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THE IMPACT OF THE SOUTH AFRICAN ELECTORAL SYSTEM ON LEGISLATIVE OVERSIGHT

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SUMMARY

This study investigates the relationship between the South African electoral system and its consequential effects on legislative oversight. Through an analysis of historical data, electoral structures, and parliamentary dynamics, this study aims to illuminate the various ways in which the chosen electoral system shapes the nature and efficacy of legislative oversight mechanisms. The study delves into the features of South Africa's electoral model, exploring how proportional representation and constituency-based elements influence the conduct of elected representatives in Parliament. In addition, this study assesses the implications of these electoral dynamics for the ability of parliamentary bodies to oversee effectively the conduct of the executive branch in order to ensure accountability and transparency in the governing process. By examining the impact of one-party dominance in Parliament as a consequence of the electoral system, this study provides insights into the intricate interplay between electoral systems and the crucial function of legislative oversight in fostering a robust democratic system.

1 INTRODUCTION

The South African electoral system is particularly inclusive owing to its broad representation of various political parties in Parliament.[1] The main objective of representation and inclusivity in the National Assembly is to enhance public accountability. Accountability not only requires public office bearers to account for their conduct, but also that they carry out their tasks with integrity. The constitutional duty to ensure public accountability thus rests with Parliament through its legislative oversight duties. The Constitution of the Republic of South Africa, 1996 (the Constitution) does not define the term "accountability", even though it is expressly included in its founding values.[2] Section 55(2) of the Constitution requires Parliament to establish accountability mechanisms to ensure effective legislative oversight. These mechanisms are required to ensure that the executive is held accountable for its exercise of public

1 Ferree "Electoral Systems in Context" in Herron, Pekkanen and Shugart (eds) *The Oxford Handbook of Electoral Systems* (2018) 1.

2 S 1 of the Constitution.

power.[3] Although the duties and functions of the legislature are clearly set out in the Constitution, the nature of the political structure in South Africa includes an electoral system that creates political party dominance, thus sidelining the legislative branch by placing it in a position where it is unable to exercise its oversight functions.[4] The party-list system has continuously defied the expectation of accountability through equal representation with a low number of seats being allocated to opposition parties in Parliament at national level. The party-list system has created one-party dominance by the ANC in the National Assembly. This study investigates the impact of the electoral system on the oversight function of the legislature. This study further investigates the issue of one-party dominance in Parliament and whether this, in turn, has resulted in stultifying the legislative oversight function.

2 THE ELECTORAL SYSTEM IN SOUTH AFRICA

The Constitution guarantees everyone the right to vote. Section 19(1) of the Constitution provides that every adult citizen is free to make political choices, which include the right to form a political party, to participate in the recruitment of members and to campaign for a political party.[5] Section 19(3) further provides that every adult citizen has the right to vote in elections for any legislative body recognised in terms of the Constitution.[6] The legislature has a duty to enact legislation that realises the provisions of section 19, including creating the electoral system that regulates elections. Parliament has the power to determine the way the electoral system is structured. However, this does not mean it has absolute authority. There are various mechanisms aimed at protecting citizens who wish to exercise their right to vote.[7] One of these safeguards is a requirement that there be a rational relationship between the structure that Parliament adopts and the achievement of a legitimate governmental purpose. As such, Parliament cannot act arbitrarily.[8] A structure adopted by Parliament would thus be deemed unconstitutional if there were no rational link between the structure and the governmental purpose.

South Africa employs a party-list system for parliamentary elections, where voters choose political parties rather than individual candidates. The Constitution stipulates the National Assembly's composition – that is, 350 to 400 members elected through the prescribed electoral system.[9] The Electoral Act mandates party registration and the submission of

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3 S 55 of the Constitution.

4 Hudson and Wren "Parliamentary Strengthening in Developing Countries" (2007) https://odi.org/en/publications/parliamentary-strengthening-in-developing-countries/ (accessed 2022-05-10) 18.

5 S 19(1) of the Constitution.

6 S 19(3) of the Constitution.

7 *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC) par 19.

8 *Ibid*.

