the amendment was motivated by a desire to entrench the dominance of the ANC.

By way of conclusion, let us examine another argument at play in *UDM*. For, in addition to arguing that the Membership Act was unconstitutional for failing to be enacted pursuant to section 74(1), the UDM submitted in the alternative that the Act was unconstitutional because it undermined the 'basic structure' of the South African Constitution. The basic structure doctrine was developed by the Supreme Court of India, and applies to constitutional amendments that have been adopted in accordance with formal constitutional procedure.¹⁴⁶ The doctrine turns on a distinction between those amendments that truly amend a constitution and those that destroy or abrogate it. The doctrine has been in place since 1973, and continues to be used, albeit sparingly. In *UDM* (as it had on an earlier occasion)¹⁴⁷ the Court declined to accept the invitation to import the doctrine into South African constitutional law and apply it.

There are two ways to read the Indian cases on the basic structure doctrine.¹⁴⁸ According to one view, the 'struggle between parliament

¹⁴⁵ T Roux 'Principle and pragmatism on the Constitutional Court of South Africa' (2009) 7 *International Journal of Constitutional Law* 106, 130.

¹⁴⁶ For details and analysis, see R Ramachandran 'The Supreme Court and the basic structure doctrine' in BN Kirpal, A H Desai, G Subramaniam, R Dhavan & R Ramachandran (eds) *Supreme but not infallible: Essays in honour of the Supreme Court of India* (2000) 130; G Jacobsohn 'An unconstitutional Constitution? A comparative perspective' (2006) 4 *International Journal of Constitutional Law* 460; SP Sathe *Judicial Activism in India* (2002) ch 3; S Krishnaswamy *Democracy and constitutionalism in India: A study of the basic structure doctrine* (2009).

¹⁴⁷ *Premier, KwaZulu-Natal & Others v President of the Republic of South Africa & Others* 1996 1 SA 769 (CC); 1995 12 BCLR 1561 (CC) paras 45-50.

¹⁴⁸ LI Rudolph & SH Rudolph 'Judicial review versus parliamentary sovereignty: The struggle over stateness in India' (1981) 19 *Commonwealth & Comparative Politics* 231.

and court for supremacy in interpreting the constitution pitted proponents of the oppressed many without property against the privileged few with property'.¹⁴⁹ The Supreme Court of India developed the doctrine in the context of a lengthy legal-political saga concerning land redistribution, which was a dominant theme in Indian constitutional jurisprudence in the 1950s and 1960s. The national Parliament attempted to abolish the medieval system of tenure (the Zamindari system) and redistribute land to peasants. The Supreme Court responded by striking down these laws on the basis that they breached the constitutional obligation to compensate landowners for deprivations of property.¹⁵⁰ In response, Parliament amended the constitution to withdraw estates held under the Zamindari system from the right to compensation, and then to make the amount of compensation non-justiciable.¹⁵¹ The Supreme Court responded by treating constitutional amendments as ordinary laws that were subject to the fundamental rights in the Indian Constitution, including the right to property.¹⁵² Parliament responded through a set of constitutional amendments that asserted, *inter alia*, the plenary nature of the power of constitutional amendment.¹⁵³

The Supreme Court famously responded in *Kesavananda Bharati*, which asserted the Court's power to review the substance of constitutional amendments for compliance with the Constitution's basic structure, which included the power of the courts to ensure that the amount of compensation paid for property compulsorily acquired by the state was not arbitrary.¹⁵⁴ The Court's jurisprudence on property rights was widely attacked by Indian legal and political elites, in tones reminiscent of the attack on the *Lochner*-era jurisprudence of the United States Supreme Court a generation earlier.

But there is another way to read the Indian cases. The basic structure doctrine arose in the context of the domination of the Indian Parliament by the Congress Party, which alone, and with its allies, controlled the process of constitutional amendment. The course of the doctrine holds lessons for how one Supreme Court managed to check the power of a dominant political party through constitutional adjudication. In this counter-narrative of the doctrine, the most

¹⁴⁹ Rudolph & Rudolph 'Judicial review versus parliamentary sovereignty' (n 148 above) 236.

¹⁵⁰ *The State of Bihar v Maharajadhiraja Sir Kameshwar Singh of Darbhanga & Others* 1952 1 SCR 889; AIR 1975 SC 1083 and *Karimbil Kunhikoman v State of Kerala* 1962 Supp 1 SCR 829.

¹⁵¹ These were the Constitution First (1951), Fourth (1955), and Seventeenth (1964) Amendment Acts.

¹⁵² *Golak Nath v State of Punjab* AIR 1967 SC 1643.

¹⁵³ The Constitution 24th (1971), 25th (1971), 26th (1971) and 29th (1972) Amendments Acts.

¹⁵⁴ *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1469.

important jurisprudential development is its extension to the political process, in the *Indira Gandhi* election case.¹⁵⁵ In 1975, Indira Gandhi was found guilty of committing electoral fraud arising out of the 1971 election. Had it stood, the conviction would have stripped Gandhi of her seat in Parliament, and barred her from seeking election to Parliament for six years. The judgment threatened to end Gandhi's political career.

Gandhi's first response was to declare a state of emergency, within weeks of the handing down of the judgment. Under emergency powers, the government detained approximately 13,000 individuals linked to political parties and banned organisations. By presidential order, these detentions were immunised from judicial review. Freedom of the press was sharply curtailed. As Granville Austin put it, '[w]ith the sweep of her hand, Mrs Gandhi had snuffed out democracy'.¹⁵⁶ Firmly in control of the political process – indeed, with many opposition politicians in detention – Gandhi then introduced a series of constitutional amendments to immunise the exercise of emergency powers from judicial review, and to protect her from being removed from office. The key constitutional amendment was the 39th Amendment, which purported to set aside the judgment against Gandhi, and withdraw the jurisdiction of the Supreme Court over the conduct of elections of the Prime Minister. In the *Indira Gandhi* election case, The Court struck down the amendment, on the basis that democracy was an essential feature of the basic structure of the Constitution and the amendment jeopardised free and fair elections. As Sudhir Krishnaswamy has noted, critics of the basic structure doctrine turned into its strongest advocates.¹⁵⁷

What is the lesson for South Africa? The South African courts have thus far refused to apply the basic structure doctrine to set substantive restraints on the power of constitutional amendment. This may be due to two reasons. First, the founding provisions, set out in section 1, serve as a surrogate for the doctrine, since they subject constitutional amendments to provisions of the constitution that implement those provisions to the enhanced super-majority requirements of section 74(1). The founding provisions protect design features that would be part of any South African basic structure doctrine: constitutional supremacy, the rule of law, universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government. The development of such a doctrine may be unnecessary. Second, the doctrine may be tainted in South Africa by its origins in the constitutional struggles

¹⁵⁵ *Indira Nehru Gandhi v Shri Raj Narain & Another* AIR 1975 SC 2299.

¹⁵⁶ Austin *Working a democratic constitution* (n 99 above) 309.

¹⁵⁷ Krishnaswamy (n 146 above) 225.

over land redistribution and property rights, especially in light of South Africa's constitutional commitment to social transformation through law to redress the evils of apartheid.

But it would be a mistake to read the basic structure doctrine narrowly as being legally inapplicable or as rooted in an illegitimate anti-redistributive politics. The counter-narrative of the basic structure doctrine highlights its intimate association with the protection of democracy against the abuse by a political party of its dominant position to preserve, enhance, and entrench its power through formally constitutional and democratic means. The key is a narrow but strong judicial role. The legal home for the reception of the Indian experience that is narrowly focused on the threats of a dominant political party would be the comparably narrow anti-domination doctrine. If the reluctance of the South African Constitutional Court to accept the UDM's challenge against the floor-crossing amendments was rooted in a political calculus that such a move would pose a danger to its institutional legitimacy given the dominance of the ANC, the *Indira Gandhi* election case suggests otherwise. The Supreme Court of India's intervention to check attempts to preserve those 'in power from accountability and competition'¹⁵⁸ was accepted by political actors as being legitimate.

3.2 Anti-capture: independent institutions and cadre deployment

The doctrine of *anti-capture* grows out of a striking feature of the South African Constitution: the large number and wide variety of independent institutions that it creates. The most prominent of these are creatures of chapter 9. That chapter's title – 'State Institutions Supporting Constitutional Democracy' – underlines the central role of the independent institutions in the South African constitutional scheme. The institutions created by chapter 9 are the Public Protector, the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor General, and the Electoral Commission. Although chapter 9 varies in the extent to which it specifies the powers and functions of each institution, the qualifications for holding office, the term of office, and the procedures for appointment and removal, etc, it provides that all these institutions 'are independent ... and they must be impartial and must exercise

¹⁵⁸ Rudolph & Rudolph 'Judicial review versus parliamentary sovereignty' (n 148 above) 234.

their powers and perform their functions without fear, favour or prejudice'.¹⁵⁹

These are not the only independent institutions created by the Constitution. Chapter 10 creates the Public Service Commission, and chapter 13 creates the Financial and Fiscal Commission and the South African Reserve Bank, and expressly designates them as independent. In addition, the Constitution also vests certain functions in independent institutions that it does not itself create, but which it provides *must* be created by national legislation. These include independent bodies to determine municipal boundaries,¹⁶⁰ to determine ward boundaries in municipalities,¹⁶¹ to regulate broadcasting,¹⁶² to recommend salaries for elected officials and the most senior civil servants,¹⁶³ and an independent police complaints body.¹⁶⁴

Finally, chapter 8 creates two institutions that appear to lie outside the normal departmental structure of government: the Judicial Service Commission and a national prosecuting authority. The Constitution designates neither as independent. In the case of the Judicial Service Commission, however, the fact that its functions include the disciplining of independent judges and recommending judicial appointments is highly suggestive that it, too, must be independent. In the case of the national prosecuting authority, the Constitution mandates that it carry out its functions 'without fear, favour or prejudice' – a requirement that the Constitution elsewhere uses to qualify the operation of institutions formally declared to be independent.¹⁶⁵

The doctrinal implications of the constitutionally independent status of an institution depend on what 'independent' precisely means. The Constitution does not define this pervasive term. But consider the counterfactual. Each and every function performed by the independent institutions is central to the modern state. If the Constitution did not vest responsibility for these functions with independent institutions, it would be necessary for legislation to vest those functions with some entity. In many cases, this would have been a government department, under the control of a minister or

¹⁵⁹ 1996 Constitution, sec 181(2).

¹⁶⁰ Section 155(3)(b).

¹⁶¹ Section 157(4)(a).

¹⁶² Section 192.

¹⁶³ Section 219(2).

¹⁶⁴ Section 206(6).

¹⁶⁵ The courts themselves are 'independent' and 'must apply [the Constitution and the law] impartially and without fear, favour or prejudice' (sec 165(2)). The requirement of independence stands alongside the injunction to act without fear, favour or prejudice with respect also to the Public Service Commission (sec 196(2)), and the Reserve Bank (sec 224(2)).

provincial member of executive committee (MEC), who is a member of a legislature and under the Constitution, politically accountable to the legislature for departmental decisions. For an institution to be independent accordingly means that it lies outside the normal chain of political control and accountability.

