Enhancing democratic accountability through constitutionalism in South Africa

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For the peoples of Africa, and posterity.

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Abstract

The central question in this thesis is whether full compliance with the tenets of constitutionalism can enhance democratic accountability in South Africa. The thesis examines historical and contemporary issues on the crisis of accountability and constitutionalism to answer the question. The analyses of electoral, legislative, executive, administrative and legal accountability in the thesis reveal that indeed, full compliance with the tenets of constitutionalism can enhance democratic accountability in South Africa. The thesis attempts to add new knowledge and insights to existing knowledge by closing gaps in the legal discourse on democratic accountability. As far as could be reasonably ascertained, the thesis is one of the first of its kind to trace the development of constitutionalism in South Africa from a perspective of democratic accountability. The historical discussion shows that South Africa has always been in a crisis of accountability due to illiberal constitutionalism. Also, the historical analysis shows that Africans in South Africa have always wanted, and taken initiatives, to bring about an accountable government.

The thesis further attempts to add to knowledge with the argument that democratic accountability is necessary to contain public mistrust in the government and to bolster confidence in Parliament, the judiciary and Chapter 9 institutions. Without confidence in these institutions of accountability, South Africa is bound to fall into a constitutional crisis, a situation which must be avoided at all costs. Whereas the Constitution is founded on accountable, responsive and open governance, contemporary South Africa faces elevated levels of corruption, maladministration and other manifestations of a lack of accountability. Notwithstanding, the thesis affirms that South Africa has an adequate constitutional and legislative regime for an accountable government. The thesis attempts to prove that South Africa has resilient institutions of accountability and that to successfully hold the political branches of government accountable, institutions such as the Public Protector and the judiciary need more support from citizens.

Based on the main findings, the thesis proffers constitutional and legislative amendments to enhance democratic accountability. The proposed constitutional amendments are not made lightly, given that the Constitution is the foundation of constitutionalism and the bedrock of constitutional democracy. Constitutional amendments are proposed because

the thesis leads to the inevitable conclusion that one of the main causes of the lack of accountability lies in the Constitution. The thesis proposes the enactment of legislation to strengthen existing institutions of accountability and to create new ones. Some of the recommendations entail the enactment of a statute to regulate and protect intra-party democracy, a reconsideration of electoral legislation to change the electoral system, and the vesting of impeachment of the President in the Constitutional Court. The thesis identifies the need for more research to determine whether South Africa needs a permanent institution to tackle complex issues such as 'state capture' and high-level corruption. Also, the thesis reminds South Africans of their duty to be more constitutionally vigilant against abuses of power. Due to the topicality of the discourse, the thesis suggests further research on other forms of accountability.

Keywords: democratic accountability, constitutionalism, electoral accountability, legislative accountability, parliamentary oversight, executive accountability, legal accountability.

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List of Abbreviations and Acronyms

Courts

CC	Constitutional Court
D	High Court of South Africa, Durban
GP	High Court of South Africa, Gauteng Division, Pretoria
KZP	High Court of South Africa, KwaZulu-Natal Division, Pietermaritzburg
SC	Supreme Court (of India)
SCA	Supreme Court of Appeal
The Court	Constitutional Court of South Africa
WCC	Western Cape Division, Cape Town
ZACC	South Africa: Constitutional Court
ZAEC	South Africa: Eastern Cape Division
ZAFSHC	South Africa, Free State Division, Bloemfontein
ZAGPJHC	South Africa: Gauteng Local Division, Johannesburg
ZAGPPHC	South Africa Gauteng Provincial Division, Pretoria
ZASCA	South Africa: Supreme Court of Appeal
ZAWCHC	South Africa: Western Cape Division, Cape Town

Journals

AJPA	African Journal of Political Affairs
Ariz J Int'l & Comp Law	Arizona Journal of International and Comparative Law
BSALR	Butterworths South African Law Review

Cape LJ	Cape Law Journal
CCR	Constitutional Court Review
Denning LJ	Denning Law Journal
Harv JL & Pub Pol'y	Harvard Journal of Law and Public Policy
ICON	International Journal of Constitutional Law
Int Rev Adm Sci	International Review of Administrative Sciences
J Soc Political Econ Stud	Journal of Social, Political and Economic Studies
J South Afr Stud	Journal of Southern African Studies
KritV	Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft
NCJ Int'l L & Com Reg	North Carolina Journal of International Law and Commercial Regulation
PER/PELJ	Potchefstroom Electronic Law Journal
SAH	Southern African Humanities
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPL	Southern African Public Law
SMU L Rev	Southern Methodist University Law Review
Soc Res	Social Research: An International Quarterly
Stell L Rev	Stellenbosch Law Review
TSAR	Tydskrif Vir Die Suid-Afrikaanse Reg
Windsor YB Access Just	Windsor Yearbook of Access to Justice

Judges

CJ (as in Mogoeng CJ)	Chief Justice
DCJ (as in Zondo DCJ)	Deputy Chief Justice
J (as in Jafta J)	Judge
JA (as in Rumpff JA)	Judge of Appeal
JP (as in De Wet JP)	Judge President

Law reports

AC	Appeal Cases
AD	Appellate Division Reports
AIR	All India Reporter
All SA	All South African Law Reports
BCLR	Butterworths Constitutional Law Reports
OR	Official Reports of the High Court of South Africa
Roscoe	Roscoe's Reports
SA	South African Law Reports
SACR	South African Criminal Law Reports
SAR	Reports of the High Court of the South African Republic
TS	Transvaal Supreme Court Reports
WLD	Witwatersrand Local Division Reports

Miscellaneous

ABSA	Amalgamated Bank of South Africa

ANC	African National Congress
CEU	Central European University
CODESA	Convention for a Democratic South Africa
DOI	Digital Object Identifier
HSRC	Human Sciences Research Council
IEC	Independent Electoral Commission
IPID	Independent Police Investigative Directorate
MEC	Member of the Executive Council
MPNF	Multi-Party Negotiating Forum
NCOP	National Council of Provinces
NDPP	National Director of Public Prosecutions
NEC	National Executive Committee
NPA	National Prosecuting Authority
NPC	Non-Profit Company
NWU	North-West University
OECD	Organisation for Economic Co-operation and Development
PAIA	Promotion of Access to Information Act
PAJA	Promotion of Administrative Justice Act
PEC	Provincial Executive Committee
PIC	Public Investment Corporation
PRASA	Passenger Rail Agency of South Africa

RF	Ring-Fenced
SABC	South African Broadcasting Corporation
SAHO	South African History Online
SANDF	South African National Defence Force
SAPES	Southern African Political and Economic Series
SAPS	South African Police Service
SARS	South African Revenue Service
UCT	University of Cape Town
UDHR	Universal Declaration of Human Rights
UNESCO	United Nations Educational, Scientific and Cultural Organization
USA	United States of America
WJP	World Justice Project

Chapter 1 Introduction

1.1 Background

The central question in this thesis is whether full compliance with the tenets of constitutionalism can enhance democratic accountability in South Africa. One of the crucial arguments in the thesis is that South Africa is in a crisis of accountability. Like many issues which confront South Africa, the crisis of accountability has a historical context.[1] Colonial architects in South Africa, Jan van Riebeek and Cecil John Rhodes, described Africans as 'savage and barbaric'.[2] Some scholars also labelled Africans in South Africa as 'primitive savages and threatening barbarians'[3] who knew no principles for good governance and who had no viable institutions of accountability.[4] The disingenuous arguments were used in South Africa and other parts of Africa to justify the subjugation of Africans to colonial regimes in the name of civilisation and to advance views that corruption is acceptable to Africans and that abuse of power is part of African culture.[5] Nowhere in the history of humanity has impunity been a 'culture'. Africans have demonstrated in infinite ways that they want accountable, responsible and transparent governance.[6]

Notwithstanding, Africa experiences rampant abuses of power and impunity caused by the manipulation of state institutions for the benefit of ruling elites.[7] In the result, most African governments are unaccountable to their citizens,[8] and have subverted democracy and created perceptions that modern democracy, accountability and transparency are incompatible with African needs and that the principles will never work on the continent.[9] Some Africans attribute the crisis of accountability to the legacies of colonisation, failed

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1 See Corder "Judicial Review of Parliamentary Actions in South Africa: A Nuanced Interpretation of the Separation of Powers" 85 on the importance of South Africa's history in understanding contemporary issues. See also De Vos and Freedman (eds) *South African Constitutional Law in Context* 5.

2 Gordon *Transformation & Trouble* 23.

3 See the discussion in Ngcukaitobi *The Land is Ours* 47-49. For a general exposition of the 'noble savage,' see Ellingson *The Myth of the Noble Savage* 339.

4 Maathai 1995 *Resurgence* 6; Menski *Comparative Law in a Global Context* 481-482.

5 Ayittey 2010 *Soc Res* 1184.

6 Menski *Comparative Law in a Global Context* 482.

7 Chirwa and Nijzink "Accountable Government in Africa: Introduction" 2-3; Menski *Comparative Law in a Global Context* 480; Maathai 1995 *Resurgence* 6.

8 Adibe 2010 *Soc Res* 1242.

9 Ayittey 2010 *Soc Res* 1184.

imported systems of Western democracy, post-independence dictatorships and poverty on the continent.[10]

Pre-colonial Africans had viable systems of democratic governance.[11] African customs spelt the requirements for accountability. For instance, among the Ndebele and Zulu, proverbs and idioms (*izaga lezitsho*), captured the requirements for accountability in customary law.[12] The proverb *inkosi yinkosi ngabantu* (a king is a king because of his people), indicated the understanding that the peoples ruled by a king were the ultimate source of the king's power. Importantly, the proverb affirmed a government of the people, by the people and for the people, widely understood as a core feature of democracy. Ndlovu[13] argues that the proverb was a reminder for kings to rule according to the will of their peoples. Although they had contradictory sayings, such as *inkosi kayoni* (a king commits no wrong),[14] Africans had the means to enforce accountability. Mandela[15] said that although pre-colonial South African societies could not measure to the demands of the modern era on accountability, democratic participation in the affairs of the tribes was the foundation of accountable governance.

African rulers who did not act in the best interests of their peoples and who sought to operate with impunity were deposed and assassinated. The assassination of King Shaka of the Zulu was an example of African opposition to tyranny and the use of regicide to enhance accountability. Regicide was a double-edged sword which discontented peoples used to get rid of despotic kings and which kept kings alive to the needs of their peoples. However, colonisation brought new power dynamics and Western democracy. The arrival of Europeans in South Africa in 1652 changed the institution of government and shifted democracy and accountability in favour of colonisation and impunity. However, the Presidency of Paul Kruger in the South African Republic proved the democratic illegitimacy of colonisation and the impunity it brought. President Kruger had strained a relationship

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10 Jallow "The Case for African Leadership Studies and Leadership in Colonial Africa" 2-4

11 See Menski *Comparative Law in a Global Context* 482 for a commentary on Maathai's research.

12 In this context, the Ndebele refers to 'the people of Mzilikazi' who fled from King Shaka of the Zulu and settled in modern day Zimbabwe. For an account of the history of the Ndebele kingdom and its migration to Zimbabwe, see Rasmussen *Migrant Kingdom*.

13 Ndlovu 2008 *SAH* 375.

14 Interestingly, the maxim 'the King can do no wrong' existed in British discourse for many centuries - see Turpin and Tomkins *British Government and the Constitution* 707.

15 Mandela *Part of My Soul Went With Him* 53, quoted by Ayittey 2010 *Soc Res* 1186.

with the judiciary, subverted the constitution and lacked accountability.[16] The President was 'captured' by businesspeople and was criticised for corruption and patronage. One Hugo Nellmapius captured President Kruger and embroiled the President in a web of corruption and clandestine state contracts, often characterised by favours to friends and family members.

> By the beginning of the 1890s it was an open secret among businessmen that a third *Volksraad* existed, a fraternity of businessmen (including the rich, capitalist *uitlanders* of the Rand), government officials and *Volksraad* members prepared to provide or facilitate patronage for personal benefit. The *Volksraad* (whether the First or Second *Volksraad*) was, economically speaking, at the mercy of forces over which it had little control and which greatly emasculated any well-intentioned attempts at proper regulation and oversight.[17]

Although the literature does not show that the unprecedented levels of corruption, skewed democracy and 'state capture' experienced in the South African Republic manifested in the British colonies in South Africa, things changed with the establishment of the Union of South Africa. In 1909, the British Imperial Parliament enacted the *South Africa Act*,[18] an enactment which unified the four British colonies (Cape of Good Hope, Natal, the Orange Free State and the South African Republic).[19] The Act established a dual system of governance: a parliamentary democracy for whites and a dictatorship for Africans.[20] The statute entrusted the control and administration of Africans to the Governor-General in Council, and thus placed Africans under indirect colonial rule[21] administered by the executive.[22] Legislative supremacy transformed into executive authoritarianism.[23]

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16 Van der Merwe *Brown v Leyds* 342.

17 Van der Merwe *Brown v Leyds* 344.

18 *South Africa Act,* 1909.

19 The Orange Free State and the South African Republic were semi-autonomous but lost their independence after defeat by the British in the Second South African War which ended in 1902 – see chapter 8 in Davenport and Saunders *South Africa*. The Unification of the four British colonies in South Africa was negotiated at the Natal Convention in 1908. However, Africans were excluded from the proceedings, with the result that their needs and interests were not even considered – see Loveland *By Due Process of Law?* 103.

20 Meierhenrich *The Legacies of Law* 112.

21 De Vos and Freedman (eds) *South African Constitutional Law in Context* 10.

22 Currie and de Waal *The Bill of Rights Handbook* 2-3.

23 Venter "Parliamentary Sovereignty or Presidential Imperialism?" 95.

The abuse of parliamentary sovereignty and the political marginalisation of Africans enabled the rise of apartheid.[24] The apartheid system sought to keep Africans under the control of the white minority through a system of "codified repression"[25] and the exclusion of Africans from the formulation and enactment of legislation. The systematic marginalisation had far-reaching human rights implications.[26] The separate development agenda excluded Africans from political participation and suppressed them with draconian legislation.[27] Without the freedom to partake in democratic processes, Africans had no means for electoral accountability. Security statutes and other legislation criminalised association between Africans and restricted Africans to the 'locations' and the homelands.[28] The government also criminalised African political opposition with spurious charges of treason and subversion.[29] In the result, the apartheid regime created a police state in which Africans had no lawful means to question the government. The climate of fear and repression nurtured a breeding environment for embezzlement of state funds, corruption, nepotism and impunity - all in the name of state security.

In one of his watershed judgements on accountability, Mogoeng CJ remarked that the apartheid era institutionalised impunity.[30] The remarks confirm studies on "nepotism, ghosting, phoney contracts, bribery, fraud, kickbacks and greed"[31] in the apartheid government.[32] When the grand corruption came to light, the regime established judicial commissions to buy political time and to create impressions that it was tackling corruption.[33] Judge Pickard, who headed a commission into the Department of

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24 See Issacharoff *Fragile Democracies* 168 for a synopsis of the inadequacies of parliamentary sovereignty under the apartheid regime.

25 Moseneke *My Own Liberator* 209.

26 See *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 10 BCLR 968 (CC) para 208.

27 Some of the notorious apartheid enactments were the *Group Areas Act* 41 of 1950; *Suppression of Communism Act* 44 of 1950; *Separate Representation of Voters Act* 46 of 1951; *Reservation of Separate Amenities Act* 49 of 1953 and the *Public Safety Act* 61 of 1986.

28 See Dugard *Human Rights and the South African Legal Order* 102-104 for a criticism of the homeland policy and other so-called 'separate development' strategies employed by the regime.

29 See the discussion in Cameron *Justice* 14-16.

30 *Economic Freedom Fighters v Speaker of the National Assembly* 2016 5 BCLR 618 (CC) para 1 (hereinafter *Economic Freedom Fighters 1*).

31 Bauer "Public Sector Corruption and its Control in South Africa" 219.

32 For a synopsis of corruption in the apartheid regime, see in general, Van Vuuren "Apartheid Grand Corruption: Assessing the Scale of Crimes of Profit in South Africa from 1976 to 1994."

33 Some of the Commissions were the Commissions of Enquiry into Alleged Irregularities in the Former Department of Information (1978) and the commission of Enquiry into the Alleged Misappropriation of

Development Aid, reported that "theft, dishonesty, fraud, negligence, and unauthorised activities resulted in huge losses. It must certainly run to many millions, *if not billions*.[34] Similarly, the Van den Heever Commission, which investigated the Department of Education and Training, also reported fraud, kickbacks, bribery, nepotism and an astounding lack of accountability in the state procurement of books and video equipment.[35] However, the government did not act on the reports of the two Commissions. Ministers simply refused to take responsibility for massive corruption perpetrated in their departments.[36] With no political responsibility, it is not surprising that the elite nature of corruption became ingrained in politics and business. Perhaps the most serious looting of state assets and funds occurred when public office-bearers laundered and syphoned offshore trillions of Rands during an illicit procurement of weapons for the state.[37] In the result, the apartheid government teetered on the brink of bankruptcy.[38]

When apartheid ended, it left a template for corruption, nepotism, embezzlement and other forms of abuse of state resources and power. The turn of the 21st Century saw elevated levels of unlawful conduct involving the abuse of state money and property by public office-bearers in South Africa.[39] The Public Protector reported on improprieties and maladministration in state-owned entities, corruption and fraud in government procurement, and the 'state of capture'.[40] Despite several judgements on abuses of public power,[41] none of the high-profile persons alleged to have committed wrong-doing has

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Funds of the Lebowa Government Service (1989). See Van Vuuren "Apartheid Grand Corruption: Assessing the Scale of Crimes of Profit in South Africa from 1976 to 1994" 15 for a complete list.

34 Pickard Commission 1991 *Report of the Commission of Inquiry into the Department of Development Aid* 118 (emphasis added).

35 Bauer "Public Sector Corruption and its Control in South Africa" 225-227.

36 Bauer "Crime, Corruption and Democracy in South Africa" 59-60.

37 For a complete discussion, see Van Vuuren *Apartheid Guns and Money*.

38 Cameron *Justice* 14.

39 *South African Association of Personal Injury Lawyers v Heath* 2001 5 BCLR 77 (CC) para 3.

40 Some of the Public Protector's reports, curiously named, were *"Derailed"*, *"Docked Vessels"*; *"When Governance and Ethics Fail"* and *"Secure in Comfort."*

41 See *Economic Freedom Fighters I* in which the Court ordered former President Zuma to repay the state for funds unlawfully spent on non-security upgrades at his home; *Corruption Watch NPC v President of the Republic of South Africa; Nxasana v Corruption Watch NPC* 2018 10 BCLR 1179 (CC), in which the Court ordered the former National Director of Public Prosecutions (the NDPP hereinafter) Nxasana to repay about R10 million acquired in an unlawful 'golden handshake;' and *Democratic Alliance v Minister of Public Enterprises; Economic Freedom Fighters v Eskom Holdings Limited; Solidarity Trade Union v Molefe* [2018] ZAGPPHC 1 in which the court ordered Molefe, the former Group Chief Executive Officer of Eskom, to reimburse the state utility for an early retirement pension, initially calculated at R30 million, acquired when he was not eligible for any pension at all for his service of 15 months to Eskom.

been convicted. The lack of accountability dismays South Africans. Sachs J[42] expressed shock at the many failures of national leadership and the extensive involvement of public office-bearers in corruption. At the time of writing, the Commission of Inquiry into State Capture has unearthed astounding abuses of power and corruption in state entities. The government has also committed serious violations of human rights.[43] Undoubtedly, South Africa is in a crisis of accountability.

South Africans disagree on whether the government is less accountable than the apartheid regime.[44] Sensational phrases, such as 'worse than apartheid,'[45] feature prominently in the discourse. Factually, the irregularities in public procurement and several forms of fraud and corruption experienced under apartheid have unashamedly manifested in the democratic dispensation.[46] The government has a convenient scapegoat in the excesses of the apartheid regime, as it continues to blame apartheid for problems faced by South Africa.[47] In all fairness, one cannot reasonably ascribe contemporary corruption and fraud in the public sector to the apartheid regime. In the foregoing context, this thesis ascribes the historical lack of accountability to the weaknesses of illiberal constitutionalism under colonial and apartheid administrations. The thesis investigates the interplay between democratic accountability and constitutionalism towards a solution to the challenges of accountability. Although the Constitution of the Republic of South Africa, 1996 (the Constitution) is founded on accountability, responsiveness and openness,[48] the exacerbated levels of corruption, maladministration and financial impropriety are symptoms of partial compliance with the tenets of constitutionalism.

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42 Sachs *We, the People* 4.

43 See Suttner *Recovering Democracy in South Africa* 94; Price 2015 *Acta Juridica* 314.

44 See Lekalake "Post-1994 South Africa: Better than Apartheid but Few Gains in Socioeconomic Conditions" 2.

45 See Van Onselen 2018 https://www.huffingtonpost.co.za/gareth-van-onselen/is-sa-really-worse-now-than-under-apartheid_a_23358994/ for a short discussion.

46 President Mandela said "Little did we suspect that our own people, when they got a chance, would be as corrupt as the apartheid regime" - see Cerff "African Leadership Insights: The Role of Hope, Self-efficacy and Motivation to Lead" 135.

47 Cerff "African Leadership Insights: The Role of Hope, Self-efficacy and Motivation to Lead" 135.

48 Section 1(d) of the Constitution.

1.2 Central questions

The thesis seeks to answer the question whether full compliance with the tenets of constitutionalism can enhance democratic accountability in South Africa. The next chapters answer the following sub-questions:

- What is the nexus between democratic accountability and constitutionalism? (chapters 2).
- When, and why, did South Africa adopt constitutionalism; and how did South African constitutionalism develop? (chapter 3).
- What is the theoretical framework and legislative regime for electoral accountability in South Africa? (chapter 4).
- Why should the executive account to the National Assembly, and how does the National Assembly exercise oversight over the executive? How does the Public Protector ensure administrative accountability in South Africa? (chapter 5).
- Why, and how does the judiciary hold the executive and the legislature accountable? (chapter 6).
- What can South Africans learn from the crisis of accountability and this thesis on the enhancement of democratic accountability through constitutionalism? (chapter 7).

1.3 Aims and objectives

To ascertain whether full compliance with the tenets of constitutionalism can enhance democratic accountability in South Africa, the thesis has the following objectives:

- In relation to the nexus between democratic accountability and constitutionalism (chapter 2):
    a. Examine the conceptual challenges of democratic accountability.
    b. Discuss the tenets of democratic accountability in constitutional theory.
    c. Analyse the theoretical justifications for democratic accountability.
    d. Discuss theoretical perspectives on constitutionalism.

e. Connect constitutionalism with democratic accountability.

- In relation to the historical development of constitutionalism in South Africa (chapter 3):
    a. Trace the inception of constitutionalism into South Africa.
    b. Examine African aspirations for liberal constitutionalism.
    c. Discuss the transition to transformative constitutionalism, its democratic legitimacy and the constitutional vision for accountable government in contemporary South Africa.
- Concerning electoral accountability (chapter 4):
    a. Describe the nexus between elections and electoral accountability.
    b. Discuss theories and elements of electoral accountability.
    c. Examine the constitutional and legislative regime which regulates electoral accountability.
    d. Discuss political parties as conduits for electoral accountability.
    e. Examine the influence of public and private funding of political parties on electoral accountability.
- On executive accountability, parliamentary oversight and administrative accountability (chapter 5):
    a. Discuss theoretical perspectives on executive accountability.
    b. Examine parliamentary processes for executive accountability.
    c. Discuss the accountability of the National Assembly for its oversight role and factors which impede its effectiveness
    d. Analyse administrative accountability by the Public Protector.
- On legal accountability (chapter 6):
    a. Examine constitutional and other legal rules which the judiciary uses as standards to hold the legislature and the executive accountable;
    b. Explore the democratic nature of legal accountability;

c. Discuss the democratic role of the judiciary, particularly the Constitutional Court, and its legitimacy.

d. Examine the limitations of legal accountability.

e. Analyse the extra-curial functions of judicial officers.

- On the conclusion and recommendations (chapter 7):

a. Draw conclusions from all the chapters and proffer recommendations for policy, legislative and constitutional development on how to enhance the compliance of the South African government with tenets of constitutionalism to ensure democratic accountability.

1.4 Hypotheses and assumptions

1.4.1 Hypotheses

The central hypothesis in this study is that compliance with the tenets of constitutionalism can enhance democratic accountability in South Africa. In addition to the central hypothesis, the following apply:

- The government must account to citizens because the government derives the mandate to govern from citizens through popular sovereignty;
- South Africa has been in a crisis of accountability for more than a Century;
- Illiberal constitutionalism caused the crises of accountability during colonial and apartheid epochs;
- The effectiveness of democratic accountability is directly proportional to government compliance with the tenets of constitutionalism.
- The conflation of executive and parliamentary roles is one of the reasons for weak parliamentary oversight over the executive.

1.4.2 Assumptions

The study is based on the following assumptions:

- Democratic accountability safeguards human rights and freedoms.

- Democratic accountability is partly an aid, and partly a prerequisite, for the legitimacy of the government.

- Liberal constitutionalism is inversely proportional to the rise of impunity and the weakening of oversight institutions.

- The founding constitutional values of accountable, responsive and open government, enshrined in section 1(d) of the Constitution, provide a blueprint for democratic accountability.

- The effectiveness of all mechanisms of accountability created by the Constitution is directly proportional to the compliance of the government with constitutional limits on its powers.

1.5 The contribution of the thesis to knowledge

The original contribution of the thesis to scholarship should be understood in the context that the thesis is not an attempt to shake the concrete foundations of legal knowledge. Notwithstanding, there are gaps in the discourse on accountability in South Africa. No scholar, as far as could be reasonably ascertained, no scholar has examined the historical development of South African constitutionalism from a perspective of democratic accountability. Most accounts of pre-1994 South Africa focus on the absurdity and injustices of colonisation and apartheid[49] and give scant attention to the impact thereof on democratic accountability. The historical analyses of the crisis of accountability, in this chapter and in chapter 3, show that the lack of accountability is not peculiar to the current constitutional dispensation but that the problem has existed for centuries due to selective application of the tenets of constitutionalism. The thesis proposes that the answer to the challenges of democratic accountability lies in full compliance with the tenets of constitutionalism. After a diligent search, no study was found in which full compliance with the tenets of constitutionalism was advanced as a solution to the lack of democratic accountability in contemporary South Africa. It is hoped that the contribution of the thesis to the different theoretical justifications for accountability will add to the scholarly recognition of democratic accountability as a core democratic and constitutional value in

[49] Ngcukaitobi *The Land is Ours* 5.

South Africa, at par with other values of an open and democratic society founded on human dignity, equality, freedom and justice.

In the light of divergent academic propositions on the correct source and motives for the adoption of liberal constitutionalism in South Africa, the thesis shows that Africans have always wanted to ensure accountable government through constitutionalism.[50] Given the political implications on the research methodology,[51] the thesis brings out the law and a theoretical contribution from political processes such as elections, voter choices and coalitions of political parties from the perspective that political processes are grounded in law, as prescribed by the Constitution and electoral legislation. The contribution of the thesis in this regard is anchored on the view that politics shape the law; determine government commitment to the protection of human rights and the rule of law; economic performance and social stability. Regardless of affiliation and attitude towards politics, one cannot deny that politics affects all aspects of society, hence the need to flesh out the law with hopes that the contribution will lead to further debate and legal reform for the improvement of accountability.

1.6 Research methodology

1.6.1 Doctrinal legal research

The thesis is based on doctrinal research. Hutchinson and Duncan view doctrinal research "is the core legal research method."[52] The method entails the analysis and interpretation of legal sources which encompass the Constitution, legislation, case law and academic writings. The thesis is not a comparative study because South Africa has too many challenges on democratic accountability. Hence, a comparative study would make the thesis unnecessarily voluminous and cumbersome to all persons involved. Notwithstanding, the thesis uses materials gleaned from other jurisdictions for descriptive purposes and to plug knowledge gaps. The use of foreign material is necessary for four

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50 Whereas Venter 2010 *SAJHR* 45-65 refers to the adoption of liberal democracy as an unintended consequence of 'constitution-writing propelled by the winds of globalisation,' and whereas Klug *Constituting Democracy* 1-2 views the transition from apartheid as one of many constructions of democratic constitutional orders through legal transplants at the end of 20th Century, Ngcukaitobi *The Land is Ours* (see generally) and Sachs *We, the People* 25, attributes the birth of constitutionalism to African intellectuals as far back as 1923 – see also section 3.4 of this thesis.

51 See section 1.6.3.

52 Hutchinson and Duncan 2012 *Deakin Law Review* 2.

main reasons. First, constitutional theory knows no geographic boundaries. Second, the current South African legal order was inspired by Western legal systems, among them Germany, Canada and the United States.[53] Third, section 39 of the Constitution gives foreign law (in the case of precedents, for example), a special place in constitutional interpretation. Lastly, tenets of constitutionalism and democratic accountability have so much in common between states such that it is impossible to produce a scholarly contribution of this magnitude without reference to Western literature. This thesis only utilises sources which add meaningfully to the achievement of the aims and objectives. Neither foreign concepts of little relevance nor inappropriate case law is used in this thesis.[54] However, the doctrinal legal research methodology presents challenges on the interplay between law and politics.

1.6.2 Limitations of doctrinal legal research

Since this thesis is a perspective on constitutional law, the political genesis of democracy, accountability and related concepts cause difficulties. Accountability and democracy are mostly political concepts without strong theoretical bases in constitutional law. Harlow argues that accountability "is not a central term of art within the discipline"[55] of constitutional theory. The fact that the rule of law, one of the pillars of constitutional theory, is also one of the themes in comparative politics, complicates matters.[56] To a political scientist, accountability involves political institutions and processes, such as political parties, electoral systems, parliaments and civil society, which hold public officer-bearers accountable.[57] Fortunately, the challenge of politics in legal discourse is not unique to this thesis. A survey of the literature reveals that politics has confronted legal scholars for centuries. One is implored to bear in mind that although the thesis may touch on issues which sound political (such as intra-party democracy),

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53 Davis 2003 *ICON* 187; Sarkin 1998 *Journal of Constitutional Law* 181.

54 In *Du Plessis v De Klerk* 1996 5 BCLR 658 (CC) para 147, Kriegler J was sceptical of comparative jurisprudence and refused to consider the position in the United States, Canada and Germany because he had "enough difficulty with our Constitution not to want to become embroiled in the intricacies" of a foreign doctrine.

55 Harlow "Accountability and Constitutional Law" 195.

56 See Lane *The Principal-Agent Perspective* xiv.

57 Chirwa and Nijzink "Accountable Government in Africa: Introduction" 3.

> The emphasis is upon the law, and not politics. No attempt is made to describe or to examine the political structure except in so as far as it impinges upon the legal process.[58]

Whereas democratic accountability encompasses elements of constitutional law, politics and public administration,[59] there is a link between accountability and the discourse on constitutionalism.[60] Given the interplay of the several disciplines, the approach to democratic accountability in this thesis is understood in the light that one cannot convincingly argue that the law is completely isolated from politics.[61] The law itself is political.[62] Institutions which enforce the law – including the courts – are political because they are part of the "larger framework of government and representative democracy."[63] There is also a connection "between public, political activity and the generation of constitutional meaning."[64] To some extent, political institutions, like Parliament, enforce executive accountability through political processes prescribed by the law.[65] The law regulates political processes for the election and removal of elected public office-bearers.[66] Elections complement democracy,[67] hence the need for an analysis of electoral democracy as a means of accountability. The thesis proves that the intertwined relationship between law and politics is the central theme in electoral, legislative, executive and legal accountability.

1.6.3 Caveats

Notwithstanding the reality of the multi-disciplinary linkage identified in the thesis, the overlap should not be understood as utilisation of political science methods, subjective political commentary and other tools (which are foreign to legal scholarship) to resolve the research question. Such tools should, in the present context, be treated as no more than ancillary aids. In this light, the arguments raised in this thesis should not be taken as ideological stances on political issues. It is for political scientists, not legal scholars, to contribute to political discourse. Whereas it is common cause that legal scholarship

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58 Dugard *Human Rights and the South African Legal Order* 3.
59 Mulgan *Holding Power to Account* 1.
60 Chirwa and Nijzink "Accountable Government in Africa: Introduction" 3.
61 See Langa 2006 *Stell L Rev* 356-357 on the relationship between law and politics.
62 Fowkes 2015 *Acta Juridica* 78.
63 Gauja *Political Parties and Elections* 6.
64 Fowkes 2015 *Acta Juridica* 78-79.
65 See chapter 5 of this thesis on constitutionally prescribed processes available to Parliament to enforce accountability in the executive.
66 Gauja *Political Parties and Elections* 6.
67 Adar, Hamdok and Rukambe "Multiparty Electoral Trends in Africa in 2004: Introduction" 3.

requires objective observation and analysis, the caveat serves to eliminate potential impressions of prejudice (no matter how remote) and other connotations that the candidate uses the thesis to pursue an agenda which is not relevant to the advancement of legal knowledge.

The thesis is not an encyclopaedia of all issues on democratic accountability and constitutionalism. The suggestions for further research at the end of the thesis show that there is room for further contribution to legal scholarship, specifically on other forms of accountability which do not fall within the category of 'democratic accountability'. Judicial accountability, the role of the Auditor-General in enabling oversight, and the place of the criminal justice system in the pursuit of accountability fall outside the purview of the thesis. Everything which is not mentioned in this thesis is omitted not by oversight but by design. The thesis is confined to the analysis of issues and principles which contribute directly to answering the research question. Importantly, the thesis is based on democratic accountability in the post-1993 South Africa, with a special focus on contemporary developments on democracy, accountability and constitutionalism. As such, the historical discussions in this chapter and in the third chapter should be understood as no more than essential backgrounds which provide vital insights into the constitutional and legislative regime which governs the different aspects of democratic accountability and constitutionalism in contemporary South Africa. The historical analyses are informative and for the most part, provide useful angles to view current problems on accountability.

1.7 The chapters in brief

Chapter 2: The nexus between democratic accountability and constitutionalism

The second chapter examines the theoretical framework of democratic accountability in constitutionalism. The first theme of the chapter analyses the conceptual challenges of the concept of democratic accountability. The second theme advances theoretical justifications for accountability, while the third theme presents constitutionalism as a means of accountability. The fourth theme links constitutionalism with popular sovereignty. The last theme discusses the tenets of accountability in constitutionalism.

Chapter 3: The inception and development of constitutionalism in South Africa

Since constitutionalism is not a concept of African origin, chapter 3 traces the inception and development of constitutionalism in South Africa. The chapter covers illiberal constitutionalism from the Union of South Africa to the apartheid regime. Also, the chapter discusses the conception of liberal constitutionalism, as a means of accountability, by African intellectuals. Lastly, the chapter focusses on the transition to transformative constitutionalism with an analysis of the transition, its democratic legitimacy and the constitutional vision for accountable, responsive and open government.

Chapter 4: Electoral accountability

The fourth chapter analyses electoral and legislative accountability. The first theme of the chapter examines electoral accountability from a perspective of universal democratic theory. The theme analyses the nexus between voting and electoral accountability and advances two theories on the function of elections. Also, the theme analyses political parties as conduits for electoral accountability. The last part of the first theme discusses the influence of public and private funding of political parties on electoral accountability. The second theme examines the elements of electoral accountability in South Africa, which include proportional representation and multiparty democracy. The second theme also analyses the constitutional and legislative framework for the exercise of the franchise in South Africa.

Chapter 5: Executive accountability and parliamentary oversight

The fifth chapter examines executive accountability, parliamentary oversight and administrative accountability from the perspective of representative democracy and popular sovereignty. The first theme of the chapter analyses executive accountability. The second theme discusses legislative oversight over the executive by examining parliamentary oversight in context, the powers of the National Assembly, areas of legislative oversight and parliamentary processes for executive accountability. The third theme analyses the institutional accountability of the National Assembly for its oversight role and the individual accountability of members of the legislature. The fourth theme looks at public participation in parliamentary processes and several factors which affect

parliamentary effectiveness in ensuring an accountable executive. The last theme discusses administrative accountability through the Public Protector.

Chapter 6: Legal accountability

The sixth chapter examines legal accountability through an evaluation of constitutional and other legal rules which the judiciary uses as standards to hold the legislature and the executive accountable. The chapter also explores the democratic nature and legitimacy of legal accountability. In addition, the chapter discusses the democratic role of the judiciary, particularly the Constitutional Court, and limitations of legal accountability. Lastly, the chapter analyses the extra-curial functions of accountability.

Chapter 7: Conclusion and recommendations

The last chapter wraps up the thesis with a summary and a presentation of the major conclusions. The chapter also proffers recommendations for constitutional and statutory reforms to enhance the democratic accountability of the government.

1.8 Conclusion

In short, this study examines the thesis that compliance with the tenets of constitutionalism can enhance the democratic accountability of the South African government. The study is based on doctrinal research. This chapter shows that the crisis of accountability is more than a century-old and that colonisation and apartheid regimes perverted and destroyed all that was good in African societies, as far as good governance and accountability were concerned. The different pre-1994 periods in South African history were phases of impunity punctuated with corruption and other abuses of public power. However, current reports of the Public Protector and court decisions on corruption in South Africa paint a gloomy picture on accountability. One wonders whether institutions of accountability are strong enough to halt the deterioration of accountability. The following chapter seeks to determine whether there is a theoretical basis for citizens to demand accountability from the government.

Chapter 2 The Nexus Between Democratic Accountability and Constitutionalism

2.1 Introduction

Despite the topicality of the discourse on accountability,[1] the term democratic accountability presents several conceptual challenges.[2] The term is both elusive and amorphous.[3] The difficulty stems from the lexical meaning of the root term, accountability,[4] which originated from book-keeping and financial accounting.[5] Accountability is an abridged version of the phrase democratic accountability.[6] For expediency, accountability is used in this chapter and elsewhere in the thesis interchangeably with the term democratic accountability, unless expressly stated otherwise. Since scholars have begun to question the correctness and relevance of some core concepts in constitutional theory,[7] the need to discuss principles such as democracy and popular sovereignty, which justify the need for democratic accountability in this thesis, is compelling. In addition, this chapter examines the principal-agent theory, constitutional democracy and government legitimacy as justifications for accountability. Arguably, the theoretical constructions of these concepts have not outlived their relevance and that they are still much applicable in South Africa.

Given the broad and theoretical nature of accountability, this chapter analyses the framework for accountability and constitutionalism from a general perspective with reference to South African realities. Whereas constitutionalism is an umbrella term for

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1 See Goetz and Jenkins *Reinventing Accountability* 1. Several South African precedents affirm the topicality of the discourse on accountability. See in general, *Democratic Alliance v President of the Republic of South Africa; Economic Freedom Fighters v State Attorney* [2019] 1 All SA 681 (GP) (hereinafter *Democratic Alliance v President of RSA*); *Economic Freedom Fighters v Speaker of the National Assembly* 2018 3 BCLR 259 (CC); *Corruption Watch NPC v President of the Republic of South Africa; Nxasana v Corruption Watch NPC* 2018 10 BCLR 1179 (CC) (hereinafter *Nxasana*)

2 Pelizzo and Stapenhurst *Government Accountability and Legislative Oversight* 1; Flinders *The Politics of Accountability in Modern States* 11.

3 Flinders *The Politics of Accountability in Modern States* 11; Pelizzo and Stapenhurst *Government Accountability and Legislative Oversight* 1.

4 See Hood "Accountability and Blame-Avoidance" 603 on how human ingenuity has attached several adjectives to the term accountability.

5 Bovens, Schillemans and Goodin "Public Accountability" 182.

6 Goetz and Jenkins *Reinventing Accountability* 11.

7 Venter *Constitutionalism and Religion* 190-191 calls "for the doctrinal liberation of tired constitutional artefacts." See Venter 2017 *SAJHR* 72-96 for some of the impugned constitutional concepts and theories.

constitutional law concepts which limit government powers for the protection of citizens,[8] most scholars do not treat accountability as a central theme of constitutional theory.[9] This chapter examines the tenets of accountability in constitutionalism to overcome conceptual difficulties. The perspectives on constitutionalism discussed in this chapter show that when properly implemented, constitutionalism can provide effective mechanisms for an accountable government.

2.2 Conceptual challenges of accountability

Accountability refers to the liability of public office-bearers to explain and justify the discharge of their obligations.[10] In several languages, however, the term accountability does not readily translate into its democratic and performance dimensions as in English.[11] Instead, the translated term merely touches on unrelated and narrow "concept[s] of financial control and reconciliation of budget expenditures and auditing."[12] Scholars offer several views on democratic accountability. Turpin and Tomkins[13] define democratic accountability as institutions and procedures, found in democracy, by which citizens keep public office-bearers in check and require them to explain and justify their conduct in public administration. In line with this definition, Pelizzo and Stapenhurst[14] argue that accountability arises from the relationship between an individual and an institution which subjects the functions and performance of the individual to oversight by the institution. When exercising an accountability role, an institution may require the individual to justify his/her conduct. Olsen[15] argues that the political and non-political participation of citizens in governance provides the foundation for accountability.[16] Goetz and Jenkins employ five definitional questions to describe accountability:

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8 Henkin "A New Birth of Constitutionalism: Genetic Influences and Genetic Defects" 41-42.

9 Harlow "Accountability and Constitutional Law" 195.

10 Normanton "Public Accountability and Audit: A Reconnaissance" 311.

11 Harlow "Accountability and Constitutional Law" 195.

12 Pelizzo and Stapenhurst *Government Accountability and Legislative Oversight* 1-2; Bovens, Schillemans and Goodin "Public Accountability" 182.

13 Turpin and Tomkins *British Government and the Constitution* 132.

14 Pelizzo and Stapenhurst *Government Accountability and Legislative Oversight* 2.

15 Olsen *Democratic Accountability, Political Order, and Change* 1.

16 See Damgaard and Lewis "Accountability and Citizen Participation" 259 on the necessity of public participation in governance. The scholars argue that public participation enhances responsiveness of the government and improves the accuracy and appropriateness of government policies. To them, public participation entails the education of citizens on government policies through "involvement,

1. *Who* is seeking accountability?
2. *From* whom (or what) is accountability sought?
3. *Where* (in which forums and over what extent of geographic coverage) is accountability being sought?
4. *How* (through what means) are the powerful being held to account?
5. *For what* (which actions, and against which norms) is accountability being sought?[17]

Callamard also uses five definitional questions to construct the meaning of accountability:

> Who is accountable? 2) To whom? 3) For what? 4) How (mechanisms of reporting)? and 5) For which consequences?[18]

Callamard answers these questions and submits that elected public office-bearers, in general, are accountable to citizens by observing the laws and the constitution of the state and through the delivery of policies which are in the public interest. Callamard says citizens hold elected persons accountable through elections, legal processes and scrutiny by parliamentary representatives, the public, civil society and the media. Callamard concludes that there are legal (criminal trials, for example) and political (removal from office through elections) consequences for failure to account.[19] In the context of South Africa, the court captured the need for accountability and the consequences for failure to account as follows:

> It is in the public interest that charges relating to the abuse of public office – corruption and fraud – are prosecuted to ensure public accountability, the promotion of good governance, the protection of the rule of law and the protection and advancement of the rights enshrined in the Bill of Rights.[20]

An expanded and direct role of ordinary citizens and their representatives in accountability emerges from the above academic and curial observations. The operational definitions of accountability imply both preventive and corrective measures. Accountability efforts expose abuses of power and sanction unreasonable, illegitimate, prejudicial and improper exercise of public power.[21] Accountability mechanisms prevent unacceptable and *ultra*

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advice, collaboration and joint ownership." In these ways, citizens receive the information, ask questions, make judgments and define and apply the consequences.

17 Goetz and Jenkins *Reinventing Accountability* 3-4. Mulgan *Holding Power to Account* 22-23 also uses five definitional questions.

18 Callamard 2010 *Soc Res* 1213.

19 Callamard 2010 *Soc Res* 1213.

20 *Democratic Alliance v President of RSA* para 69.

21 Grant and Keohane 2005 *Am Political Sci Rev* 29.

vires conduct such as corruption, nepotism and abuse of state resources.[22] Accountability ensures that office-bearers act in the interests of citizens, whom they represent, not in their self-interests.[23] In a nutshell, the aims of accountability are:

- *Control* of abuse, corruption and misuse of public power;
- *Assurance* that public resources are being used in accordance with publicly stated aims and that public service values (impartiality, equality, etc.) are being adhered to;
- *Improvement* of the efficiency and effectiveness of public policies;
- The enhancement of the *legitimacy* of government.[24]

Accountability is not a new concept in democratic governance.[25] Whereas constitutions have existed for centuries to limit government powers in the interests of citizens, scholars did not traditionally treat accountability as a central aspect of constitutional theory, thus curtailing the understanding of accountability in constitutional law.[26] Over the years, several concepts in constitutional theory have limited government authority and ran parallel to democratic accountability.[27] The following section proposes and analyses five theoretical justifications for accountability. Whereas the theoretical justifications uniquely apply to representative, parliamentary and constitutional democracies, they overlap and apply simultaneously in some instances.

2.3 Theoretical justifications for accountability

2.3.1 Democracy

2.3.1.1 Representative democracy

Some scholars find democracy challenging to define because democracy is not a straightforward concept.[28] Etymologically, the term democracy derived from the Greek work *demokratia* which literally means "people-power."[29] However, Barr, Baird and Rankin opine that the term democracy came from a combination of two Greek words –

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22 Chirwa and Nijzink "Accountable Government in Africa: Introduction" 4.

23 Pelizzo and Stapenhurst *Government Accountability and Legislative Oversight* 2. See also *Democratic Alliance v President of RSA* para 81.

24 Flinders *The Politics of Accountability in Modern States* 9.

25 Mulgan 2000 *Public Administration* 555.

26 Harlow "Accountability and Constitutional Law" 195.

27 Harlow "Accountability and Constitutional Law" 198-199.

28 Müller, Bergman and Strøm "Parliamentary Democracy: Promise and Problems" 3.

29 Cartledge "Democracy, Origins of: Contribution to a Debate" 162.

demos (which means 'the people') and *kratien* (which means to rule).[30] Canfora[31] says that the term *demokratia* was coined for politically factional reasons by the upper class in Greek society to describe the perceivably excessive government power at the hands of poor people who, in their views, should not have had any political influence. Notwithstanding the semantic and etymological differences advanced by scholars on democracy, there is an academic consensus that democracy is concerned with the participation of citizens in the establishment of their government.

According to Ostrom,[32] democracy refers to the political organisation of a state and the exercise of power through the making of decisions in which citizens participate.[33] Issacharoff adopts a similar view and accepts that democracy is "a system through which the majority [of citizens], either directly or through representative bodies, exercises decision-making political power."[34] His approach aligns with Müller, Bergman and Strøm[35] who identify representative democracy as the ideal and dominant form of democracy. Gibson and Gouw[36] identify these prerequisites for democracy: the establishment of credible institutions for citizens to exercise electoral choices; the institutional protection of the rights of minorities to contest political power; supportive non-governmental institutions (such as civil society and the media); the participation of citizens in self-government; representative legislative assemblies such as Parliament; formal institutions exercising executive powers; strong courts with powers of review and oversight; and active business persons and interest groups. For Bellamy,[37] democracy refers to the autonomy of citizens to choose and redefine the government within a political and legal environment founded on sovereignty, equality and rules.

The term democracy is elusive because states differ and experience unique political, economic and social realities.[38] In an age which lumps dictatorial regimes with liberal

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30 Barr, Baird and Rankin "The Introduction: American Democracy" 7.

31 Canfora *Democracy in Europe: A History of an Ideology* 22.

32 Ostrom *The Meaning of Democracy and the Vulnerability of Democracies* 44-45.

33 See also Warren "Accountability and Democracy" 39 for the argument that normatively, democracy entitles citizens of a state to proportional influence over the making of collective public decisions which affect them.

34 Issacharoff *Fragile Democracies* 11.

35 Müller, Bergman and Strøm "Parliamentary Democracy: Promise and Problems" 3.

36 Gibson and Gouws *Overcoming Intolerance in South Africa* 3

37 Bellamy *Political Constitutionalism* 90.

38 Koenane 2017 *African Journal of Public Affairs* 63.

democratic states under the umbrella of 'democracies,' the term democracy becomes even vaguer.[39] Some governments claim (both genuinely and deceitfully) that they are democracies to justify their actions.[40] It is easy for a regime to claim majority rule and that it is based on the will of citizens (conferred through regular elections in which several political parties participate for the power to govern).[41] Claims of democracy emanate from perceptions of public participation in the formation of governments and the running of state affairs. However, the participation of citizens in public decision-making through representatives poses complex challenges about the workings of democratic representation.[42] The normative conceptual challenges in this regard flow from the supposed principal-agent relationship between citizens and the government.

2.3.1.2 The principal-agent theory

Several scholars argue that the relationship between citizens and the government is one of principal and agent[43] based on the 'delegation' of authority from citizens – (the holders of power) to the government (the medium through which citizens exercise their power).[44] Citizens 'delegate'[45] their powers to the government because reasons of scale prevent the participation of all citizens in the day-to-day making of government decisions.[46] Therefore, citizens elect representatives to participate in government decision-making on their behalf.[47] According to Olsen, "power is delegated by the many to the few in the interests of governability."[48] As an agent of citizens, the government undertakes decisions

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39 For a synopsis of the conceptual difficulties of the term democracy, among others, see Venter 2017 *SAJHR* 72-96.

40 See Mangu *Codicillus* 3.

41 Ostrom *The Meaning of Democracy and the Vulnerability of Democracies* 3.

42 See Brunell *Redistributing and Representation* 16.

43 See, for instance, Lane *The Principal-Agent Perspective* 1; Goetz and Jenkins *Reinventing Accountability* 9; Ostrom *The Meaning of Democracy and the Vulnerability of Democracies* xiii; Olsen *Democratic Accountability, Political Order, and Change* 4; Mulgan *Holding Power to Account* 8-9; Gailmard "Accountability and the Principal-Agent Theory" 90.

44 Olsen *Democratic Accountability, Political Order, and Change* 1; Murphy "Constitutions, Constitutionalism, and Democracy" 3.

45 See Goetz and Jenkins *Reinventing Accountability* 1; Olsen *Democratic Accountability, Political Order, and Change* 59; Mulgan *Holding Power to Account* 8 on the delegation of authority by citizens to the government. The use of the term 'delegate' and its derivatives in this thesis bears no resemblance to its meaning in administrative law.

46 *United Democratic Movement v Speaker of the National Assembly* 2017 8 BCLR 1061 (CC) para 3 (hereinafter *United Democratic Movement v Speaker*); Murphy "Constitutions, Constitutionalism, and Democracy" 3.

47 Van Wyk 2016 *Constitutional Court Review* 128.

48 Olsen *Democratic Accountability, Political Order, and Change* 1.

authorised by the principals and should only act in the best interests of citizens.[49] Mogoeng CJ observed that ideally, citizens give their power to representatives who have firm commitments to the values of accountability, responsiveness and openness.[50]

If one accepts that a relationship of principal and agent exists between citizens and the government, these questions arise: which mechanisms do citizens use for accountability? How can citizens ensure that the government exercises its powers diligently and reasonably? How can citizens keep the government within the bounds of its authority to prevent abuses of public power? What if there is a conflict between the interests of citizens and the government? The questions arise because of the vulnerability of public power to abuse and because accountability, in general, depends on the answerability and responsiveness of the government.[51] The questions become more complex when one considers that public participation in the formation and dissolution of governments through elections does not always reflect political realities due to the susceptibility of government power to manipulation and subversion by external factors.[52] Warren[53] argues that the principal-agent theory overburdens and oversimplifies accountability relationships with legally unjustifiable assumptions. Also, there is a challenge on the availability and effectiveness of democratic processes in states polarised along ethnic and tribal lines. Social divisions deprive minorities and marginalised citizens the democratic clout to influence government decisions.[54]

An understanding of the nexus between democracy and accountability requires an examination of the origins and development of democracy. The following synopses cover the origins of democracy in ancient Greece, the Magna Carta, the Enlightenment, and the French Revolution and beyond. The analyses also cover some of the origins of accountability and advance vital insights into the nature of democracy, in its *original form*, and how it has developed over centuries together with human rights and the rule of law.

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49 Grant and Keohane 2005 *Am Political Sci Rev* 31-32.

50 *United Democratic Movement v Speaker* para 3.

51 See Warren "Accountability and Democracy" 40-41.

52 Ostrom *The Meaning of Democracy and the Vulnerability of Democracies* 3. Warren "Accountability and Democracy" 40 notes that whereas in a democracy people 'own' power, elites make decisions, leaving the interests of citizens vulnerable.

53 Warren "Accountability and Democracy" 42.

54 See *S v Makwanyane* 1995 6 BCLR 665 (CC) para 88 (hereinafter *Makwanyane*).

Whereas accountability includes respect for democratic rights,[55] there is a necessity for a historical analysis because accountability is an indispensable part of every regime, including dictatorships.[56] The historical discussions serve to illustrate the origins of the principal-agent relationship which arises from democracy. The link is vital to the thesis because the development of state institutions of accountability historically progressed at the same pace with the growth of constitutionalism. However, the evolutions of accountability and democracy did not follow a systematic pattern due to unique political, economic and social factors.[57]

2.3.1.3 Democracy and accountability: a historical perspective

2.3.1.3.1 Athenian democracy

President Mandela once remarked that "Greece is the mother of democracy and South Africa is its youngest daughter."[58] The observation was an acknowledgement of the origins of democracy in Greece and the commitment of South Africa to democracy when Mandela came to power.[59] Democratic accountability originated in Greece, approximately in 508 BC when Cleisthenes established Athenian democracy to prevent tyranny and other abuses of public power.[60] Athenians had had bad experiences with dictatorships and detested tyranny so much that they replaced dictatorships with democracy.[61] The essential component of Athenian democracy was the collective exercise of public power by citizens through elections and direct participation in government decision-making.[62] As punishment, Athenians exiled and ostracised leaders who demonstrated propensities for tyranny.[63] Contemporary democracy differs from Athenian democracy through

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55 Goetz and Jenkins *Reinventing Accountability* 11.

56 Normanton "Public Accountability and Audit: A Reconnaissance" 312 argues that

> Officials in dictatorial and absolutist states are frequently even more strictly accountable that those in Western-type states with separation of powers. But they are naturally accountable within a disciplinary structure, and ultimately to the head of state; the pattern of their accountability is essentially simple -it is that of a servant to his lord. Such hierarchical accountability usually operates in secret.

57 Nash "Post-apartheid Accountability: The Transformation of a Political Era" 13.

58 Yeroulanos (ed) *A Dictionary of Classic Greek Quotations* ix.

59 See also Maphunye, Ledwaba and Kobjana *Journal of Public Administration* 161 who describe South Africa as a democracy.

60 Raaflaub "Introduction" 1.

61 Barr, Baird and Rankin "The Introduction: American Democracy" 7.

62 Aguilera-Barchet *A History of Western Public Law* 24.

63 Aguilera-Barchet *A History of Western Public Law* 25-26.

universal acceptance of the inherent equality of men and women;[64] provisions for separation of powers (as opposed to the direct participation of citizens in government decision-making); protection of both common and individual interests; and the entrenchment and justiciability of human rights.[65] The differences emanate from the possibility that intense scholarly focus on Greek democracy in the last century, in which better accounts of Athenian democracy appeared, reflect a 20th Century outlook of an ideal democracy.[66]

Despite differences between Athenian and modern democracy, genuine democracies have Athenian elements. Tenets of Athenian democracy remain around the globe because humanity has not developed a system of government that champions freedom and public participation better than democracy.[67] Notwithstanding its weaknesses and questions about its legitimacy,[68] democracy has emerged as the better and more preferred system of government.[69] The resilience of liberal democracies against the test of time, as compared to the collapse of Nazi, fascist and communist regimes of the 20th Century, shows that liberal democracy remains attractive to all states which subscribe to constitutionalism. Leher affirms "the universalization of Western liberal democracy as the final form of human government,"[70] and predicts that in the next centuries, liberal democracy will govern the world. The strength of communism in China and other states does not distract from the benefits of a government in which citizens freely choose their representatives and have justiciable human rights to protect them from the abuses of state power. South Africa anchors democracy on constitutionally protected mechanisms which enshrine political rights to ensure accountability, responsiveness and openness of

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64 See Barr, Baird and Rankin "The Introduction: American Democracy" 7 on inequalities between men and women in Athens.

65 For a synopsis of the contrasts between Athenian and contemporary democracies, see Cartledge "Democracy, Origins of: Contribution to a Debate" 156-157.

66 Sealey *The Athenian Republic* 91-90.

67 Fukuyama *The End of History and the Last Man* xi argues that liberal democracy is the "endpoint of mankind's ideological evolution," the "final form of human government."

68 Venter *Constitutionalism and Religion* 191 criticises liberal democracy because it

> ...does not indicate any single moral choice regarding the source of state authority, although some voices of liberalism tend to claim it for the cause of the supremacy of the individual. In fact its two components 'liberal' and 'democracy' can be perceived to be opposites, the first emphasizing the predominance of the free individual, the second the demand that the will of the collective majority should prevail.

69 Fukuyama *The End of History and the Last Man* xi.

70 Leher *Dignity and Human Rights* 5.

the government to citizens.[71] Section 1 of the Constitution of the Republic of South Africa, 1996 (the Constitution) affirms the centrality of democracy in the legal order. The section states that South Africa is a democratic state founded on human rights and freedoms.

2.3.1.3.2 The Magna Carta and English democracy

In the 13th Century, English barons confronted King John Lackland and coerced him to set his seal on the 'Articles of barons,' a document which declared the rights of all free men in England. The document, referred to as the Great Charter at the time, is known as the Magna Carta.[72] The Magna Carta is one of the most cherished founding documents of the 'British constitution' and is the foundation for contemporary British constitutionalism. The Magna Carta was the first written instrument in the world to lay down principles which govern rulers and their subjects.[73] It was the first document in the history of English law and constitutional theory in which an absolute monarch committed, albeit under coercive circumstances, to limit his powers for the respect of due process and the protection of human rights.[74] The most important provision of the Magna Carta was the proclamation that the king, as a maker of the law, was subject to the same law and obliged to act consistently with it. Blackstone[75] gave several examples of situations in which the monarch could not act unless authorised by the law and sanctioned by Parliament. The king could not banish citizens from England nor prevent them from leaving England. Also, the monarch could not legally deprive citizens of their property and access to courts of justice. Following the adoption of the Petition of Rights in 1628, the king could not levy taxes without the permission of Parliament.