9 S 46 of the Constitution.

candidate lists.[10] After inspection, a list of eligible parties is compiled for elections. Voters cast a single vote for their chosen party, and, post-tally, elected party members fill parliamentary seats. Notably, the party-list system grants parties the autonomy to select representatives, making them accountable to the party rather than individual voters.[11] This structure empowers parties to remove disloyal members deployed to Parliament. This system does not give the voters an opportunity to decide on the State President and they must trust that those they have elected to Parliament will act in their best interests by electing a capable head of state.[12]

South Africa is a multiparty democracy. However, all important policy decisions are made by the ANC as it holds the majority vote in Parliament, rendering the opposition parties' vote inconsequential. An example of the authority of the ANC in the voting process is demonstrated in *Speaker of the National Assembly v De Lille (Speaker v De Lille)*[13] The Speaker of the National Assembly had ruled that part of a statement made by the respondent during parliamentary proceedings – that certain Members of Parliament (MPs) were spies – was unparliamentary. She had used the word in referring to members of the Assembly and had named such members. Mrs De Lille was then asked to withdraw this part of her statement in Parliament.[14] Later on, a member of the ANC, proposed a motion to appoint an ad hoc committee to report to the House on the conduct of Mrs De Lille for making allegations against MPs without evidence and to recommend action the House should take in light of its report. The motion was adopted by the National Assembly. However, only members of the ANC supported the motion.[15] The ad hoc committee was chaired by an ANC member, which approved a report that was sent to Parliament recommending that De Lille be directed to apologise for her statements and further that she be suspended for 15 parliamentary working days.[16]

The court held that section 57 of the Constitution makes provisions for the National Assembly to determine and control its internal arrangements, proceedings and procedures. As such, there could be no doubt that this authority was wide enough to enable Parliament to maintain internal order and discipline in its proceedings by means that it considers appropriate for this purpose.[17] It held further that Parliament did not have the constitutional authority to suspend De Lille from its proceedings in these circumstances as her behaviour was not disrupting parliamentary

10 S 26 of the Electoral Act 73 of 1998.

11 *New Nation Movement NPC v President of the Republic of South Africa* 2020 (6) SA 257 (CC) par 193.

12 De Vos "It's My Party (And I'll Do What I Want To)? Internal Party Democracy and Section 19 of the South African Constitution" 2015 31(1) *South African Journal on Human Rights* 30 41.

13 *Speaker of the National Assembly v De Lille* [1999] 4 All SA 241 (A) par 2.

14 *Speaker v De Lille supra* par 3.

15 *Speaker v De Lille supra* par 6.

16 *Speaker v De Lille supra* par 8.

17 *Speaker v De Lille supra* par 16.

proceedings.[18] The court held that her suspension was a form of punishment for making a speech (which was not unreasonably impeding the business of Parliament). Rather, it was a form of punishment for making a statement that was considered unjustified by others, including the majority party and members of the ad hoc committee.[19] The support for the motion by an ANC MP (adopted by Parliament based on the support of majority party members) demonstrates the power of party dominance in Parliament.

The court's decision was a breakthrough on the issue of political party dominance and its threat to effective accountability and, consequently, democracy. A system of Parliament constructed through one-party dominance creates an opportunity for abuse of power, where the legislature fails to hold the executive accountable owing to party loyalism. The current electoral system makes parliamentarians more beholden to their political parties and less to the constitutional principles or niceties of accountability. A potential threat to democracy by a dominant party also entails using the State's laws and resources to diminish competition in the electoral arena.[20] This is a form of a dominant party system that leads to authoritarianism.

3 THE IMPACT OF THE ELECTORAL SYSTEM ON LEGISLATIVE OVERSIGHT

There are several elements of the Constitution that limit voters' control over their elected representatives. Although the electoral system provides for collective representation, there is no direct link between legislators and voters.[21] The Constitution also excludes from Parliament MPs who leave their political parties, thus reducing any form of motivation for MPs to represent public interests by challenging the dominant party.[22] Unfortunately, rigorous parliamentary oversight by majority-party MPs places them in a difficult position if they criticise senior party leaders who could remove them from the party, and consequently from Parliament, as punishment for not toeing the party line.[23] Section 47(3) of the Constitution provides that a person loses their membership of the National Assembly if they cease to be a member of the political party that nominated them as a member of the Assembly.[24]

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18 *Speaker v De Lille supra* par 17.

19 *Ibid*.

20 Mancebo "Stability and Governability the Benign Effects of Party Dominance in South Africa" 2021 13(1) *Insights on Africa* 56 60.

21 De Vos "Separation of Powers and the National Legislature" in De Vos and Freedman (eds) *South African Constitutional Law in Context* 1ed (2014) 120.