Indeed, this is how the Constitutional Court appears to understand the constitutional status of the independent institutions. In *Langeberg*, the Court located the Independent Electoral Commission in the constitutional scheme by drawing a distinction between the 'state' and 'government'.¹⁶⁶ The Commission is part of the state, it reasoned, because it 'exercises public powers and performs public functions'.¹⁶⁷ But the Commission is not part of the national government, because

it is clear that the chapter [ie chapter 9] intends to make a distinction between the state and the government, and the independence of the Commission is intended to refer to independence from government.¹⁶⁸

Indeed, the Court continued, 'the very reason the Constitution created the Commission – and the other chapter 9 bodies – was so that they should be and manifestly be seen to be outside government'.¹⁶⁹ In principle, this explanation is equally applicable to the full range of independent institutions, including those outside Chapter 9.

Now *Langeberg* explains the consequence of institutional independence, but does not offer a justification for why institutions should possess that status. Indeed, one reading of the South African transition, if anything, would argue against the widespread use of independent institutions. The denial of majority rule entailed a lack of political accountability on the part of government departments. So the establishment of a liberal democracy marked by universal suffrage and regular elections should go hand in hand with democratic control over the machinery of government. Political control and accountability would appear to be a virtue in post-apartheid South Africa.

What then is the case for independent institutions? One rationale was recently offered by the Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions struck by Parliament.¹⁷⁰

¹⁶⁶ *Independent Electoral Commission v Langeberg Municipality* 2001 3 SA 925 (CC); 2001 9 BCLR 883 (CC).

¹⁶⁷ *Independent Electoral Commission* (n 166 above) para 22.

¹⁶⁸ *Independent Electoral Commission* (n 166 above) para 27.

¹⁶⁹ *Independent Electoral Commission* (n 166 above) para 31.

¹⁷⁰ Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions (2007 report).

According to the Committee, the post-transition government ‘inherited a state which was farcically bureaucratic, secretive and unresponsive to the basic needs of the majority of its citizens’.¹⁷¹ These institutions were kept in place as part of the negotiated transition. But ‘[m]ost of the state institutions had little or no credibility and were profoundly distrusted by the majority of the people’.¹⁷² There was accordingly a need for a set of independent institutions that would ‘[r]estore the credibility of the state’, through oversight of government departments, and by taking on key functions themselves.¹⁷³ But this justification is not convincing. It would fit with a set of transitional arrangements that would operate while democratically elected governments asserted their control over and reformed the pre-existing apparatus of government. But the independent institutions are permanent features of the South African state.

The inadequacies of the first justification lead us to the second: that independence reflects an assessment that political control and accountability of government departments carries with it the risks of politicisation and partisan abuse by the governing party. But if *this* is the mischief that the Constitution seeks to address, then it creates a puzzle. The Constitution provides that ‘services must be provided impartially, fairly, equitably and without bias’.¹⁷⁴ In addition, the constitutional doctrine of legality acts as a bar to partisan abuse at both the operational and strategic levels. So why is it necessary to create a set of independent institutions? To these objections we should add O’Regan J’s dissent in the *Municipal Structures* case.¹⁷⁵ As discussed below, the majority’s decision was that a particular decision was vested by the Constitution with an independent institution, the Municipal Demarcation Board, and therefore could not be assigned by statute to the relevant Minister. In her dissent, O’Regan J argued:

That the decision may have profound economic or political implications is not a valid ground for concluding that it may not properly be taken by an elected politician. Politicians are required to make difficult and controversial decisions that affect the public. When they make those decisions poorly, they run the risk of adverse consequences in future elections.¹⁷⁶

¹⁷¹ Ad Hoc Committee Report (n 170 above) 3.

¹⁷² Ad Hoc Committee Report (n 170 above) 3.

¹⁷³ Ad Hoc Committee Report (n 170 above) 3.

¹⁷⁴ 1996 Constitution, sec 195(d).

¹⁷⁵ *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development & Another; Executive Council, KwaZulu-Natal v President of the Republic of South Africa & Others* 2000 1 SA 661 (CC); 1999 12 BCLR 1360 (CC).

¹⁷⁶ *Executive Council, Western Cape* (n 175 above) 165.

To be clear, the issue before O'Regan J was the scope of the jurisdiction of independent institutions, not the need for their very existence. But if the case for the creation of independent institutions in the first place is political pressure on bureaucratic decision-making, her response would be that electoral accountability serves as a check on the abuse of authority.

The majority in the *Municipal Structures Case* did not respond to these arguments directly. But drawing on the comparative experience, the best response would be that these arguments presuppose a consolidated democracy, in which there is a range of checks on the abuse of authority, and that these checks are much less likely to operate as well in a dominant party democracy like South Africa. The external check of alternation, with the attendant risk of losing electoral power, does not exist. Moreover, one of the pathologies of a dominant party democracy is bureaucratic quiescence, which diminishes its capacity to serve as an internal check on politicisation and partisan abuse. Indeed, in South Africa, the practice of cadre deployment – which by its very design places individuals closely associated with the African National Congress, enmeshed in networks of clientelism and patronage, in positions of bureaucratic power – has put severe pressure on the very idea of bureaucratic independence, and the ability of bureaucrats to speak truth to power and challenge the inappropriate exercise of political authority. Finally, this leaves judicial review. To be sure, the doctrine of legality does prohibit the most egregious forms of partisan abuse. However, it is too heavy a burden to bear for the doctrine to be the principal bulwark. The hazards of judicial enforcement on a case-by-case basis, which raises concerns regarding cost, access and delay, will leave much abuse without a remedy. Moreover, the logic of the doctrine puts a heavy evidentiary burden on applicants, to adduce materials that raise the inference of politicisation.

Given the limitations of these checks, in a dominant party democracy like South Africa, independent institutions are vital, and have a heavy burden to bear. A primary role of such institutions is to prevent those abuses from occurring by making decisions that would otherwise be made by government departments. They are a functional substitute for the lack of alternation, and militate against the risk of bureaucratic quiescence. What is the role of the courts? Courts should focus their efforts on strengthening and buttressing the institutional structures that check partisan abuse in dominant party democracies, as opposed to checking those individual abuses themselves. When engaging in constitutional adjudication with respect to the powers and status of independent institutions, the courts should be acutely alert to the fact that they operate within a dominant party democracy and that independent institutions have an additional burden to bear because of the absence of alternation.

The South African jurisprudence on independent institutions has been good, and seems to suggest that the courts understand the special importance that those institutions play in a dominant party democracy. There are three strands to the cases. First, the Constitutional Court has interpreted the term ‘independent’ expansively. As mentioned earlier, the Constitution does not define what independent means. One interpretation would be narrowly *behavioural*. An institution would be independent to the extent that it acted independently – for example, that it did not act under the direction of other entities, be they political institutions private individuals. Moreover, other persons or entities would fail to respect an institution’s independence if they attempted to interfere with or direct its decisions. The constitutional text supports the behavioural interpretation of independence. Section 181(2) provides that independent institutions ‘must exercise their powers and perform their functions without fear, favour or prejudice’, which might mean that to behave this way is to be independent.

But in *New National Party*, the Constitutional Court went much further, and set out a *structural* interpretation of institutional independence, in a case involving the Independent Electoral Commission.¹⁷⁷ The question is what structural features of an independent institution would increase the likelihood that it will behave independently. The Court held that institutional independence encompasses both fiscal and administrative dimensions. Fiscal independence entails that the Commission ‘have access to funds reasonably required to enable the Commission to discharge the functions it is obliged to perform under the Constitution’ and its constituent legislation.¹⁷⁸ Administrative independence entails that the Commission has ‘control over those matters directly connected with the functions which the Commission has to perform under the Constitution’ and its constituent legislation.¹⁷⁹ A government may therefore breach an institution’s independence not only by blatantly interfering with its work, but failing to fund it adequately, or failing to respect its exclusive control over basic administrative matters. Likewise, an institution that behaves without fear, favour or prejudice may nonetheless lack independence owing to a lack of financial and administrative independence.

¹⁷⁷ *New National Party of South Africa v Government of the RSA & Others* (n 112 above).

¹⁷⁸ *New National Party of South Africa v Government of the RSA & Others* (n 112 above) para 98.

¹⁷⁹ *New National Party of South Africa v Government of the RSA & Others* (n 112 above) para 99.

Secondly, the Court has taken an expansive view of the scope of the jurisdiction of independent institutions, even in the face of textual uncertainty. This proposition emerges from the *Municipal Structures Case*. The Constitution provides that there are three categories of municipality (which differentiate those municipalities that are independent or part of a larger metropolitan area organised quasi-federally), and that national legislation will set out both the criteria for these categories and for determining municipal boundaries. Section 155(3)(b) charges an independent body (the Demarcation Board) with the task of applying the criteria for determining municipal boundaries.¹⁸⁰ The Constitution is silent on which body has the authority to categorise municipalities. The *Municipal Structures Case* involved a challenge to legislation that vested authority over the determination of categories of municipalities with the Minister. The Court found that the authority to determine municipal boundaries ‘of necessity’ also encompassed the authority to determine into which category a municipality fell, and therefore fell within the exclusive jurisdiction of the Demarcation Board).¹⁸¹ But as a textual matter, these are two distinct issues, and the Constitution is entirely silent on the authority to apply the criteria for determining categories of municipalities. Legislation could assign this authority to the independent body, but it need not.

So what was the real basis for the Court’s decision? The Court acknowledged that the purpose of vesting authority over determining municipal boundaries with an independent body ‘may well have been to guard against political interference’.¹⁸² The Court suggested that the power to determine the categories of municipalities likewise ‘may have profound political implications’ that ‘would have a far greater effect than the setting of boundaries’ of the municipalities thus categorised.¹⁸³ The Court’s unarticulated fear was likely that political control over the categorisation of municipalities could undermine the de-politicised determination of municipal boundaries by the Demarcation Board. The reason is that, in categorising a municipality, the legislation required the Minister to set the ‘nodal points’ of the municipality, which must fall within the municipality’s boundaries. Thus, the categorisation of a municipality was a powerful influence over its boundaries. So, while the Court quickly added that ‘the question before is not what the political effect of national government applying the criteria is’, the better reading of the judgment is that this is precisely what informed the Court’s

¹⁸⁰ Section 155(3)(b) provides: ‘National legislation must establish criteria and procedures for the determination of municipal boundaries by an independent authority’.

¹⁸¹ *Municipal Structures case* (n 175 above) para 47.

¹⁸² *Municipal Structures case* (n 175 above) para 50.

¹⁸³ *Municipal Structures case* (n 175 above) para 51.

judgment. The broader proposition may be that where the constitutional text permits, the jurisdiction of independent bodies should encompass ancillary issues that, if they remain with the authority of political decision-makers to resolve, could politicise decisions that are meant to be made on a non-partisan basis.

Third, the Court has implied institutional independence where it is not textually mandated, and indeed, there are textual indications to the contrary. Consider section 179, which addresses the issue of prosecutions. It provides that: (a) there be a single national prosecuting authority; (b) that the authority be led by a National Director of Prosecutions; (c) that the authority has the power to lay criminal charges on behalf of the state, and that (d) that the authority exercise its functions without fear, favour or prejudice. However, it also provides that (e) prosecution policy is to be determined by the National Director of Prosecutions with the concurrence of the Cabinet member responsible for the administration of justice; and (f) ‘The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority’.¹⁸⁴

Section 179 is unlike those provisions that characterise the independent institutions of the Constitution. The Constitution does not expressly state that the national prosecution authority is independent. Moreover, the consent of the relevant Minister is required to determine prosecution policy and the Minister has ‘final responsibility over the prosecuting authority’, whereas for the independent institutions, these powers do not exist, and if they were asserted, would be prohibited by the notion of administrative independence. But section 179 does provide that the authority must exercise its functions without fear, favour or prejudice. At best, these provisions appear to conflict.