The Magna Carta created a relative system of checks and balances to prevent infringements of the rights of the English.[76] The Great Charter replaced the sovereignty

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71 Section 1(d) of the Constitution.

72 Barr, Baird and Rankin "The Introduction: American Democracy" 11-12.

73 Frankenberg *Comparative Constitutional Studies* 21.

74 Frankenberg *Comparative Constitutional Studies* 38.

75 Prest (ed) *Blackstone Commentaries on the Laws of England I* 93-96.

76 In the centuries that followed the Magna Carta, the English adopted more important instruments. According to Prest (ed) *Blackstone Commentaries on the Laws of England I* 93, Blackstone described the *Habeas Corpus Act* of 1679 as the "second *magna carta,* and stable bulwark of our liberties."[76] The Act strengthened the powers of courts in the protection of freedom as it authorised the courts to decide on the lawfulness of detentions. In 1689, the English Parliament adopted a Bill of Rights to provide for freedom of speech and expression and the protection of citizens against cruel and degrading punishment – see Barr, Baird and Rankin "The Introduction: American Democracy" 8.

of English monarchs with the supremacy of the law.[77] The principles established by the Magna Carta have survived the test of time, spanning over centuries. Modern constitutions founded on constitutionalism, including the South African Constitution, entrench supremacy of law and human rights to limit the powers of the government over citizens. Interestingly, the drafters of the Magna Carta did not, and could not have, imagined the tremendous global influence of the Great Charter.[78] Although the successor to King John reaffirmed the Magna Carta twice,[79] and despite the considerable influence of the Great Charter in English political and legal affairs, there is no consensus on the influence of the Magna Carta on English democracy. Whereas in 2009 the UNESCO inscribed the Magna Carta in its Memory of the World Register as "the cornerstone of English liberty, law and democracy,"[80] Canfora argues that the Great Charter did not transform England into a true democracy and warns against the use of the Magna Carta to depict "England as the geometric centre and natural home of a perpetual freedom."[81] Notwithstanding, there is academic consensus that the ideals of democracy incorporated in the Magna Carta provided vital parts to the template of government reform and the introduction of democracy in many parts of the world.[82]

2.3.1.3.3 The Enlightenment, the French Revolution and beyond

The Enlightenment was both a period and a process of European philosophical transition in which prominent thinkers, including Baron de Montesquieu, Thomas Hobbes and John Locke, proposed several theories of government and the need for the protection of individual rights and freedoms. Pelizzo and Stapenhurst[83] argue that accountability and its origins in democracy arose from the social contract theory during the Enlightenment. However, Blackstone criticised the social contract theory, which was supposedly a "conscious accord between the people in the state of nature to establish a system of government," as misleading because, in the first instance, there was no such "historical

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77 In 1628, Sir Edward Coke proclaimed in Parliament that the law applied to all, including the King, because the "Magna Carta …will have no sovereign." – see Barr, Baird and Rankin "The Introduction: American Democracy" 12-13.

78 Church *King John* 1154.

79 Prest (ed) *Blackstone Commentaries on the Laws of England I* 23.

80 Church *King John and the Road to the Magna Carta* 6.

81 Canfora *Democracy in Europe: A History of an Ideology* 101.

82 Barr, Baird and Rankin "The Introduction: American Democracy" 8.

83 Pelizzo and Stapenhurst *Government Accountability and Legislative Oversight* 7.

state of nature."[84] In a contemporary analysis, Venter[85] also criticises the social contract theory as an untenable explanation for the formation of a modern government. Despite shortcomings of the social contract theory, the Enlightenment drove powerful ideas based on reason, rather than deference of citizens to authority.[86] The Enlightenment sought to emancipate citizens from despotism. Montesquieu proposed popular sovereignty and opined that the participation of citizens in the legislative process, through parliamentary representation, was a prerequisite for freedom and all rights.[87]

The thinkers of the Enlightenment were not mere utopians. They linked the prudent exercise of government power with real-life situations. Hence, they insisted on limitations to state authority, such as separation of powers and checks and balances, institutional accountability, the advancement of popular sovereignty and respect for the rule of law.[88] These central values of modern democratic government, combined with human rights, freedoms, democracy and justice, are products of the principles and legacies of the Enlightenment.[89] The Declaration of the Rights of the Man and of the Citizen, adopted in 1789 at the beginning of the French Revolution, was a practical implementation of the ideals of the Enlightenment. The Revolution established a link between taxpayers (citizens) and their elected representatives through the "doctrine of popular sovereignty over finance."[90] The revolutionaries reasoned that state funds belong to citizens and that the government was obliged to utilise fiscal resources prudently to advance the interests of citizens. Today, the French pride themselves for gifting the world with principles for the foundation of a state based on democracy, human rights and the supremacy of citizens over the government.[91] Whereas the Greek invented direct democracy, the French produced representative democracy.[92]

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84 Prest (ed) *Blackstone Commentaries on the Laws of England I* xxix, 42.
85 Venter *Constitutionalism and Religion* 181, 191, 194-195.
86 Fleischacker *What is Enlightenment?* 2.
87 Klug *Constituting Democracy* 8-9.
88 Bronner *Reclaiming the Enlightenment* 39.
89 Zafirovski *The Enlightenment and Its Effects on Modern Society* 2.
90 Normanton "Public Accountability and Audit: A Reconnaissance" 312.
91 Jellinek *The Declaration of the Rights of Man and of Citizens* 2.
92 See Edelstein *The French Revolution and the Birth of Electoral Democracy* 1.

The American Constitution is credited as the first modern constitution to entrench the ideals of the Enlightenment, accountability and respect for human rights.[93] Although the American Constitution is traditionally renowned as a monument for democratic governance and constitutionalism,[94] Justice Ginsburg of the US Supreme Court reportedly admitted that the South African Constitution is now the global model for all states which subscribe to constitutionalism and all the ideals of liberal democracy.[95] Ackerman J admires the Constitution and argues that the Constitution "represents the best from Europe and North America and from Africa."[96] The following section shows that at the centre of democracy and constitutionalism lies the notion of popular sovereignty, which also justifies the need for accountable government.

2.3.2 Popular sovereignty

Popular sovereignty is a key concept in both constitutional and political theory. The root term, sovereignty, ordinarily means supremacy and the highest degree of authority to demand obedience.[97] Popular sovereignty refers to the sovereignty of citizens over their government. However, scholars have not fully canvassed popular sovereignty.[98] Cynics argue that popular sovereignty is a fiction meant "to persuade the many to submit to the government of a few"[99] and that citizens are not the ultimate holders of public power.[100] The cynicism emanates from the paradox of constitutionalism which ascribes the generation of government powers from the consent of people who cannot directly exercise sovereignty but choose to delegate its exercise to a government.[101] Henkin offers a positive view of popular sovereignty and says that the locus of sovereignty is the people

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93 Venter 2017 *SAJHR* 81.

94 See Henkin "A New Birth of Constitutionalism: Genetic Influences and Genetic Defects" 42-43.

95 Ngcukaitobi *The Land is Ours* 1. Griffiths "Parliamentary Oversight of Defense in South Africa" 229 argues that the South African Constitution is "perhaps the world's most progressive constitution."

96 Ackerman *Human Dignity* 15.

97 Ostrom *The Meaning of Democracy and the Vulnerability of Democracies* 46; Bryce *Studies in History and Jurisprudence Vol II* 504.

98 Bourke "Introduction" 1; Venter *Constitutionalism and Religion* 181.

99 Morgan *Inventing the People* 60. See also the analysis by Chambers 2004 *Constellations* 154-156.

100 See Bryce *Studies in History and Jurisprudence Vol II* 509-510 on the difference between the sovereign in law and the factual sovereign.

101 See Loughlin and Walker "Introduction" 1 on the generation of government from the 'consent of the people'. See also Stremler "The Separation of Powers and Constitutional Scholarship" 34 on self-determination.

and that only the people can establish a constitution for their collective governance.[102] Henkin further argues that popular sovereignty goes together with the rule of law, constitutionalism and the democratic representation of citizens. These principles, viewed within the context of popular sovereignty, necessitate commitments to the limitation of government powers through several constitutional mechanisms, such as separation of powers, checks and balances, judicial review and oversight, and civilian control of state security.[103]

> Roughly speaking, we might define "sovereignty" as the possession of supreme (and possibly unlimited) authority over some domain, and "government" as those persons or bodies by means of which, or through whom, sovereignty is exercised.[104]

Generally, people are sovereign under the law when they have exercised the prerogative to establish a constitution for their collective governance.[105] The term 'We, the People of South Africa,' in the preamble to the Constitution, proclaims popular sovereignty and projects the Constitution as a product of national consensus. However, the Constitution does not clearly articulate the nature and import of popular sovereignty. The founding provisions in section 1 of the Constitution merely state that South Africa is a sovereign and democratic state.[106] The Constitution of Kenya, 2010 (the Kenyan Constitution), of all constitutions (perhaps) contains the most comprehensive articulation of the notion of popular sovereignty. The Kenyan Constitution stipulates that "sovereign power belongs to the people of Kenya"[107] and that the state must exercise the sovereignty of the people of Kenya within the parameters of the Kenyan Constitution. The Kenyan Constitution further provides that Kenyans may exercise their sovereignty directly and indirectly through political and non-political representation in Parliament, the executive and adjudicative forums such as the judiciary.[108] As such, public office-bearers in Kenya, whether elected or appointed, represent the citizens of Kenya in line with democratic dictates of representation. Provisions of the Kenyan Constitution on sovereignty affirm

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102 Henkin "A New Birth of Constitutionalism: Genetic Influences and Genetic Defects" 41.

103 Henkin "A New Birth of Constitutionalism: Genetic Influences and Genetic Defects" 41.

104 Waluchow *A Common Law Theory of Judicial Review* 25.

105 Chambers 2004 *Constellations* 154.

106 Perhaps section 41 of the Constitution articulates the sovereignty of the people of South Africa and the ensuing obligation of the government to account. Whereas section 41(c) stipulates that the national, provisional and local spheres of government must "provide effective, transparent, accountable and coherent government for the Republic as a whole," section 41(d) says that the three spheres must be loyal to the people of South Africa and the Constitution.

107 Article (1) the Kenyan Constitution.

108 Article 1(2)-(3).

the understanding in constitutional theory that citizens exercise their sovereignty through constitutional institutions and processes which, in addition to giving governments public powers, divide and constrain state authority to protect citizens.

The preamble to the South African Constitution does not refer to aspirations for accountable, responsive and transparent government alluded to in the founding provisions in section 1(d) of the Constitution. There is no issue with this omission because the preamble informs the founding provisions but is not affected by the founding provisions.[109] The founding values underlie the Constitution and are symbolically important.[110] Constitutional supremacy; the rule of law; human rights and freedoms; representative democracy; and good governance are the founding values of the Constitution.[111] These values sustain constitutionalism through accountable, responsive and open governance.[112] In *Nyathi v MEC for the Gauteng Department of Health*,[113] the Court said that founding values strengthen and sustain the constitutional order and that there is a need for everyone, particularly public officer-bearers, to scrupulously observe them. The Court also warned that South Africa would face a constitutional crisis if the government does not honour the founding provisions.[114]

2.3.3 Parliamentary sovereignty

Parliamentary sovereignty (parliamentary/legislative supremacy) flows from democracy under a majoritarian system in which the (perceived) will of citizens determines the government. There are three principal features of parliamentary sovereignty: unfettered legislative autonomy, prohibitions against judicial review of legislation and the authority of Parliament to extend its dominion.[115] Historically, under the Westminster system in

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109 Fowkes "Founding Provisions" 8.

110 Cameron *Justice* 177.

111 Section 1 of the Constitution.

112 Section 1(d) of the Constitution.

113 *Nyathi v MEC for the Gauteng Department of Health* 2008 5 SA 94 (CC) para 80.

114 *Nyathi v MEC for the Gauteng Department of Health* para 80. Also, the founding provisions and the preamble do not "bestow discrete and enforceable rights, even if they allude to rights stipulated elsewhere in the Constitution – see *Rail Commuters Action v Transnet Ltd t/a Metrorail* 2005 4 BCLR 301 (CC) para 21; Devenish *The South African Constitution* 27-29; Fowkes "Founding Provisions" 3. Thus, parties to legal disputes cannot rely on the rights mentioned in the preamble or the founding provisions but should base their arguments on the Bill of Rights.

115 Dicey *Introduction to the Study of the Law of the Constitution* xxxiv-xxxv; Gyorfi *Against the New Constitutionalism* 1-4.

which the monarch, the House of Lords (the highest court) and the House of Commons (the lawmaker) constituted the English 'Parliament,'[116] the Legislature had supreme authority. Parliament possessed "supreme, irresistible, absolute, uncontrolled authority."[117] As such, sovereignty did not reside in citizens but in their representatives.[118] Although the doctrine of parliamentary sovereignty ignored the people who first established the state,[119] Blackstone argues that parliamentary sovereignty was desirable because it promoted democracy and prevented legislative tyranny.[120] Locke unconvincingly argues that sovereignty could revert to citizens in the event of a constitutional crisis.[121] Henkin expresses the correct view with the argument that even in times of national emergencies, such as constitutional crises, "the people remain sovereign."[122] Members of a supreme Parliament represent the interests of society, not just their constituencies. As such, they do not need to consult citizens or seek their guidance during the legislative process.[123] A supreme Parliament can legislate as it deems fit. According to Sir Edward Coke, a supreme Parliament has

> …sovereign and uncontrollable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical, or temporal, civil, military, maritime, or criminal: this being the place where that *despotic power, which must in all governments reside somewhere.*[124]

In other words, a sovereign Parliament can do whatever is "not naturally impossible."[125] Citizens have no recourse against the substantive validity of legislation.[126]

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116 Dicey *Introduction to the Study of the Law of the Constitution* 39.

117 Prest (ed) *Blackstone Commentaries on the Laws of England I* xxx. The proposition that in jurisdictions with a constitute Parliament, like England, sovereignty resided in the three combined branches in Parliament (the Queen, the House of Lords and the House of Commons) can be contrasted with the proposition by Sir Edward Coke that the monarch had irresistible authority and that sovereignty resided in the monarch - Baker (ed) *Sir Edward Coke and the Reformation of the Laws* 14, 61.

118 Currie and de Waal *The Bill of Rights Handbook* 2. VandeWetering (ed) *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century* 9.

119 Lieberman *The Province of Legislation Determined* 51-52.

120 Prest (ed) *Blackstone Commentaries on the Laws of England I* 103.

121 Prest (ed) *Blackstone Commentaries on the Laws of England I* xxxix, 42.

122 Henkin "A New Birth of Constitutionalism: Genetic Influences and Genetic Defects" 41.

123 Bryce *Studies in History and Jurisprudence Vol II* 510; Prest (ed) *Blackstone Commentaries on the Laws of England I* xxx.

124 Prest (ed) *Blackstone Commentaries on the Laws of England I* 107 (emphasis added); Dicey *Introduction to the Study of the Law of the Constitution* 39.

125 See Prest (ed) *Blackstone Commentaries on the Laws of England I* 107.

126 See *British Railways Board v Pickin* [1974] AC 765 at 782.

Notwithstanding, sovereign parliaments are not unaccountable.[127] Parliamentary sovereignty emanates from the theory of majoritarian democracy in which the will of citizens determines government policy and the enactment of the law.[128] A sovereign Parliament cannot legislate against the will of citizens, for that would be politically unsustainable.[129] Parliamentary sovereignty circumscribes the enactment of legislation to "general principles of justice and sound policy."[130]

However, the forces which direct the development of government policies and the enactment of legislation do not reflect the popular will because ordinary citizens, no matter how huge their number is, do not constitute the sovereign.[131] As such, political and electoral choices do not constitute a sufficient benchmark of "the will of the people."[132] Apartheid South Africa showed that political power does not always reside in the majority of citizens but on a select few who control the state.[133] States with perverted forms of parliamentary supremacy, like apartheid South Africa, tend to abuse unfettered legislative powers to suppress the will of citizens and to curtail mechanisms of accountability available to citizens. Parliamentary sovereignty, although justifying accountability to a limited extent, is prone to abuse and compromise for political expediency.[134] Thus, South Africa replaced parliamentary sovereignty with constitutional democracy.

2.3.4 Constitutional democracy

Constitutional democracies emerged as alternatives to despotism and parliamentary sovereignty.[135] The USA, established in the 18th Century, is the oldest constitutional

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127 Humby, Kotze and du Plessis *Introduction to Law and Legal Skills in South Africa* 25.

128 Madala 2000 *NCJ Int'l L & Com Reg* 756.

129 VandeWetering (ed) *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century* 40-41.

130 Lieberman *The Province of Legislation Determined* 51.

131 Morgan *Inventing the People* 60.

132 Murphy "Constitutions, Constitutionalism, and Democracy" 4.

133 See Ellis "Elections in Africa in Historical Context" 37 for the argument that the tenants of power during the apartheid era were not representatives of the popular will. See also Van Vuuren "Apartheid Grand Corruption: Assessing the Scale of Crimes of Profit in South Africa from 1976 to 1994" 26-28 for a discussion of how relatively few wealthy and influential persons, the Broederbond, secretly controlled the state and dictated government policy.

134 See chapter 3 of this thesis which examines the selective application of the tenets of constitutionalism and the abuses of power and impunity under parliamentary sovereignty in South Africa.

135 Gyorfi *Against the New Constitutionalism* 42.

democracy.[136] In its simplified form, constitutional democracy is a combination of majoritarian democracy and constitutionalism. Constitutionalism entrenches rights and rules to secure the preconditions for democracy. However, Bellamy argues that in this regard, the term constitutional democracy is tautological, and not oxymoronic, because

> No tension exists between constitutionalism and democracy since the one merely codified the underlying norms and procedures of the other. Not even a democratic government could abrogate or infringe such a constitution without abolishing or detracting from democracy itself. Consequently, it is an unconstitutional rather than a constitutional democracy that represents a contradiction in terms.[137]

Bellamy further infers a democratic contract, in the form of a supreme constitution, through which citizens bind themselves to a set of pre-agreed principles.[138] Constitutional democracy links to accountability through democracy because the government obtains the mandate to govern through elections. De Vos[139] argues that constitutional democracies are premised on the need for government responsiveness to citizens. As such, the principal-agent theory applies to a constitutional democracy. According to Moseneke DCJ, public office-bearers act in their personal capacity and through a collective agency on behalf of citizens.[140] The Constitutional Court defines a constitutional democracy as "a government of the people, by the people and for the people through the instrumentality of the Constitution."[141] Constitutional democracy provides constitutional and democratic structures through which citizens realise collective aspirations for good governance and accountability.[142] Mogoeng CJ[143] remarked that "we the people" chose constitutional democracy to ensure a united, free and just society in which good governance improves the quality of life for everyone. If one subscribes to this proposition, it means that public power belongs to citizens, conveniently classified as *principals* in this thesis. The government, which holds and exercises state power on behalf

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136 Mueller *Constitutional Democracy* 3.

137 Bellamy *Political Constitutionalism* 90.

138 Bellamy *Political Constitutionalism* 100. It is not immediately clear whether the 'democratic contract' is the same as the Lockean social contract.

139 De Vos 2015 *SAJHR* 31. The author further argues that participatory democracy enhances the responsiveness of the government. For a discussion of the participatory democracy in South Africa, see also Botha 2011 *Stell L Rev* 522. In *Doctors for Life International v Speaker of the National Assembly* 2006 12 BCLR 1399 (CC) para 111, the Court concluded that the founding constitutional provisions of accountable, responsive and open government affirm both representative and participatory democracy.

140 Moseneke *My Own Liberator* 351.

141 *United Democratic Movement v Speaker* para 1; Kis *Constitutional Democracy* ix.

142 *United Democratic Movement v Speaker* para 2.

143 *United Democratic Movement v Speaker* para 1.

of citizens, is the *agent* of citizens. The obligation of the government to account to citizens arises from the relationship of the *principal* with the *agent*.

Constitutional democracy prescribes the exercise of the sovereignty of citizens within entrenched constitutional parameters. Whereas duly elected representatives of citizens exercise authority derived from citizens through elections, the exercise of public authority is subject to the values and provisions of the Constitution. In this way, constitutional democracy restricts legislative and executive powers. Thus, in a constitutional democracy, a constitution is an embodiment of the sovereignty of citizens. The supremacy of the Constitution is entrenched in section 2 of the Constitution and validates the will of the sovereign by placing certain decisions, which potentially threaten the will of citizens, beyond majoritarian whims and caprices. Constitutional democracy employs substantive constitutional limits to prohibit majoritarian discrimination and to curtail popular power, even if popular power mirrors the popular will.[144] Constitutional democracy restrains majoritarian aspects of democracy because public policies formulated and implemented to advance the interests of the majority ultimately benefit broader society.[145] Therefore, the need to ensure accountability of the designated representatives of citizens lies at the core of constitutional democracy.

An absence of mechanisms to ensure the proper exercise of public authority imperils the public interest.[146] History has shown that humans have a cunning capacity to "oppress without hurting themselves…[and] to act selfishly and abuse power."[147] Constitutional democracy counteracts these weaknesses through constitutional limitations, a justiciable Bill of Rights and separation of powers. The premise is that a government established through democratic processes is a servant of the people, not their master,[148] and has constitutional obligations to act within boundaries of the spirit and substance of the Constitution. Citizens watch over the government and hold it responsible for established standards and determine whether the government has fulfilled its mandate.[149] In South

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144 Murphy "Constitutions, Constitutionalism, and Democracy" 3. See also Klare 1998 *SAJHR* 147-148 and Bellamy *Political Constitutionalism* 91

145 Congleton *Improving Democracy Through Constitutional Reform* 127.

146 *United Democratic Movement v Speaker* para 3.

147 Murphy "Constitutions, Constitutionalism, and Democracy" 6.

148 See *United Democratic Movement v Speaker* para 33.

149 Grant and Keohane 2005 *Am Political Sci Rev* 29-30.

Africa, accountability is one of the founding values of the current constitutional order.[150] State functionaries cannot ignore the prescripts of accountability without undermining their constitutional obligations and without imperilling their legitimacy in the eyes of their *principals*.[151]

2.3.5 Government legitimacy

Accountability is a foundation for the legitimacy of most polities, particularly liberal democracies.[152] In contemporary political philosophy and constitutional theory, democracy is crucial for the legitimacy of governments and the justification of state authority because public power anchors on the authority of the government to exercise state authority and the duty of citizens to obey the law.[153] Public office-bearers achieve legitimacy by subordinating themselves to public choice through elections and with their responsibility to citizens.[154] Bentham[155] argues that legislatures derive their legitimacy from citizens through accountability. Citizens, on the other hand, submit to government authority because the government has a legitimate claim to exercise public power.[156] Accountability validates the power of command and creates a conducive environment for ensuring that public office-bearers are held responsible for their actions.[157] Corruption, nepotism and other abuses of power by elected public office-bearers sap the legitimacy of government authority.[158] An illegitimate political order, in turn, implies a deficit of democracy[159] because accountability is both a pre-condition and a major feature of democratic governance.[160]

> The concept of accountability is often used as the benchmark against which systems of government can be judged. Accountable government is deemed to be good government

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150 Section 1(d) of the Constitution.

151 For a commentary on accountability as a constitutional principle and its application in South African case law, see Okpaluba 2018 *SAPL* 1-39.

152 Flinders *The Politics of Accountability in Modern States* 9; Olsen *Democratic Accountability, Political Order, and Change* vii.

153 Ostrom *The Meaning of Democracy and the Vulnerability of Democracies* 45.

154 Shapiro and Sweet *On Law, Politics & Judicialization* 3.

155 See Dyzenhaus "The Politics of Deference: Judicial Review and Democracy" 280.

156 See Henkin "A New Birth of Constitutionalism: Genetic Influences and Genetic Defects" 41 who said that "the will of the people is the source of authority and the basis of legitimate government."

157 Normanton "Public Accountability and Audit: A Reconnaissance" 312.

158 Nkomo *Nkomo: Story of My Life* 247.

159 Olsen *Democratic Accountability, Political Order, and Change* 1. See also Waluchow "Constitutionalism" https://plato.stanford.edu/entries/constitutionalism/.

160 Bovens, Schillemans and Goodin "Public Accountability" 192.

> and carries with it connotations of advanced democracy. Governments which can be characterised as unaccountable or not properly accountable are likely to prove fertile ground for the cultivation of authoritarianism, totalitarianism and every type of abuse of power.[161]

In the most part, the relationship between a government and citizens depends on the legitimacy of the government.[162] A government should recognise the obligation to answer to citizens directly and through institutions designed for accountability. Also, the government should accept the authority of citizens to hold it accountable. Citizens, in turn, should be willing, empowered and equipped to hold the government accountable.[163] However, political and social realities, not formal legal criterion, often validate the legitimacy of governments.[164] The scourge of corruption and poor service delivery create legitimacy crises for governments.[165] In South Africa, as is the case in all fledgeling democracies, persistent poverty and marginalisation, which manifest a lack of diligence and efficiency by governments in the implementation of sustainable socio-economic solutions, discredit the legitimacy of state institutions created by democratic constitutions.[166] The lack of accountability discredits democracy[167] and casts a shadow on the suitability of constitutional democracy to end marginalisation, poverty, nepotism, corruption and other abuses of power reminiscent of past regimes in South Africa.[168]

2.4 Constitutionalism as a means of accountability

Constitutionalism emerged from theories on the protection of citizens through legal and constitutional limitations on government power.[169] Citizens need protection from the government because of the propensity of humans to exercise power arbitrarily.[170] Given unique political and historical circumstances between states, different understandings of constitutionalism are inevitable.[171] Political and legal factors, which define contexts for

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161 Butcher (ed) *Aspects of Accountability in the British System of Government* 1. See also Flinders *The Politics of Accountability in Modern States* 9.
162 Olsen *Democratic Accountability, Political Order, and Change* vii.
163 See Lello *Accountability in Practice* 10.
164 Greenberg *et al* "Introduction" xix.
165 Olsen *Democratic Accountability, Political Order, and Change* vii.
166 Goetz and Jenkins *Reinventing Accountability* 1.
167 Olsen *Democratic Accountability, Political Order, and Change* 1.
168 See Ngcukaitobi *The Land is Ours* 1.
169 See Waluchow "Constitutionalism" https://plato.stanford.edu/entries/constitutionalism/.
170 See also Murphy "Constitutions, Constitutionalism, and Democracy" 6.
171 Frankenberg *Comparative Constitutional Studies* 94.

the exercise of government power (and by implication the understanding of constitutionalism), differ between states.[172] Whereas South Africa subscribes to constitutionalism based on egalitarian principles,[173] British constitutionalism is founded on parliamentary sovereignty.[174] American constitutionalism anchors on conservatism and negative rights.[175] Moreover, constitutionalism is abstract and dynamic.[176] Constitutionalism is not a legal principle but an idea,[177] "a legal and political school of thought"[178] on the limitation of government powers based on the need to constrain all forms of governance through checks and balances.[179] Consequently, scholarly views on constitutionalism vary. To Greenberg *et al*, constitutionalism is

> [A] commitment to limitations on ordinary political power; it revolves around a political process, one that overlaps with democracy in seeking to balance state power and individual and collective rights; it draws on particular cultural and historical contexts from which it emanates, and it resides in public consciousness.[180]

Frankenberg opines that constitutionalism entails the establishment of "constitutional ideas and institutions mediating the establishment and exercise of power."[181] Henkin[182] also associates constitutionalism with limitations on government power such as the rule of law, separation of powers, checks and balances, judicial review and oversight, and accountability. Fombad[183] argues that since a government can function optimally within constitutional constraints, constitutionalism gives the legal system enough safeguards for citizens against arbitrary rule. However, constitutionalism presents conceptual challenges in South Africa due to scholarly accounts which focus more on how constitutionalism

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172 Venter *Constitutionalism and Religion* 47.

173 *Makwanyane* para 262.

174 See Turpin and Tomkins *British Government and the Constitution* 3. British constitutionalism illustrates the reality that a state can subscribe to constitutionalism without a written constitution and that therefore, a written constitution is not a prerequisite for constitutionalism. See Thio "Constitutionalism in Illiberal Polities" 134 for a further discussion.

175 Fowkes *Building the Constitution* 5.

176 Greenberg *et al* "Introduction" xxi.

177 Waluchow "Constitutionalism" https://plato.stanford.edu/entries/constitutionalism/; Henkin "A New Birth of Constitutionalism: Genetic Influences and Genetic Defects" 40.

178 Frishman and Muller "Introduction" 1.

179 Möllers "'We are (afraid of) the people': Constituent Power in German Constitutionalism" 87; Frishman and Muller "Introduction" 1.

180 Greenberg *et al* "Introduction" xxi.

181 Frankenberg *Comparative Constitutional Studies* 94.

182 Henkin "A New Birth of Constitutionalism: Genetic Influences and Genetic Defects" 42-43.

183 Fombad 2010 *Speculum Juris* 44.

ought to work, rather than how it works.[184] Fortunately, several academics define and place constitutionalism within South African realities. Venter[185] reasons that constitutionalism regulates the government by binding it to a set of pre-agreed constitutional rules and procedures which define a constitutional state. In a separate analysis, Venter[186] classifies South Africa as a constitutional state – a Diceyan *Rechtsstaat* in which the rule of law regulates the exercise of public power.[187] In his seminal book *Constitutionalism and Religion*, Venter[188] uses the table in the appendix to this thesis to illustrate the structural, substantive and doctrinal components of constitutionalism. Venter's table is the most comprehensive articulation of the constituent elements of constitutionalism.

However, other South African scholars have a limited understanding of constitutionalism. Whereas Ngcukaitobi[189] defines constitutionalism as a government system based on fair laws and informed by justice, Motala[190] opines that constitutionalism distributes government powers through the separation of powers, the rule of law and the protection of human rights through judicial review.[191] The scholars omit to include, *inter alia*, democracy, popular sovereignty and accountability in their conceptualisations of constitutionalism. Only Venter, as far as could be ascertained in South Africa, correctly identifies democracy and popular sovereignty as doctrinal components of constitutionalism.

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184 Fowkes *Building the Constitution* 3.

185 Venter 2014 www.kas.de/wf/doc/kas_12157-1442-2-30.pdf?140214093239 1.

186 Venter 2012 *McGill Law Journal* 721-747.

187 See also Venter *Constitutionalism and Religion* 81.

188 Venter *Constitutionalism and Religion* 82.

189 Ngcukaitobi *The Land is Ours* 5.

190 Motala 1995 *SALJ* 504.

191 However, De Vos and Freedman (eds) *South African Constitutional Law in Context* 40 argue that

> [Constitutionalism] does not concern itself with whether state power is being used in contravention of democratic or human rights norms. In other words, it does not seek to make value judgements as to whether the state in question adheres to or upholds its own constitutional limits or rules or whether it provides for an essentially democratic system of government.

This view seems to describe the rule of law under apartheid, not constitutionalism. The opinion cannot be accepted in this thesis in the light of the overwhelming scholarly accounts which view constitutionalism as a limitation of government authority to prevent the arbitrary exercise of public power.

2.5 Constitutionalism and popular sovereignty

Whereas Venter[192] classifies popular sovereignty as one of the doctrinal components of constitutionalism, Henkin[193] argues that constitutionalism emanates from popular sovereignty. The basis of Henkin's argument is that the people are the fulcrum of sovereignty and the source of all government authority. Although the people consent to governance, they are unable to exercise their sovereignty. Hence citizens delegate public power and the implementation of the popular will to their government within the framework of a constitution which the people ordained and established, and which sets out the powers and authority of the government. Therefore, citizens manifest their sovereignty through the state constitution.[194] The constitution, in turn, expresses the popular will.[195] In this context, limitations imposed by a constitution on the government, through the tenets of constitutionalism, ensure accountability. For protection from arbitrary and abusive exercise of public power, citizens divide and constrain the exercise of government powers through constitutional and institutional mechanisms. An examination of the Federalist Papers, in which expressions of popular sovereignty under a supreme constitution first appeared, shows that a constitution, as a legal foundation for the binding authority of the government, is an expression of popular sovereignty and an articulation of the people as the ultimate source of all public authority.[196] As such, the will and interests of citizens supersede the authority of the government.

Since constitutionalism imposes substantive and procedural constitutional constraints on the government to ensure the lawful, legitimate and accountable exercise of public power, the constitution places the people at the centre of governance through the principle of popular sovereignty. Popular sovereignty, in turn, requires both democratic and representative government. Consequently, constitutionalism prescribes the separation of powers, checks and balances, democracy and representative government, judicial review and oversight, and the protection of human rights. The tenets of constitutionalism limit public power and ensure accountable government.[197] Madison[198] argues that legislative

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192 Venter *Constitutionalism and Religion* 82.
193 Henkin "A New Birth of Constitutionalism: Genetic Influences and Genetic Defects" 41.
194 See *United Democratic Movement v Speaker* para 1.
195 Waluchow "Constitutionalism" https://plato.stanford.edu/entries/constitutionalism/.
196 Rakove (ed) *The Federalist* 18.
197 Henkin "A New Birth of Constitutionalism: Genetic Influences and Genetic Defects" 41-42.
198 Frankenberg *Comparative Constitutional Studies* 94-95.

and constitutional constraints on the powers and authority of a government are pre-conditions for long-lasting democracy in a diverse state. To Frankenberg, liberal notions of constitutionalism

> [A]re designed to establish legislative, executive and judicial powers and also bridle these powers by: (a) limiting the *scope* of their *authority*, i.e. in a federal system or balance of powers scheme; (b) limiting the *mechanisms* and *forms* used in its exercise, that is procedural requirements of law-making, majority rules governing decision-making; (c) guaranteeing *rights* as means to challenge transgressions of governmental/judicial authority or violations of forms and processes of law-rule; and (d) setting up institutions to deter these powers from violating any of the constraints mentioned above by controlling practices and redressing illegal or unconstitutional decisions, i.e. parliaments, courts, ombudspersons.[199]

Contemporary South African constitutionalism enshrines all the elements of liberal constitutionalism identified by Frankenberg. The supreme Constitution entrenches a Bill of Rights and enshrines procedural and substantive limitations on the government, making South Africa a constitutional state. Given Venter's comprehensive table on the structural, substantive and doctrinal components of constitutionalism, one cannot devise further constitutive elements of constitutionalism but can confirm that the Constitution enshrines all the formal, normative and doctrinal components of constitutionalism identified by Venter.[200] The omission by most scholars to add democratic accountability to the list of core features of modern constitutionalism, both in South Africa and beyond is ironic, given that the constitutive elements of constitutionalism, when properly implemented, ultimately lead to an accountable government.[201] The following section examines some of the tenets of accountability in constitutionalism.

2.6 Tenets of accountability in constitutionalism

2.6.1 Constitutional supremacy

A democracy founded on constitutional supremacy has a supreme constitution which is an enduring statement of the fundamental values and principles of the people in the

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199 Frankenberg *Comparative Constitutional Studies* 95.

200 See Venter's illustrious table of the components of constitutionalism in the appendix to this thesis.

201 See *Economic Freedom Fighters v Speaker of the National Assembly* 2016 5 BCLR 618 (CC) para 1, in which the Court opined that the rule of law, constitutional supremacy and accountability are the "sharp and mighty sword that stands read to chop the ugly head of impunity off its stiffened neck."

state.[202] In South Africa, the Constitution is a symbol for the nation and the values to which South Africans aspire.[203] The Constitution is supreme,[204] defines state institutions and confers law-making, executive and judicial functions. The Constitution gives the government power and sets conditions for the exercise of public authority, thereby prescribing the relationship between the government and citizens. The Constitution is an indication that steady and known principles rule society, not the arbitrary whims of persons.[205] It is founded on constitutionalism and secures the constitutional legitimacy of the government through provisions for authentic democracy and accountable, responsive and open governance.[206] Thus, the Constitution governs the government. As the supreme law, the Constitution is necessary to ensure legality and to protect fundamental rights and freedoms. Although democratic processes ensure the participation of citizens in the formation and dissolution of the government, they are not enough. There is a need for the exercise of democratic processes within a legal framework governed by constitutional supremacy.[207] It is for this reason that section 2 of the Constitution mandates the fulfilment of all constitutional obligations. In short, constitutional supremacy is the bedrock of constitutionalism.[208]

Constitutionalism entrenches limits on government power to make it more difficult for the government of the day to amend constitutional limits.[209] Constitutional supremacy is a

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202 Turpin and Tomkins *British Government and the Constitution* 4. Henkin "A New Birth of Constitutionalism: Genetic Influences and Genetic Defects" 40-41 argues that whereas constitutional theorists often identify constitutionalism with a written constitution, a state does not always need a written constitution to articulate its values. Notwithstanding, it is worthy considering the following expression by Mahomed J in *Makwanyane* para 262:

> All Constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation; the values which bind its people, and which discipline its government and its national institutions; the basic premises upon which judicial, legislative and Executive power is to be wielded; the constitutional limits and the conditions upon which that power is to be exercised; the national ethos which defines and regulates that exercise; and the moral and ethical direction which that nation has identified for its future. In some countries, the Constitution only formalizes, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future.

203 Ackerman *Human Dignity* 15; Sachs *We, the People* 25.

204 Section 2 of the Constitution provides for the supremacy of the Constitution.

205 Sachs *We, the People* 26.

206 See section 1(d) of the Constitution. For an analysis of the relationship between constitutionalism, constitutional legitimacy and democracy, see Ramcharan "Constitutionalism in an Age of Globalisation and Global Threats" 18.

207 Bellamy *Political Constitutionalism* 1.

208 See Venter "Parliamentary Sovereignty or Presidential Imperialism?" 97.

209 Waluchow "Constitutionalism" https://plato.stanford.edu/entries/constitutionalism/.

hollow concept in the absence of protection from amendment. Like most jurisdictions, South Africa entrenched the Constitution to place it beyond "ordinary legislative politics."[210] In essence, the unamendable constitutional provisions "are intended to define the society indefinitely and are not subject to review absent a complete overhaul of the society."[211] Section 74 of the Constitution sets stringent measures and requires special majorities for the amendment of founding values, among them constitutional supremacy, to thwart amendments which replace the original constitution. Section 74(1) - the entrenching clause - and the founding provisions require at least 75% approval by members of the National Assembly and at least six supportive provinces.[212] Part of chapter 6 of this thesis examines the powers of the Constitutional Court to review the constitutionality of constitutional amendments. Constitutional supremacy supersedes traditional conceptions of the doctrine of separation of powers.

2.6.2 Separation of powers

Separation of powers is an element of modern constitutionalism which divides and constrains public power through distinctive constitutional institutions.[213] Separation of powers bestows law-making powers on the legislature, interpretation of the laws in the judiciary and implementation of legislation in the executive.[214] The doctrine prevents branches of government from accumulating excessive powers and deters the arbitrary exercise of power.[215] Public office-bearers in the legislature, the executive and the judiciary must observe the highest ethical standards and demonstrate an unwavering commitment to their oaths and affirmations of office.[216] Separation of powers is a crucial aspect of accountable government.[217] The principle permits government branches to exercise only those functions prescribed by law and proscribes them from usurping

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210 See Issacharoff *Fragile Democracies* 47.

211 Issacharoff *Fragile Democracies* 48.

212 For ordinary constitutional amendments, section 74(2)-(3) of the Constitution prescribes a supportive vote of at least two-thirds of the members of the National Assembly.

213 Loughlin and Walker "Introduction" 1.

214 See *South African Association of Personal Injury Lawyers v Heath* 2001 5 BCLR 77 (CC) para 25 (hereinafter *Heath*) for a vivid description of the powers of each branch of government under the principle of separation of powers.

215 De Vos and Freedman (eds) *South African Constitutional Law in Context* 60.

216 *My Vote Counts NPC v Minister of Justice and Correctional Services* 2018 8 BCLR 893 (CC) para 1.

217 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 10 BCLR 1253 (CC) para 45 (hereinafter *Certification I*).

powers from one another,[218] thereby preventing authoritarianism.[219] Essential to the separation of powers is the prohibition of the branches from delegating their plenary powers to one another,[220] for that would lead to the accumulation of excessive powers in one branch of government, particularly the executive.[221] De Vos and Freedman[222] submit that separation of powers is a mechanism for holding public office-bearers to account collectively and individually.

> Separation of powers protects the rule of law and correlates with government legitimacy, democracy and economic development.[223] The doctrine originated from the principle that the legislature, executive and the judiciary must be functionally and individually independent from one another.[224] The government must scrupulously observe the demarcation between the legislative, judicial and executive functions in a practical and not abstract form.[225] Consequent on the requirement, the question of enforcement arises. Constitutionalism requires that when a constitution has spelt out the functions of each government branch, the relevant government branches must be prepared and able to fully undertake their obligations. However, the Constitution makes no mention of separation of powers. In *Glenister v President of the Republic of South Africa*,[226] the Court examined the structure of the Constitution and concluded that it is self-evident that separation of powers is part of the design of the Constitution. Theoretically, the principle of separation of powers is one of the[M]any unwritten principles that supplement and transcend the meaning of individual constitutional clauses."[227]

South Africa adopted its model of separation of powers in direct response to the abuses of power occasioned by the system of parliamentary sovereignty under colonial and apartheid rule.[228] The transitional Constitution[229] included the separation of powers to ensure an executive branch that is "energetic and effective, yet answerable."[230] In *De Lange*,[231] the Court noted the need to reflect on history when developing a model of separation of powers to ensure that under the current constitutional dispensation,

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218 Dube *Judicial Oversight and the Constitution* 36.

219 Vile *Constitutionalism and the Separation of Powers* 16-17.

220 For a synopsis, see *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 10 BCLR 1289 (CC).

221 *De Lange v Smuts* 1998 7 BCLR 779 (CC) para 60 (hereinafter *De Lange*).

222 De Vos and Freedman (eds) *South African Constitutional Law in Context* 60.

223 See Langa 2006 *SAJHR* 9.

224 For a synopsis of the doctrine of separation of powers and the limitation of government power, see De Vos and Freedman (eds) *South African Constitutional Law in Context* 60.

225 *Van Rooyen v The State* 2002 5 SA 246 (CC) para 34.

226 *Glenister v President of the Republic of South Africa* 2009 2 BCLR 136 (CC) para 29.

227 Ranchordás *Constitutional Sunsets and Experimental Legislation* 78.

228 *Heath* para 24.

229 *Constitution of the Republic of South Africa Act* 200 of 1993.

230 *Certification I* para 52.

231 *De Lange* para 60.

government power is restrained and not abused. The Court committed to developing a distinct model of separation of powers for South Africa since there is no universal formula for separation of powers.[232] The Court also recognised the need to restrain government power and ensure that power is not so diluted that the government cannot make timely decisions in the interest of the public.[233] Constitutional Principle VI of the transitional Constitution prescribed separation of powers with suitable checks and balances to ensure accountable, responsive and open governance.[234]

2.6.3 Checks and balances

The Constitution does not refer to checks and balances. One can infer checks and balances from the text of the Constitution.[235] However, the lines of distinction between the doctrine of separation of powers and checks and balances should not be blurred. There is also a distinction between the enforcement of accountability, in a general sense, and checks and balances. Whereas checks and balances prevent constitutional and legislative violations, traditional accountability mechanisms operate after the making and implementation of decisions,[236] and after accidents, disasters and policy failures.[237] In this sense, accountability initiatives identify and punish responsible individuals.[238] Although the imposition of sanctions occurs *ex post facto*, punishment deters power-holders from abusing their powers.[239] Whereas separation of powers recognises the functional division and independence of the law-maker, the judiciary and the executive,[240] checks and balances prevent government branches from "usurping power from one another."[241] Checks and balances also preclude government institutions and personnel from

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232 *Certification I* para 108.
233 See the remarks in *De Lange* para 60.
234 Constitutional Principle VI in Schedule 4 of the transitional Constitution.
235 See *Certification I* para 112.
236 Turpin and Tomkins *British Government and the Constitution* 132.
237 Hood "Accountability and Blame-Avoidance" 603.
238 Mansbridge "A Contingency Theory of Accountability" 56-68 argues that synonymising of accountability with punishment and other sanctions marginalises the traditional definition of accountability of giving an account of one's version and giving reasons for one's action.
239 Grant and Keohane 2005 *Am Political Sci Rev* 30. For a synopsis, see Goetz and Jenkins *Reinventing Accountability* 11.
240 *Certification I* para 109.
241 *Certification I* para 109.

overstepping constitutional boundaries. It is unavoidable for the branches of government to impose restraints on one another.[242]

Checks and balances also operate when different government institutions work together to produce a legally binding decision.[243] An example is a legislative process for enacting bills into law. The executive crafts government policy and produces draft legislation for passage by Parliament. When Parliament has voted for the bill through prescribed steps, the President signs the bill into law.[244] The President can refuse to assent to a bill which contravenes the Constitution.[245] In addition to ensuring legality, checks and balances halt the implementation of decisions which violate the law. Judgments in which the courts invalidated decisions of the executive are examples of checks and balances working to prevent constitutional and legislative violations.[246] Checks and balances work effectively when government branches are committed to enforcing the rule of law.

2.6.4 The rule of law

Dicey propounded the rule of law.[247] The rule of law links to accountability with demands for public office-bearers to act within the confines of lawful authority.[248] Former President Mandela said that the rule of law is a "set of conventions and arrangements that ensure that it is not left to the whims of individual rulers to decide on what is good for the populace."[249] In a narrow sense, the rule of law prescribes a general and prospective application of legislation for clarity and certainty. Importantly, the rule of law requires the government to publicise the laws so that citizens know what is permissible and what is

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242 *Certification I* para 108.

243 Grant and Keohane 2005 *Am Political Sci Rev* 30.

244 Sections 73-82 of the Constitution deal with the legislative process.

245 Section 79(1) of the Constitution.

246 See *Democratic Alliance v Minister: International Relations and Cooperation* 2017 1 SACR 623 (GP); *Law Society of South Africa v President of the Republic of South Africa* 2019 (3) BCLR 329 (CC); *Nxasana* and *Democratic Alliance v President of RSA*.

247 Dicey *Introduction to the Study of the Law of the Constitution* 202-203 devised three elements of the rule of law which he considered as fundamental principles of the British 'constitution:'

(a) Supremacy of the law over the influence of arbitrary power.
(b) Equality of citizens before the law.
(c) Jurisdiction of ordinary courts over all citizens.

248 Martin 2006 *The Round Table* 241.

249 Cameron *Justice* 3.

not.[250] Substantively, the rule of law protects human rights, democracy and justice.[251] However, traditional conceptions of the rule of law do not consider substantive elements of the law but focus on the procedural permissibility of government conduct.[252] From a traditional viewpoint, no government should act inconsistently with its constitution and other laws. The traditional conception commands obedience to the law (by both the government and citizens), regardless of the nature of the laws in place, making the rule of law "an empty vessel into which any law could be poured."[253] Over the years, the rule of law has developed and led to the establishment of the following internationally accepted standards and norms:

1. The government and its officials and agents are accountable under the law.
2. The laws are clear, publicized, stable and fair, and protect fundamental rights, including the security of persons and property.
3. The process by which the laws are enacted, administered and enforced is accessible, fair and efficient.
4. Access to justice is provided by competent, independent, and ethical adjudicators, attorneys or representatives and judicial officers who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.[254]

Contemporary conceptions of the rule of law require accountability to prevent the state from acting arbitrarily and in corrupt and oppressive ways.[255] Thompson[256] argues that the rule of law is for the good of citizens because it imposes practical control over governments and restrains the arbitrary use of public power. Restraints on power, in turn, protect human rights.[257] Rights and freedoms enable citizens to investigate the government and inquire into the affairs and conduct of public officer-bearers.[258]

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250 Raz "On the Authority and Interpretation of Constitutions" 3.

251 Raz "On the Authority and Interpretation of Constitutions" 4.

252 Martin 2006 *The Round Table* 241. See also Ten "Constitutionalism and the Rule of Law" 493 on the importance of administrative justice and procedural fairness to the rule of law.

253 Agrast, Botero and Ponce *WJP Rule of Law Index 2011* 9.

254 Agrast, Botero and Ponce *WJP Rule of Law Index 2011* 9. See also Ghai and Cottrell "The Rule of Law and Access to Justice" 1.

255 International Commission of Jurists *South Africa* 144.

256 Thompson *Whigs and Hunters* 261.

257 For a synopsis of the link between constitutionalism and human rights which are protected in international law, see Henkin "A New Birth of Constitutionalism: Genetic Influences and Genetic Defects" 41-42.

258 See *Van der Walt v Metcash Trading Ltd* 2002 4 SA 317 (CC) paras 65, 66, 68 and 76 in which the Court analysed these constituent elements of the rule of law in South Africa. See also Beinart 1962 *Acta Juridica* 99 quoted by Venter 2010 *SAJHR* 50.

South African constitutionalism enshrines the rule of law in several ways. First, the rule of law is one of the founding values of the Constitution.[259] Second, the Constitution imposes restraints on the government to ensure that the government acts consistently with the rule of law. The supremacy clause requires the government to fulfil obligations imposed by the Constitution and invalidates all acts inconsistent with the Constitution.[260] Thus, the supremacy clause provides a framework for compliance with the substantive elements of the rule of law. Third, the Constitution imposes substantive and adjectival limitations on legislation to protect citizens from the government and to guarantee compliance with the law.[261]

2.7 Conclusion

In conclusion, this chapter discusses the nexus between democratic accountability and constitutionalism in four themes. The first theme addresses conceptual challenges and unpacks the meaning of democratic accountability. The theme ascertains that democratic accountability refers to actions through which citizens make public office-bearers explain and justify their actions. Accountability enables citizens to prevent the abuse of public power and curtail improper use of public resources. However, the definition of accountability does not adequately explain the necessity of accountability. Hence, the second theme of this chapter advances five theoretical justifications for accountability in differently constituted polities: representative democracy; popular sovereignty; parliamentary sovereignty; constitutional democracy and government legitimacy. The third theme is a conceptual overview of constitutionalism. The theme illustrates that constitutionalism provides a juridical framework for accountability.

The fourth theme analyses the tenets of accountability in constitutionalism. The discussion identifies constitutional supremacy, separation of powers, checks and balances and the rule of law as constitutional bases for accountable government. The obligation on public office-bearers to account to citizens primarily arises from constitutional supremacy which also prescribes constitutional democracy through which citizens exercise sovereignty. The Constitution sets parameters for the government to exercise

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259 Section 1(c) of the Constitution.

260 Section 2 of the Constitution.

261 For a synopsis of the relationship between the rule of law and the law-making process, see Raz "On the Authority and Interpretation of Constitutions" 4.

sovereignty derived from citizens within a democratically representative setting governed by the Constitution. From another angle, representative democracy is tied to the sovereignty of citizens and the legitimacy of the government. In the result, the analysis shows that the centuries-old classical notions of democracy and popular sovereignty are very relevant in contemporary constitutional theory and fit perfectly within South African realities. Conclusively, constitutional democracy is a safeguard against majoritarianism and provides constitutional mechanisms that enhance accountability. The following chapter examines the inception and historical development of constitutionalism in South Africa.

Chapter 3 The Inception and Development of Constitutionalism in South Africa

3.1 Introduction

The preceding chapter examines the conceptual foundations of accountability and constitutionalism. The discussion shows that popular sovereignty, which is guaranteed with constitutional supremacy and constitutional democracy, requires the government to account to citizens. Although the previous chapter analyses the framework of accountability and the tenets of accountability in constitutionalism, it does not cover the inception of constitutionalism into South Africa. The present chapter traces the adoption and development of constitutionalism in South Africa. Historical circumstances influenced the contemporary South African constitutional structure. Therefore, analysis of constitutional issues confronting South Africa will be incomplete without a historical evaluation.[1] The first theme of this chapter is an essential discussion of early South African precedents on the relationship between citizens and the government in the context of popular sovereignty. The case law affirms the theoretical position in the previous chapter that the government derives powers from citizens and should thus govern in the interest of citizens. The second theme of this chapter discusses the lack of accountability in the Union of South Africa and the apartheid regime to illustrate the weaknesses of illiberal constitutionalism.

The third theme discusses African aspirations for constitutionalism to show that Africans in South Africa have always wanted a constitutional state founded on liberal democracy. The struggle of Africans for human rights and the rule of law, and their calls for an accountable government, explain the commitment of post-1996 governments to respect limitations on their authority and to account to citizens, albeit under trying circumstances and in varying degrees. Lastly, this chapter discusses the transition from apartheid to transformative constitutionalism. The analysis seeks to prove the democratic legitimacy of the constitution-making process and the ensuing constitutional vision for accountable government in the founding constitutional provisions.

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1 De Vos and Freedman (eds) *South African Constitutional Law in Context* 5. See also Corder "Judicial Review of Parliamentary Actions in South Africa: A Nuanced Interpretation of the Separation of Powers" 85.

3.2 Constitutionalism in the British colonies of South Africa

3.2.1 The influence of British legal tradition in the Cape of Good Hope

The first chapter of this thesis showed that before colonisation, accountability anchored on an African conceptualisation of democracy and responsible leadership. Consequently, constitutionalism is a Western import. Although the literature reveals that the Dutch arrived in South Africa in 1652, ahead of the English, history does not show whether the Dutch brought any form of constitutionalism. The English, on the other hand, brought their majoritarian Westminster system of parliamentary democracy,[2] characterised by the absence of non-political controls on the government. The Charter of Justice[3] obliged the Cape Supreme Court to follow the judicial procedure of the King's courts at Westminster.[4] By default, the statute meant that the Supreme Court could not exercise substantive judicial review of legislation and executive action. Consequently, the legal system of the Cape of Good Hope lacked judicial review, a critical component of accountability.[5]

Moreover, the justices of the Supreme Court were concerned with the maintenance of institutional comity than the limitation of the powers of the legislature and the executive. De Villiers CJ did not recognise judicial review. In *Deane v Field*,[6] the Supreme Court suggested that the only remedy available to persons aggrieved by the enactment of a draconian statute was to count on the good conscience of the government not to take injurious action against citizens. The Orange Free State Republic, dominated by Dutch descendants, was the first to introduce concrete guidelines of constitutionalism[7] because the drafters of the Orange Free State Constitution of 1854 had a copy of the American Constitution and used it as a template.[8]

3.2.2 American-inspired constitutionalism in the Orange Free State

The reliance of the Orange Free State constitutional drafters on the American constitutional text had profound implications on the limitation of government power. The

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2 Engholm 1963 *International Journal* 468.
3 Section 45 of the Charter of Justice, 1834.
4 Taitz *The Inherent Jurisdiction of the Supreme Court* 6.
5 See Chapter 5 of this study for a full discussion of judicial review as a means of accountability.
6 *Deane v Field* (1861-1867) 1 Roscoe 165 at 173.
7 Davenport and Saunders *South Africa* 80.
8 Loveland *By Due Process of Law?* 17, 48-49.

Orange Free State Constitution was supreme and conferred sovereignty on citizens.[9] In *State v Gibson,* the court held that

> The Volksraad of this State is not [in] possession of the exercise …of sovereign power, but is everywhere controlled and limited by the Constitution – that is, the people of this Republic, - which is thus a higher power, indeed the only sovereign power…the Volksraad is beyond doubt the highest legislative authority, but still not unqualifiedly the highest authority. Above the legislative authority stands the constitution-giving authority – that is, sovereign people, to whom the majesty belongs.[10]

Constitutional supremacy, augmented with entrenched and justiciable rights, limited the powers of the *Volksraad* (the legislature) and made constitutional amendments difficult.[11] However, the Orange Free State Constitution did not provide for a qualified and independent judiciary to assess the procedural legality of constitutional amendments. Thompson[12] notes that the President appointed judges upon approval by the *Volksraad.* The President could dismiss judicial officers, and the *Volksraad* could sentence the judges to imprisonment.[13] In the early years, the lack of judicial independence undermined judicial review and eroded the foundation of the Orange Free State Constitution. To cure the deficit, the *Volksraad* established the High Court in 1872 and passed legislation which required qualified judicial officers. The President could not dismiss judges. The President could only suspend them on condition of bad behaviour and upon approval of the *Volksraad.* The power of the *Volksraad* to dismiss judges was a key provision towards judicial independence.[14] However, the courts were creatures of an ordinary statute, as opposed to the constitution. Ordinary legislation, which the *Volksraad* could amend at its will, guaranteed judicial independence. Thus, there were no constitutional protections for the independence of the courts, particularly the tenure of judicial officers, leaving the powers of the judiciary exposed to legislative manipulation.

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9 For a commentary, see Ackerman "Constitutional Comparativism in South Africa: A Response to Sir Basil Markesinis and Dr Jorg Fedtke" 266.

10 *The State v Gibson* (1898) 15 Cape LJ 1 at 4.

11 Articles 20, 58 and 60 of the Free State Constitution (in no order) entrenched equality before the law, the right to protect, the rights to peaceful assembly and the petition. Article 24 prescribed a supporting vote of 75% of the members of the *Volksraad* in three annual sessions.