22 S 47(3)(*c*) of the Constitution.

23 Mattes "South Africa: Democracy Without the People?" 2002 13(1) *Journal of Democracy* 22 24.

24 S 47(3) of the Constitution provides: "A person loses membership of the National Assembly if that person–
(a) ceases to be eligible; or

3 1 Political party loyalism

Party loyalism refers to members of political parties using their positions in government to benefit the party to which they are affiliated because they are beholden to the party. Party loyalism may be seen as detrimental to democracy and good governance if one political party holds an overwhelming majority in Parliament with no possibility of change in the future. This form of majoritarian authority results in a lack of accountability, where Parliament is undermined because the very same people who must hold the government accountable act in the interests of their political parties and not in the interests of those who elected them to Parliament.[25] Although MPs must promote constitutional values above party loyalty, it is not always that simple. This is because MPs who defy their political party may face serious consequences, including being expelled from their party and losing their seat in Parliament.[26] This applies not only to members of the ANC. However, it is the best example to use as it is the governing party. The Constitution and the rules of various political parties require members to abide by the party's decisions.[27] MPs, who have a constitutional duty to hold the executive accountable while being required to toe the party line, face various difficulties.[28] De Vos affirms this by explaining that members who are seen to be disloyal are punished by removal from Parliament. For example, Makhosi Khoza openly criticised former President Jacob Zuma, and then resigned from the party after disciplinary action was threatened against her for the statement she made.[29] The trend of legislative ineffectiveness can be seen in the South African system of government where the executive seems more powerful than Parliament, owing to the relationship it has with the legislature. Although the Constitution has provided a clear mandate on the role of the legislature, implementation has proved to be a challenge owing to issues of corruption and political party loyalism.

3 2 One-party dominance in Parliament

Party dominance occurs when a particular political party dominates the government of a country over several decades, either governing on its own or as the leading partner in coalition governments.[30] One-party dominance is a system that occurs within a democratic government

(b) is absent from the Assembly without permission in circumstances for which the rules and orders of the Assembly prescribe loss of membership; or

(c) ceases to be a member of the party that nominated that person as a member of the Assembly."

25 Southall "The Dominant Party Debate in South Africa" 2005 *Africa Spectrum* 65.

26 De Vos in De Vos and Freedman (eds) *South African Constitutional Law in Context* 123.

27 *Ibid*.

28 De Vos in De Vos and Freedman (eds) *South African Constitutional Law in Context* 124.

29 *Ibid*.

30 Kassner *The Influence of the Type of Dominant Party on Democracy: A Comparison Between South Africa and Malaysia* (2014) 30.

where one party holds power for an extended period. The period that the party remains in power ensures that the ruling party can dominate both the polity and the policy-making process of the country.[31] In a procedurally democratic context of regular multi-party elections, the dominant party wins in at least four or more consecutive national elections and opposition parties exist, but are less likely to win at national level.[32] When South Africa transitioned into a democracy in 1994, the ANC won the national elections in a clean sweep, and became the governing party. Although the ANC does not display any aspects of defeat in its position as the ruling party, it has failed to hold its members accountable through party discipline.[33] Instead of holding party members accountable, the ruling party has used its power to replace disloyal MPs with loyal ones, enabling the ruling party to exclude any vote of no confidence. Apart from a formal vote of no confidence in Parliament, there are not enough effective mechanisms for the legislature to use to check executive conduct.[34]

Despite its highly proportional electoral system, South Africa has experienced majoritarian outcomes in elections, with the ANC coming out victorious in every national election since 1994.[35] This form of majoritarianism demonstrates one-party dominance despite the fact that the system strives towards perfect proportionality.[36] The ANC has been elected into power in six consecutive national elections, thus consolidating its position as the dominant party within a dominant party system. The dominant party's power is based on influence, and it goes beyond its recurring electoral victories. The ANC is strongly identified with South Africa's liberation from apartheid, which is how it has maintained its influence over the public.[37]

The ANC holds the most seats in Parliament, placing it in a better position when it comes to decision-making processes. However, it is important to clarify what this concept really means and how it affects accountability and legislative oversight. Suttner describes one-party dominance as a situation where political organisations that are electorally powerful have successfully won elections to an extent that their defeat is unlikely to occur in future.[38] The notion of the dominant party system is not new; it belongs to a well-established theory in the work of political scientists where strict prescriptions are laid down to establish whether a country qualifies as a democracy.[39] The dominant party debate relates to the question of the consolidation of democracy. Before a democracy can

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31 Thuynsma *Political Parties in South Africa: Do They Undermine or Underpin Democracy?* (2017) 1.

32 *Ibid*.

33 Murray and Nakhjavani "Republic of South Africa" 2006 *Federalism and Foreign Relations* 212 216.

34 Mattes 2002 *Journal of Democracy* 24.

35 Ferree in Herron *et al The Oxford Handbook of Electoral Systems* 2.

36 *Ibid*.