Taken together, it is plausible to reconcile the various components of section 179 as follows – the national prosecution authority is part of government and not independent of it; there is a division of labour between the National Director of Prosecutions and the Minister, whereby they jointly determine prosecution policy but the National Director of Prosecutions implements that policy in the first instance without fear, favour or prejudice; but that the National Director of Prosecutions reports to the Minister on the implementation of policy, including in particular cases, and that the Minister can direct the National Director of Prosecutions in particular cases but only to ensure compliance with prosecution policy.

¹⁸⁴ Section 179(6).

However, this is not how the courts have interpreted section 179. In the *Certification Case*, the Constitutional Court concluded that the requirement that the prosecuting authority exercise its functions without fear, favour or prejudice, was 'a constitutional guarantee of independence'.¹⁸⁵ In *National Director of Public Prosecutions*, the Supreme Court of Appeal elaborated on this position.¹⁸⁶ It held that (a) the Minister may not instruct the National Director of Prosecutions 'to prosecute or to decline to prosecute or to terminate a pending prosecution', and that Ministerial responsibility entails only that the Minister is entitled 'to be kept informed in respect of all prosecutions initiated or to be initiated which might arouse public interest or involve important aspect of legal or prosecutorial authority'.¹⁸⁷ This reading of section 179 dramatically curtails the role of the Minister and protects the independence of the prosecution authority. Given that the constitutional text does not definitively settle this issue, the real basis for these decisions is to be found in the proposition that 'any prosecution authority ought to be free from executive or political control'.¹⁸⁸ Criminal prosecution is the ultimate weapon for a governing party to use against its opposition. Moreover, political control over prosecutions can immunise a governing party from criminal liability. These are concerns in any democracy. But in a consolidated democracy, alternation would reduce the risk of such abuse, because of the fear that criminal prosecutions could be used to punish a party once out of power. By contrast, in a dominant party democracy, this electoral check is absent. The Court may accordingly have found it necessary to establish the constitutional independence of the prosecuting authority. Indeed, this may have been the significance of the Court's discussion of the *lack* of independence of the Attorney-General's office under apartheid. The implication was that the National Party's dominant status enabled it to use the criminal law against its political opponents and to commit crimes without risk of prosecution, because it did not fear that it would be the victim of politicised prosecutions. The barely unstated concern was that the ANC not be able to engage in the same misconduct.

The judicial conferral of institutional independence on the NPA sets the stage for the new issue on the frontier that will soon come before the Constitutional Court: the *capture* of independent institutions by the governing party, through its manipulation of the process governing appointments. The integrity of the mechanism for appointments is the most fundamental question, because if that process is politicised, the financial and administrative dimensions of

¹⁸⁵ *Certification Case* (n 8 above) para 146.

¹⁸⁶ *National Director of Public Prosecutions v Zuma* 2009 2 SA 277 (SCA); 2009 4 BCLR 393 (SCA).

¹⁸⁷ *National Director of Public Prosecutions v Zuma* (n 186 above) para 32.

¹⁸⁸ *National Director of Public Prosecutions v Zuma* (n 186 above) para 28.

institutional independence (*Langeberg*), no matter how well designed, will be largely meaningless. If the individuals who hold office in independent institutions view themselves as agents of the governing party, it is far less likely that they will behave independently. Likewise, partisan appointments will undermine attempts to expand the range of decisions protected from politicised decision-making, either by expanding the jurisdiction of independent institutions through constitutional interpretation (*Municipal Structures Case*) or by expanding the range of institutions formally regarded as independent (*National Director of Public Prosecutions*).

Although the power of appointment is the primary vehicle for the capture of independent institutions by the dominant party, the power of removal plays an important role as well. The abuse of the power of removal buttresses the manipulation of the power of appointment in two ways. First, it enables a dominant party to remove individuals who were appointed on a genuinely non-partisan basis and have behaved independently, paving the way for a partisan appointment. Second, the power of removal serves as a mechanism to enforce principal-agent relationships between a dominant party and its partisan appointees. Thus, although control over appointments facilitates the capture of independent institutions by a dominant party, control over both powers of appointment *and* removal further strengthens the power of a dominant party to capture independent institutions.

The impact of the procedures for appointment and removal on independent institutions came before the Constitutional Court in the *Certification Case*. Constitutional Principle (CP) 29 required that the independence of a series of institutions, including the Public Protector and the Auditor-General, be ‘provided for and safeguarded’ by the Final Constitution. Under the initial draft of the Final Constitution, both the powers of appointment and removal rested with the President. Both powers could only be exercised after the passage of a suitably worded resolution by a majority of the members of the National Assembly.¹⁸⁹ In the hearing before the Court, members of the bench raised the concern that these thresholds were too low to safeguard the independence of these institutions, and suggested that a higher threshold would be required. According to one account, Kriegler J stated that ‘the objection is that they can be appointed and dismissed by simple majority. How independent can they be?’ In case there was any doubt as to what majority the bench

¹⁸⁹ See initial draft of Final Constitution submitted to Constitutional Court for certification, sections 193 (appointment) and 194 (removal).

was referring, President Chaskalson added: ‘they are not independent of the majority party’ – ie the African National Congress.¹⁹⁰

The Court confined its holding to the provisions governing removal, which it held did not comply with CP 29 because the majority required was too low.¹⁹¹ But the revised provisions were directly responsive to the concerns expressed by the bench in the hearing, which implicated the constitutionality of both the procedures governing appointment and removal. Both sets of provisions were amended, to require approval through resolution of at least 60% of the members of National Assembly for appointments, and a two-thirds majority for removals. In the *Second Certification Case*, the Court held that the New Text of the Constitution ‘substantially enhances the independence’ of both institutions and therefore complied with CP 29.¹⁹²

Although the *Certification Case* turned on one dimension of the procedures for appointment and removal – the numerical thresholds of support in the National Assembly – it would be a mistake to read the case so narrowly. The function of a higher numerical threshold than a simple majority is to force the governing party to justify its decision on the basis of considerations other than those of naked partisan self-interest. The super-majority requirement forces this kind of public-regarding justification, since the governing party will rarely attain the requisite level of support on its own, and will need to appeal to members of opposition parties.

Thus understood, there is an integral link between these numerical thresholds and the substantive criteria for appointment and removal under chapter 9. For appointment under chapter 9, individuals must be ‘fit and proper persons to hold the particular office’; to be removed, there must be a finding by a committee of the National Assembly of ‘misconduct, incapacity or incompetence’.¹⁹³ These substantive grounds should likewise be viewed as instruments for protecting the independent institutions from the dangers of partisan capture. Moreover, in cases where the level of support of the dominant party is at or close to the two-thirds level, it is these criteria that are the principal bulwarks against the capture of independent institutions by the dominant party, and should be interpreted accordingly. I term this the doctrine of *anti-capture*.

¹⁹⁰ C Rickard ‘The certification of the Constitution of South Africa’ in P Andrews & S Ellman (eds) *Post-apartheid constitutions: Perspectives on South Africa’s basic law* (2001) 224, 247 and 248.

¹⁹¹ *Certification Case* (n 8 above) paras 163 and 165.

¹⁹² *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996, In re: Ex parte Chairperson of the Constitutional Assembly 1997 2 SA 97 (CC); 1997 1 BCLR 1 (CC) para 134.*

¹⁹³ Sections 193(1)(b) and 194(1)(a) and (b).

This leads us to the cases on the independence of the NPA, which have arisen in a highly volatile political context: the criminal investigation of President Zuma for his alleged involvement in the arms deal, which provided the alleged impetus for Hlophe JP's visit to the Constitutional Court. The NPA's original position, announced in 2003, was that there a 'prima facie' case against Zuma (then-Deputy President), but there was insufficient evidence to secure a conviction, and hence that no charges would be laid. However, in June 2005, following the conviction of Zuma's associate, Schabir Shaik, and the dismissal of Zuma as Deputy President, the NPA – now led by Vusi Pikoli – announced that charges would be laid against Zuma. In September 2008, President Mbeki suspended Pikoli. Mbeki's successor, Kgalema Motlanthe, decided to remove Pikoli from office in December 2008, and in February 2009, the National Assembly passed a resolution supporting his removal.

Pikoli brought two proceedings - one challenging the legality of his dismissal, and a second seeking interim relief to bar the President from appointing a replacement to Pikoli pending the resolution of the main application. His basic allegation is that he was dismissed in order to terminate the prosecution of Zuma, in order to facilitate Zuma's assumption of the office of President. The judgment on the request for interim relief was handed down in August 2009 in Pikoli's favour. The Court addressed the substance of Pikoli's claim on the merits of the main application, which turned on the interpretation of the NPA's constituent legislation.¹⁹⁴ The key provision authorised the dismissal of the head of the NPA 'on account thereof that he or she is no longer a fit and proper person to hold the office concerned'.¹⁹⁵ The Court held that the phrase 'fit and proper' must be interpreted 'in view of the constitutional requirement of prosecutorial independence'.¹⁹⁶ Unfortunately, the Court did not explain how prosecutorial independence should condition the interpretation of the phrase 'fit and proper'. But the most plausible interpretation is that a court reviewing the dismissal of the head of the NPA should be alert to attempts to interfere with the NPA's independence under the pretext of assertions that that individual is no longer 'fit and proper'.

This reading of the judgment is supported by the Court's analysis of the claim before it. After suspending Pikoli in 2007, President Mbeki appointed an inquiry (chaired by Dr Frene Ginwala) into whether Pikoli was fit and proper to continue as head of the NPA. Dr Ginwala's report was critical of Pikoli, but concluded that the government had failed to make out its case that Pikoli was not fit and proper to hold office, and therefore recommended that he be allowed

¹⁹⁴ *Pikoli v President of the Republic of South Africa* (n 9 above).

¹⁹⁵ National Prosecuting Authority Act 32 of 1998 ('NPA Act'), sec 12(6)(a)(iv).

¹⁹⁶ *Pikoli v President* (n 9 above) 10.

to resume his duties. The Court concluded that President Motlanthe had failed to respond adequately to the Ginwala report, which threw into question his assertion that Pikoli was not fit and proper. The barely unstated implication was that Ginwala's report had exposed President Motlanthe's reasons for the dismissal as pretextual – ie, that the real reasons were the ones that Pikoli had alleged. Since Pikoli reached a settlement with the government, the merits of this issue will never come before the courts.

The judgment in *Pikoli* (on interim relief) sets the stage for the Simelane proceedings, in two ways. Simelane was appointed as the new head of the NPA in November 2009, to succeed Pikoli. It is alleged that Simelane sees himself as an ANC cadre, and views his mandate implementing the ANC's vision for the NPA. The outline of this vision emerges from Simelane's testimony before the Ginwala inquiry (in his former capacity as then-Director-General of the Department of Justice and Constitutional Affairs), in which he clearly stated that the NPA was part of the government and not independent from it.¹⁹⁷ It is therefore alleged that the appointment is designed to bring the NPA under political control. This broader agenda is allegedly tied to a more sinister one – to shield Zuma from prosecution, and more generally, to protect the ANC from criminal investigations into corruption arising out of the arms scandal.