12 Thompson 1954 *BSALR* 53.

13 Articles 34 and 15 of the Free State Constitution.

14 Thompson 1954 *BSALR* 53.

Nevertheless, the High Court exercised its powers to review the constitutionality of legislation. In *Cassim and Solomon v S*,[15] the High Court considered the constitutionality of legislation which prohibited Asians from settling in the Orange Free State. Aggrieved persons challenged the statute for violation of the right to equality enshrined in article 58 of the Orange Free State Constitution.[16] Although the High Court dismissed the case, the decision was significant because it demonstrated the power of the courts to interpret the constitution and to review legislation for constitutionality. De Villiers CJ contributed immensely to the advancement of constitutionalism. In one of his writings, he opined that the powers of the *Volksraad* were so vast that it was undesirable to give the *Volksraad* further powers to interpret its laws.[17] In his view, constitutional interpretation was a judicial function which only judges could fulfil. At one time, De Villiers CJ publicly expressed his disapproval of a proposed draconian piece of legislation. The *Volksraad* subsequently withdrew the offensive bill.[18]

However, the Orange Free State was not entirely democratic.[19] Loveland[20] argues that the drafters of the Orange Free State Constitution lifted whole sections from the American Constitution not because of their admiration for liberal democracy but in a poorly veiled attempt to bestow legitimacy for slavery and racially oppressive laws. As such, the Orange Free State Constitution confined the right of citizenship to white males and excluded Africans.[21] The South African Republic was also anti-African, as its constitution was founded on inequality.[22] One understands the denial of the franchise to Africans in the

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15 *Cassim and Solomon v S* (1892) 9 Cape L J 58.

16 For a commentary, see Dugard *Human Rights and the South African Legal Order* 19.

17 De Villiers 1897 *Cape Law Journal* 38-49. See Thompson 1954 *BSALR* 56 and Loveland *By Due Process of Law?* 50 for commentary.

18 Loveland *By Due Process of Law?* 50-51.

19 Thompson 1954 *BSALR* 38.

20 Loveland *By Due Process of Law?* 49. The scholar also argues that factually, Dutch descendants left the Cape because they desired to create their own states in which they could guarantee their own people freedoms and justice while at the same champion slavery of Africans in the American fashion. The Dutch descendants were unhappy when the British abolished slavery and introduced colour-blind legislation in the Cape.

21 Davenport and Saunders *South Africa* 80; Klug *The Constitution of South Africa* 11.

22 De Vos and Freedman (eds) *South African Constitutional Law in Context*1. See also Loveland *By Due Process of Law?* 17, 42.

context that in both the Orange Free State and the South African Republic, "colonisation remained wedded to brutal exploitation of the conquered population."[23]

3.2.3 Presidential imperialism in the South African Republic

3.2.3.1 The constitutional setting of the South African Republic

The Constitution of the South African Republic, 1858 (the *Grondwet*), was not a result of a legislative enactment by lawmakers exercising powers bestowed on them by sovereign people. A military council appointed 14 men to draft a constitution and passed the resultant document to the *Volksraad* for endorsement in 1858.[24] Unlike his Orange Free State counterparts, the lead drafter of the *Grondwet*, Jacobus Stuart, did not have the benefit of the American Constitution to guide him. Arguably, Stuart had limited knowledge of constitutionalism. Consequently, he drafted a lengthy constitution littered with confused, contradictory and often trivial articles.[25] Moreover, the *Grondwet* did not provide for procedures and thresholds for constitutional amendments.[26] As such, the *Volksraad* was at liberty to amend the *Grondwet* in the same way as ordinary legislation.[27] Although it is unclear whether Stuart and his assistants were aware of the weakness caused by the omission of provisions for amendment, the *Grondwet* had rigid procedures for the enactment of legislation. The *Grondwet* required the publication of all bills in the Government Gazette at least three months before the Bills were tabled before the *Volksraad,* provided for public participation through commentary on the bills and imposed a minimum of 75% supporting votes for bills to pass into law.[28]

The *Volksraad* did not always follow constitutional requirements in enacting legislation. The *Volksraad* fell into the habit of passing legislation disguised as simple resolutions.[29]

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23 Meierhenrich *The Legacies of Law* 89. For a note on colonial conquest in South Africa, see Budlender "Access to Justice: Lessons from South Africa's Land Reform Program" 23.

24 *Brown v Leyds* (1897) 4 OR 17 (hereinafter *Brown*). For a synopsis of the military arrangement, see Thompson 1954 *BSALR* 58-59.

25 For a synopsis, see Davidson 1985 *Harv JL & Pub Pol'y* 693-694 and Thompson 1954 *BSALR* 59.

26 Davidson 1985 *Harv JL & Pub Pol'y* 694.

27 See Möllers *The Three Branches* 126 on the vulnerability of constitutions from ordinary legislative amendments.

28 Thompson 1954 *BSALR* 60.

29 Barrie 2014 *Journal of South African Law* 817.

Initially, the judges upheld resolutions of the *Volksraad*.[30] However, Kotzé CJ soon changed his mind on the correctness of the decisions. In the first decision after his change of opinion, *Hess v The State,* [31] the Chief Justice accepted that all government institutions derived their existence from the *Grondwet*, which he described as an expression of the founding principles of the people of the Republic. He said that it was the duty of the court to test the constitutionality of the actions of the *Volksraad* and the President to ensure that the political branches did not exceed their lawful authority. In that context, he viewed the testing right as tacit, and yet a necessary, result of a popularly elected government operating under a constitution.[32]

3.2.3.2 Resistance to judicial review

In 1876, the Executive Council set aside a Supreme Court judgment with a resolution. Kotzé CJ reprimanded the executive for its open defiance of the judiciary.[33] A major clash occurred when the Executive Council pardoned one Nellmapius, who had been convicted of embezzlement, when his appeal to the full bench of the Supreme Court was pending. At the time, Kotzé CJ was away on circuit. On his return, he interpreted the pardon as illegal and immediately issued a warrant of arrest for Nellmapius. The Chief Justice followed it up with a reprimanding note to the Executive Council for its actions.[34] A more serious confrontation between the executive and the judiciary arose from *Brown v Leyds.*[35] Brown had secured about 1200 gold claims in the Witfontein goldfields, in the Witwatersrand, in 1886. However, the government withdrew the proclamation for prospecting to avoid a stampede of fortune-seekers. The decision aggrieved Brown who instituted an action in the Supreme Court to declare the proclamation invalid. Brown argued that the government had acted *ultra vires.* In the alternative, Brown asked the court to award him £370 000.00 as compensation for his loss.[36]

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30 *Nabal v Bok* (1883)1 S.A.R 60, *Executors of McCorkindale v Bok* (1884) 1 SAR 202 (hereinafter *McCorkindale*); *Trustees of Theodore Dom v Bok* (1887) 2 SAR 189.

31 *Hess v The State* 2 SAR 114 (1903) (hereinafter *Hess*).

32 *Hess* at 116.

33 Thompson 1954 *BSALR* 62.

34 Thompson 1954 *BSALR* 63.

35 *Brown*.

36 In contemporary times, the amount equates to about £37 million - Van der Merwe *Brown v Leyds* ix.

The *Brown* case was a serious test to judicial review, judicial independence and the rule of law in the South African Republic. Two months before the hearing, President Kruger met with the Chief Justice and threatened him with suspension if the court declared the *Volksraad* resolution invalid.[37] The Kotzé did not budge and proceeded to assess whether the prospecting law conflicted with the *Grondwet.*[38] In answering the question, Kotzé CJ said that the Supreme Court was not overstepping its jurisdiction with judicial review but that the *Grondwet* limited legislative powers and that it empowered the courts to test the substantive and procedural validity of legislation.[39] The court also overruled *McCorkindale*, in which it had earlier upheld a resolution of the *Volksraad* which was not published in the *Gazette,* per the requirements of the *Grondwet,* as valid law.[40] Kotzé CJ held that the *Volksraad* did not have absolute powers and that it was not supreme to the *Grondwet* because

> [T]he portion of the sovereign power entrusted to the *Volksraad* by the people shall be exercised under and by the terms of the authority or mandate expressed in the Constitution.[41]

However, Kotzé CJ's interpretation clashed with the President's views. President Kruger behaved like medieval European monarchs who alleged to possess divine powers and thought of themselves accountable only to God from whom they proclaimed to derive their powers.[42] The behaviour of the President was reminiscent of the notion "the King can do no wrong."[43] To President Kruger,

> [T]he King's voice that resides in the *volk* (the people) is imbued with the divine authority of God: *vox populi Dei* (the voice of the people is the voice of God). As the elected leader of the *volk,* he was the supreme representative of the best interests of the *volk.* He, as the supreme representer of the *Volksraad* of laws, exercised his representative authority through the *Volksraad.* The *Volksraad* had the *hoogste gezag* (the highest authority) in the land, but it was an authority granted to it by, and therefore derived from, the people. In short, God spoke through the people, the people spoke

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37 Van der Merwe *Brown v Leyds* 352.

38 See the analysis by Van der Merwe *Brown v Leyds* 263.

39 Barrie 2014 *Journal of South African Law* 817.

40 For a synopsis of the decision, see Loveland *By Due Process of Law?* 43-44.

41 *Brown* at 26.

42 See Lonsdale "Political Accountability in African History" 129 for a synopsis of religion under medieval monarchs in Europe.

43 See Turpin and Tomkins *British Government and the Constitution* 707 for a synopsis of the notion in British constitutional law.

> through Paul Kruger, and Paul Kruger spoke through the *Volksraad.* This was the chain of command. Kruger routinely spoke of "his people," "his *Volksraad*," "his judges."[44]

The *Brown* decision precipitated a constitutional crisis in the South African Republic and led to the dismissal of the Chief Justice.

3.2.3.3 The constitutional crisis

The pronouncement that the *Volksraad* had contravened the procedures set by the *Grondwet* when it enacted legislation as simple resolutions threatened the validity of almost 75% of legislation.[45] In *An Appeal to the Inhabitants of the South African Republic,* annexed to his *Memoirs and Reminiscences,* Kotzé CJ addressed the difficulties and the uncertainty caused.[46] For him, it was essential to ensure constitutionally compliant enactment of all laws. He implored the *Volksraad* to identify and rectify all unconstitutional laws and to undertake to refrain from unconstitutional statutory enactment. His suggestions necessitated a constitutional amendment which the citizens of the South African Republic would authorise.[47] The Chief Justice wanted the constitutional amendment to secure the powers of the judiciary and to unequivocally protect everyone in the South African Republic. He wanted a constitutional guarantee for the independence of the judiciary and the protection of the *Grondwet* from amendments through special legislative majorities and processes. Van der Merwe suggests that that approach was an attempt "to force constitutional change through the barrel of a judgment."[48] Undoubtedly, President Kruger perceived the *Brown* decision as an abuse of judicial authority for political expediency.[49]

Whatever Kotzé CJ's motives, he delivered one of the most prominent judgments in favour of constitutionalism and accountability in the South African Republic.[50] However,

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44 Van der Merwe *Brown v Leyds* 343.

45 Barrie 2014 *Journal of South African Law* 817.

46 Kotzé *Memoirs and Reminiscences Vol II*, appendix I.

47 Van der Merwe *Brown v Leyds* 268-269.

48 Van der Merwe *Brown v Leyds* 267.

49 Loveland *By Due Process of Law?* 46.

50 Meierhenrich *The Legacies of Law* 95 notes that Kotzé CJ delivered many judgments against the government because his education in England gave him a very deep insight into the rule of law. More than a century after the dismissal of Kotzé CJ, the Supreme Court of Appeal referred to one of his judgments with approval. In *Powell v Van der Merwe* 2005 5 SA 62 (SCA) para 52, the court referred to Kotzé's ruling in *Ex parte Hull* (1891) 4 SAR 134 in which he disallowed a search warrant which was too general and vague.

instead of calling for the rectification of previous legislation through proper constitutional procedure, Kotzé CJ should have simply declared that all previous enactments of the *Volksraad* were valid.[51] In contemporary times, the courts have used inherent jurisdiction to prevent difficulties and absurdities which may inadvertently flow from their judgments. For instance, in *Corruption Watch (RF) NPC v President of the Republic of South Africa*,[52] the High Court reviewed, invalidated and set aside the appointment of Shaun Abrahams as National Director of Public Prosecutions (NDPP). Ordinarily, the order would have meant that all decisions and acts made by Abrahams in his capacity as NDPP were invalid. The court cured this when it ordered that despite the invalidity of Abraham's appointment, his decisions and acts performed as the NDPP were not automatically invalid.[53]

After the court delivered its judgment, President Kruger went on a tirade and argued that the Chief Justice had a mental illness. The President also criticised judicial review, calling it "the principle of the Devil"[54] and "the devil itself."[55] President Kruger said that the *Grondwet* was never intended to bestow the Supreme Court with powers to determine the legal validity of the enactments of the *Volksraad.*[56] He immediately set in motion legislative processes to expressly outlaw judicial review. Law 1 of 1897 gave the President the power to dismiss judges who refused to take an oath not to exercise judicial review. It was by this law that on 16 February 1898, President Kruger dismissed Kotzé CJ,[57] and by so doing, blatantly contravened the *Grondwet.* Article 57 of the *Grondwet* required judges to be "left altogether free and independent in the exercise of their judicial power."[58] The departure of the Chief Justice saw an end to judicial review in the South African Republic.[59] The events illustrated constitutional weaknesses in the South African Republic.

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51 For a synopsis of the inherent jurisdiction of the Supreme Court, see Taitz *The Inherent Jurisdiction of the Supreme Court* 1.

52 *Corruption Watch (RF) NPC v President of the Republic of South Africa; Council for the Advancement of the South African Constitution v President of the Republic of South Africa* 2018 1 SACR 317 (GP).

53 *Corruption Watch* para 128(5). The decision was confirmed in *Corruption Watch NPC v President of the Republic of South Africa; Nxasana v Corruption Watch NPC* 2018 10 BCLR 1179 (CC).

54 Van der Merwe *Brown v Leyds* 23.

55 Loveland *By Due Process of Law?* 46.

56 Thompson 1954 *BSALR* 65.

57 For a full discussion of the constitutional crisis and Kotzé's views, see in general, Kotzé *Documents and Correspondence Relating to the Judicial Crisis in the Transvaal*.

58 Loveland *By Due Process of Law?* 47.

59 Davidson 1985 *Harv JL & Pub Pol'y* 698.

3.3 Illiberal constitutionalism from the Union to apartheid

3.3.1.1 Parliamentary sovereignty with no rule of law

The colonial and apartheid governments applied the Westminster system with a very narrow understanding of the rule of law[60] such that whereas whites enjoyed equal protection and benefit of the law, Africans were excluded.[61] Dugard[62] argues that whereas in London parliamentary democracy is qualified by the rule of law, equality of citizens before the law and the freedom of persons from arbitrary government conduct, the colonial and apartheid regimes in South Africa used the principles of the Westminster system only in so far as the principles were desirable for colonial and apartheid ends. The regimes built their systems on grossly misdirected assumptions that Africans were inferior to other South Africans. They enforced that ideology with discriminatory legislation, arbitrary measures and frequent application of excessive force. Their behaviours invalidate any argument that the colonial and apartheid governments observed the rule of law. Dugard[63] says that the regimes embraced parliamentary supremacy only as far as legislative supremacy was unencumbered by the rule of law.

Although some people defended the apartheid system with arguments that the regime observed the rule of law,[64] the 'Sobukwe Clause' was an example to the contrary. The *General Laws Amendment Act* 37 of 1963 empowered the Minister of Justice to prohibit the release of political detainees serving time on Robben Island even after the detainees had served their full terms. Officially, the Act was of general application. In reality, the government enacted the statute to enable the Minister to perpetuate the arbitrary detention of Robert Sobukwe, an African intellectual who criticised the regime.[65] The enactment violated the doctrine of separation of powers as it placed the decision to keep persons imprisoned in the Minister, rather than in the courts.[66] Due to the absence of the rule of law, unconstrained powers at the disposal of the apartheid regime led to impunity

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60 De Vos and Freedman (eds) *South African Constitutional Law in Context* 78-79.

61 Cameron *Justice* 59.

62 Dugard *Human Rights and the South African Legal Order* 37.

63 Dugard *Human Rights and the South African Legal Order* 37.

64 See, for instance, to Levine "Rule of Law, Power Distribution, and the Problem of Faction in Conflict Interventions" 151.

65 Cameron *Justice* 179.

66 Cameron *Justice* 188-189. For a discussion of detention of prisoners, separation of powers and the rule of law, see *S v Dodo* 2001 5 BCLR 423 (CC) para 26.

as public office-bearers were not fully accountable. The laws were unfair and selectively applied to Africans in both arbitrary and unlawful ways.[67]

As opposition to it grew, the regime sanctioned extrajudicial killings and torture of political activists.[68] There was no accountability for many people murdered by security agents. The impunity with which the apartheid forces conducted themselves, enabled by national security legislation, was possible because of the absence of some of the basic tenets of constitutionalism in South Africa. However, government legitimacy suffered as a result of impunity. The uprising against the regime proved that the law could legitimise public power only if it curbs abuse of such power.[69] Without democracy, equality among citizens and respect for human rights - all which constrain the government and promote the rule of law and accountability - it is difficult to ascribe any legitimacy to colonial and apartheid regimes.

3.3.1.2 Judicial complicity in human rights violations

During the colonial and apartheid epochs, judicial officers were part of the state machinery. Judges validated and legitimised draconian laws and actions through their decisions.[70] The attitude of the courts made judges enablers of apartheid and significant contributors to the implementation of oppressive legislation.[71] Most judicial officers were unwilling to question human rights violations.[72] The apartheid regime was particularly satisfied by the legitimacy which judicial decisions bestowed on its harsh injustice.[73] Although South Africa had neither a Bill of Rights nor a supreme constitution, judicial officers could have protested "an abdication of decency and justice."[74] There were many cases in which the courts could have mitigated government excesses on human rights and freedoms. In *Rossouw v Sachs,*[75] for instance, the Appellate Division endorsed the

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67 Agrast, Botero and Ponce *WJP Rule of Law Index 2011* 9.

68 De Vos and Freedman (eds) *South African Constitutional Law in Context*78. According to Meierhenrich *The Legacies of Law* 110, 120-121, the government established the National Security Management System through which it set up hit squads and trained vigilantes to eliminate citizens opposed to apartheid.

69 Cameron *Justice* 61.

70 See Klug *The Constitution of South Africa* 225-229.

71 Dyzenhaus *The Constitution of Law* 21.

72 Davidson 1985 *Harv JL & Pub Pol'y* 742.

73 Graver *Judges Against Justice* 36.

74 Dugard *Human Rights and the South African Legal Order* 385.

75 *Rossouw v Sachs* 1964 2 SA 551 (A).

solitary confinement of a prisoner and held that it was necessary for the government also to deprive the prisoner of reading material.[76] The court decision was a serious failure by the court to fulfil its tacit obligation to defend justice and human rights.[77] Dyzenhaus[78] notes that by enhancing the apartheid agenda, the judiciary reneged on its commitment to the rule of law.

The collusion and complicity of the judiciary in the apartheid system eroded the legitimacy of the judiciary as an institution of justice.[79] It undermined core tenets of constitutionalism – the rule of law and human rights - leading to a lack of accountability. Without a fair chance before the courts, aggrieved persons were less likely to challenge the government in the courts. The current South African judiciary is a sharp contrast to the apartheid one. According to Sachs J,[80] the contemporary South African judiciary enjoys so much public confidence such that people would rather take their grievances to court than kill each other on the streets. Unlike its contemporary counterpart, the apartheid judiciary was not representative of the people of South Africa. Since the government designed the bench to achieve apartheid policies, the judiciary was racialised and patriarchal.[81] The political appointment of executive-minded judges was secretive, as there were no interviews for judicial office.[82] The secrecy left no safeguards brought by public scrutiny in open interviews.

3.3.1.3 Liberal judges and the constitutional crisis

However, several judicial appointees soon became a disappointment for the government.[83] They demonstrated affinities for independence, unwavering commitments to the rule of law and showed a lot of respect for fundamental legal principles.[84] Some

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76 See also *Loza v Police Station Commander, Durbanville* 1964 2 SA 545 AD (in which the court said that the police could rearrest and detain a person immediately after the person had completed a 90-day detention under section 17 of the *General Laws Amendment Act* 37 of 1963) and *Schermbrucker v Klindt* 1965 4 SA 606 AD, in which the court blocked the right of a detained person to give evidence on his behalf in an application to interdict an unlawful interrogation. See Dugard *Human Rights and the South African Legal Order* 290 for a discussion of the judgments.

77 Cameron *Justice* 21.

78 Dyzenhaus *The Constitution of Law* 20.

79 Madala 2000 *NCJ Int'l L & Com Reg* 748.

80 Sachs *We, the People* 141.

81 Moseneke *My Own Liberator* 218.

82 Cameron *Justice* 101.

83 Dugard *Human Rights and the South African Legal Order* 285.

84 Cameron *Justice* 36.

judicial officers frowned upon acts of racism by magistrates.[85] For instance, De Wet JP of the Transvaal Supreme Court lamented that racially biased magisterial conduct brought disgrace to the administration of justice in South Africa.[86] Ramsbottom J said Mandela's actions during the Defiance Campaign, in which Mandela encouraged Africans to defy the Pass Laws, were driven by a desire to serve Africans and to bring about the repeal of unjust apartheid laws.[87] The judge concluded that Mandela's conduct was not dishonest, and neither was it disgraceful, nor dishonourable, to warrant removal as an attorney.[88] Rumpff JA acquitted all 69 accused persons in the Defiance Campaign Trial and quashed the Pass Laws in *Komani v Bantu Affairs Administration Board, Peninsula Area.*[89] De Wet JP sentenced Mandela and other Rivonia trialists to imprisonment at a time when the statutorily prescribed sentence, which the government could have welcomed, was capital punishment.[90] To understand why judges were able to 'defy' the apartheid government, one needs to consider that

> On the one hand, the apartheid regime invoked law as an instrument to impose and justify racial discrimination and political repression, but on the other hand it allowed relatively independent courts to administer justice in accordance with the enlightened values of the common law, a mix of English and Roman-Dutch law. Meierhenrich explains this contradiction in terms of a conflict between a prerogative state, which shows little respect for the rule of law, and a normative state, which respects the rule of law. His thesis, with wide philosophical underpinnings, provides a satisfactory explanation for the fact that when South Africa became a democracy in 1994 it was able to draw on its normative heritage in order to construct a model constitutional order.[91]

Judges such as Schreiner JA were at the epicentre of the constitutional crisis caused by liberal judicial attitude. Just as in the earlier constitutional crisis experienced by the South

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85 Racism was apparent in many judgments during the colonial and apartheid eras. For instance, in *Myers & Misnum v Rex* 1907 TS 760 at 761, Innes CJ grossly generalised that African detectives were not reliable witnesses compared to Europeans, particularly when their testimony was against accused persons of European descent. Chanock *The Making of South African Legal Culture* 124 notes that similar objections were raised against the use of undercover African detectives to trap poor Europeans who stole diamonds in the mines.

86 Cameron *Justice* 37.

87 *Incorporated Law Society, Transvaal v Mandela* 1954 3 SA 102 (T) at 108D-E.

88 The issue of Mandela's fitness to remain an attorney arose after Mandela was arrested and convicted under section 11(b) of the *Suppression of Communism Act* 44 of 1950 which criminalised all acts committed by Africans to bring social and political change through the repeal of unjust and suppressive legislation.

89 *Komani v Bantu Affairs Administration Board, Peninsula Area* 1980 4 SA 448 (A).

90 For a comprehensive account of the Rivonia Trial, see Joffe *The State vs. Nelson Mandela*.

91 Review of Meierhenrich *The Legacies of Law* by Dugard, available at https://www.bookdepository.com/Legacies-Law-Jens-Meierhenrich/9780521156998.

African Republic, judicial review caused the constitutional crisis of the 1950s. A trilogy of cases triggered the constitutional crisis against the backdrop of attempts by the apartheid government to consolidate white supremacy.[92] The regime viewed the rights of Coloureds to vote as too liberal and undesirable. Parliament targeted Coloureds only because it had removed Africans from the last voter's roll in 1936.[93] In 1951, Parliament enacted the *Separate Representation of Voters Act* 46 of 1951 to remove Coloureds from the voters' roll. In its rush, Parliament failed to comply with section 152 of the *South Africa Act*,[94] 1909, which required Parliament to use a bicameral procedure. Instead, Parliament used a unicameral process. In what came to be known as the *Coloured Vote* case, the Appellate Division considered whether the courts had powers to review and set aside legislative enactments. The court reasoned that in reviewing Acts of Parliament for procedural validity, it would be protecting entrenched rights.[95]

The court was satisfied that the legislature had failed to adhere to the provisions of sections 35 and 152 of the South Africa Act, and declared the impugned statute invalid. Parliament was not pleased with the decision and decided to establish a High Court of Parliament, composed of members of Parliament, to review all decisions of the Appellate Division which invalidated enactments.[96] The Appellate Division set the statute aside.[97] Having failed to establish its own court, Parliament 'packed' the Senate to give it numbers to legally pass the statute.[98] Parliament also increased the quorum of the Appellate

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92 The trilogy cases were *Harris v Minister of the Interior* 1952 2 SA 428 (A) (hereinafter *Harris I*), *Minister of the Interior v Harris* 1952 4 SA 769 (A) (hereinafter *Harris II*) and *Collins v Minister of the Interior* 1957 1 SA 552 (A) (hereinafter *Collins*).

93 Africans were removed from the Cape voter's roll through the *Representation of Natives Act* 12 of 1936.

94 *South Africa Act,* 1909 (the South Africa Act).

95 Per Centlivres CJ in *Harris I* at 449F. Like Kotzé CJ of the South African Republic, Centlivres CJ found himself in a position in which he had to decide whether he was entitled to depart from precedents (see the at 452B-D). In his case, the impugned precedent was *Ndlwana v Hofmeyer* 1937 AD 229, a decision in which the Appellate Division had ruled that it had no powers to test the validity of Acts of Parliament. Unlike his counterpart, Centlivres CJ had the benefit of several precedents in which South African courts overruled their precedents – see, for instance *Rex v Faithful & Gray* 1907 TS 1077; *Collett v Priest* 1931 AD 290; *Bloemfontein Town Council v Richter* 1938 AD 195; *Rex v Nxumalo* 1939 AD 580; *Commissioner for Inland Revenue v Estate Crewe* 1943 AD 656. However, Centlivres CJ steered clear of the *Brown* decision and instead chose to rely on one of Kotzé's extra-curial writings - Kotze 1917 *SALJ* 280-315.

96 *High Court of Parliament Act* 35 of 1952.

97 *Harris II*.

98 Van der Schyff *Judicial Review of Legislation* 37-38. The packing of the Senate was achieved through section 2(1) of the *Senate Act* 53 of 1955 which gave the Governor-General powers to nominate 16 Senators after the dissolution of the Senate mandated in section 1(1)(a) of the same Act. The tactic worked seamless, as illustrated by the smooth passage of the *South Africa Amendment Act* 9 of 1956.

Division from five to 11 in all matters concerning the procedural validity of legislation.[99] The government appointed executive-minded judges to the Appellate Division to guarantee favourable outcomes in future litigation.[100]

3.3.1.4 The abolishment of judicial review

The government took further steps to expressly outlaw judicial review of legislation. Section 2 of the *South Africa Amendment Act* 9 of 1956 stipulated that

> No court shall be competent to enquire into or to pronounce upon the validity of any law passed by Parliament other than a law which alters or repeals or purports to alter or repeal the provisions of section one hundred and thirty-seven or one hundred and fifty-two of the South Africa Act.

The 1961 Constitution,[101] which removed the Union of South Africa from the Commonwealth and declared a republic, prohibited judicial review of legislation in two ways. First, it proclaimed parliamentary sovereignty.[102] Second, it prohibited the courts from reviewing legislation.[103] The courts could only inquire into the validity of legislation which repealed or amended sections 108 and 138 of the 1961 Constitution.[104] Effectively, Parliament outlawed judicial review. In *Nxasana v Minister of Justice*, Didcott J observed that

> [U]nder a constitution like ours, Parliament is sovereign…Our courts are constitutionally powerless to legislate or veto legislation. They can only interpret it, and then implement it in accordance with the interpretation of it.[105]

The 1983 Constitution[106] introduced a mild judicial review of legislation. Section 18(1) gave divisions of the Supreme Court powers to review compliance with section 17(2) of the 1983 Constitution. Section 17(2) required the State President, before issuing a certificate in terms of section 31 concerning a bill, an amendment or proposed amendment to the 1983 Constitution, to consult the Speaker of Parliament and the

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99 Section 110(1) of the *Appellate Division Quorum Act* 27 of 1955. See Tushnet "Establishing Effective Constitutional Review" 7-8 for a synopsis of court-packing as a mechanism to thwart review.

100 In *Collins*, the Appellate Division upheld amendments which removed Coloureds from the voter's roll.

101 *Republic of South Africa Constitution Act* 32 of 1961.

102 Section 59(1).

103 Section 59(2).

104 Section 108 entrenched Afrikaans and English as official languages. Section 138 regulated constitutional amendments.

105 *Nxasana v Minister of Justice* 1976 3 SA 745 (D) at 747.

106 *Republic of South Africa Constitution Act* 110 of 1983.

Chairperson of the Senate. However, the courts had no power of review of the decisions of the State President beyond those granted in section 18(1) of the 1983 Constitution.[107] The Supreme Court had powers to determine whether, in the enactment of legislation, Parliament and the State President complied with the 1983 Constitution.[108] Beyond that, the courts had no powers to review legislation.[109] However, the 1983 Constitution did not remove the powers of Parliament to enact draconian legislation. Notwithstanding, Africans demonstrated their aspirations for liberal constitutionalism in South Africa.

3.4 African aspirations for liberal constitutionalism

3.4.1 African conceptions of liberal constitutionalism

Ngcukaitobi[110] argues that legal and historical accounts of pre-1994 South Africa focus on the absurdity and injustices of colonisation and apartheid and that they give scant attention to the role of African lawyers to the birth of constitutionalism. Sachs J argues that the apartheid regime distorted the contribution of Africans towards freedom by

> [S]ubordinating each and every action to its racist context, suppressing all that was noble and highlighting all that was ugly. The ideals of democracy and freedom are presented as white ideals, the assumption being that blacks are only interested in a full stomach, not in questions of freedom. Daily life refutes this notion. It is the anti-apartheid struggle that has kept democracy alive in South Africa. It is not just the number of organisations that have indicated support for a document such as the Freedom Charter that proves this, but the growth of a powerful, alternative democratic culture in the country. The culture of democracy is strong precisely because people have had to struggle for it.[111]

Most African contributors to the conception of liberal constitutionalism in South Africa were active members of the African National Congress (the ANC). Africans formed the ANC to liberate themselves from a colonial government which relegated them to "hewers of wood and drawers of water."[112] In their struggle, African lawyers committed to constitutionalism and reiterated fidelity to the law even in the face of the most institutionally exploitative political, economic and social environment. African resistance

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107 Section 18(2) of the 1983 Constitution.
108 Section 34(2) of the 1983 Constitution.
109 Section 34(3) of the 1983 Constitution.
110 Ngcukaitobi *The Land is Ours* 5.
111 Sachs *We, the People* 25.
112 See Venter 2010 *SAJHR* 47.

to apartheid was a struggle for liberation, the rule of law, justice and for the attainment of authentic and inclusive democracy. African lawyers in South Africa were convinced that

> [I]njustice could only be fought with justice; illegality with legality and colonialism with constitutionalism.[113]

The ANC emerged as the most powerful and effective of all African groups which resisted the apartheid system. The ANC succeeded to unite Africans against the regime's divide and rule policy.[114] The account of the efforts of Africans against the apartheid system given in this chapter mostly focusses on the work of the ANC. The analysis does not intend (and should not be understood) to glorify the ANC or recognise its work above other organisations. The discussion merely highlights the historical struggles of Africans towards a South Africa governed through constitutionalism and in which the government is accountable. However, academics have given little acknowledgement of the role of the ANC towards constitutionalism, thus undermining efforts towards an understanding and appreciation of ANC's successful push for constitutionalism.[115]

> The ANC's contribution to the success of South African constitutionalism has been immense, and that contribution did not end when the drafting of the constitutional text did. It is inaccurate and unfair not to acknowledge this, whether we are thinking of giving due credit to the past or deciding more instrumentally how to think about the ANC going forward: we have more than one reason to want people living in South Africa, ANC members and not, to be aware of the prouder strains of the organization's recent history. And if we are trying to understand constitutional law or the Constitutional Court, the failure to acknowledge this contribution is also misleading.[116]

The following sections briefly outline the documents adopted by the ANC in its push for constitutionalism during colonial and apartheid epochs.

3.4.2 The African Bill of Rights, 1923

African lawyers made the first demands for a Bill of Rights in South Africa.[117] In 1923, the ANC conference in Bloemfontein adopted the African Bill of Rights.[118] The central themes in the African Bill of Rights were the demand for a share of the land, freedom, equality

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113 Ngcukaitobi *The Land is Ours* 74.

114 However, Issacharoff *Fragile Democracies* 168 says that the ANC "struggled to be the big tent in which the diverse opposition elements could rally toward a collective end."

115 Nthai 1998 *Consultus* 142.

116 Fowkes *Building the Constitution* 3.

117 Asmal, Chidester and Lubisi (eds) *Legacy of Freedom* 47-51.

118 Nthai 1998 *Consultus* 142.

of all citizens before the law, and justice.[119] Although the colonial administration treated Africans as subhuman and therefore felt justified to deny Africans access to justice and the freedoms which it accorded to Europeans, the ANC never adopted a resolution to exclude Europeans from the rights which it advocated for Africans. In its eyes, all South Africans were equal (and continue to be), regardless of their gender, race and origin. The African Bill of Rights called for the parliamentary representation of Africans and opposed taxation without representation in Parliament.[120]

3.4.3 The African's Claims in South Africa, 1943

Two decades after the adoption of the African Bill of Rights, 28 African intellectuals wrote the African's Claims in South Africa and passed it for adoption by the ANC at an annual conference in Bloemfontein on 16 December 1943.[121] The African's Claims emanated from deliberations on the accommodation of Africans in the post-World War II era.[122] The document was a response to the Atlantic Charter,[123] a precursor to the Universal Declaration of Human Rights (the UDHR).[124] The ANC intended to present the African's Claims at a peace conference which would follow World War II. The ANC believed that the South African government and the international community would recognise that long-lasting peace depended on equality among South Africans.[125] The African's Claims originated from the idea that the eradication of threats to humanity, peace and racial goodwill required a universal application of the Atlantic Charter. Hence, the African's Claims proposed new principles for a South Africa that belongs to all, regardless of ethnicity, race or religion. At the heart of the African's Claims lay the demand for universal adult suffrage and the end of racial discrimination.[126]

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119 Karis and Gerhart *From Protest to Challenge* 297.

120 Nthai 1998 *Consultus* 142.

121 Benson *The African Patriots* 117. The African's Claims is also known as the Atlantic Charter from the African's Point of View - SAHO 1943 https://www.sahistory.org.za/archive/africans-claims-south-africa-adopted-anc-1943-annual-conference; Meli *South Africa Belongs to Us* 94.

122 Ngcukaitobi *The Land is Ours* 1.

123 Atlantic Charter (1941).

124 Universal Declaration of Human Rights (1948).

125 SAHO 1943 https://www.sahistory.org.za/archive/africans-claims-south-africa-adopted-anc-1943-annual-conference.

126 National Heritage Monument South Africa 2017 http://nhmsa.co.za/news/the-africans-claim/.

The most important feature of the African's Claims was an expansive Bill of Rights. Among other rights, the 1943 Bill of Rights included the rights to full citizenship; equality in the courts; justice; representation in all forms of governance; freedom of trade and occupation; equality in the workplace; adequate medical and health facilities; and non-discrimination in all spheres of South African life.[127] The ANC furnished the African's Claims to the Prime Minister, Smuts. In the enclosed letter, ANC President Xuma invited the Prime Minister for a discussion of the issues. Smuts perceived the document as a propaganda tool and thought that Xuma wanted to gain popularity through him. Smuts did not perceive it necessary to address issues which affected Africans. Hence, he turned the invitation down.[128] Today, the preamble and section 1 of the Constitution are an acknowledgement of the values for constitutionalism expressed in the African's Claims.[129] Prior to the end of apartheid, the commitments to constitutionalism expressed in the African's Claims found expression in the Guidelines for a Democratic South Africa, another document of the ANC.

3.4.4 The Defiance Campaign against Unjust Laws, 1952

In 1952, it was clear to the ANC that peaceful overtures to the government and proposals for constitutional change would not achieve the desired outcomes for freedom, justice and democratic representation for Africans. The government had enacted more repressive laws against Africans.[130] Instead of using "petitions, deputations, meetings and polite persuasions"[131] to bring about the repeal of discriminatory and unjust laws, it was necessary to shift to "militant nationalism, mass actions, boycotts and strikes."[132] Before embarking on what came to be known as the Defiance Campaign against Unjust Laws, the ANC gave the government an ultimatum to repeal the repressive and unjust laws by 6 April 1952. The office of the Prime Minister responded to the ultimatum and questioned

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127 For a discussion of the content of the 1943 Bill of Rights, see Nthai 1998 *Consultus* 143. See Ngcukaitobi *The Land is Ours* 6 and Benson *The African Patriots* 117 for commentaries on the 1943 Bill of Rights.

128 Nthai 1998 *Consultus* 143.

129 For a further discussion of the significance of the African's Claims in South Africa to modern constitutionalism, see Sachs *We, the People* 12-13.

130 Some of the statutes were the *Natives (Abolition of Passes and Co-ordination of Documents) Act* 67 of 1952; *Group Areas Act* 41 of 1950; *Suppression of Communism Act* 44 of 1950; *Separate Representation of Voters Act* 46 of 1951 and the *Bantu Authorities Act* 68 of 1951.

131 Cameron *Justice* 29-30.

132 Cameron *Justice* 29-30.

the 'audacity and fraudulent' attempt by the ANC to speak on behalf of Africans. The response also threatened violence, despite the commitment of the ANC to conduct a peaceful campaign.[133]

The Defiance Campaign was testimony that if people cannot bring their government to account through peaceful and democratic processes, they are likely to resort to radical measures.[134] The relevance of the Defiance Campaign to the discourse on accountability is found in some of its defining features, particularly the unifying chants of "Afrika" and "Mayibuye."[135] In *United Democratic Movement v Speaker*, Mogoeng CJ said that the chants

> [A]re much more than mere excitement generating slogans. They convey a very profound reality that State power, the land and its wealth all belong to "we the people", united in our diversity. [Public office-bearers] are supposed to exercise the power and control these enormous resources at the beck and call of the people. Since State power and resources are for our common good, checks and balances to ensure accountability enjoy pre-eminence in our governance system.[136]

In 1955, the ANC adopted the Freedom Charter to realise the aims of the Defiance Campaign.

3.4.5 The Freedom Charter, 1955

The Freedom Charter was adopted by the Congress of the People in Kliptown.[137] The conception of the Freedom Charter was momentous for Africans and their struggle towards a free and just society.[138] The preamble to the Freedom Charter declared "We, the People of South Africa,"[139] as an indication of the representative and inclusiveness of the delegates who adopted it. The Freedom Charter contained ten sections created on the ideals of a just and free South Africa which recognises the equality of everyone before the law[140] The Freedom Charter gave practical relevance to the ideals of democracy, and

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133 Benson *The African Patriots* 175-176.

134 For a comprehensive account of the Defiance Campaign, see Benson *The African Patriots* 175-192.

135 See *United Democratic Movement v Speaker of the National Assembly* 2017 8 BCLR 1061 (CC) para 7 (hereinafter *United Democratic Movement v Speaker*). For an account of struggle songs during the Defiance Campaign, see SAHO 2017 http://www.sahistory.org.za/topic/defiance-campaign-1952.

136 *United Democratic Movement v Speaker* para 7.

137 Davis 2003 *ICON* 183.

138 Ngcukaitobi *The Land is Ours* 6.

139 See Historical Papers Research Archive "The Freedom Charter."

140 See commentary by Sachs *We, the People* 21.

human rights and freedoms.[141] In the context of popular sovereignty advanced in this study, the most important provision in the Freedom Charter was that "The People shall govern." The declaration showed the illegitimacy of the apartheid regime and the need to ensure a government based on the will of the people. In essence, the Freedom Charter was a vision of a South Africa designed in every way opposite to the apartheid regime. Although it was framed in quasi-political language, the Freedom Charter had provisions of a contemporary Bill of Rights.[142] It is probable that the UDHR inspired the Freedom Charter. Cameron J summarises the Freedom Charter as follows:

> The Charter proclaimed that South Africa belongs to all who live in it, black and white, and that no government can justly claim authority unless it is based on the will of the people. It demanded democratic government by the people, equality and human rights for all, and a share in the country's wealth. It proclaimed that the land shall be shared amongst those who work it.[143]

The ideals of the Freedom Charter lived throughout the reign of the apartheid regime and found expression in the Constitutional Guidelines for a Democratic South Africa.[144] Today, the preamble to the Constitution and the founding provisions restate core aspects of the Freedom Charter.[145]

3.4.6 The Constitutional Guidelines for a Democratic South Africa, 1989

The ANC adopted the Constitutional Guidelines for a Democratic South Africa[146] (the Constitutional Guidelines) in Lusaka, Zambia, with a vision of transformation in a post-apartheid South Africa. The ANC believed that racial domination and inequality perpetrated over the previous centuries had to be overcome with corrective action

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141 Corder and Davis 1989 *SALJ* 634-635.

142 Davis 2003 *ICON* 183. However, the apartheid regime and its supporters viewed the Freedom Charter a socialist expression and an anti-capitalist instrument. The negative interpretations of the Freedom Charter were motivated by the reality that under the apartheid regime, the *en masse* oppression of Africans was extricably interlinked with capitalist exploitation – see Hudson 1986 *Transformation* 8-9 for a discussion.

143 Cameron *Justice* 37.

144 ANC 1989 http://www.anc.org.za/content/constitutional-guidelines-democratic-south-africa.

145 In addition to the declaration "We, the People of South Africa," the Freedom Charter affirmed that "South Africa belongs to all who live in it, black and white." The Freedom Charter espoused all the elements in the founding provisions in s 1 of the Constitution, particularly freedom, equality and human dignity and political rights.

146 SAHO 1989 https://www.sahistory.org.za/archive/constitutional-guidelines-for-a-democratic-south-africa.

grounded in constitutional law.[147] The Constitutional Guidelines committed the ANC to constitutional limitations on the exercise of public power.[148] The movement understood the need for a written and supreme constitution to regulate the exercise of power in an orderly, organised and predictable manner.[149] The ANC also appreciated constitutionalism as an essential guarantee for the exercise of public power in a democratic state in which

> [T]he government is genuinely accountable to an entity or organ distinct from itself, where elections are freely held on a wide franchise at frequent intervals, where political groups are free to organise in opposition to the government in office and where there are effective legal guarantees of fundamental civil liberties enforced by an independent judiciary.[150]

The Constitutional Guidelines affirmed to the international community that members of the ANC were proponents of human rights and constitutionalists. The document cast doubt into the apartheid narrative that the ANC was no more than a group of power-hungry thugs.[151] The document was the brain-child of ANC President Oliver Tambo, to whom constitutionalism was important.[152] Tambo wanted to make the Freedom Charter a cornerstone of the legal order.[153] What made it more critical for Tambo to push for the protection and entrenchment of human rights, among other limitations on government authority, was his exile. Banned from his country, Tambo had no abstract conceptualisation of the need to protect human rights. His situation was a painfully practical one.

3.5 The transition to constitutional democracy

At the end of the 1980s, the apartheid regime accepted that the cost of maintaining apartheid was unsustainable.[154] The regime faced serious domestic challenges of legitimacy.[155] The international community was in solidarity with Africans and had

147 Ngcukaitobi *The Land is Ours* 6.
148 Davis 2003 *ICON* 183.
149 Corder and Davis 1989 *SALJ* 633.
150 Corder and Davis 1989 *SALJ* 633-634.
151 Sachs *We, the People* 10.
152 Sachs *We, the People* 12.
153 Sachs *We, the People* 13.
154 Gibson and Gouws *Overcoming Intolerance in South Africa* 16; Van der Schyff *Judicial Review of Legislation* 39.
155 Van der Schyff *Judicial Review of Legislation* 39; Cameron *Justice* 14. See also Cornell *Law and Revolution in South Africa* 1; Gibson and Gouws *Overcoming Intolerance in South Africa* 17.

suspended and expelled South Africa from all international bodies.[156] Economic sanctions and an arms embargo imposed by the United Nations Security Council caused high inflation and ballooned the sovereign debt to the verge of bankruptcy. Economic and political challenges left the government with no choice but to lean towards negotiation with its exiled political opponents. Hence, in 1987, the regime began secret negotiations with the ANC and other political groups.[157] The collapse of the Soviet Union and the fall of the Iron Curtain sped up the process of internal engagement in South Africa. Issacharoff notes that

> [T]he end of the Cold War removed from the ANC its longtime association to Soviet backing and removed National Party its last remaining international card as part of the Western anticommunist alliance.[158]

Hence, the regime unbanned its political opponents to create a conducive political climate. It also commenced formal negotiations at the Convention for a Democratic South Africa (CODESA).[159] However, the CODESA negotiations collapsed, with the result that another negotiation process, the Multi-Party Negotiation Process (MPNP), was established to continue. In the middle of 1993, the negotiating parties announced that they had reached consensus on the first inclusive elections and that they had agreed on a two-stage transition to constitutional democracy.[160] The parties agreed that the Constitutional Assembly,[161] composed of members of a democratically elected legislature, would draft the Constitution based on pre-agreed principles espoused in Schedule 4 of the transitional Constitution.[162]

In addition to commitments to a diverse, united, equal and free South Africa, the negotiating parties agreed on a supreme written Constitution in which all South Africans would enjoy universal rights and freedoms protected in international law.[163] It is in these

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156 Moseneke *My Own Liberator* 233, 258.

157 Issacharoff *Fragile Democracies* 167.

158 Issacharoff *Fragile Democracies* 167.

159 For a discussion of the prearrangements for the formal negotiations, see Issacharoff *Fragile Democracies* 167.

160 For a full discussion of the negotiations and the transition phase, see Klug "Public Participation and the Death Penalty in South Africa's Constitution-Making Process" 259-264.

161 Section 68(1) of the transitional Constitution created the Constitutional Assembly, composed of the National Assembly and the Senate sitting jointly for the purpose of constitution-making.

162 Section 71 of the transitional Constitution.

163 Cameron *Justice* 79.

commitments that one appreciates the birth of constitutionalism at the MPNP. Whereas African intellectuals conceived liberal constitutionalism many decades before, the negotiation process gave birth to constitutionalism. The transitional Constitution reflected a "broad consensus around liberal democratic principles"[164] and other tenets of constitutionalism such as constitutional supremacy and a justiciable Bill of Rights.[165] Scholars agree that the transitional Constitution converted South Africa into a liberal democracy.[166] Although the transitional Constitution was a legal watershed which ended minority rule and established a democratic Parliament with a constitution-making role,[167] there are doubts about the democratic nature of the constitution-making process and the ensuing legitimacy of the constitutional dispensation.

3.6 The legitimacy of the constitutional transition

There are differing academic and extra-curial views on the legitimacy of the transition from apartheid to constitutional democracy. Differences concern the nature of public participation in the constitution-making process.[168] Whereas Klug[169] acknowledges that the Constitution was a product of intense negotiations on the design of state institutions and the boundaries for the exercise of political power, he admits that public participation during the constitution-making process was contested.[170] Whereas Sachs J believes that "It is [W]e, the People, who produced our Constitution,"[171] Venter[172] argues that the constitution-making process and the adoption of liberal democracy were more influenced by the winds of globalisation than internal forces. The differing scholarly views on the

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164 Southall "The Contradictions of Party Dominance in South Africa" 155.

165 Cameron *Justice* 180.

166 See, for instance, Venter 2010 *SAJHR* 45; Southall "The Contradictions of Party Dominance in South Africa" 155.

167 See *Pharmaceutical Manufacturers Association: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 45 for an outline of how the adoption of the transitional Constitution altered the legal landscape in South Africa and how it shifted constitutionalism and all parts of public law from the common law to a supreme and written constitution. See ANC 2005 http://www.anc.org.za/content/statement-national-executive-committee-occasion-93th-anniversary-anc; Suttner *Recovering Democracy in South Africa* 94. See also Madlingozi 2008 *Constitutional Court Review* 65-66; Cameron *Justice* 277.

168 See Klug "Public Participation and the Death Penalty in South Africa's Constitution-Making Process" 259-264 and Venter 2010 *SAJHR* 45-65 for detailed accounts of the various forms of public participation in the making of the Constitution.

169 Klug 1996 *Review of Constitutional Studies* 18.

170 Klug "Public Participation and the Death Penalty in South Africa's Constitution-Making Process" 259.

171 Sachs *We, the People* 6.

172 Venter 2010 *SAJHR* 45-65.

democratic legitimacy of the constitution-making process lead to the question: Is the Constitution an expression of the popular will? The question is important because

> [P]articipation is not just a democratic principle but is an essential part of the process of constitutional legitimation that enables a new constitutional regime to survive the challenges of its founding and lays the foundation for its hopefully successful implementation.[173]

Sachs J[174] says that the involvement of all the people of South Africa in the making of the Constitution was important because a constitution is the first expression of sovereignty and self-determination of a people. In his view, in the absence of elections and public participation, the resultant Constitution would have no legitimacy in the eyes of the people, and they would not consider themselves bound by its authority. Sachs J[175] further argues that the need for citizens to realise and defend the constitutional vision for accountable government, among other values, arises because the Constitution is an embodiment of the values of the people of South Africa. Moseneke J[176] says that the election of members of Parliament and their role as the Constitutional Assembly gave legitimacy to the Constitution and ensured that the voice of 'we the people' was heard throughout the drafting process. However, Holmes cautions against the treatment of transitional constitutions as an embodiment of national consensus. He said

> The *lex majoris partis* is one of those decision rules that allow a population of human beings to make collective decisions for the first time. It may be a rational rule, but it is nevertheless a rule that is presupposed by, not produced by, collective choice, and that includes the choices attributed to an imaginary popular sovereign. Unless such a constitutive rule is already in place, the nation or the people cannot hammer out the kind of 'constitutive will' that could subsequently be thwarted or betrayed.[177]

When applied to South Africa, Holmes's argument strikes deep into the 'right' of the constitutional drafters to adopt the Constitution. Holmes[178] points out that in most instances, powerful political elites and economic giants direct the 'constitutionalization' process for their benefit to the exclusion, and often detriment, of the less politically influential. Given that academics and constitutional lawyers (in the form of the technical

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173 Klug "Public Participation and the Death Penalty in South Africa's Constitution-Making Process" 258.
174 Sachs *We, the People* 47.
175 Sachs *We, the People* 143.
176 Moseneke *My Own Liberator* 299.
177 Holmes "Constitutions and Constitutionalism" 190.
178 Holmes above.

committees) drafted the constitutional text and presented it for passage by the Constitutional Assembly,[179] one wonders if the resultant document was indeed a product of national consensus. Although section 73(6) of the transitional Constitution gave the President a discretion to subject the certified constitutional text a referendum,[180] the Constitutional Assembly chose to avoid going for a referendum.[181] Although one may argue that a referendum is not a meaningful form of participation because it is 'a blunt instrument,' it is doubtful whether mere submissions, verbal or written, constituted enough participation to render the resultant constitutional text a product of the will of the sovereign.

Since popular sovereignty places the right to adopt a constitution on the people,[182] the involvement of the Court in the constitution-making process, through its certification role, raised conceptual challenges. Whereas there is no doubt that certification of the Constitution by the Court gave the Final Constitution legitimacy in the eyes of the negotiators and the international community, the Court did not represent the will of the people but the interests of the negotiators – as enshrined in the 34 Constitutional Principles - and thus played a political role. The quasi-political role of the Court in the constitution-making process and led to an intractable tension between the notion of popular sovereignty and constitutional legitimacy.

> [T]he sovereignty of the people, in whose name the Constitution was adopted, was systematically weakened by a two-stage process that bound the people's elected representatives to prior agreements between political elites. As a result, it might be argued, the voice of 'the people' was drowned out by the buzz of elite bargaining, the noisy arguments of lawyers and the pronouncement of judges. Sovereignty was splintered by a political deal which fragmented the constitution-making process and turned it into a preserve of lawyers, judges and technocrats. Constituent power was effectively reduced to constituted power, which had to comply not only with the procedural requirements entrenched in the transitional Constitution, but also had to heed the 'solemn pact' represented by the Constitutional Principles. The requirement of judicial certification of the constitutional text, which is unprecedented in the history of constitutionalism, contributed further to the weakening of popular sovereignty.[183]

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179 See sections 72(2)-(3) and 73(4) of the transitional Constitution.

180 Section 73(7) of the transitional Constitution. However, section 73(8) set a high threshold of 60%.

181 For a discussion, see De Vos and Freedman (eds) *South African Constitutional Law in Context* 24.

182 Chambers 2004 *Constellations* 154.

183 Botha 2010 *SAJHR* 68-69.

Nevertheless, the certification of the amended constitutional text paved the way for the formal adoption of the current Constitution, which is founded on the values of accountable, responsive and open government.[184] It created a culture which requires the justification of the exercise of public power.[185] The Constitution introduced liberal constitutionalism to ensure accountability of the government.[186] In modern South Africa, constitutionalism is a conduit for the correction of the injustices committed by colonial and apartheid regimes so that such abuses of power and public resources do not occur again. The end of apartheid and the successful implementation of the tenets of constitutionalism led to democratic transition and set South Africa on a path of transformation, reconciliation and economic development.[187] Frankenberg[188] terms the South African constitutional setting egalitarian constitutionalism. Mahomed J affirmed liberal egalitarian values in the Constitution and reasoned that the Constitution

> [R]etains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally *egalitarian* ethos, expressly articulated in the Constitution.[189]

Scholars and the courts have referred to the transformative nature of the Constitution.[190] In *Economic Freedom Fighters v Speaker of the National Assembly*,[191] Mogoeng CJ said that the vision of the Constitution is to prevent the institutionalisation of impunity. In this regard, transformative constitutionalism is a mechanism for the enhancement of accountability.[192] The tenets of transformative constitutionalism in the Constitution

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184 Section 71(2) of the transitional Constitution gave the Constitutional Court powers to scrutinise and certify the constitutional text drafted by the Constitutional Assembly. In *Certification of the Amended Text of the Constitution of the Republic Of South Africa, 1996* 1997 1 BCLR 1 (CC), the Court certified the constitutional text for compliance with the 34 Constitutional Principles in schedule 4 of the transitional Constitution.

185 Mureinik 1994 *SAJHR* 32.

186 For a synopsis of liberal egalitarian values, see Cappelent and Tungodden 2006 *Economics and Philosophy* 393-408.

187 Bauman and Schneiderman 1996 *Review of Constitutional Studies* 1. However, transformation is a vague and pliable concept. For a synopsis, see Venter 2018 *SAJHR* 143-166.

188 Frankenberg *Comparative Constitutional Studies* 98.

189 *S v Makwanyane* 1995 6 BCLR 665 (CC) para 262 (emphasis added).

190 See, for instance, Sachs *We, the People* 161. Some of the cases are *Du Plessis v De Klerk* 1996 5 BCLR 658 (CC) para 157; *Rates Actions Group v City of Cape Town* 12 BCLR 1328 (C) para 100; *City of Johannesburg v Rand Properties (Pty) Ltd* 2006 6 BCLR 728 (W) paras 51-52.

191 *Economic Freedom Fighters v Speaker of the National Assembly* 2016 5 BCLR 618 (CC) para 1.

192 See Klare 1998 *SAJHR* 146-188 and Langa 2006 *Stell L Rev* 351-352 for an in-depth discussion of transformative constitutionalism.

prescribe democratic, constitutional and legislative mechanisms for citizens to demand and enforce accountability on the government to prevent the levels of impunity experienced in the past and to ensure an accountable government in future. The Constitution created the present framework for accountability and seeks to accommodate the needs of a future in which posterity will enjoy responsive and open governance.

3.7 Conclusion

In summary, this chapter is an examination of the historical development of South African constitutionalism. The constitutional history of South Africa is a tale of the struggle of the people to assert their sovereignty. The analysis shows that the Constitution entrenches the ideals of constitutionality and popular sovereignty which Kotzé CJ and his brethren so vainly defended in the South African Republic at the end of the 19th Century. The judgments of the supreme courts of the Orange Free State and the South African Republic on the relationship between the people and the government affirm the position in the previous chapter that sovereignty vests in the people. This chapter also shows that between the establishment of the Union of South Africa in 1910 and the end of apartheid in 1993, the South African legal system was a concoction of illiberal constitutionalism, a compromised Westminster system, illegitimate minority rule, and the absence of both the rule of law and practical limitations on government powers. The chapter exposes the shortcomings of parliamentary supremacy and the weaknesses of constitutions founded on parliamentary sovereignty. In so doing, the chapter illustrates the need for constitutional democracy and limitations on public power. The historical reflections show how the notion of constitutionalism, properly implemented, can provide the South African constitutional state with effective mechanisms for accountability.

This chapter also analyses the contribution of African intellectuals towards liberal constitutionalism to demonstrate that contrary to some schools of thought, the idea of an accountable government limited by the rule of law and a Bill of Rights originated within the state among the oppressed peoples of South Africa. The activism and resistance of African intellectuals against colonial and apartheid systems demonstrated the importance of government legitimacy earned through democratic processes and consolidated with accountability. The insight contextualises the approach of the ANC to the constitution-making process and its current mind-set on issues of accountability and constitutionalism. The discussion of the transition from apartheid to transformative constitutionalism proves

the birth of constitutionalism as a solution to unaccountable governance. The authentic democratic transition, backed by tenets of constitutionalism, gave South Africa an opportunity to reset its approach to governance to ensure accountability through constitutionalism. The following chapter analyses electoral and legislative accountability.

Chapter 4 Electoral Accountability

4.1 Introduction

This chapter discusses two major themes in electoral and legislative accountability in contemporary South Africa. The first theme analyses electoral accountability from the perspective of universal democratic theory. The theme contextualises the nexus between elections and accountability and presents elections as verdicts of citizens on the government of the incumbents. Also, the first theme analyses and elections as choices of future policies. The conceptual discussion in the first theme also covers political parties (parties) as conduits for electoral accountability. The discussion shows the significance of parties in a democracy in relation to accountability. The analysis zooms into South Africa and uses the governing party, the African National Congress (ANC) to illustrate the adverse impact of one-party dominance in a constitutional democracy and the use of coalitions by smaller parties to counterweigh the dominant party. The examination of parties proceeds to internal party democracy within South African parties and centres on the manipulation of internal party democracy and the litigious contestation of the internal processes of parties.