37 Thuynsma *Political Parties in South Africa* 2.

38 Suttner "Party Dominance 'Theory': Of What Value?" 2006 33(3) *Politikon* 277 277.

39 Suttner 2006 *Politikon* 280.

be said to be consolidated, there must be a reasonable possibility of the defeat of the ruling or dominant political party. Where such potential defeat is unlikely in the foreseeable future, democracy cannot be said to be consolidated. There is a link between the concept of dominance and consolidation, as they both contribute towards political transformation, which is required for good governance.[40]

On 20 March 2002, the Cabinet resolved that an electoral task team chaired by Dr Frederik Van Zyl-Slabbert should be established to draft the new electoral legislation required by the Constitution.[41] In preparation for the 2004 national and provincial elections or any earlier elections, should the need arise, the Electoral Task Team was to draft the new electoral legislation.[42] The Task Team conducted a round-table conference with stakeholders and political parties where they presented the advantages of the existing electoral system, which included fairness, inclusivity and simplicity.[43] Although the report was conducted in 2002 in order to transform the electoral system at that time, these key characteristics play an important role and are still present in the current electoral system. Inclusivity and representation play an important role in South Africa's election process. However, the Electoral Task Team highlighted that there was a need to introduce greater accountability into democratic politics and to identify the role that the electoral system could play in this regard.[44]

The Task Team highlighted simplicity in the South African electoral system as a significant factor in ensuring that everyone could participate. This requires the voting process to be easy to understand. As such, voters must understand not only the method of voting but also the meaning of the outcome of the results.[45] Considering South Africa's past injustices, the Task Team highlighted that a simple electoral system is ideal, as a complex one requiring a higher degree of literacy would infringe on constitutional values and violate the principles of fairness and inclusivity.[46] The South African electoral system is a fairly simple one, making it ideal. However, it is important to highlight the challenges that come with it. The Task Team identified several issues regarding public accountability. Although they were not directly linked to the electoral system, these included party discipline, the role of the legislature, party funding and the doctrine of separation of powers.[47] These issues were closely linked to a lack of responsiveness from those who must account to the public, revealing weaknesses in accountability mechanisms. The lack can be linked to one-party dominance in Parliament, which becomes a threat to democracy when the governing party is assured electoral

40 *Ibid*.
41 Van Zyl-Slabbert *Report of the Electoral Task Team* (2003) 1.
42 *Ibid*.
43 Van Zyl-Slabbert *Report of the Electoral Task Team* 7.
44 *Ibid*.
45 *Ibid*.
46 *Ibid*.
47 *Ibid*.

victory and the party does not see the need to respond to the public and weed out maladministration.[48] Although there is no hierarchy in the factors mentioned, where a political party can influence the conduct of elected representatives in the legislature, and where this influence is used for individual benefit as opposed to the public good, it poses a threat to the quality of public accountability and good governance.

The party-list system allows for political party dominance. However, this does not mean that the dominant party cannot be held accountable. According to De Jager and Parkin, South Africa is a democratic state and as such the dominant party is still subject to the democratic realities of being removed from power by those who elected them.[49] The dominance of the ANC is dependent on the continued support of the public, and eventually poor performance will be punished through collective accountability. In *UDM v Speaker of the National Assembly*,[50] the court held that the general election is the most effective extra-parliamentary mechanism for holding those elected by the people accountable. It held further that political parties must be held accountable by the electorate, as it is the electorate who votes for them.[51] This form of accountability is not swift, and does not amount to immediate accountability. The process from party registration to candidate selection, elections and eventually parliamentary representation is undoubtedly time-consuming. This elongated sequence of events can be perceived as a trade-off, providing stability through established party structures. However, it potentially delays direct responsiveness for those in power. The slow nature of the electoral process as an accountability mechanism suggests that accountability unfolds gradually through the interplay of party dynamics, as opposed to offering the instant, individual-level responsiveness often associated with other electoral systems.

One-party dominance in South Africa is influenced by the State's political and electoral system. It is important to note that the link between the voters and the legislature is facilitated through political parties in both the National Assembly and the National Council of Provinces (NCOP). This means a person cannot become a member of one of the Houses of Parliament unless they are a member of a political party. De Vos explains that owing to this system, the Constitution established not only a parliamentary system of government in which the majority party in the National Assembly forms the government, but also a system of party government.[52] This is because the system cannot function in the absence of political parties. A party system is when political parties play a central role in the functioning of the government. In a party government, the executive branch is composed of members of the ruling party or coalition

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48 Wolf "Practical Implications for the Electoral System: New Nation Movement NPC v President of the Republic of South Africa" 2021 138(1) *South African Law Journal* 58 77.