But the connection to *Pikoli* is not just political, but legal. The Democratic Alliance has brought an application to challenge the constitutionality of Simelane's appointment. One limb of the DA's challenge is that the NPA's constituent legislation requires that persons appointed to head the NPA be 'fit and proper'.¹⁹⁸ The DA argues that this requirement be interpreted in light of the constitutional requirement of prosecutorial independence, but not does explain precisely how.¹⁹⁹ The answer comes from *Pikoli*, which stands for the proposition that 'fit and proper' should be interpreted in view of the constitutional commitment to prosecutorial independence. With respect to removals, *Pikoli* held that the courts should treat assertions that an incumbent is not fit and proper with due suspicion as possible cover for attempts to undermine prosecutorial independence. As a corollary, in the challenge to Simelane's appointment, *Pikoli* should be extended to encompass the parallel risk of capture through appointments – ie that assertions that an incumbent is fit and proper should also be treated with scepticism, lest they be ruses by a dominant political party to install a partisan as

¹⁹⁷ See DA founding affidavit in *Democratic Alliance v President of the Republic of South Africa & Others*, matter pending before North Gauteng High Court, case no 59628/09 ('*Simelane*') paras 48-52 and 67-68.

¹⁹⁸ NPA Act, sec 9(1)(b).

¹⁹⁹ DA founding affidavit in *Simelane* (n 197 above) para 11.1.

the head of an independent institution that is meant to check its power.

At the time of writing, the Simelane proceedings are still alive. This will provide an occasion for the courts – including the Constitutional Court – to develop the jurisprudential architecture surrounding independent institutions to ensure they can play their role in checking the partisan abuses of a dominant party democracy, by protecting them from capture by the ANC.

3.3 Anti-centralisation and non-usurpation: dictation to provincial legislatures and the National Parliament by the ANC

3.3.1 *From rationality and public involvement to dictation and anti-usurpation*

The constitutional imbroglio concerning cross-border municipalities, on its face, appears to have little to do with the problem of dominant party democracy. These municipalities straddle provincial boundaries, and are jointly administered by the relevant provinces. This overlap in jurisdiction has given rise to administrative inefficiency, poor service delivery, and enormous costs, and has created the pressure to shift provincial boundaries to place those municipalities within a single province. For two cross-border municipalities, Matatiele and Merafong, the political controversy has turned on which province the municipality would join, with residents strongly of the view that the municipalities remain in provinces that are better resourced (KwaZulu-Natal and Gauteng, respectively). In both cases, the decision was to locate the municipality in provinces that are neither as wealthy nor as well administered (Eastern Cape and North West). The decisions have been constitutionally challenged, and have generated a line of cases: *Matatiele I*, *Matatiele II*, *Merafong*, and *Poverty Alleviation Network*. As a matter of constitutional doctrine, these cases seem far removed from the dominance of the ANC, since they turn on claims of procedural impropriety and legislative irrationality. However, on closer examination, these cases illustrate how the centralised decision-making structures of the ANC and its policy of cadre deployment undermine and the structure of South African federalism and representative democracy.

The critical case is *Merafong*, which was a challenge to the constitutionality of the provision of the Constitution Twelfth Amendment Act, which excised Merafong from Gauteng and transferred it to the North West Province. Although the recent Constitution Sixteenth Amendment Act of 2009 reversed the transfer

of *Merafong*, the case nonetheless merits careful examination. The legal grooves within which *Merafong* was argued and decided were set down in two previous decisions on cross-border municipalities, *Matatiele I* and *Matatiele II*, as well as the Court's leading precedent on the constitutional duty on provincial legislatures to facilitate public participation in the legislative process, *Doctors for Life*. These cases stand for the following propositions:

- changes to provincial boundaries require constitutional amendment (*Matatiele I*);
- a constitutional amendment that changes provincial borders must receive the approval of two-thirds of the members of the National Assembly and six provinces in the National Council of Provinces (NCOP) (section 74(3); *Matatiele II*); moreover, the NCOP cannot pass such a constitutional amendment 'unless it has been approved by the legislature or legislatures of the province or provinces concerned' (section 74(8); *Matatiele II*); for the approval of a constitutional amendment by a provincial legislature to be valid, the provincial legislature must facilitate public involvement (section 118(1)(a); *Matatiele II*); the duty to facilitate public involvement entails both the duty to create a process to facilitate public participation and to ensure that individuals can take advantage of this process (*Doctors for Life*); and
- a constitutional amendment must comply with the doctrine of rationality – ie, it must be rationally connected to a legitimate government purpose; if this ground of constitutional challenge is raised, the government must adduce evidence of the rationale underlying the amendment; it is insufficient for the government to simply assert that the wisdom of the legislative choice is not subject to judicial scrutiny (*Matatiele I*).

Drawing on these precedents, in *Merafong*, the claimants challenged the constitutional amendment both on the grounds of a failure to facilitate public involvement and irrationality. However, both the arguments raised and the issues before the Court were subtly different to those that had arisen in the previous cases. Consider the procedural question. In *Doctors for Life* and *Matatiele II*, the Court had no difficulty concluding a breach of the duty to facilitate public involvement because the relevant provincial legislatures had not attempted to consult the public and ascertain its views at all. *Merafong* presented a much more complex situation. The Gauteng provincial legislature had engaged in extensive public consultation on the proposal to transfer *Merafong*. It held a public hearing, at which it received oral and written submissions opposed to the transfer. These views were communicated to a committee of the Gauteng legislature with responsibility for directing Gauteng's NCOP delegation, which adopted a negotiating mandate for the Gauteng

delegation to the NCOP that opposed the transfer of Merafong to Gauteng. At the NCOP, the Gauteng delegation was informed that the NCOP could not amend the bill, and that therefore Gauteng could only support or oppose the bill in its entirety. So Gauteng changed its position, and withdrew its objection to the transfer of Merafong – without further public consultation.

There are two ways to read *Merafong* on procedure. On one reading, the issue was whether the provincial legislature was required to engage in a *second* consultation prior to changing its position. The Constitutional Court rejected this position, and in so doing, refined its conception of the purpose underlying the duty to facilitate public involvement. On *Merafong*, the goal of the duty is just that – to solicit the views of citizens, and even to be ‘responsive’ to them and to demonstrate a ‘willingness to consider all views expressed by the public’.²⁰⁰ What it is not is an obligation to be ‘bound by these views’, since ‘being involved does not mean that one’s views must necessarily prevail’.²⁰¹ The duty to facilitate the involvement of ‘minorities’ cannot operate to undermine ‘the democratic nature of general elections and majority rule’.²⁰² On this reading, *Merafong* points to the limits of a purely procedural right: it is only a right to a process, not at an outcome. Thus, if the minimal requirements of the duty have been met – ie some process is provided – then no more is required. At a deeper level, *Merafong* suggests there are limits to the extent to which participatory democracy can be expected to promote accountability between elections, and that the ultimate mechanism for holding politicians accountable ‘is regular elections’.²⁰³ This explains why the Court did not find it unconstitutional to not have engaged in the second consultation.

But on another reading, *Merafong* addressed a different procedural objection, ie that the entire process was a sham, because the ANC had decided in 2004 to transfer Merafong to North West, prior to proposing the Constitution Twelfth Amendment Act of 2005. This is a much more powerful objection than the failure to hold a second consultation. Rather than impugning the process as unconstitutional because of insufficiency, since it terminated after the initial consultation, it alleges that the entire process, including the initial consultation, was unconstitutional, because the ANC legislators in Gauteng were never open to persuasion in the first place. The Court’s response to this objection was that there was insufficient evidence

²⁰⁰ *Merafong* (n 10 above) paras 50 and 51.

²⁰¹ *Merafong* (n 10 above) para 50.

²⁰² *Merafong* (n 10 above) para 50.

²⁰³ *Merafong* (n 10 above) para 60.

to determine whether and to what extent the final voting mandate and debate in the NCOP Select Committee [ie the NCOP committee which considered the constitutional amendment] were directly or indirectly influenced by previously formulated policies of the ruling party.²⁰⁴

This raises the question of how the Court would have responded were such evidence available. One possibility is that the Court, faced with a suitable factual record, would have ordered a second round of consultations. But that would be inconsistent with the premise of the criticism, in which no consultation, not matter how extensive, would have sufficed. Put another way, on this argument, even if there had been a second consultation, the constitutional obligation to facilitate public involvement would not have been fulfilled. What this suggests is that a procedural understanding of the constitutional wrong fits poorly with the underlying problem. Ironically, this point was made by Van der Westhuizen J in dissent in *Doctors for Life*, who suggested that the duty to facilitate public involvement could not address a situation where

members of the legislature decide to pursue the policies of their political party and in the process reject or ignore submissions made to them by a member of the public.²⁰⁵

As he said, ‘participatory democracy would appear to be quite cosmetic and empty’.²⁰⁶ Rather than framing the problem as one of a sham process, the real objection is that the ANC legislatures in Gauteng were acting under orders of the ANC. In short, the issue is not process, but dictation – which, as will see, is in essence, the argument in *Glenister*.

We can come to the same point through the irrationality argument. In dissent, Moseneke DCJ held that the decision of the provincial legislature to change its mind was irrational. He reached this conclusion by proceeding from the assumption that a reversal of position without explanation is presumptively irrational, and then considered and dismissed a number of possible rationales for this change in position. What matters for present purposes are not the specifics of these rationales, but how Moseneke DCJ dismissed them. He stated that the idea that the province had no option but to support the amendment in its entirety was ‘a misconception of the power and obligation of the province under the Constitution’;²⁰⁷ that three pragmatic reasons for the change in position were collectively ‘so-called implications’;²⁰⁸ that two of these three pragmatic reasons

²⁰⁴ *Merafong* (n 10 above) para 50.

²⁰⁵ *Merafong* (n 10 above) para 244, point 10.

²⁰⁶ *Merafong* (n 10 above) para 244 point 10.

²⁰⁷ *Merafong* (n 10 above) para 180.

²⁰⁸ *Merafong* (n 10 above) para 181.

were ‘startling’ and ‘equally startling’;²⁰⁹ that the third ‘goes well beyond me’, was based on a ‘grandiose notion’, ‘[a]nother error of reasoning’, ‘has no merit whatsoever’, was ‘clearly erroneous’, an ‘obvious error’ and ‘a serious misappreciation of the character of the decision the legislature had to make and the power it was called upon to exercise’;²¹⁰ and taken together, the decision was taken ‘to prevent *consequences* which, at best, were imaginary’.²¹¹ Moseneke DCJ in effect accused the government of offering pretextual rationales for its change in position that were intended to hide its true motives. This raises the question of what the true motive was. Moseneke DCJ did not say. But the likely answer was that the provincial legislature was acting under dictation from the ANC, and that Moseneke DCJ viewed this as irrational.

Indeed, this is the argument made by the applicants in *Poverty Alleviation Network*, the latest case on trans-border municipalities and the third time the transfer of Matatiele has come before the Constitutional Court. In *Matatiele II*, the transfer was struck down because of the failure to facilitate public involvement. The response was the Constitution Thirteenth Amendment Act, which was challenged on the same grounds as the amendment in *Merafong* – ie both on procedural grounds and on the basis of irrationality. From a procedural perspective, the amendment is flawless, and was adopted after an extensive process at the provincial and national level with ample opportunity for public participation. The main constitutional objection was framed in terms of irrationality, on the basis that ‘there can be no rationality if one follows the dictates of the political leadership irrespective of the merits’.²¹² So the question of whether acting under dictation is irrational was squarely before the Court.