The last part of the discussion of South African political parties focusses on the impact of one of the most critical aspects of electoral accountability: the public and private funding of parties. The discussion covers the theoretical bases for state funding of parties, the accountability risks posed by private party funding, the need for transparency and compulsory disclosure of private funding. The second theme of the chapter exclusively covers the major elements of electoral accountability in South Africa, namely proportional representation, a multiparty system of democratic government and the constitutional regime for electoral accountability.

4.2 Electoral accountability: Perspectives from universal democratic theory

4.2.1 The nexus between elections and accountability

Democratic representation requires institutional settings, anchored on legislative representation, through which the government listens to the voices of citizens to advance

the interests and viewpoints of citizens.[1] Since political representation is the core of democratic systems,[2] democracy should lead to a representative legislature through which citizens take part in government.[3] Modern democracies cannot exist without elections because elections are necessary for representative democracy.[4] Elections define representative democracy and underlie all democratic processes and governance.[5] Citizens use elections to exercise their sovereignty.[6] Voting creates an electoral agency which makes citizens principals and elected public office-bearers agents.[7] Electoral processes give citizens regular and superficial opportunities to express their popular will on who should represent them in government. Given that democratic processes embrace competitive elections in which parties which aspire for public office compete for the popular vote,[8] the popular vote bestows upon the elected parties the mandate to govern on behalf of citizens for the specified duration.[9] Citizens, in turn, submit to government authority because the government has a legitimate claim to exercise public power.[10]

Representative democracy is achieved through elections and gives a government the democratic consent of the majority citizens to govern, despite that the minority consistently withholds its consent. However, a majoritarian understanding of representative democracy views elections from the theory that the primary function of elections is the choice of a government preferred by the majority of citizens to give the winning party a firm grip over the levers of state power. When citizens disagree on which policies to pursue, the theory assumes, the government should pursue the policies chosen by most of the citizens. A consensus view of democracy subscribes to the theory that the

1 Botha 2011 *Stell L Rev* 521.
2 Wolf 2015 *SALJ* 780.
3 Issacharoff *Fragile Democracies* 11.
4 Wolf 2015 *SALJ* 780.
5 Franklin, Soroka and Wlezien "Elections" 389; Gélineau 2013 *Electoral Studies* 419.
6 Damgaard and Lewis "Accountability and Citizen Participation" 258; Bovens "Public Accountability" 192. According to Müller, Bergman and Strøm "Parliamentary Democracy: Promise and Problems" 3, "popular sovereignty is exercised through delegation from citizens to individual politicians and collective actors, in particular, political parties."
7 Gailmard "Accountability and the Principal-Agent Theory" 93; Carey *Legislative Voting and Accountability* 3. See also, in general, Lane *The Principal-Agent Perspective*. In South Africa, section 42(3) of the Constitution mandates the National Assembly to represent the people and "to ensure government by the people under the Constitution."
8 Thomassen "Representation and Accountability" 1.
9 Warren "Accountability and Democracy" 45.
10 Olsen *Democratic Accountability, Political Order, and Change* 1.

government should be responsive to all sectors of society and include as many citizens as possible.[11] The theory applies mostly to states polarised along historical and ethnic divisions. In such states, proportional representation also leads to majoritarianism even when it becomes necessary to build coalitions to establish a majority government.

Representative democracy, elections and accountability are interconnected[12] because democratic governments account to citizens.[13] Strong democracy enhances accountability, whereas a subverted democracy leads to government impunity.[14] As such, the relationship between citizens and government is not just about democracy but also accountability. Citizens should go further than elections to promote and protect principles which strengthen democracy and accountability.[15] Mechanisms of accountability ensure that public office-bearers act in the best interests of citizens and not for their narrow ends.[16] By virtue of their roles as representatives of citizens, public office-bearers should also be responsive to citizens. However, elections are generally ineffective for accountability[17] because elections neither guarantee good leadership nor responsiveness of the government.[18] Some states have dominant parties because incompetent leadership and corruption do not influence voting patterns.[19] In addition, polarisation weakens electoral accountability and builds a false sense of solidarity and cultural pride which some people value more than the implications of flawed electoral choices.[20] Polarisation makes it is easy for public office-bearers to abuse power and to dodge accountability. Also, elections are not a robust accountability mechanism in a subverted democracy with compromised electoral processes.[21]

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11 Thomassen "Representation and Accountability" 2.
12 Adibe 2010 *Soc Res* 1242.
13 Turpin and Tomkins *British Government and the Constitution* 132.
14 See Mwonzora "Public Participation Under Authoritarian Rule: The Case of Zimbabwe" 142-158.
15 Koenane 2017 *African Journal of Public Affairs* 61.
16 Pelizzo and Stapenhurst *Government Accountability and Legislative Oversight* xv; Turpin and Tomkins *British Government and the Constitution* 132.
17 Franklin, Soroka and Wlezien "Elections" 390.
18 Issacharoff *Fragile Democracies* 6.
19 In the context of the thesis, dominant political parties refer to parties which have a monopoly over the government and consistently win elections.
20 Goetz and Jenkins *Reinventing Accountability* 47.
21 See Warren "Accountability and Democracy" 42.

4.2.2 Elections as verdicts on the government of incumbents

Electoral accountability refers to democratic processes which enable citizens to punish elected public office-bearers for misconduct.[22] Schumpeter[23] viewed elections as the sword with which citizens cut the tenure of a poorly performing government. Thus, elections are seen as an effective theoretical mechanism for the enhancement of governance and quality leadership.[24] However, elections only work effectively to curb abuses of power when accountability is the central concern in an election.[25] Elections express the collective will (supposedly represented by the majority vote) and a verdict of the overall opinion of citizens on governing parties and politicians.[26] Preferably, citizens would vote for a party based on the performance of the incumbent government. The assumption is that if citizens are satisfied with the performance, they will vote for the incumbent government. If citizens are dissatisfied, they will "throw the rascals out."[27] Preferably, an accountable government stands a better chance at re-election as citizens want the excellent job to continue.[28] In this context, Mulgan[29] views an election as a process in which the incumbent government, having exhausted its mandate to govern, returns to citizens to seek a renewal of the mandate.

Theoretically, governments which abuse state resources and permit self-enrichment and corruption are bound to lose the confidence of citizens and risk removal from power in elections. The reasons are simple: corruption and wasteful expenditure constitute an illegitimate exercise of public power. The mandate to govern does not extend to abuse of public power. Therefore, parties and individuals who aim for re-election ought to be of honesty and integrity, transparent, and promptly responsive to the needs of citizens. Corruption in government should ideally attract the wrath of citizens.

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22 Gélineau 2013 *Electoral Studies* 420.
23 Thomassen "Representation and Accountability" 2.
24 Wolf 2015 *SALJ* 817.
25 *My Vote Counts NPC v Minister of Justice and Correctional Services* 2018 8 BCLR 893 (CC) para 32 (hereinafter *My Vote Counts v Minister: Justice*).
26 Mulgan *Holding Power to Account* 42.
27 Thomassen "Representation and Accountability" 2.
28 See Edelstein *The French Revolution and the Birth of Electoral Democracy* 1.
29 Mulgan *Holding Power to Account* 41.

Nkomo[30] said citizens must always give due regard to their responsibility to hold the government accountable. Fombad[31] argues that citizens who care for themselves and their future get a good government because of their diligence and inquisitiveness. Fombad further argues that cowardly and gullible citizens always get a bad government. Although the views are generic, they express the profound principle that citizens have a primary responsibility to elect representatives of honesty and integrity, and who are motivated into public office by the desire to serve citizens.[32] Idealistically, citizens vote into public office individuals who have demonstrated good personal character, probity in the execution of their duties, have excellent credentials, and generally possess the necessary qualities to lead responsibly.[33]

Citizens who want accountable governance must protect and promote democracy through elections and other means.[34] The effectiveness of democratic processes for accountability depends on the willingness of citizens to exercise the franchise not only for the selection of better policies offered by competitors, but also to strengthen democracy.[35] Citizens should use elections to remove parties and individuals who undertake their public duties wrongly, corruptly and incompetently. In the South African context, the role of citizens is important because the Constitution of the Republic of South Africa, 1996 (the Constitution) does not implement itself.[36] The Constitution goes only as far as to establish democratic and constitutional structures for the achievement of its values. Since the people created the Constitution, they are not mere subjects of the government, but they are constitutional agents who must actively protect the Constitution and its values.[37] Sachs J[38] declares that South Africans owe themselves a duty to ensure that the full vision

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30 Nkomo *Nkomo: Story of My Life* 247.

31 Fombad 2010 *Speculum Juris* 42.

32 See *United Democratic Movement v Speaker of the National Assembly* 2017 8 BCLR 1061 (CC) para 3 (hereinafter *United Democratic Movement v Speaker*).

33 *My Vote Counts v Minister: Justice* para 31.

34 Moseneke *My Own Liberator* 351; Sachs *We, the People* 6; Langa 1998 *Windsor Yearbook of Access to Justice* 154; Langa 1999 *Southern Methodist University Law Review* 1538.

35 Koenane 2017 *African Journal of Public Affairs* 61.

36 *United Democratic Movement v Speaker* para 2.

37 Langa and Cameron 2010 *Advocate* 32; Langa 1998 *Windsor Yearbook of Access to Justice* 154; Langa 1999 *Southern Methodist University Law Review* 1538. Preuß "The Political Meaning of Constitutionalism" 12; Henkin "A New Birth of Constitutionalism: Genetic Influences and Genetic Defects" 41 terms the responsibility of citizens to protect their system of governance 'political constitutionalism.

38 Sachs *We, the People* 6.

of the Constitution is achieved. Moseneke J[39] adds that South Africans should ensure accountable government by defending the Constitution because they liberated themselves from an excessively abusive regime and because they committed to shunning all manifestations of impunity. Cameron J[40] says that the people of South Africa need a dedicated government and an activist civil society to translate constitutional values into practical achievements.

Although the immediate extra-curial interpretations of the underlying assumptions of the constitutional vision for accountable government are aspirational and idealistic, they have shaped the mindset and approach of the Constitutional Court on issues of accountability. One needs not to look further than the powerful declarations by Mogoeng CJ that only individuals who are strongly committed to the founding values of accountability, responsiveness and openness should govern, and that "public office-bearers ignore their constitutional obligations at their peril."[41] Mogoeng CJ reasoned that the tenets of constitutionalism, particularly the rule of law, stand in the Constitution to guard against impunity. When they have exercised their electoral duty diligently, citizens have a right to expect professional and ethical behaviour from the government.

Ideally, the suitability of public office-bearers for re-election depends on the performance of the economy under their government. Arguably, electability is directly proportional to the stability and growth of the economy. It is difficult for citizens to support a government whose policies do not resonate well with the economy.[42] Gélineau[43] argues that citizens observe the economy during the tenure of a government, form an opinion based on their observations and determine whether economic performance is the result of the actions of the government.[44] Citizens assign responsibility for the economic situation to the government and use the vote to reward good performance or punish the government.[45]

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39 Moseneke *My Own Liberator* 351. See also Henkin "A New Birth of Constitutionalism: Genetic Influences and Genetic Defects" 41 who argues that people have responsibility for their system of governance because they established it.

40 Cameron *Justice* 276.

41 *Economic Freedom Fighters v Speaker of the National Assembly* 2016 5 BCLR 618 (CC) paras 1-3.

42 Gélineau 2013 *Electoral Studies* 419.

43 Gélineau 2013 *Electoral Studies* 420.

44 See also Mulgan *Holding Power to Account* 41 who says that elections compel incumbent governments to defend their records in office and "to explain and justify their actions and give citizens the opportunity to listen and impose a verdict."

45 Grynaviski *Partisan Bonds* 1.

However, accountability based solely on economic performance exists mostly in theory. Practical realities show that the performance of the economy is not a credible benchmark for the electability of a government.[46] The theory of elections as a verdict on incumbent governments is inadequate in other several respects, partly because the theory only focusses on the incumbents and assumes that citizens would always vote for incumbents unless when the incumbents prove themselves not suitable for re-election. The foregoing analysis and the following section assume an informed and engaged electorate, which, although ideal for electoral accountability, is hardly possible even in advanced democracies.

4.2.3 Elections as choices of future policies

Although it is correct that citizens should always monitor politicians,[47] the preceding theory does not recognise that citizens may choose to vote for a newly formed party or other parties for reasons not related to the performance of the incumbents. The proposition of elections choices of citizens for future government policies advances an alternative explanation on the purpose of elections, and differs from the previous theory in that it presupposes that when citizens vote, they need not concern themselves with the past performance of the incumbents but with who among the contestants offers the best policies for future governance.[48] The theory connects the preferences of citizens to public policy through the election of parties and leaders who have pledged to implement policies wanted and approved by citizens. In this context, elections are a mechanism through which citizens elect parties and individuals who, in their views, will advance their interests.[49]

Under the theory of elections as an expression of the choices of citizens on policies for future governance, votes for or against a party set the standard for the accountability of the government.[50] Fombad[51] argues that elections give citizens the opportunity to choose representatives based on the understanding that citizens elect people whom they want

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46 For a further analysis of economic accountability, see Gélineau 2013 *Electoral Studies* 418-424.
47 Lane *The Principal-Agent Perspective* 169.
48 Thomassen "Representation and Accountability" 2-3.
49 Thomassen "Representation and Accountability" 1.
50 Van Wyk 2016 *Constitutional Court Review* 129.
51 Fombad 2010 *Speculum Juris* 42.

and thus get a government that they deserve. However, the view does not account for risks posed to election processes by rogue regimes.[52] The promotion of accountability through elections needs citizens to pay greater attention to the calibre of politicians and parties which they vote into power. The past performance of an incumbent government, juxtaposed against future expectations, enables citizens to sanction or reward politicians and their parties. Citizens should scrutinise parties and the people fielded by the parties for election to ensure that the chosen representatives are not motivated into public office by personal reasons but by a desire to serve their fellow citizens.[53]

However, the policy mandate model has several weaknesses. Citizens have no way to know how parties would perform when elected to public office. Parties often make different and antagonistic promises during election campaigns, leading to difficulties after elections because smaller parties do not always have powers to define the legislative agenda to implement their promises. Governing parties, on the other hand, can transform their electoral promises into government policies because they have the requisite parliamentary numbers to do so.[54] Since members of governing parties control national governments, governing parties should take responsibility for parliamentary actions on election promises.[55] Unfortunately, governing parties often renege on their electoral promises.[56] Although citizens are reasonably aware that persons campaigning for public office are incentivised "to say whatever it takes to win elections,"[57] it is unclear whether citizens can legally compel parties to fulfil their election promises. Gauja says that a party does not have a legal mandate to fulfil its election promises[58] and argues that the public interest demands members of a legislature to act contrary to policy documents and other electoral promises made by the party if such deviation would advance the public good.[59]

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52 Adar, Hamdok and Rukambe "Multiparty Electoral Trends in Africa in 2004: Introduction" 1 pointed out that in most African states, citizens, opposition parties and electoral institutions face many challenges from incumbent governments. Goetz and Jenkins *Reinventing Accountability* 47 reveals that dictatorial regimes often intimidate voters and misuse material things (of little value) to influence electoral behaviour in their favour. Fortunately, in South Africa, the factual reality is that the post-apartheid government does not pose a violent threat to the electoral process – see Brooks 2004 *Journal of African Elections* 122.

53 See *United Democratic Movement v Speaker* para 3.

54 Gauja *Political Parties and Elections* at 196.

55 Grynaviski *Partisan Bonds* 1.

56 Carey *Legislative Voting and Accountability* 4.

57 Grynaviski *Partisan Bonds* 1.

58 See Gauja *Political Parties and Elections* 195. See also Mulgan *Holding Power to Account* 1.

59 Gauja *Political Parties and Elections* 194-195.

However, one may ask: If the election promises of a party, based on which citizens elected the party, do not have a binding legal effect, what should citizens make of election promises? Should citizens evaluate such promises as genuine undertakings? These questions lead to the broader discussion of parties as conduits for electoral accountability.

4.2.4 Conduits for electoral accountability: Political parties

4.2.4.1 Political parties and democratic pluralism

Parties are free associations of citizens to participate in political processes. Parties have a special status in the democratic process as they are the axis for electoral accountability.[60] Parties also establish essential links between citizens and the government,[61] making them channels for the distillation of the will of citizens.[62] A historical overview reveals that parties emerged in the West in the 19th Century when the expansion of the franchise and macro electoral politics made it inevitable for candidates to use organisations (parties) to contest elections. Parties enable candidates to harness the substantial organisational resources for election campaigns and to reach large groups of potential voters.[63] In modern democracies, parties are indispensable to democratic governance because they are vehicles for citizens to participate in political affairs.[64] Parties nominate candidates to occupy public office and coordinate election campaigns. The success or failure of a party in elections has consequences for democracy because the stability and vitality of democracy in multiparty democracies depend on the electoral fortunes of parties.

Multiple parties give citizens a more extensive choice of who should represent them. Parties also determine whether citizens will participate in an election and how they are likely to vote.[65] Since citizens are represented by and through parties, it is indisputable that parties are essential in the functioning of representative democracy. Parties play a critical role in the formulation of the popular will, at times manipulating citizens and channelling them towards a national consensus of what they consider should be the

60 Franklin, Soroka and Wlezien "Elections" 390.
61 Thomas "Studying the Political Party-Interest Group Relationship" 1.
62 Wolf 2015 *SALJ* 813.
63 Gauja *Political Parties and Elections* 37
64 Wolf 2015 *SALJ* 804.
65 Dalton and Anderson "Citizens, Context, and Choice" 4.

popular will. [66] Parties do so through the organisation of the mass participation of citizens in politics and the democratic process. Therefore, the constitutional and legal regime which governs parties has an impact beyond the immediate activities of parties which it regulates and extends to the management of elections and democratic governance in practice.[67]

The legislative representatives of parties in Parliaments and the executive formulate and implement government decisions, making parties both governors and the governed.[68] As such, parties are essential mechanisms of accountability. Competition among parties is a characteristic of liberal democracy and contributes to a responsive government.[69] The competition also creates public accountability mechanisms which expose financial abuse, nepotism, wasteful expenditure and corruption in government.[70] The multiplicity of parties and uncertainties about which party will obtain the most votes in an election increase the responsiveness of elected parties.[71] Increased responsiveness enhances the accountability of the government. Within parties, persons who intend to stand for election to regional and national office, such as the President, need to secure the support of their colleagues.[72] Such support provides more democratic processes before a person can stand in any representative capacity, and is not only essential during the nomination process but also crucial for the term in office. A person who loses the confidence of his/her party may be recalled from office. The powers of a dominant party to recall a President from office raise questions about the democratic desirability of one-party dominance. One-party dominance erodes the confidence of citizens in a competitive party system,[73] thus necessitating an examination of conditions for the consolidation of democracy and constitutionalism in a state ruled by a dominant party.[74] The following

66 Gauja *Political Parties and Elections* 3.
67 Gauja *Political Parties and Elections* 9.
68 Gauja *Political Parties and Elections* 7.
69 Pridham "Southern European Democracies on the Road to Consolidation: A Comparative Assessment of the Role of Political Parties" 2.
70 Holm "Curbing Corruption through Democratic Accountability in Botswana" 288.
71 Lane *The Principal-Agent Perspective* 169; Wolf 2015 *SALJ* 812.
72 Mulgan *Holding Power to Account* 42.
73 See Brooks 2004 *Journal of African Elections* 122 and Welsh 2004 *Politeia* 8.
74 See Southall *Democracy in Africa* 55.

discussion uses the governing party in South Africa as a case-study of the challenges to democratic accountability brought by a dominant party.

4.2.4.2 One-party dominance: the ANC in South Africa

Since the advent of constitutional democracy, the ANC has dominated multiparty democracy due to its role in ending apartheid and the resultant legacy of President Mandela.[75] Between 1994 and 2008, South Africa did not have competitive democracy due to the dominance of the governing party in both Parliament and provincial legislatures.[76] The party won all successive national elections and stood to widen its gap because of weaknesses among smaller parties. However, the dominance of the governing party threatens the consolidation of democracy,[77] the rule of law[78] and accountability. Like all ruling parties, the ANC has a decisive influence on Parliament,[79] controls the legislative agenda and shields its members in the executive from oversight by Parliament and other institutions.[80] The last decade showed that the governing party often uses its superior parliamentary numbers to create a voting block through legislative party unity, coerces its members in the National Assembly and mostly relies on the discipline of its 'cadres' to thwart accountability. Arguably, the success of the ANC in defeating all motions of no confidence in President Zuma underscored the powers of the governing party to suppress all attempts by opposition parties to hold the President accountable. The dominance of the ANC also enables it to enact most legislation without the support of smaller parties.[81]

Opposition parties form coalitions to counteract the dominance of the governing party and to ensure meaningful electoral competition. Coalitions are simply alliances of two or more parties which aggregate blocks of votes of parties, making coalitions a default strategy for parties which seek to run metropolitan councils and cities. When no single party wins majority seats, coalitions become necessary. The first significant coalitions in South Africa were formed after the August 2016 Local Government Elections when all the

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75 Lotshwao 2009 *Journal of Southern African Studies* 901.
76 Welsh 2004 *Politeia* 8. See also Brooks 2004 *Journal of African Elections* 126-133.
77 Lotshwao 2009 *Journal of Southern African Studies* 902.
78 See McEldowney 2013 *TSAR* 269.
79 See Grynaviski *Partisan Bonds* 1 on the influence of ruling parties on Parliaments.
80 Botha 2011 *Stell L Rev* 533.
81 Lindberg *Democracy and Elections in Africa* 40.

parties could not obtain outright majorities to govern the metropolitan councils of Tshwane, Johannesburg and Nelson Mandela Bay. However, opposition parties do not always form coalitions for the benefit of citizens. Although some coalition partners may have honourable representative intentions, some parties are likely to engage in coalitions to guarantee themselves sufficient government powers to control state procurement and the redistribution of government resources which are not available to ordinary members of society.[82] Conclusively, coalitions do not necessarily enhance accountability due to the partisan nature of coalitions which often yields corruption.[83] Coalition parties have hidden agendas and create opportunities for the winners, with the result that partisan decisions made by coalitions often alienate citizens.[84] In addition, coalitions may destabilise the government.[85] Recently, it is common knowledge that the breakdown of coalitions in the Nelson Mandela Bay Metropolitan Council resulted in uncertainties regarding the mayoral position. Also, threats from coalition partners to pass a vote of no confidence in the mayor of Tshwane destabilised the coalition agreement in the Tshwane Metropolitan Council. As such, most coalitions are fragile.

Coalition partners often fail to work together towards common objectives. Uncertainties and mistrust between opposition leaders often affect coalitions.[86] Arguably, broad ideological lines make opposition parties ineffective in the pursuit of executive accountability. Opposition parties in South Africa are examples of the challenges of ideological differences between coalition partners. The political landscape, as observed in the activities of parties, shows that coalition partners in the City of Johannesburg and the metropolitan councils in Tshwane and Nelson Mandela Bay differ on the approach to the expropriation of land because some want radical economic transformation while others advocate for secure property rights and actively reject what they term as attempts to subvert property rights. Coalitions also fail because it is inevitable that the alliance partners will not equally share the gains of the alliance. There is always a risk that some

82 Arriola *Multiethnic Coalitions in Africa* 12-13.
83 Ostrom *The Meaning of Democracy and the Vulnerability of Democracies* 6.
84 Ostrom *The Meaning of Democracy and the Vulnerability of Democracies* 7.
85 Schofield and Sened *Multiparty Democracy* 12.
86 See Arriola *Multiethnic Coalitions in Africa* 5.

of the coalition partners would not benefit from the coalitions, thus discouraging the formation of coalitions. In law, a cheated coalition partner has no remedy.[87]

The dominance of the ANC and the formation and failure of coalitions raises issues about the prospects of South Africa to consolidate democracy. Although the sustenance of the current political order is beneficial to the sustainability of democracy, there is no academic consensus on the meaning of democratic consolidation. According to Lotshwao, democratic consolidation occurs when

> [T]he party that wins in the first elections loses it in the next elections and peacefully relinquish power to the victor without seeking to overturn the election results. The new winners also have to transfer power to the winners of the next election peacefully.[88]

The ANC has never lost power. Based on this fact, some scholars concluded that South Africa has not consolidated democracy.[89] Earlier conceptions on democratic consolidation relied on a fledgeling democracy in a political culture which had not developed so much as to make "free and fair elections an irreversible feature"[90] of democracy in South Africa. The earlier dominance of the ANC manifested the low quality of democracy.[91] Objective observation shows that currently, the ANC suffers from pockets of illegitimacy due to its perceived lack of accountability and unresponsiveness. The question arises whether, when the time comes (if it ever comes), the ANC relinquish power? The ANC government has demonstrated a substantial commitment to the rule of law and the Constitution,[92] an indication that it will not outrightly subvert the will of cities. Whereas there are doubts about internal democracy in the ANC (as discussed below) the changes in party leadership from Presidents Mandela to Mbeki, Mbeki to Zuma and Zuma to Ramaphosa, point to a strong commitment to democracy, albeit under difficult circumstances.

Linz and Stepan defines democratic consolidation as the assumption of power and the solution of political challenges through elections, and a situation in which democracy "has

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87 Arriola *Multiethnic Coalitions in Africa* 6.

88 Lotshwao 2009 *Journal of Southern African Studies* 906.

89 Maldonado "Introduction: Toward a Constitutionalism of the Global South" 27.

90 See IEC "Reflections on the State of Electoral Democracy in South Africa" 30 for a short discussion.

91 Lindberg *Democracy and Elections in Africa* 41.

92 However, Suttner *Recovering Democracy in South Africa* 297 advances a contrary view by arguing that "recent years have seen a marked deterioration in the ANC-led government's respect for legality and constitutionalism, which has been signified by countless cases of corruption and fraud."

become the only game in town."[93] Democracy becomes 'the only game in town' when citizens and political players accept democratic elections as the only and legitimate means through which political power changes hands. In the view of Linz and Stepan, democratic consolidation requires more than elections but encompasses authentic and meaningful elections, and changes in political attitudes, behaviour and habits which enhance democracy. Therefore, democratic consolidation includes constitutional processes and institutions which are deeply committed to democratic values and which are resilient to manipulation. Griffiths argues that the political and constitutional transformation of South Africa from the apartheid legal order to inclusive democracy represented a "remarkable example of democratic transition and consolidation."[94] Since 1994, South Africa has solved political problems through democracy. The Independent Electoral Commission has continued to conduct free and free elections, giving citizens equal opportunities to decide on which party to govern. Therefore, South Africa has consolidated its democracy.

4.2.4.3 Internal democracy in South African parties

Internal party democracy refers to intra-party democracy and is an essential part of accountability. De Vos[95] defines intra-party democracy as the extent and methods through which parties include their members in deliberations, decision-making and selection of public representatives. The participation of all members of a party in discussions on party policy and nomination, selection and removal of party leadership enhances prospects for the election of party leadership with necessary capabilities. Inclusive participation also enhances responsiveness within the party and in general, nurtures a democratic culture in both the party and the state.[96] Hence, political competition within parties is as crucial as competition between parties.[97] Whereas parties use legally recognised processes for the selection of party leadership and the nomination

93 Linz and Stepan *Problems of Democratic Transition and Consolidation* 5.
94 Griffiths "Parliamentary Oversight of Defense in South Africa" 229.
95 De Vos 2015 *SAJHR* 45.
96 Lotshwao 2009 *Journal of Southern African Studies* 903.
97 Gauja *Political Parties and Elections* 128.

of candidates for party lists, the processes are directly tied to internal party democracy and the factions which arise as a consequence of power struggles.[98]

The processes through which a party selects its leaders affect the prospects of the party in elections and the quality of government formed by the party. Effective elections require the involvement of the lower party structures and individuals in the selection of legislative representatives for the party to give party members meaningful opportunities to participate in the selection of more capable leaders. The involvement of all members of the party in leadership selection also leads to the adoption of policies which respond to the needs of citizens and the development of a more democratic culture within the party and the government. The leadership of governing parties can only be responsive to popular demands when elected by the broad membership of the party. The participation of lower structures and everyone else in the party results in the imposition of checks and balances on leadership.[99] Therefore, internal party democracy is more crucial within the governing party than in smaller parties.

However, Lotshwao[100] argues that the perceived lack of internal democracy in the ANC not only threatens the consolidation of democracy but could, overall, affect democratic health in South Africa. Lotshwao[101] argues that the ANC is centralised such that the governing party excludes essential structures in the party, such as the Women and Youth Leagues, from the making of important decisions. Arguments of an undemocratic culture within the ANC stem from the historical alignment of the party with the Leninist practice of democratic centralism which requires members of the party to be disciplined and to toe the line when directed by the President or the higher decision-making bodies of the party.[102] Although the governing party has evolved over the years to foster internal democracy, the perceived lack of internal democracy in the ANC has potential negative repercussions for accountability. Lotshwao[103] noted that the ANC government had, because of the lack of internal democracy, become irresponsive. The dominance of the governing party over institutions of accountability, such as Parliament, has decayed good

98 Gauja *Political Parties and Elections* 99.
99 Lotshwao 2009 *Journal of Southern African Studies* 903.
100 See in general, Lotshwao 2009 *Journal of Southern African Studies* 901-914.
101 See also Van der Schyff *Judicial Review of Legislation* 54.
102 Lotshwao 2009 *Journal of Southern African Studies* 902.
103 Lotshwao 2009 *Journal of Southern African Studies* 903.

governance and commitments to constitutionalism.[104] The reality is that it is the party, not Parliament, which influences and directs government policy, leaving the executive largely unaccountable to Parliament.

In addition to centralisation, the governing party and smaller parties manipulate internal party democracy in several ways. The right to participate in the activities of a party, enshrined in section 19 of the Constitution, obligates parties to act lawfully and in accordance with their organisational constitutions and the Constitution.[105] When parties freely and fairly elect their parliamentary representatives and leadership, they foster a national culture of democracy. To the contrary, parties governed in undemocratic ways flout their constitutions and are unlikely to observe good governance and the rule of law when elected. It is inevitable that governments formed by such parties would resist accountability.[106] Although the ANC governs democratically, several court decisions have shown that some members of the party have a propensity to subvert internal democracy. The most critical cases are *Dube v Zikalala*[107] and *Mokoena v Magashule*,[108] in which the courts interdicted delegates of the KwaZulu-Natal and Free State provinces from participating in the elective conference in 2017 because of allegations of branch-stacking and other electoral malpractices.

Branch-stacking is electoral malpractice in which members of a party, who do not ordinarily live in a branch, are enlisted into a branch for the only purpose of challenging a candidate. Persons who implement branch-stacking supply registration and membership fees for the enlisted persons to participate in branch voting. In some instances, such persons forge signatures of members on attendance registers to obtain the necessary quorum for the nomination of preferred candidates by the branch.[109] In addition to branch-stacking, one of the most severe forms of electoral manipulation within political parties is electoral bribery, which entails the use and payment of money to influence voting choices. Closely related to bribery is treating, which involves the use of food, drinks and entertainment to influence the choices of voters. Undue influence also

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104 See also Suttner *Recovering Democracy in South Africa* 297.
105 *Ramakatsa v Magashule* 2013 2 BCLR 202 (CC) (hereinafter *Ramakatsa*).
106 Adar, Hamdok and Rukambe "Multiparty Electoral Trends in Africa in 2004: Introduction" 4.
107 *Dube v Zikalala* [2017] 4 All SA 365 (KZP) (hereinafter *Dube*).
108 *Mokoena v Magashule* [2017] ZAFSHC 224 (hereinafter *Mokoena*).
109 Gauja *Political Parties and Elections* 119.

manifests when party leadership and other influential persons induce members of a party to vote in a specified way or to withdraw their participation from the electoral contest. Undoubtedly, bribery and other forms of electoral corruption result in deception and taint the electoral process.

Aggrieved members of a party can challenge the party for unfair treatment arising from the subversion of internal party democracy. There are several cases in which South African courts have considered legal challenges against parties.[110] Although court judgments have emphasised the need for the resolution of political disputes 'at a political level,'[111] there is no judicial consensus on the role of courts in enforcing intra-party democracy.[112] In *Ramakatsa*,[113] the court concluded that parties are voluntary associations created by agreement between members. The position follows the long-standing view that a party constitution is a contract between party members. A party member who feels that the party constitution (the contract) has been breached, may seek appropriate remedies from the courts.[114] Although party issues are private matters, private activities are still subject to the Constitution because of the supremacy of the Constitution and the vertical and horizontal application of the Bill of Rights.[115] However, a discontented candidate should diligently pursue remedial processes available to him/her through the party before approaching the courts. Courts will not intervene if, given the circumstances of the case, the aggrieved person failed to exhaust internal party remedies and when recourse was available. When internal remedies are not available, insufficient or compromised, the courts will intervene, as evident in *Ramakatsa.*

In *Ramakatsa*, the applicants argued that the party had violated their constitutional rights

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110 Some of the cases were *Dube v Zikalala*; *Ramakatsa*; *Mokoena*; *De Lille v Democratic Alliance* [2018] 3 All SA 684 (WCC) (hereinafter *De Lille*).

111 See, for example, *Mazibuko v Sisulu* 2013 11 BCLR 1297 (CC) para 83; *Mazibuko v Sisulu* 2013 4 SA 243 (WCC) at 256E-H.

112 See the divergent judicial views on this aspect in the cases referred to in *De Lille* para 29.

113 *Ramakatsa* para 79. See also *Natal Rugby Union v Gould* 1999 1 SA 432 (SCA) and *Turner v Jockey Club of South Africa* 1974 3 SA 633 (A).

114 See *Saunders v Committee of the Johannesburg Stock Exchange* 1914 WLD 112 at 115 on voluntary associations and the jurisdiction of the courts to grant remedies in the event of breaches.

115 According to Michelman "Constitutional Supremacy and Appellate Jurisdiction in South Africa" 46, nothing should be "allowed to remain outside the Constitution's tent or beyond the Constitution's gaze" in contemporary South Africa.

to take part in the activities of a party of their choice.[116] The litigation arose after the election of the Provincial Executive Committee (PEC) of the ANC in the Free State Province. The evidence showed that internal remedies were no longer available for the litigants because the Secretary-General of the ANC had said that there was nothing that the party would do about the various irregularities committed at the PEC. The National Executive Committee (NEC) of the party had also endorsed the outcomes of the Provincial Elective Conference.[117] The Court analysed the issues and concluded that although section 19 of the Constitution endows every adult citizen with the right to participate in the activities of a party, it does not prescribe how the right should be exercised. Since the activities of a party are an internal matter, it is up to the party to determine how best to conduct its affairs, including how members take part in various decision-making processes. The Court further said that the constitution of a party determines the participation of members in the internal affairs of the party.[118] Since the Constitution is a supreme law which imposes mandatory obligations,[119] the party constitution may not contradict the Constitution.[120]

4.2.4.4 The financing of political parties in South Africa

4.2.4.4.1 Public funding of parties

Funding is necessary for both large and small parties to cover daily operations and campaigns.[121] Money also enables parties to reach targeted constituencies and to shape the public mind-set through political advertisements and other engagements. South Africa provides financial support for parties represented in the National Assembly.[122] Although parties are private entities, they receive state funding because of their increasingly significant role in democratic processes. In *Ramakatsa,* the Court said that parties receive

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116 For a commentary on *Ramakatsa* d and its consequences, see De Vos 2015 *SAJHR* 48-54. Dafel 2015 *SAJHR* 56 points out that *Ramakatsa* is also significant in that the Court developed "a third methodological pathway through which fundamental rights applies horizontally between non-state actors" and also in that the Court permitted, for the first time, a person to utilise a cause of action against another person solely on the provisions of the Bill of Rights.

117 *Ramakatsa* para 27.

118 *Ramakatsa* para 73.

119 Section 2 of the Constitution.

120 *Ramakatsa* para 74.

121 *My Vote Counts v Minister: Justice* para 2.

122 Wolf 2015 *SALJ* 816.

public funding because parties provide the machinery for the facilitation and entrenchment of democracy.[123] The reasoning of the Court elucidated the connection between the role of parties in the democratic process and their funding.[124] Public funding of parties curbs political corruption by reducing the reliance of parties on private funding and narrows the funding gap between parties to ensure that election outcomes reflect the proposed policies of parties, not the strength of their financial resources. As such, public funding contributes to equality between parties.[125] Public funding comes handy for parties which have lost their support from labour unions, wealthy individuals and companies.[126] Public funding of parties

> [E]ntails a corollary: that the private funds they receive necessarily also have a distinctly public purpose, the enhancement and entrenchment of democracy, as well as a public effect on whether democracy is indeed enhanced and entrenched. The flow of funds to political parties, public or private, is inextricably tied to their pivotal role in our country's democratic functioning.[127]

Section 236 of the Constitution stipulates that for the state to enhance multiparty democracy, national legislation must provide for the funding of parties which participate in national and provincial elections. The provision is important because democracy requires "strong, resilient, democratically elected parties"[128] whose vitality depends on funding. Until the *Political Party Funding Act* 6 of 2018 (the Party Funding Act) comes into effect,[129] the *Public Funding of Represented Political Parties Act* 103 of 1997 regulates public funding and obligates the state to provide financial assistance to parties through the Electoral Commission. However, the requirement that only parties represented in the National Assembly and provincial legislatures may receive state funding has negative implications on popular sovereignty and accountability for two main reasons. First, the public funding model prejudices emerging parties and favours established parties. Second, the requirement subverts the will of citizens by enabling parties formed through floor crossing (and which have not been put before citizens and tested in elections) to

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123 *Ramakatsa* para 36.

124 *My Vote Counts v Speaker of the National Assembly* 2015 12 BCLR 1407 (CC) para 36 (hereinafter *My Vote Counts v Speaker*).

125 Arriola *Multiethnic Coalitions in Africa* 13.

126 Gauja *Political Parties and Elections* 144.

127 *My Vote Counts v Speaker* para 37.

128 *My Vote Counts v Speaker* para 10.

129 Section 26(1) stipulates that the Party Funding Act will come into effect on a date determined by the President by Proclamation in the Government Gazette.

access public funding.[130] Due to the inadequacies of public funding to support the day-to-day financial needs of parties, parties seek and obtain funding from private persons.[131] However, private funding has negative implications for accountability.

4.2.4.4.2 Accountability risks of private party funding

In any state, private funding may improperly influence parties in favour of their donors.[132] Persons who provide substantial funding to parties may attempt to influence government policy in exchange for funding.[133] Although democracy promises each citizen the right to share political power, economic inequalities give wealthy citizens more influence in the democratic process because money always speaks louder than the voice.[134] To a corrupt private funder, money is a tool for the achievement of improper motives which undermine constitutional values.[135] The founding values of accountability, responsiveness and openness require the election of public representatives in a free environment in which no hidden hands with ulterior motives unduly influence contestants for public office. Realistically, private funders do not sponsor parties out of benevolence but because of solid strategic reasons. Most funders sponsor parties with the intention to influence the direction of the parties on policy positions which would benefit the sectional interests of the funders. Resultantly, private funders use money to manipulate parties and their representatives.[136]

Although some businesses in South Africa voluntarily donate to parties with no expectations of favours,[137] there is a risk that most donate to secure access to government procurement.[138] If true, the allegations that the governing party has

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130 IEC "Reflections on the State of Electoral Democracy in South Africa" 14. See also Smiles 2011 *Insights on Africa* 159 on two parties which were formed through floor crossing and got representation in the National Assembly.

131 Welsh 2004 *Politeia* 5; *My Vote Counts v Minister: Justice* para 3.

132 Gauja *Political Parties and Elections* 165.

133 OECD *Financing Democracy* 46.

134 See De Vos 2015 *SAJHR* 36 on the use of money to influence political decisions.

135 *My Vote Counts v Minister: Justice* para 48.

136 *My Vote Counts v Minister: Justice* para 40.

137 Tshitereke "Securing Democracy: Party Finance and Party Donations - the South African Challenge" 1.

138 See Robinson and Brummer "SA Democracy Incorporated: Corporate Fronts and Political party Funding" 3 for accounts on how the governing party received R400 000 from an Italian property developer in exchange for environmental approval to develop the Roodenfontein golf estate. The authors also discussed how Brett Kebble used the Black Economic Empowerment policy to support the governing party and how the Democratic Alliance received R500 000 from a German fugitive.

demanded and received financial donations from businesses in exchange for state tenders not only undermine the democratic process but also commodify government decision-making and lead to poor governance.[139] Corrupt persons and entities have utilised all available opportunities to use the money to influence contenders of public office. For instance, Julius Malema, the leader of the third largest party in South Africa, is on record admitting that Adriano Mazzotti, an alleged tax evader and cigarette smuggler, funded the registration of the Economic Freedom Fighters to contend the 2014 elections.[140] In a televised process, the governing party was implicated at the State Capture Commission by allegations that it demanded, received and laundered money from Bosasa to fund its election campaigns. Thus, the democratic process, as far as private funding is concerned, needs legislative protection from external influence and insulation from fraud, unlawful competition and theft.[141]

In *My Vote Counts v Minister: Justice*,[142] the Court expressed concern that the clandestine and unregulated funding of parties by private individuals and entities pose a risk to state strategic objectives and undermine the sovereignty of the state. The Court said that bearers of public office, who come into office through elections on the ticket of parties, can only fulfil their constitutional mandate to build a better South Africa if their characters and will-power are free from all encumbrances.[143] Candidates who are potentially or factually compromised by promises to their private funders cannot be described as enforcers of the will of the people, and they would also find it difficult to follow the principles of good governance required by section 195 of the Constitution.[144] The Court further said that private funding of parties is susceptible to abuse through corruption[145] which would triumph when parties can choose to withhold information about their funding.[146] A non-governmental organisation, My Vote Counts NPC, pursued several cases

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139 Robinson and Brummer "SA Democracy Incorporated: Corporate Fronts and Political party Funding" 1, 3.

140 Malema repeated this position in several televised interviews and political rallies. For an exposition of Mazzotti's alleged tax evasion and cigarette smuggling, see Pauw *The President's Keepers* 200.

141 Issacharoff *Fragile Democracies* 42.

142 *My Vote Counts v Minister: Justice* para 41.

143 *My Vote Counts v Minister: Justice* para 42.

144 *My Vote Counts v Minister: Justice* para 47.

145 Article 7(3) of the Convention Against Corruption (2003) obligates Member States to adopt legislation and administrative mechanisms enhance the openness of parties and individuals who aspire for public office.

146 *My Vote Counts v Minister: Justice* para 45.

against the President, the Speaker of the National Assembly and the Minister of Justice on the disclosure of information about private funding from a perspective of accountability.[147]

4.2.4.4.3 The need for transparency

Transparency and accountability require the imposition of an express obligation on parties to disclose their private funding.[148] The regulation of private party funding prevents, contains and eliminates most corruption which taints democratic processes.

> [C]orruption that flows from secret private funding could otherwise stealthily creep into our political and governance space, toxify it and fossilise itself to our detriment if it has not already done so.[149]

Due to risks posed by the financing of parties by criminal syndicates and the ensuing corruption surrounding the private funding of parties, Parliament enacted the Party Funding Act, assented to by the President in January 2019. Prior to the enactment, legislation did not compel parties to disclose private funding. Local and foreign businesses, civil society and trade unions were at large to contribute unlimited amounts of money to parties without the risk of disclosure.[150] After Parliament abandoned the *Promotion of Multi-Party Democracy Bill*,[151] tabled in 1997, it became clear that the legislature lacked the will to regulate the private funding of parties. Although a court application by the Institute for Democracy in South Africa failed, it raised constitutional issues around the right to make informed political and electoral choices through access to information on the private funding of parties.[152] In the landmark case *My Vote Counts v Minister: Justice*,[153] the Court recognised the necessity of access to information about the private funding of parties for the meaningful exercise of the right to vote.

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147 Some of the cases were *My Vote Counts NPC v President of the Republic of South Africa* [2017] 4 All SA 840 (WCC); *My Vote Counts v Speaker* and *My Vote Counts v Minister: Justice*. For commentaries on some of the decisions, see Klaaren 2018 *Law, Democracy and Development* 1-11; Cachalia 2017 *SAJHR* 138-153; Tham 2016 *Constitutional Court Review* 74-96; Van Wyk 2016 *Constitutional Court Review* 97-154.

148 *My Vote Counts v Minister: Justice* para 44.

149 *My Vote Counts v Minister: Justice* para 4.

150 Gueorguieva and Simon *Voting and Elections the World Over* 137.

151 [B67A-97]. The Bill specifically required disclosure of private party funding.

152 *Institute for Democracy in South Africa v African National Congress* 2005 5 SA 39 (C). For a criticism of the judgment, see Botha 2011 *Stell L Rev* 534.

153 *My Vote Counts v Minister: Justice* para 53.

The disclosure of private party funding informs citizens of who funds the party they support and enables citizens to understand the position of the party and business interests which may influence the party. It also deters potential corruption disguised as party funding. Transparency in the funding of parties protects constitutional values and democracy by deterring questionable funding. Disclosure of party funding protects the government and smaller parties from capture and bondage to funders (some of whom may be in the service of foreign interests)[154] and ensures that the government and individual legislative representatives are not at the "mercy of unknown and even unscrupulous funders"[155] whose agenda may negate the ability of the government to fulfil founding constitutional values of accountability, responsiveness and openness. After an election, citizens may use the information of private funding disclosed by parties to identify business favours granted by public office-bearers as *quid pro quo* for private funding.[156] In *My Vote Counts v Minister: Justice,* the Court ordered Parliament to enact legislation to regulate the recording and reasonable accessibility of information on private party funding.[157] Without the obligation, citizens cannot meaningfully exercise the right to vote. The crux of the Court's reasoning was that a legal regime that obligates the disclosure of private party funding would constrain the undue influence of private party funders.[158]

4.2.4.4.4 Compulsory disclosure under the Party Funding Act

The Party Funding Act extensively regulates the funding of political parties. The preamble to the Act contextualises the enactment on the constitutional values of accountability, responsiveness and openness; multi-party democracy; the need to consolidate democracy and the national interest; the protection of South Africa's sovereignty; and the need to meet international obligations on the transparency of political party funding. Although the preamble does not refer to the Court pronouncement on the need to enact a statute to regulate private party funding, the preamble recognises the obligation under section 236 of the Constitution. The section requires Parliament to enact legislation to

154 *My Vote Counts v Minister: Justice* para 41.
155 *My Vote Counts v Minister: Justice* para 48.
156 *My Vote Counts v Minister: Justice* para 3 and *My Vote Counts v Speaker* para 42.
157 *My Vote Counts v Minister: Justice* para 44.
158 *My Vote Counts v Minister: Justice* para 42.

regulate the funding of political parties at both national and provincial level on an equitable and proportional basis to promote multi-party democracy. The Party Funding Act addresses several issues on the funding of parties and establishes a Represented Political Party Fund and a Multi-Party Democracy Fund.[159]

Section 8 of the Party Funding Act prohibits donations to parties by foreign governments and agencies, foreign persons and entities, and organs of state and state-owned enterprises. Also, section 8 sets a ceiling for amounts which parties may receive in donations[160] and prohibits parties from accepting donations from the proceeds of crime.[161] Importantly, section 10 of the Party Funding Act prohibits donations to members of political parties[162] and criminalises contravention of the section.[163] In addition to prohibitions on donations to parties and party members, the Party Funding Act mandates parties to disclose to the Electoral Commission all funding received from private persons.[164] The obligation to disclose donations extends to juristic persons and entities.[165] Hence, both parties and funders must disclose donations. The Electoral Commission must disclose to citizens, every quarter through publication, information related to donations to parties.[166]

The Electoral Commission has extensive powers to enforce the Party Funding Act. Section 14 gives the Commission monitoring and inspection powers which include powers to compel persons to disclose information; enter premises to inspect books, records, reports and other documents and to copy and store information; and to ask questions.[167] The Electoral Commission may turn to the Electoral Court for an order to compel compliance.[168] The Electoral Commission may suspend the payment of money to a party which fails to comply with the Party Funding Act after issuing directions to an implicated party.[169] The Electoral Commission may also recover monies irregularly accepted by

[159] Sections 2 and 3 of the Party Funding Act, respectively.
[160] Section 8(2).
[161] Section 8(3).
[162] Section 10(1)-(2).
[163] Section 10(3).
[164] Section 9(1).
[165] Section 9(2).
[166] Section 9(3).
[167] Section 14(2).
[168] Section 14(3).
[169] Section 16.

parties,[170] and impose administrative fines.[171] Persons found guilty of contravening the Party Funding Act are liable to fines and imprisonments ranging from two to five years.[172] Thus, the Party Funding Act is a comprehensive enactment for the regulation of private funding of parties. The statute ensures transparency and accountability.

4.3 Elements of electoral accountability in South Africa

4.3.1 Proportional representation

4.3.1.1 The nature of proportional representation

South Africans embrace the inclusive and proportionally representative dispensation as the only legitimate and ideal form of democratic government.[173] The proportionally representative model of democracy in South Africa tallies with the notion of a government "of the people by the people for the people"[174] alluded to in *United Democratic Movement v Speaker.*[175] The first inclusive and democratic elections in 1994, held under the transitional Constitution, were a democratic breakthrough for South Africa. The elections did not only end almost five decades of an apartheid regime but also introduced, for the first time, a government formed through proportional representation, thus giving South Africans a voice in the democratic process.[176] Constitutional Principle VIII of the transitional Constitution prescribed the adoption of a

> [R]representative government embracing a multiparty democracy, regular elections, universal adult suffrage, a common voter's roll, and in general, proportional representation.[177]

After the democratic transition, proportional representation offered South Africa an opportunity to rebuild itself, reconcile and promote stability.[178] Also, it improved the democratic accountability of the government. In *Certification I*, the Court observed that

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170 Section 17.
171 Section 18.
172 Section 18.
173 Welsh 2004 *Politeia* 7.
174 Lane *The Principal-Agent Perspective* 169.
175 *United Democratic Movement v Speaker* para 1.
176 Gueorguieva and Simon *Voting and Elections the World Over* 133.
177 Constitution Principle VIII in Schedule 4 of the transitional Constitution. See also *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 10 BCLR 1253 (CC) para 180.
178 IEC "Reflections on the State of Electoral Democracy in South Africa" 9.

the foundation of the constitutional text espoused in the 34 Constitutional Principles was proportional representation.[179] Although section 1(d) of the Constitution replicates Constitutional Principle VIII and envisages an electoral system that ensures accountability of the government, it does not mention proportional representation. In *United Democratic Movement v President of RSA*,[180] the Court said that proportional representation is not a founding value of the Constitution and that if the constitutional drafters had intended to make proportional representation an integral part of multiparty democracy, the Constitution would have expressly articulated so. Consequently, proportional representation is not a prerequisite for multiparty democracy in South Africa.

The Constitution prescribes a parliamentary government system for the representation of citizens by legislatures at municipal, provincial and national spheres of government. At the national level, there is the National Assembly and the National Council of Provinces.[181] The proportional representation system is used for the election of members of both houses of Parliament.[182] Under the proportional representation system, citizens vote for parties, thereby making parties accountable to citizens.[183] Citizens who intend to exercise the franchise vote for parties registered to contest elections at either the provincial or national level. Independent candidates can contest elections at the municipal level.[184] Parties nominate candidates through regional and national party lists.[185] After the election, parliamentary representatives elect their peers to lead the executive branch and Parliament (the President, the Speaker of the National Assembly and the Chairperson of the National Council of Provinces) in line with the principle that in a party system, the vote of the citizen is more for the party than the individual.[186]

Proportional representation produces multiple parties and dispenses with the winner-takes-all majoritarian element.[187] Proportional representation gives both majorities and

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179 *Certification I* para 45(i).

180 *United Democratic Movement v President of the Republic of South Africa* 2002 11 BCLR 1179 (CC) para 29.

181 Section 42(1) of the Constitution.

182 Section 46(1)(d) of the Constitution prescribes proportional representation. For a discussion, see Schofield and Sened *Multiparty Democracy* 12.

183 *Certification I* para 186.

184 See *Mwali v Electoral Commission of South Africa* [2016] ZAEC 5.

185 *Ramakatsa* para 68.

186 See *My Vote Counts v Minister: Justice* para 2.

187 Lindberg *Democracy and Elections in Africa* 41.

minorities opportunities to participate in governance to enable them to safeguard their interests.[188] The system gives minorities a (limited) voice in the government[189] and ensures the election of members of Parliament from diverse political, ethnic and racial sectors of the population.[190] The proportional representation of different groups is necessary for purposes of diversity in line with the principle of popular sovereignty.[191] However, proportional representation does not stand in the way of a majority government. Instead, proportional representation is conciliatory, making the majority responsive to the interests of minorities, thereby fostering legitimacy and enabling as many citizens as possible to participate in governance and influence the government.

4.3.1.2 Proportional representation and accountability

Despite its benefits, proportional representation has negative implications for accountability. Party leadership usually have firm control of party lists used for proportional representation and exercise a veto on who among members of a party enters the legislature on the party list. The closed party lists in both Parliament and provincial legislatures result in the election of representatives without the direct vote of citizens whom they purport to represent.[192] Hence, there is no link between citizens and legislative representatives. The result is that the party-list system and proportional representation create two *principals* to whom members of Parliament must account: citizens and party leadership. Whereas section 1(d) of the Constitution requires accountability of the government to citizens, the influence of party leadership on the party lists means that party members should act according to the dictates of party leaders, not in accordance with their conscience on what is good or bad for citizens. Furthermore, party leadership often lack meaningful accountability both within their parties and within the government because in all parties, leaders automatically qualify at the top of party lists, making them less vulnerable to electoral sanction. If a party loses ground in elections, members at the lower levels of the party lists lose out on legislative positions.

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188 Welsh 2004 *Politeia* argues that the inclusivity of the proportional representation reinforces the political system in South Africa.

189 Southall *Democracy in Africa* 14.

190 Thomassen "Representation and Accountability" 3.

191 See Wolf 2015 *SALJ* 788-789.

192 Wolf 2015 *SALJ* 817.

Unfortunately, the courts have interpreted the intertwined relationship between elections, proportional representation and multi-party democracy in ways which do not enhance electoral accountability. In *Certification I*, the Court held that under proportional representation, it is the parties, not elected representatives of citizens, who are accountable to citizens.[193] The observation contradicts the prescripts of popular sovereignty, which bestows power on citizens, not parties.[194] In *Ramakatsa*,[195] the Court reiterated that the Constitution prescribes the exercise of the franchise through parties. By implication, the interpretation limits the right of independent candidates to contest provincial and national elections. Furthermore, in *My Vote Counts v Minister: Justice*,[196] the Court said that the Constitution requires the use of parties as instruments for ascending to public office. The interpretations give parties a monopoly on democracy and inadvertently dilute electoral accountability.

Wolf[197] argues that the system shifts the collective will of citizens to elect representatives of their choice and that the impediments also restrict citizens to stand as independent candidates. There are no clear justifications for these limitations, as far as the Constitution is concerned. The constitutional requirement for multiparty democracy does not in any way negate the rights of citizens to contest elections independently. As the Court observed in *Ramakatsa*,[198] the foundation of democracy in South Africa is a multiparty system which must result in proportional representation. Whereas there is no question about the constitutionality of proportional representation, prescribed in section 46(1)(d) of the Constitution, one wonders whether the limited proportional representation system, in which only parties contest elections, can pass proper constitutional scrutiny. As far back as 2002, the government set up the Slabbert Commission to investigate the proportional representation system against the values of fairness, inclusivity and accountability.[199]

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193 *Certification I* para 186.
194 See chapter 2 of this study on the notion of popular sovereignty.
195 *Ramakatsa* para 68.
196 *My Vote Counts v Minister: Justice* para 2.
197 Wolf 2015 *SALJ* 780, 781.
198 *Ramakatsa* para 68; sections 46(1)(d) and 105(1)(d) of the Constitution.
199 Electoral Task Team 2003 *Report of the Electoral Task Team* 1-2.

The Slabbert Commission reported that the electoral system satisfied the first three values but fell short on accountability.[200] The Commission recommended more constituency representation through a Mixed Member Proportional System in which most members of Parliament would come from the constituencies by direct vote, and 25% would be appointed by proportional representation. If adopted, the recommendations would have caused electoral uncertainty for party leaders (as they would have had to seek direct election by citizens). Direct election would have fostered more accountability and responsiveness.[201] However, the governing party resolved not to implement the recommendations.[202] The resolution laid bare the overwhelming powers placed at the hands of parties by the current proportional representation system.

In *Majola v State President of the Republic of South Africa*,[203] the court considered the constitutionality of the narrow system of proportional representation. The applicant challenged section 57A and Schedule 1A of the *Electoral Act* 73 of 1998 (the Electoral Act). The applicant argued that the impugned statutory provisions undermined political rights protected in section 19 of the Constitution and that they unconstitutionally inhibited the participation of independent candidates in the electoral process. The limitations placed on the rights of independent candidates to contest elections, the applicant argued, did not satisfy the tests of reasonableness and justice. The court disagreed and held that the requirements for individuals to take part in elections through parties do not infringe political rights.[204] The court arrived at its decision because it did not consider popular sovereignty and accountability, both of which define representative democracy.[205] In the *New Nation Movement PPC v President of the Republic of South Africa*,[206] the High Court dismissed a challenge against the Electoral Act. The applicant impugned the electoral statute because the statute does not contain provisions for independent candidates to

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200 See Electoral Task Team 2003 *Report of the Electoral Task Team*.

201 See also Wolf 2015 *SALJ* 785-787 for a synopsis of the findings of the Slabbert Commission.

202 Wolf 2015 *SALJ* 787.

203 *Majola v State President of the Republic of South Africa* [2012] ZAGPJHC 236 (hereinafter *Majola*). However, one notes that the Constitution refers to the President of the Republic of South Africa, not a State President - see item 3(2)(b) of Schedule 6 of the Constitution on historical terminology.

204 *Majola* para 47.