49 De Jager and Parkin *Wither the ANC's Dominance? Waning Electoral Dominance, Rising Hegemonic Dominance* (2017) 2.

50 *United Democratic Movement v Speaker of the National Assembly* 2017 (5) SA 300 (CC) par 78.

51 *Ibid.*

52 De Vos *et al South African Constitutional Law in Context* 120.

in the legislative branch. The party or coalition exercises significant control over the executive, and members of cabinet are often drawn from the ranks of the dominant party. Key characteristics of a party government include party discipline, where members of the governing party are expected to vote in line with party positions in Parliament, and the strong connection between executive and legislative branches. The party in power typically sets the agenda, formulates policies, and implements its political platform. In a party government, the party's strength and cohesion are crucial in shaping and implementing government policies.

In *New Nation Movement NPC v President of the Republic of South Africa*,[53] the Constitutional Court held that the Electoral Act was unconstitutional insofar as it provides for a purely proportional electoral system that caters only for representation by political parties and excludes adult citizens from standing as independent candidates in elections for the National Assembly and provincial legislatures. In this judgment, the applicants applied to the court seeking to invalidate the provisions of section 57A and Schedule 1A of the Electoral Act.[54] Section 57A provides that Schedule 1A applies to the National Assembly and provincial legislature elections in general. In addition, Schedule 1A provides for a party-proportional representation system, which is accomplished through party lists.[55] The applicants argued that the Electoral Act is unconstitutional for unjustifiably limiting the right of an individual to stand for public office and, if elected, to hold the office conferred by section 19 of the Constitution.[56] A further argument brought before the court was that the Electoral Act infringed on the applicants' constitutional right to freedom of association.[57]

The respondents in the matter relied on the decision of the High Court that nowhere in section 19(3)(*b*) of the Constitution does it expressly provide that standing for public office must include standing as an independent candidate as opposed to a member of a political party. The High Court also held that, by referring to a multi-party system in section 1(*d*), the Constitution entrenched a party system.[58] The High Court held further that sections 46(1)(*a*) and 105(1)(*a*) of the Constitution provided Parliament with the discretion to prescribe an electoral system that applies to the National Assembly and provincial legislatures through national legislation.[59] The Constitutional Court rejected the respondents' contention that section 19(3) must be interpreted to imply that an adult

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53 *Supra* par 2.

54 73 of 1998.

55 *New Nation Movement NPC v President of the Republic of South Africa supra* par 3. S 19(3) of the Constitution provides that every adult citizen has the right to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and to stand for public office and, if elected, to hold office.

56 *New Nation Movement NPC v President of the Republic of South Africa supra* par 4.

57 S 18 of the Constitution provides that everyone has the right to freedom of association.

58 *New Nation Movement NPC v President of the Republic of South Africa supra* par 5.

59 *Ibid*.

citizen must stand for and hold political office through a political party.[60] The court held that if the content of section 19(3)(*b*) entails that an adult citizen's intention to hold political office is impossible without joining a political party, this interpretation pits section 19 against section 18.[61] Instead of pitting the sections against each other, they should be read together such that the application of section 19(3) does not result in the denial of the right to freedom of association provided for in section 18.[62]

Despite the important role of political parties in the system of government, the Constitution does not provide enough guidance on the relationship between the leadership of a political party and its representatives in Parliament and the executive or how these parties must operate once they have members in both branches of government.[63] Owing to the lack of guidance, De Vos postulates that it is uncertain to what extent political party leaders can control their members in the legislature and the executive, and whether the extra-parliamentary leadership of a political party can prescribe to its members what they must say and how they should act when serving in the legislature or executive.[64] The testimony given by Dikeledi Magadzi at the State Capture Commission, where she stated that she had never asked why the ruling party took decisions that it did, and why when the party decided on taking a certain route members could not deviate, was very telling of this question. Magadzi stated that she was not in Parliament for herself and that she represented the ANC.[65] De Jager and Parkin describe this form of domination by political parties as hegemonic dominance.[66] This dominance is not merely about power but involves a more comprehensive influence that shapes the norms, values and structures of a given system. This form of influence is achieved when the dominant party obtains control of the government and party members appointed into official state positions show their loyalty by promoting the interests of the party as opposed to those of the public.[67] The dominance then results in a merger between the party and government, as members are not able to distinguish between the public good and the interests of the party to which they are affiliated.

Electoral systems play a pivotal role in shaping political competition and conflict and as such they contribute towards the destiny of the State's democratic government.[68] The ANC's dominance is drawn from the Black

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60 *New Nation Movement NPC v President of the Republic of South Africa supra* par 63.

61 *New Nation Movement NPC v President of the Republic of South Africa supra* par 20.