Poverty Alleviation Network dismissed this argument, by invoking UDM’s refusal to interrogate legislative motive. As the Court put it, ‘the alleged disputes of fact the applicants raise ... are irrelevant’.²¹³ But as I have argued above, this proposition cannot be squared with the doctrine of rationality, which requires the Court to examine whether public action was undertaken for an illicit purpose. However, there is a better argument that the Court could have offered: following party dictates is not per se irrational, in the sense that the Constitutional Court has defined it, ie that public action be rationally related to a legitimate purpose. For a claim of irrationality to succeed, an additional step in the argument is required: that the reasons why the ANC supported the transfer of a municipality were

²⁰⁹ *Merafong* (n 10 above) paras 182 and 183.

²¹⁰ *Merafong* (n 10 above) para 186.

²¹¹ *Merafong* (n 10 above) para 192 (my italics).

²¹² Applicant’s Heads of Argument, *Merafong*, para 6.3

²¹³ *Poverty Alleviation Network* (n 10 above) para 75.

illegitimate. Although this may in fact have been the case, this is far from clear, because a legitimate objective plausibly exists: for example, the promotion of administrative efficiency. By contrast, the dictation argument stands apart from the question of rationality, because a decision may have been made under dictation even if it is entirely rational. Whereas the doctrine of rationality requires public decisions to be substantively rational, the rule against dictation demands that the appropriate decision-maker makes the rational decision. So as with the argument under public involvement, it is necessary to separate the question of rationality from dictation and deal with it directly.

Where does this leave us? In *Merafong* and *Poverty Alleviation Network*, the apparent breach of the duty to facilitate public involvement, and the requirement of rationality, direct our attention to, and are at best symptomatic of, a deeper underlying issue: dictation. As it turns out, the proposition that it is constitutionally prohibited for public officials to act under dictation is already part of the doctrine of legality. *SARFU* held that the doctrine of legality encompasses the administrative law rule which prohibits the ‘unlawful abdication of power’ by a public entity on whom the power to make a decision has been conferred.²¹⁴ The most familiar application of this doctrine is the rule against delegation. But another limb of the doctrine prohibits an office-bearer from acting ‘under dictation’, which occurs when ‘a functionary vested with a power does not of his or her own accord to exercise the power, but does so on the instructions of another’.²¹⁵

In the context of a dominant party democracy, I term the specific problem of dictation to elected officials by the party apparatus as usurpation, and the doctrine that prohibits this practice the doctrine of *non-usurpation*. This shift in terminology, from abdication to non-usurpation, highlights an important point: although the doctrine formally applies to elected officials, the real target of the doctrine is the non-Parliamentary wing of the dominant party. The real problem is not abdication; it is the seizure of public power. The purpose of the doctrine is to protect public officials who are democratically elected, and through them, the democratic process, from unelected party officials who lack democratic legitimacy and attempt to usurp and wield public power. On its face, the doctrine should apply with equal force in fully competitive democracies in which there is alternation between governing parties. However, as I argued in section 2.2, the danger that the non-parliamentary wing of the party will usurp power from and dictate to the party’s parliamentary wing is much more

²¹⁴ *SARFU* (n 110 above) para 39.

²¹⁵ *SARFU* (n 110 above) paras 39 and 40.

acute in a dominant party democracy. The practical bite of the doctrine will be greater in a dominant party democracy like South Africa.

An excellent illustration of how the doctrine on non-usurpation works in practice is the High Court's judgment in *Mlokoti*, a constitutional challenge to a hiring decision by a municipality for the post of Municipal Manager by an unsuccessful applicant. The applicant was one of two finalists, and was unanimously ranked first by the selection panel. The panel forwarded its recommendation to the municipal council, which was legally vested with the authority to make the appointment. The ANC members of the municipal council voted to appoint the runner-up, while the opposition members of the council voted to appoint the applicant.

Prior to the vote at the municipal council, the ANC caucus met and discussed the appointment. It subsequently came to light that the Regional Secretary of the ANC had attended that meeting, and provided an 'instruction' from the ANC's Regional Executive Committee to pass over the applicant and appoint the runner-up that 'was then accepted by caucus'.²¹⁶ Although the Court did not identify the party affiliation of the runner-up, the implication is that he was allied with the ANC. The Court concluded: '[t]his is not an example of democracy in action ... certainly not of constitutional democracy.'²¹⁷ The ANC councillors 'supinely abdicated to their political party their responsibility to fill the position of the Municipal Manager', which 'was a responsibility owed to the electorate as a whole and not just to the sectarian interests of their political masters'.²¹⁸ The court concluded that the ANC councillors had acted unconstitutionally because they 'demonstrated a lamentable abdication of [their] responsibilities by succumbing to a political directive from an external body'.²¹⁹ But it was clear that it was the ANC's Regional Executive Committee that had acted to subvert the constitution; its actions 'amounted to a usurpation of the power' of the municipal council.²²⁰ Thus, the point of the ruling was as much to condemn the conduct of the unelected wing of the ANC as unconstitutional and to constrain its power as it was to assess the legality of the actions of the ANC councillors.

Mlokoti concerned the usurpation of the powers of elected officials by the ANC at the municipal level. However, the logic of the decision is applicable to higher levels of government. It provides an

²¹⁶ *Mlokoti* (n 11 above) 22.

²¹⁷ *Mlokoti* (n 11 above) 36.

²¹⁸ *Mlokoti* (n 11 above) 37.

²¹⁹ *Mlokoti* (n 11 above) 38.

²²⁰ *Mlokoti* (n 11 above) 26.

alternative legal framework for considering the issues raised by *Merafong* and *Poverty Alleviation Network*, and points to a different result in those cases. Although the challenges to the transfer of cross-border municipalities have come to an end, the Court may soon have another occasion to squarely address the constitutional problems raised by the usurpation of authority by the non-parliamentary wing of the ANC in the *Glenister* litigation. The *Glenister* cases are a pair of constitutional challenges to the disbanding of the Directorate of Special Operations (DSO) – the Scorpions – a special investigatory unit housed in the Department of Justice that reported to the Minister of Justice.

In *Glenister I*, the applicant sought to have cabinet’s decision to initiate the legislation set aside as unconstitutional and invalid and the withdrawal of the bills from Parliament. My interest is in the submissions of the United Democratic Movement (UDM), which based its argument on the rule against the unlawful abdication of power. The UDM submitted that cabinet had acted unconstitutionally because it was operating under dictation from the ANC, and had thereby ‘abdicated its constitutional responsibility’.²²¹ Moreover, acting under the dictates of the ANC meant that cabinet ‘substituted for its accountability to Parliament accountability to the governing party’, which itself was a reflection of ‘the blurring of the line between government and party’ and ‘the identification of the ruling party with state power’ that is associated with ‘the phenomenon of “one-party domination”’.²²²

The factual basis for the UDM’s submissions was strong. The Scorpions came into existence in 2001. The focus of its work was organised crime, and it had an extremely high conviction rate. It also earned the ire of elements within the ANC, because of its involvement in a series of high-profile investigations involving prominent members of the ANC. It was the Scorpions that conducted the investigation that led to criminal charges being laid against Zuma for corruption in connection with the arms deal. In 2005 the government appointed a judicial commission of inquiry headed by Judge Sisi Khampepe to consider the future of the Scorpions. The commission recommended in February 2006 that the Scorpions be left intact. Cabinet initially accepted this recommendation, in December 2006. In December 2007, the ANC resolved at its National Policy Conference in Polokwane that the Scorpions be dissolved, and incorporated into the South African Police Service. Cabinet changed course in February 2008 and pressed ahead with a plan to eliminate the Scorpions through legislation, which was passed in 2009. UDM alleged that the

²²¹ Applicant’s Heads of Argument, *UDM*, para 59.

²²² Applicant’s Heads of Argument, *UDM*, paras 60, 83 and 84.

‘[g]overnment’s decision to disestablish the DSO [ie the Scorpions] was taken in order to give effect to the Polokwane resolution’ passed by the ANC in December 2007.²²³ The Minister of Safety and Security cited the resolution in Parliament as the reason for the government’s about-face. Moreover, the evidence supports the conclusion that this decision was taken by the ANC NEC, which dictated it to cabinet. Perhaps the clearest evidence is the statement of Matthews Phosa, the ANC’s Treasurer-General, who stated that:

The president of the country takes guidelines, mandates and instructions from the ANC ... There is only one centre of power and that is the highest decision-making structure of the ANC. The NEC, including the President of the ANC, in effect becomes the representative of the majority of voters between elections. Its task therefore is to instruct the executive and legislative organ of government on issues of policy ... The President and his or her Cabinet accounts to the NEC of the ANC, as any other structure of Government does.²²⁴

The UDM’s submissions in *Glenister* track precisely the analytical structure of the doctrine of non-usurpation, and articulate the doctrine’s rationale. The Constitutional Court rejected the UDM’s argument. Its reasons are open to two interpretations. The judgment may have turned on the prematurity of the application, with the Court holding that ‘appropriate relief can be sought in due course’ and that no ‘material and irreversible harm will result of the Court does not intervene at this stage’.²²⁵ Thus, the Court stated that ‘if in this case, once the legislation is enacted, it is established that the legislation does breach the Constitution, relief will be available and the legislation declared invalid’.²²⁶ But on another reading, the Court summarily dismissed the phenomenon of dominant party democracy as a factor that should shape the interpretation of the Constitution, which it characterised as a claim that ‘the Court should act because no-one will’.²²⁷ Given that the anti-usurpation argument presupposed the dominant status of the ANC, this suggests that the Court may be disinclined to accept these arguments when the next *Glenister* case reaches the Court.

The Court may soon have its chance. After the enactment of the legislation, *Glenister* brought a fresh constitutional challenge that is currently before the Constitutional Court. Although formally framed as a claim that the legislation is irrational because it is motivated by the desire to end investigations into ‘allegations of corruption or criminality against highly placed ANC politicians and their associates’,

²²³ Applicant’s Heads of Argument, *UDM*, para 60.

²²⁴ Applicant’s Heads of Argument, *UDM*, para. 62.1.

²²⁵ *Glenister I* (n 11 above) paras 53 and 54.

²²⁶ *Glenister I* (n 11 above) para 54.

²²⁷ *Glenister I* (n 11 above) para 55.

Glenister has coupled these with the non-usurpation claim, asserting that both Cabinet and Parliament ‘were not constitutionally entitled merely to dance to the tune of the ANC’ and were ‘blindly following the *diktat* of the Party’s Polokwane Decision’.²²⁸ At the time of writing, *Glenister II* has been heard by the Constitutional Court but not yet decided at the time of writing.

However, the scope of application of the doctrine of non-usurpation may be somewhat limited. Blatant dictation of the sort at issue in *Mlokoti* is probably uncommon. The relationship between the parliamentary and non-parliamentary wings of political parties in fact lies on a continuum, between the poles of complete independence and subservience. There will be numerous situations in which the interplay between both wings of the party will defy easy categorisation. The evidence will be ambiguous. Moreover, the precise location of ultimate decision-making power may vary by issue. In short, situations like the elimination of the Scorpions, and statements like Phosa’s, will be rare. Indeed, judicial self-doubt regarding the dangers of over-enforcement – ie to label a public decision as occurring under dictation, when in fact, it did not – may prompt courts to systematically under-enforce the doctrine of non-usurpation.