205 Wolf 2015 *SAJHR* 182 criticises the judgment as "a serious miscarriage of justice."

206 *New Nation Movement NPC v President of the Republic of South Africa* [2019] ZAWCHC 43.

contest both provincial and national elections.[207] Nevertheless, proportional representation is only possible because of a multiparty system of democratic representation.

4.3.2 A multiparty system of democratic government

Competition among parties lies at the epicentre of well-functioning democracies.[208] In South Africa, a multiparty system of democratic government is one of the founding values of the Constitution. The Constitution established a democratic system based on multiple parties to ensure accountable, responsive and open government.[209] At the heart of multiparty democracy are political institutions and processes which give different groups opportunities to organise themselves and to participate in the promotion of their ideas in debate and free and fair elections.[210] The question arises whether members of the legislature may switch parties (and thereby lose membership of their parties) and still remain in Parliament. In general, floor-crossing is a prominent feature in mature democracies.[211] One of the justifications for floor-crossing is that floor-crossing enables parliamentary representatives who have been directly elected to act with their conscience and in the best interests of citizens.[212] However, Members of Parliament in South Africa are not directly elected by citizens but by parties. Floor crossing also enables 'unelected' parties to occupy seats in the National Assembly and provincial legislatures.[213]

The transitional Constitution expressly prohibited floor crossing. The rationale was that floor crossing would subvert the will of the people on the choice of parties.[214] During the Constitution certification proceedings, opponents of floor-crossing argued that the prohibitions on floor-crossing prevent corruption and secure the stability of the legislature because, in the absence of restrictions, the governing party and other bigger parties

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207 In *New Nation Movement NPC v President of the Republic of South Africa* [2019] ZACC 27, the Constitutional Court refused an urgent appeal against the decision of the High Court. The matter will be fully ventilated when the Court sits in August 2019.

208 Benoit and Laver *Party Policy in Modern Democracies* 1.

209 See section 1(d) of the Constitution.

210 *United Democratic Movement v President* para 26.

211 See *Caluza v Independent Electoral Commission* 2004 1 SA 631 (Tk) at 634C.

212 Wolf 2015 *SALJ* 807.

213 For examples of parties which benefited in this way, see Smiles 2011 *Insights on Africa* 159.

214 IEC "Reflections on the State of Electoral Democracy in South Africa" 12.

would entice members of smaller parties to join them.[215] The Court upheld the provisions of the constitutional text against floor crossing and held that the restrictions were consistent with the democratic government system envisaged in the founding values. Also, the Court held that the provisions against floor-crossing did not negatively impact on the need to ensure accountability, responsiveness and openness of the government through checks and balances.[216] The Court further emphasised that the provisions against floor-crossing enabled parties to retain control over their representatives and that the loyalty of party representatives, although coerced, protects the choices of voters and the expectations of citizens for party representatives to follow the dictates of the party.[217]

The reasoning of the Court took no consideration of the paramountcy of the interests of citizens, not parties, over democratic processes. However, all parties in Parliament soon realised the potential gains of floor crossing.[218] The parties saw that in addition to political expediency, floor-crossing enhances electoral and legislative accountability because it enables members of Parliament to align with parties which, in their view, advance the interests of citizens. Parliament enacted the *Local Government: Municipal Structures Act* 117 of 1998 to provide for, *inter alia*, floor-crossing at the local level. The Act prescribes summary procedures for the election of office-bearers where political representation fundamentally shifts because of floor crossing.[219] Parliament also inserted Schedule 6B into the Constitution through the Eighth Constitutional Amendment of 2002.[220]

4.3.3 The constitutional regime for electoral accountability

4.3.3.1 The theoretical foundation of electoral legislation

Electoral legislation affects all participants in the democratic process, particularly parties, as it underpins the legal status of parties and access to vital resources such as public funding. In any democratic state, the genesis for the legitimacy of electoral legislation

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215 *Certification I* para 182.

216 Wolf 2015 *SALJ* 784.

217 *Certification I* para 183. Smiles 2011 *Insights on Africa* 159 provides scholarly support for similar views because "To cross the floor from the opposition to the governing party is a direct, wilful and inexcusable betrayal of that mandate" given to party representatives.

218 IEC "Reflections on the State of Electoral Democracy in South Africa" 13.

219 For a commentary on the Act, see Van Wyk "Local Government" 160.

220 Section 6B was renumbered by section 6 of the Constitution Tenth Amendment Act of 2003. The amendment was effectively repealed by the Constitution Fifteenth Amendment Act of 2008.

stems from the institutional and adjectival choices framed into law by parties within the context of overriding legislation, the state constitution.[221] The diversity and dynamism observed in parties, as well as their role in shaping public opinion and moulding the will of citizens, make the regulation of parties inevitable.[222] The transparency and openness of the electoral market, and the ease with which new parties emerge, squarely depend on electoral legislation.[223] In this context, electoral legislation affects the conditions necessary for citizens to make meaningful electoral choices and to align themselves with specific parties.[224]

Electoral legislation also affects information available to citizens about the democratic process, their input and other forms of participation in elections. Consequently, electoral legislation affects democratic responsiveness.[225] Political competition is a robust exercise which increases the vitality of democracy, hence the need for electoral legislation which best protects the democratic process from manipulation, mirrors both normative and cultural expectations of democracy in the state, and nurtures an electoral environment which gives all contestants sound reasons to recognise and respect electoral outcomes.[226] The legitimacy of the whole electoral process lies in both substantive and procedural aspects of electoral legislation. Electoral legislation also affects fundamental rights and freedoms, such as freedom of association and expression, which are crucial during the lifespan of any party and how the party participates in the elections.[227]

In South Africa, the Electoral Act is the core legislation governing elections. The Act is crucial and should be interpreted in line with the founding constitutional provisions of universal adult suffrage, political rights and accountability. Section 19 of the Constitution should be read and interpreted generously and purposively to give effect to, rather than obstruct, the promotion of the constitutional values of an open and democratic society which the Electoral Act seeks to advance. In *Ramakatsa*,[228] the Court held that any

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221 Gauja *Political Parties and Elections* 7.
222 Gauja *Political Parties and Elections* 3.
223 Gauja *Political Parties and Elections* 9.
224 Murphy "Constitutions, Constitutionalism, and Democracy" 3.
225 Gauja *Political Parties and Elections* 127.
226 Issacharoff *Fragile Democracies* 42.
227 Gauja *Political Parties and Elections* 9.
228 *Ramakatsa* para 70.

limitation of the rights contained in section 19 should satisfy the tests of reasonableness in section 36 of the Constitution.[229] Citizens hold elected public office-bearers accountable through the exercise of political rights enshrined in section 19 of the Constitution and other provisions of the Bill of Rights.

4.3.3.2 The right to cast a meaningful and informed vote

The right to vote is a fundamental element of democratic representation, "a precious right which must be vigilantly protected."[230] In *My Vote Counts v Minister: Justice*,[231] the Court held that the establishment, functionality and vitality of constitutional democracy stem from and depend on the right to vote. The legislature and the executive cannot legitimately exist without the right to vote. The right to vote depends on properly established institutions and procedures which enable citizens to pursue transparency and accountability on individuals who occupy public office.[232] The choice of public office-bearers and the reasons and the procedures for voting them into office are central to accountability. As such, the right to vote is a right to cast an informed and meaningful vote.[233] There is no legal obligation on citizens to vote, as is the custom throughout the world.[234] However, the discretion not to exercise the franchise has adverse outcomes for accountability. By implication, citizens who do not register to vote and citizens who register to vote but fail to present themselves at the polling booth temporarily surrender their sovereignty to fellow citizens and thus tacitly concur in the choices made by their fellow citizens, even if such choices are flawed.

The concept of universal adult suffrage is the most profound expression of the rights of all adult citizens in a state to vote with no barriers as to their race, gender, religious belief and conscience, level of intelligence and sophistication in life, socio-economic status or any other ground on which repressive governments have suppressed the people. The

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229 Section 36(1) of the Constitution requires all limitations to the Bill of Rights to satisfy the test of reasonableness and justifiability in "an open and democratic society based on human dignity, equality and freedom."

230 *Rail Commuters Action v Transnet Ltd t/a Metrorail* 2005 4 BCLR 301 (CC) para 47.

231 *My Vote Counts v Minister: Justice* para 32.

232 The Constitution established the Independent Electoral Commission (the IEC) to advance constitutional democracy through the management of elections and to protect the free and fair exercise of the franchise – see *August v Electoral Commission* 1999 4 BCLR 363 (CC) para 16 (hereinafter *August*).

233 *My Vote Counts v Speaker* para 38.

234 see Gueorguieva and Simon *Voting and Elections the World Over* 135.

constitutional protection of the franchise is a commitment to prevent the "wholesale denial of political rights to citizens of the country from ever happening again."[235] However, the franchise may be limited based on mental maturity.[236] Adult persons generally have the right to vote and to contest elections under parties.[237] Even convicted citizens serving custodial sentences have the right to vote.[238] The rationale is that the right to vote is an expression of the recognition that everyone counts. It follows that any limitation of the franchise must be scrutinised against disenfranchisement.[239]

In *S v Makwanyane*,[240] the Court correctly concluded that the rights of South Africans would be adequately protected if the state is willing to protect all persons, including perpetrators of the most heinous crimes, to enjoy fundamental rights enshrined in the Constitution. Prisoners have the right to vote because they are human beings and do not forfeit their rights merely because they have committed crimes.[241] Since imprisonment limits the right to freedom of movement, the Electoral Commission must organise the registration and voting of prisoners and persons awaiting trial.[242] Prisoners are released to society after the completion of their sentences or when paroled. It is only just that they are afforded the right to choose democratic representatives who will govern them upon release from incarceration.

4.3.3.3 The right to free and fair elections

There is a close connection between the right to vote and the right to free and fair elections. The right to a meaningful vote requires free and fair elections which, in turn, bestow the government with democratic legitimacy.[243] Since democratic choices depend

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235 *Ramakatsa* para 64.

236 Gueorguieva and Simon *Voting and Elections the World Over* ix.

237 See sections 19 and 46(1)(c) of the Constitution.

238 For a synopsis of the rights of prisoners to vote, see *August* and *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders* 2005 3 SA 280 (CC).

239 *August* para 17.

240 *S v Makwanyane* 1995 6 BCLR 665 (CC) para 88 (hereinafter *Makwanyane*).

241 See *Makwanyane* para 137 in which the Court held that the commission of a criminal offence by an individual, no matter how egregious or aberrant against human life, does not constitute forfeiture of the right of the person to his own life. In *Ehrlich v Minister of Correctional Services* 2009 1 SACR 588 (E) para 7, the court reiterated that under democratic constitutionalism, prisoners retain all the basic rights and freedoms enjoyed by ordinary citizens, except those rights which prisoners cannot enjoy by virtue of their status as prisoners.

242 *August* para 18.

243 Wolf 2015 *SALJ* 789. For a full discussion of the relationship between government legitimacy and elections, see Anderson *et al Loser's Consent*. According to Simpser *Why Governments and Parties*

on meaningful elections through which citizens exercise meaningful choices,[244] the organisation and contestation of elections must meet standards consistent with democracy.[245] Electoral fraud, corruption, manipulation and patronage in the electoral process are considered for testing whether the cleanliness of elections and to detect fraud.[246] The starting point is that elections must be free from all illegal and coercive influences which compromise the free will of citizens.

Electoral manipulation is the most potent threat to the credibility of an election and manifests through the stuffing of ballot boxes, intimidation of candidates and voters, buying of voters and other acts which undermine political freedoms and compromise the ability of candidates to campaign. Electoral manipulation also encompasses all acts which interfere with the free exercise of the voter's will.[247] The manipulation of elections has severe repercussions for accountability as it erodes the confidence of citizens in electoral institutions and democracy. In addition, electoral manipulation propagates voter apathy and makes citizens lose faith in the electoral contest as a means of accountability. Also, electoral manipulation discourages influential individuals from participating in political matters.[248]

4.3.3.4 Access to information

Access to information enhances democracy[249] because it enables citizens to exercise the franchise meaningfully.[250] Effective electoral accountability requires a citizenry which is informed of the activities of legislative representatives.[251] Information about the policies of parties, their history and general trustworthiness is vital for the exercise of the franchise. Information enables citizens to decide whether to place their future in the hands of the parties and to decide whether the parties will mitigate corruption and all forms of unethical conduct in public administration. Information further helps citizens to

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Manipulate Elections 1, manipulated elections lead to legitimacy disputes and may sow divisions in a state, resulting in long-term conflict and strife.

244 Wessel and Schmitt "Meaningful Choices: Does Parties' Supply Matter?" 40.

245 Swanson and Mancini *Politics, Media and Modern Democracy* 1.

246 Simpser *Why Governments and Parties Manipulate Elections* 32.

247 Simpser *Why Governments and Parties Manipulate Elections* 1.

248 Simpser *Why Governments and Parties Manipulate Elections* 3.

249 Van Wyk 2016 *Constitutional Court Review* 983.

250 *President of the Republic of South Africa v M & G Media Ltd* 2012 2 SA 50 (CC) para 10.

251 Carey *Legislative Voting and Accountability* 3.

decide on the commitment of parties to the founding values of good governance and accountability.[252] Citizens cannot protect their interests through elections if they do not have the freedom to communicate.[253]

Idealistically, the importance of public office requires occupation only by individuals who, after extensive public scrutiny, have been certified by citizens through elections as worthy to govern. The verdict of citizens on any party or individuals in elections depends on the availability of reliable information.[254] Access to reliable and relevant information also empowers citizens to make free and informed political choices, such as whether to join a party or support its cause. The availability of information about the policies of parties facilitates the recruitment of both supporters and members of parties. Citizens also need information about parties they support to enable them to distinguish the policies and activities of their preferred parties from those of the opponents. Information about the competitors helps citizens to decide whether to keep or change their membership of a party. Parties need media exposure to attract new members and retain their supporters. Ultimately, the exposure of both wrong-doing and good deeds by a party or its leaders help citizens to make the final choice.[255]

4.3.3.5 Media rights and freedom of expression

Media rights are closely related to the right to information and freedom of expression.[256] The media are pivotal to elections and all democratic processes,[257] and provide platforms for potential voters to access information about the policies and activities of different parties. In addition to providing a platform for the debate of ideas between different

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252 *My Vote Counts v Minister: Justice* para 38.

253 Murphy "Constitutions, Constitutionalism, and Democracy" 4.

254 *My Vote Counts v Minister: Justice* para 36.

255 See *My Vote Counts v Minister: Justice* para 28.

256 See *Maharaj v Mandag Centre of Investigative Journalism NPC* 2018 1 SA 471 (SCA) (hereinafter *Maharaj*) in which the court dealt with freedom of expression in the context of prohibitions on the disclosure of official investigations by the media. The court said that given the scourge of corruption, the media has a duty to report on activities which are in the public interest (at para 28). See also *Tshabalala-Msimanga v Makhanya* 2008 6 SA 102 (W) para 37 in which the court emphasised the right of the public to be informed of events and affairs concerning the lives of public figures and politicians. In *Maharaj* para 27, the court said that the disclosure of information in the public interest is necessary to ensure the probity of senior public office-bearers in the light of the "overarching constitutional values of accountability, responsiveness and openness." See *Cape Town City v South African National Roads Authority* 2015 3 SA 386 (SCA) para 16-18 and *Khumalo v Holomisa* 2002 5 SA 401 (CC) paras 22-23.

257 In *Media 24 Limited v National Director of Public Prosecutions, In re: S v Van Breda* [2017] ZAWCHC 35 para 10, Desai J observed that 'the media is the guarantor of democracy."

parties, the media are instrumental in the dissemination and analysis of vast amounts of information available during election times. Undoubtedly, the media are a catalyst for the democratic process.[258] The media aid, guard and guide the democratic process against fraud. However, the media can effectively aid democratic processes if they engage in investigative journalism to uncover accurate and reliable information about parties.[259] Media freedoms insulate investigative journalists from threats emanating from both incumbent governments and businesses with vested interests in the outcome of elections.

Media freedoms and diversity of media houses contribute to a balanced media, which is a critical part of truth and accountability. Compromised media pose a danger to the democratic process through fake news.[260] Hence, there is a need for the media to act within established ethics. Professional media conduct serves to protect the public interest and to prevent misinformation of the voters.[261] However, the regulation of media during election campaigns, particularly concerning election advertising and broadcasting of political statements, presents several challenges in the light of rights to freedom of expression, speech and political expression.[262]

4.4 Conclusion

In summary, this chapter examines electoral and legislative accountability to show that there is a nexus between elections, democracy and accountability. The analysis shows that the conceptual justification of elections lies in popular sovereignty and theories of elections as verdicts of citizens on incumbent governments and as choices of future policies. The analysis of parties as conduits for electoral accountability shows that although parties are indispensable to democracy, electoral legislation in South Africa

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258 In addition to conventional media, the increase in the use of social media has further strengthened accountability efforts. In the modern era, parties and the government have set up social media profiles to engage the public and respond to information shared through social media. Follow-ups by the media on election promises made by the parties during their campaigns are crucial and made possible by social media – see International Institute for Democracy and Electoral Assistance "Emerging Trends and Challenges of Electoral Democracy in Africa" 31 for a synopsis.

259 IEC "Reflections on the State of Electoral Democracy in South Africa" 31.

260 For a discussion of the phenomenon of fake news and its negative influence on elections, see in general, Goodspeed *Alternative Facts*. See also De Vos 2015 *SAJHR* 37 in which the scholar argues that media houses controlled by rich individuals often contribute to marginalisation by suppressing certain views and promoting the views of the wealthy.

261 IEC "Reflections on the State of Electoral Democracy in South Africa" 31.

262 Section 16 of the Constitution regulates freedom of expression. De Vos 1998 *Law, Democracy and Development* 261 argues that during election campaigns, parties have a right to state-funded political advertisements because media access is indirect funding of parties.

inadvertently places obstacles on citizens to contest elections outside the medium of parties, thereby undermining the right to free and fair elections. The constitutional and legislative framework, in combination with historical and social factors, produced a dominant party in South Africa- the form of the ANC. One-party dominance not only threatens the consolidation of democracy but also undermines democratic accountability. Challenges to internal democracy in the governing party and smaller parties further undermine electoral accountability. Democratic weaknesses within parties erode accountability at the national level because of proportional representation, a key feature of representative and multiparty democracy in South Africa, makes it possible for undemocratically elected individuals to occupy public office. The contrasting case law on the democratic place of parties amplifies jurisprudential shortcomings on the suitability of proportional representation for accountability. Whereas smaller parties counter the dominance of the governing party through coalitions, coalitions have many challenges of accountability and do not always advance the public interest.

This chapter shows that the most potent threat to electoral accountability comes from the private funding of parties. Although the financing of parties is an essential element of electoral and legislative accountability, and whereas legislation provides that parties may receive funding from both the state and private sources, private funding comes with entanglements and results in political corruption. Often, private entities fund parties to advance their agendas and to capture politicians. Consequently, there is a need for transparency and disclosure of the private funding of parties to insulate the democratic process from manipulation and to ensure the reflection of the will of citizens, not the preferences of influential and monied persons, on electoral outcomes. Following the landmark judgment in *My Vote Counts v Minister: Justice*, Parliament enacted the Party Funding Act, a comprehensive piece of legislation which ensures transparency in the funding of parties. The Party Funding Act will ensure accountability, thwart threats to the democratic process and criminalise contraventions. The following chapter examines parliamentary oversight and executive accountability in South Africa.

Chapter 5 Executive Accountability and Parliamentary Oversight

5.1 Introduction

The preceding chapter examines electoral and legislative accountability in relation to the role played by citizens in enhancing accountability through elections and other democratic processes. This chapter proceeds to analyse how elected representatives in Parliament exercise oversight over the national executive. Globally, legislative oversight was considered as understudied in the last decade.[1] Although this chapter shows that the literature has grown - to some extent - it also shows that there is a lack of solid descriptions of constitutional provisions and processes of parliamentary oversight in South Africa. This chapter builds on existing scholarship and adds new insights into how Parliament oversees the executive in South Africa. The chapter has five themes. The first theme discusses theoretical perspectives on executive accountability to contextualise the need for legislative oversight. The second theme focusses on the oversight functions of the National Assembly. In particular, the second theme examines areas of oversight and the processes employed by the National Assembly to hold the executive accountable.

The third theme examines the institutional accountability of the National Assembly for its oversight functions and analyses the need for individual accountability of the members of the National Assembly. Since the National Assembly exercises oversight on behalf of citizens for the protection of the public interest, the fourth theme looks at public participation in parliamentary processes which oversee executive conduct. Due to the weaknesses of parliamentary oversight, which are discussed in this chapter, the fifth theme adds administrative accountability into the discourse by examining extra-legislative accountability in the context of State Institutions Supporting Constitutional Democracy (Chapter 9 institutions). Due to practical considerations on the relevance of Chapter 9 institutions to this thesis, the fifth theme only focusses on how the Public Protector ensures executive and administrative accountability.

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1 Stapenhurst *et al* "Introduction" xvi.

5.2 Executive accountability

The Constitution vests executive authority in the President.[2] The President works with other members of Cabinet in the development and implementation of national policy, preparation and initiation of legislation, and coordination of the functions of state departments and administrations.[3] In the capacity of Head of State and head of the national executive, the President performs all functions conferred on the office by the Constitution and legislation.[4] Section 92 of the Constitution requires the accountability of members of Cabinet and imposes collective and individual responsibility for the exercise of executive authority as well as the performance of functions assigned by the President to the Cabinet.[5] The President, other Cabinet members and Deputy Ministers (collectively referred to as members of the executive in this thesis) must properly and responsibly perform their functions within the confines of the Constitution.[6] Hence, members of the executive must act consistently with the Constitution.[7] The *Executive Member's Ethics Act* 82 of 1998 (the Ethics Code) enacted pursuant to section 96(1) of the Constitution, precludes members of the executive from undertaking other paid work during their tenure in the executive. Members of the executive must observe the Ethics Code[8] and must not act inconsistently with their duties and should not expose themselves to situations which put their public responsibilities in conflict with private interests.[9]

In addition, members of the executive must not abuse information entrusted to them to enrich themselves or to improperly benefit themselves or other persons.[10] The provisions are meant to deter and sanction corruption, impropriety, maladministration and other abuses of executive power. The measures restrain the exercise of executive power, curtail the authority of the executive and ensure that decisions and actions of members of the executive meet the standards of legality, fairness and just public administration, respect

2 Section 85(1) of the Constitution.
3 Section 85(2) of the Constitution.
4 Section 84 of the Constitution stipulates the powers and functions of the President.
5 Section 92(1)-(2) of the Constitution.
6 *United Democratic Movement v Speaker of the National Assembly* 2017 8 BCLR 1061 (CC) para 36 (hereinafter *United Democratic Movement v Speaker*).
7 Section 92(3)(a) of the Constitution.
8 Section 96(1) of the Constitution.
9 Section 96(2)(b) of the Constitution.
10 Section 96(2)(c) of the Constitution.

the Bill of Rights, and observe the founding constitutional values of accountable, responsive and open governance. Hence, the Constitution requires members of the executive to take oaths or solemn affirmations[11] to promote the advancement of the Republic and to oppose harm to it, protect and promote the rights stipulated in chapter 2 of the Constitution, discharge their duties diligently and ethically, do justice to everyone and devote themselves to the people of South Africa.[12]

However, there are no guarantees that members of the executive will always exercise their powers lawfully and perform their functions within the prescripts of the Constitution. In several cases, the courts pointed out instances in which members of the executive did not only fail to honour their constitutional obligations[13] but violated individual rights.[14] To combat abuses of power by the executive, the Constitution established institutions and procedures for the promotion and enforcement of executive accountability. The institutions include Parliament, Chapter 9 institutions and the courts. Institutional mechanisms of accountability are meant to ensure the best behaviour among members of the executive and prepare for the eventuality that elected representatives may turn out to be the worst. Sachs J argues that the Constitution, like all other constitutions, is "based on mistrust. The more devoted we are to our leaders and our organisations, the more we have to be constitutionally mistrustful of them."[15]

Sachs J argues that accountability mechanisms are not anti-government or against the leadership of the executive but are processes through which South Africans can ensure that the government undertakes its responsibilities transparently and responsibly so that the government functions fairly and does not abuse citizens. Sachs J alludes to the weaknesses of mankind in the face of "the seductions of power."[16] He warns against

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11 Sections 87, 90(3) and 95 of the Constitution.

12 Schedule 2 of the Constitution.

13 See, for instance, *Economic Freedom Fighters v Speaker of the National Assembly* 2016 5 BCLR 618 (CC) (hereinafter *Economic Freedom Fighters I*); *Corruption Watch NPC v President of the Republic of South Africa; Nxasana v Corruption Watch NPC* 2018 10 BCLR 1179 (CC) (hereinafter *Nxasana*); *Law Society of South Africa v President of the Republic of South Africa* 2019 (3) BCLR 329 (CC).

14 See, for instance, *Abdi v Minister of Home Affairs* 2011 3 SA 37 (SCA) para 36; *Eveleth v Minister of Home Affair* 2004 11 BCLR 1223 (T) paras 45-48; *Nyathi v MEC for the Gauteng Department of Health* 2008 5 SA 94 (CC); *Total Computer Services (Pty) Ltd v Municipal Mayor, Potchefstroom Local Municipality* 2008 4 SA 346 (T) para 21; *Van Straaten v President of the Republic of South Africa* 2009 5 BCLR 480 (CC).

15 Sachs *We, the People* 37.

16 Sachs *We, the People* 38.

wasteful utilisation of state resources and how corruption undermines democratic transformation and its pursuit of clean governance.[17] Parliament is one of the most important institutional mechanisms which prevent, constrain and mitigate the improper exercise of executive power.[18]

5.3 Parliamentary oversight over the executive

5.3.1 An overview of legislative oversight

Parliaments are embodiments of the will of most citizens in a state and have three functions: democratic representation, law-making, and oversight over the executive.[19] Parliamentary oversight entails mechanisms through which the legislature fosters answerability of the executive to ensure compliance with the law. However, Pelizzo and Stapenhurst[20] argue that greater legislative capacity to exercise oversight over the executive does not necessarily result in greater effectiveness. Notwithstanding, Parliaments are vital for good governance.[21] Good governance, in turn, results in greater accountability, public participation and transparency in the government.[22] In most states, the executive and most state organs account to legislatures. Citizens elect members of legislatures to exercise oversight functions collectively and individually.[23] However, the nature and import of parliamentary oversight over the executive differ from one state to another.[24]

Legislative oversight stems from the separation of powers and the system of checks and balances in a constitutional democracy. However, institutional divisions between the legislature and the executive are less strict due to the conflation of legislative and executive powers and functions. Whereas the executive initiates and implements government policies, Parliament legitimates and scrutinises the activities of the executive.

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17 Sachs *We, the People* 309.

18 *United Democratic Movement v Speaker* para 37.

19 Stapenhurst *et al* "Introduction" 1; Pelizzo and Stapenhurst *Government Accountability and Legislative Oversight* 16.

20 Pelizzo and Stapenhurst *Government Accountability and Legislative Oversight* 1.

21 Stapenhurst *et al* "Introduction" xvi.

22 Stapenhurst *et al* "Introduction" xv.

23 Mulgan *Holding Power to Account* 45.

24 The extent to which a legislature exercises oversight over the executive in a state is termed oversight potential, measured with the "number of oversight tools available to the legislature - Pelizzo "Oversight and Democracy Reconsidered" 29.

Since the legislature shares equal powers with the executive, Parliament plays a crucial role in the formulation of government policies and legislative amendments, repeals and new enactments.[25] Although Parliament legislates and the executive executes, Parliament must also oversee executive authority so that what is executed is in line with what was legislated. In this way, legislative oversight improves the quality of democracy. Notably, in South Africa, the legislature plays a bigger role in government policy because the governing party needs the support of smaller parties to amend the Constitution, making smaller parties key players in policy-formulation and legislative enactment.

5.3.2 The oversight function of the National Assembly

South Africa has a bicameral Parliament, composed of the National Assembly and the National Council of Provinces (the NCOP). Bicameralism promotes accountability as it enhances the adequacy of the representation of different interests in Parliament.[26] Members of the executive must account to Parliament and provide the legislature with "full and regular reports concerning matters under their control." [27] The National Assembly is the dominant of the two Houses.[28] The National Assembly is more important for accountability (in the context of this thesis) because it also has constitutional obligations to scrutinise the exercise of executive authority and to ensure a government of the people within the prescripts of the Constitution.[29] New ideas are discussed in the National Assembly, as well as corruption, maladministration and abuse of power. Whereas the dominant function of the National Assembly is to legislate, the National Assembly must hold the executive accountable through oversight mechanisms so that the interests of the people of South Africa find expression in the decisions and actions of the state and its organs, in line with the principle of popular sovereignty.[30] The National Assembly must ensure the responsiveness of the executive to the will of citizens[31] because the National

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25 Mulgan *Holding Power to Account* 45.
26 De Vos and Freedman (eds) *South African Constitutional Law in Context* 107-108.
27 *United Democratic Movement v Speaker* para 36.
28 De Vos and Freedman (eds) *South African Constitutional Law in Context* 108.
29 Section 42(3) of the Constitution.
30 See *United Democratic Movement v Speaker* para 38.
31 *United Democratic Movement v Speaker* para 38.

Assembly represents the people and must "ensure government by the people under the Constitution."[32]

The National Assembly fulfils its oversight role by partaking in public inquiries and debates in which it scrutinises and oversees the executive.[33] The National Assembly has further constitutional obligations to ensure the accountability of the executive and other organs to it.[34] Legislation facilitates the quality of service delivery to citizens and makes it easier for the National Assembly to hold the executive and organs of the state organs accountable for the exercise of their constitutional powers, functions and responsibilities.[35] The Constitution further obliges the National Assembly to maintain oversight over the executive in relation to the implementation of legislation enacted by Parliament.[36] The National Assembly elects the President[37] on behalf of citizens because, apart from constitutional provisions, the National Assembly is the institution through which the people govern under the Constitution. As a representative of the people, the National Assembly elects one of its own to be President. The President, in turn, has a constitutional obligation to select other members of the National Assembly to assist the President in the exercise of executive authority.[38] Whereas the President has unfettered discretion to dismiss other members of the executive, the National Assembly may remove the President and the Cabinet, or remove the Cabinet and leave the President. Through votes of no confidence and impeachment, the National Assembly sanctions the executive on behalf of citizens.[39] Section 56 of the Constitution gives the National Assembly and its committees powers to

> (a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents;
>
> (b) require any person or institution to report to it;

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32 Section 42(3) of the Constitution. See also *United Democratic Movement v Speaker* para 38.

33 Section 42(3) of the Constitution.

34 Section 55(2)(a) of the Constitution.

35 *United Democratic Movement v Speaker* para 38.

36 Section 55(2)(b) of the Constitution.

37 Section 42(3) of the Constitution.

38 Section 91(3)(b)-(c) provides that in addition to Ministers appointed from the National Assembly, the President may appoint at most two Ministers and up to two Deputy Ministers outside the National Assembly.

39 See the discussion in sections 5.3.4.2 and 5.3.4.3 of this chapter.

(c) compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph (a) or (b); and

(d) receive petitions, representations or submissions from any interested persons or institutions.

In addition, the National Assembly has autonomy over its internal arrangements and proceedings to protect its independence and the integrity of its processes.[40] Only the National Assembly has the competence to establish its committees and their functions, procedures and duration.[41] The National Assembly enjoys independence to the extent that neither the judiciary nor any state organ may prescribe mechanisms for the National Assembly to hold the executive accountable.[42] The legislature also has discretion on how to conduct its affairs. When it determines its affairs, the National Assembly must consider the need to ensure effective representative and participatory democracy, and the interests of accountability, transparency and public involvement in its processes.[43] The requirement seeks to ensure that all members of the National Assembly, including representatives of smaller parties, have equal and genuine platforms to play a meaningful role in the legislature.[44]

The National Assembly may provide financial and administrative assistance to all represented parties to enable the parties to perform their functions effectively.[45] Members of the National Assembly enjoy specific privileges to enable them to fulfil oversight functions. They have enhanced freedom of speech[46] and cannot incur criminal or civil liability for all utterances made, and all documents submitted and produced in the National Assembly and in its committees.[47] Although the National Assembly may remove disruptive members from its sittings, it may not arrest its members for conduct which is protected in section 58 of the Constitution.[48] The *Powers, Privileges and Immunities of*

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40 Section 57 of the Constitution.

41 Section 57(2)(a) of the Constitution.

42 *Economic Freedom Fighters I* para 93.

43 Section 57(1)(b) of the Constitution. See also *Speaker of the National Assembly v De Lille* [1999] 4 All SA 241 (A) at 449H/I-450E (hereinafter *Speaker v De Lille*).

44 *Oriani-Ambrosini v Sisulu* 2012 6 SA 588 (CC) para 63.

45 Section 57(c) of the Constitution.

46 Section 58(1)(a) of the Constitution. See also, in general, *Speaker v De Lille*, *Malema v Chairman, National Council of Provinces* 2015 4 SA 145 (WCC) and *Lekota v Speaker, National Assembly* 2015 4 SA 133 (WCC).

47 Section 58(1)(b) of the Constitution.

48 *Democratic Alliance v Speaker, National Assembly* 2016 3 SA 487 (CC) paras 40, 42 and 52.

Parliament and Provincial Legislatures Act 4 of 2004, enacted pursuant to section 58(2) of the Constitution, prescribes other privileges and immunities of the National Assembly and its members. Through its powers, functions and privileges, the National Assembly exercises oversight over several areas of executive action.

5.3.3 Areas of parliamentary oversight

5.3.3.1 Government policy and implementation of legislation

In all jurisdictions, the formulation of government policies is an executive function. Most policies developed by the executive have effect mostly when enacted into legislation. As such, the executive must provide Parliament with information about its proposed policy, the necessity of the policy, alternative solutions to the problem and reasons for the preference of the policy.[49] The executive must also provide information on the mechanisms for the implementation of the policy and the associated costs. Upon receipt of the information, members of the legislature debate and criticise the policy as part of the legislative enactment process.[50] In this way, Parliament helps the executive to shape, reshape, change, modify and transform the policy proposal.[51] Although in some jurisdictions 'executive privilege' and 'public interest immunity'[52] enable the executive to withhold specific information from the legislature, it is not immediately clear if the executive in South Africa may constitutionally withhold information from the National Assembly.

Whereas in reality the executive controls Parliament due to the influence of parties and proportional representation, Parliament mostly regulates the exercise of public power through constitutional amendments and legislation which define the parameters of executive authority. Parliament may amend, reject or approve government policies through legislative enactments, amendments and repeals. The legislature also has powers to approve or reject government budgets which allocate financial resources for the implementation of policies. As such, it is difficult for the executive to implement policies without the involvement of the legislature. Parliament monitors the implementation of

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49 Pelizzo and Stapenhurst *Government Accountability and Legislative Oversight* 16.
50 Mulgan *Holding Power to Account* 46.
51 Pelizzo and Stapenhurst *Government Accountability and Legislative Oversight* 16.
52 Mulgan *Holding Power to Account* 46.

legislation and thereby, the implementation of national policies. Parliament has the power to require the executive to explain and justify the progress made in the implementation of policies, the results expected and the adjusted costs.[53] The inquiries enable the legislature to determine whether the executive uses the budgets efficiently and appropriately. In this way, Parliament has both foresight and oversight of the implementation of policies. Parliament may then determine whether to change, continue or stop the implementation of the policy through legislative amendments and repeals. However, the practical reality is that in South Africa, the initiative to call the executive to account has been proven to come exclusively from parliamentary opposition parties, who constitute a minority. Also, accountability depends more on revelations of aspects of executive conduct than on actual parliamentary censure.

5.3.3.2 Fiscal policy and the national budget

In any state, good governance requires transparent and accountable processes for the formulation and review of national budgets.[54] The legislature is a centre of financial accountability as it approves government expenditure of public funds.[55] However, members of Parliament in South Africa may not introduce money Bills.[56] Only the executive member responsible for national financial matters may introduce a money Bill.[57] Often, members of Parliament lack financial and economic expertise to determine the expenditure of fiscal resources in the state. The position is the same in presidential systems in which legislatures are not involved in the preparation of budgets.[58] In line with global practices, Parliament must authorise government expenditure[59] to ensure that the executive adopts appropriate budgets for the discharge of constitutional mandates.[60]

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53 Pelizzo and Stapenhurst *Government Accountability and Legislative Oversight* 16-17.

54 Pelizzo and Stapenhurst *Government Accountability and Legislative Oversight* 25.

55 Mulgan *Holding Power to Account* 46.

56 Section 55(1)(b) of the Constitution. Section 74 of the Constitution defines a money Bill as a Bill which
(a) appropriates money;
(b) imposes national taxes, levies, duties or surcharges;
(c) authorises direct charges against the National Revenue Fund, except a Bill envisaged in section 214 authorising direct charges.

57 Section 73(2)(a) of the Constitution.

58 Pelizzo and Stapenhurst *Government Accountability and Legislative Oversight* 18.

59 Mulgan *Holding Power to Account* 45.

60 *United Democratic Movement v Speaker* para 38.

Budget approval by Parliament is necessary because citizens should have a say (through legislative representatives) on the imposition of taxes and expenditure of public money. An unapproved budget essentially runs without the consent of the citizens (the collective owners of public money) and is bound to lead to abuse of public funds. Parliament deals with money Bills through the procedure stipulated in section 75 of the Constitution. However, Parliament may refuse to pass a money Bill. The global practice is that if Parliament refuses to pass a budget, the old budget remains until the approval of a new budget.[61] In addition to overseeing public expenditure, the National Assembly exercises oversight over national security and defence.

5.3.3.3 National security and defence

The South African National Defence Force (SANDF) is an apparatus for the defence of national security and sovereignty of South Africans. There is a need for parliamentary oversight over the SANDF because Parliament represents the people of South Africa[62] and because the civilian control of armed and security forces is one of the core mechanisms and procedures of constitutionalism.[63] Civilian control of the SANDF enhances democracy as it eliminates the possibility of abuse of the armed forces. The apartheid regime used the army for extra-judicial killings, torture, forced removals and other human rights violations against its political opponents and Africans.[64] The transition to democracy necessitated the restoration of civilian control of the defence forces as part of the guarantees of democracy. Transformation also entailed the reorientation of the defence forces to ensure transparency and accountability.[65] Section 198(d) of the Constitution subjects the control of national security to both Parliament and the executive. Although the President is the Commander-in-Chief of the SANDF,[66] the SANDF does not belong to the executive but to the people of South Africa.

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61 Pelizzo and Stapenhurst *Government Accountability and Legislative Oversight* 24.

62 Section 42(2) of the Constitution.

63 See Venter *Constitutionalism and Religion* 82 on civilian control of state security and the armed forces as a structural element of constitutionalism.

64 See Meierhenrich *The Legacies of Law* 117, 123.

65 Griffiths "Parliamentary Oversight of Defense in South Africa" 229.

66 Section 202(1) of the Constitution.

The SANDF must not enter the political arena and must not prejudice legitimate interests of any political party,[67] or "further, in a partisan manner, any interest of a political party."[68] Section 199(8) of the Constitution requires parliamentary committees to oversee the defence forces to ensure accountability and transparency in the security services. Members of Parliament constitute the Portfolio Committee on Defence and Military Veterans and the Joint Standing Committee on Defence through the proportional representation system.[69] Proportional representation ensures the involvement of the diverse peoples of South Africa in national security and defence matters. The parliamentary committees may investigate and recommend budgets, organisation, policy and functions of the SANDF. Section 199(4) of the Constitution binds Parliament to enact national legislation to structure and regulate the security services. In line with its functions, Parliament has enacted legislation to regulate the SANDF comprehensively. Whereas some of the legislation, such as the *Defence Act* 42 of 2002, regulate internal operations of the SANDF, some of the legislation ensures that the SANDF complies with international law.[70]

The imposition of political responsibility for the conduct of the SANDF is an essential element of accountability and transparency.[71] Only the President may authorise the deployment of the SANDF. When the President has deployed the SANDF, the President must immediately inform Parliament of the reasons for the deployment; the place to which the SANDF is deployed; the number of personnel deployed; and the period for which the deployment will last.[72] In the event that Parliament does not sit within seven days of the deployment of the SANDF, the President must inform the parliamentary oversight committee responsible for defence.[73] The reporting obligations enable defence oversight committees to scrutinise the motive and implications for military deployment to prevent abuse of the defence force. Parliament may also approve or reject a declaration

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67 Section 199(7)(a) of the Constitution.

68 Section 199(7)(b) of the Constitution.

69 Griffiths "Parliamentary Oversight of Defense in South Africa" 230.

70 Section 198(c) of the Constitution binds the state to pursue national security in accordance with international law. The *Implementation of the Rome Statute of the International Criminal Court Act* 27 of 2002 and the *Implementation of the Geneva Conventions Act* 8 of 2012 regulate the conduct of the SANDF from a perspective of international criminal justice and humanitarian law.

71 Section 201 of the Constitution.

72 Section 201(3) of the Constitution.

73 Section 201(4) of the Constitution.

of a state of national defence.[74] In such event, the SANDF must withdraw from the deployment.

However, parliamentary oversight over national defence and security has failed to ensure accountability and transparency, as seen from the massive corruption in what has come to be known as the 'Arms Deal'. The on-going criminal proceedings against former President Zuma and a French armaments manufacturer represent the lack of accountability in the R30 billion arms procurement. Although the Commission of Inquiry into Allegations of Fraud, Corruption Impropriety or Irregularity in the Strategic Defence Procurement Package did not uncover any corruption, the conviction of Schabir Shaik on allegations of corruption told a different story.[75] It is not clear why parliamentary oversight lapsed so much as to result in so much controversy and corruption in defence procurement. Presently, the State Capture Commission has received oral evidence from the former head of the Independent Police Investigative Directorate (IPID) Robert McBride, of executive attempts to cripple anti-corruption bodies to cover up previous, present and future crimes. In a televised live feed, McBride told the Commission of brazen looting of the secret service account used by Crime Intelligence. The fact that the Parliamentary Portfolio Committee on Police, composed of members from all represented parties, did little amid the revelations in the media long before the Commission heard the evidence, paints a gloomy picture of the effectiveness of the legislature to oversee defence and security.

5.3.3.4 Public appointments

Most democracies experience less electoral accountability for civil servants.[76] Given that civil servants should ideally be politically neutral public servants with expertise in various fields of governance,[77] their appointments should be on merit. Since they exercise enormous power, civil servants such as the National Director of Public Prosecutions (NDPP) should go through a public appointment process which involves citizens and their

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74 Section 203 of the Constitution.

75 For a synopsis of corruption in the 'Arms Deal,' see *S v Shaik* 2007 12 BCLR 1360 (CC); *S v Shaik* [2007] 2 All SA 9 (SCA) and Griffiths "Parliamentary Oversight of Defense in South Africa" 234.

76 Mulgan *Holding Power to Account* 107.

77 For a discussion of the accountability of civil servants, see Gailmard "Accountability and the Principal-Agent Theory" 226-421

parliamentary representatives. Parliament ought to have constitutional powers to review and rectify the appointment of senior government officials. However, in most cases, politicians within the government and at 'Luthuli House,' the headquarters of the governing party, appoint high-ranking civil servants through cadre deployment.[78] The President has the prerogative to appoint the National Commissioner of the Police Service,[79] the NDPP[80] and the Commissioner of the South African Revenue Service (SARS)[81] with no parliamentary oversight.[82]

The President has powers to dismiss civil servants directly appointed by the President.[83] However, this power is susceptible to abuse.[84] To insulate unelected public office-bearers from political manipulation, there is a constitutional need to place the appointment of high-ranking public servants in the hands of the people through the National Assembly. Although the National Assembly cannot oversee other executive appointments[85] and high-ranking civil servants, the legislature plays a critical role in the appointment of judges,[86] the Public Protector, the Auditor-General and commissioners of Chapter 9 institutions.[87] There is no reason why important and senior public office-bearers, such as the

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78 Venter 2010 *SAJHR* 61. See *Mlokoto v Amathole Municipality* Case No 1428/2008 (Unreported), referred to by Venter, in which the court dealt with the undue influence of the governing party on the appointment of a less qualified candidate for the mayoral manager position for no other reasons other than his political cooperation.

79 Section 207(1) of the Constitution.

80 Section 179(1)(a) of the Constitution.

81 See *Moyane v Ramaphosa* [2019] 1 All SA 718 (GP) in which the court dealt with the powers of the President in relation to the Commissioner of the South African Revenue Service.

82 Section 84(e) empowers the President to make all appointments that the Constitution and national legislation empowers him to make. Section 84(i) further gives the President powers to appoint ambassadors, plenipotentiaries and consular and diplomatic representatives. Kopecký 2011 *Political Studies* 723 concluded that at least 60% of South Africa's ambassadors were "party political appointees rather than career diplomats."

83 *Masetlha v President of the Republic of South Africa* 2008 1 SA 566 (CC) para 68 (hereinafter *Masetlha*).

84 See *Nxasana* para 85 in which the Court detailed how President Zuma unlawfully removed Nxasana, the former NDPP, and expressed "a lot of sympathy for him for the undue, persistent pressure to which he was subjected."

85 Section 91 of the Constitution vests powers in the President to appoint members of the executive from the National Assembly and not more than two outside the National Assembly. Since members of the executive are "purely political appointees placed in positions of government leadership" - *Masetlha* paras 228, the President has no constitutional obligation to give reasons for removing members of Cabinet. The courts cannot review the appointments of Cabinet members and Deputy Ministers – see *Democratic Alliance v President of the Republic of South Africa* [2017] ZAWCHC 34.

86 Some members of the National Assembly make up the Judicial Service Commission, which appoints judges – see 178(1)(h) of the Constitution.

87 Section 193(4) of the Constitution.

Commissioners of SAPS and SARS and the NDPP, should not be overseen by the National Assembly in the same way as functionaries of Chapter 9 institutions.

5.3.4 Parliamentary processes for executive accountability

5.3.4.1 Questions to members of the executive

Section 92(2) of the Constitution imposes collective and individual responsibility on Cabinet members. Cabinet members must regularly furnish Parliament with full reports on matters under their control.[88] The same applies to Deputy Ministers.[89] Periodically, members of the executive must answer oral and written questions from members of Parliament during sittings of the National Assembly and its portfolio committees. Question and answer sessions are the most popular way in which members of the executive account to Parliament.[90] Rule 138 of the Rules of the National Assembly outlines a cluster system for Ministers to answer questions in the National Assembly. The Deputy President must answer questions once every month.[91] The legislature may not compel the Deputy President to answer more than six questions per day.[92] Members of the National Assembly must confine their questions to matters of national and international importance assigned to the Deputy President by the President.[93] Rule 140 of the Rules of the National Assembly stipulates that the legislature may put questions to the President at least once per quarter,[94] limited to six questions per session.[95] Due to party politics, question sessions mostly play into the hands of smaller parties which use the opportunities for political purposes and to expose corruption and other abuses of power.[96] In practice, the majority membership usually does not pose questions for purposes of oversight but to politically support the executive. The political bias of members of the National Assembly aligned to the governing party obstructs them from understanding and appreciating the importance of their duty to hold the executive accountable. Although question sessions are political

88 Section 92(3)(b) of the Constitution.
89 Section 93(2) of the Constitution.
90 *United Democratic Movement v Speaker* para 40.
91 Rule 139(1) of the 9th Edition of the Rules of the National Assembly (2016).
92 Rule 139(3).
93 Rule 139(2).
94 Rule 140(1)(a).
95 Rule 140(3). Rule 141 stipulates that members may put urgent questions to the executive.
96 Pelizzo and Stapenhurst *Government Accountability and Legislative Oversight* 11. See also Salmond 2014 *Journal of Legislative Studies* 322.

playfields for smaller parties, they contribute to enforcing accountability through public exposure of wrongdoing.

Since the President selects members of Cabinet from the National Assembly,[97] and since members of Cabinet keep their parliamentary seats during their tenure as executive members,[98] question sessions enable members of Parliament to scrutinise their colleagues in the executive. In this way, members of the executive must answer questions from their colleagues to ensure that the exercise of public power by the executive benefits the interests of citizens.[99] Members of the executive must account to their peers because they are members of the legislature and because they exercise public power.[100] Members of the executive should also take responsibility for departments under their control.[101] Therefore, question sessions are part of internal checks and balances and important mechanisms through which elected representatives of citizens scrutinise the exercise of executive authority. The National Assembly may invoke enforceability mechanisms under sections 89 and 102 of the Constitution to remove Cabinet members for poor performance, misconduct and legal violations. The following section discusses the relationship and distinctions between the procedures provided in sections 89 and 102.

5.3.4.2 Motions of no confidence in the President and Cabinet

5.3.4.2.1 Section 102 of the Constitution

The lexical explanation adopted by Devenish[102] defines a vote on a motion of no confidence as a censure of aspects of government policy. In South African realities, any member of the National Assembly may initiate a motion of no confidence in the President, although post-1994 history has shown that the governing party prefers to recall a President than to utilise section 102 of the Constitution. South Africa has a history of successful motions of no confidence in the executive, dating to the Cape House of Assembly in 1881 and the Hertzog Ministry in 1939.[103] Hence, a motion of no confidence

97 Section 91 of the Constitution
98 Members of the National Assembly appointed to the Cabinet retain their parliamentary seats so that when removed by the President, they return to the legislature.
99 Mulgan *Holding Power to Account* 45.
100 Mulgan *Holding Power to Account* 48.
101 Mulgan *Holding Power to Account* 48.
102 Devenish 2015 *SAPL* 290.
103 Devenish 2015 *SAPL* 292.

in the President is not a new phenomenon in South Africa. After the adoption of the 1961 Constitution,[104] members of Parliament had constitutional powers to remove the State President for misconduct and inability to perform the functions of the office of State President.[105] The 1983 Constitution[106] gave two Houses of the tri-cameral Parliament powers to decide, by a majority vote of an electoral college, on the removal of the State President, pursuant to which the Chief Justice would declare the President duly removed.[107]

Section 102 of the Constitution stipulates that the National Assembly may pass motions of no confidence in the President and in the Cabinet. Motions of no confidence are an invaluable tool for holding the executive accountable. However, the National Assembly may pass motions of no confidence for purposes other than holding the executive accountable.[108] The Constitution does not specify the grounds on which the National Assembly can hold a motion of no confidence.[109] In *United Democratic Movement v Speaker*, the Court suggested that a motion of no confidence would be ideal when

> [A] point could conceivably be reached where serious fault-lines in the area of accountability, good governance and objective suitability for the highest office have since become apparent [but do] not necessarily rise to the level of grounds required for impeachment.[110]

The Court further suggested that a motion of no confidence would be ideal when the expectations of the majority members of the National Assembly in the President to deliver on his/her constitutional mandate have become dim due to questionable conduct. In the final analysis, the Court said that a motion of no confidence is necessary to protect constitutional democracy and the best interests of citizens in government decision-making. Motions of no confidence ensure that the President is suitable for office and responsive to the needs and wants of citizens. Lastly, the Court said that a motion of no confidence is a firm expression of the dissatisfaction of the representatives of citizens

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104 *Republic of South Africa Constitution Act* 32 of 1961.
105 See sections 8(1) and 10 of the 1961 Constitution.
106 *Republic of South Africa Constitution Act* 110 of 1983.
107 Section 9(3) of the 1983 Constitution.
108 *United Democratic Movement v Speaker* para 32.
109 *United Democratic Movement v Speaker* para 45.
110 *United Democratic Movement v Speaker* para 46.

with the performance of the executive.[111] A successful motion of no confidence in the President has serious constitutional ramifications, as it automatically removes both the President and the Cabinet.[112]

5.3.4.2.2 Procedure

A motion of no confidence passes with a majority vote of the members of the National Assembly.[113] However, the Constitution does not prescribe a procedure for motions of no confidence. It is up to the National Assembly to decide on the procedure.[114] In *Mazibuko v Sisulu,*[115] the Court held that the National Assembly must adopt a procedure which does not hinder or prohibit the formulation, tabling and vote on a motion of no confidence. The Court made the order because the governing party was using its numeric superiority in the legislature to thwart members of smaller parties from tabling motions of no confidence. The interests of citizens in good governance demand that when a motion of no confidence is tabled against the President, it must be voted on expeditiously and concluded within a reasonable time.[116] Although after *Mazibuko* the National Assembly amended its rules relating to the tabling of motions of no confidence, its compliance was unsatisfactory.[117] The Rules of the National Assembly merely provide that when a member tables a motion of no confidence, the Speaker must give the motion "due priority."[118] There is no legal clarity on the meaning of due priority. The ambiguity gives the Speaker room to delay a motion.[119] In *United Democratic Movement v Speaker*, the Court directed the Speaker to put in place mechanisms to nurture conditions necessary for members of the National Assembly to participate in a motion of no confidence effectively and without hindrance.[120]

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111 *United Democratic Movement v Speaker* para 47.

112 *Economic Freedom Fighters v Speaker of the National Assembly* 2018 3 BCLR 259 (CC) para 135 (hereinafter *Economic Freedom Fighters II*).

113 Section 102 of the Constitution.

114 See Rules 6; 26; 102; 103 and 104 of the *Rules of the National Assembly*.

115 *Mazibuko v Sisulu* 2013 11 BCLR 1297 (CC) para 41.

116 *United Democratic Movement v Speaker* para 28.

117 For a synopsis of *Mazibuko* and its implications, see Venter 2015 *TSAR* 395-404; Venter 2014 *TSAR* 407-418.

118 Rule 129(2) of the 9th Edition of the Rules of the National Assembly (2016).

119 For a discussion, see Venter 2015 *TSAR* 395-397.

120 *United Democratic Movement v Speaker* para 43.

When the National Assembly has resolved to vote on a motion of no confidence, the Speaker must decide on either an open or secret ballot. However, the Speaker has always preferred a vote by open ballot, leading to litigation. In *Tlouamma v Speaker of the National Assembly*,[121] the court refused to order the Speaker to conduct a vote of no confidence in the President by secret ballot. The court based its reasoning on the understanding that the Constitution neither implies nor expressly provides for a vote of no confidence in the President by secret ballot. The approach was wrong, as seen in *United Democratic Movement v Speaker*, in which the Court took a different approach and weighed the interests of accountability, political considerations and the Constitution. The Court concluded that a decision to hold a motion of no confidence by open or secret ballot belongs to the National Assembly which must make it in terms of section 57 of the Constitution, bearing in mind considerations to advance the constitutional vision of an accountable, responsive and open government.[122]

The Rules of the National Assembly supplement section 57 of the Constitution and stipulate that subject to the Constitution, the presiding officer may prescribe a voting procedure and that members of the National Assembly may support or oppose a motion. Members of the National Assembly may abstain from partaking in the vote.[123] A member who is unable to cast a vote may do so through the chief whip of his/her party after informing the Chair and the Secretary at the Table.[124] Rule 104(3) says that when a manual voting system permits, the names and votes of the members must be printed in the Minutes of the Proceedings. In *United Democratic Movement v Speaker*,[125] the Court interpreted this clause to include votes on motions of no confidence. Consequently, the Court declared that the Speaker has constitutional powers to hold a motion of no confidence either through an open or secret ballot. However, the Speaker may not

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121 *Tlouamma v Speaker of the National Assembly* 2016 1 SA 534 (WCC).

122 *United Democratic Movement v Speaker* para 59. The Court adopted a constitutional interpretation approach elucidated in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) In re: Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC) para 21 and *Matatiele Municipality v President of the Republic of South Africa* 2007 1 BCLR 47 (CC) para 36. In both cases, the Court holistically considered the issues at stake and interpreted constitutional provisions in the light of the history of impunity in South Africa, the founding constitutional provisions for accountable government and the justiciable Bill of Rights – see *United Democratic Movement v Speaker* paras 29-30.

123 Rule 103(3).

124 Rule 103(4).

125 *United Democratic Movement v Speaker* para 67.

exercise the discretion subjectively and should ensure that "Members exercise their oversight powers most effectively."[126] The Court was mindful of the implications of an open vote on members of Parliament and political pressure from their parties.[127]

5.3.4.2.3 Party politics

There is a clear conflict of interest between the constitutional obligations of members of the National Assembly, as a legislative institution, and their status as representatives of political parties in the legislature. In considering this obvious conflict of interest, the view of the former British Prime Minister, Sir Churchill is instructive:

> The first duty of a member of Parliament is to do what he thinks in his faithful and disinterested judgement is right and necessary for the honour and safety of Great Britain. His second duty is to his constituents, of who he is the representative but not the delegate…it is only in the third place that his duty to party organization or programme takes rank. All these three loyalties should be observed, but there is no doubt of the order in which they stand under any healthy manifestation of democracy.[128]

Although Churchill spoke from a British perspective, his views are an expression of a common duty among members of the legislature in any state. In *United Democratic Movement v Speaker*, the United Democratic Movement sought a secret vote to protect the public interest in a democratic outcome guided by the exercise of the free will of individual members of the National Assembly, rather than career considerations. The United Democratic Movement based its argument on considerations of accountability in the light of the oaths and affirmations taken by Members of the National Assembly when they took legislative office.[129] In its determination, the Court adopted a position like Churchill's, albeit phrased differently. The Court said that the will of political parties must not prevail over the will of individual members of the National Assembly because members of the National Assembly represent the people of South Africa, not their parties.[130] However, the Court's argument defied the reality that the proportional representation system empowers parties over individual members of the National Assembly. To believe that the individual will of members of the National Assembly will

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126 *United Democratic Movement v Speaker* para 68.
127 *United Democratic Movement v Speaker* para 60.
128 Gauja *Political Parties and Elections* 35.
129 *United Democratic Movement v Speaker* para 15.
130 *United Democratic Movement v Speaker* para 61.

always prevail does not only deny reality but also contradicts earlier cases in which the Court affirmed the superiority of parties in South Africa.[131]

Notwithstanding, the Court acknowledged that conceptually, the governing party would always oppose the removal of the President and Cabinet and that it is possible for the representatives of the governing party to support a motion of no confidence. Hence, the Court reasoned that there is a need for mechanisms to protect the liberty of members of the National Assembly from undue influence by their parties.[132] However, the Court observed that in as much as the courts may be privy to political realities and the overriding will of parties on the voting patterns of their legislative representatives, it is not open to the courts to prescribe an open or secret voting procedure for the National Assembly in a motion of no confidence in the President.