62 *New Nation Movement NPC v President of the Republic of South Africa supra* par 21.

63 De Vos *et al South African Constitutional Law in Context* 121.

64 *Ibid*.

65 Gerber "'I Represent the ANC, and I Will Always Toe the Party Line' – Magadzi tells Zondo Commission" (8 February 2021) https://www.news24.com/news24/southafrica/news/i-represent-the-anc-and-i-will-always-toe-the-party-line-magadzi-tells-zondo-commission-20210208 (accessed 2022-05-10).

66 De Jager and Parkin *Wither the ANC's Dominance?* 4.

67 *Ibid*.

68 Basedau, Erdmann and Mehler (eds) *Votes, Money and Violence: Political Parties and Elections in Sub-Saharan Africa* (2007) 16.

working class and the party has long worried about losing this support owing to poor service delivery.[69] The lack of high-quality service delivery and improvement in people's lives is linked to the lack of accountability. The legislature has failed to hold the executive accountable over the years and this has created a culture of impunity, resulting in various issues such as state capture and ongoing loadshedding (forcing many South Africans to go back to using candles) and in many businesses failing.[70] The influence of the ANC as the dominant party is gradually fading as it is losing its popularity with the people of South Africa. The 2021 local government elections revealed a lack of trust in the ruling party, and this sheds a doubtful light on the role that political parties play in enhancing democracy.[71]

4 ELECTORAL REFORM TO STRENGTHEN LEGISLATIVE OVERSIGHT

4 1 From a Westminster system to proportional representation

South Africa used the British system of electing representatives in Parliament prior to 1994. It remained essentially unchanged from its implementation at unification in 1910, until it was replaced by the new electoral system that came with the Interim Constitution.[72] Five years prior to the adoption of the Interim Constitution, there were intense debates on the electoral options for the new South Africa.[73] During this process, many of the proposals for electoral reform differed with respect to technical detail.[74] However, according to Faure and Venter, an extraordinary degree of unanimity characterised the debate, at least in relation to two aspects. The first was that the old British system of elections was unfair as it overrepresented large parties in the system, especially the ruling party, and secondly, there was agreement among those who participated in the debate at that time that some form of proportional representation was highly desirable.[75]

The structure of South Africa's parliament resembles the British Westminster system, in which the executive and legislature interact, because the prime minister (who is head of government) and members of the cabinet (who collectively form the political leadership of the executive)

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69 Haffajee "Torched by Power Cuts, the Middle-Class Will Load Shed the ANC in 2024 – Survey" (2023) https://www.dailymaverick.co.za/article/2023-03-14-torched-by-power-cuts-the-middle-class-will-load-shed-the-anc-in-2024-survey/ (accessed 2023-04-03).

70 Haffajee https://www.dailymaverick.co.za/article/2023-03-14-torched-by-power-cuts-the-middle-class-will-load-shed-the-anc-in-2024-survey/.

71 Basedau *et al Votes, Money and Violence* 7.

72 Faure and Venter *Electoral Systems and Accountability: A Proposal for Electoral Reform in South Africa* Paper presented at conference, Norwegian Institute of Human Rights, Oslo (2001) 1.

73 *Ibid*.

74 *Ibid*.

75 *Ibid*.

are appointed from the elected MPs, who form a large part of the legislature.[76] Without a clear separation of powers, checks and balances do not operate robustly in the Westminster system. This means that accountability becomes relatively easy to avoid and the executive, though constitutionally answerable to Parliament, in fact enjoys greater power than the legislature.[77] Hudson and Wren opine that although parliaments could make an important contribution towards holding the executive accountable, they seem to be ineffective because the legislature has become an imprint of the executive, and its role is to approve the plans of government; as such, parliaments are not doing enough to deliver on oversight.[78]

Democratic election processes are planned before the first vote. However, the processes are not cast in stone, and decisions on how elections should take place may be revisited.[79] South Africa has the flexibility to revisit its electoral system to encourage inclusivity and promote government accountability. Electoral reform is important. It is not always concerned with the values of shared cultural identity and freedom; rather, those who promote reform do so to encourage equality, honesty, transparency, accountability in government and political unity.[80]

African elections perform three key functions – namely, assisting in sustaining effective democratic institutions, providing the people with an effective tool to control government impunity, and enhancing public participation by allowing people to change their government when they are not satisfied with the service delivery of the current one.[81] Elections give the public an opportunity to participate in the governing process by allowing them to choose who should govern them. To ensure that government is transparent and to prevent tyranny, there must be free and frequent elections.[82] It is important to note that frequent elections are not an effective guarantee against maladministration, hence the need for electoral reform to enhance the legislative oversight role.