3.3.2 *Is cadre deployment unconstitutional? Anti-seizure and anti-centralisation*

But there is a way to recast the judicial role to check the seizure of political power by unelected party functionaries while avoiding the need to ascertain the precise character of that relationship on a case-by-case basis. The structure that makes dictation possible is the system of cadre deployment. The power of the non-parliamentary wing of ANC to dictate to MPs and MPLs how they should vote – ie, the power of a body outside the formal framework of government to direct the decisions of political office-holders – is ultimately a power that depends on the threat of deployment, and redeployment, to be effective. If political office-holders do not toe the party line, they can be removed by the ANC NEC, and replaced with cadres who will be compliant. Thus, dictation presupposes deployment. So it is cadre deployment that is ultimately at the root of the complaints in *Merafong*, *Poverty Alleviation Network* and in the *Glenister* litigation.

This raises the fundamental question of whether cadre deployment is itself unconstitutional. How could the constitutionality of cadre deployment even come before the Court? The answer is that

²²⁸ Applicant’s Head of Argument, *Glenister II*, paras 45, 44 and 43;

the power of deployment is vested in the ANC by law. We begin with sections 47(3)(c) and 106(3)(c) of the Constitution, which provide that MPs and MPLs lose office if they cease to become a member of the party that nominated that person, respectively.²²⁹ Since political parties possess the power to expel party members, they can create a vacancy through expelling a sitting MP or MPL, or by wielding the threat of expulsion to trigger a resignation. Sections 47(4) and 106(4) in turn provide that vacancies in provincial legislatures must be filled in terms of national legislation.²³⁰ The relevant statute is the Electoral Act 73 of 1998. At first blush, it would seem that an individual can become a MP or MPL between elections only if the new member appeared ‘on the list of candidates’ from which that party’s members were originally drawn.²³¹ If this is where things ended, the power to deploy would be very limited. However, it is possible to alter party lists between elections through another set of provisions in the Electoral Act.²³² In short, the power to deploy is a power granted by statute, and is therefore subject to the Constitution.

First consider cadre deployment at the national level. Some guidance for how the Constitutional Court could grapple with this issue comes from the jurisprudence of the German Federal Constitutional Court (FCC). Like South Africa, Germany has closed-list system of proportional representation. Article 38(1) of the Grundgesetz requires that elections to the lower house of Germany’s national parliament – the Bundestag – be ‘direct’. The most fundamental implication of this provision is that voters themselves must elect members directly, as opposed to indirectly, eg through an elected college of electors. A system of constituency-based representation, where voters cast ballots directly for candidates, would satisfy article 38(1). The constitutionality of closed-list

²²⁹ Section 47(3) provides:

- ‘A person loses membership of the National Assembly if that person
- (a) ceases to be eligible;
 - (b) is absent from the Assembly without permission in circumstances for which the rules and orders of the Assembly prescribe loss of membership; or
 - (c) ceases to be a member of the party that nominated that person as a member of the Assembly.’

Section 106(3) of the Constitution provides:

- ‘A person loses membership of a provincial legislature if that person
- (a) ceases to be eligible; or
 - (b) is absent from the legislature without permission in circumstances for which the rules and orders of the legislature prescribe loss of membership; or
 - (c) Ceases to be a member of the party that nominated that person as a member of the legislature.’

²³⁰ Section 474 provides ‘Vacancies in the National Assembly must be filled in terms of national legislation’, while sec 106(4) provides ‘Vacancies in a provincial legislature must be filled in terms of national legislation.’

²³¹ Item 23(1)(a)(i) of Schedule 1A to the Electoral Act.

²³² Electoral Act item 21.

proportional representation has raised more complex issues, since votes are cast for parties, not individual candidates. The democratic selection of parliamentary representatives is unavoidably indirect and is mediated through party lists. Parties determine the inclusion and ordering of candidates on their respective lists.

The FCC has assessed the constitutionality of Germany's closed list system of proportional representation under article 38(1).²³³ It has held that an electoral system would violate the requirement for 'direct' elections if political parties, not the people, chose elected representatives. However, despite the enhanced role for parties relative to constituency-based representation, the FCC has not declared closed-list proportional representation unconstitutional per se. Rather, it has subjected proportional representation to constitutional restraints to ensure that elections are still 'direct'. The FCC held that party lists have to be published in advance. Moreover – and of direct relevance to South Africa – when a vacancy arises subsequent to an election, it is unconstitutional for a party to choose a substitute or to modify the order of candidates on the list, in order to determine who should fill that vacancy. Rather, article 38(1) requires that the vacancy be filled with the candidate who is placed next highest on the party list.

What is the rationale for the FCC's holdings? As has been widely observed, relative to constituency-based representation, closed-list proportional representation empowers political parties relative to voters. Closed-list proportional representation accordingly dilutes the accountability of parliamentary representatives to the electorate and enhances the power of the unelected party leadership over the parliamentary wing. The FCC's jurisprudence yields this proposition: certain design features of closed-list proportional representation could amount to such a severe dilution of the accountability of parliamentary representatives to the people that they would in effect transfer the people's power to choose those representatives to the party. Elections would still take place, voters would still cast ballots for parties, and the level of a party's parliamentary representation would reflect its electoral performance. But the FCC's jurisprudence reflects the premise that democracy requires something more: the selection of elected representatives by the people themselves to the extent possible. Even under a system of closed-list proportional representation, the primary constitutional relationship is between the voter and the parliamentary representative. Elections are the mechanism whereby the people hold parliamentary representatives accountable for their performance.

²³³ See DP Currie *The constitution of the Federal Republic of Germany* (1995)106-7.

The FCC's jurisprudence under article 38(1) specifically prohibits the publication of party lists after an election, and the filling of vacancies other than according to the party list in the name of 'direct' elections, in order to bar the party from seizing the power that belongs to the people. I term this the doctrine of *anti-seizure*. Framed this way, it builds conceptually upon the doctrine of non-usurpation, which bars the usurpation of the powers of elected representatives by the non-parliamentary wing of the party. What makes that practice undemocratic is that by disempowering elected representatives, it indirectly robs voters of their power. The practices banned by the FCC, by contrast, directly rob voters of their power, through the design of the electoral system.

One can make a parallel argument about the use of statutory powers to wreak havoc on the structure of representative democracy in South Africa. At the national level, the Constitution creates a structure of accountability between voters, the National Assembly, the President, and the cabinet. Voters elect the National Assembly,²³⁴ which in turn elects the President at its first sitting after an election, or within 30 days of a vacancy occurring.²³⁵ The President in turn appoints the cabinet from among the MPs, assigns them their powers and functions, and may dismiss them.²³⁶ The Cabinet – including the President – are accountable, individually and collectively, to Parliament for the performance of their functions.²³⁷ Thus, the National Assembly has the power to pass a motion no-confidence in the cabinet but not the President, in which case the President must reconstitute the cabinet;²³⁸ if the motion is passed against the President, the President and the Cabinet Council must resign.²³⁹

Cadre deployment disrupts each link in this chain of accountability, which runs from the voters through MPs to the President and the cabinet. Instead of voters electing MPs through their inclusion in a list, MPs can be removed and appointed by the ANC NEC. The ANC NEC can remove a President, regardless of whether she has lost the confidence of the National Assembly. The ANC NEC can likewise remove a member of the cabinet, regardless of whether she has been dismissed by the President, or whether the National Assembly has passed a motion of no-confidence in the cabinet. It is the statutory powers granted to the ANC that enable it to undermine the constitutional structure. On the doctrine of anti-seizure, those

²³⁴ 1996 Constitution, sec 46(1).

²³⁵ Sections 86(1) and (3).

²³⁶ Section 91.

²³⁷ Section 92(2).

²³⁸ Section 102(1).

²³⁹ Sections 102(2).

powers should be found unconstitutional, because they seize the power of voters.

Does political competition therefore offer an alternative mechanism to judicial review for imposing restraints on, and even ending, the practice of cadre deployment? Political parties are under no constitutional obligation to exercise the legal power to deploy. The issue of deployment could therefore become a point of partisan political cleavage. Parties could campaign on the basis that they will not wield this power. Indeed, they may even promise to repeal it. But this objection assumes the existence of political competition and the possibility of alternation. In a dominant party democracy, this assumption does not hold. Electoral competition cannot be relied on to check cadre deployment. Moreover, there are few internal checks within parties. Armed with the legal power to deploy parliamentary representatives, party elites enjoy enormous power over the parliamentary wing of the party. In this respect, the situation in South Africa is fundamentally different than in post-Independence India, where it was Congress Party MPs who challenged the attempt to usurp their power by the non-parliamentary wing of the Congress Party. The independent electoral mandate of Congress MPs gave them political resources to challenge the unelected leadership of the Congress Party that the ANC MPs lack.

Let us next turn to the constitutionality of cadre deployment to provincial legislatures. Consider an argument that combines the constitutional structure of representative government (as above) with an additional element: the federal nature of South Africa. At the provincial level, the constitution creates a system of political accountability between the provincial electorate, the provincial legislature, the Premier, and the Executive Council. Provincial voters elect the provincial legislature,²⁴⁰ which elects the Premier at its first sitting after an election, or within 30 days of a vacancy occurring.²⁴¹ The Premier in turn appoints the provincial Executive Council from among the MPLs, assigns them their powers and functions, and may dismiss them.²⁴² The MECs — including the Premier — are accountable, individually and collectively, to the legislature for the performance of their functions.²⁴³ Thus, the legislature has the power to pass a motion of no-confidence in the Executive Council but not the Premier, in which case the Premier must reconstitute the Council;²⁴⁴

²⁴⁰ Section 105(1).

²⁴¹ Sections 128(1) and (3).

²⁴² Section 132.

²⁴³ Section 133(2).

²⁴⁴ Section 141(1).

if the motion is passed against the Premier, the Premier and the Executive Council must resign.²⁴⁵

Cadre deployment disrupts this framework of political accountability within each province. Instead of provincial voters electing MPLs through their inclusion in a list, MPLs can be removed and appointed by a national body, the ANC NEC. The ANC NEC can remove a provincial Premier, regardless of whether she has lost the confidence of the provincial legislature. The ANC NEC can likewise remove a provincial MEC, regardless of whether she has been dismissed by the Premier, or whether the provincial legislature has passed a motion of no-confidence in the Executive Council. As Christina Murray sums up:²⁴⁶

[n]ormally in parliamentary systems the premier and cabinet derive their legitimacy and authority from the fact that they are the leaders of the majority party in the legislature and are responsible to it. Deployment from the centre means that the premier is in fact accountable to not to his or her [provincial] legislature, but rather, to the central authority ... The result is that the provincial government has limited legitimacy, and its role as a democratic institution representing the local population is eroded.

The use of the power to engage in cadre deployment at the provincial level is an assault the South African constitutional structure in two distinct ways. To highlight these two distinct harms, consider two counter-factuals: (a) deployment at the provincial level by provincial executive committees that are independent of the ANC NEC, and (b) the selection of MPLs, MECs, and Premiers by elected officials at the national level – the National Assembly, the national executive, or some combination of the two. In the first scenario, provincial political parties seize the political power of provincial voters, whereas in the second scenario, it is elected national political officer-holders that seize the political power of provincial voters. These harms are distinct. The first harm is the seizure of the power of voters by political parties, which disrupts the accountability of elected representatives to voters. The second harm is to the federal structure of South Africa, which entails the accountability of elected provincial office-holders to provincial voters.