> [C]onsiderations of separation of powers demand an ever-abiding consciousness of the constitutionally-sanctioned division of labour among the arms and a refrain from impermissible intrusions.[133]

When there is a dispute between members of the National Assembly on which procedure to follow, the role of the courts is to pronounce on the constitutional permissibility of both procedures, not to prescribe a specific procedure.[134] Arguably, considerations of accountability and the national interest favour a secret ballot for votes on motions of no confidence.[135] A secret ballot is ideal because of the huge powers at the disposal of parties and their influence on members of the National Assembly. In determining whether to vote on a motion of no confidence by open or secret ballot, the National Assembly must be guided, in addition to accountability, by the question whether an open ballot may undermine the right and ability of members of the National Assembly to exercise their vote freely without undue influence and coercion by their parties. As is the case with secret ballots used for the election of the President, a secret ballot in a motion of no

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131 See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 10 BCLR 1253 (CC) para 186 (hereinafter *Certification I*); *Ramakatsa v Magashule* 2013 2 BCLR 202 (CC) para 68 (hereinafter *Ramakatsa*); *My Vote Counts NPC v Minister of Justice and Correctional Services* 2018 8 BCLR 893 (CC) para 2 (hereinafter *My Vote Counts v Minister: Justice*); *Majola v State President of the Republic of South Africa* [2012] ZAGPJHC 236.

132 *United Democratic Movement v Speaker* para 61.

133 *United Democratic Movement v Speaker* para 63.

134 *United Democratic Movement v Speaker* para 64.

135 *United Democratic Movement v Speaker* para 74.

confidence enables members to vote with their conscience and insulates them from disapproval and intimidation by the party leadership.[136] A successful motion of no confidence is likely to induce disappointment and frustration in the losing President and his/her supporters. The anger and dejection may cause losers to act prejudicially against members of their parties who voted in support of the motion.

5.3.4.3 Removal of the President

5.3.4.3.1 Section 89 of the Constitution

Section 89 of the Constitution regulates the removal of the President. The section does not use the term 'impeachment,' although the procedure is factually an impeachment. Impeachment is a process through which a legislature institutes formal processes and charges a high-ranking public official, such as a President, with misconduct.[137] Impeachment of public officials by Parliament originated in 14th Century England[138] when political crimes committed by public officials against the state were impeachable offences.[139] In a political sense, a Presidential impeachment is a manifestation of extreme political failure.[140] Although other jurisdictions have a history of impeachment,[141] South Africa does not. During the constitution-making process, the removal of the President through impeachment was more of a theoretical than a practical consideration.[142] Section 89 of the Constitution lists three categories of impeachable conduct - serious violations of the Constitution or the law,[143] serious misconduct[144] and inability to perform the functions of the office.[145]

However, it is not clear what constitutes serious misconduct in terms of section 89(1) of the Constitution. In *Economic Freedom Fighters II*,[146] Zondo DCJ said that the

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136 *United Democratic Movement v Speaker* para 73.

137 Gerhardt *Impeachment* 6. See also Perez-Linan *Presidential Impeachment and the New Political Instability in Latin America* 6.

138 Wolf 2017 *SALJ* 3.

139 Gerhardt *Impeachment* 11.

140 Perez-Linan *Presidential Impeachment and the New Political Instability in Latin America* 1.

141 See the Appendix to Gerhardt *Impeachment* 201-202 and Perez-Linan *Presidential Impeachment and the New Political Instability in Latin America* 1.

142 Wolf 2017 *SALJ* 1.

143 Section 89(1)(a) of the Constitution.

144 Section 89(1)(b) of the Constitution.

145 Section 89(1)(c) of the Constitution.

146 *Economic Freedom Fighters II* para 1.

determination of serious misconduct and serious violations "is a value judgment that a person must perform in a given set of facts."[147] Arguably, an impeachable constitutional or legal violation should be of such a serious nature that the only logical step available to the National Assembly is the removal of the person. The Constitution does not specify whether impeachable misconduct should be of a criminal nature. Arguably, any conduct which violates the law or the Constitution, and which is of such gravity that it can reasonably be considered serious, would suffice for impeachment.

Unlike a motion of no confidence, an impeachment of the President does not affect other Cabinet members. As such, the section 89 procedure only holds the President accountable, not the entire national executive. A President who is removed from office for serious violation of the Constitution or the law and for serious misconduct loses benefits and cannot occupy public office, whereas a President removed for inability to undertake the duties of the President does not lose his/her constitutional benefits.[148] There is one justification for the disqualification of an impeached President from holding the office of the President or any other public position: an impeached President is a person who has conducted himself/herself in such a manner as to exhibit an intentional disregard of the Constitution and its founding provisions for an accountable, responsive and open government. The Court has considered one case on the interpretation of the impeachment provision in the Constitution.

5.3.4.3.2 The Impeachment case – Economic Freedom Fighters II

In *Economic Freedom Fighters II*, the applicants sought an order to compel the National Assembly to put in place mechanisms to hold President Zuma accountable for his failure to implement the remedial action of the Public Protector in the Nkandla report.[149] In the previous year, the Court had declared that the President violated his oath of office by his failure to implement the remedial action and ordered him to pay back a portion of the funds spent on non-security upgrades at his Nkandla home.[150] In *Economic Freedom Fighters II*, the applicants also sought an order declaring that subsequent to the Court

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147 *Economic Freedom Fighters II* para 64.

148 Section 89(2) of the Constitution.

149 Public Protector 2014 *"Secure in Comfort."*

150 *Economic Freedom Fighters I*. The Court said that the President had violated section 83(b), read with sections 181(3) and 182(1)(c) of the Constitution.

findings in *Economic Freedom Fighters I*, the National Assembly had failed to hold the President accountable and to put proper mechanisms to hold the rest of the executive accountable.[151] The Speaker of the National Assembly argued that the legislature had held the President accountable and pointed out the several question sessions and failed motions of no confidence as examples of the efforts of the National Assembly to hold the President accountable. The National Assembly had also set up an *ad hoc* committee to determine whether the transgressions of the President were impeachable. The committee found that they had not, and thus cleared him. In the minority judgment, the justices were satisfied that the National Assembly had done all it could to hold the President accountable. The justices also found no problem with the composition of the *ad hoc* committee, which was constituted through proportional representation. Since the governing party dominated the committee, it was easy to secure the majority vote which absolves the President.

The majority justices were convinced that in the light of the findings of the Court in *Economic Freedom Fighters I*, there was no need to investigate whether the President had committed serious constitutional violations. The justices held that the several failed motions of no confidence in the President and the question sessions to which he subjected himself to in Parliament did qualify as holding the President accountable. The justices opined that the correct procedure for holding the President accountable is under section 89(1) of the Constitution. The majority further said that the failure of the National Assembly to adopt rules for the conduct of impeachment proceedings breached the constitutional obligations of the National Assembly to scrutinise and oversee executive action under section 42(3) of the Constitution. Accordingly, the majority ordered the National Assembly to make rules for the removal of the President in terms of section 89(1) of the Constitution.

In line with the Court judgment, the National Assembly commenced proceedings to adopt rules to remove the President in terms of section 89(1) of the Constitution. However, the ANC recalled President Zuma before the National Assembly completed the process. It is not immediately clear whether the recall was influenced by the adverse judgment. Supposing that the judgment caused the political repercussions, it was the second time

[151] *Economic Freedom Fighters II* para 29.

that the judiciary had played a significant role in the removal of a President. Whereas the recall of President Zuma was a culmination of several adverse court judgments which plagued his Presidency,[152] the recall of President Mbeki was pretexted by the High Court judgment in *Zuma v National Director of Public Prosecutions.*[153] The refusal of the National Assembly to hold President Zuma accountable for constitutional transgressions raised questions about the institutional accountability of the National Assembly and the individual accountability of members of the legislature.

5.4 Institutional and individual accountability for legislative oversight

Since the National Assembly represents citizens,[154] it is only natural for citizens to demand (or at least want), a legislature that is accountable. Overall, accountability mechanisms should result in the maximisation of the responsiveness of Parliament towards the preferences of citizens. The several failed motions of no confidence in former President Zuma illustrate a legislative failure to scrutinise executive action and to hold the executive accountable. The ANC caused the failures by ordering its members to vote against the motions of no confidence. The governing party has effectively 'captured' the National Assembly due to its superior representation in the legislature.[155] The failure of the several motions of no confidence in the former President manifested the powers of a strong President and a compromised legislature, both which stem from the proportional representation system. The constitutional structuring and functioning of Parliament, the Presidency, the executive and the caucus system compromise the ability of the National Assembly to hold the President accountable. The weaknesses represent constitutional shortcomings, regardless of which party has a parliamentary majority.

The ensuing dominance of the governing party in the National Assembly undermines the efforts of Parliament to hold the executive accountable. It is a common reason that the outcomes of votes of no confidence and attempts to remove the President depend entirely on political factors, other than legal reasons because the office of the President is a

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[152] See *Democratic Alliance v President of the Republic of South Africa; Economic Freedom Fighters v State Attorney* [2019] 1 All SA 681 (GP) para 23 for a list of the Zuma cases.

[153] *Zuma v National Director of Public Prosecutions* 2009 1 BCLR 62 (N). In *National Director of Public Prosecutions v Zuma* 2009 2 SA 277 (SCA) para 15 (hereinafter *Zuma v NDPP*), the Supreme Court of Appeal criticised the adverse findings in *Zuma v NDPP* as unwarranted and unsubstantiated.

[154] Section 42(3) of the Constitution.

[155] Goetz and Jenkins *Reinventing Accountability* 47-48 identify other instances of 'capture' of legislatures.

political office occupied and retained through political means. Theoretically, a motion of no confidence tabled by a member of an opposition party would fail unless if the President has failed to tightly control members of his party, particularly when the governing party has a small majority margin. Another factor which contributes to the failure of the National Assembly to hold the President accountable is that there is no absolute separation of powers between the National Assembly and the executive,[156] leading to an "over-concentration of executive power in the legislature."[157]

In the result, political considerations compromise the ability of the legislature to fulfil its oversight and accountability obligations. The anomaly is not peculiar to South Africa. Parliaments in Presidential systems have unique institutional structures which make effective legislative oversight a challenge. Consequently, legislative incapacity imperils democracy and accountability.[158] The question arises whether members of the National Assembly have any level of individual accountability at all. Theoretically, it is not clear to whom individual members of the National Assembly should account. Should they account to citizens or their party leadership? In this context, Carey defined *principals* as political actors

> [W]ho command some measure of loyalty from legislators, and whose interests a legislator might represent and pursue in an official capacity. Given that most legislators in democracies are popularly elected, we might think voters as the ultimate, universal principals to whom legislators are accountable.[159]

Under a proportional representation system in which party leaders have a firmer grip on members of Parliament than citizens, individual members of the National Assembly are likely to account to the leadership of their parties than to citizens whom they represent. Arguably, the interests which members of the National Assembly advance, as individuals and as a collective legislature, are those of the parties whom they represent. Generally, Parliaments act in accordance with different pressures and demands from political actors.[160] Although parties represented in Parliament provide some form of collective accountability, there is a need for individual accountability of each member of Parliament

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156 *Certification I* paras 108-109.

157 Klassen 2015 *PELJ* 1902. See also McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* 209.

158 Pelizzo and Stapenhurst *Government Accountability and Legislative Oversight* xv.

159 Carey *Legislative Voting and Accountability* 4.

160 Carey *Legislative Voting and Accountability* 1.

to ensure that each member takes individual responsibility for his/her actions in Parliament.[161] Parties dominate Parliament because they control the voting of individual members of the legislature. When it comes to voting on critical issues in Parliament, parties often impose their will on their representatives, making the outcome of such votes, even if conducted by secret ballot, predictable and more stable.[162] However, votes by secret ballot impede individual accountability in that the votes of individual members of Parliament are not visible.[163] Hence, citizens cannot tell whether a representative voted in line with their needs and wants.[164] Open votes enable informed citizens to monitor the voting patterns of their parliamentary representatives.

5.5 Public participation in parliamentary processes

Public participation is an element of both democracy and good governance[165] and is premised on the openness of parliamentary processes to the public to enhance both publicity and deliberation in Parliament.[166] The Constitution embedded public participation to ensure the responsiveness of the government to the needs and wants of citizens in the formulation and implementation of government policies through legislation and the evaluation of the success of the policies.[167] Public participation makes the legislature justify its enactments. The rationale for public participation in the enactment of legislation is the responsiveness of the government to the input of citizens, civil society and communities in relation to issues which affect them.[168] In its essence, public participation does not mean the participation of every citizen but entails the establishment of

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161 Grynaviski *Partisan Bonds* 1.

162 Carey *Legislative Voting and Accountability* 6.

163 However, Klaaren 2018 *Law, Democracy and Development* 1-2 argues that there is a need to "move beyond the balancing metaphor and to recognize that transparency and secrecy are not two concepts separate from each other. Bovens "Public Accountability" 183 does not subscribe to this view and argues that openness arises from the nature of public power which, ordinarily, should be transparent to citizens.

164 Carey *Legislative Voting and Accountability* 165.

165 See Offor 2006 *Journal of Social, Political, and Economic Studies* 268 who says that public participation enables citizens to participate both maximally and minimally in government processes. See also Booysen 2009 *Politeia* 4 who submits that public participation is an element of representative democracy.

166 Mulgan *Holding Power to Account* 46.

167 Sachs *We, the People* 173.

168 Booysen 2009 *Politeia* 23.

institutional mechanisms through which citizens and their designated representatives make submissions and engage the government to influence its policies.[169]

Whether submissions influence the government is another question. What matters is that the legislature must hear the people. On this point, it is important to note that public participation operates as an element of direct democracy through which citizens influence government decision-making, regardless of their political affiliation. However, public hearings are often used a charade because the governing party, using its superior numbers, seals the fate of the proposed legislation before public hearings even start. A notable example is the controversy surrounding the amendment of section 25 of the Constitution. Although it is common knowledge that many people made written and oral submissions against the expropriation of land without compensation, the Constitutional Review Committee went ahead to recommend to the National Assembly to amend the Constitution.

The National Assembly must consult citizens when enacting legislation. A failure to involve the public in the legislative process infringes the Constitution, making the ensuing legislation unconstitutional.[170] To prevent the government from reneging on the constitutional promises for democracy, transparency and responsiveness, section 59 of the Constitution provides for public access and involvement in the National Assembly and obligates the legislature to ensure that citizens have an opportunity to contribute.[171] Although citizens theoretically delegate their law-making powers to the National Assembly, citizens have a right to make direct input in the legislative process because legislation directly affects citizens. Arguably, citizens are principals of the National Assembly and have a right (and even a duty to themselves and to posterity) to oversee how the agent undertakes its obligations.

Section 57 of the Constitution obliges the National Assembly to consider the interests of accountability, transparency, public involvement and representative and participatory democracy when the legislature makes rules and orders for the conduct of its business.[172]

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169 Calland *Anatomy of South Africa* 85-97.

170 See, *Doctors for Life International v Speaker of the National Assembly* 2006 12 BCLR 1399 (CC) (hereinafter *Doctors for Life*).

171 See also rules 57 to 61 of the Rules of the National Assembly on public access to the National Assembly.

172 Section 57(1)(b).

The provisions ensure that the National Assembly remains open and democratic in enhancing accountability. The National Assembly must conduct its business transparently and ensure that members of the public and the media have access to its sittings and committees.[173] All limitations to the rights of the public and the media from sittings and committees of the National Assembly must satisfy the tests of reasonableness and justifiability in an open and democratic society.[174] Arbitrary exclusion of the media and members of the public from parliamentary sittings taints the legislative process and renders the ensuing legislation unconstitutional.[175] Access to parliamentary proceedings is thus not a privilege but a constitutionally protected right which Parliament may not alter as and when it sees fit.[176] Due to the weaknesses of parliamentary oversight, the Constitution established other institutions to ensure administrative accountability.

5.6 Administrative accountability

5.6.1 Extra-legislative institutions of accountability

Chapter 9 of the Constitution established State Institutions Supporting Constitutional Democracy as core features of constitutionalism[177] and gave them the mandate to ensure that the executive does not abuse state financial resources, respects human rights and that the executive does not act in an improper or prejudicial manner against citizens. Chapter 9 institutions compensate for the weaknesses of electoral and legislative accountability.

> [E]xtralegislative accountability institutions [are] a diverse set of institutions designed 'to enhance accountability of government, which operate outside parliament and the political process expressed through parliament', and whose creation paradoxically has been 'largely driven by a perception of the inadequacy of parliament as an accountability mechanism.[178]

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173 Section 59(1)(a)-(b)(i) of the Constitution.

174 Section 59(2) of the Constitution. See also section 36 of the Constitution for a criterion used in the limitation of constitutional rights and freedoms.

175 *Doctors for Life* para 300.

176 De Vos and Freedman (eds) *South African Constitutional Law in Context* 114-115.

177 Fombad 2010 *Speculum Juris* 44-45. Section 181(1) of the Constitution established these State Institutions Supporting Constitutional Democracy: 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.

178 Pelizzo and Stapenhurst *Government Accountability and Legislative Oversight* 49.

Sachs J says that extra-legislative institutions curb executive excesses because they are "founded on the principles of mistrust and vigilance that we placed in our Constitution to protect ourselves from ourselves."[179] Whereas Chapter 9 institutions account to the National Assembly and must report to the legislature at least once a year,[180] their recommendations and remedial action bind the National Assembly and everyone unless when reviewed and set aside by the courts.[181] The obligation of Chapter 9 institutions to account and to present their reports and findings to the National Assembly every year[182] does not mean subservience to the legislature. The Constitution guarantees the independence of Chapter 9 institutions and instructs them to operate impartially and to "perform their functions without fear, favour or prejudice."[183] The Constitution also imposes an obligation on all state organs to protect Chapter 9 institutions to ensure their "independence, impartiality, dignity and effectiveness."[184] The provisions create a constitutional environment in which Chapter 9 institutions freely work towards ensuring a government that is accountable, responsive and open as envisaged in the founding provisions. The rest of this chapter focusses on administrative accountability through the Public Protector. Due to several considerations, which include the need to focus on institutions which enhance democratic accountability, only the Public Protector is analysed as an extra-legislative institution. This choice does not downplay the importance of other Chapter 9 institutions.

5.6.2 The Public Protector

5.6.2.1 The mandate of the Public Protector

The institution of the public ombud (the Public Protector in South African terms) developed in 1809 in Sweden to safeguard the interests of citizens through investigation and resolution of complaints against government departments and members of the executive.[185] After the 1970s, ombudsmen became more acceptable channels of

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179 Sachs *We, the People* 4.
180 Section 181(5) of the Constitution.
181 See *Economic Freedom Fighters I*.
182 Section 181(5) of the Constitution.
183 Section 181(2).
184 Section 181(3)-(4).
185 Pelizzo and Stapenhurst *Government Accountability and Legislative Oversight* 52.

accountability, among civil society and anti-corruption agencies.[186] The public ombud falls into the category of extra-legislative institutions of accountability which exercise independent administrative control and financial oversight over the executive to ensure accountability.[187] The Public Protector exercises public powers[188] for three principal functions:

> (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
>
> (b) to report on that conduct; and
>
> (c) to take appropriate remedial action.[189]

Thus, the constitutional obligation of the Public Protector is to investigate issues related to legality, good governance and administration to protect the interests of citizens. The *Public Protector Act* 23 of 1994 (the Public Protector Act) supplements the powers and functions of the Public Protector and gives the Public Protector autonomy to decide on how to conduct investigations.[190] In *South African Broadcasting Corporation Soc Ltd v Democratic Alliance*,[191] and *Economic Freedom Fighters I*, the courts affirmed the binding nature of the remedial action of the Public Protector, unless when reviewed and set aside by the courts. Consequent to the two judgments, the courts heard several review cases against the remedial action of the Public Protector, yielding both positive and negative results for the applicants.[192] However, the Public Protector does not have unlimited powers. The Public Protector may, for instance, not investigate the judiciary.[193] The

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186 Mulgan *Holding Power to Account* 2.

187 Bovens "Public Accountability" 188; Pelizzo and Stapenhurst *Government Accountability and Legislative Oversight* 49; Mulgan *Holding Power to Account* 25.

188 *Police and Prisons Civil Rights Union v Minister of Correctional Services* 2008 3 SA 91 (E) paras 52-53.

189 Section 182(1) of the Constitution.

190 See *Minister of Home Affairs v Public Protector* 2018 3 SA 380 (SCA) para 39 (hereinafter *Minister: Home Affairs v Public Protector*).

191 *South African Broadcasting Corporation Soc Ltd v Democratic Alliance* 2016 6 SA 522 (SCA).

192 See, for instance, *South African Reserve Bank v Public Protector* [2017] 4 All 269 (GP) (hereinafter *Reserve Bank v Public Protector*); *Absa Bank Limited v Public Protector* [2018] 2 All SA 1 (GP) (hereinafter *Absa v Public Protector*); *Minister of Home Affairs v Public Protector*]2018] 2 All SA 311 (SCA); *Public Protector v South African Reserve Bank* [2018] ZAGPPHC 175; *President of the Republic of South Africa v Office of the Public Protector* [2018] 1 All SA 576 (GP) (hereinafter *President of RSA v Office of the PP I*); *President of the Republic of South Africa v Office of the Public Protector* (2018) 1 SA 800 (GP) (hereinafter *President v Office of the PP*).

193 Section 182(3) of the Constitution. In *Minister: Home Affairs v Public Protector* para 44, the court said that whereas the Labour Court has exclusive jurisdiction on labour matters, the Public Protector may investigate labour issues because the Public Protector is not equivalent to a court.

limitation protects judges as individuals and the judiciary as an institution from interference.

5.6.2.2 The Public Protector and administrative action

In *Minister: Home Affairs v Public Protector*,[194] the court dealt with an appeal of a labour matter and the question of whether decisions of the Public Protector are administrative action. The litigation arose after the Department of Home Affairs recalled the first secretary of the South African embassy in Cuba, Marimi, after complaints about his conduct. The Department of Home Affairs warned Marimi that it would institute disciplinary proceedings against him and stopped his living allowance. Marimi laid a complaint with the Public Protector who investigated and concluded that there was maladministration. The Minister of Home Affairs unsuccessfully sought a review of the findings in the High Court.[195] The Supreme Court of Appeal held that the decisions of the Public Protector do not constitute administrative action and are thus not reviewable under the *Promotion of Administrative Justice Act* 3 of 2000 (PAJA)[196] The court held that the Public Protector stands apart from the institutions of public administration.[197] The court also held that the Public Protector does not exercise administrative action because she does not administer public powers, but investigates, reports and remedies the exercise of such powers.[198]

The question of whether the remedial action of the Public Protector is administrative action also arose in *ABSA v Public Protector*.[199] The Public Protector had released a report in which she said that the government and the South African Reserve Bank had, without just cause, failed to recover about R3,2 billion from Bankorp Limited/ABSA, lent to the bank by the apartheid government.[200] ABSA, the Minister of Finance and the South African Reserve Bank challenged the report. In their consolidated arguments, the applicants

194 *Minister: Home Affairs v Public Protector*.

195 *Minister of Home Affairs v Public Protector* [2017] 1 All SA 239 (GP).

196 However, in *National Empowerment Fund v Public Protector* [2017] ZAGPPHC 610 para 1 Van der Westhuizen AJ misinterpreted the judgment of the Supreme Court of Appeal in *Minister: Home Affairs v Public Protector* when he said that the judgment essentially said that "[I]t is trite that the actions and decisions of the [Public Protector] are administrative action."

197 *Minister: Home Affairs v Public Protector* para 37.

198 *Minister: Home Affairs v Public Protector* Para 37.

199 *Absa v Public Protector*

200 Public Protector 2017 *Report on an Investigation Into Allegations of Maladministration, Corruption, Misappropriation of Public Funds and Failure by the South African Government to Implement the CIEX Report and to Recover Public Funds From ABSA Bank*.

contended that the Public Protector had acted outside her powers and that she was not authorised by the Constitution, the Public Protector Act or any law to issue such remedial action, and that she had also breached section 6(2)(a)(i) of the PAJA. In her defence, the Public Protector contended that her remedial action is not administrative action and thus not challengeable in terms of the PAJA. She also argued that the applications were fatal because of the unjustified and unreasonable delays of the applicants to file their applications for review.

However, the court rejected that the remedial action, which the Public Protector argued amounted to mere recommendations, had no binding effect. The court pointed out that on top of finding ABSA guilty, the Public Protector had directed the Special Investigating Unit to investigate the bank. The court found that her remedial action was administrative action and that she breached the principle of legality and the PAJA. The Public Protector unsuccessfully sought leave to challenge the personal costs order.[201] The conduct of the Public Protector (as an institution) in the Bankorp matter and earlier cases raised questions about the lawfulness and rationality of the remedial action of the Public Protector.

5.6.2.3 Lawfulness and rationality of remedial action

The recommendations and remedial action of the Public Protector may be reviewed on the grounds of legality.[202] When the Public Protector acts unlawfully, *ultra vires* and with a lack of procedural fairness, her remedial action can be set aside on review.[203] In *President of RSA v Office of the PP*,[204] the court had to decide on the lawfulness and rationality of the remedial action of the Public Protector in which she ordered the President to appoint a commission of inquiry into the alleged 'state capture'.[205] Since the Constitution vests the President with powers to appoint commissions of inquiry,[206] the questions were whether the Public Protector could direct other organs of state to conduct further investigations on an issue, and whether the Public Protector could prescribe the

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201 *Reserve Bank & Public Protector*.

202 *Minister: Home Affairs v Public Protector* para 38.

203 See *Minister: Home Affairs v Public Protector* paras 48, 51-54 in which the court refused to set aside the Public Protector's remedial action because she had not acted under an error of law, fact or unreasonably.

204 *President of RSA v Office of the PP II*.

205 Public Protector 2017 *State of Capture*.

206 Section 84(2)(f) of the Constitution.

conduct of such investigations. The Public Protector had found *prima facie* evidence that the President was involved in wrongdoing. She said that the President had acted contrary to the Ethics Code when he involved members of the Gupta family in the appointment and removal of Cabinet members and some persons in state-owned enterprises.

Although the Public Protector had made some findings during her investigation, she issued a remedial action for the appointment of a judicial commission of inquiry for three reasons. First, she alleged that she did not have adequate resources to carry a full investigation. Second, she could not complete the investigation in time because her seven-year term was ending. Third, the Public Protector alleged that she lacked confidence in the qualifications and experience of her successor to carry out a full investigation.[207] Since the alleged involvement of the President in the violation of the Ethics Code compromised the President, the Public Protector requested the Chief Justice to appoint the judicial officer to head the commission. The President challenged the remedial action on the grounds that it undermined his constitutional powers.

The court held that the President was conflicted in terms of section 84(2)(f) of the Constitution and the principle of legality. Therefore, the President could not appoint a commission of inquiry to investigate his own conduct.[208] The court also found that the Public Protector can direct members of the executive to perform their constitutional duties.[209] The court further observed that the Public Protector Act and the Ethics Code do not enjoin the Public Protector from directing other organs of state to conduct further investigations into alleged improprieties and constitutional violations.[210] The court concluded that there was a need for a judicial commission to inquire into state capture.[211] Since the President was too conflicted, the court said that the remedial action for the Chief Justice to appoint the judicial officer was rational.[212] Accordingly, the court dismissed the application with personal costs against the President and ordered him to appoint the commission within 30 days.[213] Eventually, the President capitulated and appointed the Judicial Commission of Inquiry into Allegations of State Capture. The Chief

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207 *President of RSA v Office of the PP II* para 161.
208 *President of RSA v Office of the PP II* paras 61-71.
209 *President of RSA v Office of the PP II* paras 82, 85-86.
210 *President of RSA v Office of the PP II* para 91.
211 *President of RSA v Office of the PP II* paras 105-106, 107, 112 and 140.
212 *President of RSA v Office of the PP II* para 147.
213 *President of RSA v Office of the PP II* para 191.

Justice Zondo DCJ to head the Commission. The impact of the Public Protector's *State Capture* report was significant towards the establishment of the world's first wide judicial commission of inquiry into corruption.

5.6.2.4 Overreaching remedial action

Although the Public Protector has powers to investigate all aspects of public administration, she should not overreach into the domain of other state organs. A classic case of a Public Protector overreaching her powers arose in *Reserve Bank v Public Protector* when the Public Protector issued remedial action for the Chairperson of the Portfolio Committee on Justice and Correctional Services to initiate processes for the amendment of section 224 of the Constitution to alter the mandate of the Reserve Bank. The Governor of the Reserve Bank sought a court order to review and set aside the remedial action because it intruded into the domain of the National Assembly. The court observed that the remedial action on the amendment of the Constitution removed the powers and responsibility of the Reserve Bank to protect the value of the currency, the Rand, and assigned the Reserve Bank a mandate to promote balanced and sustainable growth for socio-economic development.

The remedial action would have left the currency exposed, mainly because the Public Protector did not assign the responsibility to protect the currency to another institution. Also, the amendment would have obliged the Reserve Bank to report directly to Parliament, not the Minister of Finance, as is currently the case. The court ruled that the responsibility to initiate legislative and constitutional amendments lies with Parliament, not the Public Protector, by virtue of sections 43 and 44 of the Constitution. The court also said that the Public Protector does not have constitutional powers to prescribe to Parliament how to carry out its discretionary legislative powers to enact, amend and repeal legislation. It also said that the remedial action to shift the mandate of the Reserve Bank was both unreasonable and irrational because banks deal with financial markets, not socio-economic matters. Accordingly, the court set aside the impugned report.

5.7 Conclusion

This chapter analyses executive accountability, parliamentary oversight and administrative accountability in South Africa. The discussion shows that the executive must take responsibility for the exercise of its public powers and account to the National

Assembly. The National Assembly represents citizens in line with constitutional provisions and popular sovereignty. The National Assembly also elects the President, who selects other members of the executive. The National Assembly must oversee executive conduct to protect the interests of citizens. The unchecked exercise of executive power is bound to result in impropriety, abuse, corruption, nepotism and other signs of unaccountable governance. The National Assembly oversees government policy and the implementation of legislation, fiscal policy and the national budget, national security and defence, and some public appointments. The main processes available to the National Assembly to ensure accountability in the executive are questions to the executive, motions of no confidence and impeachment of the President and Cabinet.

However, indications discussed in the chapter show that Parliament has failed to restrain the executive. Several court judgments have illustrated the failure of the National Assembly to fulfil its constitutional obligations to oversee and scrutinise executive action. The controversies which arose from the Nkandla issue manifested a fatal failure by the National Assembly to exercise effective and meaningful oversight. The challenges arose because of the conflation of parliamentary and executive powers emanating from the proportional representation system, the huge influence of parties in the legislature and the dominance of the governing party. Resultantly, the analysis reveals a lack of adequate institutional and individual accountability for legislative oversight. Whereas the Constitution prescribes public participation in parliamentary processes which scrutinise executive action, the discussion puts into question whether public participation has any meaningful impact on accountability.

This chapter exposes the inadequacies of parliamentary oversight and the need for extra-legislative accountability through Chapter 9 institutions. The Public Protector was established to safeguard the public interest and to investigate improprieties and prejudices in public administration and to report on that conduct and to take remedial action. The Public Protector plays a crucial role in holding the executive to account. The discourse on the Nkandla matter and the establishment of the Judicial Commission of Inquiry into State Capture prove the significance of the Public Protector to accountability. The Public Protector should act lawfully, rationally and not overreach the bounds of constitutional authority. Given the role played by the courts in resolving disputes on the

constitutional powers of the National Assembly, the executive and the Public Protector, the following chapter discusses legal accountability in South Africa.

Chapter 6 Legal Accountability

6.1 Introduction

The fourth and fifth chapters expose several deficiencies of democratic means of accountability in South Africa. This chapter takes the analysis further by examining the extent to which legal accountability can remedy the deficiencies of electoral and executive accountability and parliamentary oversight. Legal accountability refers to legal processes, grounded on a constitution and statutes, by which public office-bearers account through the courts.[1] This thesis requires an examination of legal accountability because of the topicality of judicial processes such as constitutional review and judicial oversight on constitutionalism and accountability in South Africa. The first theme of this chapter contextualises legal accountability through a discussion of constitutional review and judicial oversight. The second theme examines several justifications for legal accountability, such as reinforcement of the rule of law, protection of constitutional democracy and reaffirmation of popular sovereignty. The third theme discusses the relationship between legal accountability and democracy. The theme dispels counter-majoritarianism, contextualises democratic representation through the courts, and analyses the democratic legitimacy of constitutional review and judicial oversight.

In addition, the third theme discusses the constitutional supremacy of the Constitutional Court (the Court) as a quasi-political institution of accountability, the guardianship of the Court over the Constitution, and the relationship of the role of the Court with democracy, politics and law-making. Lastly, the third theme puts into perspective the extra-curial functions of accountability performed by judicial officers. The last theme exposes the limitations of legal accountability. Since the previous chapters dealt with electoral and executive accountability and legislative oversight at the national level, this chapter only focusses on the Court (to the extent possible) because the Court is the highest institution of legal accountability because the Court sits at the apex of the judiciary in South Africa. This demarcation does not downplay crucial roles played by the High Court of South Africa and the Supreme Court of Appeal in holding the legislature and the executive to account.

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1 See Bovens "Public Accountability" 187-188.

6.2 Legal accountability in perspective

One better understands legal accountability from the perspective that the Constitution was a product of national consensus on the need to limit the excesses of an electoral majority.[2] The historical context for the adoption of the Constitution shows that the purposes of the first democratic Constitution in South Africa,[3] and the current Constitution, was to regulate and constrain the exercise of public power. This chapter analyses two forms of legal accountability in South Africa: constitutional review and judicial oversight. The terms constitutional review and judicial review are interchangeably used in this thesis to refer to the judicial practice of reviewing and setting aside (due to constitutional invalidity) legislative enactments and executive conduct. However, different jurisdictions use these terms differently due to unique constitutional settings. Whereas the USA, a common law system, uses the terms judicial review, South Africa is a traditionally mixed (common law and civil law) system which dramatically changed with the adoption of constitutional democracy. In the United Kingdom, judicial review does not depend on a constitution.[4] Globally, constitutional courts mostly employ constitutional review to assess the constitutionality of a statute, policy or government programme,[5] and to constrain a democratically-elected legislature from enacting statutes which contravene constitutional values, principles and provisions.[6] If courts with jurisdiction find the impugned conduct constitutionally inconsistent, they declare such conduct invalid and set it aside. When a court has pronounced on the constitutional invalidity of government conduct, the legislature and the executive must accede to the decision.[7]

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2 See Issacharoff *Fragile Democracies* 181. However, in *Du Plessis v De Klerk* 1996 5 BCLR 658 (CC) para 147 (hereinafter *Du Plessis & De Klerk*), Kriegler J remarked that the avowed intention of the constitutional drafters (in relation to the transitional Constitution) was not to limit government control. In his judgment, Kriegler J expressed misgivings about a comparison of the South African constitutional framework to the USA, Germany and Canada.

3 *Constitution of the Republic of South Africa Act* 200 of 1993.

4 For a discussion of the use of the terms and 'judicial control of constitutionality,' see Tushnet *Advanced Introduction to Comparative Constitutional Law* 40.

5 Robertson *The Judge as Political Theorist* 5.

6 Jovanović "Introduction" 1. Ironically, judicial review emanated from English law, albeit constrained by parliamentary sovereignty and the absence of a written supreme constitution in England. See Blom-Cooper "The Scope of Judicial Review and the Rule of Law: Between Judicial Restraint and Judicial Activism" 182.

7 Tushnet "Establishing Effective Constitutional Review" 7.

Constitutional review arises from two questions: what is the constitutional distribution of authority between the three branches of government and between other organs of state?[8] Which constitutional limits on the exercise of public power does the Constitution prescribe?[9] These two questions lead to answers on what laws Parliament can enact and which decisions the executive can lawfully make. Constitutional review of legislation extends to review of legislative bills. The constitutional certification process, captured in the two *Certification* cases,[10] was itself an exercise of judicial review over a legislative bill, albeit one of a higher status than ordinary legislation. The idea is that it is best to quash an unconstitutional bill than to allow the enactment of an unconstitutional statute. However, courts do not intervene *mero motu* but only pronounce on the constitutionality of a bill when invited by applicants. When the Court intervenes in the legislative process, it affirms its advisory role in legislation. Only the President and a Premier may refer a parliamentary bill and a provincial bill, respectively, to the Court for a decision on constitutionality.[11] Citizens must wait for the completion of the legislative process before they challenge a statute in the Court.[12]

> During this process, the rights of the public are safeguarded by the President who has the authority to challenge the constitutionality of a bill consistent with his or her duty to uphold, defend and respect the Constitution. Once the process is complete, the public and interested groups may challenge the resulting statute. This scheme seeks to ensure that judicial intervention in the law-making process is kept to the minimum; hence it is limited to challenges by the President.[13]

However, the President is most not likely to challenge an offending statute because in general, the executive initiates most bills. Factually, it is improbable that the President, as head of the national executive, will challenge the constitutionality of a statute initiated by his subordinates in the executive. Also, since the President is elected by the National

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8 According to Robertson *The Judge as Political Theorist* 9, the first case on judicial review in the world, *Marbury v Madison* 5 US (1 Cranch) 137 (1803), dealt with this issue. In that case, Marshall CJ proclaimed that "[I]t is emphatically the province and duty of the judicial department to say that the law is." – See Tushnet *Taking the Constitution Away from the Courts* 7 for a critique of the judgment.

9 Robertson *The Judge as Political Theorist* 10.

10 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 10 BCLR 1253 (CC) (hereinafter *Certification I*) and *Certification of the Amended Text of the Constitution of the Republic Of South Africa, 1996* 1997 1 BCLR 1 (CC).

11 Sections 79(4)(b) and 121(2)(b) of the Constitution, respectively. For a commentary, see Van der Schyff *Judicial Review of Legislation* 123.

12 *Van Straaten v President of the Republic of South Africa* 2009 5 BCLR 480 (CC) paras 4-5.

13 *Doctors for Life International v Speaker of the National Assembly* 2006 12 BCLR 1399 (CC) para 54 (hereinafter *Doctors for Life*).

Assembly, which must vote to approve a bill for presidential assent, it is implausible that the National Assembly and the President may have divergent views on a statute. The President derives his/her mandate from parliamentary representatives, who happen to come from his/her party. Therefore, the President is likely to listen to the people who put him/her into power. Furthermore, the President may sign and assent to a bill even if the President has reservations about the constitutionality of the bill.[14] Conceptually, the powers of the President to challenge a potentially unconstitutional bill arises from the duty of the President to protect the Constitution, per his/her oath of office, and from the role of the President in the system of checks and balances.[15]

Section 80(1) of the Constitution gives members of the National Assembly the right to apply to the Court to declare an Act of Parliament or part of the Act unconstitutional. However, the Court will only decide on such an application if at least one-third of the members of the National Assembly support the application.[16] The application must be lodged within 30 days of the date on which the President assented to and signed the impugned Act.[17] When an application to challenge an Act of Parliament is made in terms of section 80(1) of the Constitution, the Court may, in the interests of justice and considerations of reasonable prospects of success, order that the whole or part of the impugned Act to be of no force until the Court has decided on the application.[18] Section 80 of the Constitution is unique in that it gives members of the National Assembly a time-frame within which to challenge an Act of Parliament and because it requires other members of the National Assembly to challenge a potentially unconstitutional statute. Ordinary citizens, on the other hand, have no time-bar and do not need the support of other citizens to challenge an unconstitutional statute. Whereas an unsuccessful person who files a constitutional challenge against an Act does not necessarily have to pay costs,[19] section 80(4) of the Constitution stipulates that members of the National

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14 Section 79(4)(a) of the Constitution.

15 *Doctors for Life* para 53. Sections 79(5) and 121(3) of the Constitution stipulate that when the Court has determined that a parliamentary or provincial bill is constitutional, the President and the Premier, respectively, must sign the bill.

16 Section 80(2)(a) of the Constitution.

17 Section 80(2)(b) of the Constitution.

18 Section 80(3) of the Constitution.

19 See *Biowatch Trust v Registrar Genetic Resources* 2009 10 BCLR 1014 (CC) paras 22-23.

Assembly who file an unsuccessful application in terms of section 80(1) and which did not have reasonable prospects of success may be ordered by the Court to pay the costs.[20]

The involvement of the Court in the legislative process is further understood in the context that the contemporary role of the judiciary is not merely to enforce the will of Parliament but to scrutinise statutory enactments against the Constitution. Hence, there is no immunity from judicial review. All conduct is subject to the test of constitutionality.[21] Judicial oversight goes a step further than constitutional review. In addition to declaring executive conduct constitutionally invalid, a court may issue a structural interdict which ensures the involvement of the court in the implementation of its decision.[22]

6.3 The relevance of legal accountability

6.3.1 Reinforcement of the rule of law

Legal accountability is a powerful and effective mechanism against legislative and executive excesses. The implications of legal accountability are more extensive than electoral accountability and parliamentary oversight, and can empower citizens with a clarification of their rights and the legality of political procedures which shield public office-bearers from responsibility and accountability.[23] When courts test legislative enactments and executive conduct for constitutionality, they enhance accountable, responsive and open governance, as stipulated in the founding provisions in section 1(d) of the Constitution. Arguably, it is for this reason that the Court requires applicants who challenge the government in the public interest to prove that the impugned conduct imperils the ends of justice and good governance.[24] Often, citizens use constitutional

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20 See section 122 of the Constitution for provisions applicable when members of a provincial legislature apply to the Court to declare all or part of a provincial Act unconstitutional.

21 See Michelman "Constitutional Supremacy and Appellate Jurisdiction in South Africa" 46.

22 See, for instance, *Black Sash Trust v Minister of Social Development* 2017 5 BCLR 543 (CC) (hereinafter *Black Sash Trust I*).

23 See, for instance, *Mazibuko v Sisulu* 2013 11 BCLR 1297 (CC); *Economic Freedom Fighters v Speaker of the National Assembly* 2016 5 BCLR 618 (CC); *United Democratic Movement v Speaker of the National Assembly* 2017 8 BCLR 1061 (CC) (hereinafter *United Democratic Movement v Speaker*) and *Economic Freedom Fighters v Speaker of the National Assembly* 2018 3 BCLR 259 (CC) (hereinafter *Economic Freedom Fighters II*) in which the Court clarified several points of law regarding the constitutionality of parliamentary processes and decisions which shielded President Zuma from votes of no confidence and other attempts to remove him.

24 See *United Democratic Movement v Speaker* para 23. Section 167(6) of the Constitution prescribes the enactment of national legislation and the rules of the Court to allow any person to directly approach the Court "when it is in the interests of justice and with leave of the Constitutional Court." On the

litigation as a last resort when electoral accountability and parliamentary oversight over the executive have failed to hold abusers of power accountable.[25] Constitutional litigation prevents constitutional violations, stop on-going contraventions and remedies past violations. Even parties represented in the National Assembly turn to the courts when their political platform in Parliament comes short.[26] In exercising review and oversight, the judiciary prevents the executive from becoming too powerful and from encroaching on the administration of justice.[27] Due to the frequency of complaints on the abuse of power by the executive, hardly a week passes without a significant pronouncement by a South African judge.[28]

The 'Zuma cases'[29] showed that when democratic processes have failed to rein in the executive, the courts are the last line of defence of the Constitution and the values of good governance which the Constitution embodies. The precedents also show that the National Assembly does not have enough political power and the will to rein in the executive on behalf of citizens, confirming the findings in chapter 5 of this thesis that parliamentary oversight is too weak when utilised as the only institutional check on the executive. The precedents also confirm that since citizens elect public office-bearers to act lawfully (and not to disregard the laws), South African judges are assertive enough to counterweigh the weaknesses of parliamentary oversight in a proportionally representative legislature. Judicial review mostly centres on the compliance of the government with the rule of law and other tenets of constitutionalism.[30] Since the rule of law is one of the tenets of accountability, legal accountability contributes to the protection, promotion and respect of the rule of law by ensuring that the legislature and the executive observe the fundamentals of the rule of law.

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jurisdiction of the Court as court of first instance, see *Ramakatsa v Magashule* 2013 2 BCLR 202 (CC) para 40 and *Union of Refugee Women v Director, Private Security Industry Regulatory Authority* 2007 4 BCLR 339 (CC) para 21.

25 See, for instance, *Black Sash Trust I*.

26 Some of the cases were *Mazibuko*; *Economic Freedom Fighters I*; *United Democratic Movement v Speaker*; *Economic Freedom Fighters II*; *Democratic Alliance v President of the Republic of South Africa; Economic Freedom Fighters v State Attorney* [2019] 1 All SA 681 (GP) (hereinafter *Democratic Alliance v President of RSA*).

27 Flinders *The Politics of Accountability in Modern States* 139.

28 Corder "Appointment, Discipline and Removal of Judges in South Africa" 96.

29 See *Democratic Alliance v President of RSA* para 23 for a list of the Zuma cases.

30 Blom-Cooper "The Scope of Judicial Review and the Rule of Law: Between Judicial Restraint and Judicial Activism" 181.

Judicial review enables the courts to hold public office-bearers accountable; to determine whether the laws and the legal system are fair, publicised to citizens, understood and stable; and whether the enactment, administration and enforcement of statutes are fair, accessible and efficient. Judicial review fits into the rule of law as one of the robust processes through which the courts impartially enforce compliance with the Constitution. Courts exercise judicial review to enforce constitutional values for the limitation of the powers of the government and public office-bearers.[31] When the judiciary tests the conduct of the government against the Constitution, it enhances democratic participation, ensures access to justice and protects constitutional rights. When challenged on constitutional review, members of the executive can exculpate themselves only if they raise sound defences which explain and justify their impugned conduct. If they do not do so, the courts will hold them responsible for all wrong-doing emanating from their conduct.[32] The protection of the rule of law is particularly important for the promotion of democracy and human rights. The rule of law, when properly enforced, fortifies democratic processes and holds anti-democratic forces at bay until a fledgeling democracy is consolidated.[33]

In review cases, courts consider the legality, rationality, reasonableness and proportionality of impugned conduct. The requirement for legality is essential to constrain momentary political desires, which, if unchecked, are bound to result in the abuse of power. In the most part, legality entails that the government should follow procedural requirements set out in the Constitution to prevent the infringement of rights for expediency. The principle guards against the propensity of the powerful to view the law as an encumbrance. When it comes to the determination to set aside government conduct for irrationality, the court should decide whether, in the circumstances, no reasonable legislature or executive can make the impugned decision. This requirement sought to prevent the arbitrary exercise of public power and was infused into the legal system as part of the several 'democratic concerns' enforced through judicial review.[34] Viewed in their totality, the foregoing reasons for judicial review ultimately ensure procedural

31 See Schauer "Legislatures as Rule Followers" 468-469 for a discussion.
32 Price 2015 *Price* 319.
33 Martin 1985 *Journal of Modern African Studies* 136.
34 Gardbaum *The New Commonwealth Model of Constitutionalism* 86.

propriety and substantive compliance with the Constitution by enabling judges to thwart unjust and procedural administrative action.[35] Constitutional review also promotes respect for the Bill of Rights.

6.3.2 Promotion of respect for the Bill of Rights

The South African legal order hinges on civil, political, economic, social and cultural rights protected in Chapter 2 of the Constitution, the International Bill of Rights and other international and regional human rights instruments.[36] The "Bill of Rights is a cornerstone of democracy in South Africa"[37] and is unequivocal on the need for the government to protect rights and freedoms from violations by both public and private actors.[38] The Bill of Rights not only pronounces what the government cannot do but also declares what the government should do to protect human rights.[39] A violation of the rights undermines democracy and can be reviewed by the courts for inconsistency with both the Constitution and the need to protect democracy.[40] The entrenched and justiciable Bill of Rights limits the powers of the government by requiring the government to act consistently with it.[41] It is therefore not surprising that the alleged conflict between democratic principles and judicial review arises from a Bill of Rights.[42]

When it comes to the protection of the Bill of Rights through judicial review, the historical context is important. South Africa has a long history of power abuse.[43] Judicial review is necessary for the protection and promotion of the rights enshrined in the Bill of Rights because political power, whether emanating from colonial subjugation or democratic

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35 For a full discussion of the standards of rationality, reasonableness and proportionality in constitutional review, see Courtis 2011 *Constitutional Court Review* 31-50.

36 The major human rights instruments applicable to South Africa are the Universal Declaration of Human Rights (1948); International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966). According to Roberts *The Contentious History of the International Bill of Rights* 2-3, the three instruments comprise the International Bill of Rights. The African Charter on Human and Peoples' Rights (1981) further prescribes human rights.

37 Section 7(1) of the Constitution.

38 See section 8 of the Constitution.

39 Sections 7(2) and 8(1) of the Constitution.

40 Section 2 of the Constitution provides that the obligations imposed by the Constitution must be fulfilled. For a discussion of the relationship between democracy, judicial review and constitutionally protected rights, see Bellamy *Political Constitutionalism* 15-16.

41 See Waluchow *A Common Law Theory of Judicial Review* 9.

42 Waluchow *A Common Law Theory of Judicial Review* 9.

43 *S v Makwanyane* 1995 6 BCLR 665 (CC) paras 311-312 (hereinafter *Makwanyane*).

elections, cannot be trusted with the protection of rights. Hence, democratic rights need protection from political fluctuations and placement beyond the reach of the whims and caprices of majoritarian politics.[44] Judicial review is one of the mechanisms through which courts play a part in defence of democracy and the protection of democratic rights from manipulation.[45]

> Democracy relies on open political processes in which freedom of speech and association flourish, the dignity and autonomy of individuals is respected and the liberties of all, and most especially minorities, are protected. All these goods are vital to the political equality on which democracy itself rests. . . . And to the extent that political decisions interfere with the rights of individuals, political accountability cannot be sufficiently independent and objective to provide the necessary safeguards for individuals and minorities. It is through the rule of law as well as through political mechanisms that these democratic freedoms are protected; ministers and public bodies must be held legally accountable through the courts as well as politically accountable through Parliament.[46]

Democracy, and by implication, accountability, cannot flourish in an environment in which the state has no respect for human rights. The analysis in chapter 4 of this thesis reveals that the constitutional and legislative regime for electoral accountability hinges on civil and political rights protected in the Constitution. Judicial review ensures the protection of political rights and the progressive realisation of socio-economic rights. The strides made by South Africa towards the realisation of the rights to housing and access to health care were possible mostly because of court decisions which bound the government to its constitutional obligations on socio-economic rights.[47] Judicial review also acts to preserve economic rights by ensuring that the legislature and the executive do not unduly interfere with property rights.[48] The protection of economic rights is a hugely topical issue in South Africa, given the on-going parliamentary process for the amendment of section 25 of the Constitution. Although a more nuanced discussion of human rights litigation is apposite at this juncture, the inevitable litigation around the amendment of section 25 of the Constitution will provide a firm jurisprudential footing for an analysis of the protection of

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44 See *Makwanyane* para 89.

45 Bauman and Kahana "New Ways of Looking at Old Institutions" 2.

46 Weir and Beetham *Political Power and Democratic Control in Britain* 429-430.

47 Some of the decisions were *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 12 BCLR 1696 (CC), *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) and *Minister of Health v Treatment Action Campaign* 2002 6 BCLR 1033 (CC).

48 See Gill "Market Civilization, New Constitutionalism and World Order" 34.

economic rights through judicial review. There are clear signs that intense litigation will ensue from the purported amendment of section 25 of the Constitution.[49]

6.3.3 Protection of constitutional democracy

The democratic process requires protection from political manipulation. Whereas one can legitimately expect elected public office-bearers to behave lawfully, respect human rights and to be responsive and responsible, politicians are hardly ethical when given unlimited power.[50] Constraining Parliament through constitutional review in its law-making processes is important and necessary because, from time to time, legislatures are inclined to circumvent substantive provisions and procedures laid down by themselves and their predecessors.[51] The idea to protect democratic processes through the courts gained momentum in Europe after the fall of totalitarian and authoritarian regimes of the 20th Century. The adverse political experiences of European states under totalitarian regimes motivated them to construct democratic legislatures bound by justiciable rights and the rule of law.[52] Judging from historical experiences and the development of the German Constitutional Court as "a bastion of fundamental rights and an emblem of liberal–democratic stability,"[53] it is necessary to consider Bickel's[54] argument that over time, judicial review weakens democratic processes.

Judicial review aids the democratic process through the promotion of the rule of law, justice and the protection of fundamental rights and freedoms.[55] Judicial review co-exists with democracy as a pillar of constitutional democracy. As such, the limitation of legislative and executive power is an inherent part of South Africa's constitutional democracy. In addition to its compatibility with democracy, judicial review enhances both representative democracy and popular sovereignty by providing a concrete platform for the enforcement of political rights and the equal participation of citizens in the democratic

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49 See Gerber 2018 https://www.news24.com/SouthAfrica/News/land-anc-determined-to-press-on-after-court-win-but-afriforums-fight-far-from-over-20181130.

50 Sachs *We, the People* 38.

51 Bauman and Kahana "New Ways of Looking at Old Institutions" 10.

52 See Möllers *The Three Branches* 127.

53 Collings *Democracy's Guardian* xxix.

54 Bickel *The Least Dangerous Branch* 21.

55 Eisgruber *Constitutional Self-Government* 47.

process.[56] Arguably, a constitution based on democratic principles is undemocratic if it bestows all power to the elected government.[57] The import of the argument is that democracy can only flourish when a higher law - in the case of South Africa, the Constitution – imposes constraints on the powers and authority of elected persons. The following section advances the view that majoritarian democracy, which is immune from judicial scrutiny, is unconstitutional for the only reason that the exercise of democratic rights in a constitutional democracy is subject to the test of constitutionality to protect popular sovereignty.

6.3.4 Reaffirmation of popular sovereignty

The notion of popular sovereignty affirms that in a state, power emanates from all 'the people,' not just the majority of 'the people'. Constitutional review safeguards the sovereignty of citizens of South Africa by ensuring that all the people, particularly minorities and marginalised groups, have a voice in their governance. [58] Judicial review protects minorities and marginalised groups against encroachment by the majority.[59] In *Makwanyane*,[60] the Court said that the Constitution enshrines judicial review to prevent a lapse into parliamentary sovereignty and to protect people who cannot protect their rights and interests through democratic processes. In this way, judicial review also advances a much sensitive and vital element of the South African constitutional order – diversity and tolerance. Through judicial review, the democratic majority is bound to respect and tolerate the rights and choices of political minorities. Whereas statutes espouse the will of the legislature, the Constitution concretises the will of all the people. When Parliament contravenes the Constitution, it does not only violate its obligations set by the supreme law but also undermines the will of the people. In such instances, the courts have a duty to enforce the will of the people through judicial review.[61]

Therefore, judicial review, far from limiting the exercise of democratic rights, reinforces the sovereignty of South Africans against majoritarian encroachment. Constitutional

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56 Gardbaum *The New Commonwealth Model of Constitutionalism* 72.

57 See Flinders *The Politics of Accountability in Modern States* 141.

58 *Makwanyane* para 88. See also Botha 2011 *Stell L Rev* 521 on the use of constitutional interpretation to protect the democratic participation of all citizens in governance.

59 See *United Democratic Movement v Speaker* 429.

60 *Makwanyane* para 88.

61 See Bickel *The Least Dangerous Branch* 16.

review does not thwart the popular will but merely tests the laws and executive conduct for compliance with the Constitution. The Constitution is a product of national consensus. The Constitution was enacted by democratically elected representatives and binds everyone.[62] The interest of citizens in good governance requires judges to hold public office-bearers accountable to the Constitution and the laws of South Africa.[63] When judges decide on the constitutionality of legislative enactments and executive conduct, it is not the interests of governing parties which matter but the interests of citizens in ensuring that public office-bearers and institutions of governance act lawfully. When judges invalidate constitutionally offensive statutes, they protect the Constitution, which is an embodiment of the sovereignty of the people of South Africa.[64] During his tenure at the Court, Moseneke DCJ was prepared to declare a law unconstitutional and set it aside if public office-bearers deviated from the principles of good governance and constitutional values.[65] Sachs J[66] emphasises the role of judges to uphold core tenets of governance and approves the reality that today, South Africans have confidence in the judiciary to protect them from unaccountable governance and that they do not have to resort to belligerence to be heard by the government.[67]

Constitutional review also safeguards sovereignty by preventing the government from unduly interfering in the lives of the people.[68] Constitutional review also ensures that the legislative and executive branches carry out their constitutional obligations lawfully and fully and that they do not, for their convenience or other reasons, abdicate their responsibilities by delegating their plenary powers.[69] Since citizens have delegated their power to Parliament, the legislature has no authority to sub-contract its constitutional powers. However, the involvement of the judiciary in the validation of statutory enactments and executive conduct raises questions on the democratic genesis, nature and legitimacy of legal accountability.

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62 See section 2 of the Constitution.
63 Moseneke *My Own Liberator* 344.
64 See section 2.3.2 of this thesis
65 Moseneke *My Own Liberator* 346.
66 Sachs *We, the People* 5.
67 Sachs *We, the People* 141.
68 Sachs *We, the People* 161.
69 See *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 10 BCLR 1289 (CC).