4 2 Party loyalism and party dominance

The lack of legislative oversight is a result of party loyalism, which means MPs are loyal first to their political party, before they serve the State in their official capacity. In *Democratic Alliance v South African*

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76 Tan "The Singapore Parliament: Representation, Effectiveness, and Control" in Zheng, Lye and Hofmeister (eds) *Parliaments in Asia* (2013) 30.

77 *Ibid*.

78 Hudson and Wren https://odi.org/en/publications/parliamentary-strengthening-in-developing-countries/ 15.

79 Bowler and Donovan (eds) *The Limits of Electoral Reform* (2013) 1.

80 Bowler and Donovan (eds) *The Limits of Electoral Reform* 47.

81 Mbaku "Threats to Democracy in Africa: The Rise of The Constitutional Coup" (2020) https://www.brookings.edu/blog/africa-in-focus/2020/10/30/threats-to-democracy-in-africa-the-rise-of-the-constitutional-coup/ (accessed 2023-11-10) 1.

82 *Ibid*.

Broadcasting Corporation Ltd (DA v SABC),[83] the court held that the findings of the Public Protector were not binding and enforceable.[84] The President and the National Assembly did not comply with remedial actions that the Public Protector required, arguing that the Public Protector did not enjoy the same status as a judicial officer and the remedial action she takes did not have a binding effect.[85] Instead of implementing the remedial action, the President appointed the Minister of Police to investigate and report on whether he was liable for any amount in respect of the security upgrades that were made in his private home. The Minister absolved the President of any liability and found that the upgrades identified by the Public Protector as non-security features were in fact security features. To hold the President to account, the legislature established two ad hoc committees consisting of MPs to examine the reports of both the Minister of Police and the Public Protector. At the conclusion of its investigation of the reports, Parliament concluded that the President was not responsible for the irregular expenditure and absolved him of all liability.

The functions of elections and their relevance for democracy vary in every country, as do their evaluation of the quality of the electoral process.[86] Multi-party elections are a common institution in African countries, even though there are some doubts regarding the impact of the process on accountability – especially in states with political party dominance.[87] The ANC's dominance in government has revealed the dangers of one-party dominance to democracy and good governance. The report of former Public Protector Thuli Madonsela on state capture[88] provided evidence of a culture of impunity and a lack of accountability by government officials exercising state power. The report was intended to investigate alleged improper and unethical conduct of the then-President and other state functionaries relating to the improper relationship and involvement of the Gupta family in the appointment and removal of Cabinet Ministers, which resulted in the corrupt and improper award of state contracts for the benefit of the Gupta family and the power elite.[89]

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83 *Democratic Alliance v South African Broadcasting Corporation Ltd* 2015 (1) SA 551 (WCC).

84 *Democratic Alliance v South African Broadcasting Corporation Ltd supra* par 74.

85 In *Economic Freedom Fighters v Speaker of the National Assembly* 2016 (3) SA 580 (CC) par 72, the court held: "For these reasons I have come to the conclusion that the findings of the Public Protector are not binding and enforceable. However, when an organ of state rejects those findings or the remedial action, that decision itself must not be irrational."

86 Basedau *et al Votes, Money and Violence* 144.

87 Basedau *et al Votes, Money and Violence* 7.

88 Madonsela "State of Capture: Report on an Investigation Into Alleged Improper and Unethical Conduct by the President and Other State Functionaries Relating to Alleged Improper Relationships and Involvement of the Gupta Family in the Removal and Appointment of Ministers and Directors of State-Owned Enterprises Resulting in Improper and Possibly Corrupt Award of State Contracts and Benefits to the Gupta Family's Businesses" *Report No: 6 of 2016/17* (2017) http://www.saflii.org/images/329756472-State-of-Capture.pdf (accessed 2023-03-03).

89 *Ibid.*

The legislature failed to hold former President Zuma to account, as the court held in *Economic Freedom Fighters v Speaker of the National Assembly* (*EFF 1)*[90] that he did not uphold his constitutional duties as head of state. The decision in *EFF 1* was one of many revelations of the detriments of party loyalism in Parliament. The legislature failed in its lofty duty to uphold and protect the constitutional values of section 1 of the Constitution, so promoting a culture of impunity by not holding the executive accountable. This led to incipient corruption.[91] The electoral system makes for weak, ineffective legislative oversight. For example, the *EFF1* decision was followed by several unsuccessful votes of no confidence against the then-President, even after the court found that he had violated his oath of office by not upholding the supreme law of the land.

The ineffective votes of no confidence against the former President were owing to the dominance of the ANC, as well as party political loyalism. This was evident in the vote of no confidence through a secret ballot following the court's decision in *UDM v Speaker*.[92] The vote was in favour of the majority party. However, it revealed a division of members within the ANC, leaving the party in a weaker position. The popularity of the ANC has also declined following the last local government elections, leading the ruling party towards coalitions to maintain its power. The local government elections serve as an indication of how elections can be used as an accountability mechanism by allowing the public to punish those in power by removing them from office. However, there is still a need for electoral reform to ensure that this does not only occur once every five years, leaving the public frustrated for the duration of the party's term.

The process of elections can be used as a tool to establish effective accountability bodies aimed at overseeing executive conduct through regularly replacing poorly performing political elites.[93] The impact of the electoral system on the role of legislative oversight must be revisited, and potential alternative systems should be given consideration[94] – for example, a more inclusive system of government that represents a mixed system of parliament consisting of the youth, women and persons with disabilities to bridge the gap between Parliament and the public. Where individuals representing various groups of society are included to promote their interests in Parliament, citizens will be represented in the governing process. In accordance with the recommendation for a mixed electoral system by this study, the Report of the Independent Panel Assessment of Parliament provides that the current electoral system

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90 *Supra*.

91 *EFF 1 supra.*

92 *Supra.*

93 Mbaku https://www.brookings.edu/blog/africa-in-focus/2020/10/30/threats-to-democracy-in-africa-the-rise-of-the-constitutional-coup/ 1.

94 Govender "Report of the Independent Panel Assessment of Parliament" (2009) 94.

should be replaced with a mixed system that captures the benefits of both constituency-based and proportional representation.[95]

4 3 Active public participation in the decision-making process

The active participation of citizens in decisions that impact their lives is a foundation on which the South African constitutional democracy is built. De Vos posits that it is important for citizens to take an active part in the democratic and decision-making process because the Constitution is premised on the notion that governments must be responsive to the needs of the people and this can only be achieved through a certain degree of citizen participation.[96] He explains further that participation can be in the form of public discussions, peaceful protests and other political activities such as elections.[97] Public participation is important in ensuring government accountability. As the representative of the people, the legislature must ensure that the public takes part in decision-making processes. A lack of public participation results in an unaccountable and unresponsive government, and where government fails to be responsive to the needs of the people, it falls into a democratic deficit.[98] As such, it is important that government responds to the needs of the people in order to uphold the values of the Constitution. The current system promotes public participation and inclusivity. However, consideration as to whether the State must retain the current system must include the fact that the current constituency mechanisms are not effective enough; members often do not have enough knowledge and understanding as to what is expected of them,[99] which results in a lack of effective legislative oversight, as they are not able to ask the executive the relevant questions in order to report to Parliament with a way forward.

5 CONCLUSION

Good governance requires a range of features such as elections, competitive politics, constitutional reviews and the limitation of presidential terms as accountability mechanisms. The problem with the approach of competitive politics is that it assumes the meaning of democracy to be restricted to representative democracy. Although mechanisms have been established to protect democracy and safeguard accountability, there are other methods for protecting democracy besides strengthening opposition parties through competitive politics.[100]

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95 *Ibid*.

96 De Vos 2015 *SAJHR* 30.

97 De Vos 2015 *SAJHR* 31.

98 *Ibid*.

99 Parliament "Oversight Model of the South African Legislative Sector" (2012) https://sals.gov.za/research/oversight_model.pdf (accessed 2023-03-18) 81.

100 *Ibid*.

The investigation into the impact of the electoral system on effective legislative oversight has revealed the intricate interplay between electoral mechanisms and the efficacy of parliamentary scrutiny. The party-list system, with its emphasis on party representation, as opposed to direct voter choice of individuals, has far-reaching implications for the nature of legislative oversight. While offering stability through established party structures, it introduces a dynamic where elected representatives are primarily accountable to their parties rather than the electorate.

The deliberate separation between voters and the selection of representatives challenges traditional notions of direct accountability, raising questions about the responsiveness of elected officials to the diverse needs and preferences of the population. Moreover, the process – from party registration to candidate selection and eventual parliamentary representation – unfolds over a considerable period, contributing to a limited understanding of accountability that evolves gradually.

In conclusion, this study underscores the importance of recognising the trade-offs inherent in the South African electoral system, balancing political party cohesion with the need for responsive and transparent legislative oversight. As South Africa continues to navigate its democratic journey, further investigation and public discourse on the implications of the electoral system are imperative for refining and strengthening the mechanisms that underpin legislative accountability in the pursuit of robust and inclusive democratic governance.