The doctrines that check these two harms, although closely related, are also distinct, and accordingly need to be labelled differently. The first is the anti-seizure doctrine, which also renders unconstitutional cadre deployment at the national level, and prohibits measures that have the effect of transferring the power to

²⁴⁵ Section 141(2).

²⁴⁶ Murray 'South Africa' (n 51 above) 274-75.

select parliamentary representatives from the people to political parties. However, it is entirely indifferent on whether the people whose democratic rights are protected are organised on a single, unitary basis or federally. The second doctrine protects the federal character of the polity, and is termed the *anti-centralisation* doctrine. It checks the seizure of provincial power by a national institution. As discussed earlier, one of the pathologies of a dominant party democracy is the tendency of a dominant party to usurp the power and erode federalism in order to thwart political competition. The anti-centralisation doctrine seeks to check this danger. Democratic centralism and cadre deployment at the provincial level combines both harms, because it has shifted power to an institution that lies outside the formal institutions of government, the ANC NEC, and has also shifted power away from political majorities at the provincial level to a national institution.

There is a precedent for accepting that political party dominance may undermine the proper functioning of South African federalism: the *Certification Case*. Perhaps the most challenging task for the Court was to assess compliance with Constitutional Principle (CP) 18(2). As Nicholas Haysom points out, unlike every other CP governing federalism, which set out criteria according which powers were to be assigned to the levels of government, CP 18(2) provided that ‘the powers and functions of the provinces defined in the [Final] Constitution ... shall not be substantially less than, or substantially inferior to, those provided for in this [Interim] Constitution’.²⁴⁷ The Court therefore had to weigh each change to the powers of the provinces, to consider whether it increased or diminished provincial power.

An important change was the creation of the NCOP, which replaced the old upper chamber, the Senate. The Senate had the role of protecting provincial interests in the national legislative process under the Interim Constitution. It consisted of equal numbers of representatives from each state, in order to ensure the representation of provincial interests. Senators were nominated by the parties in the provincial legislatures, but were not required to exercise their powers in accordance with the views of the provincial legislature. Rather, Senators developed the practice of joining their party caucuses with members of the National Assembly and voted on party lines. The Court accepted this characterisation of the Senate, stating that ‘it is more a House in which party political interests are represented than a House in which provincial interests are

²⁴⁷ N Haysom ‘The origins of co-operative governance: The ‘federal’ debates in the constitution-making process’ in N Levy & C Tapscott (eds) *Intergovernmental relations in South Africa: The challenges of cooperative government* (2001) 43-65.

represented'.²⁴⁸ It was argued that the NCOP was very different, because it consisted of delegations appointed by each provincial legislature, and in areas of concurrent national and provincial competence, each delegation was to vote collectively as a province, and that vote was to be cast in accordance with the mandate conferred on the delegation by provincial legislatures. Thus, it was argued that the representation of provincial interests would be stronger in the NCOP than in the Senate.

The *Certification Case* did not accept this argument. What bears careful examination is the Court's methodology. As a matter of constitutional form, the claim that the NCOP provided stronger representation for provincial interests is hard to dispute. Indeed, the Court stated 'the structure and functioning of the NCOP ... are better suited to the representation of provincial interests than the structure and functioning of the Senate'.²⁴⁹ However, the Court was 'unable to say that the collective interest of the provinces will necessarily be enhanced by the changes that have been made', because such a conclusion was 'too speculative'.²⁵⁰ So clearly, the Court looked beyond constitutional form in reaching this conclusion. What materials did it use to supplement the text to reach its conclusion? The Court refers to '[a] number of variable and uncertain factors' including 'the influence of parties on voting patterns'.²⁵¹ The Court's concern was likely was that the representation of political party interests would trump the representation of provincial interests.

Taken on its own, this position is incoherent. Since the closed-list system of proportional representation governs elections to provincial legislatures, all MPLs are members of parties, and a provincial government will have a party identity, or consist of a coalition of parties. Moreover, since provincial delegations to NCOP vote on the basis of mandates provided by the provincial legislature, in a parliamentary system, this will be a mandate provided by the majority party or governing coalition of parties. Since provincial legislatures cannot operate without reference to party identity, neither can NCOP delegations. If this were the Court's objection, then NCOP could never represent provincial interests, unless parties were uninvolved in the provincial legislative process, which they cannot be, as a matter of constitutional design.

But there is another way to read the Court's judgment that is perfectly intelligible. Parties are the units of political competition, and enhance the accountability of government to the provincial

²⁴⁸ *Certification Case* (n 8 above) para 320.

²⁴⁹ *Certification Case* (n 8 above) para 331.

²⁵⁰ *Certification Case* (n 8 above) paras 331 and 333.

²⁵¹ *Certification Case* (n 8 above) para 332.

electorate, by providing a framework for elections to be fought on issues affecting the polity as a whole. Parties are not opposed to provincial interests; they are the vehicle for representing provincial interests, as determined by the results of a free and fair election. However, this presupposes a functioning system of political competition with a province, in which alternation is possible, which permits the electorate to register their disapproval of how provincial interests have been represented in NCOP through voting. But in a dominant party democracy, this assumption does not hold. Thus, the implicit premise of the *Certification Case* must be a misgiving about the relationship between parties and provincial electorates in a dominant party democracy that overwhelms constitutional form. As Haysom puts it, '[t]his must be understood to mean that an ANC provincial government would not be able to express a regional or provincial interest – only a party political national interest'.²⁵² That same misgiving should apply to the determination of the constitutionality of the power to engage in cadre deployment.

Let me conclude by reflecting on the broader significance of this analysis. One constitutional strategy for checking the power of political parties is for the constitution to align the political program and structure of political parties with the ideals and structure of the constitutional order. This strategy arose initially in the context of threats to democracy by what Issacharoff has termed anti-democratic majoritarian political parties.²⁵³ The premise is that in the absence of alignment, a party could take power through freely contesting democratic elections and then undermine constitutional democracy from within, either by simply seizing control of the state through extra-legal means in a coup d'état or through using the power of constitutional amendment to abolish democracy itself. The notion of militant democracy, developed by Karl Lowenstein in the wake of the rise of Nazism in Germany through democratic processes, adopts this diagnosis of the risks posed by certain political parties.²⁵⁴ Party/constitution alignment is a risk-reducing strategy. A leading example of a constitution that implements this ideal is the German Grundgesetz, which bans political parties 'which seek to undermine or abolish the free democratic basic order',²⁵⁵ and provides that parties' 'internal organisation must conform to democratic principles'.²⁵⁶

²⁵² Haysom (n 247 above) 56.

²⁵³ S Issacharoff 'Fragile democracies' (2007) 120 *Harvard Law Review* 1405.

²⁵⁴ K Lowenstein 'Militant democracy and fundamental rights, I' (1937) 31 *American Political Science Review* 417, and 'Militant democracy and fundamental rights, II' (1937) 31 *American Political Science Review* 638.

²⁵⁵ Grundgesetz, article 21(2).

²⁵⁶ Grundgesetz, article 21(1).

Militant democracy achieves alignment by prohibiting parties whose programme and/or organisation is not aligned with the constitutional order. But the strategy of party/constitution alignment is not limited to threats to democracy, and need not only be achieved through party bans. Thus, a constitution may promote the protection of territorial integrity and dampen secessionist political mobilisation, either through a prohibition on parties organised on the basis of regional, ethnic or sub-national identities, and/or a requirement that parties nominate candidates in a minimum number of regions. Turkey, for example, both prohibits separatist parties and stipulates that for parties to be eligible to contest national elections, they must field candidates in at least half of the provinces.²⁵⁷

In principle, this strategy also extends to situations where the threat to the constitutional order arises from the use of party structures to circumvent the constitution. Consider the problem of presidential term limits. Term limits are now a standard feature of presidential forms of government, because the advantages of incumbency are so great that the potential exists for a president to use the power of her office to secure her re-election many times over, posing a parallel danger to a constitutional democracy as the lack of alternation between parties. The South African Constitution accordingly imposes a two-term limit on the presidency.²⁵⁸ President Mbeki promised to relinquish the presidency in compliance with the Constitution, but proposed to stay on as ANC President. This would have allowed Mbeki, through the ANC NEC, to issue directives to the next President, although he was constitutionally barred from holding that office. Democratic centralism would have permitted Mbeki to circumvent the two-term limit in the constitution. Party/constitution alignment would require that a party in government prohibit an individual who is not President from being party president. The idea that the internal rules of the party should align with the constitution is the intuition underlying Lisa Thornton's suggestion that political parties be considered organs of state for the purposes of the Bill of Rights and are therefore bound by the right to just administrative action under the Constitution.²⁵⁹

²⁵⁷ B Reilly 'Introduction' in B Reilly & P Nordlund (eds) *Political parties in conflict-prone societies: Regulation, engineering and democratic development* (2008) 3, 11.

²⁵⁸ 1996 Constitution, sec 88(2).

²⁵⁹ L Thornton 'The constitutional right to just administrative action – are political parties bound?' (1999) 15 *South African Journal on Human Rights* 351. The strategy of alignment may make sense of *Max v Independent Democrats & Others* 2006 3 SA 112 (C) and *Mthethwa v Municipal Manager, Uthungulu District Municipality & Others* [2007] JOL 20640 (N), in which the courts held that the decisions of parties to expel members following disciplinary proceedings amounted to administrative action.

Party/constitution alignment is an important way for thinking about how constitutions can regulate political parties. But this section suggests that another strategy is available. Consider the Mbeki hypothetical again. If Mbeki had remained President of ANC while relinquishing the state presidency, he would have exercised Presidential powers through non-state institutions, and outside institutions created by the constitution and to which certain powers had been exclusively assigned. This problem could be addressed by drawing the party and state into alignment, and by forcing Mbeki to relinquish the ANC presidency. Another approach, however, would be to leave Mbeki in place, to leave untouched the lack of alignment between the internal rules of the party and the constitution of the state, and to push the party away from the state in order to protect the constitutional order. The two constitutional doctrines set out in this section – anti-seizure and anti-centralisation – fall into the second category. They do not seek to make the ANC internally democratic (for example, with respect to the constitution of party lists) or internally federal (but requiring that the ANC have distinct national and provincial parties, that are allied but institutionally autonomous of each other), as would occur under the strategy of party/state alignment. The broader implications of this way of approaching the constitutional regulation of political parties – for example, whether it must substitute, or can potentially complement, party/state alignment – I leave to explore in future work.

4 Conclusion: BEE and the constitutional political economy of ANC dominance

Instead of summarising a lengthy argument, let me conclude by pursuing a thread that I have not fully explored. One of the central insights provided by comparative politics is that the maintenance and decline of political monopolies by dominant political parties is closely linked to monopolies over public resources. Dominant political parties derive an electoral advantage over opposition parties by putting public resources to partisan ends. The diversion of public resources to partisan ends is possible because of the lack of restraints – the external restraint of the risk of alternation, which deters the partisan abuse of public resources, and the internal restraint of an independent bureaucracy.