6.4 Legal accountability and democracy

6.4.1 The nexus

Whereas democracy gives the preferences of the majority, supposedly manifested in the popular vote and reinforced with policies developed by elected representatives, a constitutional democracy imposes constraints on what a government can do to protect the broader interests of society, not just those currently holding the reins of public power.[70] Legal accountability ensures the effectiveness of constitutional constraints on the government by pronouncing on whether the government has exceeded its powers. Expressed differently, legal accountability entails constitutional constraints which work to compel public office-bearers to act consistently with constitutional requirements.[71] However, judicial review of the legality, procedural propriety and rationality of the decisions and actions of political branches of the government often irritate the executive,[72] leading to arguments that legal accountability is both inconsistent and incompatible with democracy.[73] The decisions of the Court which overturn parliamentary Acts and which nullify executive conduct are absolute, thus putting into question the consistency of judicial review with democratic principles. It is at this point that Bickel's classical notion of a counter-majoritarian challenge appears.[74]

Where does judicial review begin and where does it end? How, and to what extent, should the Court intervene in a dispute, particularly in instances in which the applicants invite the Court to wade into the domain of a political branch of government? Although it is common cause that government conduct which is inconsistent with constitutional provisions is invalid and could be set aside by the courts,[75] it is not immediately apparent to what extent the courts can restrain the wishes of the majority of South Africans, unequivocally expressed through democratic processes. Since constitutional democracy places constitutional values and fundamental rights beyond the whims and caprices of

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70 Holcombe *Advanced Introduction to Public Choice* 134.

71 Holcombe *Advanced Introduction to Public Choice* 135.

72 Blom-Cooper "The Scope of Judicial Review and the Rule of Law: Between Judicial Restraint and Judicial Activism" 181.

73 Eisgruber *Constitutional Self-Government* 46; Van der Schyff *Judicial Review of Legislation* 47.

74 See Bickel *The Least Dangerous Branch* 16. However, Lemieux and Watkins *Judicial Review and Contemporary Democratic Theory* 9 noted that the notion of counter-majoritarianism pre-existed in legal theory and that Bickel merely formalised and distilled scholarly concerns on the Warren Court.

75 See sections 2 and 172(1)(a) of the Constitution.

unchecked majoritarian power,[76] citizens affected by constitutionally inconsistent legislative or executive conduct have a right to constitutional review.[77] The source of public power (citizens, in the case of Parliament) is an irrelevant consideration when it comes to the test of constitutionality. No conduct and no law are beyond the test of constitutionality.[78]

6.4.2 Dispelling counter-majoritarianism

Constitutional review does not make the reviewing authority – the judiciary – an opposition to the legislature or the executive.[79] However, Bickel argues that

> [W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not [on] behalf of the prevailing majority, but against it…it is the reason the charge can be made that judicial review is undemocratic.[80]

Like Bickel, other critics of judicial review[81] also assume that judicial review is counter-majoritarian and therefore presumptively at odds with democracy.[82] Lemieux and Watkins criticise Bickel's assumption of a counter-majoritarian difficulty from two angles. First, they argue that his theory is flawed because it is an inaccurate description of what judicial power entails and because the theory assumes that the legislative and executive branches represent popular majorities. Second, they argue that even if the counter-majoritarian difficulty were correct, it does not present all the normative challenges which Bickel and his disciples advanced. The scholars proceeded to argue that in principle, counter-majoritarianism is good because minorities and other less politically powerful individuals need the protection of their rights against encroachment by wielders of the levers of state power.[83] Their argument echoes the sentiments in *Makwanyane*,[84] in which it was said that judicial review protects minorities and marginalised groups who cannot adequately

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76 Roederer 2009 *Ariz J Int'l & Comp Law* 48.

77 *Speaker of the National Assembly v De Lille* [1999] 4 All SA 241 (CC) para 14.

78 Michelman "Constitutional Supremacy and Appellate Jurisdiction in South Africa" 46.

79 Sachs *We, the People* 182.

80 Bickel *The Least Dangerous Branch* 16-17.

81 Jeremy Waldron is one of the most prominent critics against judicial review. In one of his recent publications, *Political Political Theory*, he dedicates the whole of chapter nine to "The core case against judicial review."

82 Lemieux and Watkins *Judicial Review and Contemporary Democratic Theory* 9-10.

83 Lemieux and Watkins *Judicial Review and Contemporary Democratic Theory* 10.

84 *Makwanyane* para 88.

protect their rights through the democratic process. Lemieux and Watkin's most potent argument in favour of constitutional review is that the preferences of the majority people in a state are "inherently unknowable and irrational,"[85] hence the need to subject legislative action to review to protect the public good. The argument is a restatement of the dangers of the whims and caprices of unchecked majoritarian power.

In the seminal 78th Federalist Paper, Hamilton[86] makes a pivotal case for judicial review. Hamilton argues that the confusion around judicial review emerges from the argument that when a court sets aside a constitutionally inconsistent enactment adopted by a democratically representative and properly constituted legislature, the court in effect places itself superior to the legislature. To Hamilton, a legislature operates on delegated authority, whose terms of reference is the constitution. Hence, the legislature must act consistently with the instrument delegating its authority – the constitution. A failure of the judiciary to review and set aside constitutionally offensive statutes would mean that the legislature - the delegatee - is superior to the people from whom the delegated power derives. In his final analysis, Hamilton[87] was unconvinced by the argument that courts substitute their opinions for the intentions of the legislature. Based on this argument alone, the fear of judicial review as an instrument of the tyranny of the minority falls away.[88]

From a South African constitutional view, the counter-majoritarian argument fails to consider that South Africa is not an ordinary democracy but a constitutional democracy in which democratic governance depends on a supreme law - the Constitution. Constitutional democracy does not merely benefit from parliamentary democracy but depends on essential institutions such as the judiciary. The judiciary exercises the delegated power of citizens to hold the legislature and executive accountable[89] because the Constitution is the source of all power in the state and the principal instrument through which power is delegated to the branches of government and organs of state. When ensuring that the political branches act consistently with the Constitution, legal

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85 Lemieux and Watkins *Judicial Review and Contemporary Democratic Theory* 132.
86 See Seagrave *The Accessible Federalist* 71.
87 Seagrave *The Accessible Federalist* 72.
88 See Eisgruber *Constitutional Self-Government* 60.
89 Goetz and Jenkins *Reinventing Accountability* 1.

accountability barricades and fortifies public power from abuse.[90] The proper functioning of constitutional democracy, in which the exercise of powers bestowed by representative democracy must comply with constitutional prescripts,[91] requires judicial review to ensure constitutional compliance. However, judicial review is a form of checks and balances which, in the strictest sense, is incompatible with a pure form of separation of powers.[92]

6.4.3 Considerations on separation of powers

In modern times, one cannot adequately understand constitutional review through the lenses of the traditional model of separation of powers.[93] The diffusion of constituted power between the legislature, the executive and the judiciary blurs the separation of powers.[94] Pursuant to its promise in *De Lange v Smuts*,[95] to develop a distinctive model of separation of powers, the Court constantly remodels the separation of powers to enable the judiciary to effectively keep the exercise of legislative and executive power in check.[96] The innovative model of separation of powers developed by the Court enables the judiciary to devise new approaches to difficult questions and to put its massive constitutional powers into use to hold the legislature accountable and to prevent executive dominance.

The nature and extent of the Court's powers to review legislative and executive conduct presents unique questions for the judiciary and calls for a careful balancing of several factors, including representative democracy, to ensure that the Court does not unnecessarily invade legislative and executive domains.[97] As such, the Court should adopt an approach that shows great judicial deference and restraint towards the political arms of government while at the same time ensuring that these approaches do not grant a free pass to the political branches to violate the Constitution.[98] The Court must consider

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90 See Beloff 1999 *The Denning Law Journal* 166.

91 See *United Democratic Movement v Speaker* para 1.

92 Napel, Luiten and Voermans "Introduction" 10.

93 Robertson *The Judge as Political Theorist* 1.

94 Napel, Luiten and Voermans "Introduction" 7.

95 *De Lange v Smuts* 1998 7 BCLR 779 (CC) para 60.

96 Van der Schyff *Judicial Review of Legislation* 47.

97 See *Economic Freedom Fighters I* para 93.

98 See *Bato Star Fishing v Minister of Environmental Affairs* 2004 7 BCLR 687 (CC) para 46 and *National Treasury v Opposition to Urban Tolling Alliance* 2012 11 BCLR 1148 (CC) para 65. In *Makwanyane* para 107 in which the Court considered several cases from comparative jurisdictions and concluded that it is not open to the Court to substitute its will for that of the executive.

the implications of its decisions on the doctrine of separation of powers while at the same time ensuring the exercise of effective checks and balances to promote and protect the Constitution and its values. This means that the Court must guard against judicial activism and at the same time avoid timidity which may expose the constitutional order to violations.[99] In extreme circumstances, the Court may exercise oversight over executive functions which ordinarily fall within the jurisdiction of the President and the national executive. A classic example arose in *Black Sash Trust I*,[100] in which part of the Court order read:

> 7. The Minister and Sassa must file reports on affidavit with this court every three months, commencing on the date of this order, setting out how they plan to ensure the payment of social grants after the expiry of the 23-month period, what steps they have taken in that regard, what further steps they will take, and when they will take each future steps, so as to ensure that the payment of all social grants is made when they fall due after the expiry of the 12-month period.
>
> 8. The reports filed by the Minister and Sassa as contemplated in para 7 must include, but are not limited to, the applicable time-frames for the various deliverables which form part of the plan, whether the time frames have been complied with, and if not, why that is the case and what will be done to remedy the situation.
>
> 9. If any material change arises in relation to circumstances referred to in a report referred to in para 7 or 8, the Minister and Sassa are required immediately to report on affidavit to the court and to explain the reason for and consequences of the change.[101]

Questions on the principle of separation of powers arise from the Court's order. Why, and to what extent, should the Court supervise its counterparts in this manner? What is the impact thereof on democracy? The questions arise mostly because members of Cabinet are responsible to the President, their appointing authority, and accountable to the National Assembly.[102] Therefore, structural interdicts with a supervisory element are controversial. The interdicts blur the lines between, on the one hand, ensuring the implementation of a Court order by a complacent executive, and on the other hand, judicial supervision over the executive. If one subscribes to the concept of a separation of powers which places the judiciary at an equal level to the legislature and the executive, one can argue that the Court can only grant supervisory orders in extreme cases in which

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99 For a discussion, see Cachalia 2015 *SALJ* 285-312 and Davis 2016 *KritV* 250-260.

100 *Black Sash Trust I*.

101 *Black Sash Trust I* para 76.

102 See section 92 of the Constitution.

the executive has demonstrated a lethargic or contemptuous unwillingness to implement a Court order on a vital constitutional issue. The principle of separation of powers does not preclude the Court from reaching out if convinced of the exigency to protect founding constitutional values.[103] The Court has exhibited a willingness to intervene in political matters when the legislature and the executive threaten the values of accountability, responsiveness and openness.[104]

However, not all justices of the Court agree on the need for the Court to intervene in political matters. A confrontational dissent emerged in *Economic Freedom Fighters II* when the Chief Justice described a majority judgment which ordered the National Assembly to impeach President Zuma as

> [A] textbook case of judicial overreach – a constitutionally impermissible intrusion by the Judiciary into the exclusive domain of Parliament.[105]

The Chief Justice saw the majority judgment as an outright disregard of the principle of separation of powers,[106] and lamented that the majority decision caused him "deep-seated agony and bafflement."[107] Mogoeng CJ perceived the order as a result of an "inability or failure [of the majority justices] to confront squarely, the issues raised."[108] The other justices did not take kindly to these views. Jafta J described the Chief Justice's description as "unprecedented… misplaced and unfortunate."[109] Jafta J went further to question why one can perceive the interpretation and application of a constitutional provision, a duty bestowed upon the Court by the Constitution, as judicial overreach. His simple view was that the Chief Justice's disagreement with the majority decision could not, under any circumstances, warrant the suggestion that it was an overreach.[110] Jafta J opined that the majority judgment was not directing the National Assembly to undertake its constitutional obligations in a specific way but was a pronouncement of the failure of the National Assembly to fulfil its obligations and a direction to it to do so without further

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103 Robertson *The Judge as Political Theorist* 240.

104 See, for instance, *Economic Freedom Fighters I*; *United Democratic Movement v Speaker*; *Economic Freedom Fighters II*.

105 *Economic Freedom Fighters II* para 223.

106 *Economic Freedom Fighters II* para 224.

107 *Economic Freedom Fighters II* para 267.

108 *Economic Freedom Fighters II* para 225.

109 *Economic Freedom Fighters II* para 218.

110 *Economic Freedom Fighters II* para 219.

delay. This, Jafta J reasoned, was not downplaying the separation of powers.[111] Froneman J acknowledged the importance of robust debate and the inescapable disagreements which may flow from the unique individual interpretation and application of the Constitution by the justices. Notwithstanding, Froneman J emphasised the need for substantive reasons and dissenting opinions devoid of a "label to the opposing view."[112] Froneman J further said that his disagreement with the dissent did not mean that he thought the minority justices had abdicated their constitutional responsibility to ensure that the National Assembly upheld the Constitution.[113] To him, both minority and majority judgments were products of serious, frank, impartial, honest and detached reasoning.[114]

The dissent by Mogoeng CJ is the first reported decision in which a sitting South African judge has accused other judges of judicial overreach. All along, it has been politicians and (mostly) implicated ordinary persons who have accused judges of downplaying the separation of powers through political activism. Although judges have differed in some decisions, they have always presented a united front in defending their judgments and quelling political attacks on the judiciary. The assertions by the Chief Justice lent credence to the accusations that the courts are violating the Constitution, subverting democratic processes and that the judiciary intrudes into the exclusive domains of the legislature and the executive. The fact that the head of the judiciary made the accusation gave it so much weight that it cannot just be ignored.[115] The statement further showed that a lack of understanding of the democratic nature of judicial review and oversight is a major challenge in the discourse on constitutionalism and accountability in South Africa.

6.4.4 Democratic representation

The judiciary has been criticised as an "unelected, unrepresentative and largely unaccountable elite"[116] which pushes for a 'judicial dictatorship' and undermines the will of the people.[117] In addition to missing vital points on the representative nature of the judiciary, the accusations show that the executive is not so receptive of court decisions

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111 *Economic Freedom Fighters II* para 220.
112 *Economic Freedom Fighters II* para 280.
113 *Economic Freedom Fighters II* para 281.
114 *Economic Freedom Fighters II* para 282.
115 Section 165(5) of the Constitution provides that the Chief Justice is the head of the judiciary.
116 Flinders *The Politics of Accountability in Modern States* 141. See also Van der Schyff *Judicial Review of Legislation* 55-56.
117 See Pitjana "Constitutional Challenges Facing South Africa" 20.

which declare legislative and executive conduct constitutionally invalid. The argument that judges should 'mind' their powers and refrain from wading into legislative and executive territory is theoretically and constitutionally insupportable and out-dated because it flows from a traditional conceptualisation of the doctrine of separation of powers which views the courts as no more than mere arbiters of disputes. In contemporary South Africa, the courts serve the people in an equal but different manner. Judges are "unelected servants of the people"[118] bestowed with the mandate to ensure constitutional vigilance in the exercise of public power. The courts use legal accountability to enforce the democratic commands expressly articulated in the Constitution. As such, the courts play a prominent role in directing the democratic process.[119] The Constitution does not oblige the courts to accede to unlawful and unconstitutional majoritarian preferences but requires the judiciary to test such preferences against the standard of reasonableness and other constitutional prescripts.[120] The Court has emphasised that when the legislature and the executive violate the Constitution, the courts have no discretion but a duty to intervene[121] because courts are guardians of the Constitution.[122]

The argument that judicial officers are unelected and therefore have no democratic mandate to make a final determination on the choices of democratically elected public office-bearers overlooks several issues. First, members of the National Assembly, in their totality, do not derive a direct mandate from citizens because of the proportional representation system which makes citizens vote for parties as opposed to specific persons aspiring for legislative office. Since the National Assembly elects the President, who appoints other members of the national executive, one cannot say that judicial review trumps the legislative preferences of the majority of citizens.[123] Second, members of the executive exercise their powers not because of their democratic role as members

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118 *United Democratic Movement v Speaker* para 4.

119 Issacharoff *Fragile Democracies* 9.

120 See Grant and Keohane 2005 *American Political Science Review* 32.

121 *International Trade Administration Commission v Scaw South Africa (Pty) Ltd* 2010 5 BCLR 457 (CC) para 92 (hereinafter *Scaw*); *Glenister v President of the Republic of South Africa* 2009 2 BCLR 136 (CC) para 33 (hereinafter *Glenister I*).

122 See *Glenister I* para 33. See also Cameron *Justice* 107, 109.

123 Van der Schyff *Judicial Review of Legislation* 54.

of the National Assembly but by virtue of their single-handed appointment by the President.

Third, the President can choose two members of Cabinet outside the National Assembly,[124] thereby reinforcing the view that the executive has no direct mandate from the people. Fourth, most legislation is delegated legislation made by members of the executive who, as argued, are not directly elected by citizens. Lastly, civil servants in state departments develop government policies for approval by Cabinet members. One cannot say civil servants exercise power on behalf of the people because they are unelected but appointed to perform functions at the direction of politicians in the executive. Whereas most civil servants enjoy formal protection from executive interference, they are most responsive and responsible to their political bosses.

Constitutional review affirms the judiciary as an institutional limitation on majoritarian powers because there are no guarantees that executive members will conform to the Constitution and observe all the laws. The short history in the first chapter of this thesis shows that public office-bearers have a propensity to misbehave and to act unlawfully, prejudicially and with reckless disregard of procedures. Legal accountability enables the courts to step in as a bulwark against the arbitrary exercise of public power,[125] making the judiciary a crucial institution for the maintenance of political morality and the protection of the rights of vulnerable groups in society.[126] Judges have the constitutional authority to speak for everyone as they form part of a politically uncompromised institution with a duty to ensure that the values and principles chosen by the people of South Africa, as espoused in the Constitution, always prevail. Therefore, the judiciary acts as a protective institution which safeguards the broader interests of society and has the authority to make final determinations on controversial moral and political issues. When judges overrule unconstitutional legislation or executive conduct, they act on behalf of all the people in rejecting encroachment on founding constitutional values.

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124 Section 91(2)(c) of the Constitution.
125 See Weir and Beetham *Political Power and Democratic Control in Britain* 429.
126 Sachs *We, the People* 13; *Makwanyane* para 88.

6.4.5 Democratic legitimacy

It is necessary to consider the democratic legitimacy of constitutional review. In general, constitutional democracies enjoy considerable support for constitutional review and judicial oversight because deficiencies in accountability lead to a popular consciousness against the legislature and the executive.[127] Consequently, in a contemporary constitutional democracy, the judiciary operates in a legal framework which citizens can use to combat the inadequacies of electoral accountability and parliamentary oversight. Inadvertently, legal accountability slowly shifts the role of judges from adjudicators of disputes to overseers of core executive functions, making constitutional review and judicial oversight powerful mechanisms of accountability. The magnitude and frequency of judicial scrutiny of Parliament and the executive increases, further legitimating judicial authority.[128] Dimitrijević[129] argues that a constitutional democracy cannot sustain its legitimacy without an independent institution which checks the exercise of public power.

Legal accountability derives its democratic legitimacy from the several advantages it enjoys over other forms of accountability. Scholars often present judicial review as a necessary add-on to democracy[130] and an auxiliary precaution which prevents the abuse of power and ameliorates deficiencies in the accountability of public office-bearers.[131] Legal accountability enjoys independence from political influences because judicial processes are not adulterated by partisan politics. Judges claim their legitimacy as "neutral servants of 'the law."[132] However, the democratic legitimacy of the courts ultimately rests on the moral standing of the judiciary[133] and the democratic theory advocated by the courts.[134] Judicial review of democratic decisions, such as statutory enactments, is necessary because a majority decision does not necessarily mean that the decision is lawful, right or even democratic at all.[135] In a populist contemporary era, there

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127 Flinders *The Politics of Accountability in Modern States* 131.
128 Flinders *The Politics of Accountability in Modern States* 132.
129 Dimitrijević "Always Above the Law? Justification of Constitutional Review Revisited" 39.
130 Bellamy *Political Constitutionalism* i.
131 Weir and Beetham *Political Power and Democratic Control in Britain* 429.
132 Shapiro and Sweet *On Law, Politics & Judicialization* 3.
133 Eisgruber *Constitutional Self-Government* 57.
134 Lemieux and Watkins *Judicial Review and Contemporary Democratic Theory* 11.
135 See Weir and Beetham *Political Power and Democratic Control in Britain* 429.

is a greater need to guard against majoritarian decisions to prevent the tyranny of the majority.[136]

> Even a legislature that is scrupulously faithful to electoral majorities may nevertheless represent the people poorly, for electoral majorities are themselves unsatisfactory substitutes for the people as a whole. That is so for two reasons: first, the majority is not the same thing as the whole, and, second, the electorate is not the same thing as the people…a majority is by definition merely a fraction of the people. In order to speak on behalf of the people, a government must take into account the interests and opinions of all the people, rather than merely those of a majority or some other fraction of the people.[137]

Although majority rule is evidently more democratic than minority rule, the people still need protection from the controllers of the levers of power. The Constitution endows the courts with the power to test the lawfulness, rationality, proportionality and other aspects of government conduct. The judiciary uses the Constitution as a benchmark for the validity of government conduct. The legislature, for its part, has no power to alter judicial decisions.[138] When its enactments and other decisions have been set aside for constitutional invalidity, the legislature is pushed to consider its conduct in more serious and principled terms.[139] In exercising their review power, the courts should guard against majoritarian influences, such as public opinion, because the Constitution commits the judiciary to fulfil its obligations as an independent arbiter of the Constitution, even if court decisions may contradict a national consensus. Courts should not concern themselves with popular opinions because such opinions are only relevant to Parliament,[140] and because courts are not politically responsible institutions and thus do not account to public opinion.[141] The constitutional obligation of the courts is to decide issues without fear, favour or prejudice.[142] Whereas the Court is a 'legal' institution, it has a democratic mandate which is deep-rooted in politics.

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136 See *Daniels v Scribante* 2017 8 BCLR 949 (CC) para 153 (hereinafter *Daniels*) on contemporary "angry rhetoric and intransigent attitudes, whose perils exceed those of history and the frailties of its telling."

137 Eisgruber *Constitutional Self-Government* 49-50.

138 Bickel *The Least Dangerous Branch* 20.

139 Gardbaum *The New Commonwealth Model of Constitutionalism* 74.

140 *Makwanyane* paras 88- 89.

141 *Makwanyane* para 305. See also Eisgruber *Constitutional Self-Government* 60.

142 Section 165(2) of the Constitution.

6.5 The Constitutional Court and democratic accountability

6.5.1 The Court

One of the fundamental questions which arose during the negotiation and transition period was how to balance majoritarian aspirations with constitutionalism. The apartheid regime was concerned about the possibility that the democratic government would deviate from the 34 Constitutional Principles enshrined in schedule 4 of the transitional Constitution. Hence, it advocated for the establishment of a constitutional court to certify the compliance of the final constitutional text with the Constitutional Principles, and to test the constitutional validity of legislation and executive conduct going forward into the new era and beyond.[143] The parties agreed that once certified for compliance by the Court, the Constitution would not be challenged in any court of law.[144]

> [T]hreatened political elites, eager to preserve their current status beyond future majoritarian elections, press for the constitutionalization of rights (as they understand them) to preserve their policy preferences: "judicial empowerment through the constitutionalization of rights and the establishment of judicial review may provide an efficient institutional means by which political elites can insulate their increasingly challenged policy preferences against popular pressure, especially when majoritarian decision-making procedures are not operating to their advantage."[145]

Although there were concerns that a justiciable Bill of Rights would entrench the 'privileges' of the minority,[146] there was wide acceptance of the need to create the Court. The ANC was apprehensive to the prospect that the Appellate Division, which was untransformed and possibly reactionary at the time, would review and set aside the decisions of the democratic government.[147] Whereas the negotiating parties agreed on the need for the judiciary to constrain government excesses, the ANC refused to entrust that obligation on the judges of the Appellate Division because the judges were politically contaminated by their service to the apartheid regime. Memories of an executive-minded judiciary, which enabled and legitimised rule by law under apartheid, were still fresh in the minds of the negotiators. Hence, the parties settled on the Court as one of the institutional mechanisms for the protection of the rights and interests of minorities. Since

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143 See section 71(2) of the transition Constitution.
144 See section 71(3) of the transitional Constitution and Robertson *The Judge as Political Theorist* 228.
145 Lemieux and Watkins *Judicial Review and Contemporary Democratic Theory* 24.
146 See Issacharoff *Fragile Democracies* 173.
147 Langa and Cameron 2010 *Advocate* 32.

the establishment of the Court was not on its own enough to safeguard and guarantee against majoritarian encroachment,[148] the transitional Constitution mandated the limitation of legislative and executive powers, in line with the prescripts of constitutionalism, and created other institutions to support constitutional democracy.

The creation of the Court and the adoption of a justiciable Bill of Rights affirmed the desirability of constitutionalism to the fledgeling democracy. When they entrusted the certification of the text of the final Constitution to the Court, the negotiating parties embraced constitutional review and set the tone for the judiciary in the new South Africa. They delicately balanced the extremes of outright majoritarianism and helped to ease the anxiety and concerns of the new political minority.[149] The entrenchment of judicial review further served as a political guarantee of the transition from apartheid to constitutional democracy.

> The judicial review of legislation as one of the cornerstones of the new order has come to reflect a principled preference for its perceived benefits over and above the idea that the political process was by itself the answer in having rights permeate society. On the other hand, the introduction of judicial review has also served as a political device to address the fears of the white minority that they might be sidelined by a new parliament which they could no longer dominate numerically. This is because expanding the vote has meant changing the composition of political organs, which could in turn drown out the voice of the previously advantaged classes. Combined, these two reasons imply that judicial review was chosen not only because it presented a new substantive model for the country's future, but also because it served as a bridge to securing that new future.[150]

When it was established, it was clear that the Court would become a very influential political body.[151] The apparent juridification of politics and the politicisation of the Court's role in the constitution-making process made the Court a decisive political player beyond the certification process. In discharging its certification role, the Court expressed its position on purely political questions.[152] Although some of the issues in the *Certification* cases dealt with purely constitutional and human rights matters, some were political, such as the issue of provincial autonomy and questions on proportional representation and

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148 Issacharoff *Fragile Democracies* 171.

149 Moseneke *My Own Liberator* 301.

150 Van der Schyff *Judicial Review of Legislation* 45.

151 O'Malley "South Africa: Designing New Political Institutions" 75.

152 See, for instance, the Court's contentious view on proportional representation in *Certification I* para 186.

democracy. Robertson[153] argues that Constitutional Principle XVIII, which protected the powers and functions of provinces, was a political requirement. Since it was a product of political compromise, the Court was not at liberty to frustrate the will of political parties who made its creation possible.[154]

However, the Court found the first text of the Final Constitution fatally deficient for failure to fully comply with some of the Constitutional Principles.[155] Issacharoff[156] argues that when the Court refused to certify the first text, the Court was merely enforcing pre-agreed Constitutional Principles which were political guarantees of the transition. The political role of the Court was amplified by the fact that some of its inaugural justices were political appointees and ANC 'cadres deployed to the Court' to advance the party's ideology. For instance, Sachs J was a member of the first ANC delegation to the second round of negotiations.[157] His activism started early in his student life before he attended the Congress of the People, which adopted the Freedom Charter in 1955.[158] Sachs J admits that personal historical circumstances and political consciousness influenced his thinking on the bench.[159]

6.5.2 Powers and authority of the Court

In exercising its powers to safeguard the supremacy of the Constitution, the rule of law and the founding values, the Court enjoys pre-eminence as the highest court in South Africa.[160] Hence, the contribution of the Court to politics is vast.[161] The Court may decide not only constitutional matters[162] but also appeals in other matters of general public importance and relevant for consideration by the Court.[163] When its jurisdiction is impugned, only the Court may make a final determination on whether a matter is

153 Robertson *The Judge as Political Theorist* 229.
154 See Klug *Constituting Democracy* 116 for a discussion.
155 See the *Certification I* judgement.
156 Issacharoff *Fragile Democracies* 181.
157 Robertson *The Judge as Political Theorist* 226.
158 SAHO 2011 https://www.sahistory.org.za/people/judge-albert-louis-albie-sachs.
159 Sachs *We, the People* 211.
160 Section 167(3) of the Constitution.
161 See Robertson *The Judge as Political Theorist* 226.
162 Section 167(7) of the Constitution defines a constitutional matter as one which includes "any issue involving the interpretation, protection or enforcement of the Constitution.
163 Section 167(3) of the Constitution.

admissible and justiciable.[164] Section 167(4) of the Constitution gives the Court exclusive jurisdiction in certain matters. No other court, except the Court, may

> (a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;
> (b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;
> (c) decide applications envisaged in section 80 or 122;
> (d) decide on the constitutionality of any amendment to the Constitution;
> (e) decide that Parliament or the President has failed to fulfil a constitutional obligation; or
> (f) certify a provincial constitution in terms of section 144.[165]

The exclusive jurisdiction of the Court is augmented by its powers to review and confirm declarations of invalidity of Acts of Parliament, provincial Acts and the actions of the President made by the High Court and the Supreme Court of Appeal.[166] The requirement ensures that the apex Court is involved in determinations of the constitutionality of the enactments of elected representatives and the head of state. The powers of the Court make legal accountability potent. Together with other superior courts, the Court can issue explanatory, informatory and corrective orders. The Court has constitutional competency to order the legislature and the executive to undertake specific duties in specific ways, to make information available to the public and to interdict Parliament and the executive from undertaking unconstitutional actions.[167] When the conduct of a public office-bearer threatens constitutional values on the need to respect the rule of law and to ensure accountable, responsive and open governance, the Court will utilise its powers to craft an extraordinary remedy.[168]

The Court can coin new remedies to meet the peculiar circumstances of each case. In the result, mandatory and structural interdicts, which subject the executive, Parliament and organs of state to supervision by the Court ensure compliance with both the Constitution and Court orders.[169] Together with the High Court and the Supreme Court of Appeal, the Court has a huge leeway to grant just and equitable and appropriate

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164 Section 167(3) of the Constitution.
165 Section 167(4) of the Constitution.
166 Section 167(5) of the Constitution.
167 Flinders *The Politics of Accountability in Modern States* 132-133.
168 See *Black Sash Trust I* para 43; *Electoral Commission v Mhlophe* 2016 8 BLCR 987 (CC) para 137.
169 Van der Schyff *Judicial Review of Legislation* 192.

remedies.[170] These wide powers can be interpreted as infinite. When it comes to the Bill of Rights, the Court may give any order which it considers appropriate.[171] Constitutional remedies are both open-ended and contextually flexible. The powers of the Court are wide because sections 8(3), 38, 39(2) and 172(1) of the Constitution affect the Court's determination of the best way to protect rights and because "there is no constitutional straightjacket"[172] for the tailoring of remedies. The yardstick is that a constitutional remedy should vindicate and entrench the rule of law.[173] In the last two decades, the Court used its powers in many cases and declared many statutes and the conduct of both Parliament and the President inconsistent with the Constitution and invalid.

In contemporary times, the Court has asserted its position within the constitutional dispensation as equally positioned – if not superior – to Parliament and the executive. The Court has granted prospective relief to litigants to prevent impending constitutional violations, stopped continuing violations with interdicts and granted restorative relief for violations already committed.[174] These constitutional remedies give effect to the founding values, the Bill of Rights and specific constitutional provisions. Constitutional damages include monetary awards. Monetary compensation ensures that citizens, whose representatives violated rights, compensate the affected persons. The Court does not award constitutional damages when alternative legal and political remedies exist to guarantee state accountability.[175]

The exercise of judicial discretion in granting just and equitable remedies is a controversial aspect of judicial review, particularly when a person has successfully challenged government conduct but denied a remedy by the Court. A typical example of a denial of a remedy to a successful party arose in *Nxasana.* Nxasana, the National

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[170] Section 172(1)(b) of the Constitution.

[171] See *Fose v Minister of Safety and Security* 1997 7 BCLR 851 (CC) paras 18-19.

[172] *Bel Porto School Governing Body v Premier Western Cape* 2002 9 BCLR 891 (CC) para 180. See *Sanderson v Attorney-General, Eastern Cape* 1997 12 BCLR 1675 (CC) para 27; *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 3 BCLR 229 (CC) para 85 (hereinafter *Bengwenyama*).

[173] *Corruption Watch NPC v President of the Republic of South Africa; Nxasana v Corruption Watch NPC* 2018 10 BCLR 1179 (CC) para 82 (hereinafter *Nxasana*). See also *Steenkamp v Provincial Tender Board of the Eastern Cape* 2007 3 BCLR 300 (CC) para 29. See also section 172 on certain powers of the Court in constitutional matters.

[174] See, for instance, *Black Sash Trust I*.

[175] *Rail Commuters Action v Transnet Ltd t/a Metrorail* 2005 4 BCLR 301 (CC) paras 77-78. See also *Minister of Safety and Security v Van Duivenboden* [2002] 3 All SA 741 (SCA) para 21.

Director of Public Prosecutions at some time, had on many occasions unequivocally made it known to the President that he did not want to leave the office. When it became plain to him that the President was hell-bent on removing him, Nxasana accepted a large amount as a golden handshake. Although the Court expressed sympathy "for the undue, persistent pressure to which he was subjected"[176] by the President, the Court ordered Nxasana to repay the whole of the settlement agreement amount and refused to reinstate him to his former position. Consequently, Nxasana left the Court with no remedy. The Court's denial of Nxasana a remedy inadvertently gave legal validity to the unlawful conduct of the President.[177]

However, the denial of remedies to successful parties existed in jurisprudence long before Nxasana's case. There are three grounds on which the Court will not grant a remedy to a successful party. First, when the Court cannot, due to the peculiar circumstances of the case, tailor appropriate relief.[178] Second, when other interests preclude a remedy in favour of the affected person, such in Nxasana's case. The Court denied Nxasana a remedy because re-instating him to his position would not vindicate the rule of law. Nxasana was complicit in the abuse of public money through the 'golden handshake,' given that he had been in office for just over a year.[179] Third, the Court will deny a successful party a remedy if granting the order would lead to so much disorder and administrative difficulties that it will be best not to give an order at all.[180] A remedy which causes harm is not appropriate because it is not in the interests of justice.[181]

6.5.3 Constitutional supremacy of the Court

Judgments of the Court are conclusive in all matters since the Court has the final decision on the constitutionality of legislative enactments and the conduct of the President.[182] The Court is the highest court in the Republic[183] and has a monopoly on constitutional and

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176 *Nxasana* para 85.

177 See also *Bnegwenyama* para 85 on how the denial of a remedy to a successful party may inadvertently give legal validity to an unlawful act.

178 See *Dawood v Minister of Home Affairs* 2000 8 BCLR 837 (CC) paras 63-64.

179 See *Nxasana* paras 83-84.

180 See *Tsotetsi v Mutual and Federal Insurance Company Ltd* 1996 11 BCLR 1439 (CC) para 10.

181 See *Fraser v Naude* 1998 11 BCLR 1357 (CC) paras 9-10.

182 Section 167(5) of the Constitution.

183 Section 167(3)(a) of the Constitution.

legislative interpretation.[184] In addition, the Court has exclusive jurisdiction to entertain any matter which raises arguable points of law or is in the public interest.[185] The implications of these provisions are far-reaching because, in most instances, the Court uses these powers to resolve sensitive political disputes. Although Davis J[186] downplayed accusations of 'juristocracy' and the vast powers of the Court, which make it immensely powerful, the Court is a supreme institution. The decisions of the Court are binding on all branches of the government, organs of state and to both public and private persons.[187] Even an erroneous decision is binding.[188] Unlike in other states, the political branches cannot enact a statute to override a Court decision because a decision of the Court must be complied with.[189] The only hope that South Africans have against judicial error is for the Court not to set a wrong precedent; or when it does, to overrule the precedent in a subsequent case, as it has done.[190]

Whether the massive powers at the hands of the Court are excessive and undesirable is a question which must be answered looking at the purpose for which the constitutional drafters ascribed those powers to the Court and how the Court exercises those powers. The position in this thesis is that contrary to pessimistic and disapproving views on the supremacy of the Court, 'juristocracy' is healthy for the sustainability of constitutional democracy. The position arises from the sovereignty of South Africans. Whereas the elected branches represent the majority will, and to a limited extent, the minorities, the

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184 See section 167(4)-(5) of the Constitution on the powers of the Court in relation to the meaning of constitutional text.

185 Section 167(3) of the Constitution.

186 Davis 2016 *South African Law Journal* 258-271.

187 See section 165(5) of the Constitution.

188 To guard against error, section 167(1) of the Constitution prescribes 11 judges for the Court. Section 167(2) stipulates that at least eight justices of the Court must hear a matter. Although this provision prescribes a remarkably high quorum, it raises problems in adjudication when the Court is evenly split. See, for instance, *Jacobs v S* 2019 5 BCLR 562 (CC) in which the Court dismissed an appeal on a crucial principle of criminal law because the justices were evenly split.

189 The Canadian Charter of Rights, for instance, permits "legislatures to respond to court decisions invalidating laws by enacting sequels and thereby often having the final word" - Gardbaum *The New Commonwealth Model of Constitutionalism* 112.

190 See, for instance, *Minister of Justice and Constitutional Development v Prince; National Director of Public Prosecutions v Rubin; National Director of Public Prosecutions v Acton* 2018 10 BCLR 1220 (CC) (hereinafter *Prince II*) in which the Court technically overruled *Prince v President Cape Law Society* 2001 2 BCLR 133 (CC).

Court represents the values which underlay the Constitution and acts as a guardian of constitutional limits on political power.

> One of the axioms of political theory and governmental practice is that there must be in every state a supreme authority whose determinations are final and not subject to any recognized higher power. This supreme authority is generally regarded as constituting the very essence of the state and is based ultimately upon the physical power which makes civil authority effective. The nature and operation of government requires that there shall be "some permanent human force invested with acknowledged and supreme authority, and always in a position to exercise it promptly and efficiently, in case of need, on any proper call." This power of supremacy may be located in one of the regular departments of the government in the exercise of its normal functions, or the final determination of governmental matters may be reserved for constitutional conventions, constituent assemblies or the popular referendum.[191]

Since the Constitution is the supreme law, it is important for the Court to jealously guard the Constitution against legislative and executive encroachment so that political representatives do not sacrifice the concrete foundation of the Constitution for political expedience or other self-serving interests. In the relatable context of the American Constitution, Hamilton says that the judiciary exercises judicial review as a safeguard against enabling "the representatives of the people to substitute their will to that of their constituents."[192] To Hamilton, a court is not superior to the legislature because it exercises judicial review and invalidates unconstitutional statutes. His explanation was that the power of the people (presumably their sovereignty) is superior to both the legislature and the court itself. Hence, the court must test the compliance of legislative enactments with the constitution, which is the fundamental law.[193]

Tushnet[194] argues that judges would always support judicial supremacy because the antecedent power makes the judicial office more important and interesting. Although plausible, the explanation potentially trivialises judicial review by presenting judicial officers as power-hungry persons, thus opening windows for political attacks on the judiciary. Whereas massive judicial authority, as vested in the Court by the Constitution, is susceptible to abuse due to the trappings of power,[195] it is necessary to remind South

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191 Haines *The American Doctrine of Judicial Supremacy* 1.

192 Spector "The Theory of Constitutional Review" 17; Seagrave *The Accessible Federalist* 71.

193 Seagrave *The Accessible Federalist* 71-72.

194 Tushnet *Taking the Constitution Away from the Courts* 7.

195 Mogoeng CJ admonished judges against using judicial power to for celebrity reasons – see SABC 2018 http://www.sabcnews.com/sabcnews/judicial-officers-must-never-seek-to-be-celebrities-mogoeng/.

Africans that judicial supremacy was purposely built into the legal system as part of the transition from apartheid to constitutional democracy. Judicial review serves as a reactive mechanism of accountability,[196] embedded into the constitutional foundation to guard over the Constitution because of the meaninglessness of constitutional democracy without a supreme judiciary which exercises constitutional review.[197]

6.5.4 Guardianship of the Constitution

The term 'guardian of the constitution' refers to an organ of state or branch of government with a constitutional mandate to protect the constitution against infringement.[198] The role of a constitutional guardian is to limit and constrain the political branches from undermining a constitution. O'Malley[199] argues that Chapter 7 of the transitional Constitution, whose terms Chapter 8 of the Constitution incorporates, established the Court as a guardian of the Constitution. The Court guarantees constitutionalism as it has a mammoth task to ensure that the legislature, the executive, other organs of state and the people do not violate the founding values of the Constitution. In several decisions, the Court has self-proclaimed its role as the guardian of the Constitution.[200] When it exercises judicial review, the Court affirms the Constitution as the supreme law and protects the people against violation by the government. Since legislatures worldwide have a history of stretching laws to the limit and transgressing the boundaries of legitimate law-making,[201] the constitutional role of the Court is not to enforce the will of the elected representatives but to ensure that their conduct meets constitutional muster.

The most crucial role of the Court's guardianship is to block unconstitutional amendments to the Constitution. The supremacy of the Constitution is crucial in this context because,

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196 Flinders *The Politics of Accountability in Modern States* 152.

197 However, in *Glenister I* paras 33 and *Doctors for Life* paras 37-38, the Court correctly pointed that it does not have unfettered powers.

198 Vinx *The Guardian of the Constitution* 174.

199 O'Malley "South Africa: Designing New Political Institutions" 75.

200 See *Glenister I* para 33; *Mazibuko* para 135; *Scaw* para 92; *S v Mamabolo* 2001 5 BCLR 449 (CC) para 63 (hereinafter *Mamabolo*).

201 Bickel *The Least Dangerous Branch* argues that "Judicial review expresses, of course, a form of mistrust of the legislature." In the context of Sachs J's reasoning of institutions of mistrust, the Court is the most important institution of mistrust which has been vigilantly working to protect the people of South Africa – see Sachs *We, the People* 4.

in a liberal constitutional state, a constitution contains the law of making laws.[202] When they entrenched the Constitution, the constitutional drafters tacitly gave the Court powers to test the substantive and procedural constitutionality of amendments to the Constitution.[203] A constitutional amendment which replaces the original Constitution is thus an unconstitutional amendment which the Court would not permit, even if Parliament passes the amendment procedurally. The yardstick to determine the constitutionality of a constitutional amendment is whether the amendment abrogates the founding provisions of the Constitution. In *Premier KwaZulu-Natal v President of the Republic of South Africa*,[204] Mahomed J convincingly relied on *Indira Nehru Gandhi v Raj Narain*,[205] in which the Supreme Court of India held that powers to amend a constitution are not conferred to enable the government to damage, destroy or abrogate the constitution. A constitutionally permissible constitutional amendment must retain the original constitution, albeit in amended form.[206]

Section 74 of the Constitution entrenches constitutional amendments and prescribes a supporting vote of at all least 75% of the members of the National Assembly and at least six provinces to amend the entrenching clause.[207] When the National Assembly intends to amend the Bill of Rights, it must have a supporting vote of at least two-thirds of its members[208] and must secure a supporting vote of at least six provinces.[209] Other constitutional amendments (other than the entrenching clause and amendments to the Bill of Rights), require a supporting vote of at least two-thirds of the members of the National Assembly and in certain circumstances, six provinces.[210] To ensure public

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202 Möllers *The Three Branches* 126.

203 By reason, an amendment of the Constitution is a constitutional matter because section 167(7) of the Constitution stipulates that "[a] constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution."

204 *Premier of KwaZulu-Natal v President of the Republic of South Africa* 1995 12 BCLR 1561 (CC) paras 47-48.

205 *Indira Nehru Gandhi v Raj Narain* AIR 1975 SC 2299 paras 251; 650.

206 For a discussion of constitutional amendments and abrogation, see Bellamy *Political Constitutionalism* 90.

207 Section 74(1) of the Constitution.

208 Section 74(2)(a) of the Constitution.

209 Section 74(2)(b) of the Constitution.

210 Section 74(3)(b) provides for a supporting vote of at least six provinces when a constitutional amendment –
(i) Relates to a matter that affects the council;
(ii) Alters provincial boundaries, power, functions or institutions; or
(iii) Amends a provision that deals specifically with a provincial matter.

participation in a process which amends the Constitution, section 74(5)-(7) prescribes the publication of a purported amendment in the Government Gazette at least 30 days prior to the tabling of the amendment, among other procedural requirements. The provisions are meant to prevent clandestine amendments to the Constitution and to ensure that all affected persons are informed and given opportunities to make submissions.

However, Henkin[211] questions whether, in the American constitutional context, restrictions on constitutional amendments are compatible with democratic principles. In the same setting, Holmes[212] queries why the people who crafted the original constitution bound posterity to commit to an inherited constitution. The two questions, although not directly applicable to South Africa, raise pertinent questions about the entrenchment of constitutional provisions and the extent to which the Court may go to safeguard the Constitution. Arguably, when the Court invalidates an inconsistent amendment to the Constitution, it does not undermine the sovereignty of the people but upholds it. Although *Certification I* case tested the constitutionality of a constitutional enactment, the Court has not had an opportunity to test the constitutionality of an amendment to the Constitution.

Given that the Constitution does not envisage all life scenarios (probably because the constitutional drafters did not, and could not, have had prophetic foresight and the necessary space in the constitutional text to contemplate all future occurrences), one can take the Constitution as a 'mere' framework for how the government should govern the state and held accountable by citizens. As such, Parliament, the executive, organs of state and the people, in general, should seek the interpretation wisdom and guidance of the Court on their duties and obligations. The legal avenue is a handy mechanism for the determination of the nature and extent of public powers and authority. Bearing in mind that the Constitution is also a political document, adopted to realise a political objective, it is only necessary that there be an institution, in the form of the Court and the judiciary in general, to decide on the meaning of the Constitution when the political players do not

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211 See Henkin "A New Birth of Constitutionalism: Genetic Influences and Genetic Defects" 42. Alexander Hamilton, one of the American founders, argues that it was important "to research a right to the people to 'alter or abolish the established Constitution whenever they find it inconsistent with their happiness" – see Issacharoff *Fragile Democracies* 40. See also the contentious dissent by Holmes J in *Gitlow v New York* 268 U.S. 652 (1925) at 673 in which he argues that the will of the dominant forces in society must be given room to prevail.

212 Holmes "Constitutions and Constitutionalism" 190.

agree on its meaning. Whereas the Constitution is both a legal and a political instrument, and since the Court is at the apex of the legal system, the question arises whether the Court is also at the apex of the political order in South Africa? Do the justices use their political conscience in deciding political matters? To answer these questions, one needs to consider the interplay of the roles of the Court in democracy, politics and law-making.

6.5.5 Democracy, politics and law-making

Although, from a constitutional perspective, the role of the Court is legal, and not political, the Court has decided political questions.[213] Many political disputes end up in the courts.[214] The judicialisation of politics is not peculiar to South Africa. From a broader perspective, judicialisation of politics refers to the use of the courts by political actors to advance their interests and to gain legitimacy on their contribution to the rule of law, making judges major contributors and influencers of public policy.[215] Although the role of the Court is partly political, it is not clear how the Court should react when invited to decide political questions. Jafta J admonished political actors to find political solutions to political problems.

> Political issues must be resolved at a political level. Our courts should not be drawn into political disputes, the resolution of which falls appropriately within the domain of other fora established in terms of the Constitution.[216]

Jafta J further referred to Davis J, who warned against the juridification of political disputes.

> There is a danger in South Africa, however, of the politicisation of the judiciary, drawing the judiciary into every and all political disputes as if there is no other forum to deal with a political impasse relating to policy or disputes which clearly carry polycentric consequences beyond the scope of adjudication. In the context of this dispute, judges cannot be expected to dictate to Parliament when and how it should arrange its precise order of business matters. What courts can do, however, is to say to Parliament: 'you must operate within a constitutionally compatible framework; you must give content to section 102 of the Constitution; you cannot subvert this expressly formulated idea of a motion of no confidence. However, how you allow that right to be vindicated is for you to do, not for the courts to so determine.[217]

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213 See *Doctors for Life* para 21 and *Economic Freedom Fighters I* para 43.

214 See Davis 2016 *South African Law Journal* 259 for a synopsis and a list of some of the cases.

215 Dressel "The Judicialization of Politics in Asia: Towards a Framework of Analysis" 4.

216 *Mazibuko* para 83.

217 *Mazibuko v Sisulu* 2013 4 SA 243 (WCC) at 256E-G.

David J objected to what he perceived as an invitation to the judiciary to intrude into the political arena and to what he viewed as an invitation to create a juristocracy in South Africa.[218] Judges are apprehensive of political attacks on the courts. In Davis J's view, judicial intrusion into the legislative terrain invites unwarranted criticism and imperils constitutional democracy.[219] In the past, Mogoeng CJ lamented the undesirability of political attacks on the judiciary and urgently met with President Zuma to discuss harsh criticism of the courts.[220] In October 2017, Mogoeng CJ said that it was undesirable for political parties to resolve their internal disputes in the courts and warned that "[if] we push our courts [sic] to the point where it literally becomes a raw political player, we are exposing it to criticism that could have been avoided."[221] To protect the courts against accusations of overreach, the Chief Justice reasoned, political parties must first try to resolve disputes internally.[222]

The different views expressed by the justices in *Economic Freedom Fighters II* underlie a political conscience in the Court. Since the separation of powers is a political doctrine, and since the Constitution is a political instrument designed to regulate the legal order, it follows that individuals assigned to decide political disputes should have a political conscience. The Court has demonstrated its political conscience by continually referring to history.[223] Some of the judgments of the Court were deliberately framed in strong political language, thus reiterating the Court's political consciousness as a political institution exercising a political role.[224] The justices have demonstrated that they are not mere legal robots exercising a fundamental constitutional duty but that they are politically

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218 *Mazibuko* at 256H.

219 *Mazibuko* at 256H.

220 Ackroyd 2015 https://www.enca.com/south-africa/ten-key-points-agreed-zuma-and-mogoeng.

221 Staff Reporter 2017 http://www.huffingtonpost.co.za/2017/10/26/mogoeng-political-parties-must-resolve-issues-inside-the-family-first_a_23256319/.

222 Staff Reporter 2017 http://www.huffingtonpost.co.za/2017/10/26/mogoeng-political-parties-must-resolve-issues-inside-the-family-first_a_23256319/.

223 See, for instance, *Doctors for Life* para 62 in which the Court said that the "nature of our democracy must be understood in the context of our history;" *Makwanyane* paras 156, 220, 262-266, 302, 322; *Certification I* para 10; *Azapo v President of the Republic of South Africa* 1996 8 BCLR 1015 (CC) paras 2-3;; *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 10 BCLR 968 (CC) para 208; *Economic Freedom Fighters I* para 1.

224 See, for example, *Du Plesis & De Klerk* para 119; *Daniels* paras 152-155.

conscious public office-bearers with a political role in a political institution.[225] It is for this reason that one should appreciate that the constitutional duty of the apex Court extends far beyond the traditional understanding of the role of a court. Therefore, it should come as no surprise that like all political institutions, the Court has a law-making role.

The Court is the custodian of the official records of all Acts of Parliament.[226] Although the Constitution does not expressly bestow legislative powers on the Court, the Court has a law-making role which is far more potent than that of Parliament. By necessity, the Court is a lawmaker.[227] The judicial-legislative role arises from section 39 of the Constitution, the justiciability of the Bill of Rights and from the Court's guardianship of the Constitution, taken together with the power to grant infinite remedies. Furthermore, the Court has a constitutional duty to develop the common law to "promote the spirit, purport and objects of the Bill of Rights."[228] These powers imply that the Court has authority to order the enactment of legislation to advance the Bill of Rights and also that the Court can strike down aspects of the common law which are inconsistent with the Constitution. These are law-making powers meant to safeguard the Constitution as a cornerstone of the legal order and a guarantee of democracy and rights.[229]

In many instances, the Court has proven that it has the ability and the will to rewrite the law. In *Makwanyane*, the Court essentially amended the *Criminal Procedure Act* 51 of 1977 when it struck down capital punishment in section 277(1)(a) of the Act. The section mandated the capital sentence for some persons convicted of murder. When Parliament has omitted or failed to use legislation to protect constitutional rights, the Court may exercise its law-making powers by directing Parliament to amend an offending statute or enact a statute to provide for rights.[230] While waiting for Parliament to make amendments

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225 Although the political role of the justices as members of a political institutions is uncontested, the Court still needs to protect is legitimacy by avoiding appearances of political partisanship. For a synopsis, see Möllers *The Three Branches* 128.

226 Section 82 of the Constitution.

227 See Van der Schyff *Judicial Review of Legislation* 59.

228 Section 39(2) of the Constitution.

229 However, Wallis JA argues in the article 'The Common Law's Cool Ideas for Dealing with Ms Hubbard - at 940 - that although the Constitution is a cornerstone, "a cornerstone does not constitute a building, and a centrepiece without surrounds is a jewel without a setting." The Supreme Court of Appeal judge critiques the approaches of his court and the Court in *Hubbard v Cool Ideas 1186 CC* [2013] 3 All SA 387 (SCA) and *Cool Ideas 1186 CC v Hubbard* 2014 8 BCLR 869 (CC).

230 Parliament enacted the *Civil Union Act* 17 of 2006 in compliance with the Court order in *Minister of Home Affairs v Fourie* 2006 3 BCLR 355 (CC) (hereinafter *Fourie*) to enact legislation to provide for

to statutes, the Court reads-in and reads-out provisions from enactments. When the Court has found part of legislation constitutionally inconsistent, it has given Parliament grace periods, ranging from one year to two years, to amend offending parts.[231]

However, the grace periods have been accompanied with ultimatums that in the event of Parliament's failure to amend the statutes within the specified period, reading-in and reading-out of words into and out of the impugned statutes would become automatic and permanent. Court directives to Parliament to amend or enact legislation within a specified period give Parliament greater latitude on how to regulate a complex issue which cannot be properly 'regulated' with a court order. In *Stransham-Ford v Minister of Justice and Correctional Services*,[232] Fabricius J commented on the need for Parliament to enact a statute regulating the right to die with dignity because the law-maker is best positioned to regulate such complex matters. The approach is a special kind of judicial deference to the legislature.[233] Judicial deference is essential for the preservation of institutional comity between the three branches as it quells perceptions of judicial intrusion into legislative and executive domains.

6.5.6 Extra-curial accountability

In addition to their functions at the Court, justices perform extra-curial functions of accountability subject to limitations based on the separation of powers. The Constitution does not prohibit judicial officers from performing extra-curial functions.[234] Judges have extensive experience in legal procedure and evidence, and the capacity to act impartially and lawfully, making them favourable candidates for commissions of inquiry.[235] Some issues, triggered by political events or which involve politicians, are so sensitive that they cannot be properly investigated by the police and thus require judicial commissions of inquiry.

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same-sex marriages. In a controversial decision in *Prince II*, the Court ordered Parliament to amend the *Drugs and Drugs Trafficking Act* 140 of 1992 and the *Medicines and Related Substances Control Act* 101 of 1965 to allow the possession and use of cannabis in private dwellings.

231 See, for example, *Fourie* and *Prince II*.

232 *Stransham-Ford v Minister of Justice and Correctional Services* 2015 6 BCLR 737 (GP) para 1.

233 *Black Sash Trust I* para 10. See also *Economic Freedom Fighters I* para 19; *Doctors for Life* para 23.

234 *South African Association of Personal Injury Lawyers v Heath* 2001 5 BCLR 77 (CC) is a leading precedent on separation of powers and extra-curial functions.

235 See Hoexter "Judges and Non-Judicial Functions in South Africa" 476.

> A judicial appointment, presumed to be apolitical, acts to reinforce the independence and impartiality of the inquiry and to enhance its credibility and legitimacy. Judges also lend dignity and authority to the proceedings and symbolise the serious nature of the investigation.[236]

At the time of writing, the President had established major commissions of inquiry: The Commission of Inquiry into State Capture, the Commission of Inquiry into Tax Administration and Governance in the South African Revenue Service, and a Commission of Inquiry into Allegations of Impropriety Regarding the Public Investment Corporation. The Mokgoro Inquiry probed the abuse of power by Advocates Jiba and Mrwebi to determine their fitness to hold office at the National Prosecuting Authority (the NPA). The Mokgoro Inquiry found the two to have abused their office, acted in bad faith and with outside influence and therefore unfit to hold office. The President moved swiftly and removed the two from the NPA.

However, judicial commissions of inquiry are essentially executive inquiries whose terms of reference are issued by politicians. South African governments have a history of using judicial commissions of inquiry as cover-ups.[237] For instance, several challenges stemming from limited terms of reference plagued the Arms Procurement Commission. President Zuma, named in the Schabir Shaik judgments as a key player in the corruption that ensued from the 'Arms Deal,' set up the Commission, raising concerns of conflict of interest.[238] Judicial commissions of inquiry are also costly and often do not issue binding findings. Although judicial commissions of inquiry are quite effective instruments to promote accountability, particularly when one examines the work of the Commission of Inquiry into State Capture, and whereas commissions of inquiry are not the only extra-curial instruments of accountability, the weaknesses of judicial commissions of inquiries, constitutional review and oversight highlight the limitations of legal accountability.

6.6 Limitations of legal accountability

Judicial processes cannot guarantee the accountability of the government because the Court merely announces what is constitutional and what is not. The Court can foster a democratic and human rights culture but has no enforcement mechanisms. Although they

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[236] Flinders *The Politics of Accountability in Modern States* 161.

[237] Hoexter "Judges and Non-Judicial Functions in South Africa" 476.

[238] The Schabir Shaik judgements were *S v Shaik* [2005] 3 All SA 211 (D); *S v Shaik* [2007] 2 All SA 9 (SCA) and *S v Shaik* 2007 12 BCLR 1360 (CC).

are constitutionally-bound to implement court decisions,[239] the political branches have shown a tendency towards ignoring judicial decisions[240] and delaying the implementation of Court orders.[241] The Court has no force beyond its judgments. Hence, it is up to the moral commitment of the executive to implement the decisions.[242] Tushnet[243] argues that as a consolation, a constitutional court faced with a defiant legislature or executive might receive public support, particularly among opposition parties. However, the support of the public and smaller parties cannot prevent a rogue regime from defying a court order.