Does this model illuminate the South African case? To be sure, it usefully highlights the importance of bureaucratic independence as a bulwark against partisan abuse of the public fisc. The independent institutions arguably guard against this danger, in two ways. They shift some decision-making functions from the bureaucracy that is potentially vulnerable to political pressure to independent

institutions that are insulated to a greater degree. Moreover, some of the independent institutions – most directly, the National Prosecuting Authority (NPA) and the Public Protector – have a mandate to combat official corruption, and should bureaucracy controls fail, operate as a fail-safe to punish and deter the misappropriation of public resources for partisan purposes. But the more important independent variable is the size of the state sector. Put simply, the larger the size of the state sector, the greater the resources available to dominant political parties for patronage. Conversely, if the size of the state sector shrinks, the party has fewer public resources at its disposal to purchase public support, and its political monopoly is harder to sustain. Indeed, Kenneth Greene argues that the principal reason for the decline and demise of party dominance is the privatisation of publicly owned corporations.

On this latter dimension, at first blush, the model fits South Africa poorly. In the leading cases of party dominance – eg Mexico, Taiwan, India, and Italy – the proportion of GDP accounted for by the state sector was very large. South Africa is strikingly different. Initially, the ANC was committed to a broad-based program of nationalisation as part of the ‘national democratic revolution’ that would accompany the transition to majority-rule. The reason is that apartheid was an integrated system of political and economic disenfranchisement, domination and exploitation, and at its core was based on mutually reinforcing political and economic monopolies that denied non-whites not only political power, but ownership and control of the economy. To redress political inequality without economic inequality was radically incomplete. However, as Southall explains, at the heart of the negotiated transition to democracy was a bargain that would adopt majority rule for politics along with a market economy. In practical terms, this means “‘black” control of politics and “white” control of the economy’.²⁶⁰ The reasons for this political compromise are manifold, and include the collapse of the Soviet Union and with it the demise of state socialism as an alternative economic model to capitalism, the accommodation between large South African corporations and the ANC in the pre-transition period, and pressure applied by international financial institutions.

The ANC’s commitment to markets, as well as the relatively large size of the private sector, suggests either that (a) the ANC’s political dominance must be due to factors other than the size of the state sector, or (b) that South Africa is not in fact a dominant party democracy.²⁶¹ However, upon closer examination, the economic power of the South African state is considerable. The size of the

²⁶⁰ R Southall ‘Ten propositions about Black Economic Empowerment in South Africa’ (2007) 34 *African Review of Political Economy* 67, 70.

²⁶¹ Southall ‘The “dominant party debate”’ (n 28 above).

public sector is a poor way to measure the state's economic power, and hence, the political leverage which it provides the ANC. The South African case illustrates how we must broaden our conception of the public resources at the disposal of the state. These public resources structure a complex set of relationships between the state (under ANC control), emerging black elites that are part of the ANC establishment, and large private sector corporations. These relationships form a political-economic model, and their development has been a deliberate goal of public policy.

The genesis of this model can be traced to the official policy of Black Economic Empowerment (BEE). BEE arose as a response to the ongoing friction between the political and economic settlements of 1994. Although the ANC embraced free markets, its goal was to nurture the growth of an upwardly mobile black middle class who would assume a significant degree of ownership and control of the economy, with the goal of reaching a state of affairs where the economic power was not stratified on racial lines. This would be a 'patriotic bourgeoisie' that would be the vanguard of black economic empowerment more generally, including the extremely poor. In the period immediately following 1994, the market was largely left to its own devices, and little progress was made in increasing black ownership and control in the private sector. The basic problem, as Southall puts it, was 'the quandary of how black aspirant *capitalists without capital* can be capitalised',²⁶² especially within an extremely short frame against the backdrop of deep, state-sponsored economic inequality.

The public policy response was a much more interventionist, state-led effort to actively foster the creation of a black capitalist class, known as BEE, launched in 2001. As Okechukwu Iheduru has documented, the ANC-led national government has employed a number of different policy levers to pursue this goal.²⁶³ Procurement by the national government, and by the state-owned enterprises (SOEs) – over 300 in total, including giants like Eskom (the power utility) and Transnet (the transportation utility) – is valued at R250 billion per annum.²⁶⁴ The Preferential Procurement Policy Framework Act 5 of 2000 creates strong financial incentives for private corporations to take on black shareholders. For example, it requires that at least 40% of equity in bidders to be held by previously disadvantaged business people, and awards up to 10% of points in

²⁶² R Southall 'The ANC and black capitalism in South Africa' (2004) 31 *Review of African Political Economy* 313, 319.

²⁶³ O Iheduru 'Black economic power and nation-building in post-apartheid South Africa' (2004) 42 *Journal of Modern African Studies* 1, 10-14.

²⁶⁴ O Iheduru 'Why 'Anglo licks the ANC's boots': Globalisation and state-capital relations in South Africa' (2008) 107 *African Affairs* 333, 349.

scoring tenders on the basis of BEE criteria. The process for the privatisation of SOEs has provided another opportunity to promote BEE, by requiring bidders to meet minimum thresholds of equity ownership by previously disadvantaged business people. The same criterion – minimum levels of equity ownership by BEE partners – also applies to the awarding of contracts for the management of select SOEs services and build-operate-transfer concessions.

In other cases, requirements for BEE ownership have been the result of government-industry negotiation in the shadow of the threat of regulation. For example, in the natural resource sector, the threat of legislated requirements for BEE ownership, coupled with the assertion of state ownership over mineral resources, have led to negotiated BEE Charters with the petroleum and mining sectors that set minimum levels of BEE ownership, in 2000 and 2002, respectively. A similar threat prompted the financial services sector to adopt an empowerment charter in 2003. Finally, the national government has also financially underwritten the growth of BEE ownership by making available vast amounts of credit to BEE entrepreneurs to acquire equity stakes, especially through the Industrial Development Corporation.

Private corporations also see strategic advantages to taking on BEE partners. Indeed, this practice predated the official inauguration of BEE in 2001. The selling of equity, or the launching of joint ventures with BEE investors, was viewed as a means to buy political access and influence with the ANC. The principal form of capital that BEE investors possessed was political capital. As a consequence, BEE transactions have tended to involve companies owned by black entrepreneurs with close political connections to the ANC. As Roger Tangri and Roger Southall put it:

Established white business has always feared greater political intrusion to advance the BEE process. To exercise political influence within ruling circles, it has wanted to attract prominent black former politicians turned businessmen/women with good political connections. Many white companies have sold their stakes to black businessmen/women who serve in the highest decision-making structures of the ANC, and who can push for policies to the benefit of capital.²⁶⁵

The same cast of senior ANC members have emerged as the principal players in BEE transactions across a variety of sectors: Patrice Motsepe, Saki Macozoma, Tokyo Sexwale, Cyril Ramaphosa and Mazi Khumalo. Even when participation in BEE transactions is more widespread, ANC insiders participate and benefit to a

²⁶⁵ R Tangri & R Southall 'The politics of Black Economic Empowerment in South Africa' (2008) 34 *Journal of Southern African Studies* 699, 710.

disproportionate degree.²⁶⁶ Indeed, as Iheduru has described, the government fuelled a BEE bidding war in the mining sector between rivals Anglo American and Lonmin to secure mineral licences, who competed to enrich ANC insiders.²⁶⁷ BEE illustrates how dominant parties can politicise their powers to procure, privatise state resources, and regulate the private sector to turn private wealth into a political resource for partisan advantage.

BEE has come under harsh criticism, because its benefits have been narrowly confined to a politically-connected black elite who have cashed in on their status in the ANC. The overwhelming majority of blacks have derived no benefit whatsoever. On this view, BEE is nothing more than a legalised form of influence peddling, aided and abetted by the South African state. This critique of BEE is closely tied to a broader set of concerns about widespread corruption within the ANC.²⁶⁸ The arms scandal is one example. But without a doubt, the most disgraceful conduct arises from the business activities of the ANC itself. Through its investment arm, Chancellor House, the ANC has openly entered into joint ventures with foreign companies and bid for government contracts. It owns 25% of Hitachi Power Africa, which won a multibillion rand contract from Eskom – whose board has been deployed by the ANC national government – to build two coal-fired power stations. Eskom has in turn sought a steep increase in power rates to pay for this contract. This is the most blatant and scandalous form of self-dealing, a venal and disgraceful spectacle, for which the ANC remains utterly unrepentant. The party is able to feast upon the state with impunity, as a direct consequence of its dominant status.

But there is another way to understand the link between the BEE and the ANC domination. BEE is not merely the consequence of political domination, but in fact contributes to its maintenance. Dominant parties can be understood as political cartels among political elites. Like any cartel, they face the risk of defection, and must provide mechanisms to stem defection through incentives or sanctions. BEE can be viewed as an elaborate scheme whereby the ANC provides payments to members of a political cartel in the form of equity in private corporations through exercising or threatening to exercise the state's powers over procurement, licensing and privatisation. The goal is to dissuade them from defecting from the ruling party and forming a credible electoral alternative that could contend with the ANC for power. On this interpretation, Ramaphosa, Sexwale, and the other principal beneficiaries of BEE are not just

²⁶⁶ Tangri & Southall 'The politics of Black Economic Empowerment in South Africa' (n 265 above) 710.

²⁶⁷ Iheduru 'Why "Anglo licks the ANC's boots"' (n 264 above) 353-54.

²⁶⁸ Tangri & Southall 'The politics of Black Economic Empowerment in South Africa' (n 265 above) 710.

members of the ANC elite who trade on their political ties to the government; they are also potential challengers to the ANC who could unseat it through democratic politics by leading an opposition party. Thus, the harm of BEE must be understood not simply in terms of corruption, but also in terms of political competition. Indeed, BEE may lie at the heart of the constitutional political economy of ANC domination.

Are there doctrinal tools available to fragment or even dissolve this economic-political cartel? BEE is underpinned by section 9(2) of the Constitution, which permits the government to take ‘legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination’ in the name of equality.²⁶⁹ In *Van Heerden*, the Constitutional Court interpreted section 9(2) broadly to permit measures that target persons or categories of persons who have been disadvantaged by unfair discrimination, where the measure’s purpose was to protect or advance such persons and if the measure in fact promoted the achievement of equality.²⁷⁰ The debate on the Court in *Van Heerden* – between Moseneke J on the one hand, and Mokogoro and Ngcobo JJ, on the other – is whether measures that are over-inclusive because they benefited persons who had not been victims of discrimination could nonetheless fall within the scope of section 9(2). For Mokogoro and Ngcobo JJ, over-inclusion was fatal to a defence under section 9(2).

What was the danger that motivated the interpretive stance of Mokogoro and Ngcobo JJ toward section 9(2)? It may be that they were concerned that in countries where a political majority has also been the victim of historic discrimination, affirmative action programmes can be captured by elites within that majority to direct goods and opportunities toward them. The risk of this kind of self-dealing, under the guise of redressing historically constituted and structurally entrenched social injustice, may have shaped the Indian constitutional jurisprudence on reservations, which requires the exclusion of the ‘creamy layer’ for a programme to be held to be non-discriminatory.²⁷¹ On this reading, section 9(2) is a vehicle to restrain the consequences of political domination. A Court that was alert to the phenomenon of dominant party democracy would interpret section 9(2), to prevent it from shielding measures like BEE that are thinly veiled measures to protect the ANC’s dominant political status.

²⁶⁹ Section 9(2), in its entirety, provides: ‘Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.’

²⁷⁰ *Minister of Finance & Another v Van Heerden* 2004 6 SA 121 (CC); 2004 11 BCLR 1125 (CC).

²⁷¹ *Indira Sawhney v Union of India* AIR 1993 SC 447.

I leave the development of the precise details of that argument for another day.