The refusal of the executive to obey Court orders has ominous implications for the rule of law.[244] It is not immediately clear what should happen if a member of the executive, or an organ of state, refuses to abide by a Court order. The Constitution only states that other organs of state must take all measures to ensure the effectiveness of the courts. The question becomes more complicated when, theoretically, the perpetrator is the President. From a common law perspective, the offence of contempt of court will apply for failure or outright refusal to implement a court order. Person(s) alleging defiance of a court order should prove beyond a reasonable doubt that the failure to comply was driven by wilfulness or *mala fides*.[245] A closer examination reveals that the legal system is partly to blame for the weaknesses of legal accountability. Constitutional review and judicial oversight can only be utilised through litigation, which is notoriously expensive and therefore beyond the reach of the most vulnerable members of society against whom the executive often abuses public power through unjust administrative action.

Also, litigants often encounter procedural obstacles such as stringent Court timeframes and challenges of standing and justiciability of their cases. At times, the Court refuses to

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239 Section 165(5) of the Constitution.

240 See *Minister of Home Affairs v Somali Association of South Africa Eastern Cape* [2015] 2 All SA 294 (SCA); *Southern Africa Litigation Centre v Minister of Justice* 2015 9 BCLR 1108 (GP); *Minister of Justice and Constitutional Development v Southern African Litigation Centre* [2016] 2 All SA 365 (SCA).

241 For instance, in *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 1 BCLR 1 (CC), the Court ordered the declared the contract awarded to Cash Paymaster Services invalid and ordered the South African Social Security Agency to find another service provider. However, the executive stalled many times until the Court extended the contract in *Black Sash Trust I*.

242 *Mamabolo* para 63.

243 Tushnet "Establishing Effective Constitutional Review" 11.

244 *Mamabolo* para 65.

245 See *Lourens v Premier of the Free State Province* [2017] ZASCA 60 para 11-12; *Fakie v CCII Systems (Pty) Ltd* 2006 4 SA 326 (SCA) para 42.

hear cases and insists on litigants to first take their cases to the High Court and the Supreme Court of Appeal for the justices to benefit from the jurisprudence of the lower courts.[246] On the bright side, it is only fair to the litigants and the interests of justice for matters to rise up the appeal chain so that by the time they reach the apex Court, a body of jurisprudence has developed and could be utilised by the Court. A litigant who loses at the Court has no legal remedy since the Court is the highest court in South Africa. However, the appellate chain offers no solace to a litigant who finds himself/herself in a matter in which the justices of the Court are conflicted. In such a case, the Court will dismiss the case without hearing the merits.[247]

6.7 Conclusion

This chapter examines legal accountability through constitutional review of legislation and judicial oversight. The analysis shows that the Constitution introduced a robust accountability framework in which the Court plays a more significant role than political actors in ensuring an accountable, responsive and open government envisaged in section 1(d) of the Constitution. Like all fledgeling, fragile and unconsolidated democracies, South Africa needs a strong Court to play the democratic role of an institutional limitation on majoritarian power. The Court reinforces compliance with the rule of law, promotes respect for the Bill of Rights, protects constitutional democracy from political manipulation and reaffirms popular sovereignty. In discharging this mandate, the Court binds Parliament and the executive to the prescripts of constitutionalism embedded in the Constitution.

The powers of the Court make it an immensely powerful guardian of the Constitution. Resultantly, the analysis reveals that far from undermining the will of the people of South Africa espoused in the Constitution, the supremacy of the Court is democratically legitimate, considerate of the separation of powers and serves as a special form of representation and enforcement of constitutional values. This chapter further shows that given the quasi-political role of the Court in the constitution-making process, the politicisation of the Court and the judicialisation of politics, Parliament and the executive cannot claim a greater democratic mandate than the Court. Hence, legal accountability

246 Van der Schyff *Judicial Review of Legislation* 56.

247 See, for instance, *Nkabinde v Judicial Service Commission* [2016] ZACC 25.

has a democratic genesis which places judicial review and oversight on an equally strong constitutional and democratic footing like electoral, legislative and executive accountability. However, legal accountability is relatively weak when faced with a legislature and executive which refuse to implement Court orders.

Chapter 7 Conclusion, Findings and Recommendations

7.1 Introduction

The previous chapters contextualise and examine themes on accountability and constitutionalism to determine whether full compliance with the tenets of constitutionalism can enhance democratic accountability in South Africa. The chapters discuss electoral, legislative, executive, administrative and legal accountability. This chapter brings the thesis to a head with a summary of the analyses, a presentation of the main findings and recommendations to improve democratic accountability. The concluding chapter begins with a recontextualization of the crisis of accountability. The discovery of workable solutions to the lack of accountability depends on a frank discussion of the origins of the problem. Arguably, if South Africa is to achieve any measure of accountability, there is a need for acceptance that the crisis of accountability is rooted in political, social and economic circumstances influenced by history. A holistic approach to the historical origins of the crisis of accountability will lead to a better understanding of the problem and hopefully free South Africans from historical entanglements which compromise democratic accountability in contemporary times.

7.2 Summary of the thesis and main findings

7.2.1 The crisis of accountability in South Africa

The first chapter uses a doctrinal method to disprove perceptions of an 'African culture of impunity' and shows that pre-colonial Africans had viable democratic institutions of accountability.[1] Also, the analysis shows that after the arrival of colonialists, South Africa plunged into a crisis of democratic accountability. Colonisation perverted and destroyed African societies as far as traditional systems of good governance and accountability were concerned. The analysis reveals that the arrival of colonial settlers tilted traditional approaches on democracy and accountability to colonisation and impunity, codified repression and institutionalised corruption. Colonial and apartheid governments were not responsive to most South Africans but subjected Africans to the worst forms of conquest and exploitation. The adverse use of the law by both regimes and the overzealous judicial enforcement of draconian statutes deprived Africans of the essential tool for democratic

[1] Section 1.1.

accountability – the franchise. Without the right to exercise the franchise, Africans had no lawful means of accountability. The denial of the franchise, taken together with gross human rights violations committed by both colonial and apartheid regimes, illustrates that both systems were founded on unethical leadership and that accountability was not a concern.

The background in the first chapter further shows that post-apartheid South Africa inherited a template of an unaccountable government, as manifest in corruption, nepotism, fraud in state procurement and the state of capture.[2] There are many court judgments and reports of the Public Protector which paint a gloomy picture on accountability in contemporary South Africa. The State Capture Commission continues to hear testimonies of astounding abuses of public power and resources for the benefit of a few political elites and connected businesspersons. The fact that there appear to be no adverse consequences for most persons implicated in corruption and other unethical and illegal conduct aggravates the lack of accountability, and suggestions the institutionalisation of impunity.

7.2.2 The nexus between democratic accountability and constitutionalism

Although the analysis in the first chapter opens the possibility to revive some of the lost African traditions on accountability to improve contemporary practices, it is impossible to infuse traditional accountability with modern constitutionalism due to the sophistication of governance in contemporary times. Arguably, the answer to the contemporary lack of democratic accountability potentially lies in full compliance with the tenets of constitutionalism. However, there is a deficiency of scholarship on the meaning of accountability and its connection with constitutionalism. Hence, the second chapter examines the nexus between democratic accountability and constitutionalism. The analysis progresses from general perspectives on the conceptual challenges of defining democratic accountability and its link to constitutionalism. The discussion shows that accountability refers to constitutional and democratic processes through which public office-bears answer for their conduct in state affairs.[3]

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2 See, in general, section 1.1.

3 Section 2.2.

Importantly, the second chapter advances several core theoretical justifications for an accountable government.[4] The primary theoretical justification is representative democracy, which in turn anchors on the idealistic notion of popular sovereignty. Although democracy and popular sovereignty are centuries-old concepts, previous chapters show that the two have not outlived their relevance and are still applicable in constitutional theory in the modern era. South Africa justifies accountability on constitutional democracy.[5] Theoretical justifications of accountability overlap between dictatorships and representative, parliamentary and constitutional democracies. The analysis shows that government legitimacy is a common denominator in all polities. Governments cannot legitimately exist without accountability.[6]

The second chapter also shows that constitutionalism is an umbrella term for all constitutional law principles which limit the powers and authority of the government for the protection of citizens.[7] The discussion introduces constitutional supremacy, separation of powers, checks and balances and the rule of law as the most fundamental tenets of accountability and constitutionalism.[8] Ultimately, the chapter shows that when properly implemented, constitutionalism safeguards citizens against impunity for abuse of public power and that constitutionalism can provide effective means for citizens to ensure an accountable government. Whereas the genesis of democratic accountability stems from disciplines such as political science and philosophy, constitutionalism provides a juridical framework for accountability. Constitutionalism prescribes democratic, legal and constitutional processes for citizens to hold representatives accountable. Since the theoretical framework of constitutionalism in the second chapter shows that constitutionalism is a Western concept and does not explain why and when South Africa adopted constitutionalism, the third chapter traces the adoption and development of constitutionalism in South Africa.

4 Section 2.3.
5 Section 2.3.4.
6 Section 2.3.5.
7 Section 2.4.
8 Section 2.6.

7.2.3 The adoption and development of constitutionalism in South Africa

South Africa imported constitutionalism in the middle of the 19th Century. Whereas the British brought Westminster constitutionalism and its inadequacies emanating from parliamentary democracy,[9] the Orange Free State Republic introduced concrete guidelines for liberal constitutionalism when its drafters used the American Constitution as a template.[10] The South African Republic, on the other hand, was characterised by presidential imperialism and resistance to judicial review, leading to a constitutional crisis.[11] Although the Supreme Court of the South African Republic delivered a landmark decision on popular sovereignty and the obligation of the government to respect the constitution,[12] judicial review was effectively abolished, leading to the dismissal of the Chief Justice, John Kotzé. Due to the wrangle between the executive and the judiciary in the South African Republic, the delegates at the Natal Convention – which paved the way for the formation of the Union of South Africa – did not incorporate the judicial review of legislation and executive action in the *South Africa Act*,[13] the statute which established the Union.

The formation of the Union of South Africa, as discussed in the third chapter, introduced a compromised version of the Westminster system and an illiberal form of constitutionalism which championed parliamentary sovereignty without the rule of law.[14] The discussion shows that between 1910 and 1993, illiberal constitutionalism, coupled with judicial complicit in human rights violations, led to impunity.[15] Furthermore, the analysis covers the response of Africans to apartheid and shows that Africans in South Africa always aspired for liberal constitutionalism. Africans articulated their conceptions and desires for liberal constitutionalism in the African Bill of Rights, the African's Claims in South Africa, the Defiance Campaign Against Unjust Laws, the Freedom Charter and the Constitutional Guidelines for a Democratic South Africa.[16] The contents of the documents lead to the conclusion that Africans have always wanted an accountable

9 Section 3.2.1.
10 Section 3.2.3.
11 Section 3.2.3.
12 *Brown v Leyds* (1897) 4 OR 17.
13 *South Africa Act,* 1909.
14 Section 3.3.1.1.
15 Section 3.3.1.
16 Section 3.4.

government which is limited by a supreme law, the rule of law and a justiciable Bill of Rights.

African resistance to the apartheid regime further affirmed the dangers of illegitimacy brought by a lack of government accountability. The examination of the transition from apartheid to constitutional democracy illustrates the birth of constitutionalism as a solution to the challenges of governance and legitimacy in South Africa.[17] Although the transition raised pertinent questions of legitimacy, it introduced transformative constitutionalism through a Constitution founded on accountable, responsive and open governance.[18] Based on the analysis of the theoretical framework and the nexus between democratic accountability and constitutionalism, the following section construes the main elements of accountability in the Constitution. The reader will note that the following section is a discussion of the candidate's understanding of the values of accountability, responsiveness and openness enshrined in section 1(d) of the Constitution.

7.2.4 The tenets of accountability in the Constitution

7.2.4.1 Answerability

In South Africa, accountability is a constitutional obligation, since section 1(d) of the Constitution adds several political rights to the founding constitutional provisions to ensure an accountable, responsive and open government. Political rights enable South Africans to call public office-bearers to account through explanation and justification of their decisions and actions in public governance. It is not enough for public office-bearers to merely explain why they exercised their powers in the manner in which they did. Instead, the explanations must be reasonable and justifiable. Section 36 of the Constitution provides that all actions of the government which limit any of the rights contained in the Bill of Rights must be reasonable and justifiable in an open and democratic society founded on human dignity, equality and freedom.

The preceding discussion lays the ground for the answerability of public office-bearers. In the context of section 1(d) of the Constitution, one treats answerability as accountability. The assertion becomes clearer later in this discussion. Answerability entails

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17 See section 3.5.

18 Section 3.6.

the obligation of a public office-bearer or institution to give reasons for the failure to act when there was an express obligation to take active steps. When applied to accountability, answerability comprises several principles; namely legality, explanation, reasonableness and justification. The implementation of these principles requires adequate constitutional and legislative means for citizens to seek and obtain reasons and justifications for government conduct. Implementation also requires mechanisms to compel public office-bearers to give reasons and to sanction them when found wanting. For instance, parliamentary committees summon members of the executive to appear and provide answers. Ordinary citizens, on the other hand, may litigate to compel answers from public office-bearers.

Whereas the inclusion of accountability in the founding values of the Constitution increased the expectations of South Africans for more answerable government, the failure of the government to answer for continuing corruption, abuse of public power, nepotism and other manifestations of lack of accountability illustrate poor government responsiveness to challenges which confront South Africa in modern times. The continuing lack of accountability can also be attributed to the failure of citizens and institutions of accountability to ask public office-bearers the right questions and to take swift and appropriate action against implicated persons. Under a constitutional and legislative framework that imposes obligations on public office-bearers to answer for their conduct in public affairs, South Africans can make public office-bearers more accountable. Accountability, in turn, requires the responsiveness of public office-bearers to citizens.

7.2.4.2 Responsiveness

As already noted in the immediate discussion, responsiveness of the government and public office-bearers to citizens is one of the three founding constitutional provisions for which section 1(d) of the Constitution enshrines political (democratic) rights. The responsiveness of the government is one of the hallmarks of democratic governance and a core feature of constitutionalism. Responsiveness complements answerability in that whereas answerability requires explanation and justification for the discharge of duties by public office-bearers, responsiveness requires public office-bearers to make decisions and act with due consideration of the needs and interests of communities they serve. Ideally, when citizens have expressed their needs, wants and preferences through submissions to the government, a prudent government which holds itself accountable to

citizens responds positively and within a reasonable time by taking action which implements and vindicates the popular will. Thus, the responsiveness of the government is a responsibility, not a discretion. The government, an *agent* of citizens, must submit itself to the control, demands, needs and wants of citizens whom it serves.

Whether one treats the government as an *agent* or *representative* of citizens, it is indisputable that public office-bearers and state institutions in South Africa must respond appropriately to citizens. The determination of the popular will depends on public participation, as it is only through the facilitation of public participation that the government can ascertain the views of citizens, their needs, expectations and preferences. Hence, there is a need to establish communication channels between the government and citizens. It is only through access to information on the views of citizens that the government can respond to their needs and demands. In contemporary times, in which mass access to the internet has revolutionised communication methods, there is a need for innovation to allow citizens to put their views directly to public office-bearers.

Since South Africa's constitutional democracy is "a government of the people, by the people and for the people through the instrumentality of the Constitution,"[19] the Constitution requires the government to facilitate public involvement and participation before making decisions and enacting legislation which fundamentally affects citizens. Any enactment passed by Parliament without adequate public input is invalid for failure to facilitate public involvement.[20] For the benefit of the government, involvement and participation of citizens legitimise the resultant decisions and smoothens their implementation, since citizens 'own' the decisions. From this perspective, one views citizens as partners in the governing process. Ultimately, it is not enough for the government to merely hear the views of citizens; the government should consider and implement those views (where possible), although the final decision lies with the government.[21] For citizens to hold the government answerable, citizens should know how

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19 *United Democratic Movement v Speaker of the National Assembly* 2017 8 BCLR 1061 (CC) para 1.

20 See *Doctors for Life International v Speaker of the National Assembly* 2006 12 BCLR 1399 (CC).

21 These cases are instructive on the subject: *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 10 BCLR 968 (CC); *Matatiele Municipality v President of the Republic of South Africa* 2007 1 BCLR 47 (CC) and *Poverty Alleviation Network v President of the Republic of South Africa* 2010 6 BCLR 520 (CC).

the government ought to respond to them. In short, responsiveness is opposed to the imposition of decisions on citizens by the government.

However, realities show that the South African government lacks responsiveness. At times, the government is torn between implementing the wants of citizens and enforcing standards and principles with a far more significant impact on society beyond the immediate communities. However, citizens may be unreasonable and inconsiderate in their demands. Often, citizens resort to illegal means, such as violent protests and arson on state infrastructure, in their attempts to force the government to change reasonably necessary decisions. A necessary government decision may receive public opposition if adopted and enforced clandestinely. The following discussion conceptualises the importance of openness in the making of government decisions and in enabling citizens to meaningfully participate in the formulation and implementation of policies, legislation and other decisions which affect citizens.

7.2.4.3 Openness

In addition to accountability (answerability) and responsiveness, section 1(d) of the Constitution stipulates openness as one of the founding constitutional values enforced through political rights. Openness entails transparency in the making and implementation of government decisions. Openness enables citizens to decide whether the conduct of the government is lawful, and if not, to challenge it in court. Citizens, the mass media and institutions of accountability need information, which is only available when the government is open, to decide on the lawfulness of the decisions and actions of the government. South African realities show that public office-bearers, particularly in the executive, have a weakness to act unlawfully, unreasonably, maliciously, incompetently and dishonestly, and to attempt to hide information which may embarrass them, their parties and the government.

Section 1(d) of the Constitution enshrines openness in the founding provisions to enable citizens and institutions of accountability to take remedial steps against misdemeanours and malpractices of public office-bearers. Even in instances in which transgressions are dealt with 'internally,' citizens are entitled to know the nature and extent of such transgressions since citizens are collective *principals* of public office-bearers. Openness enables citizens and institutions of accountability, such as the National Assembly, the

Public Protector and the judiciary, to hold public office-bearers responsible for their conduct in public affairs. Openness and the right to information enhance parliamentary questions to members of the executive and make public interest litigation possible. Members of the National Assembly are better equipped to hold the President and Ministers accountable if informed of potentially illegal or unethical conduct.

Openness requires the government to enact laws that enable citizens and their representatives to request and access information held by the government. The *Promotion of Access to Information Act* 2 of 2000 (PAIA) is one such piece of legislation, which when taken together with the *Promotion of Administrative Justice Act* 3 of 2000 (PAJA), provides for the right to seek and obtain information on the government and administration of the state. When empowered with information, citizens can use avenues available to them to ensure the accountability and responsiveness of the government. Without obligations imposed by the statutes on the government to provide reasons for its conduct, accountability will be ineffective. Openness also enables the government to hold public inquiries into its actions and decisions, to accept constructive criticism and to tolerate negative views. Feedback from citizens enables public office-bearers and the government to learn from mistakes.

The Constitution enshrines the right to access any information held by the state.[22] Public office-bearers are thus constitutionally obliged to maintain the highest standards of openness regarding their decisions and actions. Like all rights in the Bill of Rights, the right to information can only be limited in terms of the limitations clause.[23] If the national interest requires the restriction of some information, such restriction must pass the standards of reasonableness and justifiability "in an open and democratic society based on human dignity, equality and freedom."[24] Section 46 of the PAIA provides for mandatory disclosure of some information in the public interest if, *inter alia,* disclosure would expose a "substantial contravention of, or failure to comply with, the law" The provision applies

22 Section 32 of the Constitution.
23 See section 36(1) of the Constitution.
24 Section 36(1) of the Constitution.

to a contravention of the Constitution, the subversion of legislation, acts of corruption, nepotism and other illegal and unethical conduct.[25]

7.2.4.4 Remedial action

Although the tripartite founding constitutional provisions in section 1(d) of the Constitution do not mention enforceability, sanctions and other forms of remedial action, section 2 of the Constitution mandates the fulfilment of constitutional obligations. Answerability, responsiveness and openness have no meaning when there is no enforcement of sanctions on public office-bearers found wanting for the performance of public obligations. The nature of a sanction that can be imposed on a public office-bearer depends on who imposes the sanction. Within government, sanctions include the institution of criminal proceedings against perpetrators, suspension, dismissal and other disciplinary measures. Sanctions may also include civil remedies, such as damages, personal costs and disqualification from public office. The recall of Presidents Mbeki and Zuma and the removal of advocates Jiba and Mrwebi of the National Prosecuting Authority are examples of sanctions against public office-bearers. Ideally, a President can be sanctioned through a vote of no-confidence and impeachment, as discussed in chapter 5. However, political considerations make it difficult for citizens and legislative representatives to sanction public office-bearers such as the President. Although citizens may use votes to punish parties to which errant public office-bearers belong, elections have challenges, particularly in the light of the flaws of proportional representation.

7.2.5 Electoral accountability

The fourth chapter examines electoral accountability, which refers to democratic processes, mainly elections, through which citizens hold public office-bearers accountable through political parties. The fourth chapter has two themes. The first theme analyses electoral accountability from the perspective of universal democratic theory to illustrate the nexus between elections and accountability; elections as verdicts on the government of the incumbents; and elections as the choices of citizens on future government policies.[26] The first theme shows that elections are a crucial part of legislative

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[25] For a discussion of disclosure of information in the public interest, see *President of the Republic of South Africa v M & G Media Limited* 2015 1 SA 92 (SCA).

[26] Section 4.2.

accountability because it is only through elections that citizens elect a representative and democratic government. The election of a democratic government, in turn, depends on the performance of an incumbent government and on which policies, among the options offered by contestants for public office, resonate well with the needs and wants of citizens. Citizens will ideally vote for a party which has demonstrated or promises solid commitments for accountable governance. However, the discussion in the fourth chapter shows that elections are a relatively weak mechanism of accountability due to the susceptibility of citizens to manipulation by populist rhetoric and social fault lines.

The first theme in the fourth chapter also discusses parties as conduits for electoral accountability and shows that in South Africa, citizens utilise electoral accountability through parties because parties have a monopoly on democratic representation and governance.[27] Electoral legislation expressly and implicitly requires citizens to participate in the democratic process mainly through parties. For instance, party funding legislation only provides for public financial support of parties, not independent candidates.[28] Any person who wishes to contest provincial and national elections will, therefore, have to amass considerable financial resources and to overcome current barriers placed by the monopoly of parties. The monopoly of parties on democracy is affirmed by the proportional representation system which allocates seats in the national and provincial legislatures to parties. Several court judgments discussed in the fourth chapter show that it is impossible for a citizen to stand for provincial or national office on his/her own without the involvement of a party.[29] However, parties pose several challenges to accountability as they shield party leadership from legislative scrutiny. The dominance of the African National Congress (the ANC) since 1994 has enabled the party to thwart legislative scrutiny of the executive. Also, the dominance of the ANC raises challenges to its internal democracy with the result that it is possible for undemocratically elected persons to rise in the leadership ranks of the party and government.[30]

Notwithstanding the challenges of proportional representation, elections subject the government to the judgment of citizens and produce legislative representatives of citizens

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27 See, in general, sections 4.2.4 and 4.3.1.
28 Section 4.2.4.4.
29 Section 4.3.1.2.
30 Sections 4.2.4.2 and 4.2.4.3

- in the form of Members of the National Assembly and delegates to the National Council of Provinces. Parliamentary representatives oversee and scrutinise the executive and hold members of the executive accountable on behalf of citizens.[31] When citizens vote for parties, they send the representatives of the parties to Parliament to deliberate on issues affecting citizens, formulate policies to solve the issues and to enact their election promises into legislation. To fulfil the expectations of citizens, Parliament should show responsiveness to the demands of citizens, whom the legislature represents. The attitude of parties to the responsiveness of Parliament is vital since parties often act as conduits for legislative accountability. When exercising their duties as representatives of citizens, members of Parliament and the executive must not depart from the prescripts of the Constitution, the instrument which delegates public power from citizens to elected and appointed public office-bearers. The discussion in the fourth chapter further reveals that effective electoral accountability mostly depends on the consolidation of democracy. The consolidation of democracy, in turn, depends on the strength and resilience of institutions of accountability discussed in chapters 5 and 6.

7.2.6 Executive accountability and parliamentary oversight

The fifth chapter analyses executive accountability, parliamentary oversight and administrative accountability in South Africa. The discussion shows that the President exercises enormous powers because the Constitution vests national executive authority in the President. The Constitution, the *Executive Member's Ethics Act* 82 of 1998 (the Ethics Code) and other legislation impose accountability obligations on the national executive to prevent abuse of power and public resources. Since the national executive exercises enormous powers, there is a greater need for constitutional mechanisms to ensure that the executive acts legally, fairly and justly, and that the executive respects the Bill of Rights and the Constitution. The analysis in the fifth chapter further demonstrates that Parliament exercises oversight over the executive to constrain, mitigate and remedy the improper exercise of executive authority.

The discussion in the fifth chapter further shows that the National Assembly has a constitutional obligation to elect the President, hence the powers of the National Assembly to hold the President and the rest of the executive accountable. Also, the

[31] Section 42(3) of the Constitution.

Constitution obligates the National Assembly to scrutinise and oversee the exercise of public power by the executive.[32] Given that the executive is responsible for the implementation of laws enacted by Parliament, the legislature must oversee the executive and ensure that the executive executes statutes in line with the intentions of the legislature. In this regard, the relationship between Parliament and the executive is part of checks and balances which ensure legality and probity in the implementation of the law. The duty of the National Assembly to hold the executive accountable also arises from the constitutional right of citizens to govern. Since the National Assembly elects the President, the President and the executive are *agents* of the legislature, making the National Assembly the *principal* who in turn, acts on behalf of citizens. The Constitution bestows members of the National Assembly with certain powers, privileges and immunities to enable the legislature to effectively scrutinise and oversee the executive.[33]

Chapter 5 also shows that the legislature exercises oversight because the executive develops and implements government policies, legislation, fiscal policy, national security and defence, and makes prominent public appointments.[34] To fulfil its duties, the National Assembly puts oral and written questions to members of the executive at predefined intervals. The National Assembly may pass a motion of no confidence in the President and Cabinet when the executive has demonstrated a lack of accountability, bad governance and unsuitability to hold executive office. However, the National Assembly may pass a vote of no confidence for purely political reasons. The most potent sanction against the President is removal through 'impeachment,' regulated in section 89 of the Constitution.[35]

Given that the legislature must also remain accountable in exercising its oversight powers and functions, the National Assembly should ideally be responsive to the needs, wants and preferences of citizens. However, the discussion shows that there is a lack of institutional and individual accountability for legislative oversight because of the proportional representation system and the monopoly of parties in the democratic process. The analysis points to the inevitable conclusion that the President's control of

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32 See section 5.3.2.
33 Section 5.3.2.
34 Section 5.3.3.
35 For a discussion of parliamentary process for holding the executive accountable, see section 5.3.4.

the majority caucus in the National Assembly, his entrenched position and powers over the executive are the weakest elements in the system of accountability, as far as legislative accountability and parliamentary oversight over the executive are concerned.[36] As a (little) consolation, the discussion further shows that the Constitution provides for public participation in parliamentary processes to give citizens access to legislative processes which hold the executive accountable.[37] However, public participation is relatively weak, as the participation of citizens in parliamentary processes has no meaningful impact on the ultimate decisions of the legislature and the executive on contested issues.

7.2.7 Administrative accountability

Due to the weaknesses of parliamentary oversight, the last part of the fifth chapter analyses administrative accountability. The Public Protector is an extra-legislative mechanism which counterweights the unintended results of proportional representation and party monopoly on democracy.[38] Although South Africa has several State Institutions Supporting Constitutional Democracy, as established in section 181(1) of the Constitution, the fifth chapter only focuses on the Public Protector because the Public Protector must investigate, report and take remedial action against improper and prejudicial conduct in state affairs.[39] The discussion shows that the Public Protector has immensely contributed to ensuring an accountable executive. Although appointed on the recommendations of the National Assembly, the Public Protector acts impartially and has investigated and reported on impropriety by very high-ranking public office-bearers, such as the President and former members of Cabinet. The establishment of the State Capture Commission was only possible because of the gallant efforts of the Public Protector.

However, there are challenges on the lawfulness and rationality of the acts of the Public Protector.[40] The recent case law canvassed in the fifth chapter shows that although the Public Protector must act lawfully and rationally, some of the remedial action issued by the Public Protector has overreached the powers of the institution, leading to many cases

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36 See section 5.4 on institutional and individual accountability of members of the National Assembly.
37 Section 5.5.
38 Section 5.6.
39 Section 182(1) of the Constitution.
40 Section 5.6.2.3.

in which the courts have set aside remedial action. The courts intervened in the ABSA and South African Reserve Bank matters because of the politically motivated, irrational and overstepping remedial action issued by the Public Protector.[41] The judgments are a reminder that political contamination of institutions of accountability runs deep in South Africa, hence the need to watch watchdogs such as the Public Protector and to restrain the political branches of government through legal accountability.

7.2.8 Legal accountability

The sixth chapter explores how legal accountability can remedy the deficiencies of electoral accountability, parliamentary oversight and extra-legislative accountability. The discussion shows the topicality of judicial processes on constitutionalism and accountability in South Africa. The analysis is limited to an examination of constitutional review and judicial oversight as the primary mechanisms through which the courts hold elected and appointed public office-bearers accountable. Having shown in earlier chapters that members of the executive have a propensity to behave unlawfully, prejudicially and with both negligent and reckless disregard of founding constitutional values of accountable, responsive and open government, the sixth chapter seeks to prove that legal accountability reinforces the rule of law, protects constitutional democracy and reaffirms popular sovereignty.[42] Unlike the National Assembly and the executive, South African courts are politically uncompromised, independent and robust in their approach when they hold public office-bearers and state organs accountable. The premise is that legal accountability protects the rights and interests of all South Africans, not just those of political majorities because electoral majorities are merely a percentage of the people. Given the propensity of public office-bearers to abuse their authority, the courts are an institutional guarantee of constitutional vigilance as they hold undemocratic, abusive and prejudicial forces at bay until the consolidation of democracy and beyond.

Constitutional review and judicial oversight have a concrete foundation in the Constitution, legislation and case law because legal accountability is mostly a constitutional and statutory creature. Often, constitutional violations arise in the exercise of administrative power. Hence, the Constitution entrenches a right to just administrative

41 Section 5.6.2.4.
42 Section 6.3.

action.[43] Parliament enacted PAJA in line with the provisions of section 33 of the Constitution to place judicial review at the epicentre of governance. Unlike colonial and apartheid judiciaries which were executive-minded and established to serve a Westminster-style of parliamentary democracy,[44] the contemporary South African judiciary enjoys constitutional pre-eminence as an institutional guardian of the Constitution and a guarantor of constitutional democracy.[45] As part of their constitutional obligations, the courts have jurisdiction to determine all issues related to governance and the constitutionality of Acts of Parliament and the decisions, policies and actions of the executive. The Constitution buttresses judicial power with authority to grant just, equitable and appropriate remedies. The judiciary can also review the decisions and actions of private entities, professional associations and virtually, everyone.

However, the South African constitutional arrangement is not immune to the classical counter-majoritarian argument and other contentions which portray constitutional review and judicial oversight as undemocratic and against the wishes of the people.[46] The sixth chapter dispels the counter-majoritarian dilemma and highlights the relationship between legal accountability and democratic accountability. The chapter contextualises democratic representation in the courts and the democratic legitimacy of both constitutional review and judicial oversight.[47] The standard set by constitutional democracy is simple: the exercise of majoritarian power must pass the test of constitutionality to enable citizens to govern democratically within the prescripts of the Constitution and to realise the principles of good governance expressly articulated in founding constitutional provisions.

Courts review decisions made by the representative of citizens because of the need to ensure that the decisions of democratically elected and appointed persons remain within constitutional parameters. As such, the legislature and the executive in South Africa cannot claim a greater democratic mandate than the courts. The conclusion draws from the analysis of the Constitutional Court (the Court) as a supreme quasi-political institution of accountability, established as a guardian of the Constitution and bestowed with a

43 Section 33 of the Constitution.
44 See section 3.3.1.2.
45 Section 6.5.
46 See section 6.4.2.
47 Sections 6.4.4 and 6.4.5.

democratic, political and law-making role.[48] The discussion shows that the Court is not at par with the legislature and the executive but that from a constitutional view, the Court holds a higher status and has decisive authority to protect the Constitution against political encroachment. The powers of the Court to grant constitutional remedies would be infinite, were it not for limitations placed by constitutional considerations such as the separation of powers and the unwritten rule to promote institutional comity between the Court, Parliament and the executive.[49] However, the analysis in the sixth chapter exposes the weaknesses of legal accountability because the Court entirely depends on the political branches to implement judicial decisions. Thus, legal accountability remains effective against abuses of power only when political morality to respect and implement court decisions subsists.

7.3 Recommendations to enhance democratic accountability

7.3.1 Citizens should be more constitutionally vigilant

The previous chapters show that an accountable, responsive and open government depends on citizens (chapter 4), elected persons (chapter 5), appointees of elected persons (chapter 5- in relation to the Public Protector) and judicial officers (chapter 6). Citizens have a meaningful role to play to protect democratic processes and institutions established by the Constitution for democratic accountability. Only citizens can put the Constitution into practice to ensure the effectiveness of democratic institutions created to prevent public office-bearers from acting contrary to the founding values of an accountable, responsive and open government. In the light of the foregoing, South Africans must demand accountable governance and proactively use all legal processes to ensure that persons entrusted with public power are answerable, responsive, responsible and open. South Africans should show no tolerance to all manifestations of unaccountable governance because impunity negatively affects the interests and rights of citizens. Citizens have everything to lose when faced with an unaccountable, irresponsible, secretive and unresponsive government.

The duty of citizens to realise section 1(d) of the Constitution starts at the ballot in which citizens have a responsibility (to themselves and to posterity) to elect persons who have

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48 Section 6.5.

49 See *Black Sash Trust v Minister of Social Development* 2017 5 BCLR 543 (CC) para 51.

integrity and honesty, and who have proven themselves committed to the realisation of the constitutional vision for a government that is accountable, responsive and open. When they have rewarded competent persons and punished abusers of power through the ballot, citizens can have a moral standing and a firm ground to demand accountable, responsible, responsive, open and ethical leadership. If citizens abandon their electoral obligation, they have no moral authority to complain about corruption and other abuses of power. The constitutional vigilance of South Africans should also manifest in strong support for institutions of accountability, such as the Public Protector and courts, when these institutions come under unjustified political attacks. South Africa needs strong oversight institutions to scrutinise and oversee the legislature and the executive. The resilience of institutions of accountability, such as the judiciary and the Public Protector, entirely depends on the support given to them by citizens. Citizens are the last line of defence for oversight institutions against political contamination and manipulation.

However, it is not immediately clear whether citizens are empowered enough to exercise constitutional vigilance. Whereas section 1(d) of the Constitution provides for an accountable government, there appears to be no established general norms and standards of accountability in legislation. The lack of clarity on the standards to which citizens can hold elected and appointed public office-bearers accountable hampers electoral accountability and parliamentary oversight over the executive. There is a need for more research to determine substantive and procedural aspects for the establishment of such norms and standards. Further research will provide guidance on the empowerment of citizens to insist on the full compliance of public office-bearers with the norms and standards of accountability.

7.3.2 Legal protection of intra-party democracy

The enhancement of accountability depends on the strength and resilience of democratic institutions, such as parties. The protection and promotion of intra-party democracy are crucial because parties have a monopoly over the government and because the quality of democracy depends on the outcome of democratic processes within parties. However, the analysis in the fourth chapter shows that internal party democracy is prone to manipulation by powerful forces within parties to the extent that elections of party leadership are susceptible to undemocratic and possibly illegal threats which include the

staffing of ballots, branch-stacking, dictatorship and outright intimidation of party membership. Despite the monopoly of parties on the democratic process and the susceptibility of intra-party processes to manipulation, South Africa has no statute to regulate internal party processes. By implication, the dictates of an open and democratic society envisaged in the founding constitutional provisions and the Bill of Rights require electoral legislation to regulate key players in the democratic process.

Comprehensive regulation of parties can also eliminate the double standard which arises from the discrepancy between the importance of parties in a proportionally representative democracy, on the one hand, and their traditional legal status as voluntary associations, on the other hand. A statute which protects internal party democracy can enhance democracy within South African parties and provide reasonably aggrieved persons with clear legal rights and the means to protect the same. Parliament may enact such a statute and term it the *Promotion of Party Democracy Act.* The jurisdiction of the Electoral Court, which principally decides disputes connected with elections, can be expanded to encompass the power to decide political disputes related to intra-party democracy. Presently, aggrieved members of parties have limited constitutional remedies because of the silence of legislation on the issue and because of the reluctance of the courts to intervene in the political affairs of parties.

7.3.3 Reconsideration of the electoral system

The analysis in the fourth chapter shows that in South Africa, electoral legislation is the weakest link on democratic accountability. There is a need to relook at the proportional representation system to enhance accountability. The idea should not be to replace proportional representation *per se* but to consider ways to enhance accountability through the electoral system. A mixed constituency-based electoral system is recommended to ensure that citizens, not parties, decide on which individuals represent the people in Parliament. A mixed constituency-based electoral system will give citizens leverage over politicians and parties. The current system of proportional representation gives parties too much power and emasculates citizens from sanctioning individuals implicated in corruption and other abuses of power. The last decade showed that parties have the capacity, which they often use, to shield the President from accountability to the extent that a majority party has the prerogative to elect a person accused of

wrongdoing. To cure this, South Africa should consider an amendment of the electoral system from one of proportional representation to a mixed one of direct constituency election and proportional representation.

The electoral system should give citizens powers to directly elect the majority members of the National Assembly to ensure that members of the National Assembly get a direct mandate from citizens, as opposed to the current legislative framework which does not give citizens a choice between two or more persons vying to represent the people in the National Assembly. However, research is required to determine the demarcation of electoral constituencies and the percentage of members of the National Assembly who must be directly elected by citizens. A constituency-based system will also automatically enable independent candidates to directly contest elections, as opposed to current prohibitions placed by section 57A of the *Electoral Act.*[50] In August 2019, the Court will hear a constitutionality challenge to the section and other prohibitions on independent candidates to contest provincial and national elections.[51] The case will give the Court a once in a lifetime opportunity to play a direct role in the enhancement of the electoral system. A reformed electoral system will allow citizens to contest for public office outside the medium of parties and break institutionalised political cartels.

The imposition of individual responsibility on members of the National Assembly is impossible in a wholly proportional representative system in which the work of individual legislators is not measurable because members operate collectively. The introduction of a mostly constituency-based electoral system will lead to individual legislative accountability. Individual accountability of members of the National Assembly can be achieved if there is a link between the members and their constituencies. Direct election by citizens will also liberate members of the legislature from bondage to their parties who have powers to deploy and recall them to and from the legislature at will. With such independence, members will have leeway to act independently of their parties.

The proportional representation system makes it possible for individual legislators to ignore the demands of citizens through the pursuit of policies which at times are not in

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50 *Electoral Act* 73 of 1998.

51 The application will be heard in August 2019 following the decision of the Court in *New Nation Movement NPC v President of the Republic of South Africa* [2019] ZACC 27 in which the Court dismissed the urgent application for leave to appeal the decision of the Western Cape High Court in *New Nation Movement NPC v President of the Republic of South Africa* [2019] ZAWCHC 43.

the best interests of citizens. Hence, individual accountability is necessary for members of the National Assembly. Citizens will know whom they are electing, instead of blindly casting a ballot for a party in the hope that the party will deploy responsible and accountable persons to the National Assembly. The proposed mixed and constituency-based system will also ensure the responsiveness of elected persons to citizens because an individual will have to cultivate their support in the constituencies, instead of relying on parties to garner support among citizens on their behalf. When members of the legislature account individually to citizens, they can easily be rewarded or punished at the polls by citizens. The other part of the proposed mixed constituency-based electoral system is a limited proportional representative system, calculated based on the number of seats obtained by candidates affiliated to parties in elections. Research is necessary to determine the mechanisms of such a system. A limited proportional representative system is proposed because it will potentially give minorities and marginalised groups a voice (albeit limited) in the democratic process. Access to the legislature will give minorities a platform to advocate for their interests and to protect themselves from the tyranny of the majority.

Ideally, the proposed electoral system should directly place the election of the President in the hands of citizens. Citizens should have powers to choose a President from a list of candidates. Such an electoral arrangement will require a constitutional amendment which takes away the powers of the National Assembly to elect the President. The present system is one in which citizens have no say on who should occupy the highest position in the state. It is not only limiting for accountability but also corrosive to democracy to let parties elect the President. It would be ideal to separate parliamentary and presidential elections so that when citizens cast their ballots in a particular year, they only concentrate on a handful of (hopefully) popular candidates.

The envisaged mixed constituency-based and limited proportionally-representative electoral system would not make the National Assembly the appointing authority of the President. It will not be ideal for the National Assembly to retain powers to remove the President in terms of section 89 of the Constitution. Notwithstanding, the President should still submit to question and answer sessions in the National Assembly to give the broader representatives of citizens an update on the exercise of executive authority. Also, it would be ideal to retain the powers and authority of the National Assembly to oversee and

scrutinise the exercise of executive authority in terms of section 42(3) of the Constitution. Although it is possible to conduct a referendum in which citizens can indicate whether or not they have confidence in the President, it would be necessary, for practical and logistical reasons, to retain the powers of the National Assembly, as a body which mostly represents citizens, to decide on motions of no confidence in the President. Also, it would be ideal to enact legislation to regulate motions of no confidence by secret ballot and to make it compulsory for the National Assembly to vote on motions of no confidence by secret ballot. Votes by secret ballot will insulate individual members of the National Assembly from interference by minimising political coercion, intimidation and victimisation of members who follow their consciences (as opposed to the dictates of their parties) on whether to vote in favour of the motions of no confidence.

7.3.4 Impeachment of the President to vest in the Constitutional Court

The fifth chapter shows that whereas section 89 of the Constitution provides for the removal of the President for serious misconduct, there is a legal gap on the meaning of serious misconduct and that the justices of the Court disagree on the issue.[52] To remove all doubt, it is necessary for Parliament to enact legislation to supplement section 89 of the Constitution by defining the elements of serious misconduct. The envisaged legislation should set a high standard expected of the President and codify acts which disqualify a person from continuing as President to ensure the highest possible standard of executive accountability.

Furthermore, Parliament should consider a constitutional amendment of section 89(1) of the Constitution to remove the powers to impeach the President from the National Assembly and vest the Court with the powers to decide whether a person is fit and proper to continue as President in terms of the legislation envisaged in the above paragraph. The sixth chapter shows that the Court 'represents' citizens to some extent and that the role of the Court is political to a large degree. Hence, there should be no problem with vesting the Court with powers to remove the President. The Court is an ideal institution to decide whether a person is fit and proper to continue a term as President. The Court is uncontaminated by party politics. The Court is capable of an objective assessment and decision on whether a person has contravened the provisions of section 89(1) of the

[52] See section 5.3.4.3.2 for a discussion of the Impeachment case – *Economic Freedom Fighters II.*

Constitution to a degree which warrants removal. The Court currently has exclusive jurisdiction, in terms of section 167(4)(e) of the Constitution, to decide whether the President has failed to fulfil a constitutional obligation. As such, it should not be a problem to amend section 167 of the Constitution to provide that the Court has exclusive jurisdiction to determine whether the President has contravened section 89(1) of the Constitution.

Parliament should also consider adding a subsection to section 89 of the Constitution (section 89(4)) to impose an obligation on the legislature to enact legislation to regulate the removal of the President by the Court in terms of section 89(1) and the proposed amendment of section 167(4). The amendment will ensure that it is not left to the discretion of the legislature to enact a statute to regulate the removal of the President. When it fulfils that obligation, Parliament may name the Act *Removal of the President Act.* The Act should, by virtue of the amendment of section 89(1) of the Constitution and extension of the exclusive jurisdiction of the Court with an amendment to section 167(4) of the Constitution, repeal the *Rules to Regulate Section 89 of the Constitution: Removal of the President* adopted by the National Assembly in August 2018 pursuant to the Court judgment in *Economic Freedom Fighters II.* The envisaged *Removal of the President Act* should be the same statute which regulates motions of no confidence in the President and should clearly outline the circumstances, procedures and consequences of both processes. It would be necessary to retain the three grounds for removal of the President in terms of section 89(1) of the Constitution (constitutional violations, serious misconduct and inability to perform the functions of the President).

The envisaged *Removal of the President Act* should give all citizens the right to apply to the Court for the removal of a President who has contravened the Act and section 89(1) of the Constitution. The Act should provide that a person who intends to apply to the Court for the removal of the President should give the National Assembly and the President a notice of intention to make such application to enable the National Assembly to decide whether to hold a motion of no confidence in the President. The provision will ensure that the National Assembly, the institution which represents citizens in terms of section 42(3) of the Constitution, has the first opportunity to remove a President in terms of section 102 of the Constitution.

When the National Assembly has decided not to hold a motion of no confidence in the President after receiving a notice, the Speaker should issue a certificate to that effect. The certificate should be required in terms of legislation before the Court may hold a preliminary hearing on the prospects of an application to remove the President. If the Speaker refuses or delays to issue the certificate within 15 days (ideally) after the lapse of the notice, applicants should have a right to approach the Court for a declaration to that effect, at which point the Court shall call the Speaker to show cause for failure to issue a certificate. The Court should hear an application in terms of the envisaged amended section 89(1) of the Constitution and the *Removal of the President Act* on an urgent basis to ensure speedy accountability. However, the National Assembly and the Court have constitutional powers to regulate their processes. Consequently, some of the provisions of the envisaged *Removal of the President Act* would potentially contravene these prerogatives. Hence, further constitutional amendments would be necessary.

7.3.5 Establishment of an Anti-Corruption Commission of South Africa

Reports of the Public Protector, court judgments and evidence led before the State Capture Commission, among other public inquiries, show that the crisis of accountability is deeper than anyone has envisaged. Whereas the Public Protector (as an institution) has generally done well in exposing improprieties in public administration by issuing remedial action with far-reaching consequences, it is doubtful whether the Public Protector has the necessary capacity to handle the high volumes of complaints of abuse of public power by the executive. Capacity constraints emerged when Public Protector issued a remedial action for the establishment of a judicial commission of inquiry into the 'state of capture' because her office did not have adequate resources to unravel the full extent of corruption. The State Capture Commission, which came into being because of the remedial action, is one of many *ad hoc* institutions of accountability. The evidence led thus far in the State Capture Commission is astounding and so much such that the chairperson of the Commission applied to the High Court in 2018 for an extension of the period given to the Commission to complete its work.

Perhaps, the time has come to set up a permanent institution to conduct investigations and lead evidence in the manner in which the State Capture Commission and other commissions have done and continue to do. Corruption is not *ad hoc* and continues to

spiral every day, hence the need for a permanent and fully capacitated body, in the form of an Anti-Corruption Commission of South Africa (the ACCSA), as a seventh State Institution Supporting Constitutional Democracy. The Public Protector should continue to investigate and report on improprieties and prejudices in public administration but should focus on less sophisticated investigations to ensure that the Public Protector has resources, time and capacity to serve all South Africans. To enhance accountability, the Public Protector should have constitutional obligations to refer complex and bulky cases to the ACCSA, which should focus on sophisticated cases. The envisaged ACCSA should have both investigative and prosecutorial powers like the newly established investigative unit in the NPA.[53] Whereas the establishment of the Unit is commendable for the enhancement of accountability (as the Unit will go after cartels of politicians and private actors who collude in public procurement and other areas), it is submitted that for reasons advanced in the following section, an investigating unit will fit better in the ACCSA than in the NPA. To establish the ACCSA and its investigative arm, Parliament will need to amend Chapter 9 of the Constitution and enact legislation, in the form of an *Anti-Corruption Commission of South Africa Act* (or called by such other name as the legislature may deem fit).

7.3.6 Future research agenda on other forms of accountability

In line with the stated delimitations, the thesis does not cover all issues related to constitutionalism and democratic accountability in South Africa.[54] An attempt to the contrary would not only have made the thesis exceedingly voluminous but also cumbersome to everyone involved. This section identifies several gaps in South African

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[53] In March 2019, President Ramaphosa gazetted Proclamation No. 20 of 2019 which establishes an Investigating Directorate in the Office of the National Director of Public Prosecutions (the Unit). The Proclamation gives the Unit powers to investigate common law offences such as fraud, forgery, uttering, theft and other offences involving dishonesty, statutory offences concerning the contravention of specified enactments which combat corruption and related offences; and unlawful activities involving serious corruption by high profile persons. Importantly, the Unit has powers to investigate criminal conduct exposed in the State Capture Commission, the SARS Commission and the PIC Commission. Also, the Unit will investigate contraventions of the *Prevention and Combating of Corrupt Activities Act* 12 of 2004; *Prevention of Organised Crime Act* 121 of 1998; *Protection of Constitutional Democracy against Terrorist and Related Activities* 33 of 2004; *Public Finance Management Act* 1 of 1999; *Local Government: Municipal Finance Management Act* 56 of 2003 and the *Financial Intelligence Centre Act* 38 of 2001.

[54] See section 1.6.3.

constitutional law which could be explored further (individually and as a team) to advance legal scholarship.

7.3.6.1 Enabling oversight through the Auditor-General

Due to the need to confine the thesis to 'democratic' processes through which the legislature and the executive account, the analysis of administrative accountability in the fifth chapter only focuses on the Public Protector. Recent developments show that another Chapter 9 institution, the Auditor-General, can play a far more significant role in enabling oversight and ensuring that persons who negligently, recklessly and intentionally contribute to illegal expenditure of state money and related conduct reimburse the state from their pockets. The *Public Audit Amendment Act* 5 of 2018, which came into effect on the 1st April 2019, gives the Auditor-General some 'teeth' to tackle wasteful, unauthorised and irregular expenditure of state money by public office-bearers.

Part 1A of the Act gives the Auditor-General certain powers to issue remedial action, such as the recovery of monies from accounting officers for losses incurred by state departments and entities as a result of the conduct of accounting officers.[55] Section 5B gives the Auditor-General powers to issue a certificate of debt requiring an accounting office to repay to the state the amount specified in the certificate of debt and to submit the certificate to the responsible executive authority to recover such monies. The executive authority must at all times keep the Auditor-General informed of the progress made towards the collection of the debt due from the accounting officer/accounting authority.[56] These provisions make the findings and remedial action of the Auditor-General binding, a first in the history of South Africa. A full examination of the role of the Auditor-General (in the context of new legislation) in enabling oversight and ensuring the accountability of public office-bearers who control the use of public funds is necessary.

7.3.6.2 Accountability of judicial officers

Whereas this thesis extensively covers legal accountability, it does not discuss judicial accountability because the accountability of judges is not considered a 'democratic' process within the context of the thesis. Notwithstanding the discussion in chapter 6,

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55 Section 5A(3).
56 Section 5B(3).

which shows that the Court is a quasi-political institution of accountability, the thesis does not examine the means for holding judges accountable. An examination of judicial accountability in a separate study is necessary because of the need to watch the watchdog. Judges have so much power that it is not far-fetched for them to fall prey to power like other public office-bearers. The conduct of some judicial officers in the past manifested abuse of judicial authority in the form of corruption, bias, partiality and other misdemeanours. The fact that a Judge President sued the full bench of the Constitutional Court and the Court itself shows that there are more problems on judicial accountability than meets the eye.[57]

The dangers of an unaccountable judiciary can never be emphasised enough. As holders of public office, judicial officers are servants of citizens, albeit unelected, and must ideally account to citizens.[58] Underperformance and other undesirable conduct should result in the removal of a judge through a process stipulated in section 177 of the Constitution. However, the failure of the Judicial Service Commission to conclude disciplinary proceedings against judges points to a deeper crisis in which judges find it difficult to sanction their own. The intricacies of judicial accountability which arise in this regard need to be explored in a comprehensive study.

7.3.6.3 Accountability through the criminal justice system

One of the controversies surrounding the aftermath of many court judgments and reports of Chapter 9 institutions, particularly the Public Protector and the Auditor-General, is the disproportionate absence of prosecutions and convictions of highly placed persons pronounced to have committed wrongdoing. The political contamination of the NPA, as revealed in court judgments and the report of the Mokgoro Inquiry, show that in the last decade, the NPA has been one of the weakest links in the criminal justice system. A study into the role of the NPA in the accountability framework, in the light of the overbearing influence of the executive in the NPA, is necessary to determine how best to enhance the contribution of the NPA to an accountable, responsive and open government. A

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57 See De Vos 2008 http://constitutionallyspeaking.co.za/the-hlophe-letter-of-demand/; Choudhry 2009 *Constitutional Court Review* 1-86; *Hlophe v Constitutional Court of South Africa* [2008] ZAGPHC 289; *Langa v Hlophe* 2009 4 SA 382 (SCA); *Hlophe v Judicial Service Commission* [2009] All SA 67 (GSJ); *Nkabinde v Judial Service Commission* 2016 4 SA 1 (SCA); *Nkabinde v Judicial Service Commission* [2016] ZACC 25; and *Nagan v Hlophe* [2009] ZAWCHC 56.

58 *United Democratic Movement v Speaker* para 4.

comprehensive study will also determine how best to give the NPA independence from the executive.

7.3.6.4 Audit of challenges to constitutionalism in South Africa

In the last decade, South African institutions of accountability came under many serious tests, considering the involvement of former President Zuma in numerous allegations of impropriety, corruption and endless litigation. The law reports are replete with the Zuma cases.[59] The litigation against the former President covered a diverse range of constitutional law areas. A study is necessary to determine the extent to which the Zuma Presidency enhanced or undermined the rule of law because the facts surrounding the litigation entailed some of the most severe threats to the Constitution. His litigation tactics, which entailed endless appeals and other legal tricks to delay and frustrate accountability initiatives, ultimately led to watershed judgments on several aspects of constitutional law.[60]

It is often said that every cloud has a silver lining. The central argument for proposed further research is that the Presidency of Zuma was a *Felix culpa* for constitutional law enthusiasts - a series of unfavourable situations which turned advantageous in other angles. Without his conduct, the courts would not have had opportunities to develop constitutional jurisprudence as they have done. The proposed study will analyse prominent Zuma cases which contributed immensely to the interpretation and articulation of the Constitution and the obligations which the Constitution imposes on public office-bearers and institutions of accountability. A study will also show that the Zuma term inadvertently strengthened the hand of the judiciary and created an atmosphere for Chapter 9 institutions, particularly the Public Protector, to show their teeth. The former President's steadfast compliance with all adverse court judgments will be shown to have significantly enhanced the rule of law, which so many feared would be undermined under his leadership.

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59 For a list of some of the reported judgments, see *Democratic Alliance v President of the Republic of South Africa; Economic Freedom Fighters v State Attorney* [2019] 1 All SA 681 (GP) para 23.

60 See *Democratic Alliance v President of RSA* para 23 for a list of the cases.

7.4 Closing remarks

This thesis examines historical and contemporary issues on the crisis of accountability to determine how South Africans can enhance the democratic accountability of their government. The discussions of electoral, legislative, executive, administrative and legal accountability reveal that indeed, full compliance with the tenets of constitutionalism can enhance democratic accountability in South Africa. The thesis adds new knowledge and insights to existing knowledge by closing gaps in the legal discourse on democratic accountability. As far as could be reasonably ascertained, the thesis is the first to trace the development of constitutionalism in South Africa from a perspective of democratic accountability. The historical discussion in this regard reveals that South Africa has always been in a crisis of accountability due to illiberal constitutionalism. Also, the historical analysis shows that Africans in South Africa have always wanted and taken initiatives to bring about an accountable government. On this point, the thesis proposes full compliance with the tenets of constitutionalism as a solution to the crisis of accountability.

The thesis further adds to knowledge with the argument that accountability of the government is necessary to contain public mistrust in the government and to bolster confidence in Parliament, the judiciary and Chapter 9 institutions. Without confidence in these institutions, South Africa is bound to fall into a constitutional crisis, a situation which must be avoided at all costs. Whereas the Constitution is founded on accountable, responsive and open governance, contemporary South Africa faces elevated levels of corruption, maladministration and other manifestations of a lack of accountability. Notwithstanding, the thesis affirms that South Africa has an adequate constitutional and legislative regime for an accountable government and that the legal framework can be improved to enhance accountability. Also, South Africa has resilient institutions of accountability, such as the Public Protector and the judiciary. To successfully hold the political branches of government accountable, these institutions need more support from citizens, who must be vigilant against all signs of abuse of power.

Based on the main findings, the thesis proffers constitutional and legislative amendments to enhance democratic accountability. Also, the thesis proposes the enactment of legislation to strengthen existing institutions of accountability and to create new ones. Some of the recommendations entail the enactment of a statute to regulate and protect intra-party democracy, a reconsideration and amendment of electoral legislation to

change the electoral system, and the vesting of the impeachment of the President in the Constitutional Court. Also, the thesis identifies the need for more research to determine whether South Africa needs a seventh State Institution Supporting Democracy, in the form of an Anti-Corruption Commission of South Africa, with investigative and prosecutorial powers. Also, the thesis reminds South Africans of their duty to be more constitutionally vigilant against abuses of power. Due to the topicality of the discourse, the thesis suggests further research on other forms of accountability, such as accountability through the Auditor-General, judicial accountability, the role of the criminal justice system in ensuring accountability and an audit of all challenges which confront constitutionalism in South Africa.

Appendix

Venter's formal requirements, normative qualities and doctrinal components of constitutionalism.

Structural (formal)		Substantive (normative) qualities	Doctrinal components
Strict	Mechanisms and procedures		
Legally (usually constitutionally) regulated division of the authority of the state among institutions and	Free and fair elections with multiparty contestation	Legitimate, non-arbitrary government and recognition of human dignity	Rule of law/ *Rechtsstaat/* Constitutional state
Independence of the judiciary	Judicial review jurisdiction	Legality and legal certainty	Democracy
Binding legal regulation of mutual relations between organs of state and of relationships between individuals and the state	Civilian control of the armed and security forces	Respect for the separation of powers	Popular sovereignty
Fixed procedures for legislation, administration and adjudication	Legal protection against arbitrary and unlawful state	Popular respect for (the legitimacy of) the constitution	
Ability of the state to maintain public order	Representative and accountable government		
Specific protection of fundamental rights			

Source: Venter *Constitutionalism and Religion* 82.